



Securities Law ADVISORY ■

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SEC Proposes Rules to Modernize Regulation S-K Disclosure Requirements

During an open meeting on October 11, 2017, the Securities and Exchange Commission (SEC) voted to propose amendments to modernize and streamline the disclosure requirements for public companies, investment advisers, and investment companies under Regulation S-K as well as improve the readability and navigability of disclosure documents and discourage repetition and disclosure of immaterial information.

Background

The SEC first began its evaluation of its disclosure requirements under Regulation S-K in December 2013, when it issued a [report](#) on its disclosure requirements, which was mandated by the Jumpstart Our Business Startups (JOBS) Act. Based on the recommendations in the report, the SEC staff “initiated a comprehensive evaluation of the type of information [the SEC’s] rules require issuers to disclose, how this information is presented, where and how this information is disclosed, and how [the SEC] can better leverage technology as part of these efforts,” which has been ongoing since that time.

In December 2015, Congress passed the Fixing America’s Surface Transportation (FAST) Act, which directed the SEC to modernize and simplify the requirements in Regulation S-K. The SEC completed its study of Regulation S-K’s requirements as required by the FAST Act in November 2016, set forth in a report issued to Congress (the “[FAST Act Report](#)”); the amendments proposed at the recent open meeting are implementing the recommendations contained in the report.

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Proposed Amendments

The SEC's proposal was published in a 253-page proposing release, and proposed amendments make changes to the following items:

- Description of Property (Item 102).
- Management's Discussion and Analysis (Item 303).
- Directors, Executive Officers, Promoters, and Control Persons (Item 401).
- Compliance with Section 16(a) of the Exchange Act (Item 405).
- Corporate Governance (Item 407).
- Forepart of Registration Statement and Prospectus Cover Page (Item 501(b)).
- Risk Factors (Item 503(c)).
- Plan of Distribution (Item 508).
- Undertakings (Item 512).
- Information Omitted from Exhibits (Item 601).
- Various rules related to incorporation by reference.

The SEC's proposing release is available [here](#) and contains descriptions of these proposed amendments.

Highlights of Amendments

Description of Property (Item 102)

As currently drafted, Item 102 requires the disclosure of "principal" plants, mines, and other "materially important" physical properties. In an effort to emphasize materiality, the SEC's proposed amendments require disclosure of physical properties only to the extent they are material to the registrant and allow descriptions of properties to be provided on a collective basis, if appropriate.

Management's Discussion and Analysis (Item 303)

The SEC is proposing to amend Item 303 to allow registrants that provide financial statements covering three years to only provide discussion in connection with the two latest years and not the earliest year in some situations. Discussion regarding the earliest year would not be required if (1) the discussion is immaterial to understanding the registrant's financial condition, changes in financial condition, and results of operations; and (2) the registrant has filed its prior year Form 10-K on EDGAR that includes a discussion of the earliest of the three years in the financial statements of the current filing.

Directors, Executive Officers, Promoters, and Control Persons (Item 401)

As currently drafted, Instruction 3 to Item 401(b) allows disclosure of information about executive officers to be included in Part I of Form 10-K and not repeat the information in its definitive proxy or information statement. Although the instruction applies to all of Item 401, its location next to Item 401(b) causes confusion about its applicability. In an effort to eliminate any confusion, the SEC proposes to move the instruction from its current location and make it a general instruction to Item 401. In addition, the proposed amendments change the required caption for the disclosure if it appears in Item 1 of the Form 10-K to "Information about our Executive Officers."

Compliance with Section 16(a) of the Exchange Act (Item 405)

Section 16(a) of the Exchange Act requires officers, directors, and certain security holders to report their beneficial ownership of a registrant's equity securities on a form prescribed by the SEC. If a required reporting person does not file the form on time, the registrant must disclose it under the caption "Section 16(a) Beneficial Ownership Reporting Compliance." In addition, Section 16(a) also requires the reporting persons to furnish a duplicate of the reports to the registrant. The SEC's proposed amendments eliminate the requirement of reporting persons to provide the reports to the registrant and instead encourage the registrant to rely on the reports filed on EDGAR by the reporting persons. Finally, the SEC also proposed amendments to eliminate the disclosure of "Section 16(a) Beneficial Ownership Reporting Compliance" when the registrant does not have any delinquencies to report and to change the heading of the section to "Delinquent Section 16(a) Reports" when there are delinquencies to report.

Corporate Governance (Item 407)

The SEC staff recommended in the FAST Act Report that a reference to an outdated auditing standard in Item 407(d)(3)(i)(B) be revised and that Item 407(e)(5) be updated to clarify that emerging growth companies are not required to provide a compensation committee report. In its proposed amendments, the SEC implements both of these recommended revisions to Item 407.

Risk Factors (Item 503(c))

Item 503(c) requires the disclosure of risk factors that might make an offering speculative or risky. Currently, it is located in Subpart 500 because it is an offering-related disclosure requirement. The SEC wants to expand the disclosure of risk factors to registration statements on Form 10 and periodic reports and therefore proposes to move the risk factors disclosure from Subpart 500 to Subpart 100. As proposed, Item 503(c) would become a new Item 105. Additionally, as currently drafted, Item 503(c) enumerates specific examples of certain risk factors; however, the SEC proposes to eliminate the specific examples so as not to confuse registrants or suggest that addressing each of the examples is required.

Plan of Distribution (Item 508)

Item 508 uses the term "sub-underwriter," which is not a defined term. Item 508 also uses the term "principal underwriter," which is a defined term in Regulation C. To eliminate possible confusion in providing the disclosure required by Item 508, the SEC is proposing to incorporate a definition for sub-underwriter into Regulation C.

Information Omitted from Exhibits (Item 601)

Separately, Item 601 currently requires that registrants file complete copies of exhibits. Item 601(b)(2) currently allows registrants to omit schedules and similar attachments from material acquisition agreements unless they contain information that is material to an investment decision and unless the information is not otherwise disclosed in the agreement or the disclosure document. Securities Act Rule 406 and Exchange Act Rule 24b-2 permit a registrant to request confidential treatment of certain information included in an exhibit, but the SEC staff frequently allows registrants to omit personally identifiable information from exhibits without submitting a confidential treatment request.

The SEC proposes to add new paragraph (a)(5) under Item 601 to allow registrants to omit schedules and similar attachments from all exhibits unless they contain material information or unless that information is already disclosed in the exhibit or disclosure document. Registrants taking advantage of this rule would be required to list the omitted schedules and attachments in the exhibit and would be required to provide the omitted schedules and attachments to the SEC staff on a supplemental basis upon request. The SEC also proposed to add new paragraph (a)(6) to allow registrants to omit personally identifiable information. Additionally, the SEC proposes to revise Item 601(b)(10) to permit registrants to omit confidential information from material contracts without requesting confidential treatment so long as the information is not material and is competitively harmful if publicly disclosed. Registrants would be required to indicate in the exhibits where confidential information has been omitted.

Various rules related to incorporation by reference

The proposed amendments include various changes to the exhibits provided by registrants. Item 202 requires the registrant to provide a description of all of its securities in registration statements, but not in its Form 10-K or Form 10-Q. The SEC proposes to require registrants to provide this information as an exhibit to Form 10-K as well.

The proposed amendments also 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.

Next Steps

Upon publication of the proposed amendments in the *Federal Register*, a comment period of 60 days will commence when comments to the proposed amendments may be submitted by industry participants and other interested parties. Comments will be accepted electronically through the SEC's website, by email, or the Federal Rulemaking Portal; paper comments can be mailed to the SEC's office in Washington, D.C.

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WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-8580 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333