



SECURITIES LAW ALERT

MORE DISCLOSURE REDUCTIONS FROM THE SEC

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On March 20, 2019, the Securities Exchange Commission (SEC) voted to adopt [amendments](#) to modernize and simplify disclosure requirements for public companies. According to its [press release](#), the SEC expects the amendments “to benefit investors by eliminating outdated and unnecessary disclosure and making it easier for them to access and analyze material information.”

Because most of the amendments take effect on May 2, 2019, companies that intend to file their upcoming 10-Qs should carefully review the amendments prior to filing.

Increasing Flexibility in Discussing Historical Periods in MD&A

The SEC amended Item 303(a) to allow registrants, when financial statements included in a filing cover three years, to omit discussion of the earliest year if such discussion was included in a prior EDGAR filing under either the Securities Act or the Exchange Act that required Management Discussion and Analysis (MD&A) disclosure so long as the company believes it is not material to an understanding of its financial condition and results. Registrants that decide to omit a discussion of the earliest year must include a statement identifying the location in the prior filing where the discussion may be found. The SEC also revised Instruction 1 to Item 303(a) to eliminate the reference to five-year selected financial data for trend information and to emphasize that registrants may use any form of MD&A presentation that, in the registrant’s judgment, would enhance a reader’s understanding of the company’s financial condition.

Streamlining Redaction of Confidential Information

The SEC eliminated the requirement that registrants redacting information from a publicly filed exhibit must submit a confidential treatment request identifying the legal and factual basis for the redaction. Under the amended rules, registrants may redact confidential information from any exhibit, including material contracts, without submitting a confidential treatment request if the redacted information (1) is not material, and (2) would be competitively harmful if publicly disclosed. The amended rules also codified the SEC’s current practice of allowing registrants to omit personally

identifiable information (i.e., social security numbers, bank accounts, and home addresses) without first submitting a confidential treatment request.

When filing redacted exhibits, registrants must still: (1) mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted; (2) include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is not material and would be competitively harmful if publicly disclosed; and (3) indicate, with brackets, where the information has been omitted from the filed version of the exhibit. The SEC will continue to selectively review filings to assess whether redactions comply with the amended rules and may request that a copy of the unredacted agreement be provided to the staff on a supplemental basis along with an analysis supporting the redactions.

Omission of Schedules and Other Attachments to Exhibits

The SEC amended Item 601(a)(5) to permit registrants to omit schedules and attachments to all exhibits under Item 601 unless they contain information material to an investment or voting decision and that information is not otherwise disclosed in the exhibit or the disclosure document. Registrants must provide a list with each exhibit briefly identifying the contents of all omitted schedules and attachments, unless the omitted information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments (such as the Table of Contents). Upon request by the SEC, registrants must provide a copy of the omitted schedules or attachments.

Other Form Amendments

- **Amendments to Cover Pages:** The amendments require registrants to disclose the trading symbols for each class of their registered securities on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F. The amendments also require all information on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F to be tagged in future years using Inline XBRL.
- **Executive Officers:** The SEC clarified that disclosures about executive officers do not need to be repeated in proxy or information statements if the disclosure is already included in Part I of Form 10-K under the revised caption: "Information about our Executive Officers."
- **Risk Factors:** The amendments move the current risk factor disclosure requirement from 503(c) to new Item 105. The SEC also eliminated the specific examples of material risks previously found in Item 503(c) as inconsistent with the SEC's emphasis on "principles-based requirements that encourage registrants to provide risk disclosure that is more precisely calibrated to their particular circumstances and therefore more meaningful to investors."
- **Description of Property:** The SEC revised Item 102 to clarify that registrants outside of the mining, oil and gas, and real estate industries are only required to provide information about a physical property to the extent the property is material to the registrant. The SEC also clarified that properties may be described on a collective basis, when appropriate.
- **Incorporation by Reference:** The amendments (1) remove the prohibition in Item 10(d) from incorporating by reference documents that have been on file with the SEC for more than five years; (2) require hyperlinks to information on EDGAR incorporated by reference into a registration statement or prospectus; and (3) prohibit financial statements from

incorporating by reference or cross-referencing to information outside of the financial statements unless permitted or required by the SEC's rules, U.S. GAAP, or IFRS.

