

SEC Adopts Rules to Modernize and Simplify Disclosure

Article By:

Mark D. Wood

Mark J. Reyes

Farzad F. Damania

The Securities and Exchange Commission recently adopted final rules to modernize and simplify the disclosure requirements for public companies under Regulation S-K. This rulemaking was mandated by the Fixing America's Surface Transportation Act (FAST Act), and the final rules are substantially in the forms originally proposed by the SEC in October 2017 (as discussed in the October 20, 2017 edition of the *Corporate and Financial Weekly Digest*).

The final rules make several significant changes to Regulation S-K and related rules and forms. The following are some highlights:

Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A)(Item 303)

Item 303 of Regulation S-K currently requires reporting companies to discuss the three-year period covered by their financial statements and present year-over-year comparisons of their financial condition, changes in financial condition and operating results. Pursuant to the final rules, Item 303 will now allow a reporting company to omit a discussion and analysis of the earliest of the three-year period so long as the discussion of such year is already included in an earlier SEC filing, and the company includes a statement identifying the location in the prior filing.

The final rules differ from the SEC's proposed rules in that they do not require that any omitted discussion must not be "material to an understanding" of the registrant's financial condition, changes in financial condition and results of operations. The staff found that the proposed explicit condition requiring the omitted discussion to not be material contained superfluous language and may have been interpreted to modify, supplement or alter the materiality analysis that management must conduct with respect to the information it provides investors in the MD&A.

Additionally, reporting companies are no longer required to include year-over-year comparisons of their financial results in the MD&A. Instead, Instruction 1 to Item 303 clarifies that reporting companies may use any presentation that, in their judgment, enhances a reader's understanding of

their financial condition and results of operations. The SEC noted that it expects most companies will continue to include year-over-year comparisons, as they are most familiar to investors and, in many cases, an appropriate method of presentation.

Exhibits (Item 601)—Redaction of Confidential Information

Pursuant to the final rules to Regulation S-K, reporting companies will be allowed to redact confidential information from material contracts that are filed as exhibits to SEC filings without submitting a confidential treatment request. Companies may redact this confidential information so long as the information is both (1) not material and (2) would likely cause competitive harm to the reporting company if publicly disclosed. Note, however, that the SEC will selectively review exhibit filings and assess whether redactions appear to satisfy the above requirements. The staff may request that registrants promptly provide supplemental materials, including an unredacted paper copy of the exhibit and the registrant's analysis to support its redaction. If the company's analysis does not support its redactions, the SEC may request that the reporting company file an amendment that includes some, or all, of the previously redacted information.

The final rules also expand to all exhibits (including material contracts) filed under Item 601: the existing accommodation that permits reporting companies to omit immaterial schedules and attachments to acquisition agreements under 601(b)(2). Under the final rules, reporting companies will still be required to provide with each filed exhibit a list that briefly identifies the contents of omitted schedules and attachments and, upon a request by the SEC, furnish a copy of any omitted schedules or attachments. A separate list of omitted schedules and attachments need not be included if the information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. The final rules also codify the staff's current practice that permits reporting companies to redact any personally identifiable information (PII) (e.g., bank account numbers, social security numbers, home addresses and similar information) from filed exhibits without submitting a confidential treatment request.

The SEC added a requirement that a reporting company must file a description of its securities as an exhibit to its Form 10-K (not only as part of a registration statement). However, this requirement can be satisfied by incorporating the description by reference from, and adding a hyperlink to, a previously filed registration statement.

In addition, the final rules prohibit a reporting company from incorporating by reference or cross-referencing from the financial statements to information outside of the financial statements, unless otherwise specifically permitted or required by the SEC's rules, US Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS). In the adopting release the staff noted that such practice of cross-referencing or incorporating by reference could raise questions as to the scope of an auditor's responsibilities.

Incorporation by Reference (Item 10(d))

Previously, Item 10(d) of Regulation S-K had generally prohibited reporting companies from incorporating documents by reference if such document was on file with the SEC for more than five years. The final rules eliminated the five-year limit in Item 10(d). For example, the elimination of the five-year limit allows a reporting company that files an exhibit with the SEC to incorporate such exhibit by reference in a later filing (e.g., in a 10-K), regardless of whether or not the exhibit was filed with the SEC within the last five years. However, a reporting company would not be permitted to incorporate by reference to a destroyed document because it would render its disclosure unclear and

confusing.

Form Amendments

The cover pages of annual reports on Forms 10-K, 20-F and 40-F will require disclosure of the reporting company's trading symbol(s), in addition to the (1) title of each class of securities registered under Section 12(b) of the Securities Exchange Act of 1934, and (2) name of each exchange on which such securities are registered, as already required. The same disclosure will also be required on the cover pages of quarterly reports on Form 10-Q and current reports on Form 8-K. In addition, these cover pages will need to be tagged with inline eXtensible Business Reporting Language.

The cover page of Form 10-K will no longer include a checkbox indicating that there is no (and to the best of the company's knowledge, there will not be) disclosure of late Section 16 filings in the Form 10-K or annual proxy statement. In addition, the final rules amend Rule 405 of Regulation S-K, which requires registrants to disclose in their Form 10-K or proxy statement certain information regarding Section 16 reporting persons. In particular, the final rules modify the current heading required under Item 405, "Section 16(a) Beneficial Ownership Reporting Compliance," to "Delinquent Section 16(a) Reports." The final rules also include an instruction encouraging companies to omit such heading to the extent late Section 16 filings are not required to be reported, thereby minimizing unnecessary disclosure.

Executive Officers

The SEC clarified that information about the identity and background of an SEC reporting company's directors, executive officers and significant employees required by Item 401 of Regulation S-K does not need to be duplicated in the proxy statement if it is included in the 10-K. A reporting company can choose where to present the information.

If a reporting company chooses to include information about its executive officers in its 10-K instead of its proxy statement, the caption for that information must read, "Information about our Executive Officers" (instead of "Executive officers of the registrant").

Description of Property (Item 102)

Item 102 of Regulation S-K requires disclosure of the location and general character of the principal plants, mines and other materially important physical properties of the reporting company and its subsidiaries. The staff believes that this item may demand disclosure that is not material. The final rules amend Item 102 to state that a description of property is only required when the physical properties are material to the reporting company. However, these final rules will not modify the Item 102 requirements for companies in the mining, real estate, oil and gas industries.

Timing

The amendments to Item 601(b)(2) discussed herein governing the redaction of confidential information in material contracts became effective as of April 2. The remaining amendments discussed herein will be effective on May 2.

For a copy of the SEC's adopting release, please click [here](#).

National Law Review, Volume IX, Number 102

Source URL: <https://natlawreview.com/article/sec-adopts-rules-to-modernize-and-simplify-disclosure>