

SEC Proposes Rule Changes to Modernize Regulation S-K

OCTOBER 20, 2017

Background

On October 11, 2017, the Securities and Exchange Commission (the “SEC”) issued a release¹ proposing amendments to certain disclosure requirements in Regulation S-K and related forms and rules (the “Release”). The proposed amendments follow 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”). In the Release, the SEC stated that the proposed amendments are intended to encourage clarity and readability in disclosure documents and discourage repetition and unnecessary disclosure by registrants. The SEC’s proposed changes also are intended to better align Regulation S-K with modern realities, including the electronic availability of a registrant’s historical filings.

Regulation S-K is an essential component of the SEC’s disclosure regime. It sets forth significant rules governing disclosure required by registrants in periodic and annual reports (e.g., Forms 8-K, 10-Q and 10-K) 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.

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

- Eliminating disclosure of certain information about a registrant’s physical properties if physical properties are not material to such registrant’s business (e.g., for technology companies);
- Under certain conditions, eliminating MD&A discussion of the earliest year of the previous three-year period (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 related to compliance with Section 16(a) reporting, unless the registrant has actual delinquencies to report;
- Eliminating certain undertakings currently required in registration statements as duplicative of other required disclosure or as otherwise unnecessary due to developments since their adoption;

- Allowing the redaction and omission of certain information from exhibits without the need to submit a confidential treatment request; and
- Eliminating the two-year look back for material contracts required to be filed as exhibits, unless they have not been fully performed at the time of filing or the registrant is a newly reporting company.

These and certain of the other proposed rule changes are described in greater detail below.

Proposed Rule Changes

GENERAL

Item 102: Description of Property

Item 102 of Regulation S-K currently requires disclosure of the location and character of principal plants, mines and other materially important physical properties of the registrant. The SEC noted in the Release that many registrants' physical properties are not material to their businesses (e.g., for technology companies), and therefore this requirement often results in unnecessary disclosure.

Proposed Change:

Require disclosure only to the extent that physical properties are material to a registrant's business.

Item 303: MD&A

The instructions to Item 303 currently 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.

Proposed Changes:

- Require registrants to include only year-over-year comparisons for the most recent two years, even if three years of financial statements otherwise are included, when: (i) the filing covers the past three years; (ii) discussion of the earliest year is not otherwise material; and (iii) the registrant has filed its prior year Form 10-K containing an MD&A discussion of the earliest year in the three-year period.
- Clarify 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.
 - *This is meant to discourage repetition of immaterial information and encourage companies to take a "fresh look" at prior year MD&A. In particular, this change encourages the use of alternative MD&A formats, such as a three-year comparison of particular line items (e.g., revenue or net income).*

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. Under the current rules, registrants are to make that disclosure based solely on a review of furnished reports that it has received from those reporting persons.

Proposed Changes:

- In determining whether there are any Section 16 delinquencies, allow 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.
- Eliminate requirement that reporting persons furnish Section 16 reports to the registrant.
- Eliminate the heading "Section 16(a) Beneficial Ownership Reporting Compliance" unless registrant has actual delinquencies to report; change heading itself to read "Delinquent Section 16(a) Reports."

- Eliminate the checkbox on the cover page of Form 10-K regarding Item 405 disclosures (and related instruction in Item 10 of Form 10-K).

REGISTRATION STATEMENT AND PROSPECTUS PROVISIONS

Item 501(b): Cover Page

Proposed Changes:

- PROSPECTUS “SUBJECT TO COMPLETION” LEGEND: Exclude portion of the legend that states 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 allow registrants to include a statement that the offering price will be determined by a particular method or formula that is explained in the prospectus (with a cross-reference and prominent page number).
- MARKET FOR THE SECURITIES: Expand disclosure required to include markets other than national securities exchanges. Include markets where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation as well as corresponding trading symbols.

Item 503(c): Risk Factors

Proposed Change:

Eliminate the risk factor examples enumerated under Item 503(c) so as to encourage registrants to draft a specific set of risk factors applicable to their particular business.

Item 508: Plan of Distribution

Item 508(h) requires disclosure of discounts and commissions to be paid to dealers, and if such a dealer is paid to act as a “sub-underwriter,” the registrant can make a general statement to that effect. “Sub-underwriter” is undefined in the current rules.

Proposed Change:

Define “sub-underwriter” as a dealer that is participating in an offering by committing to purchase securities from a principal underwriter, but is not itself in privity of contract with the issuer of the securities.

Item 512: Undertakings

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

Proposed Changes:

- Eliminate the following undertakings as duplicative of other required disclosure or as otherwise unnecessary due to developments since their adoption:
 - Item 512(c) undertaking, relating to certain warrant or rights offerings and which is otherwise duplicative of the undertaking required by Item 512(a)(1);
 - Item 512(d) undertaking, relating to securities offered at competitive bidding, a concept that is now obsolete;
 - Item 512(e) undertaking, 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) undertaking, requiring IPO issuers to provide certificated securities to underwriters at closing, as most equity offerings are now cleared and settled in book-entry through the Depository Trust and Clearing Corporation.

EXHIBITS

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

Proposed Changes:

- Under new Item 601(a)(5), registrants may omit entire 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.
- Proposed Item 601(a)(5) would also clarify that registrants may remove personally identifiable information (e.g., social security numbers) from all exhibits filed under Item 601 without filing a confidential treatment request with the SEC.

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

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

Proposed Changes:

Require Item 202 information as an exhibit to Form 10-K filings. A registrant may incorporate this information by reference and provide a hyperlink if it previously filed Item 202 information 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) currently 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.

Proposed Changes:

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

Item 601(b)(10): Redaction of Confidential Information from Material Contracts

Currently, registrants must file a confidential treatment request with the SEC if they wish to omit or redact confidential information from material contracts otherwise required to be filed as exhibits.

Proposed Change:

Registrants may, without submitting a confidential treatment request, omit confidential information from material contracts as long as such information is not material and is competitively harmful if disclosed. In such case, 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.

Item 601(b)(21)(i): Subsidiaries

Proposed Change:

Require registrants to include a 20-character alpha-numeric legal entity identifier (“LEI”), if one has been obtained, for each subsidiary listed.

FORMS AND DELIVERY

Captions: Forms 10, 10-K and 20-F

Proposed Change:

Allow registrants to exclude or modify any captions and item numbers that are not expressly required by Regulation S-K.

Cover Page Tagging

Currently, 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.

Proposed Change:

Expand XBRL tagging to include all data points on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F and 40-F.

Request for Comments

The Release raises nearly 100 specific questions on which interested persons are asked to comment and also seeks general comments on the proposed amendments. Comments should be submitted within 60 days of publication of the proposed rules in the *Federal Register*.

¹ Release No. 33-10425, *FAST Act Modernization and Simplification of Regulation S-K* (October 11, 2017). For a copy of the release, see <https://www.sec.gov/rules/proposed/2017/33-10425.pdf>.

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