Preparation for 2024 Fiscal Year-End SEC Filings and 2025 Annual Shareholder Meetings

Securities & Capital Markets Practice

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Yes, it is that time of year again, and as our clients and friends know, Mintz provides a yearly analysis of the regulatory developments that impact public companies as they prepare for their fiscal year-end filings with the Securities and Exchange Commission (SEC) and their annual shareholder meetings. This memorandum discusses key considerations to keep in mind as you embark upon the year-end reporting process in 2025.

Although the SEC was not as active in adopting new rules in 2024 as the previous few years, this year public companies should continue to refine their disclosures and year-end process to address the SEC's earlier rule making activities. In particular, companies need to be aware of the developing landscape of cybersecurity disclosures and the required disclosure of insider trading policies and option awards made close in time to the release of material non-public information. Additionally, companies need to assess the impact artificial intelligence (AI) may have on their business and review their AI disclosures carefully and continue to update their Environmental, Social, and Governance (ESG) practices and disclosures.

In addition to summarizing these considerations, we address several other significant developments and considerations companies should focus on this year, including the need to thoughtfully review and refine risk factors and Management's Discussion and Analysis of Financial Condition (MD&A). We also provide an update on noteworthy U.S. Food and Drug Administration (FDA) regulatory developments and recent litigation impacting corporate governance and disclosure.

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Updating Risk Factors and MD&A in 2025

Like every year, companies will need to review and update their MD&A and risk factors sections of their Form 10-K to reflect the key trends and risks facing the company. In accordance with Item 303 of Regulation S-K, among other requirements, public companies are required to describe in the MD&A any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations, as well as any known trends or demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the company's liquidity increasing or decreasing in any material way and any known material trends, favorable or unfavorable, in the company's capital resources.

Public companies are also required to include in the risk factor section of Form 10-K (under Item 105 of Regulation S-K) a discussion of the material factors that make an investment in the company speculative or risky. Importantly, risks that have begun to materialize should not be discussed in a hypothetical way. Instead, risk factors should describe how a risk has materialized and what the current risks are to the company. The SEC continues to focus on specific disclosures over hypothetical examples.

The SEC is also focused on ensuring that disclosures in the MD&A match what companies disclose in earnings releases and earnings calls. In particular, key performance indicators and other metrics that management uses to manage the business that are material to investors need to be disclosed in the MD&A. For example, if metrics such as samples tested per month, comparable store sales or other non-GAAP financial measures (e.g., non-GAAP financial measures provided as part of regular guidance) are used by management to make important business decisions and these metrics are disclosed in earnings releases or earnings calls, the SEC has asked companies to include these metrics in future filings. If non-GAAP financial measures are included in the MD&A or elsewhere in SEC filings, companies are reminded that they will need to comply with Regulation G and Item 10(e) of Regulation S-K.

In connection with closely reviewing and updating the MD&A and risk factors sections this year, below are a few important topics that companies should continue to consider to determine if and how they have affected or may affect the company's business:

Artificial Intelligence (AI)

As discussed in detail under "Navigating the Evolving AI Landscape" below and in our year-end memorandum last year, the SEC continues to be focused on company disclosures on the impact and risks of the use of AI on their business. As companies prepare their upcoming Form 10-K and Form 10-Qs, we recommend they continue to consider, to the extent applicable, the potential risks of AI on their business and add or update their AI-related risk factor to disclose potential risks.

China-Specific Risks

As discussed in our year-end memorandum last year, the SEC continues to focus on ensuring that companies are adequately disclosing material risks relating to operations in the People's Republic of China. In July 2021, in a statement by SEC Chair Gary Gensler, the SEC added to its November 2020 guidance for companies that are based in or that have a majority of their operations in China about disclosure of China-related risks, particularly since the SEC's ability to promote and enforce disclosure standards may be materially limited with respect to these companies. In July 2023, the SEC's Division of Corporation Finance issued an additional sample letter to companies regarding China-specific disclosures.

In connection with preparing for the upcoming Form 10-K and Form 10-Qs, we continue to recommend that, in addition to China-based companies, companies that have any operations in, manufacturing, or supply from, or otherwise do business in China revisit their China-related disclosures to ensure that material risks are disclosed. As the new Trump administration takes office in January 2025, the risks related to doing business in China may become heightened, especially if new tariffs or other trade restrictions are imposed by China and/or the United States.

Cybersecurity

As discussed below under "SEC Cybersecurity Disclosure Requirements," cybersecurity continues to present significant risks to many companies, as the consequences for cybersecurity events are significant and the risks continue to change as technology evolves. In addition to the cybersecurity disclosure section now required under Item 1C of Form 10-K (or Item 16K of Form 20-F) that addresses cybersecurity risk management and strategy and cybersecurity governance, companies should continue to review their cybersecurity-related disclosures to ensure that material risks are disclosed in their risk factors.

FDA Regulatory Developments

As discussed below under “FDA Regulatory Developments,” we recommend that public companies that develop medical or consumer products that may be regulated by the U.S. Food and Drug Administration (FDA) or do business directly with FDA-regulated entities consider whether any recent legal or regulatory developments prompt the need for new or updated disclosures in their Form 10-K. Among other developments discussed below, key FDA actions during 2024 included the publication of guidance covering Diversity Action Plans (DAPs) for pivotal clinical studies of investigational medical products, issuance of FDA’s final rule phasing out enforcement discretion for laboratory developed tests and the creation of the FDA Rare Disease Innovation Hub. Uncertainty regarding the priorities of the agency and proposals for reform suggested by the incoming Trump administration may also have an impact on businesses in the coming year.

Inflation and Market Conditions

Although inflation has not been as significant a factor in 2024 as in the previous few years, during the 12 months from June 2023 to June 2024, the U.S. Consumer Price Index rose approximately 3.0% (as reported by the U.S. Bureau of Labor Statistics), which remains higher than increases since March 2021. As a result of inflation, many companies have experienced and continue to experience increased costs for the supply of product components and raw materials, and companies may or may not be able to offset these cost increases by increasing the prices of their own products. To the extent companies increase their product pricing, it may result in fewer products sold. All these factors may have an impact on revenues and earnings. Interest rates and the increased cost of capital associated with higher rates than have been seen in many years may have similar impacts on businesses and consideration of these impacts should be factored in as companies update their risk factors and MD&A.

Ukraine and Middle East Conflicts

As the war in the Ukraine closes in on its third anniversary and the current conflicts in the Middle East enter their second year, companies need to continually assess the impact and risks on their business from each of these conflicts. The conflicts have adversely affected many aspects of business in the regions and the current and potential impact on your business should be fully disclosed.

