

## SEC's Amendments Streamline Reporting — In Some Cases

By **Andrew Fabens, David Korvin and Jordan Rex** (August 12, 2019, 6:02 PM EDT)

On March 20, the U.S. Securities and Exchange Commission voted to adopt several amendments to modernize and simplify disclosure requirements that apply to periodic reports, proxy statements and certain other public filings. These amendments have streamlined certain disclosure requirements, while also eliminating outdated or duplicative disclosures for reporting companies under Regulation S-K. This article provides a brief overview of the SEC's recent amendments, a summary of those that are expected to be most relevant, and practical considerations and near-term compliance matters that reporting companies, or registrants, should consider as a result thereof.

The SEC's amendments, among other things, changed the content of management's discussion and analysis — or MD&A — filings and the process for redacting confidential information in certain exhibits to improve the readability and navigability of company disclosures and discourage repetition and disclosure of immaterial information. Other than the requirement to data tag the cover page of certain periodic reports, as described in further detail below, these amendments became effective as of May 2.

### Background

Congress mandated that the SEC review certain disclosure requirements for reporting companies, and to streamline those requirements through a provision in the Fixing America's Surface and Transportation Act of 2015, also known as the FAST Act. The adopted amendments continue the SEC's ongoing effort to simplify and update such disclosure requirements where possible. In connection with the adoption, SEC Chairman Jay Clayton stated that "[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."

### Initial Guidance

#### *Management's Discussion and Analysis*

Registrants that provide financial statements covering three years in their filings are no longer required to



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include in MD&A a discussion of the earliest years if (1) such discussion was already included in any other of the registrant's prior filings that required compliance with Item 303 of Regulation S-K (e.g., Form 10-K, Form S-1, Form S-4 or Form 10), and (2) 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.

Note that the omission of the earliest year of MD&A is not specifically prohibited in circumstances where there has been a restatement or retrospective adoption of a new accounting principle, but materiality should be taken into account when differences in presentation are present. Additionally, the amendments eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a), and clarify that registrants may use their discretion in selecting the best format for their MD&A presentation. However, outside the MD&A, registrants are still required to provide the five years of selected financial data required by Item 301.

In light of the changes to Item 303, registrants should review their MD&A discussion to consider what revisions should be made so that the discussion of current-year-to-prior-year results addresses material aspects of both years. Registrants should continue to apply a materiality threshold as the primary consideration to determine appropriate revisions to their MD&A discussion.

In determining whether to omit a discussion of the earliest year in MD&A, registrants 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.

### ***Exhibits***

The amendments include several changes that impact exhibit filing requirements.

#### *Omission of Information From Material Contracts Without Confidential Treatment Request*

Registrants are now permitted to omit confidential information from material contracts filed pursuant to Item 601(b)(10) — without requesting confidential treatment from the SEC — where the information is both (1) not material and (2) would likely cause competitive harm to the registrant if publicly disclosed.

Registrants must (1) mark the exhibit index to indicate the portions of the material contract that have been omitted, (2) include a prominent statement on the first page of the redacted material contract to indicate that certain information has been omitted, and (3) 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.

Registrants should understand that they are still responsible for ensuring all material information is disclosed and limit redaction under the new rule to only those portions necessary to prevent competitive harm. Moreover, because the SEC staff will continue to selectively review and scrutinize registrants' filings, registrants should continue to undertake substantially the same analysis in deciding whether to omit

information under this rule as one would take in making a formal confidential treatment request and be prepared to explain such analysis and reasoning if requested by the SEC staff.

Upon request, registrants are required to provide supplemental materials similar to those currently required in confidential treatment requests, but registrants can request confidential treatment for all supplemental materials pursuant to Rule 83 of the Freedom of Information Act. 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 filed information.

Registrants cannot refile a redacted material contract upon the expiration of a previously granted confidential treatment order. Rather, registrants must continue to rely on the traditional methods of extending confidential treatment orders under the Securities Act of 1933 Rule 406 or the Securities Exchange Act of 1934 Rule 24b-2. Alternatively, registrants should consider using the new short form application, which applies only to contracts where a confidential treatment order has previously been granted.

