PRACTICAL LAW
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GC Agenda: May 2025

A round-up of major horizon issues for general counsel.

Practical Law The Journal

ANTITRUST

RECENT HSR FILING CHANGES

Counsel should be aware that it takes significantly longer to prepare Hart-Scott-Rodino (HSR) filings since the new HSR form took effect in February.

The revised HSR form increases the burden on filing parties by requesting significant additional information that the federal antitrust agencies state they need to effectively review transactions during the initial waiting period. Among other new requests, the HSR form requires ordinary course of business documents in certain transactions and officer and director information.

Given these changes, counsel preparing to submit a company's first HSR filing using the new form should begin preparations as soon as possible. Counsel should also:

- Allow extra time in the deal timetable for filing preparation and should negotiate the agreement's HSR filing deadline to allow enough time to submit filings (for example, more than ten business days).
- Focus on training employees on creating both transaction-related and ordinary course of business documents and explain that these documents should support the company's statements in the filing about competition between the transacting parties.
- Collect the names of officers and directors for already formed entities that may enter into transactions in the coming months as well as North American Industry Classification System codes that describe revenue for the company's business.

It remains to be seen whether the new form will make it easier for transacting parties to obtain HSR clearance during the initial waiting period, and whether the burden on filing parties outweighs its benefits to the agencies. For example, the Federal Trade Commission asked for additional time to review the Herc Holdings Inc. and H&E Equipment Services, Inc. transaction. The transaction, which was signed on February 19, 2025, required HSR filings to be submitted within ten business days. The transacting parties, who likely used the new HSR form, engaged in a pull and refile, meaning they withdrew their initial HSR filing and refiled it. This allows the agencies additional time to conduct their initial review of the transaction. The pull and refile may indicate that the agencies are still not receiving sufficient information in the new HSR filing to allow them to review the transaction within the initial waiting period.

(For more on the HSR filing changes, see HSR Rule Changes in the January 2025 issue of *Practical Law The Journal*; for model forms to assist counsel in preparing the new HSR form, with explanatory notes and drafting tips, see Preparing the New 2025 HSR Form: Buyer and Preparing the New 2025 HSR Form: Seller on Practical Law.)

ARBITRATION

VACATING AN ARBITRATION AWARD

A party seeking to vacate an arbitration award must do so within three months of issuance under the Federal Arbitration Act, even if there remain outstanding issues for the arbitral panel to determine, such as the amount of attorneys' fees payable to the prevailing party.

In *Rabinowitz v. Kelman*, the prevailing party in a rabbinical court (*bais din*) decision moved to confirm the award on the merits and then a second award on attorneys' fees in the Southern District of New York. The losing party cross-moved to vacate only in response to the second motion, arguing that the first motion to confirm was premature because the award was not final. The Second Circuit rejected this argument, affirmed the district court's determination that the merits award was final on issuance (before the award on attorneys' fees), and that the application to vacate was untimely because it was submitted as a cross-motion to the attorneys' fees award more than three months after issuance of the merits award.

(For a collection of resources to assist counsel in enforcing or challenging arbitration awards in US federal and state courts, see Enforcing or Challenging Arbitration Awards in the US Toolkit on Practical Law.)

CAPITAL MARKETS & CORPORATE GOVERNANCE

UPDATED RISK FACTORS

Companies should consider updating the risk factors in their upcoming Form 10-Q filings given the current economic turbulence.

Companies (other than smaller reporting companies) must disclose any material updates to the risk factors from their Form 10-K. This may include changes to an existing risk factor or the addition of a new risk factor. Companies should pay particular attention to risk factors regarding tariff, supply chain, and recession risk. If a company has a material update to an existing risk factor to disclose, it does not need to restate the entire risk factor that is affected, although it may choose to do so.

Companies should also consider whether any hypothetical risks previously described in their risk factors have materialized and whether this occurrence would constitute a material change to a risk factor that should then be disclosed (and the risk factor should be revised).

