



## *SECURITIES LAW ALERT*

### SEC ADOPTS AMENDMENTS TO SIMPLIFY AND UPDATE DISCLOSURE REQUIREMENTS

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On August 17, 2018, the SEC adopted amendments to eliminate, update and modify certain disclosure requirements found in Regulations S-K and S-X (and various SEC forms). The amendments are focused on disclosure requirements that have become redundant, overlapping, outdated or superseded, and are intended to (i) facilitate the disclosure of information to investors, (ii) reduce compliance burdens for companies without substantially altering the total mix of information provided to investors, and (iii) encourage capital formation. The SEC believes these changes will benefit investors, public companies and our capital markets.

The release discussing the amendments (Release) is available [here](#).<sup>1</sup> With one notable exception regarding statements to shareholders' equity carved out by the SEC staff,<sup>2</sup> the amendments will apply to all periodic reports filed on or after the effective date of November 5, 2018. A couple of other recent changes the SEC made to the content of cover pages should also be considered. In particular, the SEC (i) eliminated references to "posting" Interactive Data Files on a registrant's website, to conform to the new Inline XBRL rules<sup>3</sup> and (ii) eliminated the parenthetical after the non-accelerated filer box (indicating that the box shouldn't be checked by smaller reporting companies) making it clear that a company may now be considered an accelerated filer, an emerging growth company and a smaller reporting company with the applicable box checked for each category that is met.<sup>4</sup>

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<sup>1</sup> SEC Release, 33-10532; 34-83875; IC-33203; File No. S7-15-16 (effective Nov. 5, 2018).

<sup>2</sup> Due to the timing of effectiveness of the amendments and proximity of effectiveness to the filing date for most filers' quarterly reports, the SEC has stated that it will not object if a filer's first presentation of the changes in shareholders' equity is included in its Form 10-Q for the quarter that begins after the effective date of the amendments. For instance, a calendar-year filer could omit this disclosure from its Form 10-Q for the quarter ended September 30, 2018 and its Form 10-K for the year ended December 31, 2018, but the SEC staff would object if it did not provide the disclosures in its Form 10-Q for the quarter ended March 31, 2019 Form 10-Q. SEC, Division of Corporation Finance, Exchange Act Forms Compliance & Disclosure Interpretation No. 105.09 (Sept. 25, 2018, updated October 4, 2018).

<sup>3</sup> SEC Release, 33-10514; 34-83551; IC-33139; File No. S7-03-17 (effective Sept. 17, 2018).

<sup>4</sup> SEC Release, 33-10513; 34-83550; File No. S7-12-16 (effective Sept. 10, 2018).

## REGULATION S-K

The SEC eliminated or revised certain requirements within Reg. S-K relating to the description of an issuer's business, the stock price table, references to extraordinary items, seasonality and the ratio of earnings to fixed charges, among other things. More specifically, the SEC eliminated or revised the following items in Reg. S-K:

- **Description of Business (Item 101)**

- Eliminated the requirement to disclose segment financial information in the business description section of filings, including restatement of prior periods and discussion of interim segment performance that may not be indicative of current or future performance. A similar disclosure is still required under GAAP and/or MD&A and will continue to be available in the notes to financial statements. (Item 101(b) and a related requirement in Rule 3-03(e) of Reg. S-X)
- Eliminated the disclosure of amounts spent on R&D. The same information is still required in MD&A, if material, and under GAAP in the notes to financial statements. (Item 101(c)(1)(xi) and corresponding item for smaller reporting companies and Form 20-F and Form I-A)
- Eliminated the disclosure of financial information by geographic area, including dependence on, and risks associated with, foreign operations, but the SEC added an explicit reference to "geographic areas" in Item 303(a) of Reg. S-K. Such disclosures are also required under GAAP and/or the Risk Factor discussion (Item 503(c) of Reg. S-K) and this information will be available in the notes to financial statements. (Item 101(d)(1), (2) and (3))
- Eliminated requirement to discuss facts indicating whether financial data for geographic performance is indicative of current or future operations. Similar requirements in Item 303(a) and other revisions to MD&A cover the same information. (Item 101(d)(4))
- Eliminated requirement to identify the SEC's public reference room and its contact information because the information is viewed as rarely used. The SEC added a requirement for all issuers to disclose their web addresses (if they have one). (Portion of Item 101(e)(2) and comparable requirements in smaller reporting company rules and SEC forms)

- **Market Price and Dividends (Item 201)**

- Eliminated the requirement to provide certain market price disclosures. The SEC also added a requirement to identify the principal U.S. market(s) and trading symbol for each class of common equity. (Portion of Item 201(a)(1) and comparable requirements in Form 20-F)
- Eliminated the requirement to disclose in Form S-1 or Form 10 the amount of common equity subject to outstanding options, warrants or convertibles, when the class of common equity has not established public trading market in the U.S. Similar disclosures are required in the notes to financial statements under GAAP. (Portion of Item 201(a)(2)(i))
- Eliminated requirements to disclose frequency and amount of cash dividends declared because Rule 3-04 of Reg. S-X, as amended, will require these disclosures in the notes to financial statements under GAAP in interim periods. (Portion of Item 201(c)(1))
- Eliminated disclosure of restrictions that (i) limit the ability of subsidiaries to transfer funds to their parent or (ii) materially affect an issuer's ability to pay dividends. These requirements are being consolidated into a single disclosure requirement in the notes to financial statements under Rule 4-08(e)(3) of Reg. S-X, while equity

compensation disclosure requirements have been referred to FASB (as discussed below). (Portion of Item 201(c)(1))

