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## SEC amends rules to update and simplify disclosure requirements

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On March 20, 2019, the SEC adopted rule amendments, as mandated by Congress under the Fixing America's Surface Transportation (FAST) Act, aimed at modernizing and simplifying certain required disclosures under Regulation S-K and related rules and forms. The [final amendments](#) are substantially similar to the [proposed rules](#) from October 2017 and represent the latest in a series of rule changes adopted pursuant to the FAST Act mandate. The SEC's [press release](#) states that the amendments are intended to "improve the readability and navigability of company disclosures, and to discourage repetition and disclosure of immaterial information" and "[reduce] the costs and burdens on registrants while continuing to provide all material information to investors."

The amendments, some of which are technical in nature, touch a variety of disclosure requirements impacting registration statements and current and periodic reports. The discussion below highlights certain amendments to disclosure and filing requirements relating to the management's discussion and analysis of financial condition and results of operations (MD&A) section, confidential treatment requests, exhibits, incorporation by reference and EDGAR filings cover page form changes. Additional amendments are summarized in the chart that follows.

### MD&A

The amendment to Item 303 of Regulation S-K will allow companies that are required to provide financial statements covering three years to omit discussion about the earliest year in their MD&A as long as such discussion has already been discussed in a prior filing on EDGAR that required disclosure in compliance with Item 303, and the company includes a statement that identifies the location in the prior filing where the omitted discussion can be found. When making this decision to omit the discussion of the earliest year, companies should consider whether the inclusion of the disclosure would only reiterate the prior disclosure or whether changes to such disclosures are necessary, such as for restatements or reclassifications of prior year financial statements.

As amended, Item 303 also includes an instruction advising that a company may use any mode of MD&A presentation that in its judgment would enhance the reader's understanding of the company's financial condition and results of operations, eliminating the current reference to year-over-year comparisons.

## **Confidential treatment**

The amended rules do not change the substantive standards by which confidential treatment for commercially sensitive disclosure is permissible, but do significantly alter the process of filing exhibits from which confidential information is omitted. Companies will no longer be required to submit a separate confidential treatment request application and an unredacted copy of the exhibit to the SEC staff. Item 601 of Regulation S-K has been modified to allow companies to omit or redact from exhibits confidential information that is not material and would likely cause competitive harm if publicly disclosed. Consistent with current rules, companies will be required to (i) mark the exhibit index to indicate that portions of such exhibit have been omitted, (ii) include a prominent statement on the first page of the exhibit that certain information has been omitted because it is both not material and would be competitively harmful if publicly disclosed and (iii) include brackets where the redacted information has been omitted from the filed version of the exhibit. The SEC staff may request that a company provide on a supplemental basis an unredacted copy of the exhibit and its analysis as to why the redacted information is not material and how it would likely cause competitive harm if it was publicly disclosed. As the basis for confidential treatment has not changed, however, companies should continue to narrowly tailor redactions and contemporaneously document the substantive arguments supporting such redactions in order to be prepared for a possible SEC staff request for a written analysis.

On April 1, 2019, the SEC Division of Corporation Finance provided [additional guidance](#) regarding the amended rules and procedures for protecting commercially sensitive information. The SEC staff will review company filings for compliance with the amended rules in connection with regular filing reviews and will separate any requests for supplemental information. In turn, companies will be asked to provide responses to such requests separately from the regular filing review comment and response process to minimize the risk of inadvertent public disclosure of any commercially sensitive information.

For any pending confidential treatment request pursuant to Rules 406 or 24b-2, the company may, but is not required to, withdraw its pending application. To request the withdrawal of a pending application, the company should contact their Assistant Director office responsible for reviewing the company's filings. The Assistant Director office will destroy the application and all related materials, unless the company requests the documents be returned. Any company that chooses to withdraw their application and rely on the new rules must amend their applicable filing to conform to the new requirements. Companies may direct any transition-related questions to [RedactedExhibits@sec.gov](mailto:RedactedExhibits@sec.gov) and should include the company name, the point of contact, phone number and brief summary of the questions in the e-mail.

Any orders granting confidential treatment that are still in effect will continue until the date stated on such order.

