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Capital Markets & Governance Insights

Insights on Selected Recent Developments

ROPES & GRAY

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SEC Developments

In Twin Actions, SEC Charges Former Kubient CEO for Fraud and Former CFO and Audit Committee Chair for Failing to Investigate and Perpetuating CEO's Fraud

Key Insights

- While it rarely does so, the Securities and Exchange Commission (SEC) will pursue securities fraud charges against audit committee chairs and other audit committee members in an appropriate case;
- CFOs and audit committee members must investigate red flags regarding material financial reporting matters (including fraud-related matters) brought to their attention;
- CFOs and audit committee members should promptly correct material errors in any information given to their company's independent auditor and should always make complete disclosures to the independent auditor about concerns relating to financial reporting, fraud or suspected fraud, or other matters relevant to an audit that they are aware of; and
- CFOs and audit committee members should ensure that appropriate steps are taken to correct materially false or misleading financial information in their company's SEC filings.

Background

On September 16, 2024, the SEC filed various securities fraud-related charges against a former chief executive officer (Paul D. Roberts) (CEO), former chief financial officer (Joshua A. Weiss) (CFO), and former audit committee chair (Grainne M. Coen) (AC Chair) of Kubient Inc. (Kubient) in connection with allegedly materially false and misleading statements inflating revenue from, and touting the success of, Kubient's flagship product. The statements were contained in offering documents filed by Kubient with the SEC for its August 2020 initial public offering (IPO) and subsequent December 2020 public offering ("the follow-on offering"), and certain of its other SEC filings. The charges were filed in two complaints: one against the CEO and the other against the CFO and AC Chair. In a partial settlement subject to court approval, the CEO has consented to injunctions from future violations, with appropriate monetary and other remedies still to be resolved. In announcing the charges, the Director of the SEC's Denver Regional Office stated that "[the] case should send an important signal to gatekeepers like CFOs and audit committee members that the SEC and the investing public expect responsible behavior when critical issues are brought to their attention."

The SEC's complaints, which were filed in the U.S. District Court for the Southern District of New York, charge violations (including certain "aiding and abetting" violations) of the securities antifraud provisions of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), and Rule 10b-5 thereunder, as well as violations of Section 13(b)(5) of the Exchange Act, and Exchange Act Rules 13b2-1, 13b2-2, 13a-1, 13a-11, 13a-14, and 12b-20, relating to making materially false and misleading statements to an accountant in connection with financial statements, circumventing and failing to implement a system of internal accounting controls, falsifying accounting records, false Form 10-K and Form 10-Q certifications, false SEC filings, and, solely with respect to CFO, related control person liability provisions.

The Facts

The SEC's claims are rooted in an allegation that, ahead of its August 2020 IPO, Kubient improperly recognized $1.3 million in revenue from its flagship product, Kubient Artificial Intelligence (KAI), revenue that represented approximately 95% of the company's revenue at the time of the IPO. According to the complaints, the revenue was improperly recognized because Kubient did not perform its obligations under the underlying contract that required Kubient to use KAI, a product designed to detect real-time fraud during digital advertising auctions, to beta test the data of two customers, as the customers' data were never received or scanned by KAI. Instead, the SEC alleged, the CEO caused the fabrication of fraud analyses purported to have been generated from KAI's scanning of the customers' data, which analyses the CFO then provided to Kubient's independent auditor as part of the supporting documentation for the revenue.

Specifically, the SEC's complaints are targeted at statements (including in the financial statements) in the registration statements and prospectuses for the IPO and follow-on offering, the company's second and third quarter 2020 Forms 10-Q, 2020 Form 10-K, and an earnings Form 8-K that referred to the $1.3 million revenue and the success of KAI's beta testing of the customers' data.

According to the complaint against the CFO and AC Chair, the CFO and AC Chair first learned that the beta tests had not been performed on the day Kubient launched the follow-on offering. The SEC alleges that on that day an employee who had discovered that KAI had not scanned the customers' data informed the AC Chair of this discovery, while questioning whether it could be indicative of fraud and suggesting that, if the wrong data had been scanned for the beta test, the company might need to restate its earnings. The AC Chair then relayed this information to the CFO on the same day. The complaint further alleges that, despite learning this, neither the CFO nor the AC Chair investigated the circumstances of the $1.3 million revenue recognition; instead they both furthered the CEO-initiated fraudulent scheme by failing to correct the statements in the follow-on offering documents, signing the company's subsequent public filings including the same statements, and lying to the company's independent auditor about the revenue and their knowledge of concerns raised internally about the transactions supporting the revenue.

Allegations of Wrongdoing Against the AC Chair

The case is particularly notable for the SEC's decision to charge an audit committee chair. In this regard, the SEC charged the AC Chair for allegedly:

- Failing to investigate the circumstances surrounding the $1.3 million revenue recognition after learning that the customers' data were not scanned by KAI;
- Failing to inform the independent auditor of that discovery;
- Failing to correct the KAI testing and revenue statements in the follow-on offering documents;
- Excluding the independent auditor from the audit committee meeting where concerns about the KAI contract were discussed (the "KAI Audit Committee Meeting");
- Further concealing the KAI Audit Committee Meeting from the independent auditor by signing minutes (prepared by the CFO) of the immediately following audit committee meeting that disclosed another meeting, instead of the KAI Audit Committee Meeting, as the last audit committee meeting;
- Falsely stating to the auditor, during the 2020 year-end audit interview, that she was unaware of any tips or complaints regarding the company's financial reporting, any fraud or suspected fraud affecting the company, or any other matters relevant to the audit; and
- Signing the company's 2020 Form 10-K that included the statements in question.

