

Regulation S-K Concept Release Charts Ambitious Course for Corporate Disclosure Reform

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Last week, the SEC issued a [concept release](#), a forerunner to potential rulemaking, seeking public comment on modernizing the disclosure requirements in Regulation S-K, the central source for non-financial statement disclosure requirements for public companies. The release is focused on the business and financial disclosures that companies are required to provide on a regular basis, many of which have changed little since they were adopted over the course of the last few decades. With recent prodding from Congress, the SEC is reevaluating these requirements in order to assess whether they continue to elicit the data investors need to make informed investment and voting decisions, and how companies can most effectively present this information to investors. The release is part of the SEC's ongoing "disclosure effectiveness initiative," launched in 2013 to consider ways to improve the disclosure regime for the benefit of both companies and investors.

More than two years in the making and nearly 350 pages in length, the release contains 340 numbered requests for comment, each of which poses a series of questions on a broad range of disclosure matters. The issues addressed run the gamut from core conceptual questions about the SEC's overarching disclosure framework, to technical and detailed line-item disclosure requirements. The release does not address disclosure requirements related to executive compensation and corporate governance matters (the planned focus of the next phase of the disclosure effectiveness project), or disclosures required for foreign private issuers, business development companies and some other specific types of registrants.

Although the SEC is unlikely to propose rulemaking that encompasses the full array of potential revisions suggested by the release, rulemaking on even some of these issues could have significant consequences for public companies. When it moves ahead with rulemaking, the SEC will undoubtedly draw heavily on comments received from the public. We expect that investors and advocacy groups will enthusiastically register support for more expansive disclosure requirements; the SEC also needs the benefit of the issuer community's perspective before pursuing efforts to revise and potentially expand the disclosure burden. As a result, companies should consider reviewing the release (which we have summarized [here](#)) and submitting comment letters individually or through industry associations. While Davis Polk and other law firms will respond, we believe that responses coming directly from public companies can be especially persuasive in SEC rulemaking.

The comment period closes on July 21, 2016.

Disclosure Effectiveness Initiative

The JOBS Act of 2012 directed the SEC to "comprehensively analyze" Regulation S-K to determine how disclosure requirements could be "updated to modernize and simplify" the registration process and reduce "costs and burdens" for emerging growth companies. In December 2013, the SEC delivered a [staff report](#) to Congress summarizing its review. The legislative directive notwithstanding, the report was more of a regulatory history of the disclosure items in Regulation S-K and less of an analysis of how they could be modernized and simplified. But based on the report's recommendations, the SEC launched the disclosure effectiveness initiative, the goal of which is to systematically review the entire disclosure regime and make recommendations on how to update it to promote timely, material disclosure by public companies and facilitate investor access to that information.

The initiative was accelerated by the enactment of the FAST Act in December 2015, which also requires the SEC to conduct a study to determine how best to modernize and simplify the disclosure requirements

in Regulation S-K, and to propose revisions to those requirements. The FAST Act study is to be completed by December 2016, with rulemaking to implement the study's findings to be proposed within a year after that.

The Regulation S-K concept release is the second major product of the disclosure effectiveness initiative, following the publication in September 2015 of a [request for comment](#) on financial disclosure requirements for entities other than the registrant (our comment letter is available [here](#)). The next phase of the initiative is expected to focus on executive compensation and corporate governance information in the proxy statement, and modernization of the EDGAR system is expected to be addressed in a subsequent phase. A parallel disclosure initiative focused, for now, on [audit committees](#), is also underway (our comment letter is available [here](#)).

Highlights

The release explains what factors will guide the SEC's review of its disclosure regime, including:

- Whether specific disclosures are important or useful to investors in making investment and voting decisions, and whether more, less or different information might be needed;
- The costs of providing the particular disclosure, including the administrative and compliance costs of preparing and disseminating the disclosure; the benefits of providing the disclosure; and whether the current requirements appropriately balance the costs and benefits of disclosure;
- Whether disclosure requirements can be more appropriately tailored to companies given the likely variation across companies in benefits and costs of disclosing certain types of information;
- How to enhance information provided to investors while also promoting efficiency, competition and capital formation;
- How technology can be leveraged to lower costs, increase benefits and facilitate investor access; and
- How to make disclosure requirements more adaptable to future technological advancements and market changes.

The release outlines three broad areas for potential reform:

- **Overall Disclosure Framework**—The release presents the framework for the SEC's current disclosure regime and explores potential alternative approaches. Key concepts addressed include:
 - **sunset provisions** and **temporary rules**, as a way to institutionalize the ongoing refreshment of disclosure mandates;
 - **principles-based versus prescriptive disclosure requirements** and the fundamental tenet of **materiality**;
 - **diverse investor audiences**; and
 - **compliance and competitive costs**.
- **Existing and Potential Disclosure Requirements**—The release discusses both the substance and process of disclosure requirements, covering such topics as:
 - **core company business information** (S-K Items 101 and 102);
 - **company performance, financial information and future prospects** (S-K Items 301, 302 and 303);
 - **risk and risk management** (S-K Items 305 and 503) (emerging risks, such as those associated with **cybersecurity, climate change** and **arctic drilling**, are addressed);

- **registrant's securities** (S-K Items 201, 202, 701 and 703) (potential additional line-item disclosures related to **stock buybacks** are considered);
 - **exhibits** (S-K Item 601);
 - **industry guides**;
 - potential disclosure of information relating to **public policy** and **sustainability matters**;
 - **scaled disclosure requirements**; and
 - **frequency of interim reporting** (potential revisions to existing quarterly reporting requirements are explored).
- **Presentation and Delivery**—The release reviews alternative presentation and delivery methods to enhance disclosure accessibility and readability with the benefit of new communications technology, including through the use of tools such as **cross-referencing, incorporation by reference, hyperlinks, company websites, standardized formatting requirements, layered disclosure** and **structured data**.

For an overview of the concept release, including selected requests for comment, please see [our summary](#).

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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