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SEC adopts rule amendments under the FAST Act to modernize and simplify disclosure

On March 20, the SEC voted to adopt amendments to Regulation S-K and related rules and forms in accordance with its mandate under the Fixing America's Surface Transportation Act (FAST Act) to modernize and simplify disclosure requirements. The amendments are intended to reduce the costs and burdens of the disclosure process while continuing to require disclosure of all material information.

With exceptions discussed below, the rule changes will be effective on May 2, 2019. Although the amendments do not fundamentally alter the existing disclosure regime, the wide-ranging changes will require registrants to update their compliance checklists and monitor SEC staff guidance on transition issues and other implementation questions that may arise.

The SEC's adopting release (No. 33-10618) can be found [here](#).

Overview

The amendments afford registrants new flexibility to make certain disclosure determinations under established principles of materiality. One noteworthy rule change permits registrants to omit from management's discussion and analysis (MD&A) a discussion of the earliest of the three years covered by the financial statements if the omitted discussion is not material. Another amendment allows registrants that have no material physical properties, other than registrants operating in the real estate, mining, and oil and gas industries, to omit a description of their physical properties. Other rule changes allow registrants to redact competitively harmful but non-material information from material contracts filed as exhibits without submitting a confidential treatment request, and to omit schedules and other attachments to exhibits if they contain no material information and the information is not otherwise disclosed.

Some of the amendments impose new requirements. Periodic and current report forms under the Exchange Act have been amended to require disclosure of new information on the cover pages. Another amendment requires domestic registrants and foreign private issuers to file an exhibit to their Form 10-K or 20-F reports describing each class of securities registered under Section 12 of the Exchange Act. Other changes require registrants to tag all of the information on the cover pages of specified Exchange Act forms using Inline XBRL, and extend to investment companies the requirements, already applicable to operating companies, to file in HTML format and to use a hyperlink to each exhibit listed in the exhibit index of the filings.

The amendments generally will be effective on May 2, 2019, except that:

- amendments relating to the redaction of confidential information in material contracts became effective on April 2, 2019;
- compliance with the new data tagging requirements is subject to phase-in periods that vary with the registrant's filing status; and
- the new hyperlinking and HTML submission requirements applicable to investment companies will be effective for filings made on or after April 1, 2020.

If the SEC staff extends to the amendments the guidance it issued in 2018 with respect to earlier disclosure simplification amendments, registrants will be required to comply with amendments effective on May 2 in filings they make on or after May 2.

Background

Enacted in 2015, the FAST Act requires the SEC to study the disclosure requirements in Regulation S-K with a goal of recommending ways to update and streamline those requirements, reduce compliance costs and burdens, improve the readability and navigability of disclosure, and discourage repetition and the disclosure of immaterial information. The SEC staff published its report on this study in November 2016.

In October 2017, the SEC proposed amendments to Regulation S-K and related rules and forms in accordance with the statutory mandate and a broader review of the SEC's disclosure rules. The staff's recommendations in the November 2016 study formed the basis of the proposed amendments, although the Commission did not act on all of the staff's recommendations. The SEC has now adopted most of the amendments in the form proposed, although it modified some proposed rule changes in response to comments.

Applicability of amendments

The SEC has adopted amendments to Regulation S-K and related rules and forms that apply to domestic registrants, foreign private issuers, and, in limited instances, Canadian issuers. Some of the amendments revise rules and forms applicable to investment companies and investment advisers.

Summary of amendments

Amendments to cover pages of Exchange Act forms

Amendments to the cover pages of Exchange Act forms will require registrants to disclose:

- on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F (for foreign private issuers), and 40-F (for Canadian issuers), the trading symbol for each class of registered securities; and
- on the cover pages of Forms 10-Q and 8-K, (1) the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act and (2) each exchange on which the securities are registered, which is information currently required on the cover pages of Forms 10-K, 20-F, and 40-F.

The amendments to Forms 20-F and 40-F apply only when those forms are used as annual reports, not as registration statements.

