

Has OMB Reined in the SEC?

July 11, 2019

An April 11, 2019, Office of Management and Budget Memorandum seeks to bring certain guidance issued by federal agencies, including the SEC, under more effective scrutiny. By its terms, the Memorandum applies to agency rules, as well as “agency statement[s] of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy.”

The Memorandum states that such agency guidance “should” be submitted in advance to OMB, so that OMB’s Office of Information and Regulatory Affairs can properly classify regulatory actions for purposes of the Congressional Review Act.

Memorandum’s Impact on SEC Rulemaking

In theory, the Memorandum could result in increased OMB and congressional scrutiny — possibly leading to delay or overturning — of future SEC rules.

It is not clear, however, that the Memorandum is legally binding on the SEC, particularly in view of the SEC’s status as an independent regulatory agency, as well as the Memorandum’s use of the word “should,” rather than “must” or “shall.” In any event, the SEC, when adopting rules, already follows procedures that are generally consistent with those prescribed in the Memorandum.

Accordingly, the Memorandum probably will not saddle SEC rules with significant new burdens or obstacles. For example, although some observers speculated that the Memorandum might delay the SEC’s recent releases governing standards of care for broker-dealers and investment advisers, this does not seem to have happened.

Impact on Guidance Provided by the SEC Staff

Commentators also have suggested that the Memorandum might impact some types of “no action,” interpretive or other guidance that is provided by the SEC staff, rather than by formal action of the SEC’s commissioners. In this regard, SEC Commissioner Hester Peirce has recently expressed concern that various types of nonpublic guidance provided by the SEC staff may become, in effect, an undesirable body of “secret law.”

On the other hand, unlike SEC rules, staff guidance — whether public or nonpublic — is not legally binding on registrants. SEC Chairman Jay Clayton has recently emphasized that point (see “Use of Non-Binding SEC Staff Guidance Called Into Question,” *Expect Focus – Life Insurance*, Vol. IV (Dec. 2018)), notwithstanding that informal guidance sometimes may have much the same importance to registrants as a formal rule. The Memorandum, therefore, seems even less likely to corral future SEC staff guidance than to rein in future SEC rules.

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