SEC Charges DraftKings with Reg. FD Violation for CEO's Social Media Posts

On September 26, 2024, the SEC charged DraftKings Inc. for failing to promptly disclose to the public material, nonpublic information (MNPI) regarding its second quarter 2023 sales growth that it had selectively disclosed to some of its investors through its CEO's social media accounts in violation of Regulation Fair Disclosure (Regulation FD). The enforcement action is particularly notable because the SEC still pursued the action notwithstanding that Draftkings' communication staff, on recognizing the error, got the social media posts taken down within 30 minutes of their posting. DraftKings agreed to settle the matter by paying a $200,000 fine and taking certain remedial measures. Regulation FD prohibits public companies, or persons acting on their behalf, from selectively disclosing MNPI to holders of their securities and certain other persons outside their companies and, if they selective disclose MNPI non-intentionally, requires them to publicly disclose the MNPI promptly (i.e., no later than 24 hours (or, if later, the beginning of the next day's trading on the New York Stock Exchange) after a senior company official becomes aware of the non-intentional disclosure).

According to the SEC order, on July 27, 2023, ahead of the public release of its second quarter earnings results on August 3, 2023, the company published posts on its CEO's X (formerly Twitter) and LinkedIn accounts—accounts operated by the company's public relations firm and followed by some of the company's investors—stating that the company was *"still seeing really strong growth in existing states"* (referring to states where the company started operations in 2018-2021). Earlier, in announcing its first quarter 2023 results in which it recorded 80% year-over-year sales growth in those states, the company had recognized sales growth in those states as a trend that "is a critical element of [its] business model." When it published its second quarter 2023 earnings results, the company reported that its second quarter year-over-year sales growth in those states was over 70%. Attributing the statement in the social media posts to the company's second quarter 2023 results, the SEC found that information conveyed by the statement, in addition to being material, was not public at the time of the posts. According to the SEC order, that information only became publicly disseminated when the company released its second quarter results. The SEC further found that the CEO's social media accounts were not an official source of DraftKings' company information.

The action serves as a reminder to companies that:

- Prompt public disclosure of MNPI is the only fix for non-intentional selective disclosure of MNPI;
- To be Regulation FD-compliant, subject to permitted Regulation FD exceptions, MNPI should only be communicated through a Form 8-K or other method that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public; and
- For websites and social media accounts to be recognized channels of company communication for Regulation FD purposes, investors must first have been alerted that such websites or social media accounts would be used for such purpose and companies must comply with the other SEC requirements in Commission Guidance on the Use of Company Web Sites and SEC Says Social Media OK for Company Announcements if Investors Are Alerted.

SEC Brings Enforcement Actions for Sections 13 and 16 Reporting Violations

The SEC has brought a number of recent enforcement actions against investors, advisors, public companies, and directors and officers for failures to comply with rules requiring reporting of securities holdings and transactions. Most notably, in late September 2024, the SEC announced the results of a sweep primarily related to Schedule 13D and 13G and Section 16 filings. As part of that sweep, the SEC brought actions against a number of institutional investors for late and missed filings. Those actions evidence the SEC's willingness to bring actions for violations in cases where the error relates to technical aspects of the rules and where

no specific harm to investors is alleged, including cases where the only violation is late filing. The SEC also brought actions against public company issuers for contributing to failures by officers and directors to comply with Section 16 reporting obligations and for failing to report those missed filings in their annual reports or proxy statements. The recent sweep followed SEC enforcement actions addressing similar issues in the fall of 2023 and several recent standalone enforcement actions for Schedule 13D violations, as well as a statement by the director of the SEC's division of corporation finance that they are "closely monitoring the implementation of" the amendments to the Schedule 13D and Schedule 13G filing requirements that came into effect in 2024 (we discuss those amendments, including the accelerated filing deadlines, here).

The recent enforcement actions also included an action against an operating company for failure to file Form 13F. Earlier in September 2024, the SEC separately announced charges against a number of investment managers for failures to file Form 13F and Form 13H, which our colleagues discuss here. This SEC's focus on this space should serve as a reminder to issuers and other market participants to carefully consider the filing obligations applicable to them and ensure they have controls and procedures in place to satisfy those obligations.

SEC Disbands ESG Task Force but Still Focused on ESG

The SEC recently quietly disbanded its ESG enforcement task force. However, as we discuss in more detail here, that does not mean that the SEC is no longer focused on ESG. For example, earlier this fall, the SEC brought an enforcement action against a well-known consumer products company alleging that statements the company made regarding the recyclability of its coffee pods were inaccurate. Notably, as Commissioner Pierce noted in her dissent, the SEC's enforcement action does not assert that the statements made by the company are material—only that they were inaccurate.

Selected SEC Filing Reminders

- Companies—other than smaller reporting companies (SRCs)—filing their Form 10-K or Form 20-F for a fiscal year that began on or after April 1, 2023, will be required to disclose in that report if they have adopted **insider trading policies** (including those governing trading by the company itself) and, if not, why they have not done so. If they have adopted an insider trading policy, the policy must be filed as an exhibit to the report. The disclosure applies to SRCs for fiscal years beginning on or after October 1, 2023.

