



Securities Law ALERT ■

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SEC Issues Concept Release Seeking Comment on Regulation S-K

At an open meeting of the U.S. Securities and Exchange Commission (SEC) on April 13, 2016, the SEC voted 3-0 to issue a concept release seeking public comment on modernizing certain disclosure requirements of Regulation S-K, which governs the required business and financial disclosures in an issuer's periodic reports. The concept release is part of the staff's Disclosure Effectiveness Initiative, a comprehensive review of how the SEC can modernize its disclosure regime for the benefit of both investors and issuers. Comments can be made for 90 days following the concept release's publication in the *Federal Register* and can be submitted through the SEC's website.

The concept release addresses the following areas:

- The framework of the company disclosure regime.
- Existing and potential specific disclosure requirements.
- Alternative methods of presenting disclosures that could improve readability and investor access to information.

Background

The Jumpstart Our Business Startups Act (the "JOBS Act") and the Fixing America's Surface Transportation Act (the "FAST Act") mandated that the SEC review Regulation S-K and Regulation S-X disclosures. Specifically, Section 108 of the JOBS Act required the SEC to submit to Congress a report that includes recommendations on how to make the registration process more efficient and less burdensome for the SEC and for emerging growth companies. Pursuant to such directives, on December 20, 2013, the SEC staff issued its Report on Review of Disclosure Requirements in Regulation S-K (the "S-K Report"),¹ which started the ongoing review of the disclosure regime and has come to be known as the Disclosure Effectiveness Initiative.

¹ Our client alert discussing the SEC staff's S-K Report is available at [SEC Issues Staff Report on Review of Regulation S-K](#).

The S-K Report identified several areas that could benefit from further review. Chair White then directed the staff to begin an in-depth review of Regulation S-K and Regulation S-X,² which governs the format and content of financial reports, to evaluate the type of information registrants are required to disclose, how that information is presented, where and how that information is disclosed and how the SEC can leverage technology as part of these efforts.

Framework of Disclosure Regime

The concept release outlines the SEC's disclosure framework broadly and seeks public input on how the SEC's disclosure requirements could be updated and whether the requirements could be changed to adapt to future fluctuations in market conditions and advancements in technology. The SEC also seeks comment on aspects of its "principles-based" approach to disclosure requirements (i.e., requirements that articulate a disclosure objective, such as providing information that is material to investors) as well as "prescriptive disclosure requirements" that employ quantitative thresholds to identify when disclosure is required or that require issuers to disclose information in all cases.

Additionally, recognizing the diverse composition of investors and that some investors obtain advice through third parties rather than by reviewing an issuer's disclosure themselves, the SEC is seeking comment on whether the rules should be revised to take into consideration the various levels of investor sophistication. Finally, the concept release seeks public comment on whether changes should be made to the disclosure requirements based on the high administrative and compliance costs associated with preparation of periodic reports as well as the costs associated with disclosure of a company's proprietary information.

Specific Disclosure Requirements

The concept release generally requests comments related to whether there are specific disclosures required by Regulation S-K that should be eliminated or modified, and whether any new disclosure requirements would be helpful to investors. The SEC aims to eliminate redundant disclosure in order to provide investors with information that is more significant and specific to the issuer and provides for meaningful analysis.

Business information (Item 101)

The concept release seeks general comments on the usefulness of disclosure required by Item 101 of Regulation S-K and whether it duplicates information provided elsewhere in the reports. The SEC is also seeking specific comments on a number of issues, including whether:

- Some of the disclosures required by this section need only be provided once, with only a brief summary and material changes being disclosed after the information is initially provided.
- Additional or different formats of disclosure would be useful in areas such as intellectual property and government regulation.

² In September 2015, the SEC published a request for comment on the effectiveness of certain financial disclosure requirements in Regulation S-X. Comments were due on or before November 30, 2015. A copy of the Regulation S-X request for comment is available [here](#).

Financial information and performance (Items 301, 302 and 303)

The concept release focuses on how to elicit disclosure of financial information and company performance that is company-specific and material. The SEC seeks comment on a number of specific issues, including:

- Whether required year-over-year presentations of financial data are redundant and could be eliminated and replaced by links to earlier filings, or if having side-by-side comparisons is useful to investors.
- Whether auditor involvement should be required for certain disclosure, including the quarterly supplementary financial data and disclosure in the Management's Discussion & Analysis (MD&A).
- In the MD&A, how to eliminate boilerplate and repetition and provide investors with meaningful analysis of past performance and indicators for future performance. The concept release reiterates past guidance that emphasizes that the MD&A should provide a meaningful analysis and not just a simple reiteration of financial statements.

The SEC is also seeking comments on whether it should revise the standard for identifying required disclosure of forward-looking information.

Risk factors and risk management (Items 305 and 503(c))

The concept release notes concerns that risk factor disclosure has become too lengthy and standardized to provide meaningful information to investors. To further the goal of providing investors with more useful risk-related disclosure, the SEC is seeking comment on a number of issues, including whether:

- The rules should be revised to elicit more specific disclosure.
- Disclosure of general and industry risks is useful to investors.
- Risk factor disclosure can be consolidated by combining the risk-related disclosures required by Items 305 and 503 of Regulation S-K with other disclosures related to litigation, environmental proceedings and foreign operations.
- Requiring disclosure of a company's risk management and monitoring process would be useful to investors to more fully evaluate a company's risk profile.

Issuer securities (Items 701 and 703)

The SEC seeks general comments on whether the information required by these items is meaningful to investors and requests specific comment on a number of items, including whether:

- Issuers should have to include information regarding sales of unregistered securities even when they have already been reported on Form 8-K, or if the disclosure requirement can be eliminated.
- The threshold of 1 percent or greater for reporting unregistered sales of equity securities under Item 3.02 of Form 8-K is appropriate.
- More detailed or more frequent disclosure related to issuer repurchases would be useful to investors.

Industry Guides: The SEC is requesting comments on whether industry guides are still relevant guides to disclosure for issuers, if they should be updated and whether they should be codified within Regulation S-K.

Public Policy and Sustainability: Many commentators have expressed a desire for new disclosure requirements related to political spending, climate change and social responsibility issues. The concept release noted that the information investors consider material may change over time and is seeking comment on whether sustainability and public policy issues are important to informed investment decisions, and how disclosure related to such issues could be provided. Commissioner Kara Stein noted in the open meeting that investors consider issues beyond financial performance when making decisions and may look at issues such as sustainability, diversity and inclusion.

Exhibits (Item 601): The SEC is generally seeking comments on whether any exhibits required by Item 601 of Regulation S-K can be modified or eliminated. The SEC requests specific comments on whether issuers should be able to omit immaterial schedules and attachments from all exhibits (and not just plans of acquisition, reorganization, arrangement, liquidation or succession) and whether the rules should provide quantitative thresholds for determining whether a contract is material and a clear definition of what constitutes a contract “not made in the ordinary course of business.”

Presentation and Delivery of Required Disclosures

As a result of the S-K Report’s recommendations and the recent FAST Act mandate, the SEC is seeking public comment on how Regulation S-K can “facilitate the readability and navigability of disclosure” documents. The SEC requests comments on specific issues related to the following:

- The use of tools such as cross-referencing, incorporation by reference, hyperlinks and registrant websites.
- Alternative ways the SEC could change its disclosure requirements to improve the readability and navigability of registrant filings.
- Where information should be provided directly and in full, and where references to the location of the information may suffice.
- Whether any required disclosures would be more effective if the SEC required registrants to present them in a specified format, such as tabular or graphic presentation, layer the disclosures by means of a summary or overview, or provide certain information as structured data.

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