

SEC Proposes Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure

On October 11, the Securities and Exchange Commission proposed amendments to a wide range of its disclosure rules and forms with the goals of updating, streamlining and otherwise improving the SEC's disclosure requirements applicable to public companies, investment companies and investment advisers. Reporting companies are likely to consider a few of the proposed amendments to be helpful, if modest, improvements and disclosure counsel and others will welcome many of the more technical proposed amendments. Nevertheless, the proposed amendments will not result in substantial reductions of the disclosure costs and burdens on public companies.

According to the SEC's proposing release (available [here](#)) the proposed rule amendments are aimed at

- revising Regulation S-K and various other SEC rules and forms to modernize and simplify specific disclosure requirements for public companies, investment advisers, and investment companies
- reducing disclosure costs and burdens on public companies, while continuing to provide all material information to investors
- improving the readability and navigability of public company disclosures
- utilizing technology to make disclosure more accessible and
- discouraging redundant disclosures and disclosures of immaterial information

The amendments are proposed pursuant to a mandate under the 2015 Fixing America's Surface Transportation (FAST) Act and are largely based on recommendations made in the SEC staff's Report on Modernization and Simplification of Regulation S-K (available [here](#)), which was also mandated by the FAST Act. The proposed rules will be open for public comment for 60 days.

Highlights. Most notable among the proposed changes are:

- **MD&A—Elimination of Year-to-Year Comparisons For Prior Fiscal Years**
Currently, Instruction 1 to Item 303(a) of the SEC's Regulation S-K requires that reporting companies must, in the management's discussion and analysis of financial

Related Capabilities

- Corporate Governance & Compliance

condition, changes in financial condition, and results of operations (“MD&A”), cover the three-year period covered by the financial statements included in registration statements and periodic reports. In doing so, reporting companies are directed to use either “year-to-year comparisons or any other formats that in the reporting company’s judgment would enhance a reader’s understanding.” The instruction also states that reference to the five-year selected financial data may be necessary where trend information is relevant.

- The SEC’s proposal would eliminate (in most cases) the earliest year from the year-to-year comparisons when financial statements included in a filing cover three years, provided that including the earliest year would not be material to understanding a reporting company’s financial condition and results of operations and that fiscal year is covered by the MD&A disclosure included in a prior SEC filing. The proposal would also revise Instruction 1 to Item 303(a) to eliminate reference to five-year trend disclosure.
- To maintain consistency for foreign private issuers, the SEC’s proposed corresponding changes to Form 20-F.

- **Exhibits—Omission of Certain Information, Schedules and Exhibits Without Filing a Confidential Treatment Request**

Item 601 of Regulation S-K generally requires reporting companies to file complete copies of exhibits, including all schedules and other attachments to agreements, with the exception of exhibits that are plans of acquisition, reorganization, arrangement, liquidation, or succession, for which schedules and attachments may generally be omitted if not material. In order to omit any portions of an exhibit, including the schedules and attachments to a material agreement, reporting companies must request confidential treatment of the information at the time of filing.

- **Schedules and Similar Attachments to Exhibits.** The SEC’s proposal would permit reporting companies to omit entire schedules and similar attachments to material agreements and other exhibits unless the omitted portions contain material information that is not otherwise disclosed in the exhibit or the disclosure document. Reporting companies electing to omit such schedules and attachments would be required (1) to provide with each exhibit a list briefly identifying the contents of any omitted schedules and attachments and (2) to provide, on a supplemental basis, a copy of any omitted schedules or attachments to the SEC staff upon request.
- **Personally Identifiable Information in Exhibits.** Exhibits required under Item 601 of Regulation S-K may often contain information that “would constitute a clearly unwarranted invasion of personal privacy” (“PII”). Although the SEC staff generally does not object when reporting companies omit PII from exhibits without submitting a confidential treatment request, existing disclosure rules do not expressly permit this practice. Under the SEC’s proposed amendments, reporting companies would have express authority to omit PII from exhibits without filing a confidential treatment request or other analysis.
- **Redact Confidential Information in Material Contract Exhibits.** The SEC’s proposed amendments to Item 601(b)(10) of Regulation S-K would permit reporting companies to omit confidential information from material contracts filed as exhibits to the extent such information is not material and would be competitively harmful if publicly disclosed. Reporting companies will not need to submit a confidential treatment request to omit the information, but will be required indicate that information has been omitted by (1) marking the exhibit index, (2) a prominent statement on the first page of each redacted exhibit and (3) indicating

