SEC Adopts Rules to Streamline Disclosure Requirements

On March 20, 2019, the Securities and Exchange Commission ("SEC" or "Commission") adopted amendments to modernize and streamline disclosure requirements for public companies, investment advisors, and investment companies.[1][2] The SEC designed the amendments to eliminate unnecessary and outdated disclosures and effect certain technological updates, making it easier for investors to access and analyze material information in public filings. The Commission adopted the amendments pursuant to the SEC's mandate under the Fixing America's Surface Transportation Act ("FAST Act").[3] The FAST Act requires that the SEC improve and simplify Regulation S-K of the Securities Act of 1933, as amended (the "Securities Act").[4] Regulation S-K outlines the disclosure requirements for public companies. The amended rules are discussed in more detail below.[5]

I. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)

The amendments of Regulation S-K limit, in certain cases, the historical financial information that a filer must disclose. Previously, Item 303(a) required companies to disclose their current financial condition, changes in financial condition and results of operations on a year-to-year comparative basis. This usually takes the form of two separate year-over-year comparisons, resulting in the discussion of the financial statements relating to three separate years. The amendments allow filers to omit the discussion of the earliest of the three years and to present the discussion in whatever format is most effective, not necessarily a year-over-year comparison, if "such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with Item 303(a). Registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found."[6]

In their final form, the amendments allow this referenced discussion of an earlier financial period to appear in any prior EDGAR filings and does not limit the filing to a prior Annual Report on Form 10-K, as had been originally proposed by the SEC.[7] Any type of public filing may be used for this purpose. In the Proposing Release, the SEC emphasized the importance of registrants providing investors with all material information and evaluating whether the earliest year of financial information is material before deciding to exclude it.

II. Redaction of Confidential Information in Material Contract Exhibits (Item 601)

The amendments synthesize and streamline procedures for protecting confidential information that would otherwise be required to be filed as an exhibit. Previously, Item 601(b)(10) of Regulation S-K required filers "to file as an exhibit to their applicable disclosure document each of their material contracts entered into within the preceding two years or which is to be performed, at least in part, in the future."[8] Such contracts often contain

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[1] Final Rule available at https://www.sec.gov/rules/final/2019/33-10618.pdf.

[2] SEC press release available at https://www.sec.gov/news/press-release/2019-38

[3] See Fixing America's Surface Transportation Act (Pub. L No. 114-94).

[4] 17 CFR § 229.

[5] 17 CFR § 229.

[6] A parallel change was made to Form 20-F, applying this amendment to foreign filers as well as domestic filers.

[8] https://www.sec.gov/rules/final/2019/33-10618.pdf (p.27) ("[The SEC Staff agrees] with those commenters who stated that these exhibits are generally a subset of the material agreements filed under Item 601(b)(10) and should be treated the

confidential information. Prior to the amendments, filers were required to file a Confidential Treatment Request (a "CTR") in order to ensure that confidential portions of material contracts appeared in redacted form on EDGAR. The amendments to Item 601(b)(10) allow registrants to redact material contracts without having to file a CTR, so long as (i) the information is not material and (ii) disclosure would likely cause competitive harm. In the final rule release, the SEC also decided to expand the amendments to cover under Item 601(b)(2) exhibits relating to material plans of acquisition, reorganization, arrangement, liquidation, or succession. While the amendments should lessen the burden on filers by eliminating the need to file a CTR, the SEC states that "these procedural revisions do not limit the Commission or its staff's prerogative to scrutinize the appropriateness of a registrant's omissions of information from its exhibit." In addition, all of the required exhibit markings to identify redactions remain in effect.[9]

On April 1, 2019, the SEC Staff issued guidance on the amendments to Item 601(b) that clarifies the SEC's intended approach to compliance reviews. The SEC Staff explained that it will review the entire exhibit with the redacted portions highlighted and if the SEC Staff has comments on the redacted portions of the exhibit, it will provide these comments separately from the comments that it provides in the regular filing process in order to protect potentially competitive information from being disclosed.

