

SEC Continues to Streamline and Update Disclosure Requirements

March 27, 2019

On March 20, 2019, the Securities and Exchange Commission announced the adoption of final rules intended to simplify and modernize the disclosure requirements of public companies, investment companies and investment advisers under Regulation S-K and related rules and forms. The final rules were adopted pursuant to the Fixing America's Surface Transportation (FAST) Act of 2015, which mandated that the SEC take steps to eliminate duplicative, overlapping, outdated or unnecessary disclosure requirements.

The adopted amendments are largely consistent with those proposed by the SEC on October 11, 2017.

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Highlighted below are selected key changes under the final rules applicable to operating companies. For a full description of all adopted amendments, including those applicable to investment companies and investment advisers, the full text of the final rules is available [here](#). References below to "Item" are to the applicable Item in Regulation S-K, unless otherwise noted.

HIGHLIGHTS

Exhibits

Among the most significant changes applicable to operating companies are the amendments to Item 601 relating to exhibits.

New Exhibit Requirement

- Registrants will now be required under Item 601 to file a brief description of their securities (including registered capital stock, debt securities, warrants, rights and other securities) as an exhibit to Form 10-K. This is in addition to the current requirement to disclose this information in registration statements under Item 202.

Confidential Treatment Requests

- Item 601(a)(6) will now permit registrants to omit personally identifiable information (e.g., bank account numbers, social security numbers, home addresses, and similar information) from exhibits without submitting a confidential treatment

request (“CTR”) under Rule 406 under the Securities Act of 1933, as amended, or Rule 24b-2 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Registrants who avail themselves of this accommodation need not include an analysis supporting the redactions at the time of filing.

- Item 601(b)(10) will now permit registrants to omit confidential information from material contracts filed as exhibits without submitting a CTR if the information (i) is not material and (ii) would likely cause competitive harm if publicly disclosed. Registrants remain responsible for complying with the requirements of Rule 406 and Rule 24b-2, including ensuring that the redactions include no more information than necessary to prevent competitive harm to the registrant. In addition, registrants remain responsible for adhering to the requirements for marking exhibits subject to confidential treatment. In particular, registrants must:
 - mark the exhibit index to indicate that portions of the exhibit have been omitted;
 - include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit; and
 - indicate with brackets where the information has been omitted from the filed version of the exhibit.

The SEC will continue its selective review of registrant filings, and registrants should be prepared, if requested, to promptly provide to the SEC supplemental materials similar to those currently required in a CTR, along with an analysis supporting confidential treatment of the redacted information.

Schedules and Material Contracts

- Item 601(a)(5) will now permit registrants to omit entire schedules and similar attachments to required exhibits, provided:
 - such schedules and attachments do not contain material information; and
 - the information contained in such schedules and attachments is not disclosed in the body of the exhibit or in the base disclosure document to which the exhibit is attached.

The filed exhibit must contain a list briefly identifying the contents of any omitted schedules and attachments.

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- The two-year look back requirement for filing material contracts as exhibits in Item 601(b)(10)(i) will be limited to “newly reporting registrants” (i.e., companies that, at the time of filing, are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, certain shell companies, and any company that has not filed an annual report since the revival of a previously suspended reporting obligation). All other registrants will now be required to file as an exhibit only those contracts not made in the ordinary course of business that are material to the registrant and are to be performed in whole or in part at or after the filing of the registration statement or report.
 - Conforming changes will be made to the exhibit requirements under Form 20-F to maintain a consistent approach to MD&A for domestic registrants and foreign private issuers.

Management’s Discussion and Analysis

- Item 303(a) will now generally permit a registrant that provides three years of financial statements in a filing to omit discussion and analysis of the earliest of the three years if such discussion was already included in an earlier SEC filing, provided that the registrant identifies the location in the prior filing where that discussion may be found.
- Conforming changes will be made to the disclosure requirements under Item 5 of Form 20-F to maintain a consistent approach to MD&A for domestic registrants and foreign private issuers.

Incorporation by Reference

- Item 10(d) will no longer prohibit the incorporation by reference of documents that have been on file with the SEC for more than five years.
- Other than the annual report to shareholders, copies of information incorporated by reference will no longer need to be filed as exhibits. Instead, registrants will need to include hyperlinks to information incorporated by reference.
- In the registrant’s financial statements, incorporating by reference, or cross-referencing to, information outside of the financial statements will be prohibited unless explicitly permitted or required by SEC rules or by U.S. Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS).

Management and Security Holders

- Item 401 will be updated to clarify that the executive officer disclosure required by that item does not need to be repeated in a registrant's proxy statement if it is already included in Part I of the registrant's Form 10-K. This applies to all executive officer disclosures under Item 401, not just the disclosure required by Item 401(b).
- In determining whether there are any Section 16 filing delinquencies that must be disclosed pursuant to Item 405, registrants will now be able to rely on Section 16 reports (*i.e.*, Forms 3, 4 and 5) filed on EDGAR, rather than only on paper reports. The requirement in Rule 16a-3(e) under the Exchange Act that reporting persons furnish Section 16 reports to the registrant will be eliminated.
- The disclosure heading required by Item 405(a)(1) will be renamed from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports" and registrants with no delinquencies to report may exclude this section. The checkbox on the cover page of Form 10-K relating to disclosure of delinquent Section 16 reports will be removed.

Business Information and Risks

- Disclosure required by Item 503(c) of the most significant factors that make an offering speculative or risky will now be part of new Item 105 ("Risk Factors"). The risk factor examples that currently appear in Item 503(c) will be removed.
- Item 102 will now require a description of the registrant's physical property only to the extent that the property is material to the registrant.

Cover Page of Certain Periodic and Current Reports

- Registrants will now be required to disclose the trading symbol for each class of listed securities (in addition to the title of each class of securities and the national exchange or principal U.S. market for such securities) on the cover page of Forms 10-K, 10-Q, 8-K, 20-F and 40-F.
- Registrants will now be required to tag in Inline XBRL all information on the cover page of Forms 10-K, 10-Q, 8-K, 20-F and 40-F. Inline XBRL differs from traditional XBRL in that, with Inline XBRL, all XBRL data is embedded into the HTML document.

Cover Page of Prospectus

- When it is not practicable to provide a price for the offered securities, Item 501(b)(3) will now permit registrants to state on the cover page of the prospectus that the

offering price will be determined by a particular method or formula that is explained elsewhere in the prospectus (rather than on the cover page).

- Item 501(b)(4) will now require disclosure on the prospectus cover page of the principal U.S. trading market for the securities being offered and the corresponding trading symbol. Currently, this disclosure is required only for securities listed on a national securities exchange.
- Item 501(b)(10) will now permit registrants to exclude from a prospectus the portion of the “subject to completion” legend (*i.e.*, the “red herring” language) regarding state law prohibitions for offerings that are not prohibited by state blue sky laws.

Undertakings

- The undertakings required by Item 512(c), Item 512(d), Item 512(e), and Item 512(f) will no longer be required.

TIMING

The rules governing redaction of confidential information in material contracts will be effective immediately upon publication in the Federal Register. The remaining final rules will be effective 30 days after publication in the Federal Register, except for the Inline XBRL tagging requirements for the cover pages of certain filings, which will be subject to a three-year phase-in, and the rules regarding formatting and hyperlinking of certain investment company filings, which will become effective on April 1, 2020.

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