

CLIENT MEMORANDUM

SEC Issues Concept Release on Modernizing Regulation S-K

Seeks Public Comment as Part of Disclosure Reform Initiative

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The SEC recently issued a “concept release” seeking public comment on modernizing Regulation S-K, the regulatory framework that governs many business and financial disclosure requirements in public companies’ SEC periodic reports, registration statements and other filings.¹ This release is part of the SEC’s comprehensive review of its disclosure requirements, mandated by the Jumpstart Our Business Startups Act (the “JOBS Act”).

The 341-page release, after summarizing the history of Regulation S-K and the SEC’s integrated disclosure framework, systematically reviews much of Regulation S-K (other than executive compensation and corporate governance requirements), raising 340 questions for consideration, almost all with multiple sub-parts. In so doing, the SEC seeks input how to simplify and modernize current disclosure requirements, so that material information can be most effectively presented. The SEC asks whether *more or less* or even *different* information should be provided and *how* best to provide this information to investors, particularly in light of technological advances. It seeks to balance the costs of providing disclosure with the benefits, while promoting both capital formation and protection of investors.

¹ See Concept Release, No. 33-10064, *Business and Financial Disclosure Required by Regulation S-K*, available [here](#).

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Nature of Disclosure Requirements

- **Principles-Based v. Rules-Based Disclosure.** The current disclosure framework combines both principles-based elements (such as Management's Discussion and Analysis (MD&A)) and prescriptive or rules-based requirements (such as specific thresholds for environmental proceedings disclosure). The release discusses the advantages and limitations of each approach, suggests an alternative "objectives-oriented" approach that provides greater guidance without bright-line tests and seeks input as to how to balance these approaches to provide information important to investors.
- **Target Audience.** The release recognizes the diverse composition and varied informational needs of the investor audience and asks whether and how disclosure should be tailored to best serve them.
- **Compliance Costs.** The release solicits comment on how to reduce compliance costs for registrants, without compromising investors' access to important information.

Specific Disclosure Requirements

The bulk of the release proceeds to review many of Regulation S-K's specific requirements, asking whether they should be eliminated or modified or, in certain instances, supplemented with additional requirements.

- **Core Company Business Information.** The release suggests streamlining disclosure, by eliminating specific requirements that may not be material to many registrants, such as certain historical or organizational information, information regarding properties, governmental contracts, backlog and environmental matters, and duplicative information disclosed elsewhere. At the same time, it asks whether disclosure requirements should be expanded for certain companies, such as intellectual property disclosure for technology companies.
- **Company Performance, Financial Information and Future Prospects.** The release seeks feedback regarding the current principles-based approach of MD&A, including whether it is successful in eliciting disclosure that highlights the most important aspects of the registrant's financial condition and results of operations. It seeks comment on whether specific requirements should be added (such as performance metrics or additional liquidity measures) and whether certain current requirements should be curtailed (such as off-balance sheet arrangements or contractual obligations, which may be disclosed elsewhere).
- **Risk and Risk Management.** The release solicits suggestions regarding how to improve current risk factor disclosure, such as by mandating greater specificity or discouraging generic risks. The SEC asks whether the current Item 305 market risk disclosure contains information important to investors that is not found elsewhere in the registrant's filings. The release requests comment on a potential new requirement to disclose how risk is managed, and whether it should be combined with the existing requirement regarding board oversight of risk management.
- **Registrant Securities.** The release asks whether certain of these requirements, such as the description of capital stock and information regarding the number of equity holders, sales of unregistered securities and use of proceeds, should be revised or even eliminated.

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- **Public Policy and Sustainability Matters.** In recent years, Congress has mandated disclosure regarding various public policy concerns, including conflict minerals, payments to foreign governments for resource extraction and mine safety violations. The release seeks feedback regarding the importance of disclosure of public policy and sustainability matters, such as environmental sustainability, climate change and corporate responsibility.
- **Exhibits/Industry Guides.** The release seeks input on whether the requirements for the myriad of exhibits to SEC filings should be modified. The release also asks whether the various industry-specific guides continue to be useful and should be retained or otherwise updated.
- **Scaled Requirements.** The release summarizes the scaled disclosure accommodations the SEC has made for “smaller reporting companies” and “emerging growth companies” and asks whether these properly balance the needs of investors and registrants. Perhaps surprisingly, the release asks whether certain registrants should be exempt from filing quarterly reports and, conversely, whether more frequent financial reporting should be required of more established registrants.

Presentation and Delivery of Information

The release also suggests a variety of ways to more effectively present and deliver information to investors, through cross-referencing or incorporation by reference (eliminating duplicative information), hyperlinks, company websites, layered or graphical presentations and structured data initiatives, such as XBRL.

In this concept release, part of the SEC’s ongoing efforts to simplify and modernize the reporting process, the SEC is both seeking public comment on the issues specifically discussed in the release and soliciting other suggestions for improving the disclosure scheme. In the meantime, while waiting for modified regulations to be proposed and adopted, issuers can benefit from implementing many of the suggestions in the release to improve readability and emphasize material information in their disclosures.

There is only a 90-day period for submitting comments on the release, ending *July 21, 2016*.

If you would like to submit comments on the release or if you have any questions regarding this memorandum, please contact Cristopher Greer (212 728-8214; cgreer@willkie.com), Jeffrey S. Hochman (212 728-8592; jhochman@willkie.com) or the Willkie attorney with whom you regularly work.

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