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SEC CONTINUES TO MODERNIZE AND SIMPLIFY DISCLOSURE REQUIREMENTS

To Our Clients and Friends:

On March 20, 2019, the Securities and Exchange Commission (the "SEC") voted to adopt amendments (available here) to modernize and simplify disclosure requirements for public companies, investment advisers, and investment companies (the "Final Rules").[1] The amendments, which, among other things, will change the content of Management's Discussion and Analysis ("MD&A") and change the process for redacting confidential information in certain exhibits, are "intended to improve the readability and navigability of disclosure documents and discourage repetition and disclosure of immaterial information." The Final Rules are largely consistent with the proposed amendments outlined in the SEC's October 11, 2017 proposing release, available here (the "Proposed Rules"), with a few exceptions. For additional information on the Proposed Rules, please see our client alert dated October 13, 2017 (available here).

In connection with the adoption of the Final Rules, SEC Chairman Jay Clayton stated, "[t]he amendments adopted today demonstrate our focus on modernizing our disclosure system to meet the expectations of today's investors while eliminating unnecessary costs and burdens." The Final Rules are also consistent with other efforts by the SEC to simplify disclosure requirements, such as certain changes to Regulation S-K adopted by the SEC effective November 5, 2018. For additional information on the impact of these changes, please see our client alert dated August 27, 2018 (available here).

The amendments relating to the redaction of confidential information in certain exhibits will become effective upon publication in the Federal Register. The remainder of the amendments will become effective 30 days after they are published in the Federal Register, except that the requirements to tag data on the cover pages of certain filings are subject to a three-year phase-in. Based on the principle the SEC staff recently set forth in Question 105.09 of the Exchange Act Forms C&DIs (available here), which applied to the above-referenced set of simplification amendments, the Final Rules will apply to all filings made after the applicable effective date discussed above, unless otherwise noted by the SEC staff. As of the date of this publication, the Final Rules have not been published in the Federal Register. Given the expected timing of publication, it is likely that the Final Rules related to the redaction of confidential information in certain exhibits will apply to the first quarter Form 10-Q for calendar-year filers, but it is less clear whether the other changes set forth in the Final Rules will apply to the first quarter Form 10-Q.

I. Summary of Amendments Adopted

A. Management's Discussion and Analysis (MD&A) – Item 303 of Regulation S-K

The Final Rules adopt the amendments relating to Item 303 in substantially the form set forth in the Proposed Rules. Under these amendments, registrants that provide financial statements covering three years in their filings are not required to include in MD&A a discussion of the earliest year if: (i) such discussion was already included in any other of the registrant's prior filings that required compliance with Item 303; and (ii) registrants identify the location in the prior filing where the omitted discussion can be found. For example, if a registrant files its 2019 Form 10-K with financial statements for fiscal years 2017, 2018, and 2019, the registrant can omit from its MD&A the discussion comparing its operating results and financial condition for fiscal years 2017 to 2018, and instead only compare its operating results and financial condition for fiscal years 2018 and 2019 and refer the reader to the MD&A in the 2018 Form 10-K where the 2017 to 2018 comparative discussion may be found.

The Item 303 amendments include two modifications from the Proposed Rules. First, registrants can rely on *any* prior filing that required compliance with Item 303 (*e.g.*, Form 10-K, Form S-1, Form S-4, Form 10), rather than only the prior fiscal year's Form 10-K. Second, the Final Rules did not adopt the language specifically requiring that all omitted information not be material to understanding the registrant's financial condition because the SEC recognized that such a requirement is superfluous. The SEC did not intend to modify or alter the overarching materiality analysis management undertakes with respect to MD&A and noted, "[t]his is not to suggest, however, that materiality is not relevant to management's judgement about what disclosure is provided in MD&A."

Additionally, these amendments eliminate the portion of Instruction 1 to Item 303(a) indicating that five-year selected financial data may be necessary where trend information is relevant because, as the SEC notes, disclosure requirements for liquidity, capital resources, and results of operations already require trend disclosure. The SEC does not anticipate that elimination of such language will discourage trend disclosure or otherwise reduce disclosure of material information.

