

SEC Adopts Rule Amendments to Modernize Disclosure Requirements Under Regulation S-K and Related Rules and Forms

MARCH 28, 2019

OVERVIEW

On March 20, 2019, the Securities and Exchange Commission (the “SEC”) issued a release adopting amendments to certain disclosure requirements in Regulation S-K and related forms (the “Release”).¹ These amendments in large part track the SEC’s Report on Modernization and Simplification of Regulation S-K issued on November 23, 2016, as required by the Fixing America’s Surface Transportation Act (the “FAST Act”). The amendments are intended to encourage clarity and readability in disclosure documents and discourage repetition and unnecessary disclosure by registrants, as well as to better align Regulation S-K with modern realities, including the electronic availability of a registrant’s historical filings. The amendments also update disclosure requirements that parallel the Regulation S-K requirements being amended, such as Form 20-F for foreign private issuers, to provide consistency among disclosure requirements.

The amendments will become effective 30 days after publication in the Federal Register, except for the amendments regarding redaction of confidential information in material contracts, which will become effective on the date of publication in the Federal Register, and a three-year phase-in period for the new Inline XBRL data tagging requirement for the cover pages of certain filings.

Regulation S-K is an essential component of the SEC’s disclosure regime. It sets forth rules governing disclosure required by registrants in current, periodic and annual reports (e.g., Forms 8-K, 10-Q, 10-K and 20-F) as well as registration statements and proxy materials. Nearly every disclosure document that a reporting company files with the SEC incorporates disclosure required by Regulation S-K or other parallel SEC rules or forms.

While many of the changes outlined in the Release may appear to have limited practical implication, we note the following amendments that we believe will have the most significant impact on registrants:

- Under certain conditions, eliminating discussion of the earliest year of the previous three-year period included in Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”) (even where three years of financial statements are included in the filing) and allowing registrants to choose the form of presentation that they believe would best enhance reader understanding of the financial statements, rather than mandating a year-over-year comparison approach;

- Eliminating disclosure of certain information about a registrant's physical properties if physical properties are not material to such registrant's business (*g.*, for technology companies);
- Eliminating disclosure related to compliance with Section 16(a) reporting, unless the registrant has actual delinquencies to report;
- Allowing the redaction and omission of certain information, including schedules, attachments and personally identifiable information, from exhibits without the need to submit a confidential treatment request ("CTR");
- Eliminating the two-year look back for material contracts required to be filed as exhibits, unless such contracts have not been fully performed at the time of filing or the registrant is a newly reporting company; and
- Eliminating certain undertakings required in registration statements as duplicative of other required disclosure or as otherwise unnecessary due to developments since their adoption.

These and certain of the other amendments are described in greater detail below.

Newly Adopted RULE CHANGES

GENERAL		
SECTION OF REGULATION S-K	CURRENT RULE	CHANGES / COMMENTARY
Item 102: Description of Property	Requires disclosure of the location and character of principal plants, mines and other materially important physical properties of the registrant.	<ul style="list-style-type: none"> • Now requires disclosure only to the extent that physical properties are material to the registrant's business.

Item 303: MD&A

The instructions to Item 303 require a narrative discussion, in a year-over-year comparison format, of the full three-year period covered by the financial statements required to be included in a registrant's report or registration statement.

- No discussion of the earliest year of the three-year period is required to be included if such discussion was already included in a prior MD&A available through EDGAR.
- Clarifies that year-over-year comparisons are not required. Rather, registrants should choose the form of presentation that they believe would best enhance reader understanding of the financial statements.
- The final rule is more permissive than the proposed rule, which would have provided that a discussion of the earliest year could be omitted only if that discussion were “not material to an understanding of the registrant’s financial condition, changes in financial condition and results of operations.”
- *These amendments are meant to discourage repetition of immaterial information and encourage companies to take a “fresh look” at prior year MD&A. In particular, these changes encourage the use of alternative MD&A formats, such as a three-year comparison of particular line items (e.g., revenue or net income).*

GENERAL

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

Item 405(a) requires that registrants disclose each reporting person that failed to timely file a required Section 16 beneficial ownership report during the most recent year or prior fiscal years.

- Eliminates the heading “Section 16(a) Beneficial Ownership Reporting Compliance” unless the registrant has actual delinquencies to report; changes heading to read “Delinquent Section 16(a) Reports.”
- Eliminates the checkbox on the cover page of Form 10-K regarding Item 405 disclosures (and related instruction in Item 10 of Form 10-K).
- In determining whether there are any Section 16 delinquencies, allows registrants to rely on a review of Section 16 reports submitted on EDGAR and written representations from the reporting persons that no Form 5 was required (rather than registrants relying on Section 16 reports furnished to them).

REGISTRATION STATEMENT AND PROSPECTUS PROVISIONS

SECTION OF
REGULATION S-K

CURRENT RULE

CHANGES / COMMENTARY

REGISTRATION STATEMENT AND PROSPECTUS PROVISIONS

Item 501(b): Cover Page

Item 501(b) sets forth disclosure requirements related to the outside front cover of the prospectus.

- PROSPECTUS “SUBJECT TO COMPLETION” LEGEND: Removes portion of the legend stating that the prospectus is not an offer to sell securities in any state where the offer or sale is not permitted.
- OFFERING PRICE OF THE SECURITIES: Explicitly allows registrants to include a statement on the cover that the offering price will be determined by a particular method or formula that is explained in the prospectus (with a prominent cross-reference and page number) rather than explaining the method or formula on the cover.
- MARKET FOR THE SECURITIES: Expands disclosure of trading markets to include U.S. markets (and corresponding trading symbols) where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation. Also applies to foreign private issuers through parallel changes to Forms 20-F and 40-F.