In addition, as discussed below, the amendments eliminate from the cover page of Form 10-K the checkbox relating to disclosure of delinquent Section 16 reports under Item 405 of Regulation S-K.

The amendments include the text of the new disclosure requirements, but do not indicate where the disclosures are to appear on the cover page. This gap will be filled when the SEC staff posts the amended forms on the agency's website. Based on past staff practice in updating forms, however, it is uncertain whether the revised forms will be available for review by the May 2 effective date.

Description of property (Item 102)

The SEC has amended Item 102 of Regulation S-K to require a registrant to disclose, "[to] the extent material," the "location and general character of the registrant's principal physical properties."

Item 102 previously required disclosure of a registrant's "principal plants, mines and other materially important physical properties." The SEC revised Item 102 in response to concerns that this Item may have resulted in disclosures of immaterial physical properties. The SEC observes in the adopting release that the only physical properties held by many registrants consist of their headquarters, office space, or ancillary facilities, which investors are likely to consider unimportant to an investment decision. The SEC also saw a need to harmonize the disclosure triggers in Item 102, which variously referred to "principal" plants and mines, "materially important" physical properties, and "major" encumbrances.

Revised Item 102 provides a uniform standard for disclosure of principal physical properties based on their materiality to the registrant. As is the case generally for disclosures under Regulation S-K, the information, if any, a registrant discloses under Item 102 will depend on its determination of what is material in light of its particular circumstances, taking into account both quantitative and qualitative factors. The SEC observes that the application of this materiality analysis may require disclosure of properties on an individual or collective basis, or instead may result in no disclosure.

The amendments do not modify disclosure requirements that apply to registrants that operate in the real estate, mining, and oil and gas industries, in which physical properties may be of particular importance. Those registrants will be required to continue to comply with the existing instructions to Item 102 governing their industries and with the relevant SEC industry guides.

Management's discussion and analysis of financial condition and results of operations (Item 303)

Amendments to Item 303 of Regulation S-K afford registrants new flexibility in discussing historical periods by allowing them to omit from MD&A a discussion of the earliest year presented in financial statements covering three years that are included in a filing if the omitted discussion is not material.

Item 303(a) requires discussion of the registrant's financial condition, changes in financial condition, and results of operations. Instruction 1 to Item 303(a) before the Item was amended indicated that this discussion "shall cover the three-year period covered by the financial statements and shall use year-to-year comparisons or any other formats that in the registrant's judgement enhances a reader's understanding." Registrants filing financial statements covering three years typically have complied with the instruction by presenting both a year-to-year comparison of results for the earliest two years and a year-to-year comparison of results for the two most recent years. For example, in its Form 10-K report filed for fiscal 2018, a registrant ordinarily would compare fiscal 2018 to fiscal 2017 results and, either separately or as part of the same discussion, compare fiscal 2017 to fiscal 2016 results. The registrant typically would have discussed the earliest year (fiscal 2016) in MD&A in the prior year's annual report and carried over much of that discussion to the current filing.

The SEC has revised Instruction 1 to Item 303(a) to provide that registrants presenting year-to-year comparisons for a three-year period may omit the comparison involving the earliest year if (1) a discussion of the earliest year was included in any prior SEC filing by the registrant on EDGAR that required disclosure in compliance with Item 303 and (2) the registrant identifies in the current filing the location of the omitted discussion in the prior filing. The SEC notes that the prior filing containing the omitted disclosure need not be the same type of filing as the one containing the new MD&A. Thus, for example, a registrant may omit discussion of the earliest year from MD&A in a Form 10-K report if the omitted discussion is contained in a Securities Act registration statement.

The decision to omit a discussion of the earliest year must be guided by management's judgment about the materiality of the disclosure. The SEC reminds registrants that materiality "remains, as always, the primary consideration" in the "analysis that management must undertake with respect to the information it provides to investors in MD&A." To omit a discussion of the earliest year, a registrant should conclude that the discussion is not "necessary to an understanding of its financial condition, changes in financial condition and results of operations," which is the standard prescribed in Item 303(a) and which the SEC emphasizes remains unaffected by the amendments.