- **Description of Registrant's Securities:** The SEC amended Item 601(b)(4) to require registrants to provide information required by Item 202 as an exhibit to Form 10-K for each class of securities that is registered under the Exchange Act rather than limiting this disclosure to registration statements. If this information has been previously filed, registrants may incorporate it by reference and hyperlink to the previously filed exhibit. If any changes are made to the terms and conditions of a registrant's securities during a reporting period, regardless of whether the changes are material, the registrant must update the description of the securities filed as a Form 10-K exhibit.
- **Limiting Two-Year Lookback to Newly Reporting Registrants:** Item 601(b)(10)(i) requires registrants to file every material contract not made in the ordinary course of business if (i) the contract must be performed in whole or in part at or after the filing of the registration statement or report, or (ii) the contract was entered into not more than two years before that filing. Under the amendments, the two-year lookback now only applies to newly reporting registrants. As a result, registrants that do not qualify as newly reporting registrants are only required to file contracts not made in the ordinary course of business that are material to the registrant and are to be performed in whole or in part at or after the filing of the registration statement or report.

Proxy Statement Amendments

- **Audit Committee Discussions with Independent Auditor:** The SEC updated the requirement under Item 407(d)(3)(i)(B) to state whether the audit committee discussed with the independent auditor "the applicable requirements" of the Public Company Accounting Oversight Board and the SEC rather than a specific reference to the appropriate accounting authority.
- **Delinquent Section 16 Filings:** The revised rules (1) eliminate the requirement in Rule 16a-3(e) that reporting persons furnish 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 EDGAR to assess whether there are any Section 16 delinquencies to disclose; (3) change the disclosure heading required by Item 405(a)(1) from "Section 16(a) Beneficial Ownership Reporting Compliance" to the more specific "Delinquent Section 16(a) Reports" and encourage registrants to exclude this section altogether when they have no Section 16(a) delinquencies to report; and (4) eliminate the checkbox on the cover page of Form 10-K (and the related instruction in Item 10 of Form 10-K) whereby the registrant indicates that there is no disclosure of delinquent filers in the Form 10-K and, to the best of the registrant's knowledge, one will not be included in a definitive proxy or information statement incorporated by reference.
- **Compensation Committee Report:** The new rules clarify that emerging growth companies are not required to provide a compensation committee report.

OFFERING DOCUMENT AMENDMENTS

- **Prospectus Cover Pages:** The SEC streamlined the information required on a prospectus cover page by explicitly allowing registrants to: (1) 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; and (2) exclude the portion of the legend relating to state law when state blue sky laws are preempted. In addition, if the securities being offered are not listed on a national securities exchange, registrants must disclose on the prospectus cover page the principal United States market(s) for the securities being offered where the registrant has actively sought and achieved quotation through the engagement of a registered broker-dealer as well as the corresponding trading symbols.
- **Removal of Certain Undertakings:** The SEC amended Item 512 to remove the undertakings in registration statements in paragraphs 512(c), (d), (e), and (f), because they are duplicative of other rules or have become obsolete.

Reminder That 10-Qs Need a Statement of Changes in Shareholder’s Equity

As a reminder, the SEC’s [Disclosure Update and Simplification Rule](#) last fall added a requirement to Form 10-Q to include a statement of changes in stockholders’ equity for the current and comparative year-to-date periods. The SEC Staff previously indicated that calendar-year companies would not be required to provide this disclosure in their 10-Qs for the third quarter of 2018, but that the disclosure would be required in subsequent 10-Q filings, which means the upcoming first quarter filing for most companies.

Effective Dates of the Amendments

The amendments related to the redaction of confidential information in certain exhibits became effective on April 2, 2019. The rest of the amendments will become effective on May 2, 2019, except that the requirements to tag data on the cover pages of certain filings are subject to the following three-year phase-in schedule: fiscal periods ending on or after (1) June 15, 2019 for large accelerated filers; (2) June 15, 2020 for accelerated filers, and (3) June 15, 2021 for all others.

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