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The Legal Intelligencer

What Has the SEC Been Up To? A Roundup of Recent Regulatory Developments

August 6, 2018
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The Securities and Exchange Commission (SEC) has been staying busy recently with final rule-making and proposed regulatory changes. Below is a roundup of some of these recent developments.

INCREASED THRESHOLDS

On June 28, the SEC adopted amendments to the definition of "smaller reporting company" (SRC) that would increase the number of companies eligible to provide reduced or scaled disclosures. Before the amendments, a company would qualify as an SRC either by having a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter (the public float test) or, if the company has no public float, by having less than $50 million in annual revenues (the revenues test). Under the amended definition, the threshold under the public float test increased from $75 million to $250 million, and the threshold under the revenues test increased from $50 million to $100 million if the company has no public float or a public float of less than $700 million.

According to the SEC, these amendments are designed to promote capital formation and reduce compliance costs for smaller companies while maintaining appropriate investor protections. The benefits of qualifying as an SRC is that a company has the option to comply, on an item-by-item basis, with scaled disclosures rather than complying with the more extensive disclosure requirements that apply to larger reporting companies. The SEC estimates that about 1,000 additional companies will qualify for SRC status in the first year after the amendments become effective.

The SEC did not adopt conforming changes to the thresholds in the definitions of "accelerated filer" and "large accelerated filer." Rather, the SEC eliminated the automatic exclusion of SRCs that had been built into these definitions. As a result, some reporting companies that will now qualify as SRCs will also remain accelerated filers if they have a public float between $75 million to $250 million. These companies would continue to be subject to the accelerated filer requirement to provide an auditor's attestation report as well as the current shorter filing deadlines for accelerated filers.

Although scaled disclosures may lower compliance costs and disclosure burdens, a company should consider the investor reaction that could result from relying on scaled disclosures and seek input from its management, advisrrs, investor relations team or investors on this topic. A company will also want to review its material contracts provisions, for example, indenture covenants, to ensure that it is not obligated to comply with the more detailed disclosure requirements under these contracts.

In conjunction with the amendments to the SRC definition, the SEC also adopted technical revisions to the cover pages of certain SEC forms to account for the possible overlapping category of filers. The amendments will be effective on Sept. 10.

INLINE XBRL FILING

On June 28, the SEC also adopted amendments requiring the use of Inline eXtensible Business Reporting Language (Inline XBRL) format for the submission of company financial statements. Inline XBRL allows companies to embed XBRL data in the text of SEC filings, rather than an exhibit. Large accelerated filers that prepare financial statements in accordance with GAAP will be required to comply with Inline XBRL beginning with fiscal periods ending on or after June 15, 2019; accelerated filers that prepare financial statements in accordance with GAAP will be required to comply beginning with fiscal periods ending on or after June 15, 2020; and all other filers will be required to comply beginning with fiscal periods ending on or after June 15, 2021. The amendments also eliminate the requirement for companies to post Interactive Data Files on their websites and make conforming changes to the cover pages of certain SEC forms. These specific amendments are effective 30 days after publication in the Federal Register.

INCREASED THRESHOLD FOR DISCLOSURE UNDER RULE 701

Rule 701 is a commonly used exemption from registration under the Securities Act of 1933 for issuances of securities by private companies under compensatory benefit plans (e.g., stock options, restricted stock and other equity-based awards) or written compensation arrangements. On July 18, the SEC approved an amendment to Rule 701 to increase the threshold under which a nonreporting company would be required to provide additional disclosures, including financial statements and risk factors, to investors. The amendment increases from $5 million to $10 million the aggregate sales price or amount of securities sold during any consecutive 12-month period after which a company is required to provide the additional disclosures to investors. In addition to a threshold for providing disclosure, Rule 701 contains a number of other requirements including a maximum amount that may be sold during any consecutive 12-month period and delivery of a written compensatory plan or contract. These additional requirements remain intact.

The amendment to the Rule 701 disclosure threshold became effective on July 23. While the increase in the disclosure threshold is a promising development and is intended to lower the regulatory burden of required disclosures, it remains to be seen whether this change, by itself, will have an impact on the utility of Rule 701. The ultimate outcome of the concept release discussed below is more likely to have a significant impact on Rule 701 practices.

CONCEPT RELEASE ON WAYS TO MODERNIZE RULE 701 AND FORM S-8

On July 18, concurrently with the amendment to Rule 701, the SEC issued a concept release seeking public comment on ways to modernize Rule 701 and Form S-8, which is the registration form used for registering issuances of securities to employees and others under an employee benefit plan. Some of the questions raised by the SEC in the concept release include:

- Whether Rule 701 and Form S-8 should apply to new types of contractual relationships between companies and individuals involving alternative work arrangements in the so-called “gig economy;”
- Whether Rule 701 should be available to reporting companies;
- Whether the SEC should allow a company to register offers and sales of securities under all of its employee benefits plans on a single Form S-8;

- Whether the filing fee rules for Form S-8 should be modified; and
- Whether the disclosure and timing requirements in Rule 701(e) should be amended.

The concept release exhibits the SEC's willingness to re-evaluate the current regulatory landscape for issuance of securities for compensatory purposes in light of current trends and forms of equity-based compensation and evolving work arrangements. The SEC is also interested in what impact revisions to Rule 701 or Form S-8 would have on a company's decision to become a reporting company. The SEC will accept comments until Sept. 24.

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