



The SEC Speaks in 2016: Division of Corporation Finance Panel – Recent Staff Interpretations and Reports

Mar 24, 2016

Reading Time : **3 min**

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In September 2015, Corp Fin opened a request for comment on Regulation S-X, with a focus on the financial disclosures related to acquired businesses, affiliated entities, and guarantors and issuers of guaranteed securities. Garnett said that the Staff had received 50 comment letters so far, which the Staff will evaluate and use to make recommendations to the commissioners. While no similar request for comment has been posted with respect to Regulation S-K, she noted that the Staff was working to develop recommendations on Regulation S-K for the commissioners, possibly in the form of a concept release.

Garnett asserted that the Staff was exploring disclosure more broadly, including the most effective framework for disclosure requirements (e.g., prescriptive requirements versus principles-based requirements), and considering the pluses and minuses of competing approaches (e.g., standardization versus flexibility). Garnett noted that the Staff was also looking at how companies present and deliver information, with a view to encourage companies to use modern technology to provide information more effectively (e.g., hyperlinks and use of structured data). On this point, she added that the Staff would be requesting input on how structured data can enhance the usefulness and quality of disclosure. The Staff is also looking at industry-specific disclosure in the form of industry guides, building on its experience from 2008 in codifying the oil and gas guides into Item 1200 of Regulation S-K.

In closing, Garnett stated that a main goal of the disclosure effectiveness project is to eliminate overlapping disclosure requirements caused by both internal redundancy (e.g., Regulation S-X versus Regulation S-K) and external redundancy (e.g., SEC rules versus Generally Accepted Accounting Principles). Garnett said that she was excited to see that numerous registrants are participating in the discussion of disclosure effectiveness and that such registrants are engaged in efforts to remove duplicative or outdated disclosure in their filings. She reminded companies that they should not only seek opportunities for removing disclosures, but also concurrently seek opportunities for adding and improving the remaining disclosures.

Accredited Investors

As defined in Rule 501 of the Securities Act, under Regulation D, an accredited investor includes certain natural persons and other entities that are considered financially sophisticated and able to sustain the risk of loss of investment, thereby reducing their need for certain protections provided by the federal securities laws. A natural person qualifies as an accredited investor if such person has:

- individual income exceeding \$200,000 in each of the two most recent years
- joint income with the person's spouse exceeding \$300,000 in each of those years or
- net worth, excluding such person's primary residence, exceeding \$1 million.

As noted by Gomez Abero, Dodd-Frank required the SEC to review the definition of "accredited investor" to determine whether the requirements of the definition should be adjusted or modified. In its Report on the Review of the Definition of "Accredited Investor" (the "Report"), dated December 15, 2015, the Staff described the history of the definition, including the bases for the financial thresholds, which were established as part of the passage of Regulation D in 1982 and have not been adjusted for inflation. Gomez Abero noted that, if the financial thresholds were adjusted for inflation, a natural person would need individual income exceeding \$500,000, joint income exceeding \$600,000 or \$2.5 million of net worth to qualify as an accredited investor.

Per Gomez Abero, in preparing the Report, the Staff considered a variety of comments and analyzed various approaches to modifying the accredited investor definition. The Report provided a number of recommendations for updating the accredited investor definition, including:

- leaving the current income and net-worth thresholds in place, but subjecting investors to an investment limitation (e.g., 10 percent of prior year income or net worth)
- creating new inflation-adjusted income and net-worth thresholds that are not subject to investment limitations (e.g., new thresholds of \$500,000 of individual income, \$750,000 of joint income and \$2.5 million of net worth)
- considering other measures of sophistication for individuals to qualify as accredited investors, such as establishing a minimum amount of investments as another qualifying test
- considering individuals with certain professional credentials, such as Series 7, 65 or 82 accreditation
- considering individuals with investment experience
- considering knowledgeable employees of private funds to qualify for investments in their employer's funds
- considering designing an accredited investor examination that would enable sophisticated investors to qualify regardless of wealth, educational background or experience.

In closing, Gomez Abero noted that the Report includes a file for comment, and he encouraged interested parties to submit their views.

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