SEC Cybersecurity Disclosure Requirements

Looking Back to 2023

As we noted in last year’s memorandum, significant changes occurred in 2023 when the SEC adopted the final cybersecurity disclosure rule, which requires both (1) annual disclosures on Form 10-K (or Form 20-F) regarding cybersecurity risk management, strategy, and governance practices, and (2) current reporting on Form 8-K (or Form 6-K) of cybersecurity incidents.

Under this rule, public companies are required to include a cybersecurity disclosure section under Item 1C of Form 10-K (or Item 16K of Form 20-F), which must include the disclosure required by Item 106 of Regulation S-K. In that section, public companies are required to address both (1) cybersecurity risk management and strategy and (2) cybersecurity governance. This new disclosure was mandated for all public companies in their annual reports for fiscal years ending on or after December 15, 2023.

Beyond the annual disclosure of cybersecurity risk management, strategy and governance, the cybersecurity disclosure rule also requires current disclosure of material cybersecurity incidents under new Item 1.05 of Form 8-K (or on Form 6-K). Specifically, if the company experiences a cybersecurity incident that the company determines to be material, the company must describe the material aspects of the nature, scope, and timing of the incident, and the material impact or reasonably likely material impact on the company, including its financial condition and results of operations.

The Form 8-K (and Form 6-K) disclosures for all registrants other than smaller reporting companies began on December 18, 2023, and smaller reporting companies were required to begin complying with the Form 8-K (and Form 6-K) disclosure requirements on June 15, 2024.

For detailed information about guidance on these disclosures, please see last year's memorandum.

For additional information about the SEC cybersecurity disclosure rule, please see our Mintz advisory titled SEC Adopts Final Cybersecurity Rules for Public Companies (August 1, 2023).

Developments in 2024

2024 saw fewer cybersecurity-related developments than 2023. On May 21, 2024, Erik Gerding, the Director of the SEC's Division of Corporation Finance issued a statement seeking to clarify disclosure requirements under Item 1.05 of Form 8-K.

The SEC's clarification followed an initial flurry of "voluntary" disclosures of cybersecurity incidents under Item 1.05 of Form 8-K by reporting companies that did not appear to have made any determination related to the materiality of the reported incidents at the time of filing the Item 1.05 Form 8-K.

As noted in the statement, if a company chooses to disclose a cybersecurity incident for which it has not yet made a materiality determination, or a cybersecurity incident that the company determined was not material, the SEC encourages the company to disclose that cybersecurity incident under a different item of Form 8-K, such as, for example, Item 8.01. The statement notes, "*Although the text of Item 1.05 does not expressly prohibit voluntary filings, Item 1.05 was added to Form 8-K to require the disclosure of a cybersecurity incident "that is determined by the registrant to be material," and, in fact, the item is titled "Material Cybersecurity Incidents." In addition, in adopting Item 1.05, the Commission stated that "Item 1.05 is not a voluntary disclosure, and it is by definition material because it is not triggered until the company determines the materiality of an incident." Therefore, it could be confusing for investors if companies disclose either immaterial cybersecurity incidents or incidents for which a materiality determination has not yet been made under Item 1.05."*

The statement goes on to note that the clarification above is not intended to discourage companies from voluntarily disclosing cybersecurity incidents for which they have not yet made a materiality determination, or from disclosing incidents that companies determine to be immaterial, and instead, clarifies that the SEC encourages the filing of such voluntary disclosures in a manner that does not result in investor confusion or dilute the value of Item 1.05 disclosures.

Further, if a company discloses an immaterial incident (or one for which it has not yet made a materiality determination) under Item 8.01 of Form 8-K, and then subsequently determines that the incident is material, then it should file an Item 1.05 Form 8-K within four business days of the determination.

Finally, the statement provides guidance on determining whether a cybersecurity incident is "material." As the SEC initially made clear in the Adopting Release for Item 1.05 of Form 8-K, the materiality assessment should not be limited to the impact on "financial condition and results of operation," and "companies should consider qualitative factors alongside quantitative factors." The statement cites the following factors:

- Consider whether the incident will harm the company's reputation, customer or vendor relationships, or competitiveness.

- Consider the possibility of litigation or regulatory investigations or actions, including regulatory actions by state and Federal Governmental authorities and non-U.S. authorities.

In cases where a cybersecurity incident is so significant that a company determines it to be material even though the company has not yet determined its impact (or reasonably likely impact), the company should disclose the incident in an Item 1.05 Form 8-K and include a statement noting that the company has not yet determined the impact (or reasonably likely impact) of the incident, then amend the Form 8-K to disclose the impact once that information is available.

Foreign private issuers filing on Form 6-K would not be impacted by the statement. Unlike Form 8-K, Form 6-K does not have an equivalent to Item 1.05. Instead, Form 6-K requires foreign private issuers to disclose material cybersecurity incidents that have been publicized in a foreign jurisdiction, to any stock exchange or to securityholders. However, there is no mandatory location specified within Form 6-K for these disclosures.

Disclosure of Insider Trading Policies

In December 2022, the SEC finalized amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the "Exchange Act"), introducing new disclosure requirements for Rule 10b5-1 trading plans and insider trading policies and practices. The annual disclosure obligations for insider trading policies took effect in 2024, with the first set of disclosures required in the first filing that covers the first full fiscal year starting on or after April 1, 2023. For smaller reporting companies, the timeline extended to filings covering the first full fiscal year beginning on or after October 1, 2023. Companies with a fiscal year ending on December 31 will need to include these disclosures in their Form 10-K for the year ending December 31, 2024.

Under Item 408(b) of Regulation S-K, companies are required to disclose whether they have established insider trading policies and procedures that govern the purchase, sale, or other dispositions of the company's securities by directors, officers, and employees, or by the registrant itself, and are designed to be in compliance with insider trading laws. In situations where a company has not adopted such policies and procedures, an explanation for this absence must be provided. As part of the Form 10-K, Part III disclosure, disclosure regarding the insider trading policies and procedures can be incorporated by reference from the company's proxy statement. However, if the registrant has implemented insider trading policies and procedures, these documents must be filed as an exhibit to the Form 10-K. For additional information about the amendments to Rule 10b5-1, please see our Mintz Insights advisory, SEC Adopts Amendments to Rule 10b5-1 Insider Trading Arrangements.

