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3 Takeaways From SEC's Trim To Company Disclosure Rules

By **Tom Zanki**

Law360 (March 28, 2019, 6:51 PM EDT) -- The Securities and Exchange Commission's aim to simplify public company disclosure will make it easier for companies to redact sensitive material under specific conditions, a change that could benefit issuers but that one commissioner worries will leave investors with less information.

The SEC, acting under congressional mandate, last week adopted rules that are intended to eliminate redundancies to disclosures without reducing investors' access to material information. The idea is to make company documents more readable and easier for investors to navigate.

Congress ordered the SEC to streamline disclosures in 2015 through a provision in the Fixing America's Surface Transportation Act. The bill told the SEC to review its Regulation S-K, which lays out various reporting requirements for public companies, and pare back where possible.

Lawyers say the changes enacted by the SEC are mostly technical, though certain measures could have a significant impact, including a provision that would streamline the process for companies seeking to redact sensitive information from certain attachments to their filings.

Companies will also be allowed to trim discussion about historical performance, among other things, in an effort to freshen disclosures.

Here, Law360 looks at three takeaways from the SEC's action.

No More 'Confidential Treatment Requests'

Previously, a company seeking to omit confidential information was required to file to a separate request justifying the redaction. Such redactions are allowed if the omitted information is considered immaterial to investors but could harm the company if read by a competitor.

Under the revision, companies can exclude certain information from public view without submitting a request, though they must clearly indicate in their documents where information has been redacted and be ready to supply an unredacted version if regulators have questions.

Morgan Lewis & Bockius LLP counsel Albert Lung said this change would benefit technology and life sciences companies he advises, many of whom entered into research and licensing agreements

containing sensitive information that they don't want competitors to see.

Lung noted that past practice of filing a separate brief, known as a confidential treatment request, was a time-consuming process that can cost companies thousands of dollars or more in legal fees.

“This is a huge savings,” Lung said. “But only for those technology, life science and biotech companies, especially those companies in Silicon Valley where I work.”

While the change provides relief to certain issuers, Lung acknowledged that giving companies freer rein to redact portions of their regulatory filings could leave investors with less information.

The Council of Institutional Investors expressed such concerns in a prior letter to the SEC.

SEC commissioner Robert Jackson, the lone dissenter in the agency’s 3-1 vote to trim disclosures, is also concerned. He argued that companies are already redacting information the market considers material, which is why the SEC should review such requests in the first place.

“In a world where redactions already rob the market of information investors need, firms will now feel more free to redact as they wish,” Jackson said in a statement. “And investors, without the assurance that redactions have been reviewed by our staff, will face more uncertainty.”

The SEC did not respond to a request for comment. In its rule summary, the agency noted that existing policy was creating “sizable costs” for companies and potentially delaying transactions. The SEC added it retains the ability to scrutinize whether redactions are appropriate.

Companies Can Delve Into Less History

The SEC is also allowing companies to trim the Management’s Discussion and Analysis section of their filings. Known as MD&A, the section describes critical issues facing a company as seen by management and is considered among an issuer’s most labor-intensive filing responsibilities.

Companies are currently required to discuss performance for the past three years, using prior financial statements as a basis. Businesses will now be allowed to omit discussion about the oldest year if that period was discussed in a prior filing and is no longer considered material.

Baker Botts LLP partner A.J. Ericksen said this relief could simplify disclosure, noting that financial results from three years ago tend to be “old and cold” in terms of benefiting the reader.

“Many companies disclosures have become pretty bloated over time and it can be hard to extract what’s really important to an investor,” Ericksen said.

Ericksen said it’s not clear how many companies will take advantage of the new flexibility given that they may be used to past practice. But the SEC appears to be inviting businesses to approach their MD&A with a fresh approach as if it were a “clean sheet of paper,” he said.

The SEC Is Trimming With a Scalpel

The SEC followed Congress’ mandate to pare back disclosures by selectively trimming elsewhere, including requiring that companies only disclose details about their physical properties to the extent

that such information is material.

The SEC's disclosure tweaks also encourage wider use of technology by requiring data tagging for items on the cover page of certain filings and wider use of hyperlinks. Most of the new rules will take effect within 30 days from being published in the Federal Register.

Taken as a whole, lawyers described the disclosure changes as mostly incremental. The elimination of confidential treatment requests was the most notable exception, Lung said. That provision will become effective immediately upon publication in the Federal Register.

Keith Higgins, who chairs the securities and governance practice at Ropes & Gray LLP, said most of the disclosure changes represent a forward step toward eliminating repetition.

"We believe that issuers, preparers, and investors will likely welcome these amendments as they appear to represent modest, incremental changes to the SEC's disclosure requirements," said Higgins, who is also a former director of the SEC's Division of Corporation Finance.

--Editing by John Campbell.