

October 23, 2017

## SEC Issues Proposed Amendments Modifying and Simplifying Regulation S-K

On October 11, the Securities and Exchange Commission published proposed amendments (the “Proposed Amendments,” available [here](#)) to Regulation S-K and related rules and forms. The Proposed Amendments are intended to improve the readability and navigability of disclosure documents and discourage the disclosure of immaterial or repetitive information. Regulation S-K governs non-financial reporting requirements for SEC filings, including annual reports on Form 10-K, quarterly reports on Form 10-Q and proxy statements. The Proposed Amendments are based on the recommendations made in the SEC staff’s Report on Modernization and Simplification of Regulation S-K, as required by the Fixing America’s Surface Transportation Act of 2015 (the “FAST Act”).

The Proposed Amendments include the following:

- **Revisions to MD&A Disclosure Requirements.** The period-to-period comparison required in the Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”) by Item 303(a) of Regulation S-K would be limited to the two most recent fiscal years covered by the financial statements, rather than the existing three-year requirement, so long as the discussion of the earliest of the three years is no longer material to an understanding of the registrant’s financial condition, changes in financial condition and results of operations and that discussion has been included in the registrant’s previous Form 10-K. This revision to the MD&A is intended to improve the readability of filings by omitting previously disclosed, redundant information. In furtherance of prior MD&A guidance, the staff views this proposal as part of a broader effort to improve the quality of MD&A disclosures by encouraging registrants to re-evaluate disclosures in prior year MD&A and take a “fresh look” to determine whether such disclosures remain material.

A narrative discussion could also be used in lieu of the year-to-year comparisons as currently required if the registrant believes the narrative discussion is a more appropriate way of conveying the information. For example, if information for the earliest of the three years is necessary because it is material to an understanding of the registrant’s results of operations, the registrant may decide to provide a narrative discussion of that earliest year and a year-to-year comparison of the more recent two years. For foreign private issuers, conforming changes would be made to Form 20-F, but not to Form 40-F as the latter is largely prepared in accordance with Canadian disclosure standards.

- ***Streamlining of Confidential Treatment Provisions.*** The Proposed Amendments would allow registrants to omit confidential information from material contracts filed under Item 601(b)(10) where such information is both (1) not material and (2) competitively harmful if publicly disclosed, even where the registrant has not submitted a confidential treatment request as is currently required. Although registrants would not be required to submit a request, they would still be required to ensure that all material information is disclosed and that redactions are limited to those portions necessary to prevent competitive harm. In addition, registrants would be required to mark the exhibit index to indicate that portions of one or more exhibits have been omitted and to 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. The SEC would continue to selectively review filings to confirm that redactions are limited as required.
- ***Omission of Schedules and Similar Attachments.*** Registrants would be permitted to omit the filing of entire schedules and similar attachments to exhibits unless they contain material information and that information is not otherwise disclosed in the exhibit or the disclosure document. Registrants would be required to provide with each exhibit a list briefly identifying the contents of any omitted schedules or attachments. The SEC staff may request registrants to provide, on a supplemental basis, a copy of any omitted schedule or attachment. Personally identifiable information, such as bank account numbers, social security numbers, home addresses and similar information could also be omitted from exhibits without first requesting confidential treatment.
- ***Limitation on Material Contracts Required to be Filed.*** Currently, registrants must file material contracts not made in the ordinary course of business, provided that one of two tests is met: (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 within the last two years before the filing. The second test—the two-year look-back—captures material contracts that were performed before the filing date. The Proposed Amendments would eliminate the two-year look-back test for all registrants other than newly reporting registrants (*i.e.*, a registrant that had no reporting obligation at the time of the filing, whether or not it ever previously had been subject to reporting requirements, and any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation).
- ***Modifications to Risk Factor Requirements.*** Item 503(c) of Regulation S-K, requiring the disclosure of significant factors that make an offering speculative or risky, would be moved to Subpart 100 of Regulation S-K in order to reflect the expanded application of risk factor disclosure requirements to registration statements on Form 10 and periodic reports. The Proposed Amendments would also eliminate the currently enumerated risk factor examples.

