

The Legal Intelligencer

The FAST Track to Disclosure: The SEC Amends Regulation S-K Rules

April 26, 2019

By Katayun I. Jaffari and Nathaniel J. Stanger

On April 2, the Securities and Exchange Commission (SEC) published final rules to modernize and simplify certain disclosure requirements within Regulation S-K pursuant to the Fixing America's Surface Transportation Act (FAST Act), which was signed in to law by President Barack Obama on Dec. 4, 2015. A majority of the amendments to Regulation S-K are effective May 2. Those with different effective or compliance dates are identified below.

The principal purpose of the FAST Act is to authorize long-term funding for transit and highway projects. However, nestled within the FAST Act are multiple amendments to the federal securities laws. Under Section 72003 of the FAST Act, the SEC was required “to carry out a study of the requirements of Regulation S-K to determine how best to modernize and simplify disclosure requirements,” and to submit a report of the findings to Congress. The SEC conducted this study and issued the report to Congress on Nov. 23, 2016. Additionally, under Section 72002 of the FAST Act, the SEC was required to, among other things, “eliminate duplicative, overlapping, outdated or unnecessary provision of Regulation S-K.” The changes to Regulation S-K adopted this month are in response to this second requirement and are intended to reduce disclosure burdens and costs on reporting companies, eliminate redundancy and repetition of information in public filings and improve readability of disclosure so that investors can more easily analyze material information.

OVERVIEW OF THE AMENDMENTS

Management’s discussion and analysis—The instructions to Item 303(a) of Regulation S-K were amended to lighten the disclosure burden on companies that provide financial statements covering three years in an SEC filing. Such companies are no longer required to include a discussion of the earliest of the three years if such discussion was already included in a previous EDGAR filing that required disclosure under Item 303. Any company taking advantage of this change must include a statement that identifies the location in the prior filing where the omitted discussion can be found.

Changes to Exhibit 601(b)(10), material contracts—Only newly reporting companies must file material contracts not made in the ordinary course of business that were entered into within two years of the date the registration statement or report is filed. Prior to this change, all registrants were required to file material contracts entered into within the two years prior to the filing.

Redaction of confidential information in Exhibits 601(b)(2) and 601(b)(10), plan of acquisition, reorganization, arrangement, liquidation, or succession and material contracts—Effective April 2, companies may redact provisions or terms from certain exhibits without filing a confidential treatment request as long as the information is “not material and

would likely cause competitive harm to the registrant if publicly disclosed.” If information is redacted, the registrant should indicate or mark within the exhibit index that portion(s) of the exhibit(s) have been omitted and include a prominent statement on the first page of the respective exhibit that information has been excluded because it is not material and would likely cause competitive harm to the registrant if publicly disclosed. Additionally, brackets must be included where the information is omitted in the filed version of the exhibit. The SEC also recently issued guidance stating that it intends to review filings for compliance with this rule and explained the process by which it will review un-redacted versions of the redacted exhibits to minimize the risk of inadvertent public disclosure of competitive information.

Schedules and attachments to exhibits no longer required—In addition to a much more simple redaction process, companies are no longer required to file schedules or attachments to exhibits, provided that the schedules or attachments do not contain material information and such information is not otherwise disclosed in the exhibit or in the disclosure document. Each exhibit must contain a list that briefly identifies the contents of all of the omitted schedules, but such a list is not required if the omitted information is already included within the exhibit in a way that conveys the subject matter of the omitted schedules and attachments.

New Form 10-K Exhibit 601(b)(4)(vi), description of securities—Companies going forward are required to include as an exhibit in the Form 10-K a description of each class of the registrant’s securities that are registered under Section 12 of the Exchange Act. The information that must be disclosed is contained in Items 202(a)-(d) and (f) of Regulation S-K, which covers any capital stock, debt securities, warrants and rights, other securities or depository shares to be offered or registered. The Item 202 information is only required for securities that are registered as of the end of the period covering the report. Disclosure is also required for classes of securities that have not been retired by the end of the period covered by the report. Additionally, companies may incorporate by reference to an exhibit previously filed in satisfaction of Item 601(b)(4)(vi) as long as none of the information specified in Item 202 has changed since the filing date of the linked filing.

