

March 22, 2019

SEC Adopts Amendments to Modernize and Simplify Disclosure Requirements

Simplifies Exhibit Practices and Related Process for Confidential Treatment Requests as well as Incorporation by Reference and Streamlines MD&A to Provide Flexibility in Discussing Historical Periods

SUMMARY

On March 20, 2019, the Securities and Exchange Commission adopted its previously proposed amendments to modernize and simplify disclosure requirements in Regulation S-K and to make parallel amendments to investment company and investment adviser rules and forms. The amendments are intended to improve the readability and navigability of disclosure documents and discourage repetition and disclosure of immaterial information. Among other things, the new rules permit companies to omit immaterial confidential information from certain exhibits without submitting an application for confidential treatment and to omit schedules and similar attachments to exhibits unless they contain material information, and provide flexibility in the discussion of historical periods in the MD&A disclosure. The rules relating to the redaction of confidential information in certain exhibits are effective upon publication in the Federal Register. The other rules will become effective thirty (30) days after publication in the Federal Register, except that: (1) the requirements to tag data on certain filings are subject to a three-year phase-in and (2) the requirements that certain investment company filings include hyperlinks and be made in HTML format will become effective on or after April 1, 2020.

BACKGROUND

On October 11, 2017, the Securities and Exchange Commission (the “SEC”) proposed amendments that were designed to modernize and simplify disclosure requirements in Regulation S-K and related rules and forms, which were largely based on recommendations made in the SEC’s 2016 “Report on Modernization

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and Simplification of Regulation S-K” (the “Report”). The Report, which was mandated by the Fixing America’s Surface Transportation Act (the “FAST Act”), (1) provided detailed recommendations on modernizing and simplifying the requirements under Regulation S-K in a way that reduces the costs and burden on companies while still providing all material information and (2) made recommendations on ways to improve the readability and navigability of disclosure documents and to discourage repetition and the disclosure of immaterial information.

After receiving public comments on its proposing release, the SEC chose to adopt the majority of the amendments as proposed and to implement some of its proposed amendments with slight modifications. The SEC emphasized that, in line with its mandate under the FAST Act, these amendments are intended to improve the quality and accessibility of disclosure in filings, which should result in significant savings of time and money for companies without impacting the availability of material information for investors.

FINAL RULES

The amendments address multiple items of Regulation S-K and related rules and forms, which are summarized in the Appendix attached hereto. Of particular note are the amendments pertaining to the following areas:

- **Item 601 (Exhibits).** The amendments on exhibits:
 - Permit issuers to omit confidential information from material plans and contracts filed as exhibits under Item 601(b)(2) and Item 601(b)(10) where such information is both not material and would likely cause competitive harm to the issuer if publicly disclosed, without requiring the submission of a confidential treatment request. An issuer would instead be required to (1) mark the exhibit index to indicate that portions have been omitted; (2) include a prominent statement on the first page of each redacted exhibit that certain information in the marked sections of the exhibit has been omitted from the filed version; and (3) indicate with brackets where the information has been omitted from the filed version of the exhibit. To maintain a consistent approach to the exhibit disclosure requirements, the SEC adopted conforming changes to Form 20-F, as well as parallel amendments to the registration forms used by investment companies;
 - Allow issuers to omit entire schedules and similar attachments to exhibits unless they contain material information and unless that information is not otherwise disclosed in the exhibit or the disclosure document, and so long as the issuer provides with each exhibit a list identifying the contents of any omitted schedules and attachments. Issuers need not prepare a separate list of omitted information if that information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. The issuer is required to provide to the SEC, upon request of the SEC and on a supplemental basis, a copy of any omitted schedules or attachments. To maintain a consistent approach to the exhibit disclosure requirements, the SEC is adopting comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A, the investment company registration forms and Form N-CSR; and