- Beginning with Form 10-Ks for fiscal years beginning on or after April 1, 2023 (or, at an issuer's option, proxy statements for stockholder meetings after that year), issuers (other than foreign private issuers and SRCs) must **disclose certain information regarding options, stock appreciation rights, and similar instruments granted to named executive officers** within four business days before or one business day after, (i) filing of a quarterly report on Form 10-Q or annual report on Form 10-K, or (ii) filing or furnishing a Form 8-K (other than a Form 8-K reporting only the grant of a material new option award that includes material nonpublic information). The disclosure must also include the issuer's policies and practices on the timing of awards of options in relation to the disclosure of material nonpublic information by the issuer. The disclosure applies to SRCs for fiscal years beginning on or after October 1, 2023.

- Revised **Schedule 13G deadlines** (discussed here) are now effective; compliance with the revised deadlines became required from September 30, 2024.

Developments from the Courts

Incorporation of Private Agreements into Corporate Charters Invalid, Delaware Chancery Declares

In July 2024, in *Seavitt v. N-Able, Inc.*, the Delaware Chancery Court ruled that a Delaware corporation's charter cannot incorporate the provisions of a private agreement by reference. In the suit, the plaintiff challenged the validity of certain governance provisions in a stockholders agreement on the ground that they limited the authority of the defendant's board to manage the defendant's affairs in contravention of Section 141(a) of the Delaware General Corporation Law (DGCL). Because the validity of some of the provisions depended on whether they formed part of the defendant's charter on account of certain charter provisions that were stated to be "subject to" the stockholders agreement, the court had to decide whether a Delaware corporation's charter can validly incorporate the provisions of a private agreement by reference. To do so, the court had to determine whether a provision of a private agreement is a "fact ascertainable" under Section 102(d) of the DGCL, which allows a provision in a charter to be "dependent upon facts ascertainable outside [the charter]."

In ruling that such incorporation is not permissible, the court reasoned that:

- The common meaning of "fact" and "provision," and the context of Section 102(d) and other DGCL provisions that refer to "facts ascertainable" lead to the conclusion that a provision in a private agreement is not a "fact ascertainable";

- Such incorporation would undermine the public nature of a charter, as it would limit the public's ability to fully determine what a charter authorizes, prohibits or limits; and

- Such incorporation would undermine the certainty and stability of a charter, as parties to the agreement could effectively amend the charter by amending the agreement and thereby circumvent the DGCL's mandatory procedure for charter amendments by depriving non-party stockholders of their right to vote on the amendment.

While recent amendments to the DGCL, effective August 1, 2024, which allow a Delaware corporation to enter into a stockholders agreement that limits board authority under Section 141(a) of the DGCL by restricting certain board action or requiring the prior approval of certain stockholders for specified corporate actions, make incorporation by reference unnecessary for such stockholders agreements, the court's decision could still have important implications for other agreements in other contexts.

NYSE Developments

Under SEC-Approved NYSE Rule, NYSE May Delist Companies That Change Their Primary Business Focus

On July 24, 2024, the SEC approved a change to the New York Stock Exchange (NYSE) Listed Company Manual that will allow the NYSE to immediately commence suspension and delisting procedures against companies that significantly change their primary business focus. Under the rule, the NYSE may exercise this discretion when a company changes its primary business focus to one that is substantially different from its business at the time of listing or that was immaterial to its business at that time. According to the NYSE, the rule aims to protect investors for whom the change represents a fundamental change in their investment decision (including from stock price drops that may result from the change) and to provide the exchange with the opportunity to consider if the company would have been suitable for listing had the modified business been its primary business at the time of listing.

Although the rule requires companies that significantly change their primary business focus to promptly notify the NYSE of the change, the NYSE may still act without such notice. In deciding whether a company should face delisting, the NYSE will primarily consider whether the NYSE would have accepted the company for listing with its modified business focus. In analyzing this, the NYSE will not consider its quantitative standards for initial listing, but will focus instead on qualitative factors, including, in all cases, management and board changes, and changes in the company's voting power, ownership, and financial structure that occur in connection with the change in primary business focus. In proposing the rule, the NYSE acknowledged that, because delisting on this ground would be an extraordinary action, it expects to exercise its discretion infrequently and only after considering all relevant facts and circumstances.

NYSE Proposes Global Calculation of Holder and Trading Volume Distribution Standards

In August 2024, the NYSE proposed a rule change that would require the minimum holder and trading volume requirements of its initial listing distribution standards to be calculated on a worldwide basis. Under its current rules, for companies organized in Canada, Mexico, or the United States (collectively, "North America"), these requirements are applied on a North America-wide basis, while companies organized outside North America may only have holders and the trading volume in their home country or primary non-U.S. trading market included in the calculation at the NYSE's discretion. The proposed change eliminates this disparate treatment, thereby standardizing the treatment of all companies under the same global criteria.

The proposal, which would align the NYSE's rules with those of Nasdaq, is aimed at enhancing the NYSE's competitiveness, particularly in attracting non-U.S. companies for listing. According to the NYSE, the current rule has been a barrier to NYSE listing for non-U.S. companies that often sell a significant portion of their IPOs in their home markets. This has sometimes resulted in these companies being unable to meet the NYSE's distribution standards, thereby losing them to Nasdaq. The NYSE believes that the global approach reflected in the proposal better reflects the interconnected nature of modern securities markets and the ease of transferring securities across borders. The SEC is expected to act on the proposal by October 25, 2024.

