

Update on SEC's Simplified Disclosure Rules for Foreign Private Issuers

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Client Advisory

April 25, 2019 by Guy Ben-Ami

For several years, the Securities and Exchange Commission, or the SEC, has been focusing on its "Disclosure Effectiveness Initiative," a plan to modernize the disclosure requirements of Regulation S-K, the central resource for nonfinancial statement disclosure requirements for public companies. The amendments to the requirements attempt to simplify rules and forms in order to reduce the costs and burdens on reporting companies while continuing to provide material information to investors. The amendments are also intended to improve the readability of documents and discourage repetition and disclosure of immaterial information.

We have recently seen how some of these rules have also been adopted for Foreign Private Issuers. For example, this year's 20-F issuers were no longer required to:

- Provide exchange rate data when financial statements are prepared in a currency other than U.S. dollars, as such data is widely available.
- Disclose research and development expenditures, since such information is already required in the notes to the financial statements.
- Disclose high and low trading prices for each quarter in the last two full fiscal years and interim periods, given that such information is easily accessible to investors, so long as the trading symbol and principal trading markets are disclosed.

On March 20, 2019, the SEC adopted further amendments. Some of these amendments that are applicable to foreign private issuers are:

- Confidential Treatment Procedures: companies will be allowed to redact confidential information in material contracts without submitting a written confidential treatment request to the SEC, provided that the information is not material and would likely cause competitive harm if publicly disclosed. If requested by the SEC, companies must still provide an unredacted copy of the contract on a supplemental basis. In addition, it is now codified that companies may omit information that is "clearly unwarranted invasion of personal privacy" from their exhibits without submitting a confidential treatment request.
 - Material Agreements: companies (except new reporting issuers) will no longer be required to file material contracts that have been fully performed and are no longer operative even if they were entered into within two years before the filing date.
 - Immaterial Exhibits: it is now codified that immaterial schedules and attachments can be omitted from material contract exhibits. Each exhibit filed must contain a list briefly identifying the contents of all omitted schedules (unless such information is already included within the exhibit in a manner that conveys the omission).
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- **MD&A Historical Discussion:** on Form 20-F, companies were previously required to include a Management's Discussion and Analysis of Financial Condition and Results of Operations, or MD&A, that covers a three-year period. The MD&A compares the changes in the financial condition and results of operations between the first (the earliest) and second year and the second and third year. The amendments allow a company to exclude the changes between the second year and the third year if a discussion of the third year (oldest period) was included in any prior filing with the SEC. However, companies must identify the filing and location in such filing where the discussion may be found.
- **Cross Referencing Financial Statements:** incorporating information by reference or cross-referencing in financial statements to information from outside of the financial statements will be prohibited unless otherwise specifically required or allowed through the SEC's rules or U.S. GAAP or IFRS.
- **Description of Securities as an Exhibit:** revised Form 20-F will require that companies provide as an exhibit a brief description of all registered securities. Previously, this disclosure was only required in Item 10.B. of Form 20-F. Nevertheless, companies will be able to incorporate by reference and hyperlink to prior disclosure.
- **Cover Page Changes:** information on the cover pages of 20-F and Form 40-F will be required to be tagged in Inline XBRL and the forms will include the title of each registered class of security, the trading symbol and the name of each exchange on which registered. Notably, this will not affect Form 6-K. The SEC adopted a three-year phase-in for operating companies to tag data on the cover pages (just as it did for mandatory compliance with Inline XBRL). Foreign Private Issuers therefore are required to comply by this requirement in reports for fiscal periods ending on or after June 15, 2021.

The rules as originally proposed contained amendments to Form 20-F that would have allowed companies to exclude item numbers and captions or create their own tailored captions in those forms. This proposal was not adopted.

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