Close-in-Time Equity Awards

The new disclosure obligations pursuant to Item 402(x) to Regulation S-K, which requires executive compensation disclosure of public companies' policies and practices related to granting certain equity awards close in time to the release of material nonpublic information, took effect in 2024. Companies with a fiscal year ending on December 31 will need to include these disclosures in their Form 10-K for the year ending December 31, 2024, which can be incorporated by reference into the Form 10-K by reference from the company's proxy statement.

Under Item 402(x) of Regulation S-K, each registrant must provide narrative disclosure in Form 10-K and in any proxy or information statement describing its policies and practices on the timing of option and stock appreciation right grants in relation to the release of material non-public information (MNPI), including how the board determines when to grant such awards, whether the board or compensation committee takes MNPI into account when determining the timing and terms of an award and whether the registrant has timed the disclosure of MNPI for the purpose of affecting the value of executive compensation. The narrative disclosure is required regardless of whether grants were made in close proximity to the release of MNPI during the last completed fiscal year.

If, during the last completed fiscal year, the registrant granted options to a named executive officer in a period beginning four business days before and ending one business day after the filing or furnishing of a Form 10-Q, 10-K or 8-K that discloses MNPI (excluding a Form 8-K disclosing only a material new option award grant under Item 5.02(e) of that form), the registrant must provide the following information in a table:

- grant date of the award;
- number of the securities underlying the award;
- exercise price of the award (per share);
- grant date fair value of the award; and
- the percentage change in the closing market price of the securities underlying the award between the trading day ending immediately prior to the disclosure of MNPI and the trading day beginning immediately following the disclosure of MNPI.

Companies and their compensation committees should continue to evaluate their grant practices, assess procedures for tracking awards that will be subject to the new disclosure requirements, and consider establishing grant schedules for awards to executive officers.

Nasdaq Diversity Requirements Overturned

On December 11, 2024, the U.S. Court of Appeals for the Fifth Circuit vacated the SEC's order approving the Nasdaq board diversity rule. Nasdaq's rule, which was approved by the SEC in 2021, set a recommended objective for most listed companies with boards comprising more than five members to have at least two self-identified "diverse" members on their boards or explain the rationale for not doing so. The Court concluded that the rules exceeded the SEC's Exchange Act rulemaking authority.

The case, *Alliance for Fair Board Recruitment v. SEC*, ends (for now) the rule requiring Nasdaq-listed companies to disclose the gender, sexual orientation and racial makeup of their boards, or to explain why the companies were unable to achieve the diversity metrics the rule established. While the SEC may appeal this decision, an appeal appears unlikely given the incoming Trump administration. For additional detail about the case, see our advisory here.

Companies should consider whether they will continue to seek diversity information from their directors in upcoming year-end questionnaires and whether they will continue to provide diversity information about their directors as part of the ESG and director qualification disclosures. Although companies no longer need to comply with Nasdaq's board diversity rule requirements as a result of this ruling, it remains to be seen whether companies will continue their previous practices in this area.

Nasdaq and NYSE Modify Reverse Stock Split Regulations

In our memorandum from last year, we discussed reverse stock splits and the increase in reverse stock split activity when compared to prior years. A reverse stock split is often crucial for a Nasdaq-listed company to comply, or regain compliance, with Nasdaq's $1.00 "minimum bid price rule." Continuing to cite investor protection and other administrative concerns, Nasdaq proposed and adopted a number of regulations this year that effectively limit (or seek to limit) a company's ability to complete multiple and high-ratio reverse stock splits.

A Reverse Split Can't Result in Non-Compliance with Other Quantitative Nasdaq Share Requirements

As described in our prior alert, SEC Approves Nasdaq Rule Change on Reverse Stock Splits and Minimum Bid Price Compliance Timing, companies completing reverse stock splits often fail, immediately following these stock splits, to comply with Nasdaq's quantitative requirements to have at least 300 public holders and at least 500,000 publicly held shares. Prior to the new rule, companies were allowed to cure their minimum bid price deficiencies even if the other quantitative Nasdaq requirements were not met at the time of a reverse stock split. This is no longer the case. Per the new Nasdaq rules, a company will continue to be considered non-compliant with the minimum bid price requirement until both (i) the deficiency created by the reverse stock split is cured and (ii) *thereafter* the company meets the bid price requirement for a minimum of 10 consecutive business days (unless Nasdaq staff, at its discretion, extends this 10-day period). While not explicit, for many companies, this new rule may effectively cap the ratio size of reverse stocks split by virtue of the 300 public holder and 500,000 publicly held share requirements, thus indirectly assisting with Nasdaq's ongoing efforts to limit excessive reverse stock splits.

Nasdaq Proposal for Immediate Delisting and No Trading During Appeals Process After Second 180-Day Compliance Period

Companies failing to comply with Nasdaq's $1.00 minimum bid price rule are routinely given two 180-day compliance periods in which to regain compliance with this rule. On August 6, 2024, Nasdaq filed a proposed rule with the SEC to modify the application of the minimum bid price compliance periods and the delisting appeals process for bid price non-compliance under certain circumstances. The SEC designated a longer period within which to assess the proposed rule and in November 2024 issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule change.

Nasdaq noted that, while it views these 180-day compliance periods as grace periods to allow for temporary deficiencies and circumstances, these periods actually permit non-compliant companies to retain Nasdaq trading for 360-540 days, depending on circumstances and appellate efforts. As Nasdaq explains in it its proposal, Nasdaq believes these two 180-day compliance periods should be more than sufficient to address any temporary difficulties. Nasdaq has now proposed to amend its rules so that, if a company was afforded a second 180-day compliance period for failing to comply with the minimum bid price requirements and failed to regain compliance during its second 180-day compliance period, its securities will be delisted from trading even if the company has filed an appeal. This inability to rely on the appellate process to stay a delisting means many companies will need to be more aggressive about regaining compliance during their compliance periods.

Nasdaq Proposes No More than One Reverse Split Per Year

Unfortunately, for many Nasdaq companies, having to complete a reverse stock split to regain or maintain bid price compliance is an often-repeated process. As part of the new rule proposed on August 6, 2024, Nasdaq further proposes to amend the application of the minimum bid price compliance period so that if a company's security fails to meet the minimum bid price and the company has effected a reverse stock split over the prior one-year period, then the company will not be eligible for any compliance period and Nasdaq will immediately issue a delisting determination with respect to that security.

