

March 27, 2019

SEC Adopts Amendments to Modernize and Simplify Regulation S-K

On March 20, 2019, the SEC adopted amendments to modernize and simplify certain disclosure requirements in Regulation S-K. A majority of the amendments were adopted in the form that they were proposed in October 2017, which in turn were largely consistent with the recommendations in the SEC's FAST Act Report to Congress in November 2016.¹ The amendments are intended to improve the readability and navigability of SEC documents and discourage repetition and disclosure of immaterial information.

The final rules include approximately 30 discrete changes to Regulation S-K and related rules and forms. Highlights of key aspects of the final rules are summarized below. [Annex A](#) contains a more comprehensive summary of the amendments.

Summary of the Amendments

MD&A. Instruction 1 to Item 303(a) currently provides that, generally, a company's MD&A should address the three-year period covered by the financial statements and either use year-to-year comparisons or another format that, in the company's judgment, enhances a reader's understanding. The Instruction also states that, where trend information is relevant, reference to the five-year selected financial data may be necessary.

Under the final rules, the discussion of the earliest year may be omitted from MD&A if the company has included such discussion in a prior filing on EDGAR and includes a statement identifying the location in the prior filing. In addition, the final rules eliminate the reference to the five-year selected financial data in Instruction 1 because Item 303(a)(3)(ii) already requires disclosure of known trends and uncertainties. The final rules also further simplify Instruction 1 to emphasize that companies may use any presentation that, in the company's judgment, would enhance a reader's understanding. In the adopting release, the SEC acknowledged that many companies will continue to provide year-to-year comparisons as the format "is a familiar and, in many cases, appropriate method of presentation" but noted its belief that such a presentation "may not always be the most effective format, depending on the unique circumstances of a particular registrant."

Confidential Treatment. The final rules allow companies to redact confidential information from material contracts filed under Item 601(b)(10) where such information is both (a) not material and (b) would likely cause competitive harm to the registrant if publicly disclosed, without simultaneously submitting a confidential treatment request ("CTR") to the SEC. If the staff requests, the company must promptly provide an unredacted paper copy of the exhibit along with the company's materiality and competitive harm analyses. These changes are intended to substantially reduce the burden currently borne by companies in preparing and processing CTRs while still providing all material information to investors. Note, however, the staff will continue its selective review of company filings and will selectively assess whether redactions appear to satisfy the above requirements. If the company's analyses do not support its redactions, the staff may request that the company file an amendment that includes some, or all, of the previously redacted information.

The provisions governing redaction of confidential information in material contracts will become effective on the date the final rules are published in the Federal Register. If a company has a CTR pending at the time the amended rules become effective, the company may withdraw its pending CTR application. The SEC and its staff will continue to process pending CTR applications that are not withdrawn. Companies that elect to withdraw their CTR applications to

¹ See *Report on Modernization and Simplification of Regulation S-K* (November 2016), which was required by Section 72003 of the Fixing America's Surface Transportation (FAST) Act.

rely on the amended rules are advised to (1) refile the relevant exhibit(s), in redacted form, in an amended filing that conforms to the amended rules and (2) coordinate with the Assistant Director office responsible for reviewing their filings.

Exhibits. The final rules expand to all exhibits filed under Item 601 the existing accommodation that permits companies to omit immaterial schedules and attachments to acquisition agreements. Under the final rules, companies will still be required to provide with each filed exhibit a list that briefly identifies the contents of omitted schedules and attachments and, upon SEC staff request, furnish a copy of any omitted schedules or attachments. A separate list of omitted schedules and attachments need not be prepared if the information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. The final rules also permit companies to redact any personally identifiable information (“PII”) (e.g., bank account numbers, social security numbers, home addresses, and similar information) from filed exhibits.

Risk Factors. Item 503(c) requires companies to disclose the most significant factors that make an offering speculative or risky. The final rules relocate the line item from subpart 500 to subpart 100 of Regulation S-K to reflect the application of risk factor disclosure requirements to both Exchange Act reports and registration statements. In addition, the final rules eliminate risk factor examples. In the adopting release, the SEC stated that it believed that the elimination of these examples would encourage public companies to focus on their own risk identification processes.

Incorporation by Reference. The final rules eliminate the limit in Item 10(d), which generally prohibited the incorporation of documents by reference if they had been on file with the SEC for more than five years, and require hyperlinks to information that is incorporated by reference if that information is available on EDGAR. Unlike the requirements for exhibit hyperlinking, a company will not be required to correct inaccurate hyperlinks in an effective registration statement by including a corrected hyperlink in a subsequent periodic report or a post-effective amendment. Under the final rules, companies also need to include a clear statement describing the specific location of the information that is being incorporated by reference and identify the document where the information was originally filed or submitted and the location of the information within that document.

