

# SEC Reporting & Compliance Alert

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## SEC Modernizes and Simplifies Disclosure and Compliance Requirements

On March 20, 2019, the Securities and Exchange Commission (SEC) adopted rule changes, as mandated by the Fixing America's Surface Transportation Act (FAST Act), to modernize and simplify the disclosure and compliance obligations of SEC reporting companies. Below is a brief overview of the more notable rule changes.<sup>1</sup>

### Exhibits

*Redaction of Contract Terms Without a Confidential Treatment Request (Reg. S-K Items 601(b)(2) and (10)).* The revised rules related to the use of confidential treatment, which are expected to substantially reduce compliance costs, reflect a fundamental change in the process that companies must follow to redact commercially sensitive terms from agreements filed as exhibits to SEC filings. In particular, the SEC has eliminated the requirement that companies redacting information from an exhibit filing submit with the SEC a formal letter, known as a confidential treatment request, outlining their legal and factual support for the redacted contract terms.

Under the revised rules, companies may omit or redact confidential information from filed versions of agreements without a confidential treatment request so long as that information (i) is not material and (ii) would likely cause competitive harm to the company if publicly disclosed. Moving forward, when filing a redacted exhibit, companies must:

- include in the first page of the redacted exhibit a prominent statement that certain information has been excluded from the exhibit because it is not material and would likely cause competitive harm to the company if publicly disclosed;
- mark the exhibit with brackets where the information has been omitted; and
- indicate in the exhibit index that portions of the exhibit have been omitted.

The SEC staff is expected to monitor redactions and, in some instances, may request that a copy of the unredacted agreement be submitted to the staff on a supplemental basis and that a written analysis supporting the redactions, akin to the more customary confidential treatment request, also be submitted. As a result, consistent with existing SEC staff guidance, companies should continue to narrowly tailor their redactions in order to

<sup>1</sup> Some of the rule changes are also applicable to parallel provisions in certain forms such as Form 20-F for foreign private issuers.

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remove only those terms that are not material and would likely cause competitive harm to the company if publicly disclosed. Companies also should maintain a record of the legal and factual bases supporting redactions, so they are prepared in the event the SEC staff subsequently requests a written analysis.

*Omission of Schedules and Other Attachments to Exhibits (Reg. S-K Item 601(a)(5); Reg. M-A Item 1016).* The rule changes will permit companies to omit schedules and similar attachments to any exhibit filings (including material contracts), so long as they do not contain material information and that information is not otherwise disclosed in the exhibit or the disclosure document. This will expand the existing accommodation currently limited to plans of acquisition, reorganization, arrangement, liquidation or succession filed pursuant to Regulation S-K Item 601(b)(2). In lieu of including such schedules and similar attachments in an exhibit filing, companies must file with the exhibit a list briefly identifying the contents of the omitted schedules, unless the omitted information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments (e.g., an agreement's table of contents). Companies also will be required to provide a copy of the omitted contents to the SEC staff upon request.

*Two-Year Look-Back for Material Contracts Limited to Newly Public Companies (Reg. S-K Item 601(b)(10)(i)).* Currently, companies must file every contract not made in the ordinary course of business if the contract is material and either (i) is to be performed, in whole or in part, at or after the filing of the registration statement or report or (ii) was entered into not more than two years before the filing (even if fully performed). The rule changes limit the two-year look-back to newly reporting companies. As a result, only newly reporting companies will be required to file every contract that was not made in the ordinary course of business that is material and was entered into not more than two years before the filing. All companies still will be required to file as an exhibit every contract not made in the ordinary course of business that is material and is to be performed, in whole in part, at or after the filing of the registration statement or report.

## **Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A)**

*Omission of Earliest Year (Reg. S-K Item 303).* Currently, companies are required to provide in their MD&A two comparative year-to-year discussions covering the three fiscal years presented in the financial statements. The rule changes will permit compa-

nies to omit the discussion of the earliest of the three years, so long as the company has previously filed the omitted discussion (e.g., in the prior year's Form 10-K or other prior SEC filing). Companies electing to omit a discussion of the earliest year must include a statement identifying the location in the prior filing where the omitted discussion may be found.

## **Description of Property**

*Material Properties Only (Reg. S-K Item 102).* The revised rules add a materiality qualifier to the requirement to describe a company's principal physical properties. As a result, companies will be required to describe such properties only to the extent they are material. In addition, companies may describe their properties on a collective basis, when appropriate.

## **Risk Factors**

*Elimination of Previously Enumerated Risks (Reg. S-K Item 105).* The risk factor disclosure requirements, currently located in Regulation S-K Item 503(c), will be moved to new Item 105. The requirements also will no longer provide a list of sample risk factors, which did not apply to all companies, and instead favor a principles-based approach that encourages companies to focus on their own specific circumstances.

## **Form Amendments**

*Exchange Act Form Cover Page Changes.* The cover pages of annual reports on Forms 10-K, 20-F and 40-F will require disclosure of the company's trading symbol(s), in addition to the (i) title of each class of securities registered under Exchange Act Section 12(b) and (ii) name of each exchange on which such securities are registered, which already are required. The same disclosure also will be required on the cover pages of quarterly reports on Form 10-Q and current reports on Form 8-K. In addition, the foregoing cover pages will need to be tagged with inline eXtensible Business Reporting Language (XBRL), subject to the three-year phase-in period described below.

*Delinquent Section 16 Filings (Reg. S-K Item 405; Form 10-K).* Form 10-K will no longer include a checkbox indicating that late Section 16 filing information is or will be disclosed in the Form 10-K or annual proxy statement. In addition, the current heading required under Item 405, "Section 16(a) Beneficial Ownership Reporting Compliance," will be changed to "Delinquent Section 16(a) Reports." The new rules encourage companies to omit such heading to the extent late Section 16 filings are not required to be reported.

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## Timing of New Rule Changes

The new rules will become effective 30 days after they are published in the Federal Register, except as noted below.

*Confidential Treatment Requests.* The new rules relating to the redaction of confidential information in certain exhibits will become immediately effective upon publication in the Federal Register. If a company has a pending confidential treatment request once the rule changes become effective, it may choose to withdraw such pending request. However, the adopting release advises that if a company elects to do so, it should refile the redacted exhibit with the required language under the new rules and contact the assistant director responsible for reviewing their filings to coordinate the withdrawal. In addition, the SEC staff has informally advised companies to contact their assistant director with any questions related to new confidential treatment requests during the transition period, as well as any upcoming

requests to extend soon-to-expire confidential treatment orders. Otherwise, the SEC staff will continue to process any pending requests that have not been withdrawn.

*Inline XBRL Tagging.* The new cover page XBRL tagging requirements are subject to a three-year phase-in, depending on the type of filer. Large accelerated filers and accelerated filers that prepare their financial statements in accordance with U.S. GAAP (generally accepted accounting principles) will be required to comply in reports for fiscal periods ending on or after June 15 in 2019 and 2020, respectively. All other filers will be required to comply in reports for fiscal periods ending on or after June 15, 2021.

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Additional information is available in [the adopting release](#) and [the SEC's press release](#).

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