As Nasdaq explained in its proposal, Nasdaq believes that these repeated reverse stock splits "[are] often indicative of deep financial or operational distress within such companies rendering them inappropriate for trading on Nasdaq for investor protection reasons." If the rules become effective as proposed, Nasdaq would immediately delist a company for failure to maintain at a $1.00 minimum bid price for 30 consecutive days if, within the prior year, that company completed a reverse stock split *regardless of the ratio*. If this rule were to have applied in recent years, a large number of currently listed Nasdaq small or micro-cap companies would likely have been delisted.

Nasdaq Extended Prior Notice Period for Reverse Stock Splits

Last year, Nasdaq amended its rules to require companies to provide Nasdaq at least five business prior notice before completing a reverse stock split and to require companies to notify the market (by press release) at least two business days prior to a reverse stock split. In November 2024, Nasdaq proposed an additional change to the deadline for a company to notify Nasdaq of a reverse stock split from five business days to 10 calendar days in order to conform to the requirements of SEC Rule 10b-17 of the Exchange Act. The proposed rule change will become operative on January 30, 2025.

Under Rule 10b-17 of the Exchange Act, issuers are required to provide notice to FINRA no later than 10 calendar days prior to the date of record to participate in a stock split or reverse stock split, unless the impacted security is traded on a national securities exchange with a substantially comparable notice requirement. The Nasdaq proposal amends the deadline for a company to notify Nasdaq of a reverse stock split from no later than 12:00 p.m. ET 5 business days to 10 calendar days prior to the anticipated market effective date of the reverse stock split to ensure that the Nasdaq rules are substantially comparable to Rule 10b-17 and, therefore, that companies are compliant with Rule 10b-17 when they give notice under those rules.

The new notice requirement may have the effect of giving companies less flexibility in selecting a final reverse split ratio, if the final reverse stock split ratio must be determined earlier than currently required. In addition, the additional time must be taken into account to ensure that the requisite number of days of trading can elapse prior to the expiration of an applicable compliance period.

NYSE Proposal on Non-Compliance with Quantitative Share Requirements

In October 2024, the NYSE proposed a rule change to limit the circumstances under which a listed company may use a reverse stock split to regain compliance with NYSE's price criteria and remain qualified for listing. The NYSE's proposed rule has not yet been approved by the SEC.

Similar to the new Nasdaq rule regarding non-compliance with other quantitative requirements, the NYSE's proposed rule would prohibit a listed company from effectuating a reverse stock split for purposes of regaining compliance with the minimum price criteria if the effectuation of such reverse stock split results in the company's security falling below the other NYSE continued listing requirements. If a listed company were to effectuate a reverse stock split notwithstanding the proposed limitation, NYSE would promptly commence suspension and delisting procedures.

In addition, the NYSE proposes that if a company's security fails to meet the price criteria and (i) the company has effected a reverse stock split over the prior one-year period or (ii) has effected one or more reverse stock splits over the prior two-year period with a cumulative ratio of 200 shares or more to one, then the company would not be eligible for any compliance period and the NYSE would immediately commence suspension and delisting procedures with respect to such security.

SEC Focus on Company Violations of Whistleblower Protection Rule

During the Fall of 2024, the SEC settled charges against seven public company employers for violation of Rule 21F-17(a), the whistleblower protection rule. The SEC's Whistleblower Program found that the public companies used employment documents, such as employment agreements, separation agreements, confidentiality agreements and other employment-related agreements such as employee policies that impeded whistleblowers from reporting potential misconduct to the SEC. The SEC's recent enforcement actions are a reminder to employers to review their employment documents for compliance with SEC regulations, particularly with respect to any confidentiality, cooperation or non-disclosure provisions.

SEC Rule 21F-17(a), enacted under the Dodd-Frank Act, states that "no person may take action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications."

In its enforcement actions, the SEC has taken a more aggressive stance on language in employment documents that violate whistleblower protections because they:

- require employees to represent, as a condition of severance, that they had not filed complaints against the company with any government agency;
- prohibit the disclosure of confidential information (defined as information gained in the course of employment that could reasonably be expected to be deleterious to the company if disclosed to third parties) to anyone outside of the company without prior authorization;
- require notice to the company if the employee is contacted by any individual or entity, without explicitly excluding the SEC from such communication and notification requirement (or they do not require notice, but they are silent on the matter and don't specifically include that exclusionary language); or
- prohibit employees from receiving any form of financial award for participation in charges filed with or investigations filed by government agencies.

Given the recent focus on whistleblower-related enforcement activity by the SEC, companies should consider reviewing their employment-related business documents with legal counsel to address whether those materials suitably carve out whistleblowing actions from their confidentiality and other restrictions to ensure compliance with Rule 21F-17(a). Note, importantly, that it is not just the SEC that has taken a closer look at prohibitive language in employment-related agreements. See our blog posts here and here, regarding the National Labor Relations Board's scrutiny of employer severance and related agreements.

Navigating the Evolving AI Landscape

The integration of artificial intelligence (AI), both internally and within product offerings, presents a complex landscape of opportunities and risks for companies and their customers. While the use of AI technology by companies is not a new phenomenon, the recent popularity and wide availability of generative AI tools (GenAI), a specific type of AI, has increased prior challenges and created new ones. For example, companies face challenges in mapping out the risks associated with AI and GenAI technologies, protecting sensitive information shared with vendors or customers using the technologies, making strategic investment decisions regarding optimal AI and GenAI technologies, and realizing the full benefits of the technologies they develop or acquire. The evolving regulatory environment surrounding AI introduces further complexity, as an increasing number of U.S. states and foreign countries are adopting AI-specific laws, creating conflicting standards, uncertainties, and potential compliance costs.

This evolving regulatory landscape underscores the importance of robust AI governance. The Department of Justice's March 2024 announcement that corporate compliance programs should incorporate AI-related risks reflects a broader regulatory trend. Similarly, the SEC, CFTC, FTC, and other U.S. federal and state regulators have signaled their intent to leverage existing authority to address AI-related risk disclosures, which may result in increased scrutiny of companies' AI-related practices. Inquiries into a company's GenAI use may extend beyond current practices to scrutinize historical uses of AI technology. Similarly, questions regarding the governance of GenAI may also lead to broader inquiries into the governance of historical AI applications. Boards of directors should therefore be mindful of the potential for heightened federal and state regulatory focus on AI use and governance issues. Board of director involvement in AI governance may include board engagement with management on AI usage, board-level risk assessments of AI's internal and external applications, and proactive discussions of AI-related risks and mitigation strategies.

