

Practice Update

SEC Proposes Rules to Modernize and Simplify Certain Disclosure Requirements in Regulation S-K and Related Rules and Forms

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On October 11, 2017, the U.S. Securities & Exchange Commission (the Commission) proposed amendments to simplify and modernize the disclosure obligation of public companies in an effort to reduce costs and burdens on registrants, improve the readability and navigability of disclosure, and to discourage repetition and disclosure of immaterial information. The Commission's proposed amendments to Regulation S-K and related rules and forms are largely based upon the recommendations of the staff's Report on Modernization and Simplification of Regulation S-K dated November 23, 2016, which was issued to satisfy the requirements of Section 72003(c) of the Fixing America's Surface Transportation Act.

The Commission's proposed amendments relate to the following topics covered by Regulation S-K and the related rules and forms:

- Management, Security Holders and Corporate Governance;
- Exhibits;
- Description of Property;

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Related Work

Capital Markets
Corporate

- Management's Discussion and Analysis of Financial Condition and Results of Operation;
- Registration Statement and Prospectus Provisions;
- Incorporation by Reference; and
- Manner of Delivery

The Commission's proposed amendments can be found [here](#). Public comments to the proposed amendments are due within 60 days after publication of the proposed amendments in the Federal Register.

Overall, the Commission's proposed amendments would make incremental modifications to Regulation S-K and would allow registrants to more efficiently disclose material information to investors.

Highlights of the Proposed Amendments

Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303 of Regulation S-K)

Item 303(a) requires registrants to discuss their financial condition, changes in financial condition, and results of operations and provide a discussion generally covering the three-year period covered by the financial statements. The Commission's proposed amendment to Instruction 1 of Item 303(a) would allow registrants to eliminate discussion of the earliest year in a filing with financial statements covering three years, in cases where (i) such discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations and (ii) the registrant has filed its prior year Form 10-K on the Electronic Data Gathering, Analysis and Retrieval System (EDGAR) containing management's discussion and analysis (MD&A) of the earliest of the three years included in the financial statements of the current filing.

The Commission's proposed amendments would also eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a), which currently requires that references to such selected financial data in Item 301 be provided where trend information is relevant. In addition, the Commission's proposed amendments would simplify Instruction 1 to Item 303(a) to emphasize that registrants may use any presentation that, in the registrant's judgment, would enhance a reader's understanding and that they would not be limited to year-to-year comparisons.

The Commission is proposing similar amendments to Item 5 of Form 20-F in order to maintain a consistent approach to MD&A for domestic registrants and foreign private issuers. However, the Commission is not proposing similar changes to Form 40-F, which permits Canadian issuers to use Canadian disclosure documents to satisfy the Commission's registration and disclosure requirements.

Exhibits (Item 601 of Regulation S-K)

Item 601 generally requires registrants to file complete copies of exhibits. The Commission's proposed amendments to Item 601 would allow registrants to omit entire schedules and similar attachments to exhibits unless (i) they contain material information and (ii) that information is not otherwise disclosed in the exhibit or the disclosure document. Registrants would have to provide with each exhibit a list briefly identifying the contents of any omitted schedules and attachments and would be required to provide, on a supplemental basis, a copy of any omitted schedules or attachments to the Commission staff upon request.

In addition, the Commission's proposed amendments would permit registrants to omit personally identifiable information from exhibits without making a formal confidential treatment request under Rule 406 or Rule 24b-2.

The Commission's proposed amendments would also allow confidential information to be omitted from material contracts filed as exhibits where such information is both (i) not material and (ii) competitively harmful if publicly disclosed, without a registrant submitting a confidential treatment request. Registrants would instead be required (i) to mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted, (ii) to include a prominent statement on the first page of each redacted exhibit that information has been omitted from the filed version of the exhibit and (iii) to indicate with brackets where the information has been omitted from the filed version of the exhibit.

The Commission is proposing similar amendments to Form 20-F in order to maintain a consistent approach to exhibit filing requirements for domestic registrants and foreign private issuers. However, the Commission is not proposing similar changes to Form 40-F.

Other Proposed Amendments

The Commission's other proposed amendments are largely technical in nature and intended to reduce duplicative and immaterial disclosure and to provide increased technological integration of a registrant's filings. A summary of such proposed amendments is provided below.

Description of Property (Item 102 of Regulation S-K)

Item 102 requires disclosure of the location and general character of the principal plants, mines, and other materially important physical properties of the registrant and its subsidiaries. The Commission's proposed amendments to Item 102 would clarify that a description of property is required only to the extent that physical properties are material to the registrant (including those properties that are material to its business) and may be provided on a collective basis, if appropriate.

