

CLIENT ALERT

# SEC Adopts Additional Amendments to Modernize and Simplify Disclosure

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The Securities and Exchange Commission recently adopted amendments to modernize and simplify certain disclosure requirements under Regulation S-K and related rules and forms, as mandated by the 2015 Fixing America's Surface Transportation (FAST) Act.<sup>1</sup> The amendments are intended to reduce the costs and burdens on public companies and improve the quality and readability of disclosure documents, while continuing to provide all material information to investors. These amendments are part of the SEC's ongoing disclosure effectiveness initiative, which also led to the adoption of various disclosure simplifications in August 2018.<sup>2</sup>

The amendments will take effect 30 days after publication in the Federal Register, other than (i) the amendments relating to the redaction of confidential information in certain exhibits, which will become effective immediately upon publication in the Federal Register, (ii) the requirements to tag data on the cover pages of certain filings, which are subject to a three-year phase-in, commencing with respect to fiscal periods ending on or after June 15, 2019 for large accelerated filers that use U.S. GAAP, and (iii) the requirement that certain investment company filings be made in HTML format and use hyperlinks, which will be effective for filings on or after April 1, 2020. Many of the changes apply to investment companies and related SEC forms.

<sup>1</sup> See SEC Release No. 33-10618, *FAST Act Modernization and Simplification of Regulation S-K*, March 20, 2019, available [here](#).

<sup>2</sup> See SEC Release No. 33-10532, *Disclosure Update and Simplification*, August 17, 2018, available [here](#), and our related client memorandum, *SEC Adopts Disclosure Simplifications*, available [here](#).

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Below is a summary of the amendments:

### **Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A")**

Under Item 303(a) of Regulation S-K, companies are required to discuss their financial condition, changes in financial condition and results of operations. Current rules provide that the MD&A discussion should generally cover the three-year period covered by the financial statements included in the annual report, and may use either year-to-year comparisons or any other format that in the company's judgment would enhance a reader's understanding. As amended, Item 303 will now provide that a company may omit a discussion of the earliest of the three years if such discussion is included in the company's prior EDGAR filings and the company includes a statement identifying the location of the omitted discussion in the prior filing. The amendments also delete the reference to year-to-year comparisons in Item 303 so as to not suggest one form of presentation over another, although we expect most companies will continue to use the year-to-year comparison format. The amendments also make conforming changes to Form 20-F for foreign private issuers. As always, and particularly with principle-based disclosure such as MD&A, companies should continue to evaluate whether to include additional information, even if not explicitly required, to ensure that their disclosure provides investors with all material information.

### **Exhibits**

#### **A. Redaction of Confidential Information**

Companies frequently make confidential treatment requests ("CTRs") to redact certain sensitive information in material contracts required to be publicly filed under Item 601(b)(10) of Regulation S-K. Under amended Item 601, companies will be permitted to redact confidential information in material contracts filed under Item 601(b)(10) as well as plans of acquisition filed under Item 601(b)(2) without submitting a CTR, where the company determines that the information (1) is not material and (2) would likely cause competitive harm if publicly disclosed. These amendments are intended to ease the administrative burden for preparing and submitting CTRs, but do not substantively alter the type of information that may be redacted.

Certain existing requirements for confidential exhibits will remain in effect. Companies should continue to mark the exhibit index to indicate that portions of the exhibit have been omitted, include a prominent statement on the first page of the redacted exhibit to indicate that certain information has been omitted because it (1) is not material and (2) would likely cause competitive harm if publicly disclosed, and indicate with brackets where information has been omitted in the version of the exhibit filed on EDGAR.

The amendments also extend to certain forms to which Item 601 does not apply, such as Form 20-F for foreign private issuers, Form 8-K for material definitive agreements filed with disclosure under Item 1.01, and certain registration forms used by investment companies.