The amendments also modify Instruction 1 to Item 303(a) to remove the previous reference to year-to-year comparisons and to clarify that a registrant may use any presentation that in its judgment enhances a reader's understanding. This clarification is not intended to prevent registrants from using year-to-year comparisons—including year-to-year comparisons to address the earliest year's results—but instead to enable them to tailor their disclosure, within the bounds of Item 303's materiality requirement, to reflect their individual circumstances. In its proposing release, the SEC identified as one possible approach, where information about the earliest year remains material to an understanding of the registrant's financial condition, the inclusion of narrative disclosure about the earliest year together with a year-to-year comparison of the two most recent years. The SEC indicates in the adopting release that it anticipates that many registrants will continue to use year-to-year comparisons rather than alternative

formats, as this approach is familiar and frequently appropriate, but that this presentation may not always be the most effective one for any particular registrant.

The SEC has amended the disclosure requirements for Item 5 (Operating and Financial Review and Prospects) of Form 20-F, which is the annual report form filed by foreign private issuers, to conform with the amendments to Instruction 1 to Item 303(a).

These amendments will not affect disclosure by smaller reporting companies, which already may limit their discussion to the two-year period covered by their financial statements, or disclosure by emerging growth companies that file two years of audited financial statements.

The SEC also has eliminated previous language in Instruction 1 to Item 303(a) indicating that reference to the registrant's five-year selected financial data may be necessary "where trend information is relevant." The SEC explains that this change was not intended to signal any substantive change to a registrant's disclosure obligation, since Item 303(a)(3)(ii) already requires disclosure of known trends and uncertainties.

Directors, executive officers, promoters and control persons (Item 401)

Item 401 of Regulation S-K permits a registrant to include information about its executive officers in Part I of its Form 10-K report and thereby to omit this information from its annual meeting proxy statement. The SEC has changed the required caption for this disclosure "to reflect a 'plain English' approach." The amended caption will now read "Information about our Executive Officers" instead of "Executive officers of the registrant."

Compliance with Exchange Act Section 16(a) (Item 405)

The amendments eliminate the previous requirement in Rule 16a-3(e) under the Exchange Act that directors, officers, and ten percent shareholders furnish to the registrant copies of the beneficial ownership reports they file under Section 16(a) of the Exchange Act. In addition, revisions to Item 405 of Regulation S-K change the disclosure requirements associated with delinquent Section 16 filings.

Elimination of requirement to furnish copies of Section 16 reports. The prior requirement that reporting persons furnish copies of their Section 16(a) reports was adopted when those reports were required to be filed in paper and was designed to allow registrants to identify reporting delinquencies that required disclosure under Item 405. Now that the reports are required to be filed electronically, registrants are able to monitor reporting compliance by reviewing the EDGAR system, making the furnished reports unnecessary.

Changes to disclosure of delinquent Section 16 filings. Item 405 requires registrants to disclose certain information about reporting persons who failed to file Section 16 reports on a timely basis during the most recent fiscal year or prior fiscal years. Before it was amended, the Item stated that, in determining whether a reporting delinquency had occurred, a registrant was required to rely solely on its review of reports furnished to it by its reporting persons and on any written representations that no Form 5 filing was required.

Consistent with the elimination of the requirement that reporting persons furnish copies of their Section 16 reports to the registrant, revised Item 405 provides that, in determining whether a reporting delinquency has occurred, the registrant "may" rely solely on the Section 16 reports filed on EDGAR, as well as on any written representations that no Form 5 filing is required. The SEC underscores, however, that registrants are now permitted, but not required, to expand the scope of their due diligence beyond review of Section 16 reports and written representations. The SEC indicates that a registrant could include Item 405 disclosure if it was aware that a Section 16 report submitted on EDGAR was not complete or accurate or that a required Section 16 report was not filed.