The results of Glass Lewis's 2024 Global Policy Survey, released November 11, 2024, further highlight the need for proactive AI governance. This survey, which incorporated input from Glass Lewis clients and broader market stakeholders, revealed that despite AI's relatively preliminary presence on most board agendas, a strong majority of investors believe that boards should oversee AI, and a significant portion believe that boards should be held accountable for AI-related issues. However, there is less widespread support for the mandate of board-level AI expertise.

This confluence of factors – the popularity of GenAI tools, regulatory scrutiny, increased investor expectations, and the inherent complexities of AI – necessitates a comprehensive approach to AI governance. Unlike historical deployments of AI where risks could often be limited to parts of a business specifically intended to employ AI technology or in ways that presented reduced risks to companies, the rise of GenAI tools means that AI risks can now arise in almost every aspect of a company's business that requires human input, including regulatory compliance, data security, privacy, intellectual property, investment strategies, corporate governance, risk mitigation, insurance, product development, and marketing and advertising strategies.

Given the prevalence of GenAI use amongst employees in particular, companies should assume that their employees are using the technology daily and, if they have not already, proactively develop AI governance plans designed to map, measure, manage, and govern AI risk. These policies should focus on clear lines of accountability, establishing reporting mechanisms, and metrics for tracking and evaluating AI initiatives and tools. A formal AI governance framework serves to mitigate risk and allow for capitalizing on the potential of this transformative technology. To that end, public companies and boards not yet engaged on AI governance matters should consider a proactive and comprehensive approach to AI governance to mitigate risks, meet evolving regulatory expectations, and effectively communicate with stakeholders.

Current State of Environmental, Social, and Governance Matters

Companies continue to navigate the evolving landscape of Environmental, Social, and Governance (ESG) issues that have come to increasing prominence among regulators, corporations, the media, and the public. Although the highly-anticipated SEC rule on climate disclosures is stayed pending the result of the ongoing legal challenge, the state of California has implemented new legislation that will mandate disclosure of emissions information and climate-related financial risks for certain companies doing business in California. Among many current developments in this area, we also highlight in this section the continued rise in ESG-related litigation.

California Climate Disclosure

California continues its trend of passing landmark ESG legislation with three notable recent bills. The Climate Corporate Data Accountability Act (SB253) was signed into law in October 2023. This bill requires all companies (both publicly traded and privately held) doing business in California with revenues in excess of $1 billion to publicly disclose comprehensive emissions information on an annual basis. A second bill, SB 261, was also signed into law in October 2023, and requires the development of regulations to require companies (again, both publicly traded and privately held) doing business in California with revenues in excess of $500 million to disclose their climate-related financial risks and mitigation strategies every two years. Finally, California also enacted AB 1305 at the same time, which focuses on disclosures by participants in the carbon offset market, while also requiring disclosure of information in support of any claim of carbon neutrality, net zero emissions, or significant reductions to carbon emissions. There are indications that California will adopt an expansive definition of "doing business in California" to bring companies within the remit of this legislation. While the laws have some limited exceptions for certain types of companies, these laws are much broader than any SEC rule in that they apply to both private and public companies. As these regulations become available, companies will likely need to work with a cross-disciplinary team on these disclosures. Also, while these laws have been challenged in the courts, these disclosure rules—unlike the SEC's—have not been stayed pending the result of the legal challenges.

SEC's Climate Disclosure Rule At Risk

The SEC climate disclosure rule, introduced in March 2024, requires certain registrants to report greenhouse gas emissions, and all registrants to disclose any "material" climate-related risks, along with other climate-related information, in their financial statements. However, the rule's implementation has been delayed by legal challenges. These challenges have prompted the SEC to voluntarily stay enforcement of the rule, pending judicial review. In response to the ongoing litigation, at least 19 Democratic attorneys general have since intervened to defend the climate rule. The incoming presidential administration is expected to join efforts to reverse the climate rule by, among other things, appointing SEC commissioners opposed to its implementation. It would also likely stall renewed efforts to establish federal climate disclosure obligations for participants in the U.S. securities markets. However, climate-related reporting remains a priority for market participants and regulators at both state and international levels. Therefore, companies should continue developing internal reporting frameworks on climate risks and ESG metrics and monitor compliance with evolving regulatory demands at state and international levels, regardless of any changes in the federal landscape.

ESG Litigation

As discussed in last year's memorandum, there has been a steady increase in government enforcement related to ESG activities. These have been brought both by the SEC (which may have different enforcement priorities in a second Trump Administration) and by state regulators. Additionally, there have been a number of lawsuits by local and state governments (and private plaintiffs) against major oil and gas producers alleging claims concerning their products' roles in contributing to climate change. Further, there have recently also been actions brought by state attorneys-general seeking to combat the use of ESG by companies and investors. Second, there has been a proliferation of private shareholder litigation. This increase has taken a variety of forms, including (i) shareholders challenging fiduciaries' decisions to adopt or adhere to ESG-based policies and procedures; (ii) shareholders asserting Caremark claims seeking to hold directors liable for failure to oversee or monitor "mission-critical" ESG-related aspects of their business; (iii) securities and consumer class actions alleging greenwashing against various companies; and (iv) challenges to diversity mandates and, on the other side of the spectrum, to companies' alleged failure to satisfy stated diversity goals. For additional information about the recent increase in ESG-related litigation, please see the Mintz report titled A Mintz ESG Primer, The Current State of Environmental, Social, and Governance Matters in American Corporations (October 24, 2023).

FDA Regulatory Developments

Public companies that either develop medical or consumer products that may be regulated by the U.S. Food and Drug Administration (FDA) or do business directly with FDA-regulated entities must also consider whether any recent legal or regulatory developments in those spaces may prompt the need for new or updated disclosures in their Form 10-K. Although in some cases, non-regulated entities may need to disclose how they have positioned their products to avoid falling under the scope of FDA's oversight authorities, we will focus in this section on recent developments that affect directly regulated activities.

In order to facilitate the year-end SEC disclosure review process, it's important to ensure that the company's legal, regulatory, and compliance teams are effectively tracking FDA and other federal or state agency actions that may affect the company's business.

Throughout the year there can be a variety of legislative or administrative actions that could have the potential to be (or very clearly will be) material to a company's broader operations. Some examples of key developments during 2024 include the following:

- In response to a congressional mandate enacted in December 2022, FDA published a draft guidance document for industry this year on Diversity Action Plans (DAPs) for pivotal clinical studies of investigational medical products. A mandatory requirement to submit a DAP to the agency in conjunction with the sponsor's clinical protocol will apply to clinical studies for which enrollment begins 180 days after publication of the final guidance document. Regardless of the effective date, however, sponsors should begin looking ahead and building diversity enrollment goals and measures to achieve such goals into their clinical development programs to the extent possible. Our client alert entitled FDA Issues Guidance Intended to Diversify and Enhance Clinical Trial Participation provides more information about the scope of the June 2024 draft guidance document.