Directors, Executive Officers, Promoters, and Control Persons (Item 401 of Regulation S-K)

Item 401 requires disclosure of identifying and background information about a registrant's directors, executive officers, and significant employees. The Commission's proposed amendments to Item 401 would clarify that a registrant that provides disclosure about executive officers as required under Item 401 in Part I of its Form 10-K is not required to repeat that information in its definitive proxy or information statement.

Compliance with Section 16(a) of the Exchange Act (Item 405 of Regulation S-K)

Item 405 requires registrants to disclose each reporting person who failed to file on a timely basis Section 16 reports during the most recent fiscal year or prior fiscal years. Section 16 reports are mandated by Section 16(a) of the Securities Exchange Act of 1934, as amended (the Exchange Act), which requires officers, directors, and specified types of security holders to report their beneficial ownership of a registrant's equity securities using forms prescribed by the Commission. The Commission's proposed amendments to Item 405 would allow registrants to rely on Section 16 reports electronically filed on EDGAR rather than reports furnished to the registrant and eliminate the requirement that Section 16 reporting persons furnish to the registrant duplicates of reports filed by them on EDGAR. Under the proposed amendments, registrants may rely on Section 16 reports filed on EDGAR but are not required to limit their inquiry to those filings.

In addition, the Commission's proposed amendments would (i) rename the "Section 16(a) Beneficial Ownership Reporting Compliance" heading to "Delinquent Section 16(a) Reports," (ii) eliminate the use of such heading if the registrant does not have Section 16(a) delinquencies to report and (iii) eliminate the checkbox on the cover page of

Form 10-K relating to Item 405 disclosures and the related instruction in Item 10 of Form 10-K.

Corporate Governance (Item 407 of Regulation S-K)

Item 407 contains several disclosure requirements related to corporate governance. The Commission's proposed amendments to Item 407 (i) update a reference to an outdated auditing standard (AU sec. 30) in Item 407(d)(3)(i)(B) by referring more broadly to the applicable requirements of the Public Company Accounting Oversight Board and the Commission and (ii) revise Item 407(e)(5) to clarify that emerging growth companies are not required to provide a compensation committee report.

Registration Statement and Prospectus Provisions - Outside Front Cover Page of the Prospectus (Item 501(b) of Regulation S-K)

Item 501 includes disclosure requirements related to the forepart of the registration statement and the outside front cover page of the prospectus. The Commission's proposed amendments to Item 501 include the following changes:

1. eliminating the portion of instruction to Item 501(b)(1) that discusses when a name change may be required and the exception to that requirement;
2. amending Instruction 2 to Item 501(b)(3) to explicitly allow registrants to include a clear statement that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus, which statement would be accompanied by a cross-reference to the offering price method or formula disclosure, including a page number that is highlighted by prominent type or in another manner;
3. amending Item 501(b)(4) to require disclosure of the principal United States market or markets for the securities being offered and the

corresponding trading symbols and limiting disclosure of markets that are not national securities exchanges to those principal United States markets where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation; and

4. amending Item 501(b)(10) to exclude the portion of the legend that relates to state law prohibitions on offers or sales when it would not apply and combining Items 501(b)(10) and (b)(11) without substantive change.

Risk Factors (Item 503(c) of Regulation S-K)

Item 503(c) requires disclosure of the most significant factors that make the offering speculative or risky. The Commission's proposed amendments would (i) relocate Item 503(c) from Subpart 500 to Subpart 100 to registration statements on Form 10 and periodic reports and (ii) eliminate the risk factor examples that are currently enumerated in Item 503(c).

Plan of Distribution (Item 508 of Regulation S-K)

Item 508 requires disclosure about the plan of distribution for securities in an offering, including information about underwriters. The Commission's proposed amendments would define the term "sub-underwriter" as a dealer that is participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but is not itself in privity of contract with the issuer of the securities.

Undertakings (Item 512 of Regulation S-K)

Item 512 provides undertakings that a registrant must include in Part II of its registration statement, depending on the type of offering. Item 512(c) sets forth undertakings that a registrant must include if it registers a warrant or rights offering to existing security holders and the securities not purchased by those security holders will be reoffered to the

public. The Commission's proposed amendments would amend Item 512(c) to eliminate the required undertakings that a registrant (i) after the expiration of the subscription period, supplement the prospectus to disclose the results of the subscription offer and the terms of any subsequent reoffer to the public and (ii) file a post-effective amendment to disclose the terms of any public reoffer made on different terms from the offer to existing security holders. Furthermore, the Commission's proposed amendments would eliminate Items 512(d), (e) and (f) because they are obsolete. Item 512(d) relates to undertakings in connection with registered securities offered at competitive bidding; Item 512(e) relates to undertakings in connection with a registrant's prospectus that incorporates by reference the registrant's annual or quarterly reports; and Item 512(f) relates to undertakings in connection with underwritten equity offering of non-reporting registrants.