Item 405 previously required registrants to disclose reporting delinquencies under the caption "Section 16(a) Beneficial Ownership Compliance." Many registrants have included the caption even when they disclose no reporting delinquencies, and have indicated under the caption that they are not aware of any reporting delinquencies. Amended Item 405 revises the required caption to read "Delinquent Section 16(a) Reports" to indicate more precisely the nature of the required disclosure, and includes an instruction encouraging registrants to exclude the caption—and, by implication, any related disclosure—if they have no Section 16(a) delinquencies to disclose.

The amendments also eliminate the box previously located on the cover page of Form 10-K directing the registrant to indicate whether its Form 10-K contains Item 405 disclosure of delinquent Section 16 reports, or whether it expects Item 405 disclosure to be contained in a proxy or information statement incorporated by reference into the Form 10-K. The SEC observed in the proposing release that the checkbox will be less useful in monitoring Section 16(a) compliance once security holders and the SEC staff can search for Section 16(a) delinquencies under the amended Item 405 caption.

Exhibit requirements (Item 601)

The amendments make a number of important changes to Item 601 of Regulation S-K, which governs the filing of exhibits to Securities Act and Exchange Act forms. The rule changes:

- permit a registrant to omit confidential information from exhibit filings without obtaining an SEC order if the omitted information is not material to investors and would likely cause competitive harm if publicly disclosed;
- permit a registrant to omit schedules and other attachments to exhibits if they contain no material information and the information is not otherwise disclosed;
- limit to “newly reporting registrants” the requirement to file material contracts entered into within the preceding two years that will not be performed in whole or in part at or after the filing date;
- formalize an SEC staff practice permitting registrants to omit personally identifiable information from exhibits; and
- require registrants to file as an exhibit to their Form 10-K reports a description of each class of securities registered under Section 12 of the Exchange Act.

In light of comments on the proposal, the SEC decided not to adopt a proposed amendment requiring inclusion of legal entity identifiers for subsidiaries listed in the subsidiaries exhibit.

The SEC has amended the “Instruction to Exhibits” in Form 20-F to extend to foreign private issuers substantially the same amended exhibit requirements adopted with respect to domestic registrants.

Omission of confidential information from material contract exhibits. Registrants will now be permitted under amended Item 601 to omit confidential information from exhibits filed under Item 601(b)(2) or (b)(10) without submitting a confidential treatment request to the SEC seeking an order authorizing the redactions. The elimination of the application procedure will simplify the filing process for the covered types of exhibits. Registrants wishing to redact confidential information in exhibits filed under other provisions of Item 601 will be required to continue submitting confidential treatment requests.

The streamlined redaction process is available for “material contacts” filed as exhibits under Item 601(b)(10) and, in an expansion of the rule proposal, for exhibits filed under Item 601(b)(2), which prescribes the filing of material plans of acquisition, reorganization, arrangement, liquidation, or succession. The SEC also has extended the new process to exhibit-related requirements in specified disclosure forms to which Item 601(b)(10) does not apply, including Form 8-K and the investment company registration forms.

Consistent with the long-standing redaction standard discussed in Staff Legal Bulletin 1 (Feb. 28, 1997), registrants may omit information from exhibits filed under Item 601(b)(2) or (b)(10) only if the information (1) is not material to investors and (2) would likely cause competitive harm if publicly disclosed. Under the amendments, registrants will be required to:

- mark the exhibit index to indicate that portions of the exhibit or exhibits 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 because it (1) is not material and (2) would be competitively harmful if publicly disclosed; and
- indicate with brackets where the information has been omitted from the filed version of the exhibit.

The SEC indicates that the staff will conduct compliance reviews of redacted exhibits on a selective basis. On April 1, the Division of Corporation Finance issued an “announcement” summarizing the process it intends to follow in

reviewing redacted exhibits. After a registrant has filed a redacted exhibit, the staff may request, on a supplemental basis, an unredacted copy of the exhibit and, following its review of the redactions, “may or may not” ask the registrant to justify the redactions. Such a justification would include materiality and competitive harm analyses of the type historically submitted in confidential treatment requests.

