Debevoise & Plimpton

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TMT INSIGHTS
From the Debevoise Technology, Media & Telecommunications Practice

SEC Pares Back Required Content for Exhibit Filings: Takeaways for TMT

On March 20, 2019, the SEC announced the adoption of amendments to Regulation S-K intended to modernize and simplify disclosure requirements applicable to SEC reporting companies.

Highlighted below are two changes of note for companies in the technology, media and telecommunications ("TMT") sector.

Omission of Schedules to Exhibits

M&A deal activity in the TMT sector has been particularly strong in recent years. When publicly filing a merger, acquisition or similar agreement for these deals, reporting companies customarily exclude from the filing the disclosure schedules and other immaterial attachments to the agreement. While these omissions previously were permitted only for material merger, acquisition and similar agreements, under the new rules, immaterial schedules and similar attachments may be omitted from *all* exhibit filings, including material contracts such as credit agreements and services agreements.

This provides welcome relief to reporting companies, some of which have already been omitting such immaterial schedules and attachments from material contracts – in some cases, resulting in an SEC comment requesting that the company refile the exhibits in full. Public companies and their prospective counterparties in the TMT sector should consider how to maximize the benefits provided by the new rules when drafting and negotiating deal documentation. For example, in preparing an acquisition agreement, the deal parties can limit the amount of immaterial information ultimately made publicly available by moving this information to the schedules of the agreement to be filed. Entire agreements, such as software licenses or technology services agreements (*e.g.*, software and maintenance support agreements, and data center and hosting arrangements), if immaterial and included as a schedule to a material contract, may also be omitted from public filings.

To benefit from the new rules, the information in the omitted schedules and attachments must be (i) not material and (ii) not otherwise disclosed in the body of the exhibit or in the base disclosure document to which the exhibit is attached. Reporting companies must file with the applicable exhibit a list briefly identifying the contents of the omitted schedules and attachments (unless that information is already included within the exhibit in a manner that conveys the subject matter of the omitted materials – *e.g.*, in the table of contents) and should be prepared to furnish such omitted materials supplementally to the SEC upon request (although they need not undertake to do so in the filing).

While these new rules apply to SEC filings, other regulatory regimes remain unaffected and may require TMT companies to file complete copies of all agreements. For example, television broadcast licensees must continue to file material contracts with the FCC in accordance with FCC rules and regulations.

Elimination of Formal Process for Confidential Treatment Requests

TMT reporting companies often must publicly file material contracts and agreements that contain sensitive information, such as supply agreements, services agreements and technology license agreements. In these instances, the company typically submits to the SEC a confidential treatment request ("CTR") with respect to such information on the basis that disclosure of the information would cause it substantial competitive harm. Following review of the application, which can take several weeks, the SEC issues a confidential treatment order granting or denying the CTR. This process is time consuming and potentially disruptive to a reporting company's business. For example, the SEC will not declare a pending registration statement effective while a CTR is being reviewed.

The new rules permit reporting companies to omit confidential information from (i) material merger, acquisition and similar agreements and (ii) material contracts not made in the ordinary course of business *without* filing a formal CTR. Instead, companies need only make appropriate markings to the exhibit and exhibit index indicating the presence of omitted information because such information is both not material and would likely cause competitive harm to the company if publicly disclosed. Exhibits that do not fall under one of the two categories noted above (*e.g.*, underwriting agreements and debt indentures) do not benefit from these new rules governing CTRs.

While the new rules eliminate the formality of the CTR process, the substantive requirements related to assertions of confidentiality remain intact. As stated in an announcement issued on April 1, 2019, the SEC has established a task force and procedures for reviewing registrant filings to assess whether redactions to exhibits appear to comply with the relevant rules for redacting confidential information. Reporting companies should be prepared, upon request from the SEC, to promptly provide supplemental materials similar to those currently required in a CTR including an unredacted copy of the exhibit and an analysis supporting confidential treatment of the redacted information. If the supplemental materials do not support a company's redactions, the SEC may request that the company file an amendment to its public filing that includes some, or all, of the previously redacted information.

Other Changes and Timing

The new rules include amendments to various other disclosure requirements applicable to current and periodic reports (*e.g.*, Forms 8-K, 10-K and 10-Q) and offering documents, including with respect to executive officer disclosure, Section 16 "insider" filings (*i.e.*, Forms 3, 4 and 5) and the rules governing incorporation by reference. We summarize these and other selected changes in our recent client update, accessible here.

The rules governing redaction of confidential information became effective on April 2, 2019. Companies with pending CTRs may, but are not required to, withdraw the requests. Most of the remaining final rules will become effective on May 2, 2019.

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