## **Exhibits**

Currently, under Item 601 of Regulation S-K, companies are generally required to file complete copies of any required exhibits. The amendments will allow companies to omit any schedules, appendices and other similar attachments that are included with exhibits, as long as such omitted materials do not contain any material information and were not otherwise disclosed in the exhibit or the disclosure document. This extends the existing accommodation under Item 601(b)(2) for merger and acquisition agreements to all exhibits, except that companies will not be required to provide an explicit agreement to furnish a supplemental copy of any omitted schedule to the SEC staff upon request. The SEC staff

may, however, request that a company provide any omitted schedule. Each exhibit that includes omitted schedules or other attachments must contain a list briefly identifying the contents of each such schedule or attachment, which mirrors the language in Item 601(b)(2), unless such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments.

The amended rules also make clear that companies may omit any sensitive personally identifiable information when filing exhibits, including bank account numbers, social security numbers, home addresses and similar information.

Further, amendments to Item 601(b)(10) eliminate the two-year lookback period relating to the filing of material contracts not made in the ordinary course of business, except in the case of newly reporting companies. All companies still will be required, however, to file as an exhibit every contract that is material, not made in the ordinary course and to be performed, in whole or part, at or after the filing of the relevant current or periodic report or registration statement.

### **Incorporation by reference**

The amendments eliminate Item 10(d) of Regulation S-K, which generally prevented companies from incorporating by reference a portion of a document that itself also incorporates pertinent information by reference and also prohibited incorporating by reference to documents that had been on file with the SEC for more than five years. Companies will now be required to describe the location of the information incorporated by reference with hyperlinks to the incorporated documents filed on EDGAR.

### **Exchange Act filings cover page form changes**

The amendments will require a company to disclose on its EDGAR form cover pages the national exchange or principal U.S. market for its securities, and the trading symbol and title of each class of registered securities. Companies will also be required to tag all cover page data in inline XBRL.

The amendments also remove the checkbox on the cover page of Form 10-K (and the related instruction in Item 10 of Form 10-K) where a company previously indicated that there was no disclosure of delinquent filers in the Form 10-K and, to the best of the company's knowledge, will not be included in a definitive proxy or information statement incorporated by reference. However, disclosure of late Section 16 filings will continue to be required pursuant to Item 405 of Regulation S-K under the revised heading "*Delinquent Section 16(a) Reports.*"

### **Effective dates**

The amendments relating to the redaction of confidential information in certain exhibits are effective as of April 2, 2019. The other amendments will be effective as of May 2, 2019, except that the requirements to tag data on the cover pages of certain filings are subject to a three-year phase-in based on filer status as follows:

- Large accelerated filers that prepare their financial statements in accordance with U.S. GAAP: beginning with reports for fiscal periods ending on or after June 15, 2019;
- Accelerated filers that prepare their financial statements in accordance with U.S. GAAP: beginning with reports for fiscal periods ending on or after June 15, 2020; and
- All other filers: beginning with reports for fiscal periods ending on or after June 15, 2021.

## Summary chart

The following chart summarizes the amendments made to Regulation S-K, and the related changes to the rules under the Securities Act and Exchange Act:

<b>Rule</b>	<b>Disclosure Topic</b>	<b>Summary of Amendments</b>
Regulation S-K, Item 10(d)	Incorporation by Reference	Eliminates the prohibition of incorporating documents by reference that have been on file for more than five years.
Regulation S-K, Item 102	Description of Property	Companies will only need to provide disclosures regarding a physical property if it is material to the company.
Regulation S-K, Items 202 and 601(b)(4); Forms 10-K and 20-F	Exhibits— Description of Securities	Requires companies to provide the description of securities disclosure required by Item 202 disclosure as an exhibit to Form 10-K for each class of securities that is registered under the Exchange Act.
Regulation S-K, Item 303 and Form 20-F	MD&A	Companies are generally allowed to exclude the earliest of three years in their MD&A, if they have already included the relevant disclosure in a prior EDGAR filing.
Regulation S-K, Item 401	Executive Officers	Clarifies, by means of a new general instruction to Item 401, that companies that choose to include required information about their executive officers in Part I of Form 10-K are not required to repeat such information in their definitive proxy or information statement.
Regulation S-K, Item 405; Exchange Act Rule 16(a)-3(e); Form 10-K	Disclosure of Section 16(a) Compliance; Related Form 10-K Cover Page Changes	<p>Eliminates the requirement that reporting persons furnish Section 16 reports to companies and clarifies that companies may, but are not required to, rely on Section 16 reports that have been filed on EDGAR (as well as any written representations from the reporting persons) to determine whether there are any Section 16 delinquencies to disclose.</p> <p>Also, changes the disclosure heading required by Item 405(a)(1) from “Section 16(a) Beneficial Ownership Reporting Compliance” to “Delinquent Section 16(a) Reports.”</p> <p>Eliminates the checkbox on the cover page of Form 10-K (and the related instruction in Item 10 of Form 10-K) where a company previously indicated that there was no disclosure of delinquent filers in the Form 10-K and, to the best of the company’s knowledge, will not be included in a definitive proxy or information statement incorporated by reference.</p>

