



Securities Law ADVISORY ■

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SEC Finalizes Rules to Modernize Regulation S-K

On March 20, 2019, the Securities and Exchange Commission (SEC) voted to adopt final amendments to Regulation S-K and other rules pursuant to its mandate under the Fixing America's Surface Transportation (FAST) Act to modernize and streamline the disclosure requirements for public companies, investment advisers, and investment companies. The amendments, which were adopted substantially as proposed in October 2017, are intended to improve the readability and navigability of disclosure documents and discourage repetition and the disclosure of immaterial information.

Among other changes, the amendments allow registrants to:

- Choose how to present historical periods in Management's Discussion and Analysis (MD&A).
- Omit confidential information from most exhibits without filing a Confidential Treatment Request (CTR).
- Omit filing as an exhibit any document incorporated by reference, so long as a hyperlink is provided for such documents.

The final amendments also included parallel amendments to rules and forms for investment companies and investment advisers. The amendment to CTRs became effective upon publication in the [Federal Register](#) on April 2, 2019; the remaining amendments will take effect May 2, 2019, except the cover page data-tagging amendments, which will be phased in over a three-year period as noted below.

The adopting release is available [here](#), the SEC's proposing release is available [here](#), and our prior Securities advisory covering the proposing release is available [here](#).

Highlights of Amendments

The table below includes a brief summary of the changes the SEC has adopted:

Rule	Summary Description of Amended Rules
Description of Property (Reg. S-K, Item 102)	Registrants will need to provide disclosure about a physical property only to the extent that it is material to the registrant.
Management's Discussion and Analysis (Reg. S-K, Item 303 and Form 20-F)	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. Otherwise, registrants are now able to present disclosures in any form they believe is best suited to inform investors.
Directors, Executive Officers, Promoters, and Control Persons (Reg. S-K, Item 401)	Required disclosure of the identity and background of a registrant's directors, executive officers, and significant employees will be moved from Instruction 3 to Item 401(b) and be made a general instruction to Item 401.
Compliance with Section 16(a) of the Exchange Act (Reg. S-K, Item 405)	Eliminated disclosure of compliance with Section 16(a) when the registrant does not have any delinquency to report.
Corporate Governance (Reg. S-K, Item 407)	Item 407 is amended to include reference to the requirements of the Public Company Accounting Oversight Board and clarify that emerging growth companies are not required to provide compensation committee reports.
Forepart of Registration Statement and Prospectus Cover Page (Reg. S-K, Item 501(b))	Item 501(b) is amended to: <ul style="list-style-type: none"> • Remove discussion of when a registrant's name change is required and exceptions. • Allow registrants to state calculation of offering price. • Require registrants to list "principal United States market" as opposed to "national securities exchanges."
Risk Factors (Reg. S-K, Item 503(c))	The SEC will move Item 503 risk factors to the new Item 105 and eliminate the specific risk factors examples that are currently in Item 503(c).
Plan of Distribution (Reg. S-K, Item 508)	Item 508 is amended to define the term "sub-underwriter."
Undertakings (Reg. S-K, Item 512)	The SEC removed the undertakings in Items 512(c), (d), (e), and (f) because they are no longer unnecessary or obsolete.
Information Omitted from Exhibits (Reg. S-K, Items 601(b)(10) and 601(b)(2) and investment company registration forms)	Registrants may omit confidential information in material contracts and certain other exhibits without submitting a CTR to the SEC, so long as the information is not material and would likely cause competitive harm to the registrant if publicly disclosed.

Rule	Summary Description of Amended Rules
Two-Year Look Back for Material Contracts (Reg. S-K, Item 601(b)(10))	Only newly reporting registrants will be required to file material contracts that were entered into within two years of the applicable registration statement or report.
Information Incorporated by Reference (Securities Act Rule 411(b)(4), Exchange Act Rules 12b-23(a)(3) and 12b-32, Investment Company Act Rule 0-4, and Regulation S-T Rules 102 and 105)	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 must provide hyperlinks to documents incorporated by reference. But registrants will generally be prohibited from having cross-references, or incorporating by reference, in the financial statements to disclosures made elsewhere.
Tagging Information and XBRL (Forms 10-K, 10-Q, 8-K, 20-F, and 40-F)	Registrants are required to tag all cover page data in Inline XBRL format.

Discussion of the Amendments

Description of Property (Item 102)

The SEC amended Item 102 to require disclosure of physical properties only to the extent they are material to the registrant and allow description of properties to be provided collectively, if appropriate.

Practice Tip: Review list of properties with the appropriate internal stakeholders to establish a process for determining materiality and review such processes annually.

Management's Discussion and Analysis (Item 303)

The SEC adopted amendments to Instruction 1 to Item 303 substantially as proposed. As amended, Instruction 1 of Item 303 will eliminate reference to five-year selected financial data and reference to year-to-year comparisons, allowing registrants to use any presentation they believe will enhance readers' understanding. Registrants that continue to use year-to-year comparisons will be able to omit the earliest year's discussion if the omitted discussion is in any of the registrant's prior filings on EDGAR.

