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GLOBAL PUBLIC COMPANY ACADEMY

U.S. DISCLOSURE AND REPORTING UPDATES

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Overview

- FAST Act Modernization and Simplification of Regulation S-K (SEC Release No. 33-10618)
- Proposed Modernization of Regulation S-K Items 101, 103 and 105 (SEC Release No. 33-10668)
- Division of Corporation Finance Compliance and Disclosure Interpretations on Interactive Data (Published August 20, 2019)
- Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice (SEC Release No. 34-86721)
- Amendments To Smaller Reporting Company Definition (SEC Release No. 33-10513)
- Proposed Amendments to Accelerated Filer And Large Accelerated Filer Definitions (SEC Release No. 34-85814)

SEC RELEASE NO. 33-10618

FAST ACT MODERNIZATION AND SIMPLIFICATION OF REGULATION S-K

FAST Act Modernization and Simplification of Regulation S-K

- The final rules in SEC Release No. 33-10618, FAST Act Modernization and Simplification of Regulation S-K, became effective on May 2, 2019, 30 days after publication in the Federal Register
  - The one exception being the CTR-related changes, which became effective on April 2, 2019
- The amendments, which were proposed in October 2017, are intended to implement the Commission's mandate under the Fixing America's Surface Transportation (FAST) Act and are based on recommendations from the Staff's FAST Act Report published in November 2016.
  - Amendments primarily affect Regulation S-K, but also include revisions to several SEC Forms

Management's Discussion and Analysis (MD&A)

- Item 303(a) of Reg. S-K has been revised to allow companies to exclude discussion of the earliest of the three years included in the MD&A, as long as a discussion of that year has been included in prior filings
  - Note that a company relying upon this new rule must identify the prior filing that includes the excluded discussion
  - This change does not affect smaller reporting companies as they are only required to include two years of financials in MD&A
- Instruction 1 to Item 303(a) of Reg. S-K has also been amended to remove the reference to five-year selected financial data for trend information

Exhibits: Confidential Treatment

- Under the amended rules, companies may omit confidential information in exhibits filed under Item 601(b)(2) (Plan of Acquisition, Reorganization, Arrangement, Liquidation or Succession) and (b)(10) (Material Contracts) without submitting a CTR, so long as the information to be redacted is:
  - (i) not material to investors; and
  - (ii) would likely cause competitive harm to the company if disclosed publicly.
- Companies must still clearly mark their exhibits to indicate where immaterial and competitively harmful information has been omitted, and that any redactions remain subject to review and comment at the Staff's discretion.
- Companies may also now:
  - Omit immaterial schedules or similar attachments to the exhibits required under all of Reg. S-K 601 (not just 601(b)(2), which was previously the case), but must provide a brief list of omitted schedules; and
  - Omit personally identifiable information (PII) from exhibits

Exhibits: Other Changes

- Companies are now required to include the "Description of Capital Stock" disclosure required by Item 202 as an exhibit to Form 10-K. The "Description of Capital Stock" was previously required in the prospectus for an IPO and in the Form 8-A Exchange Act registration statement for a newly public company, and is often incorporated by reference into prospectus filings thereafter.
- Only newly reporting companies must file material contracts entered into within two years of the applicable registration statement or report. This revision eliminates the requirement for companies to file a contract that has been already fully performed but was entered into within two years prior to the filing date of the relevant filing.

Cover Page Changes

- Companies must now disclose on the cover page of Forms 8-K, 10-Q, 10-K, 20-F and 40-F the national exchange or principal U.S. market for their securities, the trading symbol, and the title of each class of registered securities.
- Be sure to check the current forms on the SEC website for where this new disclosure should be included on the cover pages; the SEC has already changed its mind once.
- Companies also must tag all cover page data in Inline XBRL (subject to the same phase-in rules as for Inline XBRL generally).

