

SEC Corp Fin Director Discusses Disclosure Effectiveness Ideas

October 7, 2014 | Client Update | 2-minute read

Since some companies have made significant changes to the presentation of their proxy statements, Keith Higgins, Director of the SEC's Division of Corporation Finance, is encouraging companies to make "similar strides" with their periodic reports, such as experimenting with layout, reducing duplication and eliminating stale information. The SEC staff is willing to discuss potential changes with companies, although they will not pre-clear specific disclosures.

The possibility of companies taking their own initiative toward revising their periodic reports was one idea noted in his recent speech on the SEC's disclosure effectiveness project. The Division's goal is to ultimately recommend rule changes, principally on Regulation S-K and Regulation S-X, to the Commission.

Perhaps in response to concern among some constituents that disclosure changes correlate to less disclosure, Higgins was careful to point out that the objective is not to reduce the volume of disclosure; and in fact, updating the requirements could result in additional disclosures. He also noted that the disclosure system does not specify that companies provide only material information, but information that the SEC believes is necessary to carry out the provision of the federal securities laws and also as necessary or appropriate in the public interest or to protect investors.

At the same time, in assessing potential revisions, Higgins indicated that the staff is aware that they must consider the compliance cost for companies, given that last year more than 9,100 companies filed annual reports.

Some of the specific details that he addressed included the need to modernize the current set of industry guides and reduce redundancy in company filings. The staff recognizes that overlapping disclosure requirements in Regulation S-K and GAAP may cause repetition and is meeting regularly with FASB to discuss efforts to reduce the amount of overlap.

As an example of the careful balancing approach that the SEC must adopt, Higgins raised the question of whether MD&A would be more useful if it focused only on two years' worth of data against the fear that material trends would be masked without that third year of information. In addition, while appreciating the notion of principle-based disclosure, the staff does not seem to be comfortable with an open-ended requirement to simply describe the material aspects of the business. Again, Higgins emphasized that balance is needed between such principle-based disclosures and line-item requirements.

The role of technology is increasingly important as a "company file" approach to public disclosure gains traction. Instead of a periodic report, companies could update information regularly through tabs covering different topics on the SEC website. However, Higgins warned that everyone needs to be mindful of all the useful processes that have developed around the periodic reporting system, such as audits and certifications.

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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