The Division’s announcement also addresses transition issues. Registrants with confidential treatment requests pending on the April 2 effective date of the amendments may, but are not required to, withdraw those requests in coordination with the responsible Assistant Director office. Registrants withdrawing their requests must amend their redacted exhibit filings to comply with the new requirements. The Division will continue to process pending confidential treatment requests that are not withdrawn. If the 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 in the order.

The Division notes that the amended rules have not changed a registrant’s ability to request confidential treatment for information in exhibit filings under Securities Act Rule 406 or Exchange Act Rule 24b-2. The Division and its staff will continue to process any new confidential treatment requests as well as pending requests that are not withdrawn.

Omission of non-material schedules and other non-material attachments to exhibits. Under a new Item 601(a)(5) of Regulation S-K, a registrant may exclude entire schedules and other attachments from any exhibit it files if (1) they do not contain information that is material to an investment or voting decision and (2) the information they contain is not disclosed elsewhere in the exhibit or in the document requiring the exhibit filing. This accommodation previously was available only for material plans of acquisition and other exhibits filed under Item 601(b)(2).

Before these amendments, with the exception of exhibits subject to Item 601(b)(2), registrants were required to include schedules and other attachments to exhibits, which resulted in inconsistent filing treatment of attachments. Under amended Item 601, registrants no longer will have to file schedules, exhibits, and other attachments, such as disclosure schedules to credit agreements or exhibits to commercial agreements, that do not contain material information. Many registrants now will be spared some of the time and cost incurred to prepare copies of exhibit attachments for filing on EDGAR.

The amendments also permit omission of non-material attachments in the exhibit-related requirements of Item 1016 of Regulation M-A, the investment company registration forms, and Form N-CSR.

Registrants that omit schedules and other attachments from filed exhibits will be required to list briefly the contents of the omitted items, as previously required by Item 601(b)(2), unless this information already is “included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments.” Unlike Item 601(b)(2) before it was amended, however, the revised rules do not require registrants to agree in the exhibit index to furnish the staff with a copy of any omitted schedule upon request. Even though this undertaking is not required, the new Item states that the registrant “must provide a copy of any omitted schedule to the Commission or its staff upon request.”

Two-year look back requirement for material contract filings. The SEC has narrowed the requirement, contained in Item 601(b)(10)(i) of Regulation S-K, for registrants to file material contracts not made in the ordinary course of business that meet one of the two tests:

- the contract is to be performed in whole or in part at or after the filing of the registration statement or report; or
- the contract was entered into within two years before the filing date.

The second test, which the SEC refers to as the “two-year look back,” therefore has required a registrant to file material contracts that were fully performed or terminated before the filing date if they were entered into within the prior two years.

The SEC has amended Item 601(b)(10) to eliminate the two-year look back test for exhibits filed by registrants other than a category of registrants which the revised Item refers to as “newly reporting registrants.” The amendments will enable many registrants to exclude or delete fully performed or terminated material contracts from their exhibit index in future filings.

The SEC concluded that the two-year look back requirement is no longer necessary to provide investors with access to fully performed or terminated material contracts filed by registrants with established reporting histories under the Exchange Act. Investors can view those contracts by consulting earlier exhibit filings on EDGAR. By contrast, access to previous filings is not available to view material contracts of companies that have not been subject to Exchange Act reporting obligations.

Under revised Item 601(b)(10), the two-year look back filing requirement now applies only to registrants without a reporting history based on their status as a “newly reporting registrant.” This category consists of the following registrants:

- a registrant, such as a company that is filing its first registration statement under the Securities Act or the Exchange Act, that is not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act at the time of filing, whether or not the registrant previously was subject to such reporting requirements;
- a registrant that has not filed an annual report since the revival of a previously suspended reporting obligation under the Exchange Act; and
- a registrant that was a former shell company, other than a business combination related shell company, immediately before completing a shell transaction that caused it to cease being a shell company and that has not made specified filings under the Securities Act or the Exchange Act since completing the transaction.