Other Major Changes

Securities Act Rule 411(b)(4); Exchange Act Rules 12b-23(a)(3) and 12b-32; Rule 0-4	Companies are no longer required to file as an exhibit any documents that are incorporated by reference in a filing, but instead must provide hyperlinks to these documents. The Commission noted that companies are not required to refile information that is incorporated by reference from a document that was previously filed with the Commission on paper. The Commission also amended these rules to prohibit having financial statements incorporate information by reference from other filings or cross-reference to disclosure in other parts of a filing, unless otherwise specifically permitted or required by the Commission's rules or by US GAAP or IFRS. The Commission's intent is to address concerns that referencing information outside the audited financial statements to satisfy financial statement disclosure requirements could create confusion about which financial information has been audited or reviewed by the independent auditor.
Item 10(d)	Item 10(d) has been revised to eliminate the prohibition against incorporating documents by reference that have been on file with the Commission for more than five years. The Commission noted that this prohibition now serves little purpose given the current practice of filing documents electronically.
Item 102	Disclosure about a physical property is now required only to the extent that it is material to the company. As revised, Item 102 now allows a reporting company to assess the materiality of its properties to its business.
Item 401	Instruction 3 to Item 401(b) is now a general instruction to Item 401 to clarify that companies need not duplicate disclosure about their executive officers required under Item 401 in their proxy statements if they have already provided it in Part I of Form 10-K.

Other Major Changes

Item 405; Form 10-K	The caption required by Item 405(a)(1) has been changed from "Section 16(a) Beneficial Ownership Reporting Compliance" to the more specific "Delinquent Section 16(a) Reports." Item 405 also has been revised to clarify that companies are encouraged not to provide this caption if there are no delinquencies to report. The amendments also eliminate the checkbox on the cover page of Form 10-K (and the related instruction in Item 10 of Form 10-K) whereby a company must indicate that there is no disclosure of delinquent filers in the Form 10-K and, to the best of the company's knowledge, will not be included in a definitive proxy incorporated by reference.
Item 407(e)(5)	The revisions clarify that emerging growth companies (EGCs) are not required to provide a compensation committee report, given that EGCs are not required to provide a compensation discussion and analysis under Item 402(b).
Item 501(b)(3)	The "red herring" legend required on the cover page of a preliminary prospectus is no longer required to include references to the need for offers and sales of the securities to comply with state law if such state laws are inapplicable. This revision acknowledges the federal preemption of state securities laws in registered offerings of exchange-listed securities.
Item 501(b)(10)	If the prospectus cover page is unable to identify the offering price (because it is to be determined based on a formula or other method rather than a specified price known at the time of offering), the issuer may omit a lengthy description of the method for determining the offering price on the cover page and instead include a cross-reference to the detailed description later in the prospectus.

Other Major Changes

Item 503	The amendments eliminate the specific examples of risk factors currently identified in Item 503(c). As with other changes to Regulation S-K, the Commission noted that providing specific examples of disclosure is inconsistent with the Commission's principles-based approach to disclosure requirements. The change is intended to encourage companies to focus on their own risk identification processes. Moreover, Item 503 has become new Item 105, grouped with other disclosure requirements related to a company's business.
Item 508	The Commission added a definition in Rule 405 to the term "sub-underwriter," which is used in Item 508 but had not been defined previously. "Sub-underwriter" is defined 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 privity of contract with the issuer of the securities.
Item 512	The amendments eliminate paragraph (c) of Item 512 because it is no longer necessary and paragraphs (d), (e), and (f) because they are obsolete. Item 512(c) requires a company to supplement the prospectus to disclose the results of the subscription offer and the terms of any subsequent reoffer to the public, but the company would already have to register and disclose the offering to existing security holders, as well as the reoffering to the public. Also, disclosure of material changes in the terms of the offering would also be required under Item 512(a)(1). Meanwhile, each of paragraphs (d), (e), and (f) is no longer necessary because of prior changes in rules.

