

SEC Adopts Amendments to Modernize and Simplify Certain Disclosures

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On March 20, 2019, the Securities and Exchange Commission (SEC) adopted amendments to modernize and simplify certain disclosure requirements in Regulation S-K, and related rules and forms, in a manner that reduces the costs and burdens on public companies while continuing to provide all material information to investors. The amendments are also intended to improve the readability and navigability of disclosure documents and discourage repetition and disclosure of immaterial information. Among other things, the amendments reduce and clarify the disclosures required in management's discussion and analysis of financial condition and results of operations and streamline requirements related to exhibit filings.

Management's Discussion and Analysis of Financial Condition and Results of Operations

The amendments revise instructions to Item 303 of Regulation S-K to reduce disclosure requirements in certain circumstances for earlier periods and year-to-year comparisons. These revisions are generally summarized below:

- *Omission of Discussion of Third Year Financial Statements.* The amendments revise instructions to Item 303 of Regulation S-K to allow companies who are providing financial statements covering three years in a filing to omit discussion of the earliest of the three years if such discussion was already included in a prior filing on EDGAR that required disclosure in compliance with Item 303. Companies electing not to include a discussion of the earliest year must identify the location in a prior filing where the omitted discussion may be found.
- *Elimination of Requirement for Year-to-Year Comparisons.* The amendments also revise instructions to Item 303 to eliminate the requirement to discuss year-to-year comparisons and will instead instruct companies to use any presentation that in the company's judgment enhances a reader's understanding of the company's financial condition, changes in financial condition and results of operations, without suggesting that any one mode of presentation is preferable to another. The SEC noted that despite the adoption of the amendments, it anticipates that many companies will continue to provide year-to-year comparisons because they are a familiar and, in many cases, appropriate method of presentation.

Exhibit Filings

The amendments include several revisions to Item 601 of Regulation S-K relating to exhibit filing requirements that will permit companies to redact confidential information and reduce other exhibit filing requirements. The amendments also introduce a new exhibit that must be filed with each Form 10-K. These revisions are generally summarized below:

- *Redaction of Confidential Information in Material Contract Exhibits.* The amendments revise Item 601 of Regulation S-K to permit companies to omit confidential information from material contracts filed pursuant to Item 601(b)(10) without the need to submit a confidential treatment request (CTR) as long as the information (i) is not material and (ii) would be competitively harmful if publicly disclosed. Although companies will no longer be required to file a CTR in connection with the redacted exhibit, the responsibility of a company to determine whether all material information has been disclosed and whether it may redact the information will remain unchanged, and the SEC may request information similar to that currently required in a CTR in connection with its review of a filing.
- *Personally Identifiable Information.* While SEC practice prior to the amendments generally permitted omission of personally identifiable information from exhibits without submitting a CTR, the amendments formally codify this practice by adding new Item 601(a)(6).
- *Two-Year Look-Back Requirement for Material Contracts.* Prior to the amendments, Item 601(b)(10) of Regulation S-K required companies to file every material contract not made in the ordinary course of business, provided that one of two tests was met: (i) the contract must 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 not more than two years before that

filing. Pursuant to the amendments, all companies will continue to be required to file as an exhibit every contract not made in the ordinary course of business that is material to the company and is to be performed in whole or in part at or after the applicable filing. However, only newly reporting registrants (a new defined term) will be required to file material contracts that were entered into in the previous two years but that are not to be performed in whole or in part after the applicable filing. Companies with established reporting histories will no longer be subject to the two-year look back requirement, as investors will continue to have access to any material agreements previously filed on EDGAR.

- *Omission of Non-Material Schedules and Attachments to Exhibits.* The amendments also revise Item 601 of Regulation S-K, which previously required companies to file complete copies of most required exhibits, including schedules, appendices, and other similar attachments, irrespective of the materiality of particular information contained therein. Pursuant to the amendments, companies may omit entire schedules and similar attachments to required exhibits, provided (i) they do not contain material information, (ii) they are not otherwise disclosed in the exhibit and (iii) the filed exhibit contains a list that briefly identifies the contents of any such omitted schedules and attachments.
- *Exhibit Containing Description of Securities.* Pursuant to the amendments, companies will now be required to file an exhibit with their Form 10-Ks that describes each class of their securities registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act). The amendments require the exhibit to include all information required by Item 202(a)-(d) and (f) of Regulation S-K.

Other Changes

The amendments also include several additional changes intended to modernize and simplify disclosure requirements. Some of these additional changes include the following:

- Cover pages for Forms 10-K, 10-Q, 8-K, 20-F and 40-F must be tagged with Inline XBRL. These changes will be phased in, which generally track phase-in compliance dates for other Inline XBRL rules.
- Cover pages for Forms 10-K, 10-Q, 8-K, 20-F and 40-F must include disclosure of the company's securities that are registered pursuant to Section 12(b) of the Exchange Act, the title of each such class, the name of each exchange on which the securities are registered and the trading symbols of the securities.
- Form 10-K will remove the check box indicating whether disclosure of delinquent filers is included in the Form 10-K or will be included in a definitive proxy or information statement incorporated by reference.
- Headings in applicable disclosure documents for Section 16(a) compliance will be changed from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports."
- Disclosure regarding physical property will be required only to the extent material to the company. Disclosure may also be on an individual basis or on a collective basis.
- "Red herring" legends in prospectuses will be permitted to omit the portion of the legend relating to state laws for offerings that are not prohibited by state securities laws.

The amendments will generally become effective 30 days after publication in the Federal Register, except for the amendments regarding redaction of confidential information in material contracts, which will become effective as of the date of publication in the Federal Register, and amendments relating to XBRL tagging requirements, which are subject to a phase-in schedule.

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