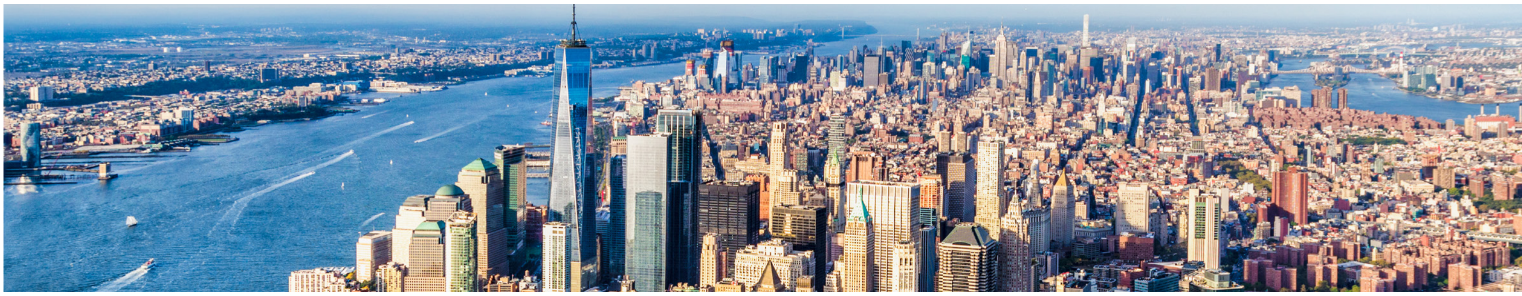
Linklaters

SEC Transactions and Compliance ("STAC") Group

Quarterly SEC Round-Up – Q1 2024



SEC's climate disclosure rules on hold for now

On April 4, 2024, the SEC voluntarily stayed its climate-related disclosure rules pending completion of the Eighth Circuit Court of Appeal's review of the numerous legal challenges to the rules. According to its order, the SEC will "continue vigorously defending" the rules in court, but issued the stay in part to avoid potential regulatory uncertainty if registrants were to become subject to the rules' requirements during the pendency of the challenges to their validity.

Meanwhile, the U.S. Chamber of Commerce has also filed a lawsuit against the state of California over its climate disclosure legislation. The state-wide laws, which mainly apply to U.S. domestic companies doing business in California, have not been stayed but are subject to funding uncertainty.

Key takeaway – We expect that if and when the SEC rules do come into force, the compliance deadlines as adopted will be pushed back to reflect the delay in implementation caused by the stay. Further, the U.S. presidential election in November could have a significant impact. A Republican-controlled SEC would be less likely to defend these rules vigorously, and may even take action to withdraw them if they are able to do so. In the meantime, SEC registrants should continue to abide by the SEC's 2010 guidance and 2021 sample comment letter around ensuring that all material climate change disclosure is contained in the registrant's relevant SEC filings.

"Pure omissions" are not actionable under Rule 10b-5

The Supreme Court issued a unanimous decision in *Macquarie Infrastructure Corp. v. Moab Partners* limiting a private plaintiff's ability to bring claims based on "pure omissions" in a public company's disclosure documents under the U.S. federal securities laws.

In the absence of an otherwise misleading statement, the court held, a company's failure to comply with Item 303 of Regulation S-K – which requires the disclosure of known trends and uncertainties that have had or are reasonably likely to have a material impact on financial performance – does not by itself support a private claim under Section 10(b) of and Rule 10b-5(b) under the Securities Exchange Act of 1934.

Key takeaway – The case resolves a split between the circuits and is an important limitation on the ability of private plaintiffs to bring cases against companies asserting Rule 10b-5 violations based on "pure omissions." However, as the Supreme Court noted, the decision does not change the SEC's ability to bring enforcement actions based solely on a violation of Item 303 without the need to invoke Rule 10b-5 or prevent private parties from bringing claims under Rule 10b-5(b) based on Item 303 violations that create misleading "half-truths." Furthermore, the Supreme Court explicitly declined to clarify what constitutes a "statement made" and when a statement made is misleading as a half-truth under Rule 10b-5(b). Private plaintiffs are likely to seek to test the meaning of these concepts in future actions. In addition, the court noted that its decision does not affect pure omissions claims for failure to disclose information in a registration statement under Section 11 of the Securities Act. Many companies incorporate their annual and periodic reports into registration statements, meaning that their disclosures will continue to remain subject to Section 11 claims based on "pure omissions."