SEC RELEASE NO. 33-10668

PROPOSED MODERNIZATION OF REGULATION S-K ITEMS 101, 103 AND 105

NEW SEC Proposal

- On August 8, 2019, the SEC issued Release No. 33-10668 regarding proposed modifications to Regulation S-K Item 101 (Business Description), Item 103 (Legal Proceedings) and Item 105 (Risk Factors)
- Comments are due on October 22, 2019

Proposed Amendment to Item 101 of Regulation S-K

- The proposed amendment to Item 101(a) relating to disclosures of general business development would:
  - provide a non-exclusive list of types of information that registrants may need to disclose, but only to the extent such information is material to understanding the general development of their business
  - add material changes to business strategy as a potential disclosure topic
  - eliminate the five-year lookback as the prescribed timeframe for development of business disclosure and
  - allow registrants to omit the general development of their business disclosure from filings subsequent to their initial registration statement and instead disclose only material changes
- The proposed amendment to Item 101(c) relating to narrative business description would:
  - replace the existing list of required disclosure items with a non-exclusive list of disclosure topics, to be addressed only to the extent such topics are material to an understanding of a registrant's business
  - add human capital resources as a disclosure topic
  - refocus regulatory compliance disclosure to include material governmental regulations and not just environmental provisions

Proposed Amendment to Item 103 of Regulation S-K

- The proposed amendment to Item 103 relating to disclosure of legal proceedings would:
  - allow registrants to hyperlink or cross-reference to disclosure about legal proceedings located elsewhere in the disclosure document, to avoid duplicative disclosure
  - revise the $100,000 threshold for disclosure of environmental proceedings where the government is a party to $300,000, in order to adjust for inflation

Proposed Amendment to Item 105 of Regulation S-K

- The proposed amendment to Item 105 relating to disclosure of risk factors would:
  - require a summary of risk factor disclosure if the risk factor section exceeds 15 pages
  - require risk factor disclosure to focus on "material" risks, as opposed to the current SEC guidance to focus on the "most significant" factors
  - require risk factors to be organized under relevant headings

INTERACTIVE DATA C&DI QUESTIONS 101.01 – 101.09

DIVISION OF CORPORATION FINANCE COMPLIANCE AND DISCLOSURE INTERPRETATIONS ON INTERACTIVE DATA

INTERACTIVE DATA – C&DIs

- On August 20, 2019, the SEC Division of Corporation Finance issued nine new C&DIs on the Inline XBRL requirement adopted in SEC Release 33-10618
- The CD&Is address common questions around the exhibit index and cover page tagging
- Also address questions relating to early or voluntary filers and foreign private issuers

Key Takeaways from Inline XBRL C&DIs

- The first filing required to comply with Inline XBRL, including cover page tagging, is the first Form 10-Q (or 10-K for 6/30 FYE), 20-F or 40-F for a fiscal period ending on or after the applicable compliance date, as opposed to the first filing for a fiscal period made on or after that date (i.e. Form 8-K filings made prior to the June 30 10-Q are not required to comply with Inline XBRL)
- An issuer that voluntarily submits Interactive Data Files in Inline XBRL format prior to its applicable compliance date, ***can*** cease voluntary submissions if it chooses until it is required to comply under the compliance schedule
- Applicable compliance dates:

Large Accelerated Filer	June 15, 2019
Accelerated Filer	June 15, 2020
All Others	June 15, 2021

Key Takeaways from Inline XBRL C&DIs (continued)

- All information on the cover page of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F must be tagged using Inline XBRL
  - Cover page Interactive Data files should be included in the exhibit table as a new Exhibit 104
  - This new Exhibit 104 should cross-reference the XBRL files provided under Exhibit 101, where applicable
  - This applies to ***all*** Form 8-K filings, even those that do not contain financial statements for which XBRL data is required
    - However, if a Form 8-K filing does not include any other exhibits, an issuer is permitted to omit the exhibit index and reference to Exhibit 104
- Inline XBRL exhibits should continue to be identified under Exhibit 101, however, the exhibit table must include the word "Inline" within the title description