Description of physical property—The introductory text and the instructions to Item 102 of Regulation S-K were amended to require disclosure of the location and general character of a registrant’s physical properties only to the extent they are material to the business. The amendment also guides companies in how to determine materiality. Prior to the amendment, companies had to disclose the location and general character of all principal plants.

Changes to Form 10-K, 10-Q and 8-K cover page—The cover pages on Form 10-K, 10-Q, 8-K, 20-F and 40-F were revised to require companies to disclose the name of the exchange on which their securities are registered, the trading symbol and the title of each class of securities. The checkbox on Form 10-K regarding delinquent reporting under Section 16(a) of the Securities Exchange Act of 1934, as amended (Exchange Act), was also removed. Additionally, all cover page information must now be tagged using InLine XBRL. Any cover page interactive data files not embedded in the cover page must be included in new exhibit 601(b)(104). The new InLine XBRL rules have a three-year phase in compliance period that is tied to the registrant’s filing status. Large accelerated filers must comply beginning with fiscal periods ending on or after June 15.

Changes to delinquent Section 16 disclosure—As noted above, the checkbox on the cover page of Form 10-K regarding delinquent reporting under Section 16(a) of the Exchange Act has been removed. Additionally, the heading required by Item 405, which appears in the proxy statement, has been changed to “delinquent Section 16(a) reports.” Item 405 of Regulation S-K as amended also authorizes and encourages companies to exclude the heading when there are no delinquencies to report.

Incorporation by reference and hyperlinking—If any document or part of a document is incorporated by reference in a filing, companies do not need to file the document as an exhibit. Instead, companies are required to include an active

hyperlink to the information that is incorporated by reference. Companies must also include a statement that expressly and clearly describes the specific location of the information being incorporated by reference. This statement must be included at the exact place where the information is required in the filing.

Prohibition on incorporating by reference and cross-referencing in financial statement—Financial statements included in a filing can no longer incorporate by reference or cross-reference to information outside the financial statements, including in other parts of the same filing, unless permitted by SEC rules, generally accepted accounting principles (GAAP) or the international financial reporting standards (IFRS).

Risk factors—The previous Item 503(c) of Regulation S-K is now new Item 105 of Regulation S-K. Additionally, the list of examples of the types of risk factors to be disclosed has been eliminated in an effort to emphasize that disclosure is principles based and should not be limited to the list that was contained in the prior rule.

Investment company filings—The final rule also included amendments to make investment company filings consistent with Exchange Act filings. Certain investment company filings are now required to include a hyperlink to each exhibit listed in the exhibit index and must be submitted in HTML format.

WHAT LIES AHEAD

The FAST Act amendments to Regulation S-K appear to be part of a larger trend to simplify disclosure requirements, eliminate redundancy and reduce costs on public companies. When the FAST Act was first passed at the end of 2015, it amended portions of the Jumpstart Our Business Startups Act of 2012 to facilitate simplified financial disclosure for emerging growth companies. In 2018, the SEC passed the disclosure update and simplification rule, which eliminated disclosure items that overlapped with requirements imposed by GAAP, IFRS and other SEC rules. Public companies and their counsel should be on the lookout for additional amendments to federal securities laws that could alter reporting requirements and put them on the fast track to disclosure.

Katayun I. Jaffari is a partner in Ballard Spahr's business and finance department. She is a member of the securities, executive compensation, life sciences/technology, energy/project finance and mergers and acquisitions practice groups. She writes and speaks extensively on these topics. Contact her at jaffarik@ballardspahr.com or 215-864-8475.

Nathaniel J. Stanger is an associate in the firm's business and finance department. He has experience in a variety of corporate and transactional matters, including federal securities law compliance, mergers and acquisitions, and municipal bond offerings. Contact him at stangern@ballardspahr.com or 215-864-8242.