SEC adopts final SPAC rules in a changed market

Amid a significant slowdown in SPAC IPOs and de-SPAC transactions in the last two years, the SEC adopted new rules that aim to align de-SPAC transactions more closely with traditional IPOs by mandating specific disclosures and increasing the potential liability of deal participants.

Key takeaway – With some key exceptions, the final rules are substantially similar to the SEC's 2022 proposal, which triggered major changes in market practice. Market participants will face a number of important risk management decisions in light of the final rules, but departures from current market practice may ultimately be limited.

SEC wins first "shadow trading" case

On April 5, 2024, a California federal jury found Matthew Panuwat liable for insider trading under the SEC's "shadow trading" theory. In *SEC v. Panuwat*, the SEC alleged that Panuwat used confidential information about an impending announcement of Pfizer's acquisition of Medivation, his then-employer, to purchase short-term, out-of-the-money call options of Incyte, a comparable public company. After the announcement, Incyte's share price increased by approximately 8%, generating profits for Panuwat of over US$100,000. It is the first case in which the SEC has argued that information about one company could be considered material to investors of another company because of their similarity.

Key takeaway – The SEC's victory will likely lead to more shadow trading investigations, and potential DOJ interest in the new insider trading theory. However, the application of the theory is not entirely clear. While *SEC v. Panuwat* is the SEC's first shadow trading action, the SEC based its case on the traditional elements of U.S. insider trading law: Panuwat traded securities in possession of inside information and the breach of a duty. The SEC was able to establish the breach of a duty because Medivation had a broad insider trading policy that specifically prohibited executives like Panuwat from trading in the securities of ***any*** publicly traded company on the basis of inside information. Not every company has such broad insider trading policies, which may make it difficult to assert the breach of duty, and thereby insider trading, in other shadow trading actions absent such broad internal policies.

The latest in whistleblowing developments

During the first quarter of 2024, there were a number of regulatory and judicial actions related to the scope and nature of protections afforded to whistleblowers. In January 2024, the SEC announced that a company had paid an US$18m civil penalty to settle charges that it had impeded clients from reporting potential securities law violations to the SEC. The charges were based on the company asking clients to sign confidential release agreements. Even though they permitted clients to respond to SEC inquiries, the agreements did not allow clients to voluntarily contact the SEC.

In February 2024, the Supreme Court issued an opinion holding that the Sarbanes-Oxley whistleblower protection provision requires a whistleblower to prove that their protected activity was a contributing factor in their employer's unfavorable personnel action, but does need not prove that their employer acted with "retaliatory intent" in taking such action.

In March 2024, the DOJ announced its new whistleblower program, which is meant to "fill gaps" in existing federal whistleblower programs and proactively address misconduct not already covered by these programs, such as foreign corruption cases outside the jurisdiction of the SEC, including FCPA violations by non-issuers and violations of the recently enacted Foreign Extortion Prevention Act. The DOJ is in the process of developing the program before formally implementing a pilot program.

Key takeaway – Whistleblowers continue to be highly valued by the U.S. government. The SEC in particular has been focusing on the language of release and other agreements to ensure that they do not impede whistleblowing. You should review your agreements to ensure that the reporting of securities law violations, voluntary contact with the SEC and other regulators and the ability to respond to regulatory enquiries are not impeded.

Share repurchase disclosure amendments removed from rules

Following the Fifth Circuit Court of Appeals' December 2023 order vacating the share repurchase disclosure rule, the SEC issued amendments in February 2024 that officially rescinded the changes made by the share repurchase disclosure rules.

Key takeaway – The Fifth Circuit's vacatur of the share repurchase disclosure rules had the legal effect of reverting to the rules and forms that existed prior to the new rules' effective date. The SEC's technical amendments revise the Code of Federal Regulations to reflect the court's vacatur. The SEC has still not indicated whether it will be re-proposing the rule.

What's happening with Ukraine-related sanctions?

Nearly two years after Russia first invaded Ukrainian territory, sanctions are now largely embedded in business and financial sectors. Domestic authorities' attention is turning to ensuring compliance with those sanctions regimes, limiting the scope for circumvention and penalizing those who breach legal restrictions. We have seen loopholes closed, technicalities addressed and guidance published to assist compliance. Our latest update on recent U.S., EU and UK sanctions developments is available here.