SEC RELEASE NO. 34-86721

COMMISSION INTERPRETATION AND GUIDANCE REGARDING THE APPLICABILITY OF THE PROXY RULES TO PROXY VOTING ADVICE

Interpretative Guidance

- On August 21, 2019, the SEC issued Release No. 34-86721 which provided interpretation and related guidance regarding the applicability of certain rules under Section 14 of the Exchange Act related to proxy voting advice
- The interpretative guidance affirmed that generally proxy voting advice provided by proxy advisor firms constitutes a solicitation under the federal proxy rules
  - Solicitation is a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy
- Solicitations even when exempt from information and filing requirements still are subject to Rule 14a-9 of the Exchange Act

Rule 14a-9 Liability

- SEC Enforcement Action
- Private Right of Action for Injunctive Relief
  - Issuer
  - Shareholders
- Private Right of Action for Monetary Relief
  - Shareholders

Suggested Disclosures for Proxy Advisors

- To address liability under Rule 14a-9 the guidance suggests that proxy advisory firms provide the information below when a voting recommendation could be considered materially false or misleading:
  - an explanation of the methodology used to formulate voting advice on a particular matter (including any material deviations from the provider's publicly-announced guidelines, policies, or standard methodologies for analyzing such matters);
  - to the extent that the proxy voting advice is based on information other than a registrant's public disclosures, such as third-party information sources, disclosure about these information sources and the extent to which the information from these sources differs from the public disclosures provided by the registrant if such differences are material; and
  - disclosure about material conflicts of interest that arise in connection with providing the proxy voting advice in reasonably sufficient detail so that the client can assess the relevance of those conflicts

Potential Impact on Public Companies

- Proxy advisor firms may offer companies more (or any) time to review draft reports prior to publication
  - Currently, ISS typically provides companies with a short window for review, Glass Lewis does not typically provide drafts for review
- Depending on compliance costs, proxy advisor firms may begin limiting coverage to larger issuers
- Some investment advisors may choose to abstain from voting to avoid potential liability

SEC RELEASE NO. 33-10513

AMENDMENTS TO SMALLER REPORTING COMPANY DEFINITION

Amendments To Smaller Reporting Company Definition

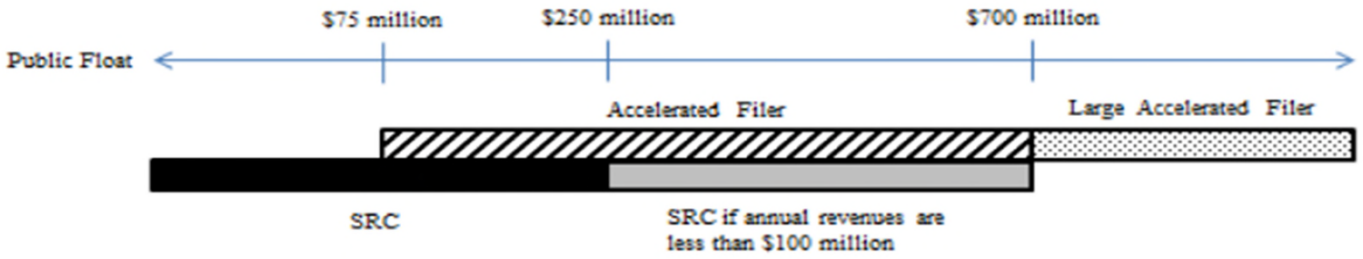
- The final rules in SEC Release No. 33-10513 became effective September 10, 2018
- Amended the definition of a "smaller reporting company" to companies with:
  - A public float of less than $250 million
  - A public float of less than $700 million and annual revenues of less than $100 million
- For first determination of SRC status on or after September 30, 2018, a company will qualify as an SRC if it meets the initial qualification thresholds noted above on the measurement date, even if it did not previously qualify as an SRC
- If SRC status is lost, can requalify if on last business day of second fiscal quarter:
  - Public float is below $200 million
  - Public float is below $560 million and annual revenues are below $80 million

SEC RELEASE NO. 34-85814

PROPOSED AMENDMENTS TO ACCELERATED FILER AND LARGE ACCELERATED FILER DEFINITIONS

After the SRC Amendments

- The definition of an "accelerated filer" was not changed when the SEC approved the amendment to the SRC definition, which led to several companies qualifying as an SRC and as an accelerated filer