In addition, the final rules prohibit the incorporation by reference or cross-referencing from the financial statements to information outside of the financial statements, unless otherwise specifically permitted or required by the SEC’s rules, U.S. Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS), because the practice could raise questions as to the scope of an auditor’s responsibilities.

Trading Symbols and XBRL. Some of the amendments require additional disclosure or incorporation of new technology. Under the final rules, the cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F will be revised to require the disclosure of the trading symbol and title for each class of a company’s registered securities and the name of each exchange on which the company’s securities are registered. In addition, under the final rules, all information on the cover pages of these forms must be tagged in Inline XBRL. The SEC adopted a three-year phase-in for operating companies to tag data on the cover pages of these forms that are identical to the compliance dates for mandatory compliance with the Inline XBRL rules adopted in 2018. For more information on the Inline XBRL rules, see our prior Alert [here](#). As a result, large accelerated filers will be required to comply with these tagging requirements beginning in reports for a fiscal period ending on or after June 15, 2019, accelerated filers will be required to comply in reports for a fiscal period ending on or after June 15, 2020, and all other filers—including foreign private issuers—will be required to comply in reports for fiscal periods ending on or after June 15, 2021.

Proposed Amendments that Were Not Adopted. The SEC had proposed, but declined to adopt, rules relating to legal entity identifiers (“LEIs”) and tailored presentations based on the comments that were submitted. The proposed rules would have required companies to include the LEIs of the company and each subsidiary listed on the company’s subsidiary list exhibit. While some commenters favored this proposal, several commenters expressed doubts about the

benefits of the information or were concerned that it would be costly and time-consuming to acquire and maintain LEIs, particularly for global companies with numerous subsidiaries. The proposed rules also contained amendments to Forms 10, 10-K, and 20-F that would have allowed companies to exclude item numbers and captions or create their own tailored captions in those forms. A majority of commenters opposed these amendments and indicated that the proposed changes could make an investor's task more challenging to locate information important to them.

Effective Date of the Amendments

Except for the amendments to the rules governing redaction of confidential information in material contracts, which are effective on the date the final rule is published in the Federal Register, the amendments will become effective 30 days after such publication date.

While the timing of the rules' official publication is uncertain, calendar year-end reporting companies should take note as these amendments could affect their preparation of first quarter 2019 reports on Form 10-Q and/or 2019 proxy statements. With respect to proxy statements filed after the effective date, for example, companies will be required to update the caption from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports," and should consider revising any references to a specific auditing standard regarding communications between the audit committee and the independent auditor that may appear in the audit committee report to refer more broadly to those matters required to be discussed by the applicable requirements of the Public Company Accounting Oversight Board and the SEC. In addition, several amendments will affect any registration statements and prospectuses that are first filed after the effective date.

* * *

Please feel free to contact any member of Ropes & Gray's [securities & public companies](#) practice group or your usual Ropes & Gray contact with any questions about this Alert.

Summary of the Amendments Pursuant to the FAST Act Modernization and Simplification of Regulation S-K

Topic/Item	Rule	Description of the Amendments
MD&A	Regulation S-K, Item 303(a) (Instruction 1) and Item 5 of Form 20-F	<ul style="list-style-type: none"> • Registrants will generally be able to exclude discussion of the earliest of three years in MD&A if they have already included the discussion in a prior filing on EDGAR. Registrants must identify the location of where the omitted discussion may be found in the prior filing. • The reference to five-year selected financial data was also deleted since Item 303(a)(3)(ii) already requires disclosure of known trends and uncertainties. • Simplified instruction to emphasize that registrants may use any presentation that, in the registrant’s judgment, would enhance a reader’s understanding.
Redaction of Confidential Information in Material Contracts	Regulation S-K, Items 601(b)(10) and 601(b)(2); and certain other SEC forms for which Item 601(b)(10) does not apply ¹	<p>Registrants will be able to omit confidential information in material contracts and certain other exhibits without submitting a confidential treatment request to the SEC, so long as the information is:</p> <ul style="list-style-type: none"> ▪ not material, and ▪ would likely cause competitive harm to the registrant if publicly disclosed.
Risk Factors	Regulation S-K, Item 105 and 503(c)	<ul style="list-style-type: none"> • Relocated Item 503(c) to new Item 105. • Eliminated specific risk factor examples.
Description of Property	Regulation S-K, Item 102	<ul style="list-style-type: none"> • Registrants will need to provide disclosure about a physical property only to the extent that it is material to the registrant. References to “major” encumbrances and “materially important” properties were replaced with references to a materiality threshold. • No modifications were made to any of the instructions of Item 102 specific to registrants in the mining, real estate, and oil and gas industries.

