Smaller Reporting Company Threshold Increased as of 9/10/18

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As you may recall, about two years ago the SEC voted to propose amendments that would increase the financial thresholds in the "smaller reporting company" (SRC) definition from a public float of $75 million to $250 million. The SEC has now finalized this increased threshold (see https://www.sec.gov/rules/final/2018/33-10513.pdf), which will be effective as of September 10, 2018.

Under the new definition, a company generally qualifies as an SRC if:

1. It has a public float of less than $250 million; **or**
2. It has less than $100 million (up from $50 million under former rules) in annual revenues and no public float or public float of less than $700 million.

For this purpose, public float is calculated by multiplying the number of the company's common shares held by non-affiliates by the market price and, in the case of an IPO, adding to that number the product obtained by multiplying the common shares covered by the registration statement by their estimated public offering price. A company may have no public float because it has no public common shares outstanding or because there is no market price for its common shares. SRC status is determined as of the last day of the company's fiscal second quarter.

From an executive compensation standpoint, why do we care whether or not a company is an SRC? Because while it is in SRC status, it gets the benefit of exemptions from certain requirements and scaled disclosure. Specifically:

- No CD&A (but some scaled narratives are required);
- Fewer NEOs (just the PEO and next two highly compensated officers, and up to two former officers if applicable);
- Two years (vs three) in the Summary Compensation Table;
- Certain tables not required (e.g., GPBA, Option Exercises/Stock Vesting, Pension, NQDC);

- No CEO Pay Ratio;
- No discussion of compensation risk policies; and
- No description of retirement benefit plans.

Note that it is possible that a company may “float” in and out of SRC status from year to year, and this new threshold may also put some companies into SRC status that had already been filing as a non-SRC company. Whether or not the company chooses to scale back disclosure “because it can” will be a business decision, but if the disclosure has already been made and the narratives already exist, it may be ill advised to scale disclosure in a significant manner. We also note that in past studies of SRC disclosures, we find that many companies provide more than the bare bones requirements and some look more like non-SRC filings than SRC filings.

Finally, remember that exclusive of any scaled disclosure permitted due to a company’s classification as an SRC, a company may also be classified as an “emerging growth company” (EGC) and take advantage of certain reduced disclosure requirements pursuant to the Jumpstart Our Business Startups Act of 2012 (JOBS Act), some of which overlap with SRCs and others that offer additional disclosure relief. Generally, from a compensation standpoint, the current difference is that SRCs are subject to say-on-pay, say-on-frequency, and say-on-golden parachute, but JOBS companies are exempt until they lose their EGC status.

About the Author

Deborah Lifshey is a managing director in the New York office, where she specializes in advising clients on compensation matters from a legal perspective including securities disclosure, taxation and corporate governance issues, negotiation contracts, and reasonableness opinion letters. She is a graduate of the Industrial and Labor Relations School at Cornell University and the University of Florida College of Law, and served as a federal clerk for the Honorable Judge Susan H. Black on the Eleventh Circuit Court of Appeals. Prior to joining Pearl Meyer, Ms. Lifshey practiced at Fried, Frank, Harris, Shriver & Jacobson, where she specialized in executive compensation, ERISA matters, and corporate transactions, and at Holland and Knight, where she specialized in employment litigation matters.

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