- FDA's final rule phasing out enforcement discretion for laboratory developed tests (LDTs) was issued in May (see our summary client alert here) and became effective in July 2024. According to FDA's implementation plan published with the final rule, the medical device regulations will gradually become fully applicable to LDTs over the next four years, with the final requirements and methods of compliance depending on the risk-based classification level of each individual test. At the first compliance benchmark, which FDA refers as "stage 1" and which will occur on May 6, 2025, laboratories with LDTs must begin complying with medical device reporting (MDR), correction and removal reporting, and complaint handling requirements. It is possible that ongoing litigation challenging FDA's authority to promulgate and implement the final rule will delay or ultimately prevent the agency from implementing or enforcing it. However, clinical laboratories should continue activities to train personnel and develop policies and procedures to comply with the medical device regulations because, at least as of now, FDA plans to continue phasing in such regulatory requirements for LDTs on the schedule described in the final rule.

- In vitro diagnostic products (IVDs) labeled for "Research Use Only" (RUO) are receiving greater enforcement attention from FDA, likely as a direct result of the significant work the agency did and is continuing to do in relation to the LDT final rule described above. An IVD may only be labeled as RUO if it is intended only for use in scientific research and not for clinical use in humans. An IVD for RUO is not subject to FDA's medical device regulations other than labeling requirements. However, if a manufacturer's promotional claims and other activities provide sufficient evidence that the IVD is, in fact, intended for clinical use in humans, FDA may initiate enforcement action against the manufacturer. In April 2024, FDA issued a Warning Letter to a company promoting and selling an RUO-labeled IVD for clinical diagnostic use. Although the agency has issued other Warning Letters in recent years to companies falsely labeling adulterated drugs, biologics, and certain devices as "RUO" in an attempt to avoid regulatory compliance requirements, the April 2024 Warning Letter represented a rare enforcement action against an IVD manufacturer for RUO claims. Our client alert entitled FDA Warning Letter Is a Stark Reminder That If You Claim Your Product Is RUO, It Has to Be RUO provides an overview of the evidence FDA collected about the manufacturer's test and cited in its warning letter. Based on this and other recent enforcement actions, it is likely that FDA is increasing its monitoring of marketing claims associated with IVD products.

- Artificial intelligence and machine learning technologies are a focus and a priority at all of the FDA's product-specific Centers. Although FDA has regulated AI-enabled medical devices for decades, the agency is taking a deliberate approach towards exploring other uses of AI that are having an impact on other agency missions, such as medical product development (e.g., uses relating to drug/biologic manufacturing or clinical trial design and performance); integration into clinical diagnostic or treatment workflows; post-market surveillance (e.g., adverse event signal or trend detection); or treatment-related interactions or communications with patients. The agency is actively assessing the potential risks associated with such emerging use cases for AI/ML algorithms. Currently, there are no specific regulations governing the use of AI in medical products or in their development, but FDA has issued certain guidance documents relating to AI-enabled devices, notably guidance on predetermined change control plans, as well as various discussion papers outlining the agency's guiding principles and proposed approaches to AI-enabled technologies. We expect this area of regulation and agency positions to evolve rapidly in the coming year, and Mintz regulatory specialists have published multiple articles in 2024 exploring different FDA and other federal agency initiatives and presented multiple webinars, including Navigating Health Tech: Regulations for AI/ML in Medical Devices and Software, a recording of which is available.

- Outside of the medical products space, FDA's cosmetic and personal care authorities have undergone a significant overhaul and any business engaged in formulating, purchasing, distributing, or selling cosmetic products should be aware of those legal and regulatory changes. Among other things, the Modernization of Cosmetics Regulation Act (MoCRA) created requirements for cosmetic facility registration, cosmetic product listing, and mandatory reporting to FDA of serious adverse events, with each of those requirements being now fully in effect. Additional resource-intensive changes will be forthcoming for this industry as well as FDA implements other mandates imposed by Congress, such as good manufacturing practice (GMP) regulations for cosmetic manufacturers. Please see our January 2024 client alert, Looking Back and Moving Forward: MoCRA Regulatory Developments Ring in the New Year.

Over the past nearly two years, FDA worked on an organizational transformation of the agency's field operations and created a new unified Human Foods Program; these massive efforts culminated on October 1, 2024. In addition to that reorganization, Congress and the agency have been intensely focused in recent years on advancing and incentivizing rare disease product development, as well as the promising areas of regenerative medicine and cellular and gene therapies. We are starting to see those resource investments and reforms coming to fruition throughout FDA, beginning with last year's reorganization at the Center for Biologics Evaluation and Research (CBER) to create the Office of Therapeutic Products (OTP). OTP, which replaced the Center's hardworking Office of Tissues and Advanced Therapies, is now considered a "super office" that includes six new offices that have been established to align disciplines and product types. This new structure within the Center is expected to allow the OTP workforce to address the exponential growth in cell and gene therapies, just as Congress authorized the accelerated hiring of staff for CBER as part of the fiscal years 2023-2027 FDA user fee reauthorization package due to the growth trajectory in those industries.

On November 1, 2024, the agency also announced the creation of the FDA Rare Disease Innovation Hub. The Hub is a cross-center program "that will act as the single point of engagement and connection with outside parties for drug and biological product development and as a forum for the Center for Biologics Evaluation and Research (CBER) and the Center for Drug Evaluation and Research (CDER) to collaborate on cross-cutting rare disease-related issues." Recognizing that traditional approaches to drug development are not a good fit for many rare diseases, one of agency's goals for the Hub is to "foster a community at the FDA for open dialogue and knowledge sharing to identify new approaches to drug and biologic development and overcome hurdles that have traditionally impeded progress for rare disease treatments." This exciting new Hub and other recent functional reorganizations at FDA are expected to accelerate various activities and programs, and as such they continue to bear watching by all FDA stakeholders.

