

## Capital Markets Implications of Amendments to Simplify and Update SEC Disclosure Rules

On August 17, 2018, the US Securities and Exchange Commission (SEC) amended certain disclosure requirements that it determined to be redundant, duplicative, overlapping, outdated or superseded in light of other SEC disclosure requirements, US GAAP or changes in the information environment.<sup>1</sup> The SEC initially proposed these amendments as part of its Disclosure Effectiveness Initiative and, subsequently, was required by the Fixing America's Surface Transportation (FAST) Act to undertake a study regarding Regulation S-K disclosure requirements. In addition, a number of other SEC proposed amendments relating to the Industry Guides and other disclosure requirements await SEC action. As a result, these amendments should be viewed as another incremental step in what may be a more comprehensive effort to reduce or modify the disclosure requirements that may be viewed as burdensome or outdated.

In connection with this series of amendments, some disclosure requirements have been modified, eliminated or consolidated with other disclosure requirements. The SEC also referred certain disclosure requirements to the Financial Accounting Standards Board (FASB) for potential incorporation into US GAAP. These amendments, which become effective 30 days after publication in the *Federal Register*, include revisions to Regulation S-K and Regulation S-X and therefore will impact upcoming SEC filings, including quarterly and annual reports, as well as registration statements for securities offerings.

### Executive Overview of the Disclosure Amendments

This Legal Update highlights amendments to disclosure rules in several key areas. Individuals who are tasked with preparing SEC filings will need to carefully review the text of the amended rules, many of which are technical in nature, applicable to such filings.

According to the adopting release, the disclosure update and simplification amendments “are intended to facilitate the disclosure of information to investors and simplify compliance without significantly altering the total mix of information provided to investors.” Nevertheless, these amendments impact a large number of SEC rules, regulations and forms, as detailed in Appendix A of this Legal Update.

**Business Disclosure.** The amendments include changes to Regulation S-K, which contains integrated disclosure rules applicable to domestic issuers and foreign private issuers that elect to make filings with the SEC on forms used by domestic issuers. For example, the following Regulation S-K amendments affect business section disclosure:

- Deletion of the requirement set forth in Item 101 of Regulation S-K to include, if material, the amount spent on research and development activities, with the SEC noting that disclosure of material trend information related to research and development activities and expenses is required to be included in

- management's discussion and analysis of financial condition and results of operations (MD&A) of Item 303 of Regulation S-K;
- Deletion of the Item 101 requirement to disclose segment financial information, with the SEC observing that these disclosures will continue to be available in notes to the financial statements;
  - Deletion of the Item 101 requirement to disclose financial information by geographic area, with an explicit reference to "geographic areas" added to the MD&A disclosure requirement;
  - Retention of the Item 101 requirement to provide seasonality disclosure at the segment level to the extent material to understanding the business as a whole (although the SEC deleted instruction 5 to Item 303(b) of Regulation S-K relating to MD&A seasonality disclosure in interim periods because US GAAP and the balance of Item 303 require interim disclosures that convey similar information);
  - Deletion of the Item 101 requirement to identify the SEC's public reference room; and
  - Expansion of the Item 101 requirement to disclose issuer website addresses of all issuers that have one.

#### **Market Price and Dividend Disclosure.**

The amendments that changed market price and dividend disclosure requirements include:

- Deletion of the requirement to disclose high and low common stock trading prices for the past two years for most issuers;
- Deletion of the requirements to disclose the amount and frequency of cash dividends declared from Item 201 of Regulation S-K, with Rule 3-04 of Regulation S-X amended to require disclosure of the amount of dividends in interim periods;
- Consolidation of the Item 201 requirement to disclose restrictions on dividends into revised Rule 4-08 of Regulation S-X; and
- Replacement of detailed disclosure of sale or bid prices previously required by Item 201 with the trading symbol for most companies whose common equity is traded in a public trading market.

**Ratio of Earnings to Fixed Charges.** The amendments deleted the requirement to disclose the ratio of earnings to fixed charges from Item 503 of Regulation S-K and deleted the related Item 601 exhibit requirement. To clarify that the ratio of earnings to fixed charges is not required in registration statements under the Securities Act of 1933, corresponding changes were made to delete the reference to that ratio from the titles of items in SEC forms that refer to Item 503, such as Item 3 of both Form S-1 and Form S-3.