The guidance also states that, for registration statements under the Securities Act and filings under the Securities Exchange Act of 1934 (the "Exchange Act"), the SEC will make public on EDGAR the request for a review of the unredacted exhibit and the closing letter. However, the SEC's comments or any dialogue surrounding the review of the redacted exhibits will not be released.

Furthermore, if the registrant provides supplemental information to the SEC as part of the compliance review process for the redacted portion of the exhibit, the registrant may request confidential treatment of those materials so long as they comply with the procedures outlined in Securities Act Rule 418 or Exchange Act Rule 12b-4.

Importantly, the amendments have not changed a registrant's ability to request confidential treatment under Securities Act Rule 406 or Exchange Act Rule 24b-2. If a registrant has a CTR pending upon the effectiveness of the new rules, the registrant may withdraw its confidential treatment request and instead rely on the amendments to Item 601(b) for redaction.

III. Financial Statements: Incorporation by Reference and Cross-Reference of Information (Rule 411, Rule 12b-23, Item 10(d) and Rule 12b-32)

The amendments seek to synthesize and streamline the various rules that govern incorporation by reference within public filings. SEC rules generally prohibit the use of cross-references and incorporation by reference in the financial statements in order to ease potential investor confusion regarding whether the referenced information has been audited. The amendments prohibit incorporation by reference or cross-reference in financial statements, except where such incorporation is "specifically permitted or required by the Commission's rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable."

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same way").

[9] The current rules require registrants to (1) mark the redacted portions of the exhibit or exhibits that have been omitted; (2) prominently state on the first page of the redacted exhibit that certain identified information has been redacted because it is not material and would be competitively harmful if disclosed; and (3) bracket where the information has been redacted.

In addition, the SEC has proposed corresponding rules for Investment Advisers and Investment Companies through updates to Rule 0-4 and Rule 0-6 of the Investment Adviser Act of 1940.

Furthermore, the amendments require that any information that is incorporated by reference as permitted be hyperlinked if the referenced information is available on EDGAR.

IV. Description of Property (Item 102)

The amendments clarify what properties a filer must disclose under Item 102 of Regulation S-K. Previously, under Item 102, filers were required to disclose "the location and general character of the principal plants, mines, and other materially important physical properties of the registrant and its subsidiaries." The SEC stated that Item 102 in its current form, specifically the use of the term "materially important," has caused confusion for registrants in terms of which properties required disclosure and which did not. For example, the headquarters of a technology company, where a computer programmer is located, is probably not as important to the business as the headquarters of a steel or manufacturing facility, where the plant itself is located.

The amendments revise Item 102 to require disclosure about physical properties *only* where material to the filer's business. The SEC stated that it believes that "registrants are best suited to determine which, if any, of their physical properties warrant discussion based on what is material to them in light of their particular circumstances." Thus, this amendment is intended to reduce unnecessary property disclosures while ensuring that those properties that are material to a filer's business are disclosed.

V. Management, Security Holders, and Corporate Governance (Items 401, 405 and 406)

The amendments make several changes to simplify the rules related to disclosure of management, owners, and security ownership. First, Item 401 of Regulation S-K requires registrants to disclose certain information regarding the identity of the registrant's directors, executive officers, and significant employees. Form10-K provides registrants the option to incorporate this information by reference to their definitive proxy or information statement, and Instruction 3 to Item 401(b) allows registrants to include this information in Part I for their Annual Report on Form 10-K. To make abundantly clear that registrants need not repeat the identifying information in either the proxy or information statement if they do so in Part I of their Annual Report on Form 10-K, the amendments move the language of Instruction 3 from Item 401(b) to become a general instruction under Item 401. This change is intended to clarify the intent of Instruction 3 and prevent unnecessary repetition.

Second, Item 407 is updated under the amendments to eliminate the checkbox on the cover of Form 10-K that identified that there is no delinquent filer disclosure in the 10-K. The SEC believes that this feature has outlived its usefulness.

Third, Item 405 is updated so that the required caption for disclosure will be changed to "Delinquent Section 16(a) Reports" and will only be required if the filer has something to disclose. The amendments also clarify that registrants may, but are not obligated to rely solely on Section 16 reports to determine if there are any Section 16 delinquencies that warrant disclosure.