New SEC Proposal

- On May 9, 2019, the SEC issued Release No. 34-85814 regarding proposed new definitions for "accelerated filer" and "large accelerated filer"
- The proposed amendments would exclude companies that qualify as an SRC and that have annual revenues of less than $100 million from the "accelerated filer" and "large accelerated filer" definitions (effectively reinstating past practice before the SRC amendments)
- Comments were due on July 29, 2019

Existing Standards

Existing Relationships between SRCs and Non-Accelerated and Accelerated Filers		
Status	**Public Float**	**Annual Revenues**
SRC and Non-Accelerated Filer	Less than $75 million	N/A
SRC and Accelerated Filer	$75 million to less than $250 million	N/A
	$250 million to less than $700 million	Less than $100 million
Accelerated Filer (not SRC)	$250 million to less than $700 million	$100 million or more

Proposed Standards

Proposed Relationships between SRCs and Non-Accelerated and Accelerated Filers		
Status	**Public Float**	**Annual Revenues**
SRC and Non-Accelerated Filer	Less than $75 million	N/A
	$75 million to less than $700 million	Less than $100 million
SRC and Accelerated Filer	$75 million to less than $250 million	$100 million or more
Accelerated Filer (not SRC)	$250 million to less than $700 million	$100 million or more

Changes to "Accelerated Filer" and "Large Accelerated Filer" Transition Thresholds

Proposed Amendments to the Public Float Thresholds			
Initial Public Float Determination	**Resulting Filer Status**	**Subsequent Public Float Determination**	**Resulting Filer Status**
$700 million or more	Large Accelerated Filer	$560 million or more	Large Accelerated Filer
		Less than $560 million but $60 million or more	Accelerated Filer
		Less than $60 million	Non-Accelerated Filer
Less than $700 million but $75 million or more	Accelerated Filer	Less than $700 million but $60 million or more	Accelerated Filer
		Less than $60 million	Non-Accelerated Filer

Currently:
$560M = $500M
$60M = $50M

These amounts were adjusted to be equal to 80% of the initial qualification thresholds, similar to what was done to the SRC thresholds in 2018

Addition of SRC Revenue Test

- Under the proposed amendments, an accelerated filer would remain an accelerated filer until its public float falls below $60 million or its annual revenues fall below the applicable revenue threshold ($80 million (if the company initially did not qualify as an SRC) or $100 million), at which point it would become a non-accelerated filer.
- A large accelerated filer would become an accelerated filer at the end of its fiscal year if its public float fell to between $60 million and $560 million and its annual revenues are not below the applicable revenue threshold ($80 million or $100 million).
- The large accelerated filer would become a non-accelerated filer if its public float fell below $60 million or its public float falls below $560 million (in most cases) and its annual revenues fall below the applicable SRC revenue threshold.

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QUESTIONS?

CLE

- If you registered noting that you need CLE the code is **DIS7765.** Please be sure fill out the post event survey and enter this code and save this number; you will need this to receive a Certificate of Attendance. You will be contacted within 30-60 days by our CLE administrative team.
- We will process your credits for other states where this program has been approved.
- Questions? Please email Aaisha Khan at aaisha.khan@morganlewis.com

Biography

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Joanne R. Soslow counsels public companies, emerging growth businesses, and corporate venture capital groups on corporate and securities matters. Deputy leader of the firm's corporate practice and former chair of the securities and corporate governance practice, Joanne advises clients primarily in the energy, biotechnology, financial services, technology, medical device, specialty pharmaceutical industries. In her transactional practice, Joanne guides companies in their complex public and private equity and debt securities activities, venture capital initiatives, and mergers and acquisitions (M&A).

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Laurie A. Cerveny is an accomplished corporate, M&A, and securities lawyer. She has extensive experience counseling US and foreign issuers and their boards on mergers and acquisitions and the ongoing disclosure and reporting requirements of public companies, corporate governance matters, annual meeting and proxy-related issues, securities laws, SEC rules, stock exchange listing requirements, executive compensation, and various other matters affecting public companies and their officers and directors. Laurie is a deputy practice leader of the M&A practice area and a member of the firm's Advisory Board and of the steering committee for ML Women, the firm’s women’s initiative.