The application, a one-page document that is emailed to [CTExtensions@sec.gov](mailto:CTExtensions@sec.gov), requires (1) affirmation that the most recently considered application for a confidential treatment order continues to be true, complete and accurate, and (2) a requested extension for either three, five or ten years.

#### *Omission of Schedules and Attachments to Exhibits*

New Item 601(a)(5) now allows registrants to omit entire schedules and similar attachments to exhibits required by Item 601, provided that such schedules or attachments do not contain material information not otherwise disclosed in the exhibit or disclosure document. 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.

Registrants should review exhibits that will be included in their upcoming filings to determine whether any schedules or similar attachments may be omitted as a result of Item 601(b)(2). If applicable, registrants should remember that, as with Item 601(b)(2), exhibits relying on Item 601(a)(5) must contain a list briefly identifying the contents of the omitted schedules or attachments.

However, a separate list does need to be prepared if that information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules or other attachments (e.g., in a table of contents or exhibit list). Additionally, registrants do not need to include an agreement to furnish a supplemental copy of any omitted schedule or attachment upon the SEC's request, but furnishing a copy upon request will be required.

#### *Omission of Personally Identifiable Information*

Registrants are now permitted to omit personally identifiable information, or PII — such as bank account numbers, social security numbers and home addresses — pursuant to Item 601(a)(6) if disclosure would constitute a clearly unwarranted invasion of personal privacy. 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 change codifies the SEC staff's prior practice of not objecting when registrants seek confidential treatment and omission of PII.

#### *Elimination of Two-Year Look-Back Period for Material Contracts*

Registrants — with the exception of newly reporting registrants, as defined below — are no longer required to comply with 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 periodic report.

Registrants now need only file 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 periodic report. Accordingly, registrants with established reporting histories should review all material contracts filed as exhibits to their periodic reports or registration statements to determine if any such exhibits may be eliminated pursuant to Item 601(b)(10)(i).

Note that 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 on Form 8-K as required by Items 2.01 and 5.06 of that form, since the completion of such transaction.

#### *New Requirement for Description of Securities*

Registrants are now required to provide a brief description of all securities registered under Section 12 of the Exchange Act as an exhibit to their Form 10-K. Specifically, Item 601(b)(4)(vi) requires registrants to provide the information already required by Item 202(a) through (d) and (f) of Regulation S-K for all securities that (1) are registered as of the end of the period covered by the periodic report or (2) are not retired by the end of the period covered by the report. This information was previously only required in registration statements.

Following the filing of an initial Form 10-K or other SEC filing containing an exhibit with the necessary Item 202 disclosure, registrants may incorporate that exhibit by reference in future Form 10-K filings to satisfy Item 601(b)(4)(vi) so long as there has not been any change to the information contained therein. Registrants should be aware, however, that any modifications to the rights of security holders or amendments to charters and bylaws during a fiscal year should be reflected in the exhibit, whether or not such modification or amendment was material.

#### *Description of Property*

Registrants are now only required to describe a physical property to the extent that such 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 amendments did not modify 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, Instruction 3 of Item 102 applies to the mining industry, Instructions 4 through 6 apply to the oil and gas industry, and Instruction 9 applies to the real estate industry.

#### *Compliance with Section 16(a) of the Exchange Act*

Item 405 of Regulation S-K has been amended to (1) eliminate the requirement for Section 16 persons to

furnish copies of Section 16 reports to the registrant; (2) clarify that registrants may, but are not required to, rely only on Section 16 reports that have been filed on the SEC's Electronic Data Gathering, Analysis and Retrieval system, or EDGAR, as well as written representations from the reporting persons, to assess Section 16 delinquencies; (3) change the disclosure heading previously required by Item 405 from Section 16(a) beneficial ownership reporting compliance to delinquent Section 16(a) reports, and to encourage registrants to exclude this heading if there are no reportable Section 16(a) delinquencies; and (4) eliminate the checkbox on the cover page of Form 10-K relating to Section 16(a) delinquencies.