NYSE Proposes to Limit Use of Reverse Stock Splits to Regain Price Criteria Compliance

In September 2024, the NYSE proposed a rule change aimed at limiting the use of reverse stock splits to regain compliance with its price criteria continued listing standard. Under NYSE rules, this listing standard requires that the average closing price of a company's listed capital stock over any consecutive 30 trading-day period should be at least $1.00 per share. The rule proposes to prohibit companies from effecting reverse stock splits that would result in noncompliance with the exchange's continued listing standard with respect to minimum number of holders of securities and publicly held shares, with companies violating this prohibition immediately facing the exchange's suspension and delisting procedures (i.e., being ineligible for the NYSE's six-month compliance period). Also, under the proposed rule, if, to regain compliance with the price criteria, a company has conducted a reverse stock split within the prior year or multiple reverse stock splits within the past two years with a cumulative ratio of 200 shares or more to one, it will similarly be ineligible for a compliance period and will face immediate suspension and delisting procedures.

The proposed rule change is similar to current and proposed Nasdaq rules which we discuss under "Nasdaq Developments" below and is primarily intended to restrict the excessive use of reverse stock splits, which the NYSE believes is indicative of financial or operational distress. The SEC is expected to act on the proposal by December 1, 2024.

NYSE Withdraws Proposal to Extend Listing Lifespan of SPACs

On September 10, 2024, the NYSE withdrew a proposal that, if approved, would have extended the maximum allowable time a special purpose acquisition company (SPAC) may remain listed without completing a business combination from 36 months to 42 months of its listing date. We previously discussed the proposal here. The NYSE proposed the change in March 2024 and, on July 9, 2024, the SEC instituted proceedings to determine whether to approve or disapprove the proposal. In proposing the change, the NYSE indicated that it was intended to enhance the NYSE's competitiveness for SPAC listings by bringing NYSE rules in line with a similar timeline available under Nasdaq rules through discretionary extensions granted by Nasdaq hearing panels. As we discuss below under "Nasdaq Developments – SEC Approves Nasdaq Rules Amending Suspension and Delisting Process for SPACs," however, on July 15, 2024, the SEC approved amendments to Nasdaq rules that would require SPACs to strictly comply with a 36-month business combination timeline for SPACs could not be circumvented through Nasdaq's hearing panels reviews, rendering the NYSE proposal moot.

NASDAQ Developments

SEC Approves Nasdaq Rules Amending Suspension and Delisting Process for SPACs

On July 15, 2024, the SEC approved Nasdaq rules that amend certain procedures governing the suspension and delisting process applicable to special purpose acquisition companies (SPACs). The rules, which would align Nasdaq's procedures with those of the NYSE, are intended to ensure that Nasdaq listing standards that require SPACs to complete one or more business combinations within 36 months of their IPO registration statements becoming effective and to satisfy Nasdaq's initial listing requirements following their business combination are not circumvented through Nasdaq's review process for staff delisting determinations.

Under the new rules, if a delisting determination is based on a SPAC's failure to comply with these listing standards, a SPAC's timely request for a review of such delisting determination by Nasdaq's Listing Qualifications Hearings Panel will not stay a suspension in trading of the SPAC's securities pending such review, as was the case under the previous rules. The rules also limit the hearing panel's authority to determining whether there was a factual error in the staff delisting determination and remove the panel's authority to grant exceptions for additional time to regain compliance.

The rules will apply to staff delisting determinations issued on or after October 7, 2024.

Nasdaq Rules Clarifying Phase-in and Cure Periods for Corporate Governance Requirements Take Effect

On August 26, 2024, the SEC approved rules that Nasdaq proposed in May 2024 to clarify and modify the phase-in schedules for certain of its corporate governance requirements, including its independent compensation and nominations committee requirement and certain of its audit committee composition requirements, and to clarify the applicability and computation of related cure periods. The rules, which codify a number of Nasdaq's policies and became effective on August 26, 2024, are generally consistent with similar NYSE rules.

Phase-in Periods

IPO Companies and Similar Companies

For companies listing in connection with an initial public offering (IPO companies), the rules:

- Clarify that the phase-in schedule that applies to the audit committee independence requirements under Rule 10A-3 of the Exchange Act also applies to Nasdaq's audit committee independence and financial literacy requirements;
- Provide that the audit committee's three-member minimum requirement may be phased in as follows: at least one member by the listing date, at least two members within 90 days of the listing date, and at least three members within a year of the listing date;
- Modify the timing of the phase-in for the one-member aspect of the independent compensation and nominations committees requirement by providing that one member must satisfy the requirement by the earlier of the IPO closing date or five business days from the listing date (instead of the previous listing date timing)—this is to accommodate the common practice of appointing additional independent directors shortly after the listing date but prior to the IPO closing date; and
- Provide that the compensation committee's two-member minimum requirement may be phased in as follows: at least one member by the listing date, and at least two members within a year of the listing date.

Under the rules, phase-in provisions similar to those for IPO companies will apply to companies listing in connection with a carve-out or spin-off transaction and those whose public company status are triggered by the total assets and record holder thresholds of Section 12(g) of the Exchange Act. In the case of the latter companies, however, the audit committee independence and financial literacy requirements must be satisfied by the listing date.

Companies That Cease to be Foreign Private Issuers

For the requirements discussed above (including the majority independent board requirement), the rules provide for a six-month phase-in period for companies that cease to be foreign private issuers. Such companies will have six months from their most recently completed second fiscal quarter to comply with the requirements, but members of their audit committees must satisfy the Exchange Act's independence requirement during the phase-in period.

