

Client Alert

SEC Adopts Rule Changes to Modernize and Simplify Registrant Disclosure Requirements

May 9, 2019

On March 20, 2019, the Securities and Exchange Commission (the “SEC”) voted to adopt certain rule changes (the “New Amendments”) to modernize and simplify disclosure requirements for U.S. domestic registrants and U.S.-registered foreign private issuers (“FPIs”).¹ These changes are the result of the congressional mandate contained in the Fixing America’s Surface Transportation (FAST) Act of 2015, which directed the SEC to modernize and streamline Regulation S-K and certain related SEC rules and forms. The final rule changes embodied in the New Amendments are consistent with the amendments as proposed in October 2017 with a few minor exceptions, and like similar rule changes in November 2018, are meant to reduce redundant and extraneous relevant and material disclosure to investors.²

Principal changes reflected in the New Amendments include:

- Enhancing flexibility in management’s discussion and analysis (“MD&A”) and Operating and Financial Review and Prospects (“OFR”) sections in disclosure documents regarding historical periods
- Simplifying the process surrounding omissions of confidential information in exhibits so that immaterial omissions do not require the filing of a confidential treatment request (a “CTR”)
- Revising and simplifying the disclosure framework to introduce a single materiality qualifier in the description of principal physical properties requirement
- Improving navigability of disclosure documents by incorporating hyperlink and data tagging technology for publicly available documents that are incorporated by reference

The amendments concerning the omission of confidential information in certain exhibits became effective on April 2, 2019, upon publication in the Federal Register. The remaining amendments will become effective on May 2, 2019 (which is 30 days after publication in the Federal Register), with the exception of the data-tagging requirements, which are subject to a three-year phase-in period.

The New Amendments generally apply to U.S. domestic registrants and U.S.-registered FPIs, although certain provisions contained in the New Amendments apply only to U.S. domestic registrants. U.S. domestic registrants and U.S.-registered FPIs should carefully review their public filings for 2019 with the newly adopted rule changes summarized below in mind to ensure compliance with the New Amendments look for ways to streamline their current public disclosure.

¹ See *SEC Adopts Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure*, available at <https://www.sec.gov/news/press-release/2019-38>.

² For the October 2017 proposals, see Release No. 33-10425, available at <https://www.sec.gov/rules/proposed/2017/33-10425.pdf>; for the November 2018 rule changes see Release No. 33-10532, available at <https://www.sec.gov/rules/final/2018/33-10532.pdf>.

Principal Changes affecting both U.S. Domestic Registrants and U.S.-Registered FPIs

Streamlining MD&A / OFR Disclosure Requirements. The New Amendments revise Item 303 of Regulation S-K and its counterpart for U.S.-registered FPIs, Item 5 of Form 20-F, to provide that when a filing requires three years of financial statements, the discussion of the earliest year and related analysis may be omitted (i) if such discussion can be found in a prior filing on EDGAR (either in the registrant's prior year Annual Report on Form 10-K (for U.S. domestic registrants) or Form 20-F (for U.S.-registered FPIs) or *any other filing* that required disclosure in compliance with such rules) and (ii) the registrant includes a statement that identifies the location in the prior filing where the omitted discussion can be found. Additionally, Instruction 1 to Item 303(a) of Regulation S-K has been revised to eliminate the reference to discussing five-year selected financial data, as required by Item 301 of Regulation S-K, where trend information is relevant. The SEC has emphasized that the registrant may use any presentation that would enhance the reader's understanding of the information presented in Item 303 of Regulation S-K or Item 5 of Form 20-F.

Omission of Confidential Information without a CTR in Material Contract Exhibits. The New Amendments provide that registrants will be able, without filing a CTR, to omit confidential information from material contracts filed as exhibits pursuant to Item 601(b)(10) of Regulation S-K or otherwise required by Form 20-F, as long as such information (i) is not material and (ii) would, in the registrant's opinion, cause competitive harm to the registrant if publicly disclosed. While filing a CTR is no longer necessary in this context, the registrant nevertheless remains responsible to ensure that all relevant material information has been disclosed; moreover, redactions should include no more information than is necessary to prevent competitive harm.

The New Amendments require any registrant so redacting a material contract (i) to mark the exhibit index to indicate that portions of the exhibit(s) have been omitted; (ii) to include a prominent statement on the first page of the redacted exhibit indicated certain information has been excluded because it is both not material and would cause competitive harm if publicly disclosed; and (iii) to indicate with brackets where the information has been omitted from the filed version of the exhibit(s). SEC staff will continue selectively to review filings to assess whether redactions under these amendments are appropriately limited; upon request by the SEC, registrants will be required to provide supplemental materials to the SEC similar to what is currently required for filing a CTR. If such a request by the SEC is made, the registrant may, however, still request confidential treatment under Rule 83 for any such supplemental materials. For redactions that are (i) material or (ii) would not be considered competitively harmful, filing a CTR remains an option for registrants to pursue.

Limiting Two-Year Look-Back Test for Material Contracts. Prior to the implementation of the New Amendments, Item 601(b)(10)(i) of Regulation S-K and the Instructions to Exhibits of Form 20-F required registrants to file as exhibits to their registration statements or relevant periodic reports any material contract that was not made in the ordinary course of business, if (i) such contract is to be performed either at the time of or after the filing of the registration statement or periodic report or (ii) such contract was entered into not more than two years prior to the filing of such registration statement or periodic report. The New Amendments dispense with the two-year look back requirement except in the case of "newly reporting registrants."³ The New Amendments therefore require seasoned issuers only to file material contracts that fall under (i) above.