### ***Cover Page Changes to SEC Forms***

Registrants are now required to include disclosure of a registrant's ticker symbol for each class of securities registered pursuant to Section 12(b) on the cover pages of periodic reports, including Form 10-K, Form 10-Q and Form 8-K; in addition to common stock, this includes classes of preferred stock or debt securities listed on the NYSE or Nasdaq.

Additionally, beginning with the first Form 10-Q or Form 10-K filed for a fiscal period ending on or after June 15, a registrant that is a large accelerated filer will be required to (1) data tag all information on its cover page in inline XBRL (i.e., embedded directly into the HTML document) for each Form 10-K, Form 10-Q and Form 8-K going forward, and (2) file the related cover page inline XBRL data as an exhibit to filing.

The timing of implementation for cover page data tagging is consistent with the SEC's three-year phase-in period for registrants to adopt inline XBRL in their periodic filings. Accelerated filers will need to comply with this requirement beginning with the first Form 10-Q or Form 10-K filed for a fiscal period ending on or after June 15, 2020. For all other filers, the first applicable filing is the first Form 10-Q or Form 10-K for a fiscal period ending on or after June 15, 2021.

### ***Other Adopted Technical Amendments***

The amendments also bring several other minor, but important, technical changes that registrants should consider when preparing their upcoming public filings.

#### *Hyperlinking*

Registrants are now required to provide hyperlinks to information on EDGAR that is incorporated by reference in a registration statement or prospectus.

#### *Relocation of Certain Requirements*

Prior Item 503(c) of Regulation S-K — the requirement to provide a discussion of risk factors — has been relocated to Item 105 of Regulation S-K, which the SEC noted is a more appropriate location because it covers a broad category of business information and is not limited to offering-related disclosure. The amendments also deleted five examples, previously found in Item 503(c), that registrants could consider when drafting their risk factor disclosure.

These examples were deleted to encourage registrants to focus on their own risk identification process and provide more specific and relevant disclosure. Registrants should note, however, that this did not make any substantive changes to the content or placement of risk factors within Form 10-K and Form 10-Q.

#### *Changes to Clarify Unclear Instructions or Terms*

Items 401 (directors, executive officers, promoters and control persons), 407 (corporate governance), 501(b) (outside front cover page of the prospectus), and 508 (plan of distribution) have been amended to clarify unclear instructions or terms within those specific Items. For example, the amendments clarified that disclosure about officers does not need to be repeated in a proxy or information statement if it is already included in Form 10-K, and revised the required caption in Item 401 from "executive officers of the registrant" to "information about our executive officers."

#### *Elimination of Obsolete Undertakings*

Item 512 of Regulation S-K was amended to eliminate undertakings that have become redundant and obsolete, including Items 512(c), covering warrants and rights offerings, (d) competitive bids, (e) incorporated annual and quarterly reports, and (f) equity offerings of nonreporting registrants.

#### **Next Steps**

In light of these amendments, registrants should take a fresh look at the disclosure in their Exchange Act reports, starting with their quarterly reports on Form 10-Q. Registrants should also review the exhibits included in their Form 10-K or Form 10-Q or registration statements, and consider whether any exhibits or particular disclosure may be eliminated as a result of the amendments.

Even beyond the technical changes, registrants should continue to evaluate how their periodic reports and registration statements can be revised to improve readability and navigability, while eliminating repetition or immaterial disclosure, as the SEC continues to modernize and simplify disclosure requirements.

Additionally, although the amendments largely reduce reporting obligations for registrants, this is not universally the case. Registrants will have additional reporting obligations with respect to description of securities registered under Section 12 of the Exchange Act, cover page data tagging — including the related exhibit — and hyperlinking information that is incorporated by reference.

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