



FAST and Furious: Proposed Amendments to Regulation S-K Requirements

In recent months, there has been an active dialogue regarding the regulatory burdens for public companies and whether these burdens have contributed to the decline in the number of U.S. initial public offerings (“IPOs”) and companies listed on U.S. securities exchanges. One of the burdens cited by commentators relates to the extensive disclosures required under the rules and regulations of the Securities and Exchange Commission (the “Commission” or the “SEC”) for companies seeking to register IPOs under the Securities Act of 1933 and also for public-reporting companies in their filings made pursuant to the Securities Exchange Act of 1934 (the “Exchange Act”). Long before the days of the recent presidential order seeking to limit new regulations and eliminate existing regulations, the Commission had already embarked on its own disclosure effectiveness initiative; however, in recent months, the “push” for regulatory burden relief has become a shove.

Yesterday’s release by the Commission of proposed amendments to certain Regulation S-K requirements, which we summarize below, are likely just the first of several disclosure-related amendments to be issued.

A Little Background

In December 2013, the Staff of the Commission issued a report mandated by Section 108 of the Jumpstart Our Business Startups (“JOBS”) Act addressing the disclosure requirements under Regulation S-K.¹ In April 2016, the Commission took another step toward furthering its review of Regulation S-K requirements by issuing a Concept Release requesting comment on the business and financial disclosures that public companies provide in their Exchange Act filings.² The Concept Release did not comment specifically on the other disclosure requirements of Regulation S-K, such as corporate governance or compensation-related items, or the required disclosures for foreign private issuers, business development companies or other types of registrants. During 2016, the Commission requested comment through four other releases noted below. In November 2016, the Staff released its “Report on Modernization and Simplification of Regulation S-K” (the “Report”), which was specifically mandated by Section 72003 of the Fixing America’s Surface Transportation Act (the “FAST Act”), which passed in December 2015.³ The FAST Act included several provisions that directed the Commission to modernize and simplify the requirements of Regulation S-K. Section 72002 aimed to make reporting less burdensome, especially for smaller companies, such as emerging growth companies (“EGCs”), by scaling back on requirements or eliminating duplicative provisions. Section 72003 also directed the SEC, in consultation with the SEC’s Investor

¹ See “Report on Review of Disclosure Requirements in Regulation S-K” (Dec. 2013), available at: <https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>. See our blog post, “More on the SEC’s Regulation S-K Study,” available at: <http://www.mofjumpstarter.com/2013/12/23/more-on-the-secs-regulation-s-k-study/>.

² See Concept Release, Business and Financial Disclosure Required by Regulation S-K, Release No. 33-10064; 34-77599, available at: <https://www.sec.gov/rules/concept/2016/33-10064.pdf>. See our client alert, “A Lofty Concept: Disclosure Effectiveness” (Apr. 18, 2016), available at: <https://media2.mofo.com/documents/160418aloftyconcept.pdf>.

³ See “Report on Modernization and Simplification of Regulation S-K” (Nov. 23, 2016), available at: <https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf>. See our client alert, “SEC Staff Recommendations to Amend Regulation S-K Pursuant to Section 72003 of the FAST Act” (Nov. 29, 2016), available at: <https://media2.mofo.com/documents/161129-section-72003-fast-act.pdf>.

Advisory Committee and the Advisory Committee on Small and Emerging Companies, to undertake a study and issue a report on the disclosure requirements of Regulation S-K. Pursuant to Section 72003, the Report covered: (1) all findings and determinations made in carrying out the required study; (2) specific and detailed recommendations on modernizing and simplifying the requirements under Regulation S-K in a manner that reduces the costs and burdens on companies while still ensuring that all material information is provided; and (3) specific and detailed recommendations on ways to improve the readability and navigability of disclosure documents and to discourage repetition and the disclosure of immaterial information.⁴ The Staff did not address in the Report the four releases that are also responsive to Section 72003.⁵ The recommendations contained in the Report were open for public comment. Also pursuant to the FAST Act, the Commission was required to present to Congress proposed rules implementing its recommendations for amending Regulation S-K by November 23, 2017.

The Commission's Release

The release, titled "FAST Act Modernization and Simplification of Regulation S-K," proposes amendments to Regulation S-K consistent with the Staff's recommendations made in the Report. The proposed amendments are limited in scope and do not purport to address the questions raised in the Concept Release, although the Commission notes that comment letters submitted in response to the Concept Release were considered.

The amendments could be grouped into four principal categories: proposed amendments that update rules to account for developments that have occurred since the rules were adopted (i.e., changes to Item 407 relating to corporate governance, changes to prospectus cover page disclosure, and changes to the undertakings); proposed amendments that require additional disclosure or incorporation of new technology (i.e., Inline XBRL tagging, use of Legal Entity Identifiers, etc.); proposed changes that simplify required disclosures (i.e., the changes to Management's Discussion and Analysis); and rationalization of disclosures that may be incorporated by reference.

