

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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What's New for Q3 Form 10-Q and Future Periodic Reports: SEC Disclosure Update and Simplification Amendments

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The SEC's Disclosure Update and Simplification Amendments adopted in late August¹ have been published in the [Federal Register](#), so we now know the effective date will be Monday, November 5, 2018. As a result, with one notable exception relating to statements of shareholders' equity carved out by the SEC staff discussed below, the new Regulation S-K and S-X amendments will apply to all periodic reports filed on or after the effective date of November 5, 2018.² Thus, U.S. calendar fiscal-year end companies in particular should review the "nuts and bolts" we provide below in preparing their third quarter Form 10-Qs.

The amendments do not effect substantive changes, but rather, are designed to streamline and improve corporate disclosures by eliminating and/or harmonizing existing line-item requirements deemed to have become redundant, duplicative, overlapping, outdated or superseded either by other SEC disclosure provisions or updated provisions of U.S. GAAP, or both. In some instances, disclosure that was required by line items in both the body of a periodic report, and the accompanying financial statements, will be required only in the financial statements. Some companies therefore may feel more pressure to improve the quality, readability, and forward-looking aspects of their MD&As in order to explain material information that some investors might now consider to be "buried" in the financial statements. From an antifraud liability exposure perspective, moreover, the Private Securities Litigation Reform Act safe harbors are not available to protect "forward-looking statements" made in the financial statements, whereas they do apply to such statements that appear in the body of a particular periodic report.

The highlights of those changes that should be considered in preparing the upcoming Form 10-Q and future periodic reports filed under the Securities Exchange Act of 1934, as amended (Exchange Act) – along with a couple of other recent changes the SEC made to the content of the cover pages of Forms 10-Q and 10-K – are set forth below in "disclosure locators" intended to clarify which sections of these periodic reports are affected.

Disclosure Locator – Form 10-Q

Cover Page

- Eliminate references to “posting” Interactive Data Files on a registrant’s website, to conform to the new Inline XBRL rules.³
- Eliminate the parenthetical after the non-accelerated filer box (indicating that the box shouldn’t be checked by smaller reporting companies) given that a company may now be considered both an accelerated filer and a smaller reporting company.⁴

Part I, Item 1. Financial Statements (Regulation S-X amendments and related changes)

- An “audit” or “examination” must be in accordance with the standards of the PCAOB for purpose of expressing an opinion (S-X Rule 1-02(d) has been amended to add reference to PCAOB in the definition of “audit” (or “examination”)).
- “Significant subsidiary” definition has been modified to drop reference to extraordinary items and cumulative effect of a change in accounting principle of the subsidiary (S-X Rule 1-02(w)(3) amended); conforming changes were made to the definitions of the term “significant subsidiary” set forth in Rule 405 under the Securities Act of 1933, as amended (Securities Act) and Exchange Act Rule 12b-2.

Rule 10-01, Interim Financial Statements

The key with respect to understanding the following changes is recognizing that the elimination of the requirement in Regulation S-X (and in other conforming places) does not mean that the disclosure is no longer required, but rather that the disclosure obligation itself now emanates exclusively from the applicable GAAP requirement and therefore will appear in the financial statements. For this reason, we have provided the ASC (U.S. GAAP) references below.

- *EPS.* Eliminated reference in S-X Rule 10-01 to requirement to present EPS on the face of interim income statements, in deference to applicable GAAP.⁵ Corresponding reference in S-K Item 601(b)(11)(requiring inclusion in annual report of exhibit in the form of a statement setting forth in reasonable detail the computation of per share earnings, etc.) also eliminated in deference to applicable GAAP (ASC 260-10-50-1a).
- *Reasons for Change in Accounting Principles.* S-X Rule 10-01(b)(6) has been deleted as duplicative of GAAP requirements (ASC 250-10-45-12 to 16, ASC 250-10-50-1a, and ASC 270-10-50-1g).
- *Disclosure of material contingencies.* Reference in S-X Rule 10-01(a)(5) deleted as duplicative of GAAP requirements (ASC 270-10-50-6). [Note that the SEC specifically deferred for future consideration whether to amend the legal proceedings disclosure requirement of Item 103 of Regulation S-K in light of GAAP’s loss contingencies accounting standard (ASC 450-20)].
- *Disclosure of Effects of Discontinued Operations.* S-X Rule 10-01(b)(5) requiring disclosure of such effects on interim revenues, net income and EPS for all periods presented, deleted because duplicative of relevant GAAP requirements (ASC 205-20-50-5B and 5C, ASC 260-10-45-3, and ASC 270-10-50-7).
- *Interim Adjustments.* Eliminated requirement in S-X Rule 10-01(b)(8) – with a corresponding change made to S-X Rule 3-03, Instructions to statement of comprehensive income requirements relevant to interim period presentations – to provide examples of adjustments in order for interim financial statements to be fairly stated, because duplicative of relevant GAAP requirements (ASC 270-10-45-10).
- *Common Control Transactions.* Deleted language in S-X Rule 10-01(b)(3) requiring that common control transactions be reflected in current and prior period comparative period interim financial statements because duplicative of relevant GAAP requirements (ASC 805-50-45-1 to -5).