Biography

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Bryan S. Keighery represents life science and technology companies in a range of corporate and securities transactions. He handles a variety of corporate finance transactions for public companies, including initial public offerings, follow-on offerings, registered direct offerings (RDOs), and private investments in public equity (PIPEs), as well as venture capital and other financing transactions for privately held companies. Additionally, Bryan counsels both public and privately held companies on general corporate law, mergers and acquisitions, and other business matters.

Bryan also regularly counsels public companies in annual, quarterly, and periodic reports; proxy statements and SEC compliance under US federal securities laws; and corporate governance requirements of various stock exchanges, including NYSE and Nasdaq.

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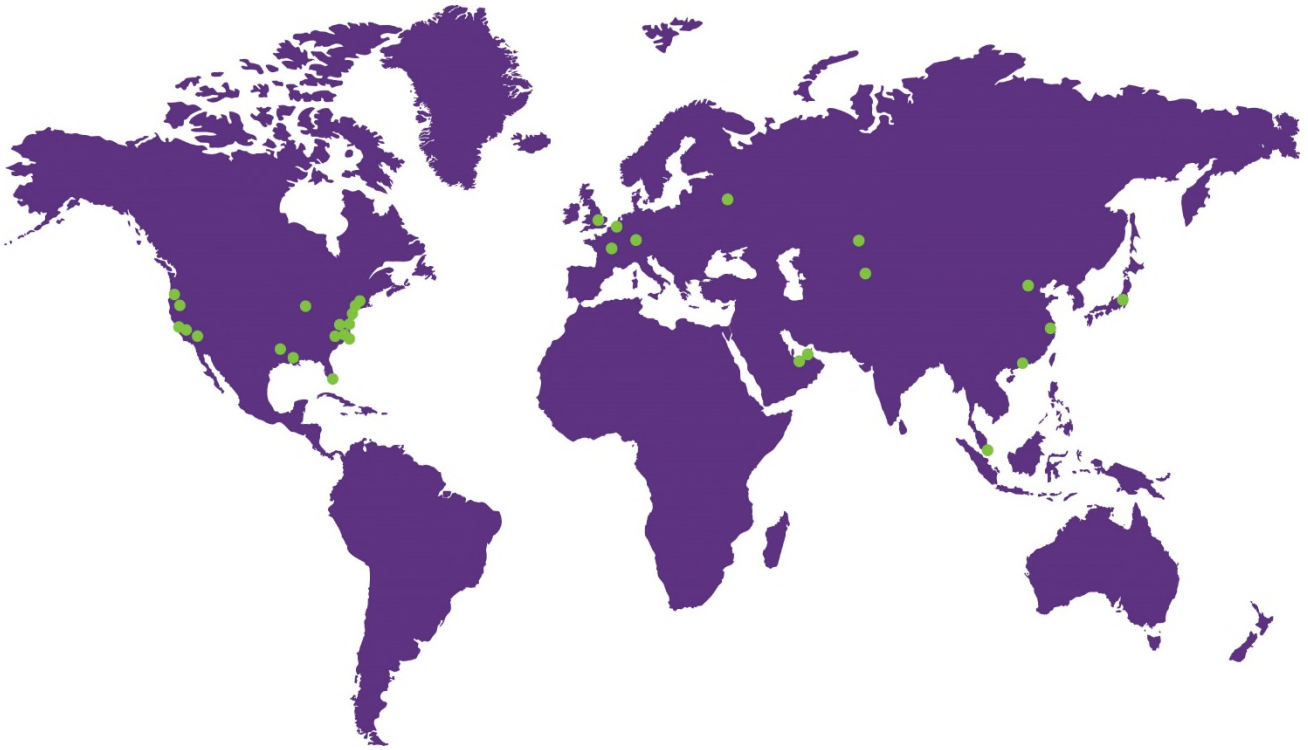

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