The proposed amendments would be very useful to registrants. The proposed amendments to Item 303 of Management's Discussion and Analysis would probably be the most immediately helpful to both registrants and investors.

We summarize the proposed amendments and compare these to the Staff recommendations in the Report in the chart that follows.

Conclusion

The Commission requests comments on the proposed amendments to Regulation S-K within 60 days of the release's publication in the Federal Register. Given that the proposed amendments are largely consistent with the Staff's recommendations in its Report and also reflect concerns raised by commenters in their letters to the Commission regarding the Report and the Concept Release, we would expect the comments to largely support the proposed amendments. We anticipate that the Staff will continue its work of reviewing Regulation S-K and the various Industry Guides, especially in light of legislative proposals and the recently issued report by the U.S. Treasury Department on reforms relating to the capital markets, and that there will be additional amendments to Regulation S-K in the near future.

⁴ FAST Act § 72003(c).

⁵ See "Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters," SEC Release No. 33-10198 (Aug. 25, 2016) [81 FR 59927 (Aug. 31, 2016)], available at: <https://www.sec.gov/rules/other/2016/33-10198.pdf>; "Modernization of Property Disclosures for Mining Registrants," SEC Release No. 33-10098 (June 16, 2016) [81 FR 41651 (June 27, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10098.pdf>; "Amendments to Smaller Reporting Company Definition," SEC Release No. 33-10107 (June 27, 2016) [81 FR 43130 (July 1, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10107.pdf>; "Disclosure Update and Simplification," SEC Release No. 33-10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10110.pdf>; and "Exhibit Hyperlinks and HTML Format," SEC Release No. 33-10201 (Aug. 31, 2016) [81 FR 62689 (Sept. 12, 2016)], available at: <https://www.sec.gov/rules/proposed/2016/33-10201.pdf>.

Item of Regulation S-K	Proposed Staff Recommendations	Proposed Amendments
Item 10(d) (General)	<ul style="list-style-type: none"> Permit incorporation by reference of documents that have been on file for more than five years by using hyperlinks to such documents, together with a description of the location (in the event of a malfunctioning hyperlink). Permit incorporation by reference of financial statements to satisfy requirements of Regulation S-K (for example, disclosure of related-party transactions pursuant to Item 404(a) could be addressed by reference to the financial statement footnotes); this recommendation would not allow the use in financial statements of incorporation by reference to disclosure in other SEC filings. 	<ul style="list-style-type: none"> <i>Adopted proposed Staff recommendations and addressed incorporation by reference for filings made by investment companies and investment advisers under the Investment Company Act and the Advisers Act.</i>
Item 102 (Description of Property)	<ul style="list-style-type: none"> Require disclosure of physical properties only to the extent that the physical properties are material to the registrant's business (currently, disclosure is required for physical properties that are materially important to the registrant), and consider combining with the description of business required under Item 101(c). 	<ul style="list-style-type: none"> <i>Require disclosure of physical properties only to the extent that the physical properties are material to the registrant. Proposal is intended to encompass all properties that are material to the registrant, which would include those properties that are material to the registrant's business (the Staff recommendation), without inadvertently omitting disclosures that would be material to the registrant but not its ongoing business; the disclosure may be provided on a collective basis, if appropriate; proposed amendments do not combine Items 101 and 102 as raised by the Staff recommendation.</i>
Item 303 (Management's Discussion and Analysis)	<ul style="list-style-type: none"> Item 303(a): require registrants to provide a period-to-period comparison for only the two most recent fiscal years presented in the financial statements and include a hyperlink to the prior year's annual report for reference or, alternatively, require registrants to discuss changes in results of operations and financial condition over the two- or three-year period presented in the financial statements and discuss known material trends and uncertainties impacting performance during the period presented in the financial statements (currently, many registrants interpret Item 303(a) as requiring a line-by-line analysis of immaterial changes over a three-year period). Items 303(a)(1) and 303(a)(5): eliminate the requirement of tabular disclosure of contractual obligations and instead require a hyperlink to the relevant financial statement notes in the same SEC filing, as well as an explanation of (i) any material changes to contractual obligations and (ii) the registrant's ability to pay such obligations over time. 	<ul style="list-style-type: none"> <i>Item 303(a): when financial statements cover a three-year period, discussion about the earliest year would not be required if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition and results of operation and (ii) the registrant has filed its prior year Form 10-K on EDGAR with the earlier year discussion; proposed amendments do not require a hyperlink to the prior year's annual report (the Staff recommendation); proposed amendments eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a) to eliminate duplication with existing disclosure requirements for results of operations; registrants may instead use any presentation that, in the registrant's judgment, would enhance a reader's understanding (currently, Instruction 1 specifies a year-to-year comparison format).</i> <i>The proposed amendments would also include changes to Item 5 of Form 20-F consistent with the changes above.</i> <i>Not proposing to eliminate or revise the table of contractual obligations as raised by the Staff recommendation.</i>
Item 401 (Directors, Executive Officers, Promoters and Control Persons)	<ul style="list-style-type: none"> Eliminate the requirement to identify executive officers by name, age, position and term of office in the registrant's proxy or information statement, if the same information is already provided in the registrant's Form 10-K. 	<ul style="list-style-type: none"> <i>Adopted proposed Staff recommendation.</i>