Changes to Other S-X Rules Relevant to Preparation of Interim Financial Statements

- S-X Rule 3-04 amended to extend to interim periods the obligation to disclose changes in shareholders' equity, including the amount of dividends per share for each class of equity (rather than just common stock) – this can be done either in a separate financial statement or a footnote to the financial statements. **Note that this is the one exception, as mentioned above, to the amendments applicable to the third quarter Form 10-Q filed after November 5, 2018. The SEC staff has indicated that it will not object if the filer's first presentation of the changes in shareholders' equity is included in the first report for the quarter that begins after November 5, 2018.⁶ For calendar year-end companies that will be the first quarter ending March 31, 2019.**
- Consolidated and combined financial statements – several revisions were made to Regulation S-X to reflect changes in GAAP, specifically to correct for numerous inconsistencies regarding Differences in Fiscal Periods and the Bank Holding Act of 1956 (S-X Rule 3A-02), and Intercompany Transactions (S-X Rules 3A-04 and 4-08). For a more specific explanation of these amendments, see the chart on p. 30 of the Adopting Release and accompanying text (links to each of the August Adopting Release and the October Federal Register version thereof are available via Endnote 1, below).
- S-X Rule 4-08(e)(3) has been amended to consolidate all disclosures by domestic registrants of restrictions on dividends and related items. The amendment also drops the 25% test for disclosing restrictions on the ability of subsidiaries to transfer funds to the parent, in favor of a “materiality” test.
- S-X Rule 4-08(h) tax-related amendments -- Language deleted from S-X Rule 4-08(h)(2) relating to income tax rate reconciliation, because duplicative of GAAP (ASC 740-10-50-12).
- S-X Rule 4-08(f) requiring disclosure of significant changes in amounts of debt issued subsequent to the latest balance sheet date – eliminated because covered by GAAP (ASC 855-10-50-2 and 855-10-55-2a).
- S-X Rule 4-08(k)(1) requiring identification of related party transactions – eliminated because covered by GAAP (ASC 850-10-50-1).

Part I. Item 2. Management's Discussion & Analysis, Item 303 of Regulation S-K

- Amendments made to include an explicit reference to “geographic areas” and certain other clarifying changes, including the elimination of Instruction 5 to 303(b)(MD&A in quarterly reports – “The registrant shall discuss any seasonal aspects of its business which have had a material effect upon its financial condition or results of operations”), corresponding to changes made to Item 101 of Regulation S-K (which will be applicable to the upcoming Form 10-K as discussed below), in deference to GAAP. With respect to seasonality disclosures, the SEC cautioned that, notwithstanding the elimination of Instruction 5, the MD&A “known trends and uncertainties” disclosure requirement would still cover seasonality if it is material to investors.

Disclosure Locator – Form 10-K (in addition to applicable items discussed above for the Form 10-Q, including changes to the cover page)

Part I, Item 1. Item 101 of Regulation S-K, Description of Business

- The business description no longer needs to include the following disclosure given that such disclosure is covered by relevant GAAP and therefore presented in the financial statements:
 - Amounts spent on research & development for all years presented (covered by ASC 730-10-50-1 and ASC 730-20-50-1).
 - Financial information by segment for last three years – e.g., revenues from external customers, a measure of profit and loss, and total assets – because otherwise covered by ASC 280-10-50-22, ASC 280-10-50-34, ASC 280-10-50-35.
 - Financial information by geographic area and risks associated with issuer's foreign operations and any segment's dependence on foreign operations (covered by ASC 280-10-50-41).

