Simpson Thacher

Memorandum

SEC Proposed Rules Would Update and Streamline Regulation S-K

October 18, 2017

On October 11, 2017, the SEC proposed amendments to certain provisions of Regulation S-K and certain SEC forms in order to improve the readability and navigability of disclosure documents and discourage repetition and the provision of immaterial information. In general, the proposed amendments respond to a mandate in the Fixing America's Surface Transportation Act, the so-called the FAST Act, that directed the SEC to perform a study on Regulation S-K and evaluate ways in which the Regulation could be modernized. Many of the proposed amendments are technical and ministerial in nature but, if adopted, the amendments would provide a helpful clean-up of certain instructions and cross-references, codify certain existing disclosure practices and introduce several new disclosure requirements.

We have provided below a summary of those proposed rule and form changes that we believe are most likely to be of interest to reporting companies. The full text of the proposing release describing all of the amendments in more detail is available here.

- ***Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303(a) of Regulation S-K).*** The proposed amendments would allow a company to limit its period-to-period comparison in the MD&A to the two most recent fiscal years presented in the company's financial statements so long as (a) the discussion of the earliest of the three years presented is not material to investors and (b) the company has filed its prior year Form 10-K on EDGAR containing an MD&A related to the earliest of the three years included in the financial statements of the current filing.
- ***Exhibits (Item 601(b)(4) of Regulation S-K)***
  - ***Schedules and Attachments to Exhibits***. The proposed amendments would permit a company to omit schedules and similar attachments to exhibits if the schedule or attachment does not contain material information that is not otherwise disclosed. Currently, this accommodation is

available for plans of acquisition, reorganization, arrangement, liquidation or succession but not contracts or exhibits generally. This proposed change would require registrants to provide with each exhibit a list briefly identifying the contents of any omitted schedules and attachments. In addition, registrants would be required to provide, on a supplemental basis, a copy of any omitted schedules or attachments to the SEC Staff upon request. This proposal would reduce the burden on registrants to file complete exhibits, which is often unnecessarily cumbersome and expensive where schedules do not include material information.

- ***Redaction of Confidential Information in Material Contract Exhibits.*** The proposed amendments would also allow a company to omit confidential information from a material contract filed as an exhibit without submitting a confidential treatment request where such information is both (a) not material and (b) competitively harmful if publicly disclosed. A company would be required to mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of each redacted exhibit that information in the marked sections of the exhibit has been omitted from the filed version of the exhibit. A company would also be required to indicate with brackets where the information has been omitted from the filed version of the exhibit and, upon request, promptly provide supplemental materials to the SEC Staff similar to those currently required in a confidential treatment request, including an unredacted paper copy of the exhibit and an analysis of the basis for the redaction.

  If adopted, this rule change would significantly alter the process companies are required to follow to redact such information, which process can be cumbersome and expensive. Currently, companies are required to submit an application for confidential treatment at the time the redacted exhibit is filed. The confidential treatment request must, among other things, provide an explanation as to why the redacted terms are immaterial and why public disclosure of such terms would result in substantial competitive harm. The registrant must also submit an unredacted paper copy of the exhibit. Furthermore, if the SEC grants the application, confidential treatment generally remains in effect for no more than ten years.

- ***Personally Identifiable Information.*** The proposed amendments would codify the current SEC Staff practice of generally not objecting to the omission of personally identifiable information (e.g., home addresses, Social Security numbers, bank accounts and similar information) from exhibits without submitting a confidential treatment request.

- ***Material Contracts Entered into Within Two Years of Filing.*** The proposed amendments would also allow a company with an established reporting history to omit completed material contracts that were entered into not more than two years before the filing. Currently, registrants are required to file every material contract not made in the ordinary course of business if (a) the contract must be performed in whole or in part at or after the filing of the registration

statement or report, or (b) the contract was entered into not more than two years before that filing. Because companies with an established reporting history are likely to incorporate these type of contracts by reference rather than including them with each filing anew, this change is not likely to have a significant impact on such companies' filing processes. A newly-public company would continue to be required to file completed contracts entered into not more than two years before the filing because investors would not otherwise have access to any material agreements previously filed on EDGAR.

- ***Description of Registrant's Securities.*** Among the several new disclosure requirements proposed as part of the amendments is a requirement that a reporting company provide a brief description of its securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as an exhibit to its annual report on Form 10-K; presently, companies are required to provide this disclosure only in their registration statements, and companies would be permitted to incorporate this information by reference from, and provide a hyperlink to, a previously filed exhibit.
- ***Subsidiaries of the Registrant and Entity Identifiers.*** Another new requirement would require reporting companies to include the legal entity identifier (LEI), if one has been obtained, for the registrant and each subsidiary on the company's list of subsidiaries filed as an exhibit to its annual report on Form 10-K. A company is currently required to provide as an exhibit, a list of its subsidiaries, the state, or other jurisdiction of incorporation or organization of each, and the names under which those subsidiaries do business. An LEI is a 20-character alpha-numeric code that allows for unique identification of entities engaged in financial transactions, and is intended to improve market transparency.

