

SEC Adopts Rules to Modernize and Simplify Disclosure For Public Companies

March 28, 2019

On March 20th, the SEC voted to adopt rules intended to modernize and simplify public company disclosure, and reduce costs and burdens on public companies while continuing to provide all material information to investors. The rules were proposed in October 2017, and are intended to implement the SEC's mandate under the FAST Act of 2015.

Among other things, the new rules—

- provide flexibility in presenting management's discussion and analysis (MD&A) for historical periods;
- allow companies to omit confidential information from most exhibits without filing a confidential treatment request; and
- update rules relating to data tagging and hyperlinks for information incorporated by reference.

This is an incremental yet welcome step in furtherance of the SEC's articulated goal of improving the public company disclosure regime for the benefit of both companies and investors.

The new rules will generally be effective 30 days after publication in the Federal Register. The confidential treatment provisions will become effective immediately upon publication and certain of the data-tagging rules are subject to a three-year phase-in.

Form 10-K and Corresponding Sections of Offering Documents

Simplification of MD&A

- Companies are currently required to discuss their financial condition and results of operations in year-to-year comparisons covering the three-year period presented in the financial statements. The new rules will allow the company to omit discussion of the earliest of the three years in the MD&A, if the company's prior filings with the SEC already contained such discussion and it is not necessary to understand the company's financial condition, changes in condition, and results of operations. Companies will need to assess the continuing materiality of the discussion of the earliest year in determining whether to omit it.
- The new rules also eliminate the reference to five-year selected financial data for trend information and instead provide that the company may use any presentation that would enhance an investor's understanding of the company's financial condition.
- The SEC adopted equivalent changes for foreign private issuers reporting on Form 20-F.

Description of Property

In a welcome development for many technology and biotech companies, the new rules provide that a description of property is required only to the extent that physical properties are material to the company.

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Executive Officers

The new rules clarify that disclosures about executive officers need not be repeated in the proxy statement if included in Part I of Form 10-K and provided under the renamed section heading “Information about our Executive Officers.”

Proxy Statement

Beneficial Ownership Reporting Compliance

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

Companies have the option of reviewing only those 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 has been eliminated and the checkbox on Form 10-K that indicates whether the company expects to include disclosure of Section 16 reporting delinquencies has been removed.

Audit Committee Discussions with Independent Auditor

The requirement to disclose whether the audit committee discussed with the independent auditor matters required by AU section 380, *Communication with Audit Committees*, has been updated. Companies are now required to state whether the audit committee discussed with the independent auditor “the applicable requirements” of the PCAOB and the SEC.

Compensation Committee Report

The new rules clarify that emerging growth companies are excluded from the requirement to provide a compensation committee report.

Offering Documents

Forepart of Registration Statement and Cover Page of Prospectus

- If the prospectus cover page is unable to identify the offering price, the issuer may omit a lengthy description of the method for determining the offering price on the cover page and instead include a cross-reference to such detailed description later 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 have been eliminated.

Exhibits

Immaterial information in schedules to exhibits can be omitted.

- Companies will be permitted to omit confidential information from exhibits as long as the information is (i) not material to investors and (ii) would likely cause competitive harm to the company if disclosed publicly. 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 required to be filed, including material contracts. Companies must still clearly mark exhibits to indicate where

immaterial and competitively harmful information has been omitted, and any redactions will remain subject to review and comment at the SEC's discretion.

- The new rules codify existing SEC staff practice of permitting the omission of personally identifiable information from exhibits without a formal confidential treatment request.
- The requirement to include material contracts from the two-year period prior to the date of filing has been 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 new rules have been adopted for Form 20-F.

Incorporation by Reference

The final rules—

- Remove the five-year limit that restricts documents that are on file with the SEC from being incorporated by reference.
- Require hyperlinks to information that is incorporated by reference if that information is available on EDGAR.
- Prohibit having financial statements incorporate information by reference from other filings or cross-reference to disclosure in other parts of a filing, unless otherwise specifically permitted or required by the SEC's rules or by US GAAP or IFRS. The intent is to address concerns that referencing information outside the audited financial statements to satisfy financial statement disclosure requirements could create confusion about which financial information has been audited or reviewed by the independent auditor.

New Requirements

The final rules include the following new requirements.

- Companies will be required to include "Description of Capital Stock" disclosure as an exhibit to Form 10-K. The "Description of Capital Stock" is currently required in the IPO prospectus but often not included in subsequent filings.
- A description of each class of capital stock, debt and other securities registered under the Exchange Act will now be required as a new exhibit to Form 10-K. The description may be incorporated by reference to the security's offering documents if there have been no amendments since the offering.
- Companies also will be required to tag all cover page data in Inline XBRL.

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