

SEC Proposes Amendments to Modernize and Simplify Disclosure Requirements in Regulation S-K

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On October 11, 2017, the Securities and Exchange Commission (the “SEC”) proposed technical amendments to modernize and simplify certain public company disclosure requirements in Regulation S-K and related rules and forms (the “Proposed Amendments”)¹, which implement Section 72003 of the Fixing America’s Surface Transportation Act (the “FAST Act”) and are based on recommendations included in the SEC staff’s report on modernization and simplification of Regulation S-K published on November 23, 2016 (the “Report”).²

The Proposed Amendments, which aim to streamline certain SEC reporting obligations, as well as improve the quality and utility of disclosure, are expected to be generally supported by registrants and investors.

Public comments on the Proposed Amendments must be received within the 60-day period following their publication in the Federal Register.

This Client Alert summarizes the material features of the Proposed Amendments and outlines certain practical considerations for registrants planning ahead for changes to the disclosure requirements.

Summary of the Proposed Amendments

Description of Property (Item 102)

Item 102 of Regulation S-K currently requires disclosure of the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries. The SEC is proposing to amend Item 102 to clarify that this disclosure should focus on physical properties that are material to the registrant’s business. This disclosure may be provided on a collective basis, if appropriate. The SEC is not proposing to revise any of the instructions to Item 102 relating to the mining, oil and gas and real estate industries.

¹ The Proposed Amendments can be found [here](#).

² The Report can be found [here](#).

MD&A (Item 303)

Item 303(a) of Regulation S-K currently requires registrants to provide a year-over-year comparison of their financial condition, changes in financial condition and results of operations for the three-year period covered by the financial statements. In an effort to encourage registrants to take a “fresh look” at their MD&A to determine whether certain disclosures related to the prior year remain material, the SEC is proposing to amend Item 303(a) to eliminate the discussion of the earliest year of the three-year period if (i) that discussion is not material to an understanding of the registrant’s financial condition, changes in financial condition and results of operations and (ii) the registrant has filed its prior year Form 10-K on EDGAR containing the MD&A of the earliest of the three years included in the financial statements of the current filing.

The SEC is also proposing to simplify Instruction 1 to Item 303(a) to emphasize that registrants may use any presentation that, in the registrant’s judgment, would enhance a reader’s understanding, including a narrative discussion for some or all of the years in the three-year period if that is a more appropriate format.

Foreign Private Issuers

The SEC is proposing similar amendments applicable to foreign private issuers filing reports on Form 20-F to maintain a consistent approach to the MD&A for domestic and foreign registrants. Similar changes are not being proposed for Canadian issuers filing reports on Form 40-F.

Compliance with Section 16(a) of the Exchange Act (Item 405)

Section 16(a) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), currently requires officers, directors and specified types of security holders to report their beneficial ownership of a registrant’s equity securities on EDGAR using Forms 3, 4 and 5 and to furnish a duplicate of those Section 16 reports to the registrant. Item 405 of Regulation S-K currently requires registrants to disclose each reporting person who failed to file on a timely basis a Section 16 report during the most recent fiscal year or prior fiscal years. The SEC is proposing to amend Item 405 to allow registrants to rely on a review of Section 16 reports available on EDGAR and eliminate the requirement that reporting persons furnish duplicates of their Section 16 reports to the registrant. The SEC is also proposing to change the heading of the section disclosing each reporting person who failed to file a Section 16 report on a timely basis to “Delinquent Section 16(a) Reports” to more accurately describe the disclosure and, in an attempt to avoid unnecessary repetition, to allow registrants to exclude the heading altogether if they have no delinquencies to report. Additionally, the SEC is proposing to eliminate the checkbox on the cover page of Form 10-K relating to Item 405 disclosures and the related instruction in Item 10 of Form 10-K.

Proposed Changes to Exhibit Requirements (Item 601)

New or Enhanced Exhibits

Item 202 of Regulation S-K currently requires a registrant to provide a brief description of its registered capital stock, debt securities, warrants, rights, American Depository Receipts and other securities in its registration statements. The SEC is proposing to amend Item 601(b)(4) of Regulation S-K to require a registrant to provide the Item 202 information as an exhibit to its Form 10-K, rather than limiting this disclosure to registration statements in order to improve investors’ access to information about their rights as security holders, which should facilitate more informed investment and voting decisions.

