

April 2, 2019

SEC Adopts Rules Modifying and Simplifying Regulation S-K

The SEC has adopted amendments (the “Amendments,” available [here](#)) to Regulation S-K and related rules and forms to modernize and simplify disclosure requirements for public companies, investment advisers and investment companies. The Amendments are largely consistent with the 2017 proposing release and are intended to improve the readability and navigability of disclosure documents and discourage the disclosure of immaterial or repetitive information. Regulation S-K governs non-financial reporting requirements for SEC filings, including annual reports on Form 10-K, quarterly reports on Form 10-Q and proxy statements. The Amendments are based on the recommendations made in the SEC staff’s Report on Modernization and Simplification of Regulation S-K, as required by the Fixing America’s Surface Transportation Act of 2015 (the “FAST Act”).

The Amendments include the following:

- **Revisions to MD&A Disclosure Requirements.** The period-to-period comparison required in the Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”) by Item 303(a) of Regulation S-K are limited to the two most recent fiscal years covered by the financial statements, rather than the existing three-year requirement, so long as the discussion of the earliest of the three years has been included in the registrant’s prior filings on EDGAR. Registrants electing not to include a discussion of the earliest year in reliance on this instruction must identify the location in the prior filing where the omitted discussion may be found. This revision to the MD&A is intended to improve the readability of filings by omitting previously disclosed, redundant information.

A narrative discussion could also be used in lieu of the year-to-year comparisons as currently required if the registrant believes the narrative discussion is a more appropriate way of conveying the information. For example, if information for the earliest of the three years is necessary because it is material to an understanding of the registrant’s results of operations, the registrant may decide to provide a narrative discussion of that earliest year and a year-to-year comparison of the more recent two years. For foreign private issuers, conforming changes will be made to Form 20-F.

- **Streamlining of Confidential Treatment Provisions.** The Amendments allow registrants to omit confidential information from material contracts filed under Item 601(b)(10) (Material Contracts) where such information is both (i) not material and (ii) would likely cause competitive harm if publicly disclosed, even where the registrant has not submitted a confidential treatment request as is currently required. Although registrants will not be required to submit a request, they

will still be required to ensure that all material information is disclosed and that redactions are limited to those portions necessary to prevent competitive harm. In addition, registrants are required to mark the exhibit index to indicate that portions of one or more exhibits have been omitted and to include a prominent statement on the first page of each redacted exhibit that information in the marked sections of the exhibit has been omitted from the filed version of the exhibit. Registrants are also required to indicate with brackets where the information has been omitted from the filed version of the exhibit. The SEC will continue to selectively review filings to confirm that redactions are limited as required. Item 601(b)(2) (Plan of Acquisition, Reorganization, Arrangement, Liquidation or Succession) is amended in a similar manner. To facilitate consistency across exhibit requirements, the amendments will be extended to certain exhibit-related requirements in specified disclosure forms for which Item 601 does not apply.

- ***Omission of Schedules and Similar Attachments.*** Registrants are permitted to omit the filing of entire schedules and similar attachments to exhibits unless they contain material information not otherwise disclosed. Registrants are required to provide with each exhibit a list briefly identifying the contents of any omitted schedules or attachments. The Amendments do not require that registrants prepare a separate list if that information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. The SEC staff may request registrants to provide, on a supplemental basis, a copy of any omitted schedule or attachment. Personal information, such as bank account numbers, social security numbers, home addresses and similar information, could also be omitted from exhibits without first requesting confidential treatment.
- ***Limitation on Material Contracts Required to Be Filed.*** Previously, registrants were required to file material contracts not made in the ordinary course of business if one of two tests is met: (i) the contract is to be performed in whole or in part at or after the filing of the registration statement or report or (ii) the contract was entered into within the last two years before the filing. The second test—the two-year look-back—captures material contracts that were performed before the filing date. The Amendments eliminate the two-year look-back test for all registrants other than newly reporting registrants (*i.e.*, a registrant that had no reporting obligation at the time of the filing, whether or not it ever previously had been subject to reporting requirements, and any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation).
- ***Modifications to Risk Factor Requirements.*** Item 503(c) of Regulation S-K, requiring the disclosure of significant factors that make an offering speculative or risky, is moved to Subpart 100 of Regulation S-K in order to reflect the expanded application of risk factor disclosure requirements to registration statements on Form 10 and periodic reports. The Amendments also eliminate the currently enumerated risk factor examples.