- **Supplementary Financial Information (Item 302)**
  - Revised to require disclosure of “income (loss) from continuing operations” instead of “income (loss) before extraordinary items and cumulative effect of a change in accounting.” (Portion of Item 302(a)(1) relating to supplemental quarterly financial information)
  - Replaced the reference to “segments” with “discontinued operation” language in order to reflect changes in GAAP relating to discontinued operations. (Item 302(a)(3))
- **MD&A (Item 303)**
  - Included an explicit reference to “geographic areas” and other clarifying changes, including the elimination of the disclosure of seasonal aspects of business in MD&A in interim reports because the same information must be disclosed under GAAP. The SEC did, however, retain the requirement in Item 101(c)(1)(v) of Reg. S-K to disclose seasonality at the segment level, to the extent material to the business as a whole. (Instruction 5 to Item 303(b))
- **Ratio of Earnings to Fixed Charges (Item 503)**
  - Eliminated disclosure of historical and pro forma ratios of earnings to fixed charges and/or preference dividends, along with related exhibit because investors are able to obtain similar information through related disclosures and other resources. (Item 503(d), Item 1010(a)(3) of Regulation M-A, Item 601(b)(12) and comparable requirement in Form 20-F)
- **Exhibit (Item 601)**
  - Eliminated disclosure of computation of earnings per share because the same information is addressed by GAAP and Reg. S-X. (Item 601(b)(11))
  - Eliminated incorporation by reference of information that is separately made available to security holders that meets some or all of the requirements of Form 10-Q because the same information is addressed in Item 601(b)(13) of Reg. S-K and Instruction D(3) to Form 10-Q. (Item 601(b)(19))
  - Eliminated disclosure of a published report regarding matters submitted to the vote of security holders because voting results must be disclosed in Item 5.07 of Form 8-K and Forms 10-K and 10-Q. (Item 601(b)(22))
  - Eliminated disclosure of invitations for competitive bids because bidders directly receive the invitation and other investors have access to the registration statement covering the securities offered at the competitive bidding. (Item 601(b)(26))

The SEC also noted that the relocation of some disclosures to financial statements will subject them to XBRL tagging requirements. In addition, the SEC pointed out that the safe-harbor for forward-looking statements is unavailable for financial statement disclosures, even though issuers have the option of providing forward-looking information outside the financial statements.

## **REGULATION S-X AND ACCOUNTING REQUIREMENTS**

The Release identifies many SEC accounting requirements in Reg. S-X that are redundant or duplicative of GAAP, IFRS requirements, or other SEC disclosure requirements. Thus, as a result of the redundancies and overlaps, many SEC disclosure requirements related to derivative accounting policies, supplemental pro forma financial information in interim filings for business combination (however, the pro forma disposition disclosure requirement is being retained), disclosure of restrictions on the payment of dividends or net assets, and the disclosure of foreign currency exchange restrictions on an issuer’s financial position and operating results were eliminated or

modified by the amendments. These revisions are in addition to others for which companies should consult with their auditors.

## REFERRALS TO FASB

The SEC identified a number of areas where its disclosure requirements overlap with, but require incremental information to, GAAP. The SEC chose to refer these matters to FASB for its consideration. In referring these matters, the SEC is asking FASB to consider whether to incorporate the SEC's incremental requirements into GAAP as part of its normal standard-setting process. Undoubtedly, incorporation of these requirements in GAAP would cause the SEC to eliminate its incremental requirements in a further effort to reduce redundancies and overlaps in its disclosure requirements. Areas identified in the referral include, but are not limited to, currency requirements for private issuers, certain equity compensation plan information, income taxes in the notes to financial statements, and major customers.

## OTHER CHANGES

In addition to the above, the SEC also deleted several financial reporting requirements in Reg. S-X that have been superseded over time by GAAP or other SEC requirements. These deletions affect disclosures related to: gains or losses on sales of properties by REITS, various consolidation requirements, development stage companies, and insurance companies.

## CONCLUSION

The amendments recently adopted by the SEC are certainly a step in the right direction. Although the impact of the amendments may be nominal for issuers who are already accustomed to complying with the SEC's (sometimes redundant and overlapping) disclosure requirements, issuers and investors alike should appreciate the SEC's attempt to (i) facilitate the disclosure of information to investors, (ii) reduce compliance burdens for companies without substantially altering the total mix of information provided to investors, and (iii) encourage capital formation.

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