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### B. Other Amendments Related to Exhibits

Additional changes related to exhibits include:

- Enhancing disclosure by requiring a new exhibit to Form 10-K describing the company's registered securities, consistent with the current requirement in Item 202 applicable to registration statements;
- Permitting companies to omit schedules and attachments for all exhibits filed under Item 601, provided (1) the omitted schedules or attachments do not contain material information, (2) the information is not otherwise disclosed in the exhibit or disclosure document, and (3) the filed exhibit contains a list briefly identifying the contents of any omitted schedules or attachments. Comparable changes are being made to Item 1016 of Regulation M-A, investment company registration forms and Form N-CSR;
- Permitting companies to omit personally identifiable information from exhibits without submitting a CTR;
- Limiting to "newly reporting registrants" the current requirement under Item 601(b)(10)(i) to file material contracts not made in the ordinary course of business that are entered into not more than two years before the filing. Companies will continue to be required to file material contracts not made in the ordinary course that are to be performed at or after the filing of the registration statement or report;
- Eliminating the prohibition on the incorporation of documents on file with the SEC for more than five years and adding a requirement to hyperlink to any information that is incorporated by reference into a registration statement or prospectus if that information is available on EDGAR; and
- Extending the recently adopted exhibit-hyperlinking rules to certain registration and reporting forms used by investment companies, and accordingly requiring these documents to be submitted in HTML format.

Comparable changes are being made to Form 20-F for foreign private issuers.

### Description of Property

The release amends Item 102 of Regulation S-K to clarify that companies need only provide disclosure about physical properties to the extent material. As part of this analysis, companies may describe properties on an individual or collective basis, or may determine that no disclosure is required under this Item.

### Financial Statements

Companies will not be permitted in their financial statements to incorporate by reference or cross-reference information outside of the financial statements unless specifically permitted or required by SEC rules, GAAP or IFRS. This is intended to address concerns about auditor responsibility for auditing or reviewing information outside of the financial statements that is referenced to satisfy financial statement disclosure requirements.

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### Management, Security Holders and Corporate Governance

The SEC amended certain disclosure requirements related to management, security holders and corporate governance, including:

- Clarifying that companies that include information about their executive officers in Part I of Form 10-K under Item 401 (provided under the renamed heading “Information about our Executive Officers”) may exclude such information from their definitive proxy or information statement, not just information provided under Item 401(b);
- Eliminating the requirement for reporting persons to furnish Section 16 reports to the company, given the availability of these reports on EDGAR;
- Clarifying that companies may solely rely on the Section 16 reports filed on EDGAR to determine if there are any Section 16 delinquencies to disclose in their Form 10-K or definitive proxy or information statement, with any such delinquencies reported under the revised caption “Delinquent Section 16(a) Reports” (which caption should be removed altogether if no delinquencies exist);
- Eliminating the checkbox on the cover of Form 10-K regarding disclosure of delinquent Section 16 filers pursuant to Item 405; and
- Revising Item 407 of Regulation S-K to update certain references in the audit committee report and specifically excluding emerging growth companies from the Compensation Discussion & Analysis (“CD&A”) reference in the compensation committee report.

### Registration Statements and Prospectuses

The SEC also adopted amendments related to registration statements and prospectuses, including:

- Explicitly allowing companies to omit an explanation of the formula or method for determining the offering price of securities on the cover of a prospectus so long as such formula or method is more fully explained elsewhere in the prospectus and a clear statement to that effect is included on the cover;
- Requiring disclosure on the prospectus cover page of the principal U.S. public trading market(s) where the company, through the engagement of a registered broker-dealer, has actively sought and achieved quotation. Previously, companies were only required to disclose “national securities exchanges” registered with the SEC;
- Revising the “red herring” legend required in preliminary prospectuses to permit companies to delete the language related to state law prohibitions where not applicable (such as where blue sky laws are preempted under the National Securities Markets Improvement Act);
- Eliminating the specific risk factor examples enumerated in Item 503(c) of Regulation S-K (also applicable to periodic reports) to better emphasize a principles-based approach tailored to the company’s particular business and associated risks, and moving the risk factor rules to new Item 105;
- Adding a definition of “sub-underwriter” as a dealer 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

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issuer. Item 508 requires certain disclosure related to sub-underwriters in the Plan of Distribution section of a prospectus; and

- Eliminating duplicative or obsolete undertakings currently required in Part II of a registration statement under Items 512(c), (d), (e), and (f).

### XBRL Tagging; Cover Pages of Certain Filings

Companies are required to file financial statements in XBRL format as an exhibit to their periodic reports, registration statements and certain current reports. The amendments will additionally require that all information on the cover page of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F be tagged in inline XBRL and filed as a new exhibit. Additionally, companies will now be required to include on the cover page of these forms the trading symbol for each class of registered securities and, for Forms 10-Q and 8-K, the title of each class of the company's securities and each exchange on which they are registered, and such information will be included in the XBRL cover page tagging.

If you have any questions regarding this client alert, please contact the following attorney or the Willkie attorney with whom you regularly work.

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