**Regulation S-X.** The disclosure update and simplification amendments involve more than 50 changes or referrals to the FASB of Regulation S-X rules, including amendments to Regulation S-X to avoid overlapping disclosure requirements, referral of certain Regulation S-X requirements to the FASB for consideration in upcoming FASB rulemaking and corrections to superseded requirements. The Regulation S-X amendments generally relate to domestic issuers and to foreign private issuers that either report under US GAAP or a comprehensive body of accounting principles other than US GAAP or International Financial Reporting Standards with a reconciliation to US GAAP. A few examples of these Regulation S-X changes:

- Deletion of the requirement for pro forma interim financial information for business combinations in Rule 8-03 and 10-01 of Regulation S-X, with the SEC relying on US GAAP and Item 9.01 of Regulation S-K to generate similar disclosures;
- Deletion of the requirement in Regulation S-X to disclose, in interim financial statements, material events subsequent to the end of the most recent fiscal year in light of similar disclosures that result from compliance with a

combination of US GAAP and Item 303(b) of Regulation S-K;

- Retention of the requirement of Rule 4-07 Regulation S-X to present a discount on shares in a manner that is incremental to US GAAP requirements, while referring this Regulation S-X disclosure requirement to the FASB for potential incorporation into US GAAP; and
- Deletion of the requirements in Rule 8-03 and Rule 10-01 of Regulation S-X to present dividends per share on the face of the income statement for interim periods because US GAAP prohibits this disclosure on the face of the financial statements (but permits it in the notes to the financial statements).

### **Amendments for Specific Issuer**

**Categories.** Some of the disclosure update and simplification amendments apply only to specific categories of issuers, such as amendments to SEC forms that only affect the types of issuers using such forms. For example, because exchange rate information is readily available for free on a number of websites, the SEC amended Form 20-F, which is used by foreign private issuers, to delete the requirement for such issuers to provide exchange rate data when financial statements are prepared in a currency other than the US dollar.

### **Practical Considerations**

The amended disclosure rules will impact quarterly and annual reports filed after the effective date of the rule changes. Therefore, companies should begin preparations for their periodic reports earlier than they typically would. It will be particularly important for companies to undertake an updated “form check” for compliance with SEC disclosure requirements when preparing their first quarterly and annual reports affected by the amendments.

Because so many of the amendments involve changes to, or referrals to the FASB of, Regulation S-X rules, company personnel

responsible for preparing financial statements should carefully review these amendments and work closely with their auditors to identify the changes they will need to make to presentations of financial information in SEC filings.

The amendments may impact the process for preparing disclosure, as well as the content of disclosure. For example, moving some disclosure items from outside to inside, or from inside to outside, the financial statements impacts audit review and XBRL tagging requirements. Companies should also consider whether they need to update their disclosure controls and procedures and/or their internal control over financial reporting in light of these amendments.

The Private Securities Litigation Reform Act of 1995 does not provide a safe harbor for forward-looking information presented within the financial statements. Therefore, companies should carefully consider whether any disclosures that are moving to the financial statements under the amended rules contain voluntary forward-looking statements that they may not want to include. The SEC noted in the adopting release that “issuers retain the option of providing forward-looking information outside the financial statements and may be required to disclose the information in certain circumstances.”

The SEC has requested that the FASB determine whether referred disclosure items will be added to the FASB’s agenda for potential standard setting within 18 months after the adopting release is published in the *Federal Register*. To the extent that companies have opinions on provisions that the SEC has referred to the FASB, they should monitor such proposed rulemaking and, when there is an appropriate opportunity, submit comments on those provisions.

## Appendix A

The following chart from the SEC’s adopting release for the disclosure update and simplification amendments identifies the rules, regulations and forms that the SEC either amended or referred to the FASB:

Commission Reference		CFR Citation (17 CFR)
Regulation S-X <sup>2</sup>	Rule 1-02	§ 210.1-02
	Rule 2-01	§ 210.2-01
	Rule 2-02	§ 210.2-02
	Rule 3-01	§ 210.3-01
	Rule 3-02	§ 210.3-02
	Rule 3-03	§ 210.3-03
	Rule 3-04	§ 210.3-04
	Rule 3-05	§ 210.3-05
	Rule 3-12	§ 210.3-12
	Rule 3-14	§ 210.3-14
	Rule 3-15	§ 210.3-15
	Rule 3-17	§ 210.3-17
	Rule 3-20	§ 210.3-20
	Rule 3A-01	§ 210.3A-01
	Rule 3A-02	§ 210.3A-02
	Rule 3A-03	§ 210.3A-03
	Rule 3A-04	§ 210.3A-04
	Rule 4-01	§ 210.4-01
	Rule 4-07	§ 210.4-07
	Rule 4-08	§ 210.4-08
	Rule 4-10	§ 210.4-10
	Rule 5-02	§ 210.5-02
	Rule 5-03	§ 210.5-03
	Rule 5-04	§ 210.5-04
	Rule 6-03	§ 210.6-03
	Rule 6-04	§ 210.6-04
	Rule 6-07	§ 210.6-07
	Rule 6-09	§ 210.6-09
	Rule 6A-04	§ 210.6A-04
	Rule 6A-05	§ 210.6A-05
	Rule 7-03	§ 210.7-03
	Rule 7-04	§ 210.7-04
	Rule 7-05	§ 210.7-05
	Rule 8-01	§ 210.8-01
	Rule 8-02	§ 210.8-02
	Rule 8-03	§ 210.8-03
	Rule 8-04	§ 210.8-04
	Rule 8-05	§ 210.8-05
	Rule 8-06	§ 210.8-06
	Rule 9-03	§ 210.9-03
	Rule 9-04	§ 210.9-04
	Rule 9-05	§ 210.9-05
	Rule 9-06	§ 210.9-06
	Rule 10-01	§ 210.10-01
	Rule 11-02	§ 210.11-02
	Rule 11-03	§ 210.11-03
	Rule 12-16	§ 210.12-16