- NOTE – some or all of the information in the three sub-bullets above may be subject to other disclosure requirements; e.g., in the MD&A and/or Risk Factors.
- Eliminating disclosure regarding the SEC’s Public Reference Room, but retaining requirements to disclose the SEC’s Internet address and the availability of electronic SEC filings at this address; plus a new requirement mandating (rather than permitting) disclosure of the registrant’s Internet address.

Part II, Item 5. Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities

Item 201 of Regulation S-K, Market Price of and Dividends on the Registrant’s Common Equity and Related Stockholder Matters

- Eliminate as outdated the requirement in S-K Item 201(a)(1) to provide certain market price disclosures, while adding a requirement to identify the principal U.S. market(s) and trading symbol for each class of common equity.
- Eliminate information on the frequency and amount of cash dividends (in S-K Item 201(c)(1)), because covered by Rule 3-04 of Regulation S-X.

Part II, Item 8 – Financial Statements and Supplementary Data

Item 302 of Regulation S-K, Supplementary Financial Information

- S-K Items 302(a)(1) and (3) – remove reference to “extraordinary items” to reflect changes to GAAP effective in 2015. (See ASU 2015-01, Income Statement – Extraordinary and Unusual Items (sub-topic 225-20), Simplifying Income Statement Presentation by Eliminating the Concept of Extraordinary Items). Conforming changes made in Item 10(b)(2) of Regulation S-K, various provisions of Regulation S-X, Securities Act Rule 405 and Exchange Act Rule 12b-2 (definitional rules), together with Exchange Act Rules 13a-10(b) and 15d-10(b)(transition reports, change in fiscal year end)
- Replace the reference in S-K Item 302(a)(3) to “segments” with “discontinued operation” language in order to reflect changes in GAAP relating to discontinued operations.

Part III, Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters

- Retain S-K Item 201(d) disclosure relating to securities authorized for issuance under equity compensation plans. Notwithstanding the SEC’s proposal to eliminate this line-item due to overlapping GAAP requirements, its continued applicability is made clear in the regulatory text of the August Adopting Release published in the October 4 Federal Register (see Endnote 1, below, for links to both).

ENDNOTES

¹ The August 2018 Adopting Release is available [here](#) and a demonstration version, with added text underlined and deleted text struck out, is available [here](#). The August Adopting Release was published in the Federal Register on October 4, 2018 available [here](#).

² This brief summary does not attempt to cover all of the amendments. Specifically, we do not address the various amendments that affect disclosures in annual reports on Form 20-F under the Securities Exchange Act of 1934, as amended (Exchange Act), proxy statements, tender offer filings, and registration statements filed under either the Exchange Act or the Securities Act of 1933, as amended (Securities Act).

³ Available [here](#).

⁴ Available [here](#).

⁵ ASC 270-10-50-1b.

⁶ The full text of the Division of Corporation Finance's interpretation, Exchange Act Forms Compliance & Disclosure Interpretation No. 105.09, as amended on October 4, 2018 to capture the November 5 effective date (available [here](#)), is as follows:

Question: On August 17, 2018, the SEC adopted amendments to certain disclosure requirements in Securities Act Release No. 33-10532, Disclosure Update and Simplification. The amendments will become effective on November 5, 2018. Among the amendments is the requirement to present the changes in shareholders' equity in the interim financial statements (either in a separate statement or footnote) in quarterly reports on Form 10-Q. Refer to Rules 8-03(a)(5) and 10-01(a)(7) of Regulation S-X. When are filers expected to comply with this new requirement?

Answer: The amendments are effective for all filings made on or after November 5, 2018. In light of the timing of effectiveness of the amendments and proximity of effectiveness to the filing date for most filers' quarterly reports, the staff would not object if the filer's first presentation of the changes in shareholders' equity is included in its Form 10-Q for the quarter that begins after the effective date of the amendments. For example, a December 31 fiscal year-end filer could omit this disclosure from its September 30, 2018 Form 10-Q. Likewise, a June 30 fiscal year-end filer could omit this disclosure from its September 30, 2018 and December 31, 2018 Forms 10-Q; however, the staff would object if it did not provide the disclosures in its March 31, 2019 Form 10-Q. (Sept. 25, 2018 and updated October 4, 2018).

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