

# Client Alert

April 2019

## SEC Adopts Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure

The Securities and Exchange Commission (SEC or Commission), on March 20, 2019, voted to adopt amendments to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms. The amendments are intended to reduce the costs and burdens on registrants, improve the readability and navigability of disclosure documents and discourage repetition and disclosure of immaterial information. The SEC is also adopting parallel amendments applicable to investment companies and investment advisers in order to provide a consistent set of rules to govern incorporation by reference and hyperlinking.

The amendments relating to the redaction of confidential information in certain exhibits became effective on April 2, 2019. The remainder of the amendments will be effective on 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, and the requirement that certain investment company filings be made in HTML format and use hyperlinks will be effective for filings on or after April 1, 2020. The following discussion provides a high-level summary of the noteworthy changes to the existing rules. The amendments are described in greater detail in the SEC's [adopting release](#).

### Changes to Registration Statement and Prospectus Provisions

- **Option to relocate disclosure of method for determining price of securities.** Item 501(b)(3) requires disclosure on the front cover of a prospectus of the price for securities. When it is not practicable to provide a price for securities on the front cover of a prospectus, Instruction 2 permits registrants to instead explain the method on the cover by which the price is to be determined. As amended, Item 501(b)(3) now explicitly 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 within the prospectus.
- **Expansion of disclosure regarding principal market for the securities being offered.** The amendment expands the required disclosure on the cover of the prospectus to include the principal United States market or markets for the securities being offered and the corresponding trade symbols. Previously, the rules only required disclosure of the “national securities exchanges” that list the securities being offered. This amendment provides important information to investors even as to markets that are not “national securities exchanges.”
- **Removal of part of the legend on a preliminary prospectus.** The change to Item 501(b)(10) permits registrants to exclude from the prospectus the portion of the “Subject to Completion” legend relating to state law for offerings that are not prohibited by state blue sky laws.
- **Risk factors in Item 503(c) are relocated to new Item 105.** This change places the risk factor disclosures within Subpart 100, which covers a broad category of business information. The change also removes the risk factor examples formerly found within the rule in order to encourage registrants to provide risk disclosures that are specific to the registrant and more meaningful to investors.

## Changes to Item 601 Exhibits

- **Limit on the requirement to file material contracts.** Item 601(b)(10)(i) requires registrants to file every material contract not made in the ordinary course of business, provided that one of two tests is met: (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. The amendment restricts the two-year lookback test to “newly reporting registrants.” Registrants with established reporting histories will no longer be subject to the two-year lookback requirement because investors will continue to have access to any material agreements previously filed on EDGAR.
- **Removal of requirement to submit a confidential treatment request when omitting confidential information in material contracts.** Item 601(b)(10) requires registrants to file as exhibits material contracts entered into within the last two years or material contracts to be performed in the future. Information contained within these exhibits is often confidential. In lieu of a confidential treatment request (CTR) to redact specific information, the revision allows registrants to omit confidential information in material contracts without submitting a CTR, if the information (i) is not material and (ii) would likely cause competitive harm if publicly disclosed. In light of these amendments, the SEC staff has also published [guidance](#) concerning its updated procedures for reviewing redacted exhibits containing immaterial or competitively harmful information.
- **Addition of description of registrant’s securities to Form 10-K.** Item 202 disclosures regarding registered securities were formerly limited to registration statements. Item 601(b)(4) is amended to require registrants to provide information required by Item 202(a)-(d) and (f) as an exhibit to Form 10-K.
- **Removal of attachments filed within exhibits required under Item 601.** New Item 601(a)(5) permits registrants to omit entire schedules and similar attachments to required exhibits, provided: (i) they did not contain material information and (ii) were not otherwise disclosed in the exhibit or the disclosure document. The filed exhibit must contain a list briefly identifying the contents of any omitted schedules and attachments.
- **Codifying the practice of omitting personally identifiable information.** New Item 601(a)(6) codifies the current staff practice that allows registrants to omit personally identifiable information without submitting a confidential treatment request.