¹ To facilitate consistency across SEC exhibit requirements, the SEC also revised exhibit-related requirements in specified disclosure forms for which Item 601(b)(10) does not apply. *See* amendments to Form 20-F (Instructions as to Exhibits), Form 8-K (Instructions 4-6 to Item 1.01), Form N-1A (new Instruction 4 to Item 28), Form N-2 (new Instruction 6 to Item 25.2), Form N-3 (new Instruction 5 to Item 29(b)), Form N-4 (new Instruction 5 to Item 24(b)), Form N-5 (new Instruction 3 of Instructions as to Exhibits), Form N-6 (new Instruction 3 to Item 26), Form N-14 (new Instruction 3 to Item 16), Form S-6 (new Additional Instruction 3 to the Instructions as to Exhibits), and Form N-8B-2 (new Instruction 3 to IX. Exhibits).

Topic/Item	Rule	Description of the Amendments
<i>Directors, Executive Officers and Corporate Governance</i>		
Executive Officers	Regulation S-K, Item 401	<ul style="list-style-type: none"> Revised Instruction 3 to Item 401(b) to be a general instruction to Item 401 to clarify its application to any disclosure about executive officers required by Item 401. Revised caption for the disclosure if it is included in Part I of Form 10-K from “Executive officers of the registrant” to “Information about our Executive Officers.”
Compliance with Section 16(a) of the Exchange Act	Regulation S-K, Item 405; Exchange Act Section 16a-3(e); Form 10-K	<ul style="list-style-type: none"> Eliminated the requirement in Rule 16a-3(e) that reporting persons furnish Section 16 reports to the registrant. Clarified that registrants may, but are not required, to rely only on Section 16 reports that have been filed on EDGAR as well as written representations to assess whether there are any Section 16 delinquencies to disclose. Changed the caption from “Section 16(a) Beneficial Ownership Reporting Compliance” to “Delinquent Section 16(a) Reports” and encourages registrants to exclude this caption when they have no Section 16 delinquencies to report. Eliminated the checkbox on the cover page of Form 10-K relating to disclosure of Section 16 delinquencies.
Corporate Governance – Audit Committee Discussions with Independent Auditor	Regulation S-K, Item 407(d)(3)(i)(B)	Updated an outdated reference to AU sec. 380 by referring more broadly to “the applicable requirements of” the Public Company Accounting Oversight Board (PCAOB) and the SEC.
Corporate Governance – Compensation Committee Report	Regulation S-K, Item 407(g)	Clarified that emerging growth companies are not required to provide a compensation committee report.
<i>Registration Statement and Prospectus Provisions</i>		
Outside Front Cover Page of the Prospectus – Name	Regulation S-K, Item 501(b)(1)	Eliminated the portion of the instruction to Item 501(b) that discussed when a name change may be required and the exception to that requirement.
Outside Front Cover Page of the Prospectus – Offering Price of the Securities	Regulation S-K, Item 501(b)(3)	Permits registrants to include a clear statement on the cover page, when applicable, that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus. Registrants must also include a cross-reference to the location of such disclosure in the prospectus (including a page number) that is highlighted by prominent type or in another manner.
Outside Front Cover Page of the Prospectus – Market for the Securities	Regulation S-K, Item 501(b)(4)	Requires disclosure of the principal United States market or markets for the securities being offered and the corresponding trading symbols.