The SEC anticipates that many registrants will continue to provide year-to-year comparisons that cover three years. Registrants that elect to omit discussion of the earliest year must identify the location of the discussion in a prior filing. Notably, the amendments did not include the proposed condition that the omitted information must be immaterial to understanding the registrant's financial statements.

The amendment included parallel amendments for foreign private issuers but will not affect smaller reporting companies or emerging growth companies.

Practice Tip: Discuss the most effective disclosure of MD&A with the finance department and investor relations in light of the new amendments. In the adopting release, the SEC reminded registrants of their "obligation" to provide investors all material information in light of the registrant's situation and in a manner that best reflects the discussion and analysis through the eyes of those managing the business.

Directors, Executive Officers, Promoters, and Control Persons (Item 401)

The SEC adopted an amendment to remove an instruction from Instruction 3 to Item 401(b) and make it a general instruction to Item 401. The instruction allows registrants to disclose information about executive officers in Part I of Form 10-K without repeating the disclosure in definitive proxy or information statements. In addition, the amendment also changes the title of the required caption to "Information about our Executive Officers."

Compliance with Section 16(a) of the Exchange Act (Item 405)

The SEC adopted amendments to Item 405 substantially as proposed to:

- Change the disclosure heading that is required by Item 405(a)(1) to "Delinquent Section 16(a) Reports" and revise the disclosure requirement so that this caption and related disclosure is only required when there are delinquent reports.
- Eliminate the checkbox on the cover page of Form 10-K where registrants declare that there is no disclosure of delinquent filers in the Form 10-K.
- Eliminate the requirement in Rule 16a-3(e) of reporting persons to provide the Section 16 reports to the registrant.
- Amend Item 405 to encourage the registrant to rely on the reports filed on EDGAR by Section 16 reporting persons, rather than copies of reports provided to the registrant.

Practice Tip: *Moving forward, registrants are only required to disclose this section if there are beneficial owners that are delinquent in filing Section 16(a) reports. Registrants that file proxy statements later in the proxy season after the amendments are effective should ensure that this caption of the proxy statement is included only if they have late filings.*

Corporate Governance (Item 407)

The SEC adopted an amendment to revise a reference to an outdated auditing standard in Item 407(d)(3)(i)(B) and to update Item 407(e)(5) to clarify that emerging growth companies are not required to provide a compensation committee report.

Practice Tip: *Consider updating any existing outdated references in the audit committee report.*

Risk Factors (Item 503(c))

The SEC adopted amendments that moved Item 503(c) to a new Item 105 (with other risk factors) and eliminated the examples that previously appeared in Item 503(c). The amendment is part of the SEC's emphasis to encourage registrants to provide risk disclosures that are more calibrated to their particular circumstances rather than rely on examples presented by the SEC even if the list was not meant to be exhaustive.

Practice Tip: *Registrants should continue to review risk factors based on information material to their specific business.*

Plan of Distribution (Item 508)

Existing Item 508 used the term "sub-underwriter," which was not a defined term, and also used the term "principal underwriter," which is defined in Regulation C. To eliminate possible confusion in providing the disclosure required by Item 508, the SEC added a definition for "sub-underwriter" to Regulation C.

Information Omitted from Exhibits (Item 601)

Material Contracts (Item 601(b)(10)) and Plans of Acquisition (Item 601(b)(2))

The SEC made several amendments to Item 601(b). First, Item 601(b)(10) now permits registrants to omit confidential information from material contracts filed pursuant to that item without first submitting a CTR if the information is not material and would likely cause “competitive harm” to the registrant if publicly disclosed.

Despite the amendment, the requirements for redacting confidential treatment will remain the same. Registrants must:

- Mark the exhibit index to indicate that portions of the exhibit have been omitted.
- Include a prominent statement on the first page of the redacted exhibit to note that the redacted information is not material and would “cause competitive harm if publicly disclosed.”
- Indicate with brackets where the information has been omitted from the filed exhibit.

Similarly, the SEC is amending Item 601(b)(2) to allow registrants to redact non-material provisions or terms from agreements that are filed as exhibits pursuant to that item if public disclosure would cause competitive harm.

On April 1, 2019, the SEC [announced](#) that it had established a compliance review process for exhibits that have been filed with redactions pursuant to the SEC’s amended rules. The SEC’s review will begin with a letter to the registrant requesting a paper copy of the unredacted exhibit that is marked to highlight the redacted information. If the SEC has no further comments, it will send a letter to the registrant to indicate the review is complete. If the review raises questions of immateriality or competitive harm, the SEC will send the registrant comments. After all questions are resolved, the SEC will send a letter to indicate the review is complete. The SEC noted that all comments and responses will be separate from regular filing review communications in order to minimize the risk of inadvertent public disclosure of exhibit information.

Practice Tip: *This amendment is effective April 2, 2019. If there is a contract that contains confidential information that is not material and would cause competitive harm if publicly disclosed, the registrant may redact the confidential information. Note that the current requirements to mark the exhibit in the index, include a statement on the first page, and indicate omitted information with brackets will remain in effect.*

Omitting Attachments to Exhibits (Item 601(a)(5))

The SEC adopted a new Item 601(a)(5). The new item will permit registrants to omit entire schedules and similar attachments to filed exhibits if they do not contain material information and were not otherwise disclosed in the exhibit or disclosure document. As is currently the case with Item 601(b)(2), the filed exhibit must include a list that identifies the schedules and attachments, unless the subject matter of the omitted schedules is already conveyed in the exhibit.