Key takeaway – Rapid and complex developments across multiple jurisdictions combined with severe legal and reputational consequences for violations means it is critical to get accurate, up-to-date advice, particularly for businesses with international operations involving parties that may now be subject to economic restrictions.

The new counterpart to the FCPA

In late 2023, President Biden signed into law the Foreign Extortion Prevention Act ("FEPA"), which amends the U.S. domestic bribery statute to make it a federal crime for foreign government officials to solicit or receive bribes from any person in the United States, any issuer, or any domestic concern.

How does the FEPA differ from the FCPA?

Unlike anti-bribery laws in many other jurisdictions, the Foreign Corrupt Practices Act (the "FCPA") does not prohibit foreign officials from demanding bribes from companies. The FEPA closes this gap by mirroring the FCPA and focusing on the recipients of bribes rather than the those who offer or pay bribes.

Significantly, the FEPA defines "foreign official" much more broadly than the FCPA. For example, the FEPA foreign official definition covers anyone acting in an official or unofficial capacity for a foreign government, without defining the term "unofficial."

Other differences are that the FEPA does not contain an exception for facilitation payments, like the FCPA does, and the FEPA does not provide for affirmative defenses.

What are the penalties for violation of the FEPA?

FEPA violations are punishable by a maximum penalty of 15 years imprisonment and a fine of up to US$250,000, or three times the value of the bribe.

How will the FEPA be enforced?

FEPA liability is triggered when foreign officials demand, seek, or accept bribes from U.S. persons or companies (whether within or outside the United States) or from any person (U.S. or otherwise) while in the United States.

However, we expect that the U.S. government will face enforcement challenges, as many non-U.S. governments may be unwilling to cooperate with the United States in prosecuting their own officials. Further, the U.S. government does not have extradition treaties with many of the countries whose officials could be the focus of FEPA enforcement.

Doug Davison and **Adam Lurie**

Contacts

London

Yaro Alekseyev
Partner
Tel: +44 20 7456 2092
yaro.alekseyev@linklaters.com

Mike Bienenfeld
Partner
Tel: +44 20 7456 3660
mike.bienenfeld@linklaters.com

Mas Harntha
Senior Associate
Tel: +44 20 7456 5228
mas.harntha@linklaters.com

Jason Manketo
Partner
Tel: +44 20 7456 4654
jason.manketo@linklaters.com

Alex Parkhouse
Counsel
Tel: +44 20 7456 3879
alexander.parkhouse@linklaters.com

Cecil Quillen
Partner
Tel: +44 20 7456 4347
cecil.quillen@linklaters.com

Igor Rogovoy
Senior Associate
Tel: +44 20 7456 3949
igor.rogovoy@linklaters.com

Pam Shores
Partner
Tel: +44 20 7456 4650
pam.shores@linklaters.com

Cole Smith
Counsel
Tel: +44 20 7456 5425
cole.smith@linklaters.com

Frankfurt

Marco Carbonare
Partner
Tel: +49 69 71003 599
marco.carbonare@linklaters.com

Paris

Luis Roth
Partner
Tel: +33 1 56 43 58 42
luis.roth@linklaters.com

Cheri De Luca
Counsel
Tel: +33 1 56 43 57 35
cheri.de_luca@linklaters.com

New York

Jeff Cohen
Partner
Tel: +1 212 903 9014
jeffrey.cohen@linklaters.com

Clara Pang
Partner
Tel: +1 212 903 9436
clara.pang@linklaters.com

Pierre-Emmanuel Perais
Partner
Tel: +1 212 903 9046
pierre-emmanuel.perais@linklaters.com

Burc Ozcelik
Senior US Associate
Tel: +1 212 903 9160
burc.ozcelik@linklaters.com

Catherine Russ
Counsel
Tel: +1 212 903 9426
catherine.russ@linklaters.com

Conrado Tenaglia
Partner
Tel: +1 212 903 9010
conrado.tenaglia@linklaters.com

São Paulo

Matthew Poulter
Partner
Tel: +55 11 3074 9525
matthew.poulter@linklaters.com

Special Contributors

Doug Davison
Partner
Tel: +1 202 654 9244
doug.davison@linklaters.com

Adam Lurie
Partner
Tel: +1 202 654 9227
adam.lurie@linklaters.com

linklaters.com

GC30584A_F/04.24