Insights From The Director

December 12, 2023

By Taylor Wirth

At the American Bar Association's 2023 Business Law Section Federal Regulation of Securities Committee Winter Meeting, held in Washington, D.C., on Dec. 6 and 7, Barnes & Thornburg partner Jay Knight led a panel titled, "Dialogue With the Director." Jay, current chair of the committee and co-chair of Barnes & Thornburg's Securities and Capital Markets practice, spoke with Erik Gerding, the Director of the Securities and Exchange Commission's (SEC) Division of Corporation Finance, about areas of Staff focus and rulemaking interpretive issues, among other topics.

Gerding highlighted three disclosure issues that the Staff anticipates emphasizing during the upcoming annual report and proxy season.

Artificial Intelligence (AI)

The SEC has begun to focus its attention on matters relating to AI, including proposing new rules in July 2023 for broker-dealers and investment advisors that address risks that AI utilizing predictive data analytics and potential conflicts of interest. Thereafter, the SEC's Division of Examinations included AI in its 2024 Examination Priorities. More recently, SEC Chair, Gary Gensler, made public statements on AI, warning against "AI washing" (that is, unsupported statements or claims about AI).

In preparing for upcoming disclosures, Gerding reminded attendees during the panel discussion that statements should be tailored to a company's business and operations rather than being boilerplate, and that discussion of emerging technologies should be specifically defined and explained.

Banking-Related Disclosures

Although the collapse of Silicon Valley Bank has receded from the headlines in recent months, the Staff remains focused on banking-related disclosures. In particular, Gerding flagged that interest rate risk and liquidity risk should be disclosed with particularity, including any sensitivity analyses. He also noted that disclosure on key assumptions banks are using may be relevant for disclosure.

While his comments were directed to financial institutions, we believe the concepts apply more broadly, including the sensitivity analysis related to

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China-Specific Disclosures

In July 2023, the Staff released a sample comment letter for issuers with significant operations in the People's Republic of China (PRC), encouraging such companies to disclose PRC-related material impacts and risks to their businesses. In his remarks, Gerding reminded attendees of the relevance of this sample letter.

The letter emphasized three areas of SEC focus: 1) disclosure under and compliance with The Holding Foreign Companies Accountable Act, 2) material risks related to the role of the PRC government in the operations of China-based companies, including disclosures about any material impacts that intervention or control by the PRC in the operations of these companies has or may have on their business or the value of their securities, and 3) material impacts of certain statutes, such as the Uyghur Forced Labor Prevention Act.

In a season that brought many new 10-K disclosure items, including cybersecurity and clawback disclosure, but not share repurchase disclosure, in all likelihood – check out our handy rule compliance date calendar to stay up to date – we appreciate the reminder from Gerding about the Staff's topics of interest.