

SEC Adopts Amendments to Modernize and Simplify Disclosure Requirements

And Provides Guidance on the Significantly Streamlined Confidential Treatment Request Process

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On March 20, 2019, the SEC voted to adopt amendments¹ to modernize and simplify disclosure requirements for public companies, investment advisers, and investment companies. The amended rules, which are based on amendments proposed by the SEC in 2017² as mandated by the 2015 Fixing America's Surface Transportation Act, are expected to benefit investors by eliminating outdated and unnecessary disclosure and making it easier for them to access and analyze material information. While many of the changes are technical in nature, companies should pay careful attention to their upcoming filings to ensure compliance with these changes and take advantage of the modified requirements.

This client alert highlights key features of the amendments and outlines certain practical considerations for registrants. The summary chart provided in Exhibit A highlights the major changes and can be used as a quick reference.

Management's Discussion and Analysis ("MD&A") (Item 303) - Only Two-Year Discussion Needed

The new rules will now allow a registrant to eliminate discussion of the earliest of the three-year period presented in their financial statements if such discussion is already included in any other of the registrant's prior filings, as long as the registrant identifies the location of the discussion in the prior filing.

The new rules will also emphasize that registrants may use any presentation that, in their judgment, would enhance a reader's understanding, including a narrative discussion for some or all of the years in the three-year period.

¹ The final rule is available [here](#).

² For a detailed discussion, see our prior alert, "SEC Proposes Amendments to Modernize and Simplify Disclosure Requirements in Regulation S-K," available [here](#).

Companies should consider revising their MD&A disclosure to improve readability and eliminate repetitive and immaterial disclosure. The new rules continue to require that registrants provide “all of the information necessary to an understanding of their financial condition, changes in financial condition and results of operations,” but companies should carefully consider what format will most enhance a reader’s understanding of the company’s performance.

Foreign Private Issuers (“FPIs”)

Equivalent changes were adopted for FPIs reporting on Form 20-F.

IPO Companies

The changes do not affect IPO companies that are required to show three years of financial statements and the comparison discussion for both periods.

Description of Property (Item 102) - Only *Material* Properties Required

Revised Item 102 clarifies that the description of property should focus on physical properties that are material to the registrant’s business. This disclosure may be provided on a collective basis, if appropriate.³

Redaction of Confidential Information in Material Contract Exhibits

Perhaps the most significant change resulting from the amendments is new, streamlined confidential treatment request (“CTR”) process. The simplified process is intended to substantially reduce the burden currently borne by companies in preparing such requests, while continuing to provide investors with material information. Under the new rules:

- Registrants will be able to omit confidential information from filed material contracts without having to submit an unredacted copy and formal CTR when such information is both (i) not material and (ii) “would likely cause competitive harm” to the registrant if publicly disclosed. Registrants must still clearly identify and mark redacted exhibits.
- Codifying an already common practice, registrants will be allowed to omit personally identifiable information, such as bank account numbers, social security numbers, home addresses and similar information, from all exhibits without submitting a CTR.

Registrants remain responsible for determining if redaction is permissible, and the SEC will continue to selectively review redacted filings and could request supplemental materials similar to those required in a CTR.

Companies should continue to narrowly tailor their redactions to remove only information that is not material and would likely cause competitive harm if publicly disclosed. Companies should maintain a record of the legal and factual bases supporting redactions in the event the SEC staff subsequently challenges the company’s determination in making such redactions.

Foreign Private Issuers

To maintain a consistent approach to the exhibit requirements for domestic registrants and FPIs, the SEC adopted similar amendments applicable to FPIs filing reports on Form 20-F.⁴

IPO Companies

This streamlined process may be particularly significant for IPOs (and other capital markets transactions), as it reduces the risk of delay associated with the need to clear a CTR with the SEC before a registration statement can be declared effective.

³ The SEC did not revise any of the instructions to Item 102 that relate to the mining, oil and gas and real estate industries.

⁴ Similar changes were not adopted for Canadian issuers filing Form 40-F.

SEC Guidance

Given the significance of this change, the SEC has provided separate guidance⁵ on how it intends to apply the new rules governing redaction of confidential information.