(For more on risk factors generally, see Risk Factors: What Keeps You Up at Night? on Practical Law; for more on materialized risk factors, see Ninth Circuit Rules Omitting That Disclosed Risks Have Materialized Can Be Materially Misleading on Practical Law.)

COMMERCIAL TRANSACTIONS

LEGAL INDUSTRY DEI

Corporate counsel should monitor the mounting legal and governmental opposition to diversity, equity, and inclusion (DEI) initiatives in the legal industry.

In March, President Trump issued an executive order (EO) addressing alleged racial discrimination at law firms. The EO directed:

- The chair of the Equal Employment Opportunity Commission (EEOC) to review the practices of industry-leading law firms for consistency with Title VII of the Civil Rights Act of 1964.
- The attorney general (AG), in coordination with the chair of the EEOC and in consultation with state AGs, to investigate the practices of large law firms that are also federal contractors for compliance with race- and sex-based non-discrimination laws and take any additional actions the AG deems appropriate.

In response, the EEOC sent letters to 20 law firms requesting information about their DEI-related practices. The letters note concerns that those practices may entail unlawful disparate treatment, or unlawful limiting, segregating, and classifying based on race, sex, or other protected characteristics, in violation of Title VII.

Given these developments, it would be prudent for companies to similarly revisit their DEI policies to avoid potential issues. Companies should carefully design, review, and apply their DEI policies to achieve their goals while minimizing the evolving risk of legal liability. For example, companies may consider focusing on “diversity” and “inclusion” practices because the “equity” aspect of DEI tends to be the most legally challenged.

(For more on challenges to DEI programs, see *Labor & Employment: Scrutiny of Workplace DEI Initiatives* below.)

DATA PRIVACY & CYBERSECURITY

CCPA REGULATIONS

Companies subject to the California Consumer Privacy Act (CCPA) should be aware of plans to narrow the scope of the proposed automated decision-making technology (ADMT), cybersecurity, and risk assessment regulations.

Following a recent board meeting, the California Privacy Protection Agency announced plans to send the proposed regulations back for further revisions focusing on:

- Narrowing the scope of technologies regulated as ADMT under the regulations.
- Narrowing the types of significant decisions triggering certain required compliance activities, such as risk assessments.
- Removing first-party behavioral ad targeting from business activities that trigger risk assessments and other ADMT requirements.
- Possibly revamping the required content for risk assessments to align with other jurisdictions’ frameworks, such as under the Colorado Privacy Act, to minimize business compliance costs.

While no exact time frame was agreed to at the board meeting, the board is expected to discuss proposed revisions at its May and July meetings. The revision process gives companies additional time to prepare for the upcoming regulations.

Companies, especially those that use AI or ADMT, should continue to monitor how the regulations may evolve in future drafts. In particular, companies should assess whether they need to make any changes regarding ADMT opt-outs and cybersecurity audits and risk assessments.

(For more on the CCPA and its regulations, see Understanding the California Consumer Privacy Act (CCPA) and the California Privacy Rights Act (CPRA) and California Privacy Toolkit (CCPA and CPRA) on Practical Law; for a tracker monitoring the development of CCPA regulations, see CCPA Regulation Tracker on Practical Law.)

FINANCE

LATEST TRUMP DIRECTIVES

The White House recently issued:

- An EO establishing a national strategic bitcoin reserve and digital assets stockpile.
- A presidential memorandum (PM) directing federal regulatory agency heads to prioritize the repeal of regulations considered "unlawful" under notable US Supreme Court decisions.

The EO, titled Establishment of the Strategic Bitcoin Reserve and United States Digital Asset Stockpile, is designed to create a framework for US holdings of bitcoin as a reserve asset, as well as federal holdings of certain other cryptocurrencies seized in federal criminal proceedings. The EO authorizes the treasury secretary to establish separate offices to administer and maintain control of custodial accounts related to bitcoin and other digital assets forfeited as part of criminal or civil asset forfeiture proceedings or not needed to satisfy requirements under 31 U.S.C. § 9705. The EO further directs the treasury and commerce secretaries to develop strategies for acquiring additional digital assets provided these strategies are budget neutral and do not impose incremental costs on US taxpayers.