Personally Identifiable Information (Item 601(a)(6)) (new)

The SEC also adopted a new Item 601(a)(6) to allow registrants to automatically omit personally identifiable information (PII) from exhibits filed pursuant to Item 601 without first filing a CTR. A comparable provision will be added to Item 1016 of Regulation M-A, investment company forms, and Form N-CSR.

Practice Tip: *This addition is a codification of current SEC guidance and current practice to omit PII from filings. If the practice is not already in place, registrants may omit all PII from exhibits filed pursuant to Item 601.*

Description of Registrant's Securities (Item 601(b)(4))

The amendments to Item 601(b)(4) will require registrants to disclose a description of their securities (with the information required by Items 202(a)–(d) and (f)) as an exhibit to Form 10-K. Although the information will overlap with disclosures that may be found in registration statements, the SEC believes including the information in one place as an exhibit to the Form 10-K annually will allow investors to access information without imposing significant costs on registrants.

Practice Tip: Prepare a description of securities to include as an exhibit to the next Form 10-K. This can be prepared from existing disclosures in registration statements.

Two-Year Look Back Period for Material Contracts (Item 601(b)(10)(i))

The SEC adopted an amendment to Item 601(b)(10)(i). Currently, all registrants are required to file every material contract not made in the ordinary course of business if the contract must be performed at or after the filing or the contract was entered into not more than two years before the filing. The amendment limits the two-year look back requirement to “newly reporting” companies. In the adopting release, the SEC explained that the change would streamline reporting obligations while protecting investors since all previously filed material agreements would be accessible to investors through EDGAR.

Practice Tip: Newly reporting companies should review material agreements entered into within the two-year look back period and be sure to file all required agreements as exhibits. Registrants that are not newly reporting companies only need to file material agreements as exhibits when they initially enter into new agreements.

Information incorporated by reference

Hyperlinks (Rule 411)

Rule 411, Rule 12b-23, and Rule 0-4 have been amended to require that registrants include a hyperlink to information on EDGAR that is incorporated by reference into another filing. In adopting this requirement, the SEC clarified that registrants will not be required to file an amendment to a filing solely to correct an inaccurate hyperlink. Among other filings, a hyperlink must be included when any Form 10-K, 10-Q, or 8-K is incorporated by reference into another filing.

Practice Tip: Hyperlinks are already required for most exhibits that are filed. Registrants should build on already-existing practices to make sure all information on EDGAR has a hyperlink that can be included in future filings whenever that information is incorporated by reference. The hyperlink requirement now extends beyond the exhibit index, so registrants should be vigilant in hyperlinking the incorporation-by-reference sections of filings such as registration statements and prospectus supplements and references to prior disclosures in the body of current reports on Form 8-K.

Financial statements

The SEC amended rules and forms to prohibit having the financial statements incorporate by reference, or cross-reference, disclosure of various financial information that is in another part of a filing or located in another filing. The amendments were adopted substantially as proposed, with a provision that only allows such incorporation by reference or cross-referencing where SEC rules and forms expressly permit.

Practice Tip: Auditors have previously objected to cross-references and incorporation by reference of information into the financial statements. This amendment is more a codification of the current practice.

Tagging information and XBRL (Forms 10-K, 10-Q, and 8-K)

The SEC adopted amendments that require all information on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F to be tagged in Inline XBRL format. A new Item 601(b)(104) was added to Regulation S-K to facilitate the change. Forms 10-K, 20-F, and 40-F, which already require disclosure of the registrant's classes of securities and the exchange on which the securities are registered, have been amended to include disclosure of trading symbols, as well. Forms 10-Q and 8-K have been amended to require all three disclosures.

These disclosures will be phased in over a three-year period, as follows:

- Large accelerated filers must comply in reports for fiscal periods that end on or after June 15, 2019.
- Accelerated filers must comply in reports for fiscal periods that end on or after June 15, 2020.
- All other filers must comply in reports for fiscal periods ending on or after June 15, 2021.

Practice Tip: *Registrants should ensure procedures are created to disclose all information on the cover page of Forms 10-K, 10-Q, and 8-K in Inline XBRL format. In addition, all mentioned forms should now disclose trading symbols, classes of securities, and the exchange on which the shares are traded.*

Proposed amendments that were not adopted

The SEC proposed the following two amendments that were not adopted.

- An amendment to allow registrants to tailor item numbers and captions to their own disclosure, or eliminate them altogether.
- An amendment to require registrants to include the legal entity identifier (LEI) of subsidiaries in exhibits if the registrant and subsidiaries have an LEI.

Next Steps

Each registrant should review the amendments with its disclosure committee to determine which changes will have the greatest impact on its current disclosure, including the presentation of its MD&A. In addition, registrants should review and discuss new or existing disclosure controls and procedures to implement these changes.

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