WINSTON & STRAWN LLP

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Public Company Priorities Program

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Security Breaches: Developing and Executing an Effective Response Plan

Managing Incident Response as a Public Company

- Increased scrutiny on public companies in light of new SEC cyber requirements
- Risks of lack of preparation
  - Class action
  - Regulatory
  - Business implications
    - Customer or client relationships
    - Business continuity
- Critical to automate processes and frontload diligence as much as possible

Assembling Your Incident Response Team

KEY PLAYERS

- Outside counsel
  - Privacy
  - Public companies
- Cyber insurer and broker
- Forensic vendor

KEY CONSIDERATIONS

- Institutional knowledge
- Cyber insurance coverage
  - Panel
  - Supplemental coverage
- Template agreements

Preparing Your Incident Response Plan

- Keep it short and concise – a framework vs. a play-by-play
  - Ensure review by key stakeholders
- Think through business continuity issues
  - Communications plan
  - Backups
- Prepare with tabletop exercises
  - Quarterly – IT team
  - Annual – Executive team

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AI: Governance, Policies and Issue Spotting

Artificial Intelligence Readiness Checklist

CREATE AI GOVERNANCE POLICY

- Identify stakeholders for decision making relating to AI and a process for revisiting the list of stakeholders to add / subtract as needed.
- Delineate responsibilities for the AI Committee
- Create a schedule to meet and assess
- **Ultimate Goal:** Exploit AI, holistically and responsibly

CRAFT POLICIES RE: EMPLOYEE USE OF AI (AND INSTITUTE TRAINING SESSIONS)

- Update current policies that apply to use of AI
- Craft new policies
- Train the employees on the policies
- **Ultimate Goal:** Quality control regarding employee use of AI tools and development of AI-related IP

Artificial Intelligence Readiness Checklist

DATA AUDIT

- What data does your organization own?
- What *usage* rights does your organization have with respect to third party data?
- **Ultimate goal**: Obtain maximum value from data

OBTAIN APPROPRIATE PROTECTION FOR PROPRIETARY AI TOOLS BEING DEVELOPED

- **Ultimate goal**: Obtain maximum value from proprietary AI and their outputs

VENDOR / SERVICE PROVIDER AUDIT

- How are your vendors / service providers using AI in the provision of services to you?
- What rights do vendors / service providers have to use your data for their own AI-related purposes?
- **Ultimate goal**: Transparency and comfort with third party use of AI tools in their provision of services

Artificial Intelligence Readiness Checklist

- Negotiate agreements with third party ai vendors and come up with a playbook for use of ai tools with non-negotiable terms.
  - **Ultimate goal**: Appropriate allocation of risk, IP ownership, etc.; and organizational compliance.
- Craft reasonable but protective agreements for end users of your organization's proprietary AI tools.
  - **Ultimate goal**: Obtain your organization's business objectives while also ensuring customers are comfortable with what you are doing.
- Monitor laws / regulations being passed that may affect your organization so that you can design / respond accordingly.
  - **Ultimate goal**: Be a step ahead and don't get caught flat-footed.

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Securities Litigation Update: Blockbuster 1H 2024 for SCOTUS and Delaware

Delaware Law Updates

DUAL PROTECTIONS REQUIRED: IN RE MATCH GRP., INC. DERIV. LITIG. (DEL. SUPREME)

- In a unanimous decision, the Delaware Supreme Court held that the entire fairness standard of review applies to all transactions involving a controlling stockholder who receives a nonratable benefit, unless the transaction is conditioned from the outset on the approval of: (i) a special committee consisting entirely of independent and disinterested directions; and (ii) a fully informed vote of a majority of the minority stockholders.
- If only one of the two procedural protections are in place or effective, the transaction will be subject to entire fairness review, but the burden of persuasion may shift to the plaintiff to show that the transaction was unfair to the minority.
- The special committee must be comprised entirely independent and disinterested directors to replicate arm's length bargaining.
- The proxy statement and/or other materials provided to stockholders must fully inform the stockholders regarding the proposed transaction and the controlling stockholder's conflicts—an issue that has been at the forefront recent Court of Chancery cases.

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Delaware Law Updates

STOCKHOLDER AGREEMENTS INVALID OR NOT: WEST PALM BEACH FIREFIGHTERS' PENSION FUND V. MOELIS & CO., (DEL. CH.) ("MOELIS")

- VC Laster found that a stockholder agreement was "facially invalid" under DGCL § 141(a) because it precluded directors from exercising their judgment, imposed substantive limitations on the board's business discretion, and deprived the board of its decision-making authority
  - DGCL § 141(a) gives the Board of Directors (BOD) the right to manage the business and affairs of the corporation and imposes fiduciary duties upon the Directors.
  - The agreement in question: (i) required the prior written consent of the founder-majority stockholder for a range of board actions; (ii) allowed the stockholder to select a majority of the board; and (iii) required board committees to be comprised of a number of the stockholder's designees.
- Following the decision (and prior to DE SC review), Delaware amended the DGCL, adding subsection (18) to Section 122, providing that notwithstanding DGCL § 141(a), a corporation may enter into stockholder agreements that delegate to stockholders the very same governance rights addressed in Moelis, including but not limited to consent rights (and thus veto rights) on corporate actions and management decisions. The Amendment is effective as of August 1, 2024.
- Companies should prepare for an influx of stockholder proposals and should consider limitations such as consent agreements as guardrails against stockholder agreements.