Item 601(b)(21) of Regulation S-K currently requires a registrant to list as an exhibit all of its significant subsidiaries, the state or other jurisdiction of incorporation or organization of each and the names under which those subsidiaries do business. The SEC is proposing to amend Item 601(b)(21) to require registrants to include in the exhibit the legal entity identifier (“LEI”)³, if one has been obtained, of the registrant and each significant subsidiary.

Omission of Schedules from Exhibits

Item 601 of Regulation S-K generally requires registrants to file complete copies of exhibits. The SEC is proposing to expand the existing accommodation in Item 601(b)(2) currently applicable only to material plans

³ A LEI is a 20-character, alpha-numeric code that allows for unique identification of entities engaged in financial transactions.

of acquisition, reorganization, arrangement, liquidation or succession by adding new Item 601(a)(5), which would permit registrants to omit schedules and similar attachments to exhibits unless they contain material information and unless that information is not otherwise disclosed in the exhibit or the disclosure document.

Shortened Look-Back Period for Material Contracts

Item 601(b)(10)(i) of Regulation S-K currently requires registrants to file every material contract not made in the ordinary course of business, provided that either: (i) the contract must be performed in whole or in part at or after the filing of the registration statement or report, or (ii) the contract was entered into not more than two years before that filing. The SEC is proposing to amend Item 601(b)(10)(i) to limit the two-year look back test to newly reporting registrants because investors of registrants with established reporting histories would continue to have access to any material agreements previously filed, unless such agreements are still material at the time of the filing.

Confidential Treatment Request Requirements

The Proposed Amendments to Item 601 of Regulation S-K to address the SEC's confidential treatment process would:

- permit registrants to omit personally identifiable information ("PII"), such as bank account numbers, social security numbers, home addresses and similar information, from all exhibits without submitting a confidential treatment request ("CTR") to the SEC. This revision appears to codify an already common practice whereby the SEC staff generally does not object where a registrant omits PII from exhibits without submitting a formal CTR, and
- permit registrants to omit confidential information from material contracts filed where such information is both (i) not material and (ii) competitively harmful if publicly disclosed, without having to submit an unredacted copy and formal CTR, as is currently required. Registrants would instead be required to mark the exhibit index to indicate that portions of the exhibit(s) had been omitted and include a prominent statement on the first page of each redacted exhibit that information in the marked sections of the exhibit has been omitted from the filed version of the exhibit. Registrants would also be required to indicate with brackets where the information has been omitted from the filed version of the exhibit.

It is important to note that registrants would remain responsible to determine if redaction is permissible, and the SEC will continue to selectively review redacted filings and could request a registrant to provide supplemental materials similar to those currently required in a CTR.

Foreign Private Issuers

To maintain a consistent approach to the exhibit requirements for domestic registrants and foreign private issuers, the SEC is proposing similar amendments applicable to foreign private issuers filing reports on Form 20-F. Similar changes are not being proposed for Canadian issuers filing Form 40-F.

Additional Technical Amendments

The SEC has proposed other amendments, largely technical in nature, that are designed to reduce repetition and eliminate immaterial or obsolete disclosure. A brief summary appears below:

Directors, Executive Officers, Promoters and Control Persons (Item 401)

The Proposed Amendments would clarify that any disclosure about executive officers required by Item 401 of Regulation S-K need not be duplicated in proxy statements if it is already included in Part I of Form 10-K.

Corporate Governance (Item 407)

The SEC is proposing:

- to update the outdated reference to AU 380, Communication with Audit Committees by referring more broadly to the applicable rules and standards of the Public Company Accounting Oversight Board and the SEC (a practice that is already followed by some registrants) (Item 407(d)(3)(i)(B)), and
- to amend Item 407 to exclude emerging growth companies ("EGCs") from the Item 407(e)(5) requirement to state whether the compensation committee has reviewed and discussed the Compensation Discussion

and Analysis (“CD&A”) required by Item 402(b) of Regulation S-K because EGCs are not required to include a CD&A in their public disclosures.