Cure Periods

Regarding its cure periods for its majority independent board, audit committee composition, and compensation committee composition requirements, the rules codify Nasdaq's policy that:

- A company relying on a phase-in period is ineligible for a cure period immediately after the phase-in period expires, unless the company is a company (an "initially compliant company") that complied with the relevant requirement during the phase-in period but later fell out of compliance before the phase-in period expired; and
  - This rule would allow Nasdaq to immediately commence delisting procedures against non-initially compliant companies that, immediately after a phase-in period expires, are non-compliant with a requirement.
- An initially compliant company would not be considered deficient with a requirement until the requirement's phase-in period ends, and the cure period for an initially compliant company will run from the date of the event that caused the company to fall out of compliance, and not from the end of the phase-in period.

SEC Approves Nasdaq Rule Aimed at Bid Price Compliance Reverse Stock Splits that Trigger Other Listing Violations

On October 7, 2024, the SEC approved a Nasdaq rule that redefines when a company regains compliance with Nasdaq's minimum closing bid price requirement of $1.00 per share in situations where the company's actions to regain compliance with the minimum bid price requirement result in non-compliance with another numeric listing requirement. Under the rule—which targets situations where a company's reverse stock split cures a bid price deficiency but reduces the number of the company's publicly held shares or the number of holders of its securities below the applicable Nasdaq thresholds—a company will not be considered to have cured a bid price deficiency if an action it took to cure the deficiency results in a new deficiency in another numeric listing requirement until (i) the new deficiency is cured and (ii) the company thereafter satisfies the bid price requirement for a minimum of 10 consecutive business days (subject to extension by Nasdaq staff). This means that a company must cure both deficiencies within the original compliance period for the bid price requirement and would not have the benefit of the compliance period that would otherwise have run from the time the new deficiency occurred.

In proposing the rule, Nasdaq expressed the belief that, by preventing companies from gaining additional time to rectify deficiencies caused by their actions to regain compliance with the bid price requirement, the rule would enhance market clarity about a company's compliance status.

Nasdaq Proposes 360-Day Noncompliance and Reverse Stock Split-Related Changes to Bid Price Noncompliance Delisting Process

In August 2024, Nasdaq proposed a rule change that would modify the delisting process for bid price noncompliance in two ways.

First, the proposed rule would ensure that companies that have been non-compliant with the bid price requirement for more than 360 days (comprised of an initial automatic 180-day compliance period and a second discretionary 180-day compliance period) are immediately suspended from trading on Nasdaq. The proposal achieves this by making a stay of a trading suspension unavailable during a Nasdaq Hearing Panel's review of a staff delisting determination that was timely requested by a company that remains noncompliant with the bid price requirement after the second compliance period. Under the current rules, a trading suspension is automatically stayed by such a timely request. Although trading would be suspended pending the hearing panel's review in such cases, per the proposal the hearings panel would still retain the authority, upon concluding review, to grant an erring company up to 180 days from a delisting determination to comply with the bid price requirement.

Second, the proposed rule stipulates that any company that becomes non-compliant with the bid price requirement within one year of a reverse stock split will not be eligible for any compliance period and will immediately receive a delisting determination subject only to Nasdaq's appeals process. If approved, this change would subject companies to another reverse stock split-related ground for facing Nasdaq's immediate delisting process for bid price noncompliance as Nasdaq rules currently subject companies that become noncompliant after completing one or more reverse stock splits resulting in a cumulative ratio of 250 shares or more to one over the two-year period before such non-compliance to Nasdaq's immediate delisting process.

According to Nasdaq, the proposed changes are intended to protect investors from potentially unstable companies by ensuring that companies with persistent bid price non-compliance or those that repeatedly use reverse stock splits to temporarily regain compliance, which Nasdaq believes is indicative of deep financial or operational distress, do not continue to trade on Nasdaq. The SEC is expected to act on the proposed rule by November 21, 2024.

Other Developments

2024 DGCL Amendments

On July 17, 2024, Delaware Governor Carney signed into law S.B. 313, which amends the Delaware General Corporation Law (DGCL) to facilitate certain market practices impacted by recent Court of Chancery decisions.

The amendments, which became effective August 1, 2024, restore common market practices and alleviate certain technical requirements. Among other changes, the amendments:

Stockholder Agreements. Permit corporations to enter into stockholder governance agreements that would constrain the discretion of a board of directors, including through stockholder consent rights and other restrictive provisions, in response to the court's February 2024 *Moelis* decision. In *Moelis*, the court invalidated several provisions in a stockholder agreement for improperly constraining the board's authority under Delaware law.

Board Approval. Simplify merger approval processes by corporate boards and reduce the risk of technical missteps, in response to the court's February 2024 *Activision Blizzard* decision. In *Activision Blizzard*, the court strictly interpreted DGCL provisions regarding board and stockholder approval of merger agreements and cast doubt upon frequently used approval methods.

Lost-Premium Damages. Permit parties to a merger agreement to contract for the ability to directly seek lost-premium damages on behalf of stockholders in the event of a buyer breach, in response to the court's October 2023 *Crispo* decision. In *Crispo*, the court limited a target's ability to recover damages in respect of lost stockholder premium from a breaching buyer, rendering commonly used lost premium provisions ineffective in Delaware.

The full text of the amendments is available here.

