

SEC Concept Release on Regulation S-K Asks More Than 800 Questions in Soliciting Comments, with a 90-Day Deadline

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The [SEC concept release](#) on the business and financial disclosure requirements in Regulation S-K is a whopping 341 pages. It would be appropriate to analogize it to the size of a phone book, except that metaphor seems obsolete for this digital age.

From the time that the SEC started talking about disclosure effectiveness a few years ago, the SEC has indicated a strong interest in obtaining the views of those who create and use disclosure. But even more daunting than the notion of reading 341 pages, without even the discussion of the cost-benefit analysis and the paperwork reduction act to break things up, is the prospect of responding to the questions asked. At first glance it appears there are 340 questions, but since each usually embeds at least two and as many as five or six additional questions, interested parties must consider more than 800 questions in 90 days, the stated deadline for comments.

Even with a willingness on the SEC's part to accept late comments, there is still only a short period to thoughtfully evaluate all of the disclosure elements discussed in the concept release, most of which are fundamental to a company's periodic reporting. The concept release notes it does not address governance or executive compensation disclosure.

The release covers each disclosure topic by briefly summarizing the history of the rulemaking that led to the current rules, the comments received then and the intended objectives at that time. The SEC is interested in feedback on whether these S-K rules should be modified, expanded or even eliminated, especially when several different rules cover the same matter. The SEC wants disclosure to be useful to investors, recognizing that it is not exactly clear what type of investor profile is the intended audience for public company disclosure, balanced against the cost and burden to companies.

The concept release covers a vast amount of material, ranging from highly technical detailed requirements to principle-based concepts. Our next post will focus on risk factors and the possibility of sustainability disclosure and new style and layout. We will also issue a comprehensive client memorandum. In the meantime, some of the more novel issues include whether the SEC should:

- Require disclosure of a company's business strategy;
- Require more information about foreign regulations and employment practices such as outsourcing;
- Amend Item 303 to codify the multiple MD&A staff guidance, which a commenter found to be a “bewildering stream...with varying degrees of formality and legal import”;
- Establish a qualitative or quantitative threshold rather than materiality for MD&A disclosure;
- Require known trend or event disclosure when it is “more likely than not, probable, or reasonably possible to occur” rather than “reasonably likely” to occur; and
- Require companies to disclose performance metrics important to their business.

Those who believe that disclosure effectiveness means more streamlined, shorter disclosure will be disappointed by the number of comments suggesting additional disclosure in many areas could be appropriate. With the opportunity to undertake some truly meaningful revisions to the core elements of a company's disclosure about its business and financial performance, it is hoped that the number of questions and the stated deadline will not end up discouraging and

ultimately deterring comments.

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

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