

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

6 October 2011

**Retrospective Review of Existing Regulations
(Release Nos. 33-9257; 34-65262; 39-2479; IC-29781)
Commission File No. S7-36-11**

Dear Ms. Murphy:

Ernst & Young LLP is pleased to comment on the Securities and Exchange Commission's (SEC or Commission) request for information, *Retrospective Review of Existing Regulations* (the Request). We strongly support the SEC's initiative to improve the retrospective review of its regulations in connection with the Executive Order 13579, *Regulations and Independent Regulatory Agencies*.

Enhance mechanisms to reconsider effectiveness of rules

The Request asks how often the Commission should review existing rules, what factors the Commission should consider in selecting rules to review, and what data the Commission should consider in this process. We believe the Commission's retrospective reviews could be enhanced through the following:

- ▶ *Timely post-implementation analysis* – We recommend the SEC review the implementation and effectiveness of each new rule, including an analysis of whether (1) the rule is achieving its intended benefits and (2) actual costs are consistent with estimates in the original rulemaking. This type of review should help the SEC decide whether to propose modifications (or even rescission). While the timing of an effective post-implementation analysis will depend on the circumstances, it preferably should occur within two years, and no longer than five years, following the effective date of a new rule.
- ▶ *Monitor trends in SEC staff no action letters, waiver requests and interpretive requests* – The SEC staff routinely responds to numerous no-action letters, waiver letters and requests for interpretations of rules, many of which are identical or substantially similar. We recommend the Commission require its divisions to prepare, at least annually, an analysis of the frequency of no-action letters, waiver requests and interpretive requests for specific SEC rules. Such an analysis should identify recurring circumstances in which waivers are granted or no-action is recommended. Such analyses should help the SEC identify rules in need of clarification (in light of recurring interpretive requests) or modification (in light of routine exemptive and interpretive

relief). For example, the Division of Corporation Finance frequently grants waivers and provides accommodations regarding the requirements of Rule 3-05 of Regulation S-X for audited financial statements of significant acquired businesses (e.g., accepting a statement of assets acquired and liabilities assumed, and a statement of revenues and direct expenses, when a registrant acquires the net assets of a business in a “carve-out” from a legal entity). The SEC could modify Rule 3-05 to formally address carve out acquisitions, which would avoid repetitive requests to the SEC staff that consume both registrant and SEC staff resources.

Enhance transparency in the retrospective rule review process and provide greater opportunity for public input

The Request asks how the Commission could improve public outreach and increase public participation in the rulemaking process, which we fully support. We believe that the process needs to be more transparent.

Currently, under Section 610(a) of the Regulatory Flexibility Act, the SEC annually reviews certain rules that have become final within the past 10 years. While the SEC posts a notice on its website regarding scheduled reviews and a general request for public comment, the notice does not identify the specific rules scheduled to be reviewed. Instead, the Federal Register is the only source of the specific SEC rules scheduled for review. This approach impedes transparency and public participation. At a minimum, the SEC website should provide information more prominently about reviews, a list of rules that are under review and a request for public comment about each rule to be reviewed. When applicable, the SEC should publish its basis for concluding that, upon retrospective review, a rule continues to be appropriate without modification.

It also would be helpful if the SEC published a list of the specific rules scheduled for review in advance of performing the retrospective review, providing constituents the opportunity to provide input that the SEC could consider as it performs the actual review. For this purpose, it would be helpful if the SEC published a multiyear schedule of its rules and the expected timing of reviews. A transparent multiyear schedule also would allow the public to comment on the timing and priority of the planned retrospective reviews, particularly whether a planned review should be accelerated for various reasons.

In our view, the SEC should develop a comprehensive program to review its rules and regulations, and then execute that plan over the next ten years. Rules that are particularly costly, complex or suspected of being outdated should be given priority. After completing the comprehensive review, the SEC should develop a program to revisit its rules on a rotating basis, with rules that have higher costs of compliance being reviewed more frequently.

The SEC also could increase public participation in its rulemaking through more frequent use of Concept Releases and Advance Notices of Proposed Rulemaking. Often, the public is not aware of the SEC’s plans to propose a new rule until the SEC schedules an open meeting to consider issuing the related rule proposal. As a result, the Commission’s proposed rule would not have the benefit of public input during its initial formulation, and it is less likely that the SEC could adopt a significantly different regulatory approach without reproposal. Issuing Concept Releases and Advance Notices of Proposed Rulemaking would provide more opportunities for the SEC to receive broad public input, including potentially innovative ideas, before embarking on a specific direction in proposing a new rule.

Under the Administrative Procedures Act, the SEC has the ability to discuss rulemaking with individuals and (or) committees outside the Sunshine Act requirements. To our knowledge, the SEC currently makes limited use of this ability to initiate external outreach on specific rulemaking initiatives in advance of an initial release. We recommend the SEC increase its public outreach to experts and various constituent groups (e.g., investors, issuers, industry groups, auditors, legal counsel) to provide diverse input to help inform both new rulemaking and retrospective review plans.

Create an SEC framework to validate existing rules (and new rules)

The Request asks if there is any other information that the Commission should consider in developing and implementing a preliminary plan for retrospective reviews of regulations. To facilitate both reviewing existing rules and adopting new rules, the SEC should develop and articulate a framework of guiding principles and objectives consistent with its missions and statutory responsibilities. We recommend the SEC analyze and document how existing and proposed rules achieve or enhance investor protection, capital formation and the maintenance of fair, orderly and efficient markets. When the rule enhances one objective but detracts from another, there should be a clear rationale why the net result is acceptable and preferable. Such a framework would help to structure the retrospective review of rules adopted primarily considering only one of the fundamental objectives, or perhaps a different objective altogether.

In retrospective reviews of existing rules, as well as new rulemaking initiatives, we encourage the SEC to consider the clarity of the rule and any related instructions. Many older rules would benefit from a rearticulation in "plain English," allowing constituents to more easily understand and apply the requirements.

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We would be pleased to discuss our comments with the Commission or its staff at your convenience.

Very truly yours,

Ernst & Young LLP