

## INSIDE THE SEC

### Thanks For (Less Than) Nothing: Section 72001 of the FAST Act and the SEC's Interim Final Rule

By Alan Singer and Linda L. Griggs

Several provisions of the Fixing America's Surface Transportation Act (FAST Act) relate to the federal securities laws. One of the provisions is Section 72001 of the FAST Act, which requires the Securities and Exchange Commission (SEC) to adopt rules permitting public companies to include a summary page in annual reports on Form 10-K, provided that each item on the summary page includes a cross-reference (by electronic link or otherwise) to the material that is summarized.

Section 72001 is peculiar because it requires the SEC to adopt a regulation enabling public companies to do what they already were able to do prior to the enactment of the FAST Act. Moreover, Section 72001 resulted in a consequence that likely was unanticipated by Congress: the interim final rule adopted by the SEC on June 1, 2016 to address the FAST Act requirement<sup>1</sup> imposes additional requirements regarding the Form 10-K summary that otherwise would not have been in effect.

#### The SEC's Interim Final Rule—Hyperlinked Cross-References and the “Fairly and Accurately” Disclosure Standard

The interim final rule permits a public company to include a summary of the information required by Form 10-K, but only if each item in the summary

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“includes a hyperlink to the material contained in [the Form 10-K] to which such item relates.” In other words, while a public company could have included a textual cross-reference (or even no cross-reference) in a Form 10-K summary prior to the enactment of Section 72001, and while Section 72001 addresses inclusion of a cross-reference “by electronic link or otherwise,” a public company will be required to use only hyperlinked cross-references under the interim final rule.

More significantly, the interim final rule provides that a public company may include a summary in its Form 10-K “only if each item in the summary is presented fairly and accurately.” Nowhere in Regulation S-K or in the instructions to Form 10-K has there previously been a “fairly and accurately” standard for disclosure. It is not clear how the “fairly and accurately” standard would be applied; if the summary is literally correct but does not address a part of the summarized content that might be considered important (particularly through the exercise of 20-20 hindsight), would the presentation be deemed other than fair and accurate?

#### Other Requirements in the Interim Final Rule

The SEC stated in the Adopting Release that the interim final rule is principles-based; public companies can decide which items to summarize (but only “as long as the information is presented fairly and accurately”). In addition, public companies are not subject to a limitation on the length of the summary. Nevertheless, the interim final rule imposes the following additional requirements with respect to the presentation of a summary.

- The summary can refer only to disclosures that are included in the Form 10-K at the time the form is filed. For example, the Form 10-K cannot refer to information in a proxy statement that retrospectively will be incorporated by reference to satisfy disclosure requirements

under Part III of Form 10-K. The summary can reference Part III information only if that information is included in the Form 10-K, which is not practical for most companies.

- If Part III information is not included in the summary, the summary must state that it does not include Part III information because that information will be incorporated by reference from a later proxy or information statement involving the election of directors. (The language in the interim final rule does not address the situation where a public company must file an amendment to the Form 10-K by the 120th day following the end of its fiscal year if the public company previously has not filed a definitive proxy statement.)

## SEC Requests for Comment

In the Adopting Release, the SEC has asked for comment on possible modifications to the interim final rule that would render the rule more prescriptive, including comment on whether the rule should:

- require that the summary be used,
- require that certain items be included in the summary, or prohibit certain items from being included in the summary,
- require the filing of an amendment to the Form 10-K that updates the summary to reflect Part III information that is filed after the initial filing of the Form 10-K,
- impose a limitation on the length of the summary, or
- require that the summary appear at the beginning of the Form 10-K.

The SEC also is seeking comment as to whether it should extend a similar summary approach to other annual reporting forms, including Form 20-F (filed by some foreign private issuers) and Form 1-K (filed by companies that have conducted a Regulation A offering).

## The Impact of the Interim Final Rule

Do the new requirements imposed by the interim final rule (and any additional requirements that may be imposed by a final rule) matter? As the SEC stated in the Adopting Release, it appears that the use of a Form 10-K summary is “extremely limited.” The Adopting Release noted that in a random sample of 150 Form 10-K filings, none included a summary, and among the 92 public companies within the Fortune 100 list, only one included a summary.

The SEC expressed an expectation that “registrants that do not currently include a summary in their Form 10-K will not be likely to begin doing so in response to the [interim final rule].” This is undoubtedly true, because a rule that reduces the flexibility available with respect to a Form 10-K summary is hardly likely to encourage greater use. However, other factors could result in greater use of Form 10-K summaries. The use of a summary in connection with a Compensation Discussion and Analysis was rare during the initial proxy seasons following the SEC’s 2006 adoption of revised executive compensation disclosure requirements. Today, however, such summaries are common. (Perhaps we should be grateful that Congress did not pass legislation requiring the SEC to adopt a rule permitting a public company to include a summary in its Compensation Discussion and Analysis.)

Section 72001 is set forth in Title LXXII of the FAST Act, which is entitled “Disclosure Modernization and Simplification.” However, simplification has not resulted from Section 72001. The lesson here may be that sometimes it is better to leave well enough alone.

### Note

1. See Form 10-K Summary, Release No. 33-77969, June 1, 2016 (Adopting Release).

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