

# Client Alert

April 2016

## SEC Publishes Concept Release on Reform of Regulation S-K

On April 13, 2016, the Securities and Exchange Commission (“SEC”) [published](#) its long-awaited concept release on the reform of Regulation S-K. The release considers various business and financial disclosures that public companies make in investor reports and seeks the public’s input on ways to further improve that disclosure. We summarize the key provisions of the concept release that may be of interest to public companies.

### The Disclosure Effectiveness Initiative

SEC Chair Mary Jo White has made reforming the SEC’s disclosure rules for public companies a centerpiece of her term as SEC chairman. Branded as the “Disclosure Effectiveness Initiative,” the project has so far moved at an unhurried pace. In an effort to spur the SEC along, Congress included several provisions affecting the SEC as part of the Fixing America’s Surface Transportation Act of 2015 (“FAST Act”). Among other things, the FAST Act requires the SEC to carry out 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 statute also directs the SEC to revise Regulation S-K to further scale or eliminate requirements, to reduce the burden on emerging growth companies (“EGCs”), accelerated filers, smaller reporting companies (“SRCs”) and other smaller issuers, while still providing all material information to investors, and to eliminate duplicative, overlapping, outdated or superseded provisions. The concept release is a first step toward satisfying the FAST Act mandates.

### Overview of the Concept Release

The concept release first focuses on business and financial disclosure required by Regulation S-K. After providing an overview of the recent history of SEC disclosure requirements, the concept release discusses and solicits public comment on the following topics:

- *Core Company Business Information*—The release solicits feedback on Items 101 and 102 of Regulation S-K, in particular the description of a company’s business, technology and intellectual property rights, government contracts and regulation (including environmental laws), the number of persons employed by the company and the description of leased and owned real property.
- *Company Performance, Financial Information and Future Prospects*—The release seeks input on Items 301, 302 and 303 of Regulation S-K, including the selected summary and supplementary financial disclosure tables, each component of MD&A<sup>1</sup> and the discussion of critical accounting elements.
- *Risk and Risk Management*—The release requests comment on Items 305 and 503(c) of Regulation S-K, including risk factor disclosure and disclosures about market risk, as well as the overall approach to risk management and risk management processes.

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<sup>1</sup> Management’s Discussion and Analysis of Financial Condition and Results of Operations

- *Securities of the Registrant*—The release solicits input on portions of Items 201, 202, 701 and 703 of Regulation S-K, such as disclosure concerning the number of equity holders, the description of capital stock, recent sales of unregistered securities, use of proceeds and issuer stock repurchases.
- *Exhibits*—The release requests feedback on Item 601 of Regulation S-K concerning the exhibits filed with Form 8-K, Form 10-Q and Form 10-K.

The release does not focus on other parts of Regulation S-K, such as executive compensation, corporate governance or required disclosures for foreign private issuers. Nevertheless, it also seeks comment on:

- *Industry Guides*—The list of SEC guides requiring supplemental disclosure for certain discrete industries has dwindled over time, but the SEC has several industry guides that are still in force. These include guides on bank holding companies, oil and gas programs, real estate limited partnerships, property-casualty insurance underwriters and mining companies.
- *Public Policy and Sustainability Matters*—The release seeks additional feedback on whether the SEC should expand its disclosure requirements on matters concerning public policy and sustainability matters, including hot-button issues like climate change, corporate political spending and supply chain management.
- *Scaled Disclosure*—The release questions whether reduced or scaled disclosures that are available to EGCs and SRCs ought to be offered to other categories of SEC registrants. The release also asks whether the SEC should change the content or frequency (semiannual, quarterly or monthly) of Form 10-Q.
- *Presentation and Delivery*—Noting that much of the current disclosure regime traces its roots back to the 1930s, the release seeks input on how the SEC can improve the overall “readability and navigability” of SEC reports, such as through the increased use of cross-referencing and incorporation by reference or the greater use of hyperlinks and company websites. The release also explores more fundamental changes in the presentation of disclosure permitted by changes in technology in the Internet age, such as through the “company file” concept and other formats that could provide greater layering and interactivity of information.

## **Next Steps**

For the SEC, a concept release is akin to an advance notice of proposed rulemaking under the Administrative Procedure Act. Thus, before taking any further action to amend its rulebook, the SEC will be required to issue a set of proposed rules, elicit further public comment and then adopt final rules in another release.

Given the time it will take to move from the concept release to proposed and then final rules, there is no chance that any final rules will be completed during the Obama administration. But there is a high likelihood that the next administration, irrespective of who wins the presidential election in November, will continue making progress on this issue. Because it has become customary for the sitting SEC chairman to tender his or her resignation with the inauguration of a new president, whoever the next president appoints as SEC chairman will heavily influence which direction future disclosure rules take.

Public companies should review the concept release and consider whether to submit comments to the SEC. The SEC last revisited its disclosure regime in such a fundamental way in the early 1980s, so the concept release could represent a once-in-a-generation effort to weigh in on these issues. Comments will be due this summer, 90 days after publication of the concept release in the Federal Register.

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