Selected ESG Developments: U.S. States and International

States and foreign countries continue to move forward with new ESG disclosure requirements. These affect both U.S. public and private companies. As we discuss here, beginning in 2026 U.S. organized entities that do business in California and exceed certain global revenue thresholds will be required to begin publicly reporting greenhouse gas emissions under the Climate Corporate Data Accountability Act, and make climate-related financial risks disclosure using the Task Force on Climate-Related Financial Disclosures framework or an equivalent framework under the Climate-Related Financial Risk Act. Many companies doing business in California also need to post information on their websites regarding their use of voluntary carbon offsets and to substantiate certain claims regarding carbon emissions under the Voluntary Carbon Market Disclosures Act.

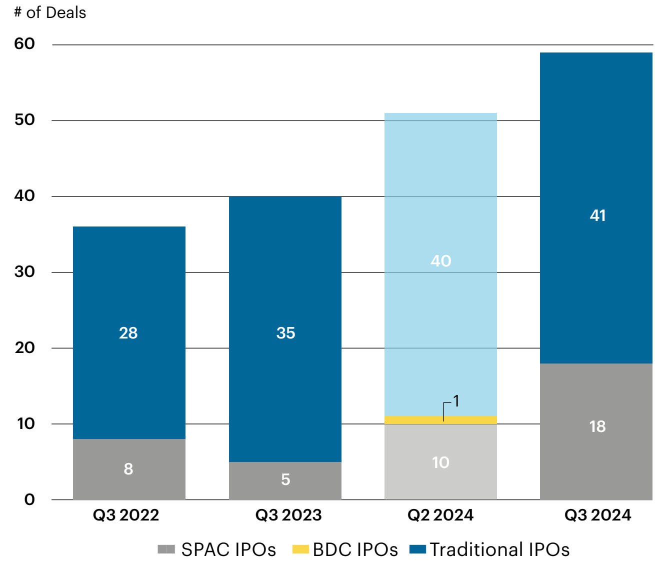
Outside the U.S., many European subsidiaries of multinational companies will be required to begin reporting under the Corporate Sustainability Reporting Directive in 2026 (with some, in particular those with securities traded on E.U. regulated exchanges, needing to begin reporting in 2025). CSRD will require publication of and external assurance over extensive sustainability information. A number of other jurisdictions are also considering or have recently adopted sustainability disclosure requirements. Notably, Australia recently adopted disclosure standards based on those developed by the International Sustainability Standards Board (ISSB), which will apply to certain Australian subsidiaries of multinational companies. Disclosure under the Australian climate-related standard (AASB S2) will be mandatory for companies that meet specified thresholds.

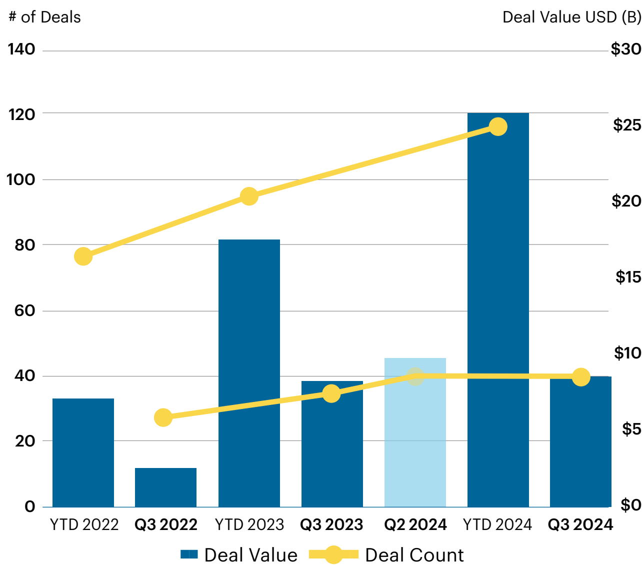
U.S. Equity & Debt Markets Activity – Q3 2024 (Data sourced from Dealogic)

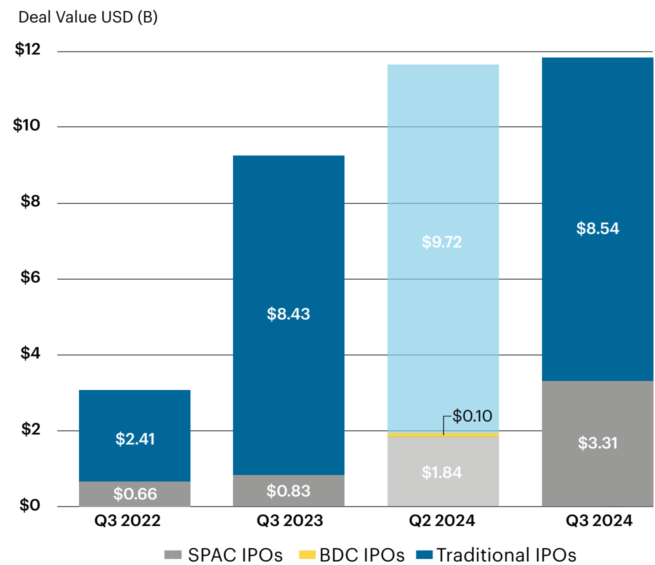
Traditional IPOs

There were 41 traditional IPOs in Q3 2024, representing a 17% increase in deal count as compared with Q3 2023. However, this momentum in deal count equated to only a 1.3% increase in deal value as compared with Q3 2023. As compared with Q2 2024, deal count in Q3 2024 was almost flat, while deal value decreased by 12% against Q2 2024's record high (since 2022) deal value. With YTD[1] 2024 IPOs just two IPOs shy of the IPOs in all of 2023 and already 28% more in deal value than 2023 IPOs, traditional IPO activity in 2024 is poised to surpass 2023 activity.

