

# SEC Releases Proposal Aimed at Simplifying Public Company Disclosure

October 16, 2017

On October 11, the SEC proposed **amendments** designed to simplify public company disclosure, reduce repetition, eliminate outdated requirements and improve overall presentation and navigability. The proposal is part of the SEC's ongoing disclosure effectiveness initiative and responds to a legislative mandate under the FAST Act of 2015 to modernize and simplify requirements in Regulation S-K, the set of rules governing public-company disclosure. Many of the ideas were developed by the SEC staff in an earlier report delivered to Congress under the FAST Act, although in some cases the proposed amendments were altered following further study. The SEC is also proposing a few additional requirements. While the proposal does not address numerous other undertakings in progress that are part of the SEC's disclosure effectiveness initiative, it is a welcome incremental step in furtherance of the SEC's articulated goal of improving the public company disclosure regime for the benefit of both companies and investors. Highlights of the proposal are discussed below.

The SEC is soliciting public comment through mid-December.

## Form 10-K and Corresponding Sections of Offering Documents

### Management's Discussion and Analysis

The SEC is proposing to revise MD&A requirements in a manner consistent with existing interpretive guidance requiring companies to tailor the presentation to reflect their particular circumstances, and evaluate prior disclosure to eliminate repetition of information that is no longer material.

A company that includes three years of financial statements in a filing may omit discussion of the earliest year if the discussion is not material to an understanding of its financial condition, changes in financial condition and results of operations, and the discussion of the earliest year is included in the prior year's Form 10-K.

The proposed amendment would eliminate the explicit suggestion for year-to-year comparisons, and instead would provide that the company may use any presentation that in its judgment enhances a reader's understanding. The SEC noted that while almost all companies provide year-to-year comparisons, in some cases a company may determine that a narrative discussion for some or all of the years in the three-year period may be more appropriate, such as where some information about the earliest year in a three-year period remains material. The MD&A instructions would also be revised to remove the suggestion for a discussion of trends in the five-year selected financial data (although the data itself is still required).

Conforming changes to MD&A are proposed for Form 20-F, for foreign private issuers, but not for Form 40-F, which is used by some Canadian companies.

### Description of Property

The proposed amendments would clarify that a description of property is required only to the extent that physical properties are material to the company. Disclosure may be provided on an aggregated basis, if appropriate.

### Executive Officers

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

## Headings

To eliminate unnecessary cross-references, the proposed amendments would permit the exclusion of item numbers and captions in Form 10, Form 10-K and Form 20-F unless their inclusion is expressly called for (such as the caption for “Risk Factors”) and will allow companies to create captions tailored to their disclosure.

## Proxy Statement

### Section 16(a) Beneficial Ownership Reporting Compliance

The heading of this section would be renamed “Delinquent Section 16(a) Reports” and a new instruction would state that companies are to exclude the heading if they have no delinquencies to report.

Under the proposed amendments, companies would be required to review Section 16 reports that are available on EDGAR (instead of reports furnished to the company) to determine if there are Section 16 filing delinquencies. The requirement that reporting persons furnish Section 16 reports to the company would be eliminated and the checkbox on Form 10-K that indicates a company is not including disclosure of any Section 16 reporting delinquencies would be removed.

### Compensation Committee Report

The proposed amendments would clarify that emerging growth companies are excluded from the requirement to provide a compensation committee report.

## Offering Documents

### Forefront of Registration Statement and Cover Page of Prospectus

- Currently, the requirement for disclosure of a security’s offering price states that when it is impracticable to state the price, the method by which the price is determined must be explained on the cover page of the prospectus. The proposed amendments would permit this disclosure elsewhere in the prospectus.
- The “subject to completion legend” may omit the state law prohibition language when blue sky laws are preempted.

### Undertakings

- Undertakings that are duplicative of other rules or obsolete due to developments since their adoption are proposed to be eliminated.

## All Filings

### Exhibits

Under the proposal, some immaterial information in schedules to exhibits could be omitted.

- Companies would be permitted to omit schedules and similar attachments from exhibits unless they contain material information not otherwise disclosed in the exhibit or disclosure document. This rule is similar to the existing provision in S-K Item 601(b)(2) pertaining to acquisition agreements, but expands the accommodation to all exhibits filed under S-K Item 601, including material contracts. Companies must briefly identify the contents of omitted schedules or attachments and would be required to provide copies of omitted information to the SEC staff on request.
- A company could omit confidential information from material contract exhibits without a confidential treatment request if the company believes the information is not material and would be competitively harmful if disclosed. The company need not obtain prior permission from the SEC staff but would be required to mark the exhibit index and indicate in the filed exhibit that omissions have been made, and would need to use brackets to signify the omissions. The SEC

staff could request an explanation of the confidential treatment analysis as part of its review of a registration statement or subsequent review of periodic reports.

- The proposed amendments would codify existing SEC staff practice of permitting the omission of personally identifiable information from filed exhibits without a formal confidential treatment request.
- Currently, reporting companies must include, as exhibits to their registration statements and annual reports, all material contracts that either (i) have ongoing obligations or (ii) have no ongoing obligations but were entered into within the past two years. The requirement to include material contracts from the two-year period prior to the date of filing would be eliminated for all but newly reporting companies since these contracts would be available on EDGAR for other companies. Accordingly, reporting companies would only need to list material contracts with ongoing obligations in their exhibit index.
- Conforming amendments are proposed for Form 20-F but not Form 40-F.

## **Incorporation by Reference**

The proposed amendments would –

- Remove the five-year limit that restricts documents that are on file with the Commission from being incorporated by reference.
- Require hyperlinks to information that is incorporated by reference if that information is available on EDGAR.
- Prohibit incorporation or cross-referencing in financial statements of information from outside the financial statements unless specifically permitted by SEC rules (such as the incorporation in Form S-3 of Rule 3-05 financial statements filed on Form 8-K).

## **New Requirements**

The proposed amendments include the following new requirements for companies.

- A description of the rights and obligations of each class of securities registered under Section 12 of the Exchange Act that contains the substantive information required by S-K Item 202 would be required as a new exhibit to Form 10-K. Amendments or modifications to such rights during a fiscal year would be reflected in the disclosure provided in the next year's Form 10-K.
- Structured data tagging would be required for all information on the cover pages of Form 10-K, Form 10-Q, Form 8-K and annual reports on Form 20-F and Form 40-F. A new "Cover Page Interactive Data File" containing the machine-readable computer code would be filed as an exhibit.
- The cover pages of Form 10-K, Form 10-Q, Form 8-K and annual reports on Form 20-F and Form 40-F would be amended to include the trading symbol for each class of registered securities.
- Legal entity identifiers (if available) for the company and its subsidiaries would be required in Exhibit 21. A legal entity identifier is a 20-character, alpha-numeric code that allows for unique identification of entities engaged in financial transactions.
- The cover page of a prospectus would list the principal U.S. market for the securities being offered if the company engaged a broker-dealer and actively sought and achieved a quotation, along with the corresponding trading symbol. This expands the existing requirement that only requires information about a listing on a national securities exchange.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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