The revised Item provides as an example of the third category of newly reporting registrant a public shell company (other than a business combination related shell company) that completes a reverse merger transaction causing it to cease being a shell company.

All registrants will continue to be required to file as exhibits material contracts not made in the ordinary course of business which are to be performed in whole or in part at or after the filing of the registration statement or report.

Omission of personally identifiable information from exhibits. The amendments to Item 601 codify the SEC staff's long-standing practice of allowing companies to omit personally identifiable information (PII) from exhibits without the need to submit a confidential treatment request. The SEC has adopted a new Item 601(a)(6) of Regulation S-K to allow companies to omit PII from their Item 601 exhibits without submitting a confidential treatment request for the redacted information or providing the SEC with a materiality or competitive harm analysis of such information. For purposes of the new Item, PII includes information such as bank account numbers, social security numbers, home addresses, and similar information that if publicly disclosed “would constitute a clearly unwarranted invasion of personal privacy.” In addition to formalizing this practice with respect to Item 601, the SEC has added comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A, the investment company registration forms, and Form N-CSR.

Description of registered securities in Form 10-K exhibit. The Item 601 amendments also require, for the first time, that a registrant include as an exhibit to its Form 10-K report a description of each class of securities registered under Section 12 of the Exchange Act. SEC rules previously required a description of securities only in registration statements filed under the Securities Act or the Exchange Act. The new requirement is intended to make disclosure of the terms of registered securities, and the rights of security holders, more accessible to investors.

The amendment creates a new Item 601(b)(4)(vi) of Regulation S-K that requires a registrant to provide in an exhibit to its Form 10-K report the information required by paragraphs (a) through (d) and (f) of Item 202 for each class of securities that are registered under Section 12. Item 202 requires a brief description of capital stock, debt securities, warrants and rights, American Depository Receipts, and other types of registered securities. An instruction to the new Item clarifies that this disclosure is required for classes of securities that are registered as of the end of the period covered by the report with which the exhibit is filed, including classes of registered securities that have not been retired by the end of the period.

If a registrant already has filed a description of its securities as an exhibit to a prior Form 10-K report, it would be permitted to incorporate the description of securities into the exhibit in its current Form 10-K report by a hyperlink to that prior disclosure, assuming it is unchanged. Some commenters on the rule proposal urged the SEC to permit registrants to incorporate the required information by reference to any prior filings. The SEC declined to expand

permitted incorporation beyond incorporation by reference to an exhibit previously filed under the new Item. The registrant therefore will have to prepare the description of securities for its initial exhibit filing rather than simply include a hyperlink to the description contained in a prior Securities Act filing.

The SEC indicates that any modifications and amendments to the rights and privileges of a registrant's registered securities that are made during a fiscal year should be included in the description of the securities filed in the report for that fiscal year. As a result, the registrant will need annually to review and update its exhibit under Item 601(b)(4)(vi) to describe any changes to the terms of registered securities previously described in the exhibit. The SEC emphasizes that even non-material modifications and amendments will have to be reflected in updates to the exhibit.

Incorporation of information by reference

In large measure to update aspects of regulation that have become outmoded by advances in technology, the SEC has amended Securities Act and Exchange Act rules that govern incorporation by reference of previously filed information. The SEC also has adopted parallel amendments to rules governing filings by investment companies and investment advisers. The SEC's goal is to "streamline the requirements associated with incorporation by reference and facilitate investor access to incorporated documents through the use of hyperlinks."