Topic/Item	Rule	Description of the Amendments
Outside Front Cover Page of the Prospectus – Prospectus “Subject to Completion” Legend	Regulation S-K, Item 501(b)(10)	<ul style="list-style-type: none"> Permits registrants to exclude from the prospectus the portion of the legend relating to state law for offerings that are not prohibited by state blue sky laws. Combined paragraph (b)(11) into paragraph (b)(10) without substantive change.
Plan of Distribution	Regulation S-K, Item 508; Securities Act Rules 405 and 491	<ul style="list-style-type: none"> Defined the term “sub-underwriter” in Rule 405. Conformed reference to “sub-underwriter” in Rule 491, consistent with the amendments to Rule 405.
Undertakings	Regulation S-K, Item 512(c)–(f)	Eliminated undertakings that are duplicative of other rules or that have become unnecessary due to developments since their adoption.
Exhibits		
Exhibits – Description of Registrant’s Securities	Regulation S-K, Item 601(b)(4); and Form 20-F, Instructions to Exhibits	<ul style="list-style-type: none"> Requires registrants to provide a description of its securities (i.e., the information required by Item 202(a)–(d) and (f)) as an exhibit to Form 10-K. The exhibit requirements of Form 20-F were also amended to include revised language comparable to the above change.
Exhibits – Schedules and Attachments	Regulation S-K, Item 601(a)(5); Regulation M-A, Item 1016; investment company forms; Form N-CSR; and Form 20-F, Instructions to Exhibits	<ul style="list-style-type: none"> Registrants will not be required to file schedules or similar attachments to their material agreements if they do not contain material information or were not otherwise disclosed. The exhibit requirements of Form 20-F were also amended to include revised language comparable to the above change.
Exhibits – Personally Identifiable Information (PII)	Regulation S-K, Item 601(a)(6); Regulation M-A, Item 1016; investment company forms; Form N-CSR; and Form 20-F, Instructions to Exhibits	<ul style="list-style-type: none"> Permits registrants to omit PII (e.g., bank account numbers, social security numbers, home addresses, and similar information). The exhibit requirements of Form 20-F were also amended to include revised language comparable to the above change.
Exhibits – Material Contracts	Regulation S-K, Item 601(b)(10); and Form 20-F, Instructions to Exhibits	<ul style="list-style-type: none"> Only “newly reporting registrants”² are required to file material contracts that were entered within two years of the applicable registration statement or report. The exhibit requirements of Form 20-F were also amended to include revised language comparable to the above change.

² A “newly reporting registrant” includes: (i) 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; (ii) registrants that have not filed an annual report since the revival of a previously suspended reporting obligation; and (iii) any registrant that (a) was a shell company, other than a business combination related shell company 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 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).

Topic/Item	Rule	Description of the Amendments
<i>Incorporation By Reference</i>		
Financial Statements: Incorporation by Reference and Cross-Reference of Information	Securities Act Rule 411; Exchange Act Rules 12b-23 and Investment Company Act Rule 0-4; and Securities Act registration forms S-1, S-3, S-11, and F-1	Registrants are prohibited from having financial statements cross-reference to disclosure in other parts of a filing or incorporate by reference information from other filings, unless otherwise specifically permitted or required by the SEC's rules, U.S. Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS), whichever is applicable.
Incorporation by Reference – Five-Year Limit	Regulation S-K, Item 10(d)	Eliminated the five-year limit in Item 10(d).
Incorporation by Reference – Exhibit and Other Filing Requirements; Hyperlinks	Securities Act Rule 411(b)(4); Exchange Act Rules 12b-23(a)(3), and 12b-32; Investment Company Act Rule 0-4; Regulation S-K, Item 601(b)(13) and (99)(ii); and Regulation S-T Rules 102 and 105	<ul style="list-style-type: none"> • Registrants will no longer be required to file as an exhibit any document or part thereof that is incorporated by reference in a filing, but instead will be required to provide hyperlinks to documents incorporated by reference if that information is available on EDGAR. In addition, the requirement in Item 601(b)(13) to file a Form 10-Q as an exhibit when it is specifically incorporated by reference into a prospectus was eliminated. • Filings that are subject to the hyperlinking requirements in Rule 411, Rule 12b-23 and Rule 0-4 are required to be filed in HTML format. • 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. • Registrants are not required to refile information that is incorporated by reference from a document that was previously filed with the SEC in paper. • Adopted several non-substantive changes to Rule 411, Rule 12b-23 and Rule 0-4 to streamline, clarify, and conform these rules.
<i>Other</i>		
Tagging Cover Page Data; Trading Symbol, Exchange and Security Information	Regulation S-T Rule 406; Regulation S-K, Item 601(b)(104); and Forms 10-K, 10-Q, 8-K, 20-F, and 40-F	<ul style="list-style-type: none"> • Registrants will be required to tag all cover page data in Inline XBRL. • Registrants will be required to disclose on the cover page of each form the national exchange or principal U.S. market for their securities, the trading symbol, and the title of each class of securities.
Exhibit Hyperlinks and HTML Format for Investment Companies	Regulation S-T Rules 102, 105, 201, 202 and 311; Form N-CSR; and investment company registration forms	Investment companies will be required to file reports on Form N-CSR and registration statements and amendments thereto in HTML format and provide hyperlinks to exhibits and other information incorporated by reference for filings made on or after April 1, 2020, although early compliance with the new requirements is permitted.