Federal Securities Updates

GOODBYE OMISSIONS THEORY: MACQUARIE INFRASTRUCTURE CORP. V. MOAB PARTNERS, L.P.

- The Supreme Court unanimously held that a failure to disclose information required by Item 303 of Regulation S-K cannot support a private claim under Rule 10b-5(b)of the Exchange Act in the absence of an otherwise-misleading statement, confirming that "pure omission" claims are not actionable.
- What does this mean in practice?
  - Plaintiffs claiming an "omission" of a material fact under Rule 10b-5(b) must show that the omission rendered statements made by the defendant misleading.
  - Court's holding based on the text of the rule and does not apply to all securities claims. For example, the Court compared that language of Rule 10b-5 to the language of Section 11(a) of the Securities Act of 1933, which the Court interpreted expressly to create liability for a pure omission where the regulated party has a duty to speak.

NO SLACK FOR STANDING: SLACK TECHNOLOGIES V. PIRANI

- The Supreme Court unanimously held that under Section 11 of the Securities Act, plaintiffs must plead and prove they purchased securities issued under the allegedly defective registration statement, versus other available securities.
- Section 11 authorizes suit for a misstatement/omission in a registration statement when a shareholder has acquired "such security," which refers only "to a security registered under the particular registration statement alleged to contain a falsehood or misleading omission."

Federal Securities Updates

CIRCUIT SPLIT: WHO IS A "SELLER" UNDER SECTION 12?

- Section 12 of the Securities Act imposes liability for the sale of unregistered securities and/or for misleading statements in connection with the offer/sale of a security, but limits liability to "statutory sellers."
- Statutory sellers include only those who (1) pass title to the purchaser; or (2) solicit the purchase, motivated by their own financial gain. As to the latter, is direct communication with the buyer required?
  - The 9th and 11th Circuits have recently held that general promotion/mass communication can constitute solicitation, even without directly contacting the buyer-plaintiff.
  - But in the 2nd, 3rd, and 5th Circuits general promotion or mass communication is not enough; direct solicitation is required.
- Jurisdiction may be outcome determinative, unless SCOTUS weighs in.
- Implications for digital assets and traditional securities.

EXCULPATING FEDERAL SECURITIES CLAIMS: MEHEDI V. VIEW, INC., (N.D. CAL. JUNE 28, 2024)

- Court found that a DGCL 102(b)(7) exculpation provision in company's charter shielded directors from liability for alleged negligent violations of Section 14(a) of the Exchange Act.
  - First time a court has applied an exculpation provision to a director stockholder claim alleging securities violations.
- Applies to Section 14 derivative actions brought against directors as well.

SCOTUS Limits Regulatory Power

THE DEATH OF CHEVRON DEFERENCE

- In Loper Bright, the Supreme Court overturned Chevron deference, whereby courts deferred to an agency's statutory interpretation.
- Courts will now interpret federal statutes without being required to accept an agency's "permissible" interpretation.
- The APA requires courts to exercise independent judgment when deciding whether an agency has acted within its statutory authority.
  - Courts may still give persuasive weight or "careful attention" to an agency's views about ambiguous statutes, but the court must decide the best reading of the statute and resolve the ambiguity.
- The decision will encourage new challenges to agency interpretations, and agencies may put more effort into persuading courts that their statutory interpretations are correct.

NEW LIMITS ON SEC'S USE OF IN-HOUSE TRIBUNALS

- In SEC v. Jarkesy, the Supreme Court held that the Seventh Amendment entitles defendants to a jury trial when the SEC seeks civil penalties.
  - Use of in-house Administrative Law Judges ("ALJs") was unconstitutional.
- What does this mean in practice?
  - The SEC can still use in-house tribunals, as long as it is seeking a remedy other than civil penalties.
  - The SEC will continue its current trend of filing in federal courts.
  - This decision may affect other agencies that impose civil penalties in in-house tribunals.

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SEC Latest Developments: What Really Matters?

Strategies for Proxy Season 2025

- Proxy Statement vs. Fourth Quarter Earnings Release
- Some Big Picture Takeaways from 2024
  - E&S shareholder proposals – increasing # of proposals yet decreasing support
  - Pushing Back
    - No Action Requests – increased requests with increased success
    - Exxon vs. Arjuna (and everyone else)
  - Activism – still up but Universal Proxy not an activist slam dunk
- 2025 Considerations
  - Let them vote
  - Settle vs. Exclude vs. Fight

Big Brother is Watching You(r Trades)

- Ontrak CEO conviction (June 2024)
- First Insider Trading case based solely on a Rule 10b5-1 trading plan
- Facts Pre-Date the New Rules
- But an Unsurprising Guilty Verdict
  - MNPI and Text Messages
  - Entry Timing and Bad Faith
  - Broker Shopping and Cooling Off Periods
- Key Takeaways
  - “Data-Driven Initiative” by DOJ and FBI
  - Update Policies and Executive Training

Climate Rule Resolution: Judicial Review vs. November 5th

- All the Briefs Are In
- The Arguments Against (and For)
  - Statutory Authority
  - Administrative Procedures Act
  - First Amendment
- The Real Review – Election 2024
  - Harris vs. Trump – Stating the obvious
  - SEC Chair Gensler's ESG Initiatives and Commission exhaustion

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