March 10, 2025

Reading the Tea Leaves on Registration and Disclosure Requirements

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The Securities and Exchange Commission (SEC) under the current Trump administration has swiftly adopted a new agenda. Some of the first initiatives dealt with shareholder engagement and shareholder proposals. These initiatives were covered in an earlier memorandum. Looking ahead, the SEC appears poised to ease some registration and disclosure requirements, at least in part to facilitate capital formation and increase the attractiveness of going public. A goal is to stimulate the market for initial public offerings (IPOs) by creating on-ramps to public markets for so-called emerging growth companies (EGCs), essentially companies with annual revenues less than $1.235 billion that are not yet public or have been public for fewer than 5 years. This would follow along the lines of the Jumpstart Our Business Startups Act of 2012, commonly known as the JOBS Act.

In addition, disclosure requirements for public companies of all sizes can be expected to be reviewed in light of the materiality of the information to investors in the particular company, using a principles-based approach, with less emphasis on environmental and social concerns or the consistency and comparability of disclosure from one company to another.

Extending Confidential Submission of Draft Registration Statements

The ability to receive confidential SEC review of draft registration statements is a popular accommodation first offered in 2012 to EGCs filing an initial registration statement. In 2017, the accommodation was extended generally to other types of issuers and to any registration statements filed within the first year of going public. On March 3, 2025, the SEC announced that it would offer confidential review in other circumstances. Generally, any company filing a registration statement will be eligible to receive nonpublic review, no matter how long the company has been public. In addition, companies will have the ability to start the review process earlier by omitting certain underwriter information from their initial submission.

Easing the Review of SPAC and de-SPAC Transactions

On December 12, 2024, Commissioner Mark T. Uyeda (now Acting Chair of the SEC) dissented from the SEC's decision to charge three special purpose acquisition companies (SPACs) for allegedly false and misleading statements concerning the absence of discussions with potential acquisition targets prior to the filing of their registration statements. Commissioner Uyeda reasoned, however, that it was not material to shareholders if preliminary discussions had taken place, since shareholders knew that the purpose of the SPAC was to enter into a business combination (a de-SPAC transaction) with a potential target.

Commissioner Uyeda also dissented from the January 2024 adoption of rules relating to SPAC transactions, emphasizing that the rules impose a greater burden on these transactions than on either an IPO or a traditional acquisition made by a public company.

Reading the tea leaves from these dissents, it seems quite possible that the SEC will seek to amend some of the more onerous provisions of the SPAC rules or at least apply a lighter touch in reviewing SPAC and de-SPAC transactions.

Scaling Disclosure for EGCs and Other Smaller Companies

One way the SEC has typically made it easier for EGCs and other smaller companies to comply with SEC disclosure requirements is to phase in new requirements on a gradual basis, starting with larger companies. By the time the compliance date for smaller companies arrives, there are models for them to adopt and possibly rule interpretations for them to rely on. In addition, EGCs and other smaller companies are exempt from some provisions altogether.

A criticism lodged at the SEC in recent years has been that new initiatives often applied to smaller and larger companies alike, at the same time. The SEC under the new administration might be expected to amend existing rules to exempt EGCs or other smaller companies from some requirements and to phase in or scale requirements more readily in any new rulemaking.

Simplifying and Updating Filer Categories

When a public company files its periodic reports, it must check a box on the cover page to indicate whether it is a large accelerated filer, accelerated filer, non-accelerated filer, smaller reporting company, or EGC. A company's reporting obligations and ability to use certain registration forms depend on the selected filer category.

As Acting Chair Uyeda noted in a February 24, 2025 speech to the Florida bar, the categories are complex and out of date. The dollar thresholds in public market float for large accelerated filers ($700 million) and accelerated filers ($75 million) have not changed since 2005. The ceiling for smaller reporting company status (less than $250 million in public market float) was adopted in 2018, but seems disproportionately low compared to today's market giants. As Acting Chair Uyeda suggested in his February 24, 2025 speech, the basic reporting obligations of a company with a $250 million public float should not be the same as for the largest public companies.

Potential reforms under the new administration might be to simplify the various filer categories and to increase the dollar amount of public float in the smaller reporting company definition. The EGC definition might also be adjusted in various ways to expand the number of companies that are eligible or extend the period of eligibility beyond five years after going public.

Another possible reform, raised by Acting Chair Uyeda at the SEC's Small Business Capital Formation Advisory Committee meeting on February 25, 2025, might be to permit unlisted public companies with a market float under $75 million to use a shelf registration statement, enabling them to access the market promptly when needed. While he conceded that the markets for such companies' stock might be easier to manipulate than for larger companies, that did not mean that they should have less access to capital.

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