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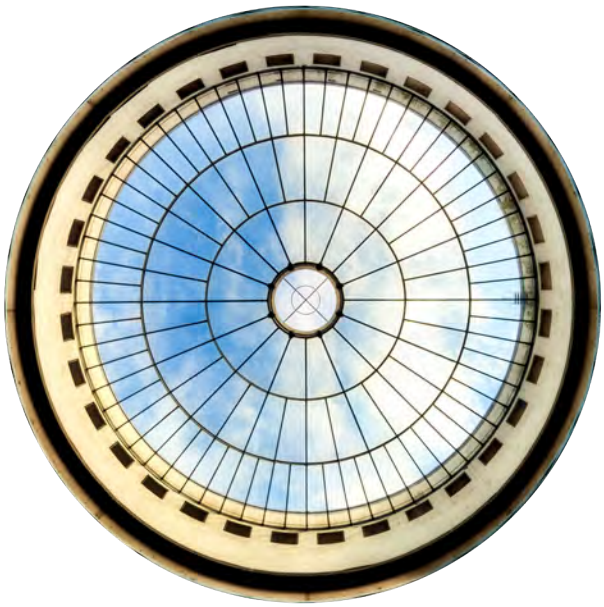

In This Issue

SEC Simplifies and Modernizes Certain Regulation S-K Requirements

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On March 20, 2019, the SEC issued a final rule[1] that revises certain disclosure requirements in Regulation S-K. Issued in response to recommendations in the SEC staff's 2016 *Report on Modernization and Simplification of Regulation S-K*,[2] the final rule incorporates substantially all[3] of the amendments outlined in the proposed rule, with certain limited modifications. Most of the final rule's provisions become effective on May 2, 2019.

Key Amendments to Regulation S-K

The changes to Regulation S-K affect U.S. registrants, foreign private issuers, and investment companies. The SEC has stated that the amendments are intended to improve the readability of filed documents and simplify registrants' compliance efforts while ensuring that all material information is provided to investors.

The most significant changes are related to the following:

- *Management's discussion and analysis (MD&A)* — Registrants that present three years of audited financial statements are currently required to address their changes in financial condition and results of operations for each year, typically by providing year-to-year comparisons between each period. The final rule permits these registrants to omit discussion of the earliest year if such discussion was already included in any of the registrants' prior EDGAR filings that required such information. Registrants electing to omit discussion of the earliest year must disclose, in the current filing, the location of such discussion in the prior filing. In addition, the instructions to the MD&A

[1] SEC Release No. 33-10618, *FAST Act Modernization and Simplification of Regulation S-K*.
[2] Both the SEC staff's report and the SEC's proposed rule were issued under a mandate in the Fixing America's Surface Transportation Act (commonly referred to as the "FAST Act").
[3] The SEC did not adopt rules that would have required (1) the removal of certain captions and item numbers from SEC forms or (2) disclosure of legal entity identifiers (see the Global Legal Entity Identifier Foundation's Web site for more information).

rules were updated to remove reference to a year-to-year comparison, clarifying that a registrant may use judgment in determining what *type* of presentation would most clearly communicate results and trends to investors. For example, in certain circumstances, a narrative discussion about specific periods on a stand-alone basis may be more meaningful than period-to-period comparisons.

The proposed rule permitted discussion of the earliest year to be omitted only if that discussion was not material to an understanding of the registrant. While the final rule does not retain a specific reference to materiality, the SEC's comments in the adopting release remind registrants of their general obligation to "provide investors with all material information, customized in light of the company's particular circumstances."

Connecting the Dots

The final rule is intended to eliminate repetitive disclosures and give registrants more flexibility in determining how to present MD&A. Registrants should consider the total mix of available information, including the impact of any recastable events (e.g., a discontinued operation or other retrospective accounting change), on the prior-period MD&A when determining whether to omit discussion of the earliest year and the most appropriate form of presentation. If a registrant concludes that it is necessary to discuss operations related to the earliest period presented, it may limit the discussion to the information that has changed or has been determined to be significant to its operations or financial condition.

"The amendments adopted today demonstrate our focus on modernizing our disclosure system to meet the expectations of today's investors while eliminating unnecessary costs and burdens." — SEC Chairman Jay Clayton

- *Redaction of confidential information* — Registrants are currently able to request approval from the SEC to redact information in exhibits that is not material and would cause competitive harm to the company. The amendments streamline this process by allowing registrants to omit such information, as well as personally identifiable information, without having to first request confidential treatment from the SEC. Registrants would instead mark the exhibits from which information has been omitted and include a statement prominently on the first page of each exhibit to indicate that the redacted information has been omitted.

Connecting the Dots

The amendments change the process related to the confidential treatment of information but not a registrant's responsibility to provide required disclosures. Exhibits would still be subject to SEC staff review, and confidential-treatment redactions that do not adhere to the requirements could be challenged. After publishing the final rule, the SEC issued an announcement describing the general compliance review process for confidential information.

