March 14, 2025

SEC Developments

Even though the nomination of Paul Atkins by President Trump is still pending, new developments are already occurring at the SEC.

Chair Gary Gensler and Commissioner Jamie Lizárraga stepped down in January, leaving just three Commissioners at the SEC's helm (Mark Uyeda, Hester Peirce and Caroline Crenshaw). In the interim, Commissioner Uyeda has been named Acting Chair of the SEC, and has commenced redirecting the SEC's agenda.

Mr. Atkins has publicly advocated against "regulation for regulation's sake," regulation by enforcement, excessive penalties against public corporations and overreach by the SEC in excess of its legislative mandate, and promoted regulatory standards for cryptocurrencies. We expect to see these themes in an Atkins-led SEC. Recent SEC developments may serve as a preview of what we can expect, given that Acting Chair Uyeda and fellow Commissioner Peirce each served as counsel to Paul Atkins when he was a Commissioner.

This memorandum surveys major initiatives affecting public companies undertaken under the prior administration, and notes subsequent developments. At this time, it is difficult to predict what additional impact, if any, the White House's February 18, 2025 Executive Order Ensuring Accountability for All Agencies, which subjects the SEC and other independent executive agencies to the oversight of the Office of Information and Regulatory Affairs and the Office of Management and Budget, will have.

For more information regarding other actions by the Trump administration, please see our Regulatory/Administrative Tracker.

Recent Developments

Facilitating Capital Formation

Acting Chair Uyeda announced that he has directed SEC Staff to review a number of rules (and proposals) with a focus on facilitating capital formation, including:

- the implementation of recommendations from the SEC's Office of the Advocate for Small Business Capital Formation regarding the exempt offering regime (including Regulation CF) to improve capital raising opportunities for entrepreneurs;
- enabling greater retail investor participation in the private markets (including changes to the accredited investor definition and to permit retail investing via pooled vehicles);
- potential changes to the "emerging growth company" definition and extending the disclosure compliance "on-ramp" that accompanies emerging growth company status;
- whether to re-align the Commission's filer categories (large accelerated filer, accelerated filer, non-accelerated filer, smaller reporting company) to reflect the size and makeup of public companies today (the definitional have not been indexed for inflation); and

- the disclosure requirements applicable to each filer category (in particular, Acting Chair Uyeda noted that he had asked SEC Staff to "identify rules that should apply only to the largest companies").

Expansion of Nonpublic Review of Registration Statements
In addition, with a view to facilitating capital formation, on March 3, 2025, the SEC announced that it was expanding the circumstances under which registrants could submit draft registration statements to be reviewed on a nonpublic basis by the SEC. As a result,

- issuers may now also submit draft registration statements to initially register securities pursuant to Section 12(g) of the Exchange Act on Forms 10, 20-F or 40-F for review on a non-public basis (previously only registration statements submitted under the Securities Act or Exchange Act Section 12(b) were eligible);

- issuers may submit draft registration statements for offerings no matter how long they have been a public company (previously issuers could only submit registration statements on a draft basis within the first 12 months that they were a public company);

    - issuers will still be required to file the registration statement and nonpublic draft submission at least 2 business days prior to the effective time;

    - the SEC will continue to review only the initial submission on a nonpublic basis and issuers filing an amendment to respond to SEC comments will need to do so publicly;

- de-SPAC registration statements may be submitted on a draft basis for nonpublic review if the co-registrant target would otherwise be independently eligible to submit a draft registration statement; and

- issuers may omit the names of underwriters from their initial submissions.

Cryptocurrency
On January 21, 2025, Acting Chair Uyeda announced that the SEC had launched a Crypto Task Force. Led by Commissioner Peirce, the goal of the Task Force is to develop a comprehensive and clear regulatory framework for crypto assets. The announcement signaled a change in enforcement priority (the Task Force will help the Commission "deploy enforcement resources judiciously"). Public input may be submitted to the Task Force at Crypto@sec.gov.

On January 23, 2025, the SEC Staff rescinded Staff Accounting Bulletin No. 121, which had effectively prevented banks and broker-dealers from taking custody of crypto assets.

On February 27, 2025, the SEC's Division of Corporation Finance issued a statement that meme coins are not securities and the offer and sale of meme coins does not require registration under the Securities Act (or an exemption therefrom).