with brackets where the information has been omitted from the filed version of each redacted exhibit. Upon SEC staff request, reporting companies would need to provide supplemental materials similar to a confidential treatment request and an analysis of why the redaction is appropriate.

- **Exhibits—Relief From Two-Year Look-Back Requirement For Material Agreements**

Currently, under Item 601(b)(10)(i) of Regulation S-K, the SEC requires reporting companies to file any material agreement entered into up to two years before the relevant filing even if the agreement has been fully performed or terminated. The SEC's proposed amendments would relieve companies with established reporting histories from the two-year look back requirement, which would only apply to newly public companies. Of course, previously filed agreements would remain accessible in the established companies' EDGAR files. This change would also apply to reports on Form 20-F filed by foreign private issuers (other than Canadian issuers filing on Form 40-F, which would remain largely consistent with Canadian disclosure standards).

- **Simplify and Harmonize Incorporation By Reference Rules**

To reduce duplicative filings, many of the SEC's rules and forms permit public companies to incorporate by reference to previously filed information in many cases, although the requirements for, and limitations on, incorporation by reference differ among various forms. As the rules and instructions governing incorporation by reference have developed over time, they have been spread throughout a variety of SEC regulations and forms.

- The proposed amendments would streamline the requirements associated with incorporation by reference and facilitate investor access to incorporated documents by using hyperlinks. The SEC's proposal would also harmonize the incorporation by reference rules applicable to investment companies and investment advisers.
- The SEC's proposal would also revise the SEC's rules and forms to prohibit incorporation by reference or cross-referencing into financial statements information located elsewhere in a filing. Conversely, the proposed amendments would allow information contained in financial statements to be incorporated or cross-referenced to satisfy narrative disclosure requirements in parts of a filing outside of the financial statements.

Other Changes. The SEC's proposed rule amendments would also make changes to clarify and update several other disclosure rules, update references and eliminate out of date requirements. Among others, these changes would affect:

- **Description of Property—Focus on Material Properties.** Item 102 (Description of Properties) of Regulation S-K would be revised to emphasize that disclosure of physical properties is only necessary to the extent the properties are material to the reporting company and that disclosure can be presented on a collective basis, if appropriate.
- **Hyperlinks.** Reporting companies would be required to include hyperlinks to information that is incorporated by reference into a filing if the information is available on EDGAR. To accommodate the hyperlinks, filings that are subject to the proposed hyperlinking requirements would have to be made in HTML format.
- **Undertakings.** Certain undertakings required in registration statements would be eliminated.
- **Description of Securities.** The existing requirement that reporting companies provide in registration statements a brief description of their registered capital stock,

debt and other securities would become a requirement to provide such a description as an exhibit to Form 10-K. The exhibit would only call for a description of securities that are registered under Section 12 of the Exchange Act.

The SEC's proposal also includes technical amendments to Regulation S-K Item 407 (Corporate Governance), Item 501 (Forepart of Registration Statement and Outside Front Cover Page of Prospectus) and Item 508 (Plan of Distribution), among others.

The Take-Away

A majority of the proposed amendments are focused on cleaning up and modernizing relatively technical aspects of the SEC's complex framework of disclosure rules. In many cases, these technical amendments are beneficial improvements, but overall they would have marginal effects on the costs and burdens of disclosure compliance, at best.

A few of the proposed amendments, such as eliminating prior-year comparisons from MD&A and the reducing the need to file confidential treatment requests in order to redact information from exhibits would be welcome, though modest, reductions of the burdens of complying with existing SEC disclosure rules.