- *Compliance Reviews* – The SEC intends to review registrants' filings for compliance with the new rules. When done in connection with a regular filing review, the requests for supplemental information and review of such information will be handled separately from the regular review in order to minimize the risk of inadvertent public disclosure.
- *Application to Securities Act Registration Statements* – The guidance clarifies that, consistent with historical practice, the SEC will ask registrants to resolve any questions relating to redacted exhibits in registration statements before submitting a request for acceleration of the effective date.
- *Transition Issues* - The new rules have not changed a registrant's ability to request confidential treatment pursuant to Rule 406 or Rule 24b-2 and the SEC will continue to process new applications as well as pending applications that are not withdrawn following established procedures.
 - If a registrant has a pending CTR at the time the amendments governing redaction became effective, it may withdraw its application and refile the exhibit(s) in redacted form. Registrants should contact the Assistant Director office responsible for reviewing their filings to coordinate the withdrawal.
 - If a registrant has received an order granting confidential treatment and the order is still in effect, the grant of confidential treatment will continue until the date stated on the order.

Section 16(a) Reporting Compliance (Item 405)

Eliminates the requirement that Section 16 reporting persons furnish Section 16 reports to relevant registrants and allows registrants to rely on Section 16 reports filed on EDGAR.

Changes the heading of the section disclosing each reporting person who failed to file a Section 16 report on a timely basis to "Delinquent Section 16(a) Reports" and allows registrants with no delinquencies to exclude this section

Eliminates the checkbox on the cover page of Form 10-K relating to Section 16(a) compliance.

Changes to Exhibit Requirements (Item 601)

1. Description of Registrants Securities – New Exhibit to the 10-K

Requires registrants to provide Item 202 information (description of registered stock, debt securities, warrants, rights and other securities) as an exhibit to their Form 10-K, rather than limiting this disclosure to registration statements.

2. Omission of Schedules

Expands the existing accommodation currently applicable only to material plans of acquisition (Item 601(b)(2) exhibits) to permit registrants to omit schedules and similar attachments to exhibits unless they contain material information that is not otherwise disclosed in the exhibit or the disclosure document.

FPIs - Equivalent amendments were adopted to require FPIs to provide information in exhibit filings comparable to the information required under amended Item 601.

⁵ "New Rules and Procedures for Exhibits Containing Immaterial, Competitively Harmful Information", available [here](#). Registrants can also direct questions to RedactedExhibits@sec.gov.

3. Shortened Look-Back Period for Material Contracts

Limits to “newly reporting registrants” the requirement to file material contracts not made in the ordinary course of business that were entered into within two years of the applicable registration statement or report.

All companies are still required to file as an exhibit every contract not made in the ordinary course of business that is material and is to be performed, in whole in part, at or after the filing of the registration statement or report.

Financial Statements: Incorporation by Reference and Cross Reference of Information

1. No Incorporation by Reference or Cross-Referencing in Financial Statements

Prohibits financial statements from using incorporation by reference to another filing or cross-referencing to other parts of a filing, except where specifically permitted by SEC rules, U.S. GAAP or IFRS.

2. Removal of Age Limit on Incorporated Documents (Item 10(d))

Eliminates the prohibitions on incorporation by reference where the documents have been on file with the SEC for more than five years.

3. Elimination of Need to File Documents Incorporated into Exchange Act Reports

Eliminates the requirement to file as an exhibit any document or part thereof that is incorporated by reference in a filing.

4. Expanded Hyperlinking

Requires hyperlinks to information incorporated by reference if that information is available on EDGAR, consistent with previously-adopted rules requiring hyperlinks to most exhibits filed pursuant to Item 601 and Forms F-10 and 20-F.

Risk Factors

Relocates the risk factor disclosure requirements of Item 503(c) to new Item 105, to reflect the application of these requirements to Form 10 registration statements and periodic reports and eliminates the generic risk factor examples to encourage registrants to focus on their particular business when identifying risks. Companies should revisit the risk identification process with a view toward minimizing generic risk factors and focusing on company-specific risks tailored for the registrant's operations.