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<p>Item 405 (Compliance with Section 16(a) of the Exchange Act)</p>	<ul style="list-style-type: none"> • Allow registrants to rely solely on a review of Forms 3, 4 and 5 and any amendments thereto when determining whether there are any delinquent Section 16 filers, and eliminate the requirement for Section 16 filers to furnish reports filed by them to the registrant. • Require registrants to include a reference to delinquent Section 16 filers only when applicable. 	<ul style="list-style-type: none"> • <i>Eliminates the requirement that reporting persons furnish Section 16 reports to the registrant; permits registrants to rely on a review of Section 16 reports filed on EDGAR and a written representation that no Form 5 is required.</i> • <i>Proposed amendments do not permit registrants to rely on the information in Section 16 reports filed on EDGAR unless it knows, or has reason to believe, that the information is complete and accurate; registrants may instead rely on Section 16 reports filed on EDGAR but are not permitted to exclusively limit their inquiry to those filings.</i> • <i>Registrants are encouraged to exclude the reference to delinquent Section 16 filers if they have no delinquencies to report.</i>
<p>Item 407 (Corporate Governance)</p>	<ul style="list-style-type: none"> • Item 407(d)(3): update the outdated reference to AU Section 380. • Item 407(e)(5): add a reference to EGCs clarifying that EGCs are not subject to the disclosure requirements under Item 407(e)(5), which refers to the compensation committee report provided in connection with the registrant’s annual report. 	<ul style="list-style-type: none"> • <i>Adopted proposed Staff recommendations.</i>
<p>Item 501 (Forepart of Registration Statement and Prospectus Cover Page)</p>	<ul style="list-style-type: none"> • Item 501(b)(1): eliminate the requirement for a registrant to change its name if the registrant’s name cannot be sufficiently differentiated from that of a “well known” company. • Item 501(b)(3): allow for disclosure of the method for computing the public offering price of securities elsewhere in the prospectus, with a cross-reference and hyperlink for ease of use on the cover page of the prospectus (currently, Item 505(b)(3) requires disclosure of the method for computing the public offering price of securities on the cover page of the prospectus); this recommendation would not change the requirement for securities being offered at market price or at a price based on market price to be disclosed on the cover page of the prospectus. • Item 501(b)(4): require disclosure of the principal U.S. public trading market where the securities being offered will be quoted (currently, disclosure is only required for securities listed on a national securities exchange). • Item 501(b)(10): shorten the “subject to completion” legend by only requiring the portion relating to state securities law when applicable to the offering of securities. • Items 501(b)(10) and 501(b)(11): combine paragraphs (b)(10) and (b)(11) to eliminate duplicative language (currently, each requires the use of the “subject to completion” legend). 	<ul style="list-style-type: none"> • <i>Item 501(b)(1): adopted proposed Staff recommendation.</i> • <i>Item 501(b)(3): allow registrants to include a statement on the cover that the offering price will be determined by a particular method or formula that is more fully explained elsewhere in the prospectus; registrants would be required to accompany the statement with a cross-reference (hyperlink raised by the Staff recommendation is not required) to the disclosure, including a page number that is prominently highlighted.</i> • <i>Item 501(b)(4): adopted proposed Staff recommendation.</i> • <i>Item 501(b)(10): adopted proposed Staff recommendation.</i> • <i>Items 501(b)(10) and 501(b)(11): adopted proposed Staff recommendation.</i>

