

SEC ADOPTS AMENDMENTS TO FURTHER MODERNIZE AND SIMPLIFY DISCLOSURE REQUIREMENTS

In March 2019, the U.S. Securities and Exchange Commission (SEC) adopted a set of rule and form amendments to modernize and simplify certain of its disclosure requirements. The SEC's final rule release for these amendments is available [here](#). Except with respect to two exceptions discussed below, these amendments will become effective on May 2, 2019.

This briefing describes these amendments as they apply to registrants and provides guidance with respect to compliance.

Background

The Fixing America's Surface Transportation Act of 2015 (FAST Act) directed the SEC to amend Regulation S-K to eliminate provisions that are duplicative, overlapping, outdated or unnecessary. Similar to a set of amendments adopted by the SEC during the second half of 2018, these amendments are meant to comply with this FAST ACT directive. Our September 2018 briefing addressing those previously adopted amendments is available [here](#).

The SEC has stated that these amendments are meant to:

- modernize and simplify certain disclosure requirements in a manner that reduces the costs and burdens on registrants while continuing to provide all material information to investors;
- improve the readability and navigability of disclosure documents; and
- discourage repetition and disclosure of immaterial information.

Where relevant, the SEC has also adopted equivalent amendments with respect to disclosure requirements applicable to registered investment companies, which are not discussed in this briefing.

Amendments affecting cover pages of SEC Forms

New box calls for ticker symbol and listing info

For Forms 8-K, 10-Q, 10-K, 20-F and 40-F, a new box will be included on the cover page. It will direct registrants to disclose:

- the title of each class of securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934, as amended (Exchange Act);
- the trading symbol for these registered securities; and
- the national exchange or principal U.S. market for these registered securities.

Section 12(b) of the Exchange Act requires SEC registration of a class of debt or equity securities before securities of that class can begin to trade on a US exchange.

Removal of checkbox for insider reporting compliance

For annual reports on Form 10-K, the checkbox and related text regarding disclosure concerning delinquent Section 16 filers pursuant to Item 405 of Regulation S-K will be eliminated from the cover page. This amendment will not affect annual reports on Form 20-F because foreign private issuers and their insiders are exempt from Section 16 of the Exchange Act.

Inline XBRL tagging of cover page data

Registrants will be required to tag all cover page data using Inline XBRL for Forms 8-K, 10-Q, 10-K, 20-F and 40-F. This change is expected to further enhance investor's use of interactive data without imposing significant additional compliance burdens on registrants. The effectiveness of this data tagging requirement will be subject to a phase-in, summarized in the below chart, depending on the type of registrant. This schedule coincides with the dates by which registrants must use Inline XBRL for data tagging.

Registrant	Compliance Date
Large accelerated filers that prepare financial statements in accordance with U.S. GAAP	Reports for fiscal periods ending on or after June 15, 2019
Accelerated filers that prepare financial statements in accordance with U.S. GAAP	Reports for fiscal periods ending on or after June 15, 2020
All other filers (including foreign private issuers that prepare financial statements in accordance with IFRS)	Reports for fiscal periods ending on or after June 15, 2021

Amendment affecting the cover page of a preliminary prospectus

The amendments provide for a modernization of the "subject to completion" legend – commonly referred to as the "red herring" legend. Registrants include this legend on the cover page of a preliminary prospectus for registered offerings of securities to meet the requirements of Item 501(b)(10) of Regulation S-K. Registrants will no longer need to include the last sentence of the currently used legend if the offering is not prohibited by state securities law. For example, for offerings of "covered securities" where state securities law is preempted by federal

securities law pursuant to Section 18 of the Securities Act, the Item 501(b)(10) legend would be permitted to only state the following:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective.

Emphasis on materiality for disclosure of non-industry specific properties

The SEC observed that, despite including text that limits disclosure to properties that are materially important to the registrant, Item 102 of Regulation S-K often resulted in disclosure of immaterial information. The SEC specifically noted that headquarters and office space may be the only physical properties held by many companies, and descriptions of these types of properties are likely to be unimportant to an investor. To address this issue, amended Item 102 will only call for disclosure about a physical property to the extent that it is material to a registrant.