In closing, as always FDA's calendar year 2024 was a busy and memorable one, but following the results of the 2024 elections, it may have an even more memorable 2025. The Trump administration has signaled that it and its allies would seek to reform significant parts of the agency's operations and overall mission, which injects material uncertainty into the FDA's future. In addition, the federal fiscal year 2024 ended on September 30 with congressional passage of a short-term continuing resolution to fund the government that ends on December 20, 2024, which means that the next appropriations negotiation will occur during the "lame duck" session of the 118th Congress. In light of Republicans retaking control of the Senate and the House for the 2025-2026 Congress, FDA's federal appropriations for next year (and potentially future years) may be reduced significantly. Such outcomes may adversely affect the agency's fiscal year 2025 budget and future programmatic or enforcement priorities.

Update on the FTC's Ban on Non-Compete Agreements

Earlier this year, the Federal Trade Commission (FTC) issued a new rule that — if implemented — would have banned virtually all non-compete agreements for U.S. workers beginning September 4, 2024. The new rule was immediately challenged in several courts and in August 2024, a judge in the Northern District of Texas issued an order setting aside the FTC's rule and ordered that the rule not be enforced or otherwise take effect in September 2024 (see our advisory here). Although multiple other courts have weighed in on the issue to mixed results, including federal courts in Pennsylvania and Florida (see our advisory here), the Texas judge's ruling resulted in the first nationwide prohibition on the FTC's enforcement of the rule. As a result of this ruling, the FTC's rule did not go into effect in September.

In granting summary judgment for the plaintiff and other intervenors, the Texas Court reasoned that the FTC lacked statutory authority to implement the rule, as Congress has not granted the FTC authority to promulgate substantive rules regarding unfair methods of competition under the FTC Act. The Court analyzed the text, structure, and history of the FTC Act and cited recent Supreme Court precedent, including *Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244 (2024) (ending Chevron deference to federal regulatory agencies) in support of its decision.

The Court also held that the rule was "arbitrary and capricious" in violation of the Administrative Procedure Act "because it is unreasonably overbroad without a reasonable explanation" and that "the Rule imposes a one-size-fits-all approach with no end date, which fails to establish a rational connection between the facts found and the choice made." The decision also questioned "[t]he Commission's lack of evidence as to why they chose to impose such a sweeping prohibition" rather than "targeting specific, harmful non-competes."

The Court's decision put an end (for now) to any employer requirements under the rule (the broad contours of which we discussed here and here).

- The FTC has appealed the ruling, in the 5th Circuit, and it's appealing another ruling against the ban, in the 11th Circuit. Should the FTC succeed in its appeals, the ban would be allowed to take effect. A federal judge in a third case challenging the ban, in Pennsylvania, sided with the government.

- The change in leadership at the FTC under the new presidential administration means the non-compete ban is unlikely to go into effect.

- A new FTC chair could move to officially withdrawal the non-compete rule.

- Alternatively, a new FTC chair could cause the Department of Justice to withdraw the appeals in the 5th and 11th Circuits and drop the case in Pennsylvania federal court. This would effectively leave intact the Texas federal court decision imposing a nationwide ban on enforcing the non-compete rule.

Regardless of any future appellate activity as to the FTC rule, employers remain well-advised to continue their careful consideration of non-compete use given the recent push in some jurisdictions to ban or limit them (as discussed more fully here). Employers looking to consider alternatives have a multitude of options at their disposal to prevent post-employment unfair competition, including by using confidentiality, trade secret, and invention assignment agreements, implementing broad trade secret protection programs, and entering into appropriately tailored non-solicitation agreements.

Notable Decisions in Securities and Corporate Governance Litigation

This year began with several notable corporate governance decisions out of Delaware, including *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024), which was then partially abrogated by the enactment of Section 122(18) of the Delaware General Corporate Law. But Delaware courts also decided several other notable cases in 2024, including several involving controlling stockholders. There were also a couple of court decisions revealing how the SEC fared in two of its more novel recent enforcement proceedings. And, the U.S. Supreme Court issued two decisions directly dealing with issues under the federal securities laws.

Supreme Court securities law decisions: pure omissions are still not enough, and the SEC must now proceed in court when seeking civil penalties

In *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. ___ (2024), the Court examined whether a Section 10(b) and Rule 10b-5 claim is actionable for an issuer's failure to disclose facts that were allegedly required to be disclosed pursuant to Item 303 of Regulation S-K, which requires companies to disclose "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." The Court determined that such failures were not actionable. The Court's analysis leaned heavily on the plain language of Rule 10b-5(b), which makes it unlawful to "omit to state a material fact necessary in order to make the statements made not misleading" in finding that "Rule 10b-5(b) does not proscribe pure omissions," notwithstanding the language in Item 303.

In *SEC v. Jarkesey et al.*, 603 U.S. ____ (2024), the Court held that when the SEC is seeking to impose civil penalties against a defendant, it must proceed in court, rather than in an administrative proceeding. The Court's decision was based on a two-part analysis. First, the Court determined that civil penalties sought by the SEC are intended to punish and deter and so were the "type of remedy at common law that could only be enforced in courts of law," thus subjecting those claims to the right to a trial by jury provided for the Seventh Amendment of the U.S. Constitution. The Court then held that the SEC's claims did not fall within the "public rights" exception, which Congress has historically used in various situations to allow government agencies to adjudicate certain claims and decide certain issues without a jury trial.

Notable controlling stockholder litigation

The most headline-grabbing decision out of Delaware challenging controlling stockholder transactions came in the Court of Chancery's decision in *Tornetta v. Musk et al.*, C.A. No. 2018-0408-KSJM (Jan. 30, 2024), which addressed Elon Musk's compensation package from Tesla. In deciding that the more exacting entire fairness standard would apply to its analysis of the compensation package, the court determined that Mr. Musk had "transaction-specific" control over his compensation award, based on the confluence of several factors: (1) his control of 21.9% of the voting power of Tesla's stock, (2) his "Superstar CEO status [that] creates a 'distortion field' that interferes with Board oversight," (3) the extent of his personal and business relationships with a majority of the other directors, and (4) how the other directors acted in their dealings with him. The court then determined that the defendants directors did not carry their burden of demonstrating that the compensation package was approved by a fully informed vote of the stockholders because the Board (1) failed to disclose the potential conflicts among the Board members negotiating the package on behalf of the company, and (2) failed to disclose the level of control Mr. Musk had over the negotiation process. Finally, in determining that the compensation package was not "entirely fair" to the company, the court found that it was not the result of a fair process and did not reflect a fair price, and, as a remedy, rescinded the compensation package. After the court issued its judgment, Tesla successfully solicited another ratification vote from its stockholders in favor of the compensation package and filed a motion with the court for it to set aside its prior judgment rescinding the compensation package on the basis of this new ratification. The court denied the motion on four grounds, including legal and procedural bases. More interesting, however, was the court's analysis of the scope of stockholder ratification. Under DGCL § 204, stockholder ratification can cure defective corporate actions, but this statute was not applicable in the Tesla case that involved alleged breaches of duty by directors in a controlling stockholder transaction. The court then held that the common law stockholder ratification doctrine would only result in a shift of the burden of proof in a controlling stockholder transaction and would not fully insulate board members from breach of fiduciary duty claims.