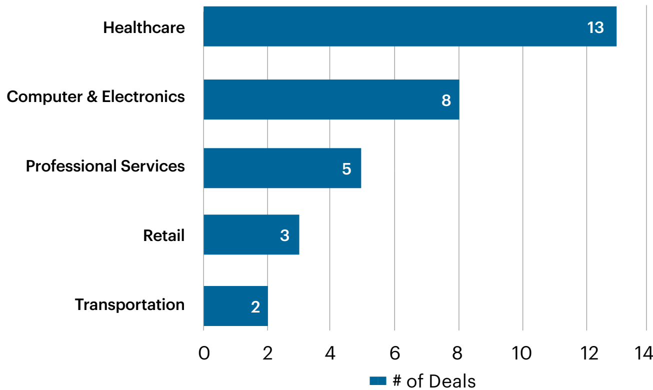
Healthcare IPOs led IPO deal count in Q3 2024 with 13 IPOs, followed by computer and electronics IPOs with 8 IPOs. Both industries led the IPO deal count in Q2 2024 with six IPOs each. The real estate/property industry, however, topped the Q3 2024 deal value chart with $5.1 billion in gross proceeds from a single IPO: the IPO by Lineage, Inc., a temperature-controlled warehouse real estate investment trust (REIT).

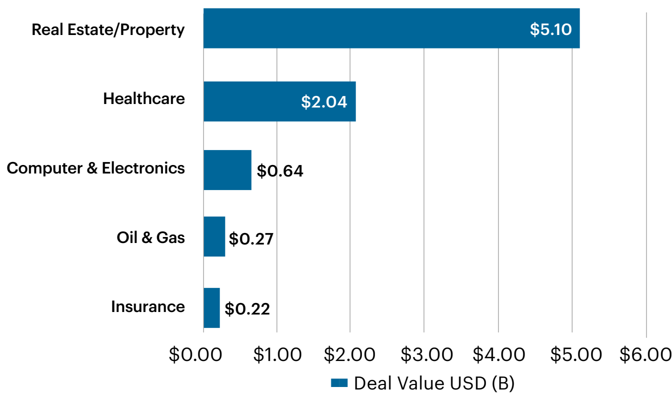


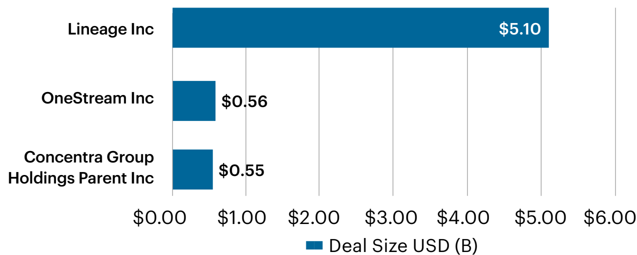




1 Means January 1 through September 30 in this section.







SPAC IPOs

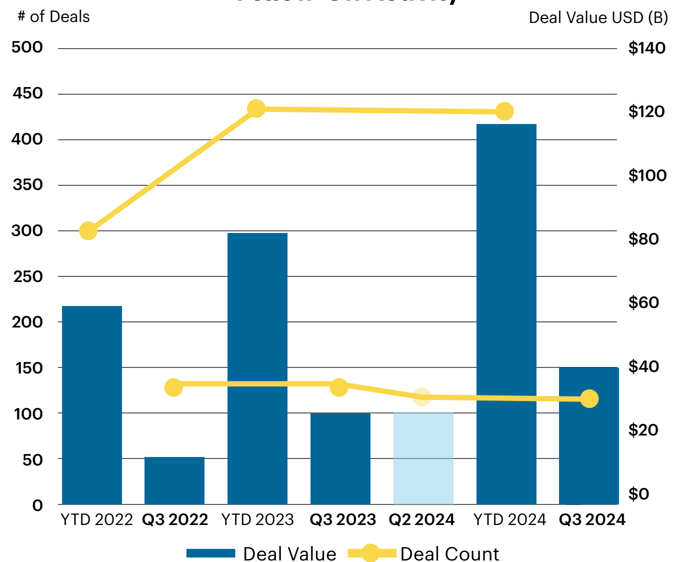
Q3 2024 featured 18 IPOs by special purpose acquisition companies (SPACs), a significant increase as compared with five SPAC IPOs in Q3 2023 and 10 in Q2 2024. There was also a corresponding significant increase in deal value, with deal value in Q3 2024 up 300% (vs. Q3 2023) and 80% (vs. Q2 2024). While SPAC IPO activity still trails far behind 2020 and 2021 numbers, the uptick in Q3 2024 appears to show that compliance with the SEC's recently adopted rules on SPAC IPOs, most of which became required from July 1, 2024 and which we discuss here, has not had an outsized impact on SPAC IPOs that were in the pipeline.

BDC IPOs

Consistent with Q3 2023 and Q3 2022, there were no IPOs by business development companies (BDCs) in Q3 2024. There have been four BDC IPOs in YTD 2024, which is a record as BDC IPOs have been no more than one per year since 2017 (except in 2021 which had three BDC IPOs).