Commission Reference		CFR Citation (17 CFR)
	Rule 12-17	§ 210.12-17
	Rule 12-18	§ 210.12-18
	Rule 12-21	§ 210.12-21
	Rule 12-22	§ 210.12-22
	Rule 12-23	§ 210.12-23
	Rule 12-24	§ 210.12-24
	Rule 12-27	§ 210.12-27
	Rule 12-28	§ 210.12-28
	Rule 12-29	§ 210.12-29
Regulation S-K <sup>3</sup>	Item 10	§ 229.10
	Item 101	§ 229.101
	Item 201	§ 229.201
	Item 302	§ 229.302
	Item 303	§ 229.303
	Item 406	§ 229.406
	Item 503	§ 229.503
	Item 504	§ 229.504
	Item 508	§ 229.508
	Item 512	§ 229.512
	Item 601	§ 229.601
Regulation M-A <sup>4</sup>	Item 1010	§ 229.1010
Regulation AB <sup>5</sup>	Item 1118	§ 229.1118
Securities Act of 1933 (Securities Act) <sup>6</sup>	Rule 158	§ 230.158
	Rule 405	§ 230.405
	Rule 436	§ 230.436
	Form S-1	§ 239.11
	Form S-3	§ 239.13
	Form S-11	§ 239.18
	Form S-4	§ 239.25
	Form F-1	§ 239.31
	Form F-3	§ 239.33
	Form F-4	§ 239.34
	Form F-6	§ 239.36
	Form F-7	§ 239.37
	Form F-8	§ 239.38
	Form F-10	§ 239.40
	Form F-80	§ 239.41
	Form SF-1	§ 239.44
	Form SF-3	§ 239.45
	Form 1-A	§ 239.90
	Form 1-K	§ 239.91
	Form 1-SA	§ 239.92
Securities Exchange Act of 1934 (Exchange Act) <sup>7</sup>	Rule 3a51-1	§ 240.3a51-1
	Rule 10A-1	§ 240.10A-1
	Rule 12b-2	§ 240.12b-2
	Rule 12g-3	§ 240.12g-3
	Rule 13a-10	§ 240.13a-10
	Rule 13b2-2	§ 240.13b2-2
	Rule 14a-101	§ 240.14a-101
	Rule 15c3-1g	§ 240.15c3-1g
	Rule 15d-2	§ 240.15d-2
	Rule 15d-10	§ 240.15d-10

Commission Reference		CFR Citation (17 CFR)
	Rule 17a-5	§ 240.17a-5
	Rule 17a-12	§ 240.17a-12
	Rule 17g-3	§ 240.17g-3
	Rule 17h-1T	§ 240.17h-1T
	Form 10	§ 249.210
	Form 20-F	§ 249.220f
	Form 40-F	§ 249.240f
	Form 10-K	§ 249.310
	Form 11-K	§ 249.311
	Form 10-D	§ 249.312
	Form X-17A-5	§ 249.617
Investment Company Act of 1940 (Investment Company Act) <sup>8</sup>	Form N-8B-2	§ 274.12
Securities Act and Investment Company Act	Form N-5	§ 239.24 and 274.5
	Form N-1A	§ 239.15A and 274.11A
	Form N-2	§ 239.14 and 274.11a-1
	Form N-3	§ 239.17a and 274.11b
	Form N-4	§ 239.17b and 274.11c
	Form N-6	§ 239.17c and 274.11d

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## Endnotes

<sup>1</sup> See <https://www.sec.gov/rules/final/2018/33-10532.pdf>.

<sup>2</sup> 17 CFR 210.10 through 210.12-29.

<sup>3</sup> 17 CFR 229.10 through 229.1208.

<sup>4</sup> 17 CFR 229.1000 through 229.1016.

<sup>5</sup> 17 CFR 229.1100 through 229.1125.

<sup>6</sup> 15 U.S.C. 77a *et seq.*

<sup>7</sup> 15 U.S.C. 78a *et seq.*

<sup>8</sup> 15 U.S.C. 80a *et seq.*

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