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- Permit issuers to omit personally identifiable information (“PII”) without submitting a confidential treatment request and without being required to provide an analysis to redact PII from exhibits. Similar to the above, the SEC is adopting comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A, the investment company registration forms and Form N-CSR.
- **Item 303 (Year-to-Year Comparisons in Management’s Discussion and Analysis).** Item 303(a) requires issuers to discuss their financial condition, changes in financial condition and results of operations. The amendments permit an issuer who provides financial statements covering three years in a filing to omit discussion of the earliest of the three years if any of the issuer’s prior filings on EDGAR already contained such discussion. Additional amendments to Instruction 1 to Item 303(a) include (1) eliminating the reference to five-year selected financial data for trend information and (2) stating that an issuer may use any presentation that, in its judgment, would enhance a reader’s understanding of the issuer’s financial condition, changes in financial condition and results of operations, in lieu of specifying the use of year-to-year comparisons.

To maintain a consistent approach to the MD&A disclosure requirements for domestic issuers and foreign private issuers, the SEC is also adopting changes to Form 20-F that conform to these amendments to Item 303(a).
- **Incorporation by Reference.** The amendments eliminate the Item 10(d) prohibition on incorporating by reference documents that have been on file with the SEC for more than five years.

The other amendments, which are summarized in the Appendix attached hereto, are incremental changes to Regulation S-K that are designed to minimize repetitive and immaterial disclosures (such as the changes to Item 102 describing the registrant’s principal properties) and to make disclosures more accessible to investors (such as additional hyperlink and data-tagging requirements).

COMPLIANCE DATES

The amendments relating to the redaction of confidential information in certain exhibits are effective upon publication in the Federal Register. If an issuer has a confidential treatment request pending at the time these amendments become effective, the issuer may withdraw its pending application but is advised to refile the exhibit(s) in an amended filing with the SEC that conforms to the new rules.

The other amendments will become effective thirty (30) days after publication in the Federal Register, except for the following:

- **Tagging of Cover Page Data.** The requirements to tag data on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F in Inline XBRL are subject to a three-year phase-in whereby:
 - Large accelerated filers are required to comply with these requirements in reports for fiscal periods ending on or after June 15, 2019;
 - Accelerated filers are required to comply with these requirements in reports for fiscal periods ending on or after June 15, 2020; and
 - All other filers are required to comply with these requirements in reports for fiscal periods ending on or after June 15, 2021.

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- ***Hyperlinks and HTML Format for Investment Companies***. The requirements that filings of investment company registration statements and Form N-CSR include hyperlinks and be made in HTML format will become effective for such filings made on or after April 1, 2020.

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APPENDIX

Additional amendments include the following:

- **Item 102 (Description of Property).** Item 102 requires disclosure of the location and general character of the principal plants, mines and other materially important physical properties of the issuer and its subsidiaries. The SEC's revisions to this disclosure requirement clarify that a description of property is only required to the extent that physical properties are material to the issuer, which would include those properties that are material to the issuer's business, and that disclosure may be provided on a collective basis if appropriate. The SEC is not revising any of the instructions to Item 102 specific to the mining, real estate and oil and gas industries.
- **Item 401 (Directors, Executive Officers, Promoters and Control Persons).** The amendments (1) clarify that the information regarding executive officers described in Item 401 is not required in proxy statements if that information is otherwise provided in the issuer's Form 10-K and (2) change the required caption 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 issuers to disclose each reporting person who failed to file Section 16 reports on a timely basis. The amendments permit issuers to rely on electronically filed reports in determining whether there are any delinquencies required to be reported and eliminate the requirement for Section 16 reporting persons to furnish duplicates of reports filed by them to the issuer. The amendments also clarify that while issuers may rely on electronically filed Section 16 reports, they are not required to limit their inquiry to those filings. Finally, the new rules (1) add an instruction to change the disclosure heading "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports" to more precisely describe the required disclosure; (2) encourage issuers to exclude that 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 by referring more broadly to the applicable requirements of the Public Company Accounting Oversight Board and the SEC, and clarify that emerging growth companies, like smaller reporting companies, are not required to provide a compensation committee report.
- **Item 501 (Forepart of Registrant Statement and Prospectus Cover Page).** Item 501 includes disclosure requirements related to the forepart of registration statements and the outside front cover page of prospectuses. The SEC is adopting amendments that:
 - 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 of the principal U.S. market(s) where the issuer's securities are being offered and the corresponding trading symbols and limit disclosure of markets that are not national securities exchanges to those principal United States markets where the issuer, through the engagement of a registered broker-dealer, has actively sought and achieved quotation;