The PM, titled Directing the Repeal of Unlawful Regulations, directs federal regulatory agency heads to prioritize the repeal of unlawful regulations as outlined in EO 14219 (known as the DOGE order). The DOGE order directed the heads of all executive departments and agencies to identify certain categories of "unlawful and potentially unlawful" regulations within 60 days and begin plans to repeal those regulations. The PM explains that in undertaking this process, agency heads are instructed to prioritize "evaluating each existing regulation's lawfulness" under ten notable US Supreme Court decisions. In effectuating repeal of "facially unlawful" regulations, agency heads are directed to finalize rules without notice and comment where doing so is consistent with the good cause exception under the Administrative Procedure Act.

(For more on these directives, see White House Issues Executive Order to Establish National Strategic Bitcoin Reserve and Digital Asset Stockpile, Trump Administration Issues Executive Order on Deregulation Initiative, and Trump Administration Issues Presidential Memorandum on Repeal of Regulations on Practical Law.)

HEALTH CARE

IMMIGRATION ENFORCEMENT IN HEALTH CARE SETTINGS

Recent changes to Department of Homeland Security (DHS) directives permit authorities to conduct immigration enforcement actions in health care settings. These changes reverse previous protections and create significant legal and operational risks for hospitals and other health care facilities nationwide.

Facilities must prepare for the likelihood that Immigration and Customs Enforcement (ICE) or other DHS agents may appear onsite without warning and engage in immigration enforcement efforts.

Facility counsel should:

- Ensure that all non-public areas on the hospital grounds are clearly marked. Immigration agents generally cannot enter non-public areas without a court order.
- Educate hospital leadership on distinctions between:
  - judicial and administrative warrants and subpoenas, which carry different compliance requirements; and
  - legally required compliance and voluntary cooperation with enforcement efforts.
- Review and update relevant policies to maintain compliance with health care laws and regulations (including the Health Insurance Portability and Accountability Act of 1996 and the Emergency Medical Treatment and Labor Act) during enforcement encounters.
- Develop response protocols specific to immigration enforcement scenarios that satisfy required legal protections while acknowledging legitimate enforcement authority.
- Continuously monitor federal immigration enforcement policies and directives for additional changes affecting health care settings.

Facilities should:

- Designate a facility representative to serve as the sole point of contact for all immigration enforcement interactions. The designated representative should coordinate all facility responses to onsite government enforcement activities.
- Implement communication protocols directing all staff to refer enforcement agents and inquiries to the designated representative.
- Minimize disruptions to patient care and deviations from policies during actual enforcement actions with:
  - regular training on immigration enforcement protocols for staff in all departments; and
  - practice drills on specific enforcement scenarios for front-line staff and clinicians.

Proper preparation protects both patients and facilities in this new enforcement environment.

INTELLECTUAL PROPERTY & TECHNOLOGY

USPTO DISCRETIONAL DENIAL POLICY CHANGE

Counsel seeking a more predictable US Patent and Trademark Office (USPTO) alternative to district court invalidity challenges should consider *ex parte* re-examination, because of a new USPTO policy making it easier to deny *inter partes* review (IPR) petitions.

IPR at the USPTO's Patent Trial and Appeal Board (PTAB) has been the primary tool for short-circuiting district court patent litigation because IPR proceedings are generally:

- Quick, with a statutory requirement to conclude within 12 months of institution.
- Inexpensive, often cheaper than district court litigation by a factor of ten.
- More predictable, with invalidity determined by administrative patent judges with technical backgrounds rather than lay juries.

Though cheaper than district court litigation, IPR petitions always required a substantial financial commitment to meet the statutory institution requirement, which is a reasonable likelihood of prevailing on at least one challenged claim.

