

INSIGHTS

SEC Adopts Amendments to Modernize and Simplify Disclosure Requirements

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The Securities and Exchange Commission has adopted final rules amending Regulation S-K and certain other rules and forms to modernize and simplify disclosure requirements. Among other matters, the amendments reduce and clarify the disclosures required in management's discussion and analysis of financial condition and results of operations (MD&A) and streamline requirements related to exhibit filings.

The amendments follow from the Fixing America's Surface Transportation (FAST) Act, enacted in 2015, which mandated that the SEC recommend changes to disclosure requirements to reduce costs and burdens on reporting companies and improve readability while continuing to provide investors with all material information. The SEC issued a report to Congress with its recommendations in November 2016 and published related proposed rules in October 2017. The final rules, which adopt the proposed rules largely as proposed but with some changes, were approved by the SEC on March 20, 2019.

Key changes effected by the final rules are summarized below. The full text of the SEC's final rule release is available [here](#).

Management's Discussion and Analysis – Item 303 of Regulation S-K

The final rules amend Item 303 of Regulation S-K to allow registrants filing reports that are required to include three years of financial statements to exclude from MD&A a discussion of the earliest of the three years, as long as a discussion of that year has been included in a prior filing. If a registrant elects to exclude discussion of the earliest year, it will be required to include in MD&A a statement identifying the location of the omitted discussion in the prior filing.

The final rules also revise the instructions to Item 303 to remove references to year-to-year comparisons and instead provide that a registrant may use any presentation that, in its judgment, enhances a reader's understanding of the registrant's financial condition, changes in financial condition and results of operations. In the adopting release, the SEC noted that it anticipates that many registrants will continue to use year-to-year comparisons because that manner of presentation is familiar and appropriate in many cases.

Exhibit Filings – Item 601 of Regulation S-K

Omission of Schedules and Similar Attachments to Exhibits

As amended by the final rules, Item 601 of Regulation S-K will no longer require that registrants file schedules and similar attachments to exhibits that are required to be filed, provided that the attachments do not contain material information that is not otherwise disclosed in the exhibit or the related filing. Previously, registrants were permitted to omit such attachments from plans of acquisition, reorganization, arrangement, liquidation or succession required to be filed as exhibits pursuant to Item 601(b)(2) of Regulation S-K but not from material contracts required to be filed as exhibits pursuant to Item 601(b)(10) or other required exhibits.

Omission of Confidential Information without Request for Confidential Treatment

As amended by the final rules, Item 601 of Regulation S-K will allow registrants to redact confidential information from a plan filed as an exhibit pursuant to Item 601(b)(2) or a material contract filed as an exhibit pursuant to Item 601(b)(10) without submitting a request for confidential treatment if the redacted information is not material and would likely cause competitive harm to the registrant if publicly disclosed. As amended, Item 601 preserves existing requirements for marking of redacted information in filed exhibits and allows the staff of the SEC to request information similar to that currently required in confidential treatments requests in connection with the staff's review of a filing.

Elimination of Two-Year Look-Back for Material Contracts for Previously Reporting Registrants

Prior to the amendments effected by the final rules, Item 601(b)(10) of Regulation S-K required filing of material contracts that either (1) are to be performed in whole or in part after the applicable filing or (2) were entered into not more than two years before the filing. As amended by the final rules, Item 601(b)(10) will require that only newly reporting registrants file material contracts that were entered into in the previous two years but that are not to be performed in whole or in part after the applicable filing. Registrants that are not newly reporting will be required to file only material contracts that are to be performed in whole or in part after the filing.

Other Amendments

The final rules make additional changes to streamline disclosure requirements, including:

- narrowing the property description requirement in Item 101 of Regulation S-K to only cover material information;
- requiring filers to provide links to documents to be incorporated by reference, instead of requiring such documents to be filed as exhibits;
- eliminating the requirement for filers to include on the cover page of Form 10-K a checkbox to reflect any delinquent Section 16 filers and changing the heading of Item 405 of Regulation S-K to be used in the proxy statement to "Delinquent Section 16(a) Reports";
- moving risk factors from Item 503 of Regulation S-K to a new Item 105 and eliminating the provided examples of risk factors in order to emphasize the principles-based nature

of the risk factor disclosure requirement; and

- requiring data tagging for certain cover page items and hyperlinks for incorporated-by-reference information available on EDGAR.

Effective Dates

The amendments will become effective 30 days after the final rules are published in the Federal Register, except for the amendments concerning the redaction of confidential information in material contracts, which are effective as of the date of publication in the Federal Register. Data tagging requirements for cover pages are subject to a three-year phase-in, depending on the filing and the filer's status.