

CLIENT ALERT

SEC Proposes Amendments to Modernize and Simplify Regulation S-K

October 20, 2017

AUTHOR

Jeffrey S. Hochman

As part of its ongoing efforts to modernize and simplify disclosure requirements, the SEC recently proposed various amendments to Regulation S-K and related rules and forms.¹ While many of the proposed changes are technical in nature, they demonstrate the SEC's continued efforts to improve public company reporting by updating or eliminating obsolete requirements, in a manner that reduces costs and burdens on registrants while focusing on providing material information to investors. The proposing release is yet other step forward in these disclosure simplification initiatives, following previous SEC recommendations and proposals and its earlier concept release in which it broadly reviewed much of Regulation S-K and sought input on how best to update and simplify current disclosure requirements, so that material information can be most effectively presented.² Comments on the proposal are due within 60 days of its publication in the Federal Register.

Description of Property

The proposal revises Item 102 of Regulation S-K to require disclosure only of material properties, recognizing that some registrants, such as those in the service and information technology industries, may not have any material physical properties. Descriptions may even be provided on a collective basis, if appropriate.

¹ See SEC Release No. 33-10425, *FAST Act Modernization and Simplification of Regulation S-K*, available [here](#).

² See the SEC's *Report on Modernization and Simplification of Regulation S-K* (the "[FAST Act Report](#)"), available [here](#), and our previous memoranda *SEC Proposes Specific Disclosure Simplifications*, available [here](#), and *SEC Issues Concept Release on Modernizing Regulation S-K*, available [here](#).

SEC Proposes Amendments to Modernize and Simplify Regulation S-K

Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A)

To streamline current MD&A disclosure, the release proposes that registrants need only provide a period-to-period comparison of the most recent two years, eliminating the previous year-to-year comparison. This elimination of the earlier comparison would be permitted so long as that discussion is (i) not material to an understanding of the company's financial condition or results of operations and (ii) contained in its previous year's Form 10-K. In so doing, the SEC hopes to encourage registrants to take a "fresh look" each period at their analyses to focus on material information and eliminate vestigial disclosures that are no longer relevant.

Exhibits/Confidential Treatment Requests

The proposal includes several items designed to minimize the burdens of filing required exhibits:

- *Confidential Treatment Requests.* To minimize the significant efforts required to prepare and submit confidential treatment requests, the proposal would permit registrants, *without* having to make such a request, to omit confidential information from material contracts if such information (i) is not material and (ii) would be competitively harmful if disclosed. Registrants would be required to indicate with brackets where information has been omitted and mark the exhibit index and include a prominent statement on the first page of the redacted exhibit to indicate that information in the marked sections of the exhibit has been omitted. Personally identifiable information, such as bank account and social security numbers, can also be redacted without a formal confidential treatment request. The filing would remain subject to SEC review to ensure that no more than is necessary to avoid competitive harm is omitted from the filing, similar to the current standards for confidential treatment requests.
- *Schedules to Exhibits.* The proposal would expand the current exception, currently available only for plans of acquisition or reorganization, that permits registrants to omit schedules to agreements filed as exhibits, unless they contain material information not otherwise disclosed. Similar to the current exception, registrants would be required to include a list identifying the contents of the omitted schedules.
- *Two-Year Lookback for Material Contracts.* The requirement to include material contracts entered into within the past two years (but no longer being performed) would be eliminated for registrants with established reporting histories, since those contracts will have been available in connection with their previous filings.

However, to make important information describing the company's securities registered under the Securities Exchange Act more readily available to investors, the proposal extends the current requirement (currently applicable only to registration statements) to also be included as an exhibit to Form 10-K. In addition, to facilitate the identification of participants and improve market transparency, each registrant would be required to include in the requisite exhibit listing its subsidiaries any "legal entity identifiers" ("LEIs") it has obtained for itself and each such listed subsidiary.

SEC Proposes Amendments to Modernize and Simplify Regulation S-K

Technical and Other Changes

The proposal, if adopted, would also:

- reorganize certain instructions and disclosures related to executive officers, eliminate the checkbox on the cover of Form 10-K relating to delinquent Section 16 reporting and delete the requirement that reporting persons provide a copy of their Section 16 reports to the registrant;
- update certain corporate governance disclosures;
- provide greater flexibility for disclosures relating to offering price methodology and state securities legends on the cover page of prospectuses, require disclosure of all principal U.S. markets for the securities and their trading symbols, and eliminate certain obsolete or duplicative undertakings required in registration statements;
- relocate and revise the instructions relating to risk factor disclosure, which now also apply to periodic reports, to better emphasize their principle-based requirements and focus registrants on tailoring their own disclosures;
- require hyperlinks to information incorporated by reference if available on EDGAR, expanding the recently adopted hyperlink requirements;
- permit registrants to exclude most item numbers and captions, to improve readability; and
- require the XBRL tagging of all items included on the covers of Forms 10-K, 10-Q, 8-K and 20-F.

Conclusion

This proposal is another step forward in the SEC's long-term efforts to modernize and simplify the reporting process, while reducing the burden on registrants. The proposal follows many of the recommendations contained in its previous FAST Act Report to update the SEC's regulations, simplify its forms and utilize technology to make disclosure more meaningful and accessible to investors. We would expect the SEC, under the new leadership of Chairman Jay Clayton, to continue and even accelerate this process, emphasizing and encouraging the materiality and readability of disclosures.

SEC Proposes Amendments to Modernize and Simplify Regulation S-K

If you have any questions regarding this client alert, please contact the following attorney or the attorney with whom you regularly work.

Jeffrey S. Hochman

212 728 8592

jhochman@willkie.com

Copyright © 2017 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000, and our fax number is (212) 728-8111. Our website is located at www.willkie.com.