Recent USPTO policy changes expanded the PTAB's power to deny IPR institution to include consideration of the PTAB's workload, thereby injecting increased uncertainty into the process. This new policy complicates the decision whether to make that upfront investment.

Counsel unwilling to risk IPR discretionary denial may look to *ex parte* re-examination as a more predictable USPTO alternative to district court invalidity challenges. However, re-examination has its own shortcomings, including that:

- Petitioners have no role in re-examinations after institution.
- Patent owners have greater flexibility to amend claims to avoid invalidity during re-examination than IPR.
- Re-examinations can become protracted, with appeals to the PTAB and then to the Federal Circuit.

(For more on this policy change, see USPTO Announces Interim Process for Discretionary Denials in AIA Trials on Practical Law; for more on *ex parte* re-examination, see Ex Parte Patent Reexamination and Supplemental Examination on Practical Law.)

LABOR & EMPLOYMENT

SCRUTINY OF WORKPLACE DEI INITIATIVES

Employers should anticipate greater federal agency scrutiny of DEI initiatives and monitor agency guidance for new legal interpretations and enforcement priorities.

The EEOC and Department of Justice issued technical assistance materials warning that DEI initiatives may be unlawful if they spur employment actions motivated in any part by race, sex, or other protected characteristics. While this guidance is not binding law, employers should expect the EEOC to investigate whether employees' protected characteristics motivate, even as a plus factor, employment decisions, such as whom employers hire, retain, promote, assign work, or provide training, mentoring, networking, and sponsorship opportunities.

Based on the recent federal agency guidance and anticipated scrutiny of DEI initiatives, employers should:

- Understand that Title VII of the Civil Rights Act of 1964 (Title VII) and other applicable antidiscrimination laws prohibit discrimination against applicants and employees based on protected characteristics, regardless of whether the victims' characteristics place them in the minority or majority.
- Audit employment practices to ensure employment decisions are not impacted or motivated in any part by protected characteristics or headcounts for individuals with those characteristics.
- Review internal and external publications, such as websites and corporate disclosures, to ensure that statements about DEI commitments, goals, and targets do not indicate that employment practices and decisions might be based on protected characteristics.
- Audit internship, mentoring, training, and networking programs to ensure that access to opportunities is not impacted by applicants' or employees' protected characteristics. For example, internship or leadership-development training programs may not be exclusively for individuals with certain protected characteristics.
- Confirm that affinity or business resource groups permit full participation and membership by all employees without regard to any protected classification.
- Monitor federal agency scrutiny of DEI training, including how the EEOC determines whether training is unlawfully discriminatory in "content, application, or context," and evaluates employee claims of alleged retaliation for opposing DEI training purported to violate Title VII.
- Anticipate other federal agencies to separately scrutinize DEI initiatives of employers that supply and contract with the federal government.

(For more on DEI in the legal industry, see *Commercial Transactions: Legal Industry DEI* above; for more on maintaining legally compliant DEI initiatives, see Diversity, Equity, and Inclusion (DEI) in the Workplace on Practical Law.)

LITIGATION

AI RISK MANAGEMENT

Companies must ensure that their law departments and outside counsel carefully manage AI risks, including potential sanctions and reputational damage from the submission of unvetted or undisclosed AI-generated materials to courts.

The District of Wyoming, Eastern District of California, and Western District of Virginia, among others, have recently addressed the submission of motions and briefs containing citations to and discussion of non-existent legal authority hallucinated by AI tools used to prepare those filings. Adverse consequences to the counsel and parties involved have ranged from the embarrassment inherent in this conduct being exposed to sanctions and the revocation of *pro hac vice* admission. Additionally, a New York appellate court recently rebuked a *pro se* litigant for using an AI avatar in an oral argument video without acknowledging that the video was AI-generated.