<b>Rule</b>	<b>Disclosure Topic</b>	<b>Summary of Amendments</b>
Regulation S-K, Item 407	Audit Committee Report; Compensation Committee Report	<p>Updates reference to AU section 380, Communication with Audit Committees to refer more broadly to “the applicable requirements of” the Public Company Accounting Oversight Board (PCAOB) and the Commission.</p> <p>Adds a reference in Item 407(g) to emerging growth companies (ECGs) to make clear that ECGs are excluded from the Item 407(e)(5) requirement to include a compensation committee report.</p>
Regulation S-K, Item 501	Cover Page Changes—Prospectus	<p>Revised the instructions to the requirement to disclose the company name on the cover of a prospectus by eliminating the portion of the instruction to Item 501(b) that discusses when a name change may be required and the exception to that requirement.</p> <p>Amends Instruction 2 to Item 501(b)(1)(3) in connection with offerings where it is not practicable to provide a price for the securities, to allow companies to include a clear statement on the cover page of the prospectus that the offering price will be determined by a particular method or formula and provide more fulsome disclosure explaining the pricing method in the body of the prospectus.</p> <p>Amends Item 501(b)(10) to permit companies to exclude from the “subject to completion legend” the reference to state law for offerings that are not prohibited by state blue sky laws.</p>
Regulation S-K, Item 501(b)(4)	Cover Page Changes—Prospectus	Revises the disclosure requirement on the prospectus cover page to include the principal U.S. market for the securities being offered in the event the securities are not listed on a national securities exchange and the corresponding trading symbols.
Regulation S-K, Item 503	Risk Factors	Relocates Item 503(c) risk factor disclosure requirements to a new Item 105 and eliminates the examples of risk factors that currently appear in the rule.
Regulation S-K, Item 512	Securities Act Undertakings	Eliminates the undertakings in Items 512(c), (d), (e) and (f).
Regulation S-K, Item 601(a)(5)	Exhibits—Schedules and other attachments	Companies will not be required to include attachments to material contracts with their filings if such attachments do not contain material information and were not otherwise disclosed in the exhibit or report. Each exhibit that includes omitted schedules or other attachments must contain a list briefly identifying the contents of each such schedule or attachment, unless such information is already included within the exhibit.

<b>Rule</b>	<b>Disclosure Topic</b>	<b>Summary of Amendments</b>
Regulation S-K, Items 601(b)(10) and 601(b)(2)	Exhibits— Confidential Treatment	Companies may omit confidential information in material contracts and certain other exhibits without the submission of a confidential treatment request, as long as such information is (i) not material and (ii) would likely cause competitive harm to the company if the information were disclosed.
Regulation S-K, Item 601(b)(10)	Exhibits— Material Contracts	Requires only newly reporting companies to file material contracts that were entered into within two years of the applicable registration statement or other filing. Existing reporting companies will not be subject to the two-year look back, but will continue to have to file contracts not made in the ordinary course of business that are material and are to be performed in whole or in part at or after the filing of the registration statement or report.
Securities Act Rule 411; Exchange Act Rules 12b-32 and 0-4	Incorporation by Reference	Explicitly prohibits incorporating by reference, or cross-referencing to, information outside of the financial statements unless otherwise specifically permitted or required by the Commission’s rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.
Securities Act Rule 411(b)(4); Exchange Act Rules 12b-23(a)(3), and 12b-32	Exhibits— Documents Incorporated by Reference	Companies will no longer have to file as an exhibit any document or part thereof that is incorporated by reference and instead will be required to provide hyperlinks to such documents that are incorporated by reference.
Exchange Act Rule 405	Definition of “Sub-Underwriter”	Amends Rule 405 to define the term “sub-underwriter” as a dealer that is 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 issuer of the securities.
Forms 8-K, 10-Q, 10-K, 20-F and 40-F	Cover Page Changes— Exchange Act Reports	Companies will be required to disclose the national exchange or principal U.S. market for their securities, the trading symbol and the title of each class of security on the form cover page.  Companies will be required to tag all cover page data in inline XBRL.

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