Outside Front Cover Page of the Prospectus (Item 501(b))

Item 501(b) of Regulation S-K addresses certain disclosure requirements related to the outside front cover page of prospectuses. The SEC is proposing to amend:

- Item 501(b)(1) to eliminate the instruction that suggests a registrant should change its name if the name is similar to that of a well-known registrant;
- Item 501(b)(3) to allow registrants to include a clear statement that the offering price will be determined by a method or formula that is explained in the prospectus, including a cross reference to such disclosure, rather than including this information on the front cover;
- Item 501(b)(4) to require disclosure of the principal US market(s) for the offered securities where the registrant has engaged a registered broker-dealer and actively sought and achieved quotation, along with the corresponding trading symbols. This expands the current requirement that only addresses listing on a national securities exchange; and
- Item 501(b)(10) to permit registrants to exclude the portion of the legend relating to state law for offerings where state law is pre-empted.

Incorporation by Reference (Item 10(d))

The SEC is proposing to eliminate the prohibitions on incorporation by reference where the documents have been on file with the SEC for more than five years and is instead proposing to require hyperlinks to information that is incorporated by reference if that information is available on EDGAR.

Risk Factors (Item 503(c))

The SEC is proposing to relocate the risk factor disclosure requirements of Item 503(c) to new Item 105 of Regulation S-K to reflect the application of these disclosure requirements to Form 10 registration statements and periodic reports. In addition, the Proposed Amendments would eliminate the generic risk factor examples that are currently enumerated in Item 503(c) in order to encourage registrants to focus on their particular business when identifying risks.

XBRL

The SEC is proposing to require all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to be tagged in Inline XBRL and to amend the cover pages of these forms to include the trading symbol for each class of registered securities. Registrants would be required to file a “Cover Page Interactive Data File” with each of the specified forms.⁴

Undertakings (Item 512)

The SEC is proposing to eliminate undertakings that are duplicative of other rules or that have become unnecessary due to developments since their adoption, including undertakings pursuant to Item 512(c)-(f) of Regulation S-K.

Plan of Distribution (Item 508)

The SEC is proposing to amend Rule 405 of the Securities Act of 1933 to add the definition of the term “sub-underwriter”, which is referenced in Item 508 of Regulation S-K, as a “dealer participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but that is not itself in privity of contract with the issuer of the securities.”

⁴ These changes would be implemented under new Rule 406 to Regulation S-T, new Item 601(b)(104) to Regulation S-K, new paragraph 104 to the “Instructions as to Exhibits” of Form 20-F and new paragraph B.17 to the “General Instructions” of Form 40-F.

Practical Considerations

The SEC is expected to move quickly on adopting final rules, as the Proposed Amendments are largely incremental and technical in nature and are generally consistent with the Report issued last November. The Proposed Amendments are also non-controversial and will likely receive favorable reception from companies seeking to reduce costs and burdens related to their SEC reporting obligations. The SEC also emphasized that the Proposed Amendments are intended to improve the quality of disclosure and accessibility to potential investors by eliminating repetition and improving access to information. SEC Chairman Jay Clayton noted in his opening statement on the Proposed Amendments that “[a]n effective disclosure regime provides investors with the information necessary to make informed investment choices without imposing unnecessary burdens of time and money on issuers, and today’s action embodies that goal.”⁵

Whether or not the final rules are adopted, the Proposed Amendments provide a helpful overview of areas where registrants may consider improvements aimed to enhance and streamline their disclosures. While many of the proposed changes cannot be implemented without such adoption, many of the suggestions can be used by registrants to help them focus on materiality and simplicity in their disclosure. As such, registrants may begin to prepare by reviewing their filings and taking the following preliminary steps:

- Take a “fresh look” at MD&A disclosure to evaluate how the MD&A format can be revised to improve readability and eliminate repetitive and immaterial disclosure. It should be noted that, rather than simply eliminating the earlier of the year-to-year comparisons, the Proposed Amendments continue to require a discussion of the third year to the extent it is material to an understanding of the registrant’s financial condition, changes in financial condition and results of operations. In furtherance of this concern, SEC Commissioner Kara M. Stein requested that commenters to the Proposed Amendments consider whether the approach to the MD&A is “consistent with ensuring that investors have ready access to the fulsome information they need”.⁶
- Revisit the risk identification process with a view toward minimizing generic risk factors, focusing on the risks that are truly relevant to the registrant’s particular business, and drafting risk factors tailored for the registrant’s operations.
- Take into account both quantitative and qualitative factors when determining whether properties are material to their business as a whole and whether disclosure (including information related to corporate headquarters and similar properties) is required.

⁵ A copy of the statement can be found [here](#).

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