B. Exhibits – Item 601 of Regulation S-K

Omission of Information from Material Contracts Without Confidential Treatment Request. Under the amendments adopted under the Final Rules, which are substantially similar to the Proposed Rules amendments, registrants can omit confidential information from material contracts filed pursuant to Item 601(b)(10)—without requesting confidential treatment from the SEC—where this information is both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed.[2] Registrants will still be required to: (i) mark the exhibit index to indicate that portions of the material contract have been omitted; (ii) include a prominent statement on the first page of the redacted material contract indicating certain information has been omitted; and (iii) indicate with brackets where this information has been omitted within the material contract.

Similarly, Item 601(b)(2) was amended to allow registrants to redact immaterial provisions or terms from agreements filed under this item.

Although registrants are no longer required to file confidential treatment requests with respect to exhibits filed pursuant to Item 601(b)(10) and Item 601(b)(2), they are still responsible for ensuring all material information is disclosed and limiting redactions to those portions necessary to prevent competitive harm. The SEC staff will continue to selectively review registrants' filings and assess whether registrants have satisfied their disclosure responsibility with respect to these redactions. Upon request, registrants are required to provide supplemental materials similar to those currently required in confidential treatment requests. Registrants can request confidential treatment pursuant to Rule 83 for these supplemental materials. If the supplemental materials do not support the redactions, the SEC staff may instruct registrants to file an amendment disclosing some, or all, of the previously redacted information.

Omission of Schedules and Attachments to Exhibits. The Final Rules add new Item 601(a)(5) to allow registrants to omit entire schedules and similar attachments to exhibits, unless these schedules or attachments contain material information that is not otherwise disclosed in the exhibit or SEC filing. This change extends the existing accommodation in Item 601(b)(2) for acquisition, reorganization, arrangement, liquidation, or succession agreements to all exhibits filed under Item 601, including material contracts. As with Item 601(b)(2), exhibits relying on this provision must contain a list briefly identifying the contents of the omitted schedules or other attachments. The SEC clarified, however, that registrants need not 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.

Omission of Personally Identifiable Information (PII). The Final Rules add new Item 601(a)(6) to allow registrants to omit PII (such as bank account numbers, social security numbers, home addresses, and similar information) from all exhibits without submitting a confidential treatment request for this information. Registrants that use this accommodation can simply provide the exhibit with appropriate redactions and need not provide an analysis supporting the redactions at the time of filing. This is consistent with the SEC staff's current practice of not objecting when registrants seek confidential treatment and omission of PII.

Elimination of Two-Year Look Back Period for Material Contracts. With the exception of "newly reporting registrants,"[3] registrants will no longer be subject to the two-year look back period under Item 601(b)(10)(i), which requires the inclusion of all material contracts that were entered into during the last two years of the applicable registration statement or report. Under the adopted amendments to Item 601(b)(10)(i), registrants need only to file as an exhibit contracts not made in the ordinary course of business that are material to the registrant and to be performed in whole or in part at or after the filing of the registration statement or report.

New Requirement for Description of Securities. The Final Rules amend Item 601(b)(4) to require that registrants provide a brief description of all securities registered under Section 12 of the Exchange Act (*i.e.*, the information required by Item 202(a) through (d) and (f)) as an exhibit to their Form 10-K. Previously, this disclosure was only required in registration statements.

C. Description of Property – Item 102 of Regulation S-K

The Final Rules adopt the amendments to Item 102 as proposed. Under these amendments, registrants are only required to describe a physical property to the extent the property is material to the registrant's business, which contrasts with the previous requirement to disclose "principal" plants, mines, and other "materially important" physical properties. However, given the significance and unique considerations of property disclosure for registrants operating in the mining, real estate, and oil and gas industries, the Final Rules did not modify the instructions to Item 102 that relate to those specific industries and as such they remain subject to their existing industry guides or other requirements of Regulation S-K. For example, the oil and gas industry guide was replaced by Item 1200 et al. in 2008.

