

October 16, 2017

SEC Proposes Amendments to Modernize and Simplify Regulation S-K

On October 11, 2017, at the first open meeting under Chairman Jay Clayton's tenure, the SEC proposed amendments to modernize and simplify certain disclosure requirements in Regulation S-K. The proposed amendments are largely consistent with the recommendations in the SEC's FAST Act Report to Congress in November 2016 (the "Report").¹ The rulemaking proposal is intended to improve the readability and navigability of SEC documents and discourage repetition and disclosure of immaterial information.

The rulemaking proposal includes approximately 30 discrete changes to Regulation S-K, and related rules and forms. With a couple of exceptions that we note below, none of the changes is likely individually to have a significant impact. Taken together, however, they should have a salutary effect on the preparation and presentation of disclosure documents. Highlights of several key aspects of the proposal are summarized in this Alert.

Proposed Rule

MD&A. Instruction 1 to Item 303(a) provides that, generally, a company's MD&A should cover the three-year period covered by the financial statements and either use year-to-year comparisons or any other format that, in the company's judgment, would enhance a reader's understanding. The Instruction also states that, where trend information is relevant, reference to the five-year selected financial data may be necessary. Under the proposed rule, the discussion of the earliest year can be omitted from MD&A if (i) that discussion is not material to an understanding of the company's financial condition, changes in financial condition and results of operations, and (ii) the company has filed its prior year Form 10-K containing MD&A of that earliest year. In the proposing release, the SEC noted that these changes are intended to discourage repetition of disclosure that is no longer material and encourage companies to re-evaluate disclosures in their prior year MD&A and take a "fresh look" to determine whether such disclosure remains material. Towards this end, the SEC declined to implement the staff's recommendation in the Report to require that companies include a hyperlink to the prior year's annual report for the earlier of the year-to-year comparisons.

In addition, the proposed rule would eliminate the reference to the five-year selected financial data in Instruction 1. This change is intended to simplify the instruction and eliminate duplication and is not intended to discourage companies from providing trend disclosure in MD&A. The proposed rule would also further simplify Instruction 1 to emphasize that companies may use any presentation that, in the company's judgment, would enhance a reader's understanding. In the proposing release, the SEC acknowledged that "almost all registrants provide year-to-year comparisons," but noted its belief that some companies may determine that a narrative discussion for some or all of the three years in the three-year period is a more appropriate format.

Confidential Treatment. The proposed rule would allow companies to redact confidential information from materials contracts filed under Item 601(b)(10) where such information is both (a) not material and (b) competitively harmful if publicly disclosed, without simultaneously submitting a confidential treatment request to the SEC. If the staff requests, the company must promptly provide an unredacted paper copy of the exhibit and its materiality and

¹ See *Report on Modernization and Simplification of Regulation S-K* (November 2016), which was required by Section 72003 of the Fixing America's Surface Transportation (FAST) Act.

competitive harm analyses. These proposed changes, if adopted, would appear to result in a substantial change to current practice and would streamline the confidential treatment process. Note, however, the staff would continue its selective review of company filings and would selectively assess whether redactions appear to satisfy the above requirements. If the company's analyses do not support its redactions, the staff may request that the company file an amendment that includes some, or all, of the previously redacted information.

Exhibits. The proposed rule would expand the existing Item 601(b)(2) accommodation that permits companies to omit immaterial schedules and attachments to acquisition agreements to include all exhibits filed under Item 601. Under the proposed rule, companies would still be required to provide with each filed exhibit a list that briefly identified the contents of all omitted schedules and attachments and, upon SEC staff request, furnish a copy of any omitted schedules or attachments. Consistent with existing staff guidance, the proposed rule would also permit companies to redact any personally identifiable information ("PII") from filed exhibits without filing a confidential treatment request.

Risk Factors. Item 503(c) requires companies to disclose the most significant factors that make an offering speculative or risky. Consistent with the staff's recommendation in the Report, the proposed rule would relocate Item 503(c) from subpart 500 to subpart 100 of Regulation S-K to reflect the application of risk factor disclosure requirements to Exchange Act reports and registration statements. In addition, the proposed rule would eliminate the risk factor examples that are currently enumerated in Item 503(c). In the proposing release, the SEC stated that it believed that the elimination of these examples would encourage public companies to focus on their own risk identification processes.

Incorporation by Reference. Consistent with the staff's recommendations in the Report, the proposed rule would eliminate the five-year limit in Item 10(d), which prohibits the incorporation of documents by reference if they have been on file with the SEC for more than five years and do not fall within one of the exceptions provided in the rule, and require hyperlinks to information that is incorporated by reference if that information is available on EDGAR. Unlike the requirements for exhibit hyperlinking, which the SEC adopted in March 2017, a company would not be required to correct inaccurate hyperlinks in an effective registration statement by including a corrected hyperlink in a subsequent periodic report or a post-effective amendment. Under the proposed rule, companies would need to include a clear statement describing the specific location of the information that is being incorporated by reference and identify the document where the information was originally filed or submitted and the location of the information within that document.

In addition, the proposed rule would prohibit the incorporation by reference or cross-referencing from the financial statements to information outside of the financial statements, unless otherwise specifically permitted or required under SEC rules, because the practice could raise questions as to the scope of an auditor's responsibilities.

LEIs, Trading Symbols, and XBRL. Some of the proposed amendments would require additional disclosure or incorporation of new technology. Under the proposed rule, companies would be required to include the legal entity identifier ("LEI"), if one has been obtained, of the company and each subsidiary listed on the company's subsidiary list exhibit. The SEC noted that the disclosure of LEIs would provide clear and unique identification of market participants that would facilitate the statistical analysis and aggregation of firm financial data. The proposed rule would also revise the cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F to include the trading symbol for each class of the company's registered securities and require that all information on the cover pages of these forms be tagged in Inline XBRL, instead of the traditional XBRL format. According to the proposing release, the proposed XBRL-related changes would enhance investors' ability to automate their use of this information and the disclosure of trading symbols would facilitate investors' efforts to search for information about companies.

Comment Period

Interested stakeholders are encouraged to share their views with the SEC on the rule proposal, which contains 97 numbered questions. Comments are due within 60 days following the publication of the proposed rule in the Federal Register.

Whether or not the SEC adopts any of the proposed amendments, companies can review their existing SEC disclosures and consider making changes to enhance them. Indeed, Chairman Clayton seemed to issue a current “call to action” at the open meeting when he said that “[c]orporate leaders should respond to [the SEC’s] disclosure requirements by conveying information to investors in a way that captures how they assess and manage their businesses. [The SEC’s] approach to disclosure allows this and issuers should be pursuing it.”

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If you have any questions or would like to learn more about this proposed rule, please contact your usual legal advisor at Ropes & Gray.