## Changes to Incorporation by Reference and Cross-Referencing

- **Clarifying incorporation by reference and cross-reference of information in financial statements.** As it relates to the financial statements, incorporation by reference and cross-referencing to disclosures in other parts of a filing are prohibited. However, when specifically permitted or required by the Commission’s rules or by US GAAP or International Financial Reporting Standards, the rules are amended to clarify that cross-references to other parts of a filing are allowed.
- **Removal of five-year time restriction on documents incorporated by reference.** Rule 10(d) previously limited documents that could be incorporated by reference to documents that had been on file with the Commission for less than five years. This five-year restriction has been removed. 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.

## Other Changes

- Removal of requirement to discuss earliest of three years in MD&A if registrant has already included the discussion in a prior filing.** Item 303(a) of Regulation S-K formerly required a discussion of the registrant's financial statements and financial condition covering a three-year period (or a five-year period when trend information is relevant) using year-to-year comparisons. As amended, Item 303 no longer requires year-to-year comparisons, eliminates the reference to five-year selected financial data and omits the requirement of the discussion of the earliest of the three years if such discussion was already included in any of the registrant's prior filings on EDGAR that required disclosure in compliance with Item 303 of Regulation S-K. Registrants electing to omit a discussion of the earliest year must identify the location in the prior filing where the omitted discussion may be found.
- Reducing required disclosure of physical property.** Item 102 has been revised to emphasize materiality. The revision clarifies that, unless specified otherwise, in the "Description of Property," registrants only need to provide disclosure of physical property that is material to the registrant.
- Removal of repetitive disclosures regarding Executive Officers.** Item 401 requires a registrant to disclose in Part III of its 10-K information about the identity and background of its directors, executive officers and significant employees. Form 10-K allows this disclosure through incorporation by reference to a definitive proxy or information statement. Alternatively, Instruction 3 to Item 401(b) permits disclosure in Part I of the 10-K. If, as the alternative provides, the registrant discloses the information in Part I of its 10-K, the registrant is not required to repeat the information in its definitive proxy or information statement.
- Simplified reporting of delinquent Section 16(a) filings.** Item 405 requires registrants to disclose each reporting person who failed to file a timely Section 16 report. Section 16a-3(e) requires reporting persons to furnish a duplicate of the Section 16 report to the registrant. The amendment eliminates the requirement to furnish a duplicate, as registrants can rely on Section 16 reports on EDGAR. The amendment also changes the heading in the 10-K from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports," clarifying that the section can be eliminated from the registrant's 10-K altogether if there are no delinquencies. The amendment further eliminates the check box related to delinquent filings on the cover page of Form 10-K.
- Changes to cover pages and manner of delivery.** The amendments require all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to be tagged in Inline XBRL in accordance with the EDGAR Filer Manual. In addition, the amendments to the cover pages of these forms will require registrants to include the trading symbol for each class of registered securities. These amendments will further enhance investors' use of interactive data to identify, count, sort, compare and analyze registrants and their disclosures.

## Final Takeaways

The new amendments are the latest developments in the SEC's ongoing disclosure effectiveness initiative, and like other recent SEC actions under that initiative are more evolutionary than revolutionary. Some issuers may be initially hesitant to drop the third year in MD&A, but others may reasonably determine that such prior disclosed information is no longer material to investors. Many issuers will also value the streamlined ability to submit confidential treatment requests. We welcome the SEC's continued endeavors on the disclosure effectiveness front.

**Contacts**

**Courtney Cochran Butler**  
courtneybutler@HuntonAK.com

**Lindsay H. Ferguson**  
lferguson@HuntonAK.com

**Scott H. Kimpel**  
skimpel@HuntonAK.com

**W. Lake Taylor Jr.**  
tlake@HuntonAK.com

**Susan S. Failla**  
sfailla@HuntonAK.com

**Jordan Hirsch**  
jordanhirsch@HuntonAK.com

**G. Michael O'Leary**  
moleary@HuntonAK.com

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