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- Allow issuers 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; and
- Consolidate Items 501(b)(10) and 501(b)(11) without 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 a new Item 105 in Subpart 100 of Regulation S-K to clarify that risk factors are required by both registration statements on Form 10 and periodic reports. 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 adopting amendments that 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 issuer of the securities.
- **Item 512 (Undertakings).** Item 512 provides undertakings that an issuer must include in Part II of its registration statement, depending on the type of offering. The SEC is adopting amendments that eliminate the Item 512(c) undertaking (warrant and rights offerings) as unnecessary and the Item 512(d), Item 512(e), and Item 512(f) undertakings (competitive bids, incorporated annual and quarterly reports, and equity offerings of nonreporting registrants) as obsolete.
- **Item 601 (Exhibits).** The SEC is adopting amendments that:
 - Require issuers to provide the information required by Item 202(a)-(d) and (f) (a brief description of their registered capital stock, debt securities, warrants and rights, other securities and American Depositary Receipts) as exhibits to Form 10-K; and
 - Limit the two-year look back period for filing material contracts not made in the ordinary course of business to newly reporting issuers.
- **Incorporation by Reference.**
 - **Rule 411 under the Securities Act of 1933; Rules 12b-23 and 12b-32 under the Securities Exchange Act of 1934; and Related Rules under the Investment Company Act of 1940 and Investment Advisers Act.** These rules govern incorporation by reference in a variety of contexts, and the SEC is adopting several revisions to modernize the rules and make them more consistent. The changes:
 - Eliminate the requirement that copies of information incorporated by reference be filed as exhibits to registration statements or reports, as well as the requirement in Rule 8b-23 under the Investment Company Act that requires investment company issuers to file with a registration statement or report a copy of any registration statement, report, or prospectus from which information is incorporated by reference (where not filed electronically);
 - Require hyperlinks to information that is incorporated by reference if that information is available on EDGAR 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 from outside the financial statements, except when otherwise specifically permitted by the SEC’s rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable;

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- 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 in the SEC's rules;
 - Eliminate the requirement that if a certificate of an independent public accountant previously or concurrently filed is incorporated by reference by an investment company (with respect to the filing of a registration statement, application, or report) or an investment adviser (with respect to the filing of an application), a written consent of the accountant must be filed with the filing; and
 - Eliminate certain restrictions currently contained in Rule 0-4(d) under the Investment Company Act and Rule 0-6(d) under the Investment Advisers Act on incorporating by reference exhibits or financial statements made in certain filings.
- The SEC will also streamline, clarify and conform these amendments by eliminating redundant or obsolete rules, relocating existing provisions to other sections and making conforming revisions to several of its forms to implement the amendments.
- ***Manner of Delivery Recommendations.*** The SEC is adopting amendments that require machine-readable Inline XBRL tagging for all information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F. To implement the cover page tagging requirements, issuers are required to file with each of the specified forms a "Cover Page Interactive Data File" (to be newly defined as the machine readable computer code that presents the information required by Rule 406 of Regulation S-T in Inline XBRL format). The release notes that non-operating companies, such as "business development companies" for purposes of the Investment Company Act, will not be subject to these requirements.

Additionally, the amendments require a ticker symbol for each class of securities registered to be included on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F and disclosure of the title of each class of securities and each exchange on which they are registered on the cover pages of Form 10-Q and Form 8-K.

Finally, the SEC is adopting amendments that apply hyperlinking and HTML requirements to forms used by and rules applicable to investment companies, similar to recently adopted rules requiring hyperlinks to most exhibits filed pursuant to Item 601, Form F-10, and Form 20-F. The amendments require investment company issuers to file registration statements and reports that include exhibits in HTML format and to include a hyperlink to each exhibit identified in a filing's exhibit index, unless certain exceptions apply.