- *Required hyperlinking to incorporated information:* To facilitate greater investor access to disclosure, the SEC has amended rules under the Securities Act, the Exchange Act, and the Investment Company Act as well as specified forms to require active hyperlinks to information that is incorporated by reference into a registration statement or report if that information is available on EDGAR. Among other effects, these amendments will require issuers to include active hyperlinks to Forms 10-K, 10-Q, and 8-K and other filings listed in the section of their Securities Act registration statements on incorporation of information by reference. Registrants are not required to file an amendment to a document solely to correct an inaccurate hyperlink, unless that hyperlink was included in a pre-effective registration statement. The SEC further indicates that an inaccurate hyperlink alone would neither render the filing materially deficient nor affect a registrant's eligibility to use Form S-3, F-3, or SF-3. The SEC also clarifies that a registrant is not required to refile information that is incorporated by reference from a document that previously was filed with the SEC in paper form.
- *Elimination of requirement to file certain incorporated information as an exhibit:* The amendments eliminate the requirement in Rule 12b-23(a)(3) under the Exchange Act that, with limited exceptions, copies of any information incorporated by reference must be filed as an exhibit to the relevant filing. The SEC removed this requirement in large part because most Exchange Act filings are available on EDGAR. The SEC also has eliminated similar exhibit filing requirements under the Securities Act, the Investment Company Act, and the Investment Advisers Act. Corresponding exhibit requirements in Item 601(d) of Regulation S-K are not affected by the amendments. Thus, for example, a registrant will still be required under Item 601(b)(13) to file an annual report to security holders or a quarterly report to security holders in electronic format as an exhibit to the relevant filing when the registrant incorporates all or a portion of such a report by reference into any electronic filing.
- *Elimination of five-year limit on certain incorporations:* The SEC has removed the provision in Item 10(d) of Regulation S-K that prohibited incorporation of documents by reference if they had been on file with the SEC for more than five years and did not fall within one of the exceptions identified in the rule. The SEC notes that this provision is no longer needed to ensure access to filed documents now that the agency retains documents electronically.
- *Restriction on incorporation and cross-reference of information in financial statements:* The SEC has amended rules and forms under the Securities Act, the Exchange Act, and the Investment Company Act to restrict cross-references in financial statements to disclosure in other parts of a filing, or incorporation of information into financial statements by reference from other filings, out of concern that this practice can raise questions as to the scope of an auditor's responsibilities. The SEC elaborated that "referencing information outside the financial statements to satisfy financial statement disclosure requirements could create confusion about which financial information has been audited or reviewed by the independent auditor." The

amendments provide that the registrant may incorporate information by reference from other filings or cross-reference to information outside of the financial statements only if specifically permitted or required to do so by SEC rules, U.S. Generally Accepted Accounting Principles (GAAP), or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS).

New requirements for tagging cover page data

The amendments will require registrants to tag all of the information on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F in Inline eXtensible Business Reporting Language (XBRL) and to file with each form a Cover Page Interactive Data file containing the data to be tagged. Regulation S-T and the EDGAR Filer Manual previously required only some of the document and entity identifier elements on the cover pages to be tagged in XBRL, including form type, company name, filer size, and public float. Registrants filing Form 20-F or 40-F will be required to tag cover page data only when those forms are used as annual reports, not as registration statements. The enlarged scope of information to which XBRL is now relevant may heighten the need for coordination between registrants' legal and accounting departments and their filing agents to ensure compliance with the new requirements.

Hyperlinking and HTML submission requirements for investment companies

Consistent with its 2017 amendments requiring the use of exhibit hyperlinks and HyperText Markup Language (HTML) format for operating companies, the SEC has amended Regulation S-T and specified reporting and disclosure forms to apply similar requirements to investment companies. The amendments require investment companies filing Securities Act registration statements on specified forms, or reports on Form N-CSR, to include a hyperlink to each exhibit (other than an exhibit filed in XBRL) in the filing's exhibit index, with limited exceptions. Because the ASCII format does not support hyperlink functionality, the SEC will now require the use of HTML format for electronic filings. Investment company registrants will continue to be permitted to file in ASCII format any schedules or forms that are not subject to the exhibit filing requirements, such as proxy statements, or other documents included with a filing, such as an exhibit. The amendments include instructions governing the correction of inaccurate or nonfunctioning hyperlinks.