D. Changes to Item 405 – Compliance with Section 16(a) of the Exchange Act

The Final Rules adopt amendments to Item 405 that eliminate the requirement for Section 16 persons to furnish Section 16 reports to the registrant; clarify that registrants may, but are not required to, rely only on Section 16 reports that have been filed on EDGAR (as well as any written representations from the reporting persons) to assess Section 16 delinquencies; change the disclosure heading required by Item 405(a)(1) from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports" and encourage excluding such heading altogether if there are no reportable Section 16(a) delinquencies; and eliminate the checkbox on the cover page of Form 10-K relating to Section 16(a) delinquencies.

E. Changes to SEC Forms – Cover Page

The Final Rules adopt amendments that require disclosure of a registrant's stock ticker symbol on the cover pages of certain filings, including Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F. Because the cover pages of Form 10-K, Form 20-F, and Form 40-F already require disclosure of the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act and each exchange on which they are registered, the amendments simply revise these cover pages to include a corresponding field for the trading symbols of any securities listed on an exchange. Unlike Form 10-K, Form 20-F, and Form 40-F, however, the cover pages of Form 10-Q and Form 8-K do not currently require disclosure of the title of each class of securities and each exchange on which they are registered. To maintain consistency across forms, the amendments will revise the cover pages of Form 10-Q and Form 8-K to include this disclosure (*i.e.*, title of class and name of exchange) in addition to the trading symbol.

While the text of the new cover page captions is contained in the adopting release, the release does not indicate exactly where the new text will be added to the Form 10-Q and 8-K cover pages. It has historically taken the SEC staff several weeks or even months to incorporate updates to the PDF cover pages published on the SEC's website.

F. Other Adopted Technical Amendments

- Changes to Clarify Unclear Instructions or Terms. The Final Rules adopt amendments to Item 401 (Directors, Executive Officers, Promoters, and Control Persons), Item 407 (Corporate

Governance), Item 501(b) (Outside Front Cover Page of the Prospectus), and Item 508 (Plan of Distribution) that help clarify unclear instructions or terms within these specific Items, such as clarifying when disclosure about executive officers need not be repeated in proxy or information statements if already included in Form 10-K (Item 401) or eliminating ambiguous terms discussing name change requirements and an exception to that requirement (Item 501(b)(1)).

- Relocation of Certain Requirements. The Final Rules adopt amendments to Item 503(c) (Risk Factors) that relocate Item 503(c) from Subpart 500 to a new separate item under Subpart 100 of Regulation S-K (Item 105). In particular, the SEC noted that Subpart 100 is a more appropriate location for Risk Factors because it covers a broad category of business information and, unlike Subpart 500, is not limited to offering-related disclosure. This amendment does not change the requirements regarding content or placement of Risk Factors within Form 10-K and Form 10-Q.

- Elimination of Obsolete Undertakings. The Final Rules adopt amendments to Item 512 (Undertakings) to eliminate undertakings that have become redundant and obsolete, including Item 512(c) (Warrants and rights offerings), (d) (Competitive bids), (e) (Incorporated annual and quarterly reports), and (f) (Equity offerings of nonreporting registrants).

- Changes to Improve Access to Information. The Final Rules adopt amendments that aim to improve access to information by requiring data tagging for items on the cover pages of certain filings (Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F) and the use of hyperlinks for information available on EDGAR incorporated by reference into a registration statement or prospectus.

II. Summary of Proposed Rules Not Adopted

Caption and Item Numbers. The Final Rules did not adopt proposed amendments to Form 10, Form 10-K and Form 20-F that would have allowed registrants to exclude item numbers and captions or to create their own captions tailored to their disclosure. The proposed amendments would not have affected captions that are expressly required by the forms or Regulation S-K. A majority of commenters who addressed this issue disfavored the proposed amendments, noting the required captions and item numbers help investors navigate filings, make it more easy to locate information important to them, and enhance their ability to compare information in different filings. The SEC ultimately agreed and stated that any benefits that might accrue by allowing more variability in the presentation of disclosure may be "outweighed by the risk that the changes could impair an investor's ability to use and navigate the information efficiently and effectively."

