SEC Rulemaking Trends to Watch in 2024

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From climate change disclosure rules to private company transparency measures, the year ahead promises to be a busy one for securities lawyers.

Just as we would tell an issuer sharing projections to accompany those with robust disclaimers cautioning an investor not to place undue reliance on the forward-looking statements contained in its presentation, we tell you, the reader, to take our modest predictions regarding expected rulemakings from the US Securities and Exchange Commission (SEC) with more than a grain of salt.

Despite some recent litigation and other challenges facing the agency, the SEC's rulemaking agenda remains ambitious. We anticipate that the SEC will take up a number of proposals related to, or affecting exempt offerings and the private markets, which have been under discussion by the SEC and the subject of remarks by various Commissioners for some time. These include the following:

- Possible changes to the "accredited investor" definition. The SEC is required by the Dodd-Frank Act to review every four years whether the "accredited investor" definition should be modified or adjusted. The SEC staff issued the December 14, 2023 staff report noting that inasmuch as the percentage of US households that qualify as accredited investors has grown steadily since the definition's adoption, the thresholds have not been adjusted to account for inflation. The SEC's Small Business Advisory Committee recently met to

discuss the definition and various Commissioners have commented publicly (though disagreeing) on steps that should be taken to amend the definition again, which was most recently updated in 2020.

- Possible adoption of two-tiered disclosure framework under Rule 506 and expansion of Form D disclosures. Commissioner Crenshaw has remarked on the need for additional transparency in the private markets noting that "unfettered access to capital through Rule 506 [of Regulation D (Reg D)]" posed investor protection concerns. The Commissioner suggested, among other changes, a two-tiered private company disclosure framework, which would include heightened disclosure and other obligations triggered based on the issuer's market capitalisation, value or investor base size. Also contemplated are amendments to Form D that would expand the information required by the form. Readers may recall that in 2013 the SEC proposed fairly controversial amendments, which included significant changes to Regulation D and Form D; these did not move forward. It is unclear that there is an investor protection concern that would justify these changes and that amendments to Form D would address any perceived information gaps or investor protection issues particularly since this form is not intended to be, and is not used as, a disclosure document.
- Possible changes to "held of record" definition. Under Section 12(g) of the Securities Exchange Act of 1934, an issuer becomes subject to the periodic reporting requirements if its total assets exceed $10 million and a class of its equity securities (other than certain excluded securities, such as those issued pursuant to compensation plans) are held by 2,000 holders of record or 500 holders of record that are not accredited investors. In then Commissioner Lee's speech relating to "the explosive growth of private markets," she urged that the SEC "reassess what it means to be a holder of record under Section 12(g)" and "recalibrate the way issuers must count shareholders of record under Section 12(g) (and Rule 12g5-1)." This would effectively "roll back" the changes brought about by the 2012 JOBS Act.

The year already has begun with a stir—a divided SEC adopted final rules addressing the treatment of special purpose acquisition companies (SPACs) in connection with their initial public offerings and subsequent business combinations. Following significant public comment on the proposed rules and a nearly two year wait, the final rules take into account only a number of the issues raised by market participants. The SEC side stepped some of the more controversial proposals—choosing to provide guidance, rather than a rule, on statutory underwriter status and guidance, rather than a safe harbor, addressing the Investment Company Act. That said, through the amendments, SPACs will no longer have available to them safe harbor protections for forward-looking statements, including projections. Was this first rulemaking a harbinger of things to come? Some other rules proposed by the SEC in 2022 and 2023 that were the subject of vigorous comments are likely be finalised this year, including the following:

- Climate change disclosure rules. In a departure from existing "principles-based" disclosure requirements rooted in materiality, the SEC's proposed rules were quite prescriptive and provided very little scaling. The SEC in its proposing release noted that the disclosures were intended to provide investors with consistent and comparable data, despite recent

evidence that a significant majority of companies questioned by SEC staff currently do not find climate change-related physical or transition risks to be material to their businesses. If the proposed rules are finalised in substantially the form in which they were proposed, registrants will be required to disclose (1) direct greenhouse gas (GHG) emissions (Scope 1) and indirect GHG emissions from purchased electricity and other forms of energy (Scope 2), and (2) indirect emissions from upstream and downstream activities in a company's value chain (Scope 3), if material, or if the company has set a GHG emissions target or goal that includes Scope 3 emissions.

- Artificial Intelligence Conflicts of Interest Rule. The proposed rules are intended to eliminate, or neutralise the effect of, certain conflicts of interest associated with broker-dealers' or investment advisers' interactions with investors through these firms' use of predictive data analytics, artificial intelligence, machine learning and similar technologies that optimise for, predict, guide, forecast, or direct investment-related behaviors or outcomes. These already have been a lightning rod for commenters and may be the subject of challenge.

We now turn to additional environmental, social and governance (ESG) developments. The SEC's current human capital management disclosure requirement brought about varied and inconsistent disclosures among companies and across industries. There has been a recommendation for **more prescriptive human capital management disclosures** that would require companies to "disaggregate the reporting of major operating costs, thus requiring companies to show employee compensation costs included in the income statement." Additionally, there is a recommendation for **additional corporate board diversity disclosures** relating to self-identified specific diversity characteristics of directors, certain board members or nominees, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background. The SEC has on its agenda proposed rulemaking to address each of these.

Last, market participants are watching closely the SEC's next steps following the US Court of Appeals Fifth Circuit decision vacating the share repurchase disclosure modernization rule. Will the SEC repropose a rule? And how will the SEC fare in response to other litigation challenges? The SEC is facing actions that would threaten to invalidate its recently adopted short sales and securities lending disclosure rules and private fund adviser rules. The only prediction that we can make that may almost certainly be accurate is that 2024 will be an interesting and busy year for securities lawyers and SEC watchers.