The Court of Chancery's lesser publicized decision in *In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation*, C.A. No. 2019-0798-JTL (Jan. 24, 2024) examined the scope of fiduciary duties owed to a company by its controlling stockholder. The Sears case involved a stockholder using his control of more than 50% of the voting stock of a company to amend the company's bylaws in a manner that – for practical purposes – prevented a contemplated liquidation of part of the company's business from moving forward. The court held that the controlling stockholder's actions should be subjected to the intermediate "enhanced scrutiny" standard, meaning that he would need to show (i) he acted in good faith, (ii) for a legitimate objective, (iii) with a reasonable basis for doing so, and (iv) he selected a reasonable means for achieving his objective. The court ultimately found that the controlling stockholder had met this standard. (The court did find, however, that a subsequent transaction between the controller and the company did not satisfy the heightened entire fairness standard – despite the controller's good faith belief that it did).

SEC jury victory in "shadow trading" case

On April 5, 2024, after an eight day jury trial, the SEC obtained a jury verdict against defendant Matthew Panuwat on a claim that Mr. Panuwat violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, as a result of conduct that has been described as "shadow trading." According to the SEC's complaint, Mr. Panuwat worked in business development for a mid-cap oncology-focused biopharmaceutical company. When he learned that his company would be acquired by a large pharmaceutical company, he purchased options in a different mid-cap oncology-focused biopharmaceutical company because he anticipated that when the acquisition of his company was announced, the stock price of this similarly situated company would also increase. This turned out to be true, and the SEC alleged that Mr. Panuwat sold the options he purchased in the other company for a profit.

SEC's novel claims concerning cybersecurity disclosures

On July 18, 2024, the court in issued its opinion on the motion to dismiss filed by the defendants. The Solarwinds case is notable for a few reasons, primarily because it is the first instance where the SEC brought claims against a company's Chief Information Security Officer on the basis that the company's public disclosures about cybersecurity were materially misleading. The case also represented the SEC's first attempt to bring a claim for failure to maintain a system of internal accounting controls based on alleged cybersecurity failings.

In ruling on the motion to dismiss, the court examined the two primary types of allegedly misleading statements the SEC based its claims on: (1) statements by Solarwinds touting its flagship software platform's cybersecurity capabilities and downplaying its cybersecurity risks, and (2) statements concerning a series of cyberattacks. With respect to the first set of statements, the court concluded that the SEC had sufficiently alleged claims against Solarwinds and the CISO for allegedly misleading representations in a "Security Statement" that Solarwinds had posted to its website. With respect to the second category of statements, the court dismissed them all, finding that the SEC had not sufficiently alleged actionable claims concerning the cyberattacks. The court also dismissed the novel claims brought by the SEC for failure to maintain proper accounting controls.

Clarification on the level of scrutiny for advance notice bylaws

In *Kellner v. AIM Immunotech Inc. et al.*, C. A. No. 2023-0879 (July 11, 2024), the Delaware Supreme Court provided a detailed analysis of the standard companies need to meet to validly enact advance notice bylaws that require stockholders to provide the board with prior notice of and information about their director nominations. The court first clarified the distinction between a validity challenge to bylaws and an enforceability challenge to bylaws. With respect to validity challenge, the court's role is to assess whether the bylaw is contrary to law or the certificate of incorporation. The court went on to clarify that where a bylaw is not facially invalid, its enforceability must still be examined under equity. Under this equitable analysis, the adoption, amendment, and enforceability of advance notice bylaws during the pendency of a proxy context are subject to enhanced scrutiny, meaning that the enforcement of the advance notice bylaws must (1) address a threat to an important corporate interest, (2) the board's motivations must be proper and not selfish or disloyal, and (3) be reasonable (or proportionate) with respect to the threat faced.

Which employees are entitled to advancement and indemnification?

A company's certificate of incorporation and bylaws typically provide for broad rights to advancement and indemnification to the company's "officers and directors." But what can be less clear are the types of employees who qualify as "officers" for purposes of these rights. The reasoning in the Court of Chancery's decision in *Gilbert et al. v. Unisys Corp.*, C.A. No. 2023-0513-PAF (Aug. 13, 2024) provides a cautionary tale of how companies should consider clearly articulating who constitutes their "officers" or run the risk that much broader set of employees will be construed as having advancement rights than may have been intended.

The Unisys decision involved a situation where two employees – one with the title of "Senior Vice President" and the other a "Vice President" – left Unisys, which then sued them for allegedly taking confidential information with them. The employees sought to have their legal fees in defending against these claims advanced to them by the company, and the company refused. But the Unisys court held that the employees were entitled to advancement because Unisys' certificate of incorporation and its bylaws were sufficiently ambiguous as to who constituted an "officer" and that this ambiguity should be construed against Unisys.

2025 Periodic Report Filing Deadlines

For public companies that are large accelerated filers, annual reports on Form 10-K are due 60 days after the end of the fiscal year (Monday, March 3, 2025 for large accelerated filers with a December 31, 2024 fiscal year-end). Annual reports on Form 10-K are due 75 days after fiscal year-end for accelerated filers (Monday, March 17, 2025 for accelerated filers with a December 31, 2024 fiscal year-end) and 90 days after fiscal year-end for non-accelerated filers (Monday, March 31, 2025 for non-accelerated filers with a December 31, 2024 fiscal year-end).

In addition, quarterly reports on Form 10-Q filed by accelerated filers and large accelerated filers continue to be due 40 days after the end of the fiscal quarter. The Form 10-Q filing deadline for non-accelerated filers continues to be 45 days after the end of the fiscal quarter. If the filing deadline would otherwise fall on a Saturday, Sunday or federal holiday, the filing is due on the first business day following such deadline.

These filing deadlines do not affect the existing proxy statement filing deadline of 120 days after fiscal year-end for companies that choose to incorporate by reference the disclosure required by Part III of Form 10-K from their definitive proxy statements.

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Contributors

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Please contact the Mintz attorney who is responsible for your corporate and securities law matters if you have any questions regarding this information. We look forward to working with you to make this year's annual reporting process as smooth as possible.

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