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SEC Publishes Concept Release on Revisions to Regulations S-K

In April 2016, the Securities and Exchange Commission (the “SEC”) published a concept release (the “Release”) seeking comment on modernizing certain disclosure requirements of Regulation S-K. The Release focuses on the scope and presentation of business and financial disclosures in a reporting company’s periodic reports. The issuance of the Release is part of the SEC’s Disclosure Effectiveness Initiative, a broad-based staff review of the SEC’s disclosure requirements mandated by the Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”).

The SEC is not proposing a fundamental overhaul of disclosure requirements; rather, it is soliciting comment on a large number of incremental changes with the goal of updating and simplifying the business and financial disclosure requirements of Regulation S-K and removing disclosure requirements that have become duplicative, outdated or unnecessary. The Release does not cover other disclosure requirements in Regulation S-K, such as executive compensation and governance, or the required disclosures for foreign private issuers, business development companies, or other categories of registrants.

Overall Framework of Regulation S-K

The Release addresses the overall framework of Regulation S-K, including the suitability of “principles-based” as opposed to “prescriptive” disclosure standards in Regulation S-K. The SEC notes that much of the disclosure currently called for is principles-based and relies on the company’s assessment regarding materiality of the information, but is overlaid with certain prescriptive requirements under Regulation S-K that rely on bright-line tests. The SEC has stated that any revisions to Regulation S-K should emphasize a principles-based approach as an overarching component of the disclosure framework. In that connection, the Release poses an important question on the standard of review to be used in disclosure, namely whether a materiality standard or another standard, such as an “objectives-oriented approach,” should be used. In addition, the Release questions the degree to which companies should be permitted to assume that investors have some level of sophistication when preparing their disclosures under Regulation S-K, and asks if the rules should be revised to address a more sophisticated investor than the current rules appear to contemplate.

Specific Requirements of Regulation S-K

The Release discusses the specific requirements of the Regulation S-K line items regarding business and financial disclosures, and seeks comments on whether any of these disclosure requirements should be modified or eliminated:

- **Core Company Business Information.** The SEC is reviewing the disclosures required by Items 101(a)(1) and (c) and Item 102 to determine whether they continue to provide information necessary to understand the nature of a company's business as well as certain non-financial aspects of a company's operations such as intellectual rights, government contracts and regulations, property and employees. In particular, the Release seeks comment on the scope of the mandated disclosure, noting that some of the currently required disclosure is duplicative of information available in other filings and asking if more limited business disclosures would be appropriate following an initial filing.
- **Company Performance, Financial Information and Future Prospects.** The SEC is seeking comments on whether it should modify or eliminate certain disclosure requirements under Item 301 (selected financial data), Item 302 (supplementary financial information) and Item 303 (MD&A). Potential revisions include the addition of a high-level executive overview in the MD&A, the abbreviation of the time periods for which financial information is required to be presented and discussed and the elimination of period-to-period comparisons in the results of operation discussion.
- **Risk and Risk Management.** The Release asks how to make the risk factors required by Item 503(c) more specific, more meaningful and free of boilerplate. It also asks whether risk factor disclosure should be expanded to include a discussion of the probability of each risk, how the risk is being addressed, and the company's strategy for managing risk exposure.
- **Securities of the Registrant.** The Release seeks comment regarding various disclosure requirements relating to the securities of the company, including the number of holders (Item 201(b)), description of capital stock (Item 202), recent sales of unregistered securities and use of proceeds (Item 701) and repurchases of equity securities (Item 703).
- **Industry Guides.** The Release requests comment on whether industry guides are still relevant guides to disclosure for registrants, whether they need to be updated and whether they should be formally codified within Regulation S-K.
- **Disclosure Related to Public Policy and Sustainability Matters.** The Release asks if disclosure relating to public policy and sustainability matters, including climate change, resource scarcity, corporate social responsibility and good corporate citizenship is important to informed voting and investment decisions. Notably, the SEC queries whether this information is important to the general population of "reasonable investors" or to a selected group of investors, as concerns have

been expressed that adopting sustainability or policy-driven disclosure requirements may have the goal of altering corporate behavior rather than producing information that is important to investors in making voting and investment decisions.

- **Exhibits.** The SEC is seeking comment on whether the exhibit requirements under Item 601 can be streamlined or eliminated with a view towards making the filing requirements less burdensome (for instance, by narrowing the range of exhibits required to be filed and by permitting issuers to omit immaterial schedules and attachments from exhibits).
- **Scaled Requirements.** The Release asks if the availability of scaled disclosure requirements, such as those available to smaller reporting companies (SRCs) and emerging growth companies (EGCs), should be modified, perhaps extending them to one or more categories of larger companies.
- **Quarterly Reporting.** The Release requests comment regarding the benefits or disadvantages associated with quarterly reporting.

Presentation and Delivery of Regulation S-K Information

The Release also seeks input on how Regulation S-K might be revised in order to facilitate the readability and navigability of disclosure documents. In particular, the SEC is focused on how the evolution of the Internet and digital technology has changed the way in which investors access information and how information could be made more readily accessible by using tools like cross-referencing, incorporation by reference, hyperlinks, company websites, updated formatting requirements and “layered disclosure.” Generally, a “layered” approach would highlight, in an overview, the information that management believes is the most important information, while providing more detailed disclosure elsewhere in the filing.

The text of the Release can be found at: <https://www.sec.gov/rules/concept/2016/33-10064.pdf>

Comments in response to the request for comment are due July 21, 2016.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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