Other amendments

The SEC has adopted amendments to a number of Regulation S-K items that govern disclosure in Securities Act registration statements and prospectuses. Among the most noteworthy are changes to the outside front cover page of the prospectus that:

- eliminate the requirement to provide a detailed explanation on the prospectus cover page of the method used to determine the offering price for the securities being offered in cases where it is not practicable to disclose a price for the securities;
- add a requirement to disclose on the prospectus cover page (1) the principal U.S. market or markets for the securities being offered, even if the markets are not national securities exchanges, and (2) the corresponding trading symbols; and
- simplify the "subject to completion" legend on the cover page of a preliminary prospectus to delete the portion of the legend relating to state law for offerings that are not prohibited by state "blue sky" laws.

The SEC also has amended Item 512 of Regulation S-K, which governs undertakings that a registrant must include in Part II of its registration statement. The amendments eliminate the undertakings relating to the following matters on the basis that the undertakings are duplicative or have become obsolete:

- warrants and rights offerings (Item 512(c));
- competitive bids (Item 512(d));
- incorporated annual and quarterly reports (Item 512(e)); and
- equity offerings of nonreporting registrants (Item 512(f)).

Compliance dates

Except with respect to the amendments regarding (1) redaction of confidential information in exhibits filed under Item 601(b)(2) or (b)(10), (2) the new data tagging requirements, and (3) the new hyperlinking and HTML submission requirements applicable to investments companies, registrants will be required to comply with the amendments beginning on May 2, 2019.

Redaction of confidential information in exhibits. The amendments to the rules governing redaction of confidential information in exhibits filed under Item 601(b)(2) or (b)(10) became effective on April 2, 2019. The SEC staff's guidance on the treatment of confidential treatment requests that were pending on April 2 is discussed above.

Data tagging of cover pages of Exchange Act forms. The SEC has adopted a three-year phase-in approach to compliance with the new data tagging requirements. The initial compliance date depends on the registrant's filing status, as follows:

- *Large accelerated filers that prepare their financial statements in accordance with U.S. GAAP* will be required to comply with the cover page tagging requirements in reports for fiscal periods ending on or after June 15, 2019.
- *Accelerated filers that prepare their financial statements in accordance with U.S. GAAP* will be required to comply with the cover page tagging requirements in reports for fiscal periods ending on or after June 15, 2020.
- *All other filers* that are subject to the cover page tagging requirements, including foreign private issuers that prepare their financial statements in accordance with IFRS, will be required to comply with the requirements in reports for fiscal periods ending on or after June 15, 2021.

A domestic form filer will be required to comply with the cover page tagging requirements beginning with its first quarterly report on Form 10-Q for a fiscal period ending on or after the applicable compliance date, even if such a filer first files on another form (such as Form 10-K) for a fiscal period ending on or after that date. The SEC provides two examples illustrating the determination of the initial compliance date for large accelerated filers with different fiscal year ends:

- A Form 10-Q filer in the large accelerated filer phase-in group with a calendar fiscal year end will be required to begin compliance with its Form 10-Q report for the quarterly period ending June 30, 2019.
- A Form 10-Q filer in the large accelerated filer phase-in group with a June 30 fiscal year end will be required to begin compliance with its Form 10-Q report for the quarterly period ending September 30, 2019 (rather than with its Form 10-K report for the fiscal year ending June 30, 2019).

Investment company hyperlinking and HTML submission requirements. All registration statement and Form N-CSR filings by investment company registrants 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. The SEC indicates that it welcomes early compliance with the new filing requirements.

Conclusion

Senior executives may not find much to interest them in the new disclosure simplification amendments. Corporate reporting teams, on the other hand, should welcome this latest phase of the SEC's disclosure modernization project. Considered individually, many of the amendments promise practical improvements, while collectively they should ease some of the compliance burden, at least after the investment of time required to master the rule changes.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed on the following page of this update.

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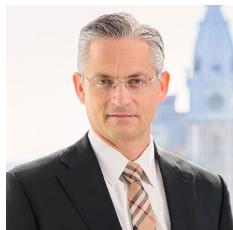
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