Item 105 / Item 503(c): Risk Factors

Item 503(c) requires disclosure of the most significant factors that make an offering speculative or risky.

- Eliminates risk factor disclosure under Item 503, including the examples enumerated therein, so as to encourage registrants to draft a specific set of risk factors applicable to their particular business.
- Moves risk factor disclosure requirement (other than examples previously enumerated under Item 503(c)) to new Item 105.
- *Changes do not affect the content or placement of risk factors in required forms.*

REGISTRATION STATEMENT AND PROSPECTUS PROVISIONS

Item 512: Undertakings

Item 512 provides undertakings that a registrant must include in Part II of its registration statement.

- Eliminates the following undertakings as duplicative of other required disclosure or as otherwise unnecessary due to developments since their adoption:
- Item 512(c), relating to certain warrant or rights offerings and which is otherwise duplicative of the undertaking required by Item 512(a)(1);
- Item 512(d), relating to securities offered at competitive bidding, a concept that is now obsolete;
- Item 512(e), requiring that if a registrant's prospectus directly incorporates by reference the registrant's annual report to security holders or quarterly report, the registrant must deliver the latest annual or quarterly report with the prospectus, as such reports are now publicly available via EDGAR; and
- Item 512(f), requiring IPO issuers to provide certificated securities to underwriters at closing, as most equity offerings are now cleared and settled in book-entry form through the Depository Trust and Clearing Corporation.

EXHIBITS

SECTION OF REGULATION S-K

CURRENT RULE

CHANGES / COMMENTARY

EXHIBITS

Item 601(a)(5):
Information Omitted
from Exhibits

N/A

- Allows registrants to omit schedules and similar attachments to exhibits unless such information is material and is not otherwise disclosed in the exhibit or disclosure document. In such case, registrants must include with each exhibit a list briefly identifying the contents of any omitted schedules and attachments and provide, on a supplemental basis, a copy of any omitted schedule or attachment if requested by the SEC.
- Clarifies that registrants may remove personally identifiable information (e.g., social security numbers) from all exhibits filed under Item 601 without filing a CTR.

Item 601(b)(4):
Description of
Securities

Item 202 (Description of Securities) disclosure is required only in registration statements.

- Requires a brief description of registered capital stock, debt securities, warrants, rights, ADRs and other securities to be filed as an exhibit to Form 10-K filings. A registrant may incorporate this information by reference if previously filed as an exhibit to another filing and there have not been any changes to such information.

Item 601(b)(10):
Material Contracts

Item 601(b)(10) requires registrants to file as exhibits all material contracts entered into within the last two years, even if they have been fully performed at the time of filing.

- Eliminates two-year look back for material contracts that were fully performed prior to the filing date for all registrants other than newly reporting registrants, (i.e., those registrants filing a registration statement that, at the time of filing, are not subject to the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act).

EXHIBITS

Registrants must file a CTR with the SEC if they wish to omit or redact confidential information from material contracts or plans of acquisition, reorganization, arrangement, liquidation or succession otherwise required to be filed as exhibits.

- Allows registrants, without submitting a CTR, to omit confidential information from material contracts under Item 601(b)(10) and plans of acquisition, reorganization, arrangement, liquidation or succession under Item 601(b)(2) as long as such information is not material and would likely cause competitive harm if disclosed. Also expands this concept to certain exhibit-related requirements in specified disclosure forms to which Item 601(b)(10) does not apply.
- In such cases, registrants must: (i) mark the exhibit index to indicate that portions of the exhibits have been omitted; (ii) include on the first page of each redacted exhibit a statement that the indicated sections have been omitted from the filed version of the exhibit; and (iii) use brackets within the exhibit to indicate where information has been omitted.
- *The SEC staff will continue to selectively review the redacted exhibits in filings to assess compliance with the new rules and may request supplemental information comparable to that currently in CTRs.*

FORMS AND DELIVERY

FORMS 10-K, 10-Q,
8-K, 20-F AND 40-
F

CURRENT RULE

CHANGES

FORMS AND DELIVERY

Cover Page Tagging

Registrants are required to tag in eXtensible Business Reporting Language (“XBRL”) a specific group of data points that appear on the cover page of a filing document known as documented entity identifier elements (“DEIs”) such as form type, company name, filer size and public float.

- Expands XBRL tagging to require Inline XBRL tagging of all data points on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F and 40-F. The date of compliance depends on the type of filer, as follows:
- Large accelerated filers with financial statements in U.S. GAAP – Reports for fiscal periods ending on or after June 15, 2019.
- Accelerated filers with financial statements in U.S. GAAP – Reports for fiscal periods ending on or after June 15, 2020.
- All other filers – Reports for fiscal periods ending on or after June 15, 2021.

¹ Release No. 33-10618, *FAST Act Modernization and Simplification of Regulation S-K* (March 20, 2019). For a copy of the release, see <https://www.sec.gov/rules/final/2019/33-10618.pdf>.

8 Min Read

Related Locations

Charlotte

Chicago

Dallas

Houston

Los Angeles

New York

San Francisco

Silicon Valley

Washington, DC

Related Topics

Corporate

Capital Markets

Securities

Related Capabilities

Transactions

Capital Markets

Related Regions

North America

Related Professionals



Matt Bergmann



Steven J. Gavin



Sey-Hyo Lee



Talbert Navia



David A. Sakowitz



Claude Serfilippi



Kevin Smith



Bruce Toth