On February 27, 2025, the SEC announced it had filed a joint stipulation with Coinbase Inc. and Coinbase Global Inc. to dismiss the SEC's civil enforcement action against the two entities. In addition, Robinhood Markets, Inc. and OpenSea have recently announced that the SEC's investigations into their respective failures to register crypto tokens as securities have been closed. These announcements herald a major shift in crypto enforcement.

FCPA Enforcement
On February 10, 2025, the White House issued its Executive Order Pausing FCPA Enforcement to Further American Economic and National Security requiring a 180-day pause on all new Foreign Corrupt Practices Act ("FCPA") investigations or enforcement actions, as well as a review of all existing FCPA matters (see our client memo here). During the pause, which can be extended for

an additional 180 days, the Attorney General is required to issue FCPA enforcement guidelines for future cases, all of which must be approved by the Attorney General.

Tender Offers and Share Registration in Business Combinations
On March 6, 2025, the Staff issued new and amended compliance and disclosure guidance related to tender offers and the registration of shares in business combinations. The new guidance notes that an extension of a tender offer for less than 5 business days may be adequate under certain circumstances. The guidance also addresses whether certain events constitute material changes requiring an extension of the offer period, with specific guidance on financing changes and the substitution of funding sources. Finally, the guidance clarifies that the Staff will not object to the registration of acquirer securities on Form S-4 in Rule 145(a) transactions in circumstances where certain target shareholders have executed lock up agreements or delivered vote consents in advance of a registration statement filing, provided certain conditions are met, including the delivery of a prospectus to all target security holders entitled to vote.

Climate
In March 2024, the SEC adopted final climate disclosure rules (see our client memo here). The rules quickly became the subject of numerous legal challenges, which have been consolidated into one litigation in the Eighth Circuit. In April 2024, the SEC issued an order staying its recently adopted climate-related disclosure requirements pending the outcome of litigation (see our client memo here).

On February 11, 2025, Acting Chair Uyeda issued a statement announcing that he had directed Commission Staff to notify the Eighth Circuit of the changed circumstances and request that the Court not schedule the case for argument to provide time for the SEC to "deliberate and determine" appropriate next steps.

Schedule 13D/G
In October 2023, the SEC finalized amendments to beneficial ownership reporting under Section 13(d) of the Exchange Act (see our client memo here). The amendments accelerated the deadlines for both initial filings of, and amendments to, Schedule 13D (shortening the period for initial filings from 10 calendar days to five business days) and Schedule 13G filings, and require filers to disclose derivative securities positions on Schedule 13D under Item 6. These rules have not changed.

On February 11, 2025, the Staff issued new compliance and disclosure guidance on the eligibility of shareholders to report their ownership interests on Schedule 13G (see our client memo here). The new guidance provides that the Staff's assessment of a shareholder's 13G eligibility will consider the subject matter of such shareholder's engagement with management and the context in which such engagement occurs. A shareholder "who discusses with management its views on a particular topic and how its views may inform its voting decisions, without more, would not be disqualified from reporting on a Schedule 13G." However, a shareholder could be disqualified if they take any of the following action:

- recommend that the company remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices or undertake specific actions on a social, environmental or political policy and, as a means of pressuring the issuer to adopt the recommendation, explicitly or implicitly condition their support of one or more of the issuer's director nominees at the next director election on the issuer's adoption of its recommendation; or

- discuss with management its voting policy on a particular topic and how the issuer fails to meet the shareholder's expectations on such topic, and, to apply pressure on management, state or imply during any such discussions that they will not support one or more of the issuer's director nominees at the next director election unless management makes changes to align with the shareholder's expectations.

Rule 14a-8
Rule 14a-8 under the Exchange Act was a focal point for the SEC under former Chair Gensler. In July 2022, the SEC proposed amendments to Rule 14a-8 (see our client memo here). The proposed amendments would have narrowed the circumstances under which companies may exclude shareholder proposals on the grounds that they are "substantially

implemented," "substantially duplicate" another proposal or constitute a resubmission that did not meet specified approval rates in prior years. The SEC did not finalize these amendments.

This proposal followed the SEC's issuance of Staff Legal Bulletin No. 14L ("SLB 14L") in November 2021 (see our client memo here) which significantly diminished the ability of public companies to exclude shareholder proposals on the grounds that they were not economically relevant or constituted "ordinary business" of the company that should be left to management.

