Articles + Publications | July 11, 2024

Securities Investigations and Enforcement Newsletter — July 2024

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RECENT SPEAKING ENGAGEMENTS

Our Securities Investigations + Enforcement attorneys are frequently called upon to speak on topics related to securities investigations and enforcement. They are recognized for their insightful analysis and commentary on a range of regulatory and enforcement issues. Their expertise extends to understanding and interpreting industry trends, providing our clients with a comprehensive view of the evolving legal landscape. Recent and upcoming speaking engagements include:

- Jay Dubow participated in a program with PBI on July 10, Navigating Parallel Proceedings: SEC, Criminal and Private Civil Litigation. This program discussed the perils and pitfalls of cases with potential for parallel proceedings. The panelist also discussed how to spot and manage a case with the capacity to include criminal (DOJ), civil enforcement (SEC) and civil (private litigation).

- Ghillaine Reid will participate in an upcoming PLI program for the SEC's 90th anniversary – "The SEC at 90—A Look Back and a Look Ahead." This program will celebrate the SEC and examine the challenges, and opportunities, it faces in the next 90 years and beyond, as well as where SEC practice has been, is, and will be.

SUPREME COURT UPDATES

US SUPREME COURT LIMITS SCOPE OF OMISSION LIABILITY FOR SECTION 10(B) SECURITIES FRAUD CLAIMS

By Jay Dubow, Tim Mast, Mary Weeks, Bianca DiBella, and Milica Krnjaja

On April 12, in a long-awaited and pivotal decision, the U.S. Supreme Court unanimously ruled that private plaintiffs may not plead a federal securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) based solely on a company's failure to disclose a known trend or uncertainty required to be disclosed under Item 303 of the U.S. Securities and Exchange Commission (SEC) Regulation S-K.[1]

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US SUPREME COURT TO HEAR NVIDIA CRYPTO MINING CASE ON SECURITIES PLEADING STANDARD

By Jay Dubow, Tim Mast, Mary Weeks, Bianca DiBella, and Milica Krnjaja

On June 17, the U.S. Supreme Court granted certiorari in *Nvidia Corp. v. E. Ohman J:or Fonder AB*,[1] agreeing to hear Nvidia's appeal of a Ninth Circuit ruling that revived shareholders' fraud claims regarding Nvidia's cryptocurrency mining sales. This gives the Court a chance to resolve two circuit splits on the pleading requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA).

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SUPREME COURT LIMITS SEC'S IN-HOUSE ADJUDICATION

By Jay Dubow, Ghillaine Reid, and Alyssa Cavanaugh

On June 27, the U.S. Supreme Court released a 6-3 decision in *SEC v. Jarkesy, et al.*, ending the Securities and Exchange Commission's (SEC) long-standing use of in-house administrative law judge (ALJ) tribunals in cases where the SEC seeks civil penalties. The majority held that for actions in which SEC seeks civil penalties for securities fraud, the Seventh Amendment requires that the action be brought in a court of law where the defendant is entitled to trial by jury.

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CLIMATE IMPACT DISCLOSURE RULES

THE SEC VOLUNTARILY STAYS CLIMATE-RELATED DISCLOSURE RULES PENDING EIGHTH CIRCUIT JUDICIAL REVIEW

By Jay Dubow, Ghillaine Reid, and Sophia Harmelin

On April 4, the Securities and Exchange Commission (SEC) issued a stay on the implementation of its newly enacted climate impact disclosure rules. This decision is connected to a challenge to the rules currently pending in the U.S. Court of Appeals for the Eighth Circuit, which is a consolidation of numerous lawsuits that hit the SEC following the rule announcement on March 6. The SEC adopted a scaled-back version of its initial 2022 proposal, requiring large public companies to report their greenhouse gas emissions, climate-related risks to their businesses, and the financial harm caused by extreme weather events, in their registration statements and annual reports. The reporting requirements were to be rolled out in stages, with the largest filers beginning disclosures in 2025.

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MOOTNESS FEES

ORACLE RULING UNDERSCORES TREND OF MOOTNESS FEE DENIALS

By Jay Dubow, Mary Weeks, Hannah Baskind, and Milica Krnjaja

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Consistent with recent trends, the Delaware Chancery Court in February denied a $5 million attorney fees request, commonly known as a "mootness fee," requested by Oracle Corp.'s shareholders' attorneys following their unsuccessful challenge to Oracle's acquisition of NetSuite Inc.

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'NO BETTER THAN A RACKET'—SEVENTH CIRCUIT CRITICAL OF MOOTNESS FEES FOR MERGER DISCLOSURES

By Jay Dubow, Joanna Cline, and Connor DeFilippis

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Judge Frank Easterbrook, disenchanted with the current "federal practice" of plaintiffs attorneys extorting fees in disclosure cases without conferring a meaningful benefit on stockholders, penned the opinion for a two-judge panel rejecting such fee agreements and empowering shareholders and federal courts alike to scrutinize these fees going forward.

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FINRA UPDATES

FINRA'S FIRST DISCIPLINARY ACTION TARGETING FIRM'S USE OF SOCIAL MEDIA INFLUENCERS

By Jay Dubow, Ghillaine Reid, Casselle Smith, Sophia Harmelin

The Financial Industry Regulatory Authority's (FINRA) Enforcement Division recently announced its first settlement involving a firm's supervision of social media influencers. The respondent, M1 Finance LLC (M1), is a financial technology company that provides self-directed trading to retail investors through its mobile application and website. In connection with FINRA's targeted exam of M1's use of social media influencers to acquire new customers, FINRA found that social media posts made by influencers on the firm's behalf were not fair or balanced, or contained exaggerated, unwarranted, promissory, or misleading claims. According to FINRA, M1 also failed to establish, maintain, and enforce a reasonably designed supervisory system for its influencers' social media posts, and failed to preapprove and preserve records of these retail communications.

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INFLUENCER CONSIDERATIONS AS FINRA INITIATES CRACKDOWN

By Casselle Smith, Jay Dubow, Ghillaine Reid, and Sophia Harmelin

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In September 2021, the Financial Industry Regulatory Authority initiated a targeted exam of firm practices for acquiring customers through social media platforms.[1]

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RISK ALERT

SEC ISSUES THIRD MARKETING RULE RISK ALERT FOR INVESTMENT ADVISERS

By Genna Garver, John Falco, and Matthew Ramsey

On April 17, the U.S. Securities and Exchange Commission's (SEC) Division of Examinations (EXAMS) issued its third risk alert on the amended Rule 206(4)-1 (the Marketing Rule) under the Investment Advisers Act of 1940 (Advisers Act). EXAMS issued its first risk alert on the Marketing Rule ahead of its November 2022 required compliance date, outlining the aspects it expected to focus on during its initial exam phase. About seven months after the rule's required compliance date, EXAMS issued a second risk alert, detailing its next exam phase, including its increased focus on additional Marketing Rule-related aspects. The third alert includes EXAMS' preliminary observations of its Marketing Rule exams, aiming to promote accurate completion of Marketing Rule items in Form ADV, compliance with Advisers Act Rule 204-2 Books and Records rule, and adherence to the general prohibitions set forth in Rule 206(4)-1(a).

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