Securities Regulation Daily Wrap Up, AI NEWS—SEC CorpFin director: Don't blame Sam Altman for legal AI 'crazy talk', (Jan 23, 2024)

By Lene Powell, J.D.



In the midst of AI hoopla, companies need to ground their public statements in reality, cautioned Director Gerding.

Attorneys who use artificial intelligence to prepare company filings cannot blame AI for any deficiencies in disclosures, said Erik Gerding, director of the SEC Division of Corporation Finance. In remarks at a securities law conference, Gerding said he has learned there are prototype software apps that use AI to prepare Form 8-Ks and other filings.

"Ultimately, it is the issuer and issuers' counsel that are responsible for the actual disclosure," said Gerding. "Don't go blame Sam Altman if your 8-K is full of crazy talk."

Gerding also discussed the need for counsel to make sure their companies' claims about AI are consistent and risks are adequately disclosed.

Gerding made the remarks in a panel at the 2024 Securities Regulation Institute, hosted by Northwestern University Pritzker School of Law. The panel, "Updates from SEC Senior Staff: Division of Corporation Finance" included CorpFin Chief Counsel Michael Seaman and was moderated by Keir Gumbs, principal and general counsel at Edward Jones.

AI disclosures. Gerding said he can't promise that any guidance on AI is imminently forthcoming, but offered some thoughts.

- Companies should look at what they are saying to investors and whether what they are saying on earnings calls is different from what they say in filings.
- Companies should explain exactly what technologies they mean, since AI "could mean radically different things to different issuers."
- If a company is making claims about AI, what is the basis for those claims?
- How is AI going to impact a company's results of operations, financial conditions, or future prospects?

Risk factors. Risk disclosures should be tailored, said Gerding.

So far Gerding is seeing that about 50% of annual risk factor disclosure is "pretty general and boilerplate." Companies need to disclose the specific ways that AI could impact that company—not impacting the entire universe.

"We're not talking about the singularity happening tomorrow or Schwarzenegger Terminator. How does it impact your particular company or issuer?" said Gerding.

According to Gerding, companies "don't need to have a crystal ball," but do need to provide a more particularized sense of what AI looks like for them.

Risk factors include "how AI might eat your lunch," said Gerding. For example, how not having AI in your products and services might cause a competitive disadvantage from other companies.

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Gerding noted that issuers and issuers’ counsel are ultimately responsible for disclosures, not AI software programs.

Executive excitement. Keir Gumbs observed there has been a lot of executive level business interest in AI and there is a temptation for product owners to say the sky is the limit, we’re doing this, we’re doing that.

But executives can be seen as company spokespeople—and these statements are happening in a regulated environment. It’s important to pay attention to what your business is saying externally from a product perspective, said Gumbs.

Gumbs added that companies need to make sure that what chatbots are saying is consistent with what you want to come out from a federal securities regulatory perspective.

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