- ***Simplification of Description of Property.*** The description of property requirement of Item 102 of Regulation S-K would be revised to focus only on the disclosure of the principal physical properties material to the registrant. Currently, disclosure is required for physical properties that are materially important to the registrant, which the SEC staff notes has in some instances elicited disclosure that is not material (for instance, in the case of registrants—such as those in the securities or information technology industry—that have no material physical properties).
- ***Description of Securities.*** Item 202 of Regulation S-K and Item 12 of Form 20-F require a registration statement to describe the terms of the securities being offered. In an effort to improve the ability of investors to gain access to information about their rights as security holders, the Proposed Amendments would require a registrant to provide this description, as an exhibit to its annual report, for all securities registered under Section 12 of the Exchange Act.
- ***Disclosure of Executive Officers.*** The Proposed Amendments would clarify that any disclosure about executive officers required by Item 401 of Regulation S-K would not need to be duplicated in the registrant’s proxy statement if the information is already included in Part I of the registrant’s Form 10-K under a separate section entitled “Information about our Executive Officers.”
- ***Updated Corporate Governance Reference.*** Existing Item 407(d) of Regulation S-K requires a registrant’s audit committee to state whether it has discussed with the independent auditor the matters required by AU section 380, *Communication with Audit Committees*. Because the reference to AU section 380 is now outdated, the SEC is proposing to update this reference by referring more broadly to the applicable requirements of the PCAOB and the SEC.
- ***Compliance with Section 16(a) of the Exchange Act.*** Item 405 of Regulation S-K would be revised to clarify that registrants may<sup>1</sup> rely only on (1) a review of Section 16 reports submitted on EDGAR and (2) any written representation that no Form 5 is required when determining whether there are any Section 16 delinquencies that must be disclosed in the registrant’s proxy statement. Consistent with staff interpretation, there would be no need to include any discussion of Section 16 ownership reporting if all reports were adequately and timely filed.
- ***Subsidiaries of the Registrant and Entity Identifiers.*** Item 601 of Regulation S-K requires a registrant to list all of its subsidiaries, the state or other jurisdiction of incorporation or organization of each, and the name under which such subsidiaries do business. Under the Proposed Amendments, registrants would be required to include the legal entity identifiers (“LEIs”) for it and each of its significant subsidiaries listed in the exhibit listing all subsidiaries of the registrant. A LEI is a 20-

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<sup>1</sup> The Proposed Amendments would make it clear that registrants are not limited in their inquiry regarding Section 16 delinquencies to these two filings and, if they find it necessary, they can supplement it with a review of other relevant sources of information.

character, alpha-numeric code that allows for unique identification of entities engaged in financial transactions.

- **Required Hyperlinks.** The SEC recently implemented new rules requiring registrants to include hyperlinks to exhibits in exhibit indexes. The Proposed Amendments would rationalize and expand requirements for hyperlinks to information incorporated by reference from previously filed documents available on EDGAR.
- **Incorporation by Reference.** The Proposed Amendments would prohibit incorporation by reference or cross-referencing in financial statements from outside the financial statements where to do so would “raise questions as to the scope of an auditor’s responsibilities” and would prohibit incorporation by reference of financial information required to be presented in comparative form for multiple years or periods unless the incorporation by reference covers the entire period for which comparative data are given. The Proposed Amendments would also eliminate the five-year limit on incorporation by reference and would consolidate the various rules governing incorporation by reference in order to streamline compliance.
- **Tagging Cover Page Data.** Although certain cover page data points are currently required to be tagged in XBRL, the Proposed Amendments would require that 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 be tagged in Inline XBRL. The Proposed Amendments would also require the cover page to include the tagged ticker symbol for each class of securities registered under the Exchange Act to facilitate investors’ efforts to search news websites and stock market data for information on registrants and distinguish between similarly named registrants.
- **Amendments to Forepart of Registration Statement.** Item 501(b) of Regulation S-K would be amended to, among other things, (1) eliminate the requirement for a registrant to change its name if it cannot be sufficiently differentiated from that of a “well known” company, (2) allow registrants to include a cross reference to the explanation of the method of computing the offering price for securities (with the method itself to be explained fully in the prospectus) if it is impracticable to state the price method or formula on the cover page of the registration statement (although this would not change the requirement for securities being offered at market price or at a price based on market price), (3) expand the cover page disclosure of markets for the registrant’s securities being offered to require not only disclosure of “national securities exchanges” but also of the principal U.S. markets for the securities being offered on which the registrant has actively sought and achieved quotation and (4) shorten the “subject to completion” legend.
- **Modifications to Undertakings Requirements.** The Proposed Amendments would update provisions of Regulation S-K in order to account for developments since their adoption or last

amendment by eliminating certain outdated, unnecessary and duplicative requirements for undertakings in registration statements.

As noted above, certain of the Proposed Amendments would also affect Form 20-F requirements. In addition, conforming changes would be made to the Form 20-F requirements to track the proposed changes to the exhibit requirements.

The Proposed Amendments also include parallel amendments to several rules and forms applicable to investment companies and investment advisers, including proposed amendments that would require certain investment company filings to include a hyperlink to each exhibit listed in the exhibit index of the filings and be submitted in HyperText Markup Language (HTML) format.

Comments in response to the request for comment are due 60 days after the publication of the proposing release in the Federal Register.

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While the Proposed Amendments may raise some interpretive questions, particularly in respect of MD&A disclosures, on balance they represent a useful first step towards modernizing public company disclosure. It remains to be seen whether the SEC will take a harder look at disclosure in light of how shareholders and other market participants obtain and digest information. In the meantime, the reference to taking a “fresh look” at disclosure serves as a useful reminder that the SEC staff for some time now has been urging registrants to mitigate “disclosure overload” by streamlining their disclosures, particularly in the MD&A, to make their reports more user-friendly, more readable and more understandable. The objective should be disclosure that is tailored to a registrant’s specific circumstances, contains no boilerplate discussions and presents material information that is not obscured by repetitive, less material or out-of-date information.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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