VI. Changes to Front Cover Items (Item 501)

The amendments attempt to simplify the cover of a prospectus by updating Item 501 of Regulation S-K.

First, Item 501(b)(1), is being updated to eliminate the portion of the instructions addressing when a discussion of a name change for a registrant may be required. This change is intended to do away with unnecessary discussion regarding when a company must discuss its name change. Although the SEC still acknowledges that confusing company names could mislead investors, the SEC Staff believes that this issue is better addressed through other means.

Second, Item 501(b)(3) is being amended to allow filers to "include a clear statement on the cover page, when applicable, that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus." This rule applies to situations where it is not practical to provide a price for the securities being offered. In its previous form, in the absence of a price being stated, a method for determining the price must be disclosed on the cover which would typically result in a lengthy, complex footnote to the pricing table. However, this amendment allows filers to instead cross-reference to the pricing method within the disclosure document itself.

Third, Item 501(b)(4) is being updated: Under the current rules, registrants are only required to disclose, on the cover of their prospectus, any national securities exchanges where the securities being offered are listed. The amendments require registrants whose securities are not being offered on a national securities exchange to disclose on the cover of their prospectus the "principal United States market or markets for the securities being offered and the corresponding trading symbols."[10]

Last, Item 501(b)(10) is also being amended to allow registrants to exclude from the cover of their prospectuses the portion of the legend that refers to state law for offerings that are not prohibited by state blue sky laws. In effect, registrants will now be able to shorten the cover page legend, also known as the "red herring," language, by excluding the portion that references state law.

VII. Risk Factors, Plan of Distribution, Undertakings and Descriptions of Securities (Items 503, 508, 512 and 601)

Other amendments update and streamline the rules affecting disclosure of risk factors, plan of distribution, undertakings and descriptions of securities.

Item 503(c) of Regulation S-K requires the disclosure of the most significant risk factors for an offering. However, as of 2005, these risk factors are required to be disclosed not just in an offering context, but also in Exchange Act periodic reports and registration statements on Form 10. To better reflect this broader application, Item 503(c) is being relocated to a new Item, Item 105, which relates to the broader range of filings. The amendments also eliminate specific examples of risk factors that are listed in Item 503(c) as these examples, although meant to provide helpful guidance, could mislead registrants regarding what risk factors they have to disclose.

Item 508 requires disclosure regarding the distribution plan for securities in an offering. Under the amendments, Item 508 is being updated to 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."[11] Previously, this term had not been defined.

[10] Form 20-F has been amended in parallel, making this requirement applicable to foreign as well as domestic issuers.

[11] https://www.sec.gov/rules/final/2019/33-10618.pdf (p.56).

Item 512 provides for a number of undertakings that a registrant must include in its disclosure. Under the amendments, the following subparts of Item 512 are being eliminated as the SEC has deemed them obsolete or duplicative: Items 512(c), 512(d), 512(e), and 512(f).[12]

Item 601(b)(4) is also being amended to require registrants to file the description of their securities registered under Section 12 of the Exchange Act as an Exhibit to Form 10-K. Under the current rules, this description is only required in the registration statement covering the securities.

VIII. Effectiveness

The amendments will go into effect at various times. The amendments relating to the redaction of confidential information will become effective upon publication in the Federal Register. The remaining amendments will go into effect 30 days after publication in the Federal Register, with the exception that the requirements that certain data on the cover pages of certain filings be tagged will be phased in over a three year period.

IX. Conclusion

These amendments show the SEC's willingness to make disclosure requirements more beneficial to both investors and filers through a combination of reducing the burden on filers and integrating user-friendly technology. The amendments should be reviewed carefully with counsel in order to ensure compliance.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or C. Wallace DeWitt at 202.862.0501 or cwdewitt@cahill.com; or Debra Edelman at 212.701.3174 or dedelman@cahill.com.

[12] These Items set forth language required to be included for warrants and rights offerings (Item 512(c)), competitive bids (Item 512(d)), incorporated annual and quarterly reports (Item 512(e)), or equity offerings of non-reporting registrants (Item 512(f)).