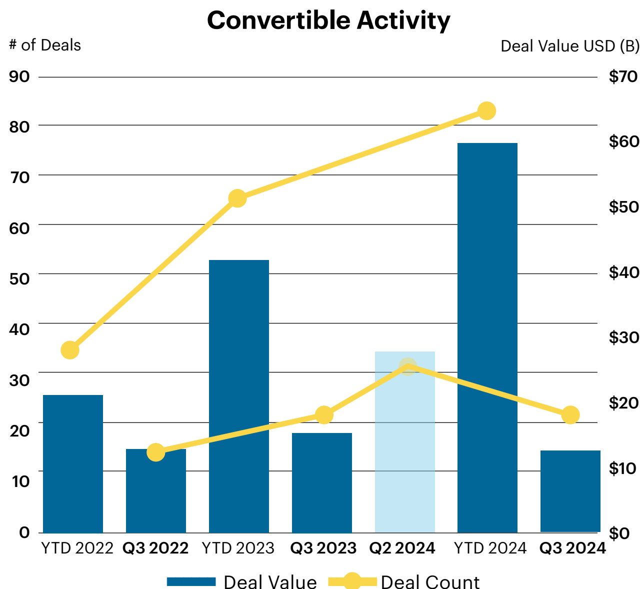
Follow-Ons

Although, as compared with Q3 2023, follow-on offerings (FOs) in Q3 2024 were down 5.5% by deal count, deal value in Q3 2024 was up almost 50%. FOs in YTD 2024 have closely followed this deal count and deal value trend when compared with those in YTD 2023. Although deal count in Q3 2024 was relatively flat as compared to Q2 2024, deal value was similarly up almost 50%.



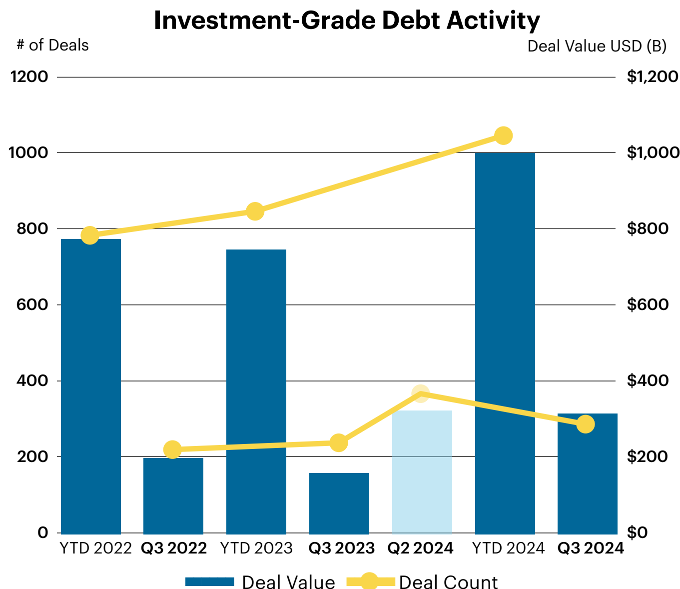
Convertibles

After three consecutive quarters of upward activity for convertible offerings, deal count and deal value in Q3 2024 were down 29% and 56%, respectively, as compared to Q2 2024. Year-over-year, however, deal count was flat while deal value decreased by 18%. YTD 2024 activity was higher than in YTD 2023, up 45% by deal value and 24% by deal count.



Investment-Grade Debt

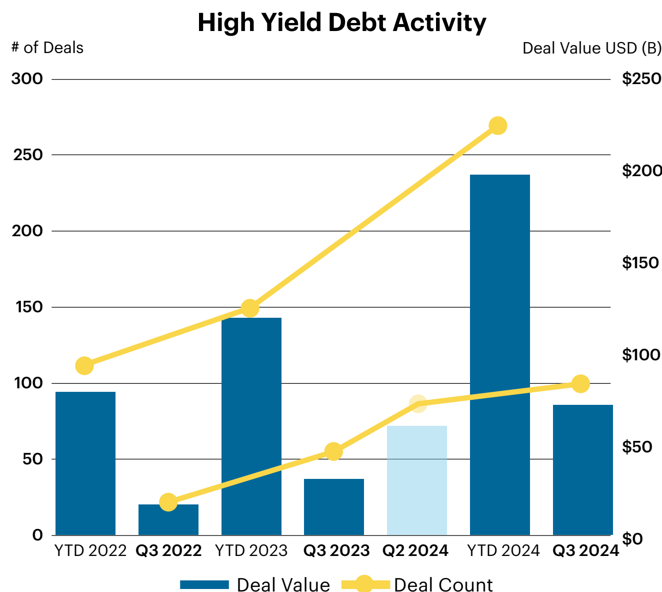
Investment-grade corporate bonds[2] issuance was markedly up in Q3 2024 as compared to Q3 2023 (up 90% by deal value and 24% by deal count). As compared with Q2 2024, deal count in Q3 2024 was down 24%, with deal values in the periods relatively even. Investment-grade corporate bonds issuance in YTD 2024 outperformed YTD 2024 with a 26% increase in deal count and a 36% increase in deal value.



2 Excludes short-term debt, convertibles, asset-backed securities, and mortgage-backed securities.

High-Yield Debt

Q3 2024 was the most active quarter for high-yield debt offerings since 2022, both in terms of deal count and deal value. High-yield debt offerings in the quarter increased 88% by deal count and doubled by deal value, as compared to Q3 2023, while they increased 10% by deal count and 19% by deal value, as compared to Q2 2024. YTD 2024 offerings have significantly outpaced YTD 2023 and YTD 2022 offerings, both from a deal count and deal value perspective.



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of the 10 largest global investment banks advised

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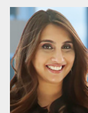
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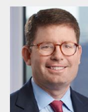
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