Form Cover Page Data Tagging in Inline XBRL

All information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F will be required to be tagged in Inline XBRL.⁶

The cover pages of these forms will be amended to include the trading symbol for each class of registered securities, and the cover pages of Form 10-Q and Form 8-K will be amended to include the title of each class of registered securities and each exchange on which they are registered (this information is already provided on the cover pages of Form 10-K, Form 20-F and Form 40-F).

Registrants will be required to file a "Cover Page Interactive Data File" with each of the specified forms.

⁶ For information on the SEC's recently-adopted rules requiring the use of Inline XBRL for the submission of operating company financial statements, see our prior alert, "New and Proposed Rules on Smaller Reporting Companies, XBRL and Whistleblower Program" available [here](#).

Corporate Governance

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

Item 401 disclosures regarding executive officers need not be duplicated in proxy statements if already included in Part I of Form 10-K.

2. Compensation Committee Report

Clarifies that emerging growth companies are not required to provide a compensation committee report under Item 407(e)(5).

3. Audit Committee Report

Updates the outdated reference to AU 380, "Communication with Audit Committees" to refer more broadly to the applicable rules and standards of the Public Company Accounting Oversight Board and the SEC.

Securities Offerings – Cover Page of the Prospectus (Item 501(b))

If the prospectus cover page is unable to identify the offering price, registrants may include a clear statement on the cover page, including a cross reference, to the description of the method for determining the offering price in the prospectus.

Registrants must disclose the principal US market(s) for the offered securities where the registrant has engaged a registered broker-dealer and actively sought and achieved quotation, along with the corresponding trading symbols (expanding the existing requirement that only addresses listing on a national securities exchange).

Registrants may exclude the portion of the legend required on a preliminary prospectus relating to state law for offerings where state law is pre-empted.

Effective Dates

The amendments have been published in the Federal Register and will be effective on May 2, 2019, except for: (i) the amendments to the rules governing redaction of confidential information in material contracts, which became effective on April 2, 2019, and (ii) cover page Inline XBRL data tagging, which will be phased in as follows: (1) large accelerated filers that prepare their financial statements in accordance with U.S. GAAP will be required to comply in reports for fiscal periods ending on or after June 15, 2019; (2) accelerated filers that prepare their financial statements in accordance with U.S. GAAP will be required to comply in reports for fiscal periods ending on or after June 15, 2020; and (3) all other filers will be required to comply in reports for fiscal periods ending on or after June 15, 2021.

Exhibit A

Rule	Summary Description of Amended Rule
Regulation S-K, Item 303 and Form 20-F (MD&A)	Registrants will generally be able to exclude discussion of the earliest of three years in MD&A if they have already included the discussion in a prior filing.
Regulation S-K, Items 601(b)(10) and 601(b)(2) and investment company registration forms (Confidential Treatment for Material Contracts Exhibits)	Registrants will be able to omit confidential information in material contracts and certain other exhibits without submitting a confidential treatment request to the SEC, so long as the information is (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed.
Regulation S-K, Item 601(b)(10) (Lookback for Filing Material Contracts)	Only newly reporting registrants will be required to file material contracts that were entered within two years of the applicable registration statement or report.
Regulation S-K, Item 601(a)(5) and investment company forms (Attachments to Material Agreements Exhibits)	Registrants will not be required to file schedules or other attachments to their material agreements if such attachments do not contain material information or were not otherwise disclosed.
Regulation S-K, Item 102 (Description of Property)	Registrants will need to provide disclosure about a physical property only to the extent it is material to the registrant.
Forms 8-K, 10-Q, 10-K, 20-F and 40-F (Cover Page – Inclusion of Trading Symbol)	Registrants will be required to disclose on the form cover page the national exchange or principal U.S. market for their securities, the trading symbol, and title of each class of securities.
Securities Act Rule 411(b)(4); Exchange Act Rules 12b-23(a)(3), and 12b-32; Investment Company Act Rule 0-4; and Regulation S-T Rules 102 and 105 (Hyperlinks to Documents Incorporated by Reference)	Registrants will no longer be required to file as an exhibit any document or part thereof that is incorporated by reference in a filing, but instead will be required to provide hyperlinks to documents incorporated by reference.
Forms 10-K, 10-Q, 8-K, 20-F and 40-F (Cover Page Data Tagging in Inline XBRL)	Registrants will be required to tag all cover page data in Inline XBRL.

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