- *Description of property* — Regulation S-K currently requires disclosure of information related to the "location and general character of the principal plants, mines, and other materially important physical properties of the registrant." The SEC has observed that this requirement may have prompted some registrants (e.g., those in the service or technology industries) to disclose information about physical property even though it is not material to their company's operations. The final rule clarifies that the disclosures are required only if the physical properties are material, and it specifies that the information "may be provided on a collective basis, if appropriate." However, the final rule does not modify the industry-specific disclosure requirements for registrants in the oil and gas, mining, and real estate industries since the disclosure of information about their physical properties is generally considered significant.

- *Risk factors* — Regulation S-K requires disclosure of the most significant risk factors related to a registrant's offering or business and currently provides examples of specific factors that a company may consider for such disclosure. Although the current requirement is intended to be principles-based, the examples of risk factors led certain registrants to disclose information that was generic or not specific to their circumstances. The final rule eliminates the examples from the disclosure requirements and encourages registrants to revisit their risk assessment and disclose their most significant risk factors.
- *Schedules and attachments to exhibits* — The current requirement to include all schedules and attachments to exhibits has been viewed by some registrants as burdensome and unnecessary. The amendments permit schedules and attachments to exhibits to be omitted unless they contain information that is material and not otherwise disclosed. A registrant must identify any omitted schedules and attachments in the exhibit list.
- *Hyperlinks and cross-references* — The final rule includes requirements related to the use of hyperlinks to documents that are incorporated by reference from other SEC filings. It also generally permits but does not require cross-references to other parts of a filing. However, within the financial statements, cross-referring to or incorporating information from outside the financial statements is prohibited unless doing so is specifically permitted by SEC rules, U.S. GAAP, or IFRS® Standards as adopted by the International Accounting Standards Board. This prohibition is intended to prevent confusion about whether such information is or has been subject to audit or review by the registrant's external auditor.
- *Cover page* — The final rule indicates that registrants must include the trading symbol for each class of registered securities on the cover page of certain SEC forms. Currently, some, but not all, of the information included on the cover page of various SEC filings must be XBRL[4] tagged. Inline XBRL tagging will be required for additional information, such as the jurisdiction of incorporation and exchange on which the securities are registered, on the cover page of certain forms filed under the Securities Exchange Act of 1934 (the "Exchange Act"), including Forms 8-K, 10-K, 10-Q, 20-F, and 40-F. The SEC has historically required registrants to indicate on the cover page of Form 10-K whether the filing includes disclosure of delinquent beneficial ownership reporting. The final rule removes this requirement.
- *Other amendments* — Additional changes made by the final rule include:
    - For existing registrants that do not meet the definition of a "newly reporting registrant,"[5] the removal of the requirement to file material contracts that were entered into within two years of the applicable registration statement or report.
    - The addition of the requirement to file a new exhibit that would include a description of a registrant's securities.
    - The addition of parallel amendments to certain rules and forms applicable to investment companies related to hyperlinking and HTML.[6]

[4] eXtensible Business Reporting Language.

[5] A "newly reporting registrant" includes, for example, registrants that are not subject to the reporting requirements of Section 13(a) of 15(d) of the Exchange Act at the time of filing or that have not filed an annual report since the revival of a previously suspended reporting obligation.

[6] HyperText Markup Language, which is a standard markup language for creating Web pages and Web applications.

Effective Date and Transition

The amendments become effective on May 2, 2019, with three exceptions:

1. The amendments related to the redaction of confidential information take effect on April 2, 2019. A registrant whose confidential treatment request is pending when the amendments become effective may choose to withdraw the pending application and refile the redacted exhibits in accordance with the amended rules. Requests that are not withdrawn will be processed in a manner consistent with past practice.
2. The transition dates for XBRL cover-page tagging are the same as those for inline XBRL, for which a three-phase approach is applied by registrant filing status, starting with the quarterly filings of certain large accelerated filers for periods ending on or after June 15, 2019. See Deloitte's July 3, 2018, *Heads Up* for further information about the requirements for adopting inline XBRL.
3. The requirements related to using hyperlinking and HTML for certain investment company filings (i.e., registrations statements on Form N-CSR) are effective for filings submitted on or after April 1, 2020.

Connecting the Dots

Given the changes to the instructions to, and the face of, commonly used forms, coupled with a 30-day effective date for most of the final rule's provisions, registrants may wish to consult with their legal counsel and advisers to ensure that the appropriate updates are reflected in future filings. The SEC maintains a list of public forms on its Web site, along with information about when a form was last updated.

Looking Ahead

The final rule marks the completion of another element of rulemaking focused on the SEC's interconnected goals of facilitating capital formation and improving disclosure effectiveness. Still on its agenda, among other items, are proposed rules to update the disclosure requirements related to significant acquisitions (e.g., Regulation S-X, Rule 3-05[7]). Stay tuned for further developments.

[7] SEC Regulation S-X, Rule 3-05, "Financial Statements of Businesses Acquired or to Be Acquired."

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