Item of Regulation S-K	Proposed Staff Recommendations	Proposed Amendments
Item 503 (Risk Factors)	<ul style="list-style-type: none"> Move “Risk Factors” to Subpart 100 of Regulation S-K to clarify that risk factors are required in offering documents, registration statements on Form 10, and periodic reports. 	<ul style="list-style-type: none"> <i>Adopted proposed Staff recommendation.</i> <i>Proposal eliminates the risk factor examples that are currently enumerated in Item 503(c) to emphasize the principles-based nature of the disclosure requirement and to focus registrants on their own risk identification process.</i>
Item 508 (Plan of Distribution)	<ul style="list-style-type: none"> Add a definition for “sub-underwriters” to clarify the disclosure of discounts and commissions. 	<ul style="list-style-type: none"> <i>Defines “sub-underwriter” as a dealer that is participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but is not itself in fs of contract with the issuer of the securities.</i>
Item 512 (Undertakings)	<ul style="list-style-type: none"> Item 512(c): eliminate Item 512(c) (requiring a registrant to include undertakings if it registers a warrant or rights offering to existing security holders and the securities not purchased by such security holders are reoffered to the public) as it is duplicative of information required to be disclosed under Item 512(a)(1)(iii) (requiring disclosure of any material information with respect to the plan of distribution for securities not previously disclosed in the applicable registration statement or any material change to such information). Item 512(d): eliminate Item 512(d) (requiring a registrant to include undertakings if the securities registered are offered at competitive bidding to underwriters) in order to reflect the rescission of Rule 50 under the Public Utility Holding Company Act of 1935. Item 512(e): eliminate Item 512(e) (requiring a registrant to deliver, along with the prospectus, the annual and quarterly reports incorporated by reference in the prospectus, as required by former Form S-2) in order to reflect the elimination of Form S-2 pursuant to Securities Offering Reform. Item 512(f): eliminate Item 512(f) (requiring a non-reporting registrant in an underwritten equity offering to undertake to provide to the underwriters at the closing the certificates required by the underwriter to permit prompt delivery to each purchaser) in order to reflect the current settlement of securities trades through the National Securities Clearing Corporation (“NSCC”) and The Depository Trust Company (“DTC”). 	<ul style="list-style-type: none"> <i>Adopted proposed Staff recommendations.</i>

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<p>Item 601 (Exhibits)</p>	<ul style="list-style-type: none"> Require registrants to file a description of each class of their registered securities as an exhibit to Form 10-K (the exhibit would mirror the disclosure required under Item 202). Item 601(b)(2): allow a registrant to omit attachments and schedules (not containing material information) filed with exhibits, and instead allow the registrant to include a brief description of the nature of the contents of the omitted attachment or schedule with an agreement to furnish the omitted document to the SEC, if requested. Item 601(b)(10)(i): limit the two-year look back period for the filing of material contracts not made in the ordinary course of business to newly reporting registrants. Item 601(b)(21): require disclosure of legal entity identifiers (“LEIs”) for the registrant and its “significant subsidiaries” under Regulation S-K. 	<ul style="list-style-type: none"> <i>Adopted proposed Staff recommendation to require registrants to file a description of each class of their registered securities as an exhibit to Form 10-K; registrants may incorporate the information by reference and provide a hyperlink to the previously filed Item 202 disclosure.</i> <i>Item 601(b)(2): permits the omission of personally identifiable information without submitting a confidential treatment request; examples include bank account numbers, Social Security numbers and home addresses.</i> <i>Item 601(a)(5): permits registrants to omit entire schedules and similar attachments to exhibits unless they contain material information and unless that information is not otherwise disclosed in the exhibit or disclosure document; expands existing limited accommodation to cover all exhibits; registrants would be required to provide a list briefly identifying the contents of any omitted schedules and attachments and provide a copy to the Staff upon request; eliminates need for certain confidential treatment requests.</i> <i>Item 601(b)(10): permits registrants to omit confidential information from material contracts where such information is not material and competitively harmful if publicly disclosed without submitting a confidential treatment request; registrants would instead be required to mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the exhibit.</i> <i>Item 601(b)(10)(i): adopted proposed Staff recommendation.</i> <i>Item 601(b)(21): adopted proposed Staff recommendation.</i> <i>The proposed amendments to Item 601 would also be made applicable to Form 20-F.</i>
<p>Manner of Delivery Recommendations</p>	<ul style="list-style-type: none"> Require machine-readable tagging (using eXtensible Business Reporting Language (XBRL)) for all information included on the cover page of periodic and current reports, and require registrants to include on the cover page of such periodic and current reports a ticker symbol for each class of its securities registered under the Securities Exchange Act of 1934. Require a registrant to include a hyperlink whenever a web address is required to be disclosed. 	<ul style="list-style-type: none"> <i>Require all of the information on the cover page of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to be tagged in Inline XBRL consistent with the recent proposal to require the use of the Inline XBRL format where XBRL data is embedded into an HTML document; if the Inline XBRL proposal is not adopted, registrants will be required to tag each cover page data point in an XBRL exhibit to the relevant filing.</i> <i>Amends the cover page of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to include the trading symbol for each class of registered securities.</i>

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