

Does The SEC's New Form 10-K Rule Create A New Disclosure Standard?

Article By:

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Yesterday, the Securities and Exchange Commission [announced](#) that it has adopted an [interim final rule](#) that allows Form 10-K filers to provide a summary of business and financial information contained in their annual reports. The SEC adopted the rule pursuant to Section 72001 of the Fixing America's Surface Transportation (FAST) Act. The rule adds a new Item 16 to Form 10-K that reads in its entirety as follows:

Registrants may, at their option, include a summary of information required by this form, but only if each item in the summary is presented fairly and accurately and includes a hyperlink to the material contained in this form to which such item relates, including to materials contained in any exhibits filed with the form.

Instruction: The summary shall refer only to Form 10-K disclosure that is included in the form at the time it is filed. A registrant need not update the summary to reflect information required by Part III of Form 10-K that the registrant incorporates by reference from a proxy or information statement filed after the Form 10-K, but must state in the summary that the summary does not include Part III information because that information will be incorporated by reference from a later filed proxy or information statement involving the election of directors.

The new rule and adopting release are mercifully short. Despite this economy of words, I found some aspects of the new rule to be highly problematical.

Although the new rule is permissive, its effect may be to limit discretion and innovation. The SEC acknowledges in the adopting release that its "current rules do not prohibit a registrant from including voluntary information, such as a summary, in its Form 10-K". By adopting a rule that allows the inclusion of summary information subject to specific conditions, the implication appears to be that the voluntary inclusion of information has been narrowed to just what is permitted by the new rule. Thus, the SEC appears to have moved from "everything is permitted (subject to the antifraud provisions of the securities laws)" to "nothing is permitted, except as specifically allowed by the new rule".

I was also struck by the SEC's introduction of an entirely novel standard of disclosure. The new rule requires that the summary be presented "fairly and accurately". Although an independent auditor's report includes an opinion as to whether the financial statements "present fairly, in all material respects, an entity's financial position, results of operations, and cash flows in conformity with generally accepted accounting principles", the "present fairly" standard is not found elsewhere in Regulation S-K (other than as to the financial statements in the Rule 13a-14(d)/15d-14(d) certifications). For an explanation of the meaning of "present fairly", see [AS 2815: The Meaning of "Present Fairly in Conformity with Generally Accepted Accounting Principles"](#). The SEC's requirement that each item in the summary be "presented fairly" would make more sense if the summary includes only financial information. However, the rule allows an issuer to include a summary of "information required by this form". Thus, the rule does not limit the information disclosed in the summary to just the financial statement information included in the Form 10-K. Similarly, the standard for disclosure under the Securities Exchange Act is not expressed as "accuracy". Under Rule 10b-5, a filer must not "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading".

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