- ***Simplification of Description of Property.*** The description of property requirement of Item 102 of Regulation S-K is revised to focus only on the disclosure of the physical properties material to the registrant. Previously, disclosure was required for physical properties that are materially important to the registrant, which the SEC staff notes has in some instances elicited disclosure that is not material (for instance, in the case of registrants in the securities or information technology industry that have no material physical properties).
- ***Description of Securities.*** Item 202 of Regulation S-K and Item 12 of Form 20-F require a registration statement to describe the terms of the securities being offered. In an effort to improve the ability of investors to gain access to information about their rights as security holders, the Amendments require a registrant to provide this description, as an exhibit to its annual report, for all securities registered under Section 12 of the Exchange Act.
- ***Disclosure of Executive Officers.*** The Amendments clarify that any disclosure about executive officers required by Item 401 of Regulation S-K will not need to be duplicated in the registrant’s proxy statement if the information is already included in Part I of the registrant’s Form 10-K under a separate section entitled “Information about our Executive Officers.”
- ***Updated Corporate Governance Reference.*** Item 407(d) of Regulation S-K required a registrant’s audit committee to state whether it has discussed with the independent auditor the matters required by AU section 380, *Communication with Audit Committees* when a registrant files a proxy or information statement relating to an annual or special meeting of security holders at which directors are elected or written consents are provided in lieu of a meeting. Because the reference to AU section 380 is now outdated, the Amendments update the reference to refer more broadly to the applicable requirements of the PCAOB and the SEC.
- ***Compliance with Section 16(a) of the Exchange Act.*** Item 405 of Regulation S-K is revised to clarify that registrants may rely only on (1) a review of Section 16 reports that have been filed on EDGAR and (2) any written representation that no Form 5 is required when determining whether there are any Section 16 delinquencies that must be disclosed in the registrant’s proxy statement. The Amendments make it clear that registrants are not limited in their inquiry regarding Section 16 delinquencies to these two filings and may, but are not required to, expand the scope of their inquiry. Consistent with staff interpretation, there is no need to include any discussion of Section 16 ownership reporting if all reports were adequately and timely filed.
- ***Required Hyperlinks.*** The SEC has implemented new rules requiring registrants to include hyperlinks to exhibits in exhibit indexes. The Amendments rationalize and expand requirements for hyperlinks to information incorporated by reference from previously filed documents available on EDGAR.

- ***Incorporation by Reference.*** The Amendments prohibit incorporation by reference or cross-referencing in financial statements from outside the financial statements unless otherwise specifically permitted or required by the SEC's rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Account Standards Board, whichever is applicable. The Amendments also prohibit incorporation by reference of financial information required to be presented in comparative form for multiple years or periods unless the incorporation by reference covers the entire period for which comparative data are given. In addition, the Amendments eliminate the five-year limit on incorporation by reference and consolidate the various rules governing incorporation by reference in order to streamline compliance.
- ***Tagging Cover Page Data.*** The Amendments require that all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F be tagged in Inline XBRL. The Amendments also require the cover page to include the tagged ticker symbol for each class of securities registered under the Exchange Act to facilitate investors' efforts to search news websites and stock market data for information on registrants and distinguish between similarly named registrants.
- ***Amendments to Forepart of Registration Statement.*** Item 501(b) of Regulation S-K is amended to, among other things, (1) eliminate the requirement for a registrant to change its name if it cannot be sufficiently differentiated from that of a "well known" company, (2) allow registrants to include a cross reference to the explanation of the method of computing the offering price for securities (with the method itself to be explained fully in the prospectus) if it is impracticable to state the price method or formula on the cover page of the registration statement (although this will not change the requirement for securities being offered at market price or at a price based on market price), (3) expand the cover page disclosure of markets for the registrant's securities being offered to require not only disclosure of "national securities exchanges" but also of the principal U.S. markets for the securities being offered on which the registrant has actively sought and achieved quotation and (4) shorten the "subject to completion" legend.
- ***Modifications to Undertakings Requirements.*** The Amendments update provisions of Regulation S-K in order to account for developments since their adoption or last amendment by eliminating certain outdated, unnecessary and duplicative requirements for undertakings in registration statements.

Certain of the Amendments also affect Form 20-F requirements, and conforming changes will be made to the Form 20-F requirements to track the changes to the exhibit requirements.

The Amendments also include parallel amendments to several rules and forms applicable to investment companies and investment advisers, including amendments that require certain investment company

filings to include a hyperlink to each exhibit listed in the exhibit index of the filings and be submitted in HyperText Markup Language (HTML) format.

The Amendments will be effective May 2, 2019, except that the amendments relating to the redaction of confidential information in certain exhibits are now effective. The requirements to tag data on the cover pages of certain filings are subject to a three-year phase-in, depending on the nature of the filer. All investment company registration statements and Form N-CSR filings made on or after April 1, 2020 must be made in HTML format and comply with the rule and form amendments pertaining to the use of hyperlinks.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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