Legal Entity Identifiers (LEIs). The Final Rules did not adopt the proposed amendments to Item 601(b)(21)(i), which would have required all registrants and subsidiaries that had LEIs to disclose such LEIs as an exhibit. LEIs are 20-character, globally-recognized alpha-numeric codes that allow for unique identification of entities engaged in financial transactions. However, in light of several comments disfavoring the proposal, the SEC opted not to adopt such amendment. The comments critical of the proposal generally expressed doubts about the benefits of the information or were concerned that it would be costly and time consuming to acquire and maintain LEIs.

III. Practical Considerations for Registrants

In light of the adopted Final Rules, registrants should take a fresh look at the disclosure in their Exchange Act reports, starting with the first quarter Form 10-Q. Compliance checks will need to be updated and reviewed closely. Even beyond the technical changes, registrants should evaluate how their reports and registration statements can be revised to improve readability and navigability and eliminate repetitive or immaterial disclosure.

Specifically, in light of the amendments to Item 303 of Regulation S-K, registrants should review their MD&A and consider what revisions should be made so that the discussion of current-year-to-prior-year results addresses material aspects of both years. Although the SEC ultimately chose not to include, as an explicit condition, a requirement that the omitted discussion must not be material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations, materiality will remain a primary consideration as registrants consider revisions to the discussion included in their MD&A. In the adopting release, the SEC noted that, "[i]n preparing MD&A, companies should evaluate issues presented in previous periods and consider reducing or omitting discussion of those that may no longer be material or helpful, or revise discussions where a revision would make the continuing relevance of an issue more apparent." In determining whether to omit a discussion of the earliest year in MD&A, companies will want to consider whether changes in their business (*e.g.*, acquisitions, dispositions, or other corporate changes; changes in the mode of conducting business; changes in management's strategy) would cause the discussion of the earliest year, or a portion of that discussion, to continue to be material.

Registrants should also review the exhibits included in their Form 10-K or Form 10-Q or registration statements and consider whether any exhibits may be eliminated as a result of the amendments to Item 601 of Regulation S-K. In addition to eliminating any exhibits that are no longer required, following effectiveness of the Final Rules, registrants must also remember to include in their Form 10-K the exhibit relating to the description of securities required under Item 601(b)(4), as amended.

Lastly, while the adopted amendments will allow companies to redact confidential information from most exhibits without filing a separate confidential treatment request, such amendments do not substantively alter a registrant's disclosure requirements and do not prevent the SEC from scrutinizing the appropriateness of any such omissions. At this time, it is unclear how vigilant the SEC will be in scrutinizing omissions made pursuant to the revised redaction rules set forth in the Final Rules. Accordingly, registrants should undertake substantially the same analysis in deciding whether to omit information following the effectiveness of the applicable amendments as one would take in making a confidential treatment request and be prepared to explain such analysis and reasoning if requested to do so by the SEC staff. For guidance relating to the SEC staff's views on appropriate redactions, registrants can continue to look to Staff Legal Bulletins 1 and 1A (available here).

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[1] Our discussion in this client alert is limited to the Division of Corporation Finance changes impacting reporting companies.

[2] The SEC slightly revised the language of this second prong from the proposed language to add the term "likely."

[3] Under the Final Rules, a "newly reporting registrant" includes: (1) registrants that are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act at the time of filing, (2) registrants that have not filed an annual report since the revival of a previously suspended reporting obligation, and (3) any registrant that (a) was a shell company, other than a business combination related shell company, as defined in Rule 12b-2 under the Exchange Act, immediately before completing a transaction that has the effect of causing it to cease being a shell company and (b) has not filed a registration statement or Form 8-K as required by Items 2.01 and 5.06 of that form, since the completion of such transaction (or, in the case of foreign private issuers, has not filed a Form 20-F since the completion of the transaction).

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any lawyer in the firm's Securities Regulation and Corporate Governance and Capital Markets practice groups, or any of the following practice leaders and members:

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