- ***Risk Factors (Item 501(b)(10) of Regulation S-K***). The proposed amendments would eliminate the risk factor examples that are currently enumerated in Item 503(c) as those examples may not correspond to the material risks of any particular registrant. This change is intended to encourage registrants to focus on their own risk identification process and to remove any suggestion that a company must address each of these examples in its own risk factors, regardless of the significance to its business, which is consistent with current practice.
- ***Description of Property (Item 102 of Regulation S-K).*** The proposed amendments would clarify that disclosure of a company's property is required only to the extent that physical properties are material to the company and that this disclosure may be provided on a collective basis. Currently, a registrant is required to disclose the location and general character of "principal" plants, mines, and other "materially important" physical properties, and most companies have historically listed all of their physical properties in response to this item. The clarification in the proposed amendments would allow a company for which physical properties have little significance to omit this disclosure to the extent immaterial, e.g., a financial company with only a headquarters or a few office buildings.

- ***Directors, Executive Officers, Promoters, and Control Persons (Item 401).*** The proposed amendments would revise the required caption for the disclosure identifying and providing background information about a company's directors, executive officers and significant employees to "Information about our Executive Officers" instead of "Executive officers of the registrants" and move the related instruction within Item 401, in each case to make this disclosure easier to apply and find.
- ***Compliance with Section 16(a) of the Exchange Act (Item 405).*** The proposed amendments would change the disclosure a reporting company is currently required to make in its Form 10-K or annual proxy statement about each reporting person who failed to file Section 16 reports on a timely basis as follows:
  - the heading under which this disclosure is provided would be changed from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports" to more precisely describe the required disclosure and enable it to be more readily searchable;
  - companies would be encouraged to omit this heading when they have no Section 16 delinquencies to report;
  - the rules would clarify that companies may rely on Section 16 reports filed on EDGAR but are not required to limit their inquiry to those filings when determining whether all Section 16 reports have been timely filed;
  - the checkbox on the cover of Form 10-K relating to the disclosure of delinquent Section 16 filings and the related instruction would be eliminated since the new heading would enable the disclosure to be more easily located through a common search term; and
  - the current requirement in Rule 16a-3(e) that reporting persons furnish Section 16 reports to the company would be eliminated since these reports are readily available on EDGAR.
- ***Prospectuses.***
  - ***Outside Front Cover Page of the Prospectus.*** The SEC has proposed a variety of amendments to simplify the front cover of prospectuses:
    - *Determination of Offering Price*. Rather than requiring a company to explain the method by which the price is to be determined on the cover of a prospectus as is currently required, the proposed amendments would allow a company to include a clear statement that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus. In this instance, a company would then be required to accompany that statement with a cross-reference that includes a page number that is highlighted by prominent type or in another manner (similar to the cross-reference that is required for risk factor disclosure on the prospectus cover).
    - *U.S. Market and Trading Symbol Disclosure.* A company would be required to disclose on the prospectus cover, the principal U.S. trading market or markets for the securities being

offered and the corresponding trading symbols, which expands the current requirement companies to name only national securities exchanges. As companies often have no control or notice of trading of their securities on the over-the-counter market, the proposed rules would limit this disclosure to those principal U.S. markets where the registrant has actively sought and achieved a quotation.

- *"Subject to Completion" Legend*. A company would be permitted to exclude from the prospectus the part of the "Subject to Completion" or "red herring" legend relating to state law for offerings that are not prohibited by state blue sky law. The proposed rules would impose a new requirement that the "Subject to Completion" legend to be included if a registrant relies on Rule 430A to omit pricing information and the prospectus is used after the effectiveness of the registration statement but before the public offering price is determined.

◦ ***Undertakings (Item 512 of Regulation S-K).*** The proposed amendments would eliminate certain undertakings presently required to be included in Part II of certain registration statements on the basis that the undertakings are duplicative or obsolete. Among the undertakings that would be eliminated are undertakings related to certain warrant or rights offerings, offerings at competitive bidding, and delivery requirements for certain incorporated annual reports.

◦ ***Investment Company Act Rules and Forms***. The proposed amendments also contain provisions that would revise certain rules and forms applicable to investment companies and investment advisers with respect to incorporation by reference and hyperlinking, including proposed rules that would require certain investment company filings to be submitted in HTML format. We will provide additional information on the proposed amendments relating to the Investment Company Act of 1940 and Investment Advisers Act of 1940 in a future *Registered Funds Alert*.

For further information about the proposed amendments, please contact one of the following members of the Firm's Corporate Department.

NEW YORK CITY

John D. Lobrano
+1-212-455-2890
jlobrano@stblaw.com

Karen Hsu Kelley
+1-212-455-2408
kkelley@stblaw.com

Janice G. Brunner
+1-212-455-3529
janice.brunner@stblaw.com

Arjun Koshal
+1-212-455-3379
akoshal@stblaw.com

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000