The SEC has confirmed that its property disclosure requirements specific to the real estate, oil and gas, and mining industries are outside the scope of this rule change. For example, Instruction 9 of Item 102, which refers to the disclosure requirements of Guide 5, continues to apply to property disclosures by REITS and other real estate companies.

New instructions for preparing Management's Discussion and Analysis

Pursuant to a revised Instruction 1 to Item 303(a) of Regulation S-K, registrants will be permitted to exclude a discussion of the earliest of three years from their Management's Discussion and Analysis (MD&A) section if that discussion is available already in a prior filing made with the SEC. This change is meant to discourage repetition of disclosure that is no longer material to investors. If registrants choose to exclude the earliest year, they must provide an active hyperlink to that discussion in a prior filing.

In addition, revised instruction 1 to Item 303(a) will no longer include a specific reference to year-to-year comparisons. Instead, it instructs registrants to use any type of presentation that in the registrant's judgment enhances a reader's understanding of the registrant's financial condition, changes in financial condition and results of operations. While the SEC anticipates that the familiar year-to-year comparisons will continue to be an appropriate method of presentation for many registrants, there may be some cases where another presentation mode may be more effective.

For annual reports filed by foreign private issuers, equivalent instructions will be provided by a new Instruction 6 to Item 5 (Operating and Financial Review and Prospects) of Form 20-F.

New caption for disclosures regarding executive officers

To reflect a more "plain English" approach, the caption to be used in annual reports on Form 10-K for disclosure regarding a registrant's executive officers

(pursuant to Item 401 of Regulation S-K) will change from "Executive Officers of the Registrant" to "Information about our Executive Officers." In addition, amended instructions to Item 401 will clarify that information about executive officers does not need to be repeated in a registrant's proxy statement if already included in its Form 10-K.

Amendments related to Section 16(a) beneficial ownership reporting

Additional amendments have been adopted with respect to Item 405. Once the amendments are in effect, insiders will no longer need to provide Section 16 reports to registrants on paper, and registrants will be able to rely on Section 16 reports filed on EDGAR when determining whether there are any Section 16 delinquencies to disclose.

In addition, the caption required to be used for disclosing Section 16 filing delinquencies pursuant to Item 405 of Regulation S-K will be changed from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports." Furthermore, the new caption and any related text will not be required to be included in an annual report or proxy statement if the registrant does not have any Section 16 filing delinquencies to report.

A new definition for the Plan of Distribution section: "Sub-underwriters"

Item 508 of Regulation S-K requires registrants to disclose discounts and commissions to be allowed or paid to dealers in connection with a securities offering. If a dealer is paid any additional discounts or commissions for acting as a "sub-underwriter", a registrant may include a general statement to that effect without giving the additional amounts to be sold. The application of this provision was unclear because "sub-underwriter" was not defined for these purposes. To provide clarity, amended Rule 405 will define "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.

Updates for corporate governance disclosures

When a registrant files a proxy statement or information statement in connection with director elections in compliance with Section 14 of the Exchange Act (from which foreign private issuers are exempt), Item 407(d)(3) requires an audit committee statement addressing certain discussions with the registrant's independent auditors. This disclosure requirement had referred to a now outdated auditing standard (AU section 380, Communication with Audit Committees). To address this issue and accommodate any future changes to the relevant requirements, Item 407(d)(3) will omit a specific reference and instead will require a statement by the audit committee that it has discussed with the independent auditors the matters "required to be discussed by the applicable requirements" of the Public Company Accounting Oversight Board and the SEC.

In addition, a new paragraph (g) will be added to Item 407 to clarify which corporate governance disclosure requirements apply to emerging growth companies and smaller reporting companies. For example, since emerging

growth companies are not required to provide a Compensation Discussion and Analysis (CD&A) in their proxy statements, the compensation committees of these companies do not need to make statements regarding CD&A pursuant Item 407(e)(5).

Relocating the requirement to disclose risk factors

The disclosure requirement for risk factors has long been provided in Item 503(c) of Regulation S-K. It was included in Subpart 500 with other offering-related disclosure requirements because it originally applied only to registration statements for securities offerings. Since 2005, however, the SEC has also required risk factor disclosures in periodic reports. To reflect that risk factors are required in periodic reports as well as registration statements for securities offerings, the SEC is moving the risk factor disclosure requirement to a new Item 105 in Subpart 100 of