On February 12, 2025, the Staff rescinded SLB No. 14L and issued Staff Legal Bulletin No. 14M ("SLB 14M") in its stead (see our client memo here). The adoption of SLB 14M and the recission of SLB 14L mark a direct reversal of policies adopted under former SEC Chair Gary Gensler.

SLB 14M revises guidance on the excludability of Rule 14a-8 shareholder proposals on the basis that a proposal lacks "economic relevance" or is related to the "ordinary business" of a company. Previously, SLB 14L provided that shareholder proposals which lacked "economic relevance" or were related to the "ordinary business" of a company could not be excluded if they concerned a significant social policy matter, regardless of whether such matter was significant to the target company. Going forward, under SLB 14M, the Staff will be taking a company-specific approach and shareholder proponents who raise "social or ethical issues" in their proposal must "tie those matters to a significant effect on the company's business."

In addition, new SLB 14M reinstates guidance making it easier for companies to exclude shareholder proposals that seek to "micromanage" them. That "anti-micromanagement" guidance had previously been rescinded by the Gensler Staff's SLB 14L. The changes signal that the Staff will now be prepared to take a more expansive view on what proposals may be excluded on the basis of "micromanagement."

Short Sale Reporting

In October 2023, the SEC adopted rules requiring institutional investment managers with short positions that exceed certain reporting thresholds to confidentially disclose those positions and net monthly activity within 14 days of the end of every month on new Form SHO (see our client alert here). Compliance with these requirements commenced January 2, 2025, and the first Form SHO filings would have been due February 14, 2025.

On February 7, 2025, the SEC issued an order granting a 12-month exemption from compliance with its short sale disclosure requirements (see our client alert here). As a result of the SEC's order, compliance will be required commencing January 2, 2026, and the first Form SHO filings will be due February 17, 2026.

Nasdaq Board Diversity Rules

In August 2021, the SEC approved Nasdaq's board diversity requirements, which required listed companies to (i) disclose the voluntarily self-identified diversity characteristics of their board members and (ii) have, or explain why they do not have, at least one director who self-identified as a female, an underrepresented minority or LGBTQ+ and, beginning in 2025, at least two self-identified diverse directors.

On December 11, 2024, in *Alliance for Fair Board Recruitment v. SEC*, the Fifth Circuit struck down Nasdaq's board diversity disclosure requirements, holding *en banc* that the SEC had exceeded its authority in approving them (see our client memo here). The challenge was initially unsuccessful, with a Fifth Circuit panel upholding the requirements in 2023. On February 4, 2025, the SEC approved Nasdaq's amendment to remove these requirements from its listing rules.

Share Repurchase Rules

In May 2023, the SEC finalized amendments to share repurchase disclosures that would have required companies to provide, on a quarterly basis, disclosures about daily share repurchases conducted during the quarter, as well as greater detail about the structure of the repurchase program, and to disclose whether any directors or executive officers effected trades in the company's securities within four business days before or after a share repurchase announcement. The amendments also would have required companies to include quarterly disclosure regarding the adoption, termination or modification of any Rule 10b5-1 trading plans by the company itself (see our client memo here).

In October 2023, the U.S. Court of Appeals for the Fifth Circuit held that the SEC's rulemaking violated the Administrative Procedure Act and remanded the matter to the SEC and directed it to correct the noted deficiencies within 30 days (see our client memo here). The Fifth Circuit vacated the rules on December 19, 2023 after the SEC advised the court that it was unable to address the deficiencies within the 30-day time period (see our client memo here).

As a result, the pre-existing requirements, under which issuers are required in their periodic reports to disclose any repurchases made in the quarter (aggregated by month) remain in effect.

Notices of Exempt Solicitations (PX14A6G Filings)
On January 27, 2025, the Staff issued new and revised CD&Is for Notices of Exempt Solicitation. Among other changes, the CD&Is:

- require shareholders who own less than $5 million of the class of subject securities and are consequently submitting a voluntary Notice of Exempt Solicitation to clearly state such fact on the cover of such notice;
- require shareholders to disseminate written soliciting materials to security holders before filing such materials under the cover of a Notice of Exempt Solicitation with the Commission;
- reiterate that only written communications that constitute a "solicitation" under the Exchange Act should be submitted under the cover of a Notice of Exempt Solicitation; and
- apply Rule 14a-9, which prohibits materially false or misleading statements, to materials filed under the cover of a Notice of Exempt Solicitation.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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