



Securities Law ALERT ■

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SEC Issues Staff Report on Review of Regulation S-K

On December 20, 2013, the staff of the U.S. Securities and Exchange Commission (SEC) released its report regarding its review of the disclosure requirements in Regulation S-K, as required by Section 108 of the Jumpstart Our Business Startups Act (the "JOBS Act").¹

The report details the history and evolution of the disclosure requirements contained in Regulation S-K and incorporates comments that the staff has received from various issuers and industry participants through the SEC's JOBS Act website. The staff identified several areas of Regulation S-K that could benefit from further review, and recommended a comprehensive approach (reviewing and updating requirements on a wholesale basis, taking into account the appropriateness of substantive requirements as a whole, as well as presentation and delivery issues) to review and revise these disclosure requirements.

The staff recognized that a comprehensive approach will "likely be a longer-term project involving significant staff resources," but advised that this comprehensive approach is more likely to "achieve the dual goals of streamlining requirements for companies, including emerging growth companies, and focusing on useful and material information for investors." This comprehensive approach would include gathering information using a variety of methods, including the staff performing its own research and seeking comment from interested parties, including investors, issuers, auditors, attorneys, underwriters, investment banking professionals and others.

Among the areas that the staff identified as needing further review are:

- risk-related requirements (i.e., consider whether to consolidate certain requirements relating to risk factors, legal proceedings and other quantitative and qualitative information about risk);
- requirements relating to a registrant's business and operations (identify antiquated and industry-specific disclosures);
- corporate governance disclosure requirements (identify material vs. boilerplate disclosures);

¹ The full report is available at <http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>.

- executive compensation requirements (determine whether further scaling is appropriate and instances where lengthy and technical disclosure can be modified);
- offering-related requirements (modernize requirements for current market practices);
- exhibit requirements and manner of making exhibits publicly available on the SEC's website;
- other general requirements included in Item 10 of Regulation S-K;
- disclosure requirements relating to business combinations (Regulation M-A) (seek market input on whether these requirements should be included in the review);
- emerging growth companies (determine eligibility for potential further scaling of disclosure requirements, whether scaling is appropriate for other companies that do not meet the definition of an "emerging growth company," and how companies should migrate to a standard disclosure regime as they mature);
- industry guides (evaluate whether guides are still useful and whether they conform to industry practices and trends); and
- a comprehensive review of the financial reporting requirements of Regulation S-X.

The report also recommended further review and information gathering to identify ways to modernize and simplify the requirements of Regulation S-K in a manner that reduces the costs and burdens on companies while still providing material information. For example, the staff recommends an evaluation of methods of information delivery and presentation, including exploring the possibility of a "filing and delivery framework based on the nature and frequency of disclosures, including a 'core' disclosure or 'company profile' filing with information that changes infrequently, periodic and current disclosure filings with information that changes from period to period, and transactional filings that have information relating to specific offerings or shareholder solicitations."

In addition, the staff noted that economic analysis must inform any reevaluation of disclosure requirements. Economic principles should be considered in the review of Regulation S-K, including the need to:

- "maintain the informativeness of disclosure to security holders, potential investors and the marketplace";
- consider historical objectives of disclosure requirements;
- determine whether information is available on a non-discriminatory basis from reliable sources;
- consider the administrative and compliance costs of each disclosure requirement;
- evaluate competitive or other economic costs of requirements involving disclosure of proprietary information;
- maintain an effective enforcement program and deter fraud; and
- encourage capital formation by maintaining investor confidence in the reliability of public company information.

Commenters provided further suggestions to guide the SEC's review process. For example, one commenter recommended that Regulation S-K should be harmonized with the SEC's Compliance and Disclosure Interpretations, as well as other sources of interpretation and guidance, in order to reduce the complexity facing registrants. Another commenter suggested that the SEC establish clear boundaries between financial statement disclosure principles and objectives and those of supplemental disclosures beyond the financial statements so as to avoid some of the redundancy found in many filings. This commenter suggested considering four factors for this review: (1) whether disclosure requirements were created to address a void in GAAP requirements in the past that may be redundant in light of later-mandated footnote disclosures, (2) whether investors can find the information contained in required disclosures more easily from another source, (3) whether required disclosures have become industry-specific and are no longer applicable to all entities and (4) whether required disclosures are based on qualitative thresholds without regard for materiality.

The report did not set forth a recommendation for the timing of any further review of Regulation S-K or any specific proposals for rule changes.

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