

No More CTRs! (and Other SEC Updates to Modernize and Simplify Disclosure for Public Companies)

By James D. Evans, Ran Ben-Tzur, Jennifer J. Hitchcock and Veronica Zavala

The following is a summary of the additional amendments adopted by the SEC:

Item 401 (Directors, Executive Officers, Promoters and Control Persons).

The amendments (1) clarify that the information regarding executive officers and directors described in Item 401 is not required in proxy statements if that information is otherwise provided in the company's Form 10-K and (2) change the required caption for the disclosure if it is included in Part I of Form 10-K to "Information about Our Executive Officers" instead of the current "Executive officers of the registrant."

Item 405 (Compliance with Section 16(a) of the Exchange Act).

Item 405 requires companies to disclose each reporting person who failed to file Section 16 reports on a timely basis. The current rules currently provide that companies should determine whether there are any delinquencies based solely upon a review of Section 16 filings on EDGAR. The amendments clarify that companies may, but are not required, to only rely on Section 16 filings on EDGAR and can expand the scope of inquiry beyond the electronic filings. In addition, the new rules (1) add an instruction to change the disclosure heading from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports" to more precisely describe the required disclosure; (2) include an instruction to clarify that companies are encouraged to exclude such disclosure heading if there are no delinquencies to report; and (3) eliminate the Form 10-K cover page's check box relating to Item 405 disclosures and the related instruction in Item 10 of Form 10-K.

Item 407 (Corporate Governance).

The amendments update an outdated reference to AU Section 380 in Item 407 by referring more broadly to "the applicable requirements" of the Public Company Accounting Oversight Board and the SEC. Additionally, the amendments clarify that emerging growth companies, like smaller reporting companies, are not required to provide a compensation committee report.

Item 501 (Outside Front Cover Page of the Prospectus).

Item 501 sets forth disclosure requirements related to the outside front cover page of prospectuses. The amendments will:

- Eliminate the portion of the instruction to Item 501(b)(1) that discusses when a name change may be required and the exception to that requirement.
- Explicitly allow a clear statement that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus, so long as a cross-reference (with a prominently highlighted page number) to such disclosure is included.
- Require disclosure on the prospectus cover page of the principal United States market(s) for the securities being offered and the corresponding trading symbols and limit disclosure of markets that are not “national securities exchanges” to only those principal United States markets where the company, through the engagement of a registered broker-dealer, has actively sought and achieved quotation.
- Allow companies to exclude from the prospectus the portion of the “subject to completion” legend relating to state law for offerings that are not prohibited by state blue sky law.
- Consolidate Items 501(b)(10) and 501(b)(11) without any substantive change, to address all the situations where a “subject to completion” legend is required.

Item 503 (Risk Factors).

The amendments relocate the “Risk Factors” requirements under Item 503(c) to new Item 105, as Subpart 100 of Reg. S-K covers a broad category of business information and is not limited to offering-related disclosure. The new rules also eliminate the specific risk factor examples currently enumerated in Item 503(c).

Item 508 (Plan of Distribution).

Item 508 requires disclosure about the plan of distribution for securities in an offering, including information about underwriters. The SEC is amending Rule 405 to define the term “sub-underwriter” 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 registrant of the securities.

Item 512 (Undertakings).

Item 512 provides undertakings that a company must include in Part II of its registration statement, depending on the type of offering. The amendments eliminate undertakings that are duplicative of other rules or that have become unnecessary due to developments since their adoption. Specifically, the SEC is eliminating Item 512(c), (d), (e) and (f) undertakings.

Incorporation by Reference.

▪ **Rule 411 under the Securities Act; Rules 12b-23 and 12b-32 under the Exchange Act; and Related Rules under the Investment Company Act of 1940 and Investment Advisers Act.** The amendments will:

- Eliminate the requirement that copies of information incorporated by reference be filed as exhibits to registration statements or reports, with limited exceptions.
- In addition to the recently adopted rules for hyperlinks for exhibits, require hyperlinks to information that is incorporated by reference if that information is available in SEC filings, and expand the requirement to file documents in HTML format to include filings that are subject to the proposed hyperlinking requirements.
- Prohibit incorporation by reference or cross-referencing in financial statements of information outside the financial statements, unless otherwise specifically permitted or required by the SEC's rules, U.S. Generally Accepted Accounting Principles (U.S. GAAP) or International Financial Reporting Standards (IFRS).
- Eliminate the general prohibition on the incorporation by reference of documents that have been on file with the SEC for more than five years.
- Restrict the incorporation of financial information required to be given in comparative form for two or more fiscal years or periods unless the information incorporated by reference includes the entire period for which the comparative data is given and except as otherwise provided by the SEC's rules, U.S. GAAP or IFRS.

Manner of Delivery.

The SEC is adopting amendments that require all information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F to be tagged in Inline XBRL in accordance with the EDGAR Filer Manual. Under the amendments, companies are required to file with each of these forms a "Cover Page Interactive Data File," which is defined as machine-readable computer code that presents the cover page information in Inline XBRL format.

Additionally, the amendments require that the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F include the trading symbol for each class of registered securities and that consistent with the other forms, the cover pages of Form 10-Q and Form 8-K include disclosure of the title of each class of registered securities and each exchange on which they are registered.