Exhibits - Description of Registrant's Securities (Item 601(b)(4) of Regulation S-K)

Item 202 requires registrants to provide a brief description of their registered capital stock, debt securities, warrants, rights, American Depositary Receipts, and other securities. The Commission proposes to amend Item 601(b)(4) to (i) require registrants to provide the information required in Item 202(a)-(d) and (f) as an exhibit to Form 10-K, rather than limiting such disclosure to registration statements and (ii) to clarify that such disclosure would only be required for securities registered under Section 12 of the Exchange Act.

Exhibits – Material Contracts (Item 601(b)(10)(i) of Regulation S-K)

Item 601(b)(10)(i) requires registrants to file every material contract 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 not more than two years before that filing. The Commission's proposed amendments would limit the two-year look back test to newly reporting registrants.

Exhibits – Subsidiaries of the Registrant and Entity Identifiers (Item 601(b)(21)(i) of Regulation S-K)

Item 601(b)(21)(i) requires a registrant to list as an exhibit all of its subsidiaries, the state, or other jurisdiction of incorporation or organization of each, and the names under which those subsidiaries do business, subject to certain exceptions. The Commission's proposed amendments would require registrants to include in the exhibit the legal entity identifier (LEI), if one has been obtained, of the registrant and each subsidiary listed. An LEI is a 20-character, alpha-numeric code that allows for unique identification of entities engaged in financial transactions.

Incorporation by Reference (Item 10(d) of Regulation S-K)

Item 10 of Regulation S-K includes general requirements on the application of Regulation S-K and subsection (d) thereto stipulates how documents may be incorporated by reference. The Commission's proposed amendments would eliminate the prohibition against incorporating documents by reference if they have been on file with the Commission for more than five years.

Incorporation by Reference (Securities Act of 1933, as amended (the Securities Act), Rule 411, Exchange Act Rule 12b-23 and Related Rules under the Investment Company Act of 1940, as amended (the Investment Company Act) and the Investment Advisers Act of 1940, as amended (the Investment Advisers Act))

Rule 12b-23 governs incorporation by reference for registration statements filed pursuant to Sections 12(b) and (g) of the Exchange Act and reports filed

pursuant to Sections 13 and 15(d) of the Exchange Act. Rule 411 governs incorporation by reference for registration statements filed under the Securities Act. The Commission's proposed amendments would:

1. eliminate (i) the requirement in Rule 12b-23(a)(3) and Rule 411(b)(4) that copies of information incorporated by reference be filed as exhibits to registration statements or reports, (ii) the corresponding exhibit requirement in Item 601(b)(99)(ii) of Regulation S-K, (iii) the requirement in Rule 8b-23 that investment company registrants file with a registration statement or report a copy of any registration statement, report, or prospectus from which information is incorporated by reference which is not otherwise filed electronically and (iv) the requirement in Item 601(b)(13) to file a Form 10-Q as an exhibit when it is specifically incorporated by reference into a prospectus;
2. amend Rule 411, Rule 12b-23, and Rule 0-4 to require hyperlinks to information that is incorporated by reference if that information is available on EDGAR;
3. prohibit registrants from incorporating or cross-referencing information outside of the financial statements into their financial statements unless otherwise specifically permitted or required by the Commission's rules;
4. amend Rule 0-4 to restrict the incorporation of financial information required to be given in comparative form for two or more fiscal years or period unless the information incorporated by reference includes the entire period of the comparative data; and
5. incorporate several non-substantive changes to Rule 411, Rule 12b-23 and Rule 0-4 to streamline, clarify, and conform these rules.

Forms (Form 10, Form 10-K and Form 20-F)

The Commission's proposed amendments would allow registrants to exclude item numbers and captions or to create their own captions tailored to their disclosure for Form 10, Form 10-K and Form 20-F but would not affect captions expressly required by the forms or by Regulation S-K.

Manner of Delivery – Tagging Cover Page Data

The Commission's proposed amendments would require 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 to be tagged in Inline eXtensible Business Reporting Language (XBRL) in accordance with the EDGAR Filer Manual (or if Inline XBRL is not adopted, to require registrants to tag each cover page data point in an XBRL exhibit to the relevant filing). Registrants filing Form 20-F and Form 40-F would only be required to tag cover page data only when those forms are used as annual reports and not when they are used as registration statements.

The Commission's proposed amendments would also modify the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to include the trading symbol for each class of registered securities; the cover pages of Forms 10-Q and Form 8-K would also be modified to require the disclosure of the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act and each exchange on which they are registered.

In addition, the Commission is proposing amendments to certain forms used by investment companies and to Rule 102 of Regulation S-T; these amendments would apply hyperlinking and HTML requirements to facilitate access to exhibits for investors and other users and would be similar to the Commission's recently adopted rules requiring hyperlinks to most exhibits filed pursuant to Items 601, Form F-10 and Form 20-F.

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