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SEC Focus on Cybersecurity Disclosure

On February 21, the SEC issued an [interpretive release](#) providing guidance to assist reporting companies in preparing disclosures concerning cybersecurity risks and incidents. The release supplements guidance provided by the SEC in 2011 and emphasizes the need for comprehensive policies and procedures related to cybersecurity risks and incidents in order to comply with disclosure obligations and prevent insider trading. Items addressed include disclosure obligations relating to materiality, risk factors, MD&A, description of business, legal proceedings, financial statements and board risk oversight. The interpretive guidance also addressed disclosure controls and procedures and selective disclosure. Click [here](#) for our memorandum on the interpretive guidance.

On April 24, the SEC announced that Altaba, the company formerly known as Yahoo! Inc., agreed to pay a \$35 million penalty as part of a [cease-and-desist order](#) to settle charges that it misled investors by failing to disclose a significant data breach in which hackers stole personal data relating to hundreds of millions of Yahoo! accounts in 2014. This was the first fine issued by the SEC based on allegations that investors were misled by a reporting company's failure to disclose a cyberattack and highlights the SEC's increasing focus on cybersecurity issues and related disclosure obligations. Click [here](#) for our memorandum on the settlement.

2018 SEC Rulemaking Agenda

On May 9, the SEC published its [2018 rulemaking agenda](#) which includes the following notable items:

- Final rules on disclosure of public company hedging policies as required by the Dodd-Frank Act. Click [here](#) for our memorandum on the proposed rule.
- Proposed rules that would extend "testing the waters" accommodations (currently available by reason of an amendment to Section 5 of the Securities Act of 1933 enacted under the JOBS Act) to non-emerging growth companies.
- Proposed rules pursuant to the SEC's disclosure effectiveness initiative, including rules applicable to acquired businesses disclosure, business and MD&A disclosure required by Regulation S-K, and Guide 3 bank holding company disclosure.

- New proposed rules regarding the disclosure of payments by resource extraction issuers. Click [here](#) for our memorandum on the elimination of an earlier version of the resource extraction rule.

Proposed New Standard of Conduct for Broker-Dealers

On April 18, by a vote of 4-1, the SEC proposed a package of rulemaking and interpretations addressing investors' relationships with broker-dealers and investment advisers. Under proposed [Regulation Best Interest](#), a broker-dealer and a natural person who is an associated person of a broker-dealer would be required, when making a recommendation regarding any securities transaction or any investment strategy involving securities, to act in the "best interest" of a retail customer without placing their respective financial interests ahead of the customer. The SEC also proposed a [rule](#) establishing a new short-form disclosure document that would provide retail investors with information about the nature of their relationship with their investment professionals, and issued an [interpretation](#) to reaffirm and, in some cases, clarify, the SEC's views of the fiduciary duty that investment advisers owe to their clients. Click [here](#) for our memorandum on the proposed rules.

Cryptocurrencies and Initial Coin Offerings

In December 2017, Chairman Jay Clayton issued a [statement](#) expressing his general views on cryptocurrencies and initial coin offerings ("ICOs") as they relate to market professionals, including broker-dealers, investment advisers, lawyers and accountants. Chairman Clayton reiterated the SEC's view that ICOs may involve the offering of securities and urged market professionals to review the SEC's June 25, 2017 [Report of Investigation](#) in which the SEC applied traditional securities law principles to virtual currency activities and found that certain virtual tokens or coins offered in an ICO could be deemed securities. In February, at the Practising Law Institute's "SEC Speaks" conference, senior representatives of the SEC's Enforcement Division underscored that the SEC views many cryptocurrency tokens as "securities" and that additional enforcement actions can be expected now that the market has been put on notice about the need for proper registration. In April, the SEC [charged](#) two co-founders with orchestrating a fraudulent ICO, and law enforcement authorities separately charged and arrested both defendants.

SEC Provides Guidance for Disclosure and Accounting Implications of Tax Cuts and Jobs Act

In December 2017, the SEC published guidance for reporting companies, auditors and others to help ensure timely disclosures of the accounting impacts of the Tax Cuts and Jobs Act. The staffs of the Office of the Chief Accountant and of the Division of Corporation Finance issued the following two interpretations:

- Compliance and Disclosure Interpretation 110.02, which provides guidance on how to comply with obligations under Item 2.06 of Form 8-K with respect to reporting the impact of a change in tax rate or tax laws pursuant to the Tax Cuts and Jobs Act, and clarifies that the accounting consequences of the Tax Cuts and Jobs Act generally will not trigger this reporting obligation, and
- Staff Accounting Bulletin No. 118, which provides guidance regarding the application of U.S. generally accepted accounting principles when preparing an initial accounting of the income tax effects of the Tax Cuts and Jobs Act and provides an accommodation for companies unable to assess the full effects of the Act during a financial reporting period.

Click [here](#) for our memorandum on the SEC's guidance.

U.S. Supreme Court Confirms State Court Jurisdiction over Securities Act Class Actions

On March 20, the U.S. Supreme Court held that the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) does not divest state courts of jurisdiction over class actions asserting claims under the Securities Act of 1933. The Court’s decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, which resolved a disagreement among the lower courts, ruled that the language of the statute did not alter the historical scheme granting concurrent jurisdiction over claims under the Securities Act to state courts. In addition, the Court held that SLUSA did not alter the bar on removal of cases under the Securities Act from state to federal court. In light of this decision, we expect that shareholders will continue to file class actions asserting only claims under the Securities Act in state courts across the country. Click [here](#) for our memorandum on the decision.

Commissioners Jackson and Peirce Sworn in, Commissioner Piwowar to Step Down

On January 11, Robert Jackson and Hester Peirce were sworn into office as SEC Commissioners. Michael Piwowar, a Republican Commissioner who has been a frequent critic of post-crisis regulations and helped quash some rules embraced by Democrats, announced that he plans to leave the agency in July. The vacancy could leave the Commission temporarily deadlocked on controversial rulemakings. Democrat Kara Stein’s term ended last year, although she can remain until December.

SEC Enforcement Priorities

On May 15, Steven Peikin, Co-Director of the SEC’s Division of Enforcement, gave a [speech](#) setting out SEC enforcement priorities. The speech focused on cybersecurity, cryptocurrencies and initial coin offerings (“ICOs”). Co-Director Peikin described the SEC’s efforts to communicate its views regarding ICOs and its formation of a dedicated Cyber Unit to focus on enforcement efforts in the ICO space, and noted that the SEC has dozens of ongoing investigations involving ICOs. He also noted that the Division of Enforcement is attempting to maximize the effectiveness of its work through a focus on identifying and charging culpable individuals. Over the last year, the SEC has charged individuals in almost 80 percent of the enforcement actions it has brought.

Remarks of the Chief Accountant

In a [speech](#) on May 3, Wesley Bricker, the SEC’s Chief Accountant, discussed several recent changes in accounting standards intended to result in better financial reporting to investors, including the new revenue recognition standards and new lease and credit losses standards. He noted the SEC guidance on accounting for the effects of income tax reform (discussed above), changes in accounting requirements for stock held in other companies, and the importance of audit committee participation in reviewing the preparation, presentation and integrity of non-GAAP financial metrics. He also discussed the recently proposed [rulemaking](#) intended to address certain challenges to compliance with part of the auditor independence rules, known as the “Loan Provision,” and discussed the role of audit firm governance and culture, noting a need for greater consistency of quality audit work.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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