Omission of Schedules and Attachments to Exhibits. The New Amendments permit registrants to omit from required exhibit filings entire schedules and similar attachments if (i) there is no material

³ A "newly reporting registrant" is (i) any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, whether or not such registrant has ever previously been subject to the reporting requirements of Section 13(a) or 15(d), (ii) any registrant that has 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, as defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before completing a transaction that has the effect of causing it to cease being a shell company and (b) has not filed a Form 20-F since the completion of such transaction. For example, newly reporting registrants would include (i) a registrant that is filing its first registration statement under the Securities Act or the Exchange Act, and (ii) a registrant that was a public shell company, other than a business combination related shell company, and completes a reverse merger transaction causing it to cease being a shell company.

information included therein and (ii) such information is not otherwise disclosed in the exhibit or the relevant disclosure document. Registrants relying on this new accommodation must, however, incorporate in the required exhibit filing a list briefly identifying the contents of any omitted schedules and attachments except in certain cases. Any such omitted information must be provided to the SEC upon request.

Personally Identifiable Information. As a general practice, sensitive personally identifiable information (“PII”), such as bank account information, social security numbers, home addresses and other similar information has previously been allowed by the SEC to be omitted from required exhibits without the need to file a CTR. This practice has now been codified as part of the New Amendments. An analysis in support of such redactions is not required.

Additional Disclosure: Description of Securities. The New Amendments require registrants to include as an exhibit to their Annual Reports on Form 10-K or on Form 20-F a brief description of all securities (including depositary receipts) registered under Section 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Such information was only previously required in registration statements. This information should be consistent with the information required under Items 202(a)-(d) and (f) of Regulation S-K and the equivalent provisions under Form 20-F.

Registration Statement and Periodic Report Cover Page Changes. The New Amendments require all information on the cover pages of certain filings, including Form 10-K, Form 20-F, Form 10-Q, Form 8-K and Form 40-F, to have in-line XBRL data tagging. In addition, cover pages of registration statements and periodic reports must also use hyperlinks for information that is incorporated by reference and publicly available and must include the stock trading symbol and name of each securities exchange on which the registrant’s securities trade, as well.

These new data tagging requirements will be subject to a three-year phase-in period whereby (i) large accelerated filers that prepare their financial statements in accordance with U.S. GAAP will be required to incorporate XBRL data tagging in reports for fiscal periods ending on or after June 15, 2019, (ii) accelerated filers that prepare their financial statements in accordance with U.S. GAAP will be required to comply in reports for fiscal periods ending on or after June 15, 2020 and (iii) all other filers subject to the new XBRL requirements, including FPIs that prepare their financial statements in accordance with IFRS, will be required to comply in reports for the fiscal period ending on or after June 15, 2021.

Elimination of Required Undertakings. The following required undertaking paragraphs, viewed by the SEC as having become outdated and/or obsolete, have been removed from Item 512 of Regulation S-K pursuant to the New Amendments: (c) (*Warrants and rights offerings*), (d) (*Competitive bids*), (e) (*Incorporated annual and quarterly reports*), and (f) (*Equity offerings of nonreporting registrants*).

Certain Changes Affecting only U.S. Domestic Registrants

Simplification of Required Physical Property Descriptions (Item 102 of Regulation S-K). The New Amendments eliminate the potentially ambiguous previous requirements to disclose all “principal plants, mines and other materially important physical properties” and now simply require disclosure of physical properties to the extent such properties are material to the registrant. Moreover, such property descriptions may be done collectively, as appropriate. Please note, however, that, owing to the particular significance of such disclosure for the mining, real estate and oil and gas industries, the SEC did not amend Item 102 or its related instructions with regard to those specific industries. Additionally, please note that the New Amendments did not make equivalent changes to the corresponding disclosure requirements for FPIs contained in Item 4.D of Form 20-F. Consequently, disclosure requirements relating to property, plants and equipment for FPIs using Form 20-F remains unchanged.

Disclosure Changes Relating to Exchange Act Section 16 Reporting (Item 405 of Regulation S-K, Form 10-K and Schedule 14A). The New Amendments have introduced a number of changes regarding Section 16 reporting and related disclosure. First, the New Amendments change the relevant disclosure heading (most often found in a registrant’s annual Proxy Statement on Schedule 14A) from “Section 16(a) Beneficial Ownership Reporting Compliance” to “Delinquent Section 16(a) Reports” and include an

instruction encouraging registrants to exclude the new heading altogether when they have no Section 16(a) delinquencies to report. In addition, Item 405 of Regulation S-K has been revised to eliminate the requirement that Section 16 reporting persons must furnish Section 16 reports to the registrant; instead, registrants may now rely only on publicly filed Section 16 reports (as well as any written representations from such persons) to assess Section 16 delinquencies. Finally, the New Amendments eliminate the checkbox on the cover of Form 10-K (and related instruction in Item 10 of Form 10-K) pursuant to which a registrant may indicate whether it expects to include disclosure relating Section 16 reporting delinquencies.

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