While companies cannot ignore the efficiencies to be gained through the adoption of AI, they must contend with the risks that the technology poses.

(For more on AI risks for law departments, see Using AI in Law Departments on Practical Law; for a model employee policy governing the use of generative AI tools in corporate law departments, with explanatory notes and drafting tips, see Generative AI Use Policy for Law Departments on Practical Law.)

REAL ESTATE

GSA LEASE TERMINATIONS

Landlords who lease properties to the General Services Administration (GSA) and other federal agencies should closely examine their lease agreements in light of the Trump administration's directive to terminate federal office leases nationwide.

Most GSA leases lack termination for convenience clauses. This typically protects landlords from unexpected lease terminations during the non-terminable phase of a GSA lease (firm term). However, federal agencies are allowed to terminate leases that are in the terminable phase (soft term). Federal agencies may seek alternative methods to exit leases, such as negotiating early termination agreements, claiming a landlord default as a basis for terminating, or obtaining consent for lease assignments.

Landlords who receive a lease termination notice from the GSA should:

- Review the lease and confirm whether termination is permitted. Termination notices for leases in the firm term were likely delivered in error, and the GSA should promptly revoke them once the error is identified.
- Be prepared to negotiate and potentially dispute any early termination attempts. Landlords should weigh the costs and benefits of initiating disputes over lease terminations, keeping in mind the administrative processes involved.
- Expect potential delays in response times from GSA contracting officers given recent personnel and organizational changes.

After delivering an initial spate of lease termination notices, the GSA is conducting further analysis of its space needs, particularly considering the government's return-to-office order for all employees and the logistics of relocation. The GSA is also attempting to rescind termination notices it determines were prematurely delivered. Landlords should consult with counsel experienced in negotiating GSA leases on whether the GSA can unilaterally revoke a termination notice delivered during the soft term. Landlords may have leverage to negotiate concessions from the GSA in exchange for allowing the GSA to withdraw the notice.

Landlords should monitor ongoing legal challenges and administrative changes that could affect their leasing arrangements with the federal government and remain proactive in managing their GSA leases amid these evolving federal policies.

(For more on GSA leases, see GSA Leases: Overview on Practical Law.)

TRUSTS & ESTATES

LIFE INSURANCE AND BUY-SELL AGREEMENTS

Corporate counsel should understand the risks associated with redemption and cross-purchase agreements and the advantages of using an LLC for life insurance policy management.

In a redemption agreement, the company:

- Buys life insurance on one or more owners.
- Uses the death benefit to purchase the deceased owner's interest in the company from the deceased owner's estate.

As illustrated in *Connelly v. United States*, redemption agreements can lead to increased estate tax liability for the deceased owner's estate if the death benefit is added to the company's value, thereby increasing the valuation of the deceased owner's interest in the company.

Cross-purchase agreements pose less estate tax risk than redemption agreements because the other owners, rather than the company, hold life insurance policies on each other. However, cross-purchase agreements risk losing the death benefits to the policy owner's creditors or through refusal by the policy owner to buy the deceased owner's interest in the company.

To mitigate these risks, counsel should consider forming an LLC to hold a life insurance policy on an owner. The LLC structure:

- Allows an independent person to serve as manager to:
  - oversee premium payment and ownership interests; and
  - ensure death benefits are applied as intended to the buy-sell agreement.
- Restricts transferability.
- Protects the death benefit against third-party claims.

Counsel should review existing buy-sell agreements considering the tax implications and risks highlighted in *Connelly*. Transitioning to an LLC for life insurance policy management can lead to better business succession outcomes.

(For more on the *Connelly* decision, see Supreme Court Holds in Connelly v. United States That Corporation's Obligation to Redeem Shares Is Not Liability That Reduces Its Value for Estate Tax Purposes on Practical Law.)

GC Agenda Interviewees

GC Agenda is based on interviews with Practical Law Advisory Board members and other leading experts. Practical Law The Journal would like to thank the following experts for participating in this issue:

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