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U.S. Securities Law Briefing.

SEC Considering Extensive Changes to Business and Financial Disclosure Requirements

On April 13, 2016, the U.S. Securities and Exchange Commission (the “SEC”) issued a 341-page concept release seeking public comment on many aspects of Regulation S-K, the main SEC regulation governing non-financial statement disclosure in registration statements and periodic reports.

The concept release is part of the SEC’s Disclosure Effectiveness Initiative, which aims to improve the SEC disclosure regime for investors and companies. The focus of the release is Regulation S-K’s business and financial requirements. The SEC is not yet addressing executive compensation and corporate governance disclosure requirements, or the required disclosures for foreign private issuers, business development companies or other categories of registrants.

In the release, the SEC does not yet advocate any particular set of changes to Regulation S-K. Rather, the purpose of the release is to ask questions – more than 300 of them – which range from minor to fundamental.

Among some of the significant questions posed include:

> Should Regulation S-K be principles-based or prescriptive?

> Should companies assume some level of investor sophistication in preparing their disclosures?

> Should quarterly reporting be retained or eliminated?

> Should the requirement for the disclosure of five years of selected financial data be retained, modified or eliminated?

> Should there be a qualitative or quantitative threshold rather than materiality for requiring management’s discussion and analysis (“MD&A”) disclosure?

> Should the period-to-period comparisons provided in MD&A be retained, eliminated or modified?

> Should there be auditor involvement (e.g., audit, review or specified procedures) regarding the reliability of MD&A disclosure?

> Should companies be required to discuss the probability of occurrence and the effect on performance for each risk factor?

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> Should the SEC specify generic risks that companies are not required to disclose?

> Should companies be required to identify and disclose, in order, their 10 most significant risk factors without limiting the total number of risk factors disclosed?

> Should the use of proceeds disclosure requirement be retained or eliminated?

> Should some or all of the Industry Guides be codified in Regulation S-K or remain separate?

> Are there specific sustainability or public policy issues important to informed voting and investment decisions? Would line-item requirements for disclosure about sustainability or public policy issues cause disclosure of information that is not material to investors?

> Should any exhibits be eliminated? Should companies be allowed to omit schedules / attachments to exhibits? Should schedules be required to be filed with M&A agreements?

> Should companies be allowed to incorporate by reference to their websites?

Although the SEC appears to be committed to modernizing Regulation S-K, it is difficult to predict whether it will take action on any particular item. The concept release is just the first regulatory step towards any amendments to the SEC's disclosure requirements. Comments are due 90 days after the concept release is published in the Federal Register, and it will take many months before a proposing release is published and some time after that before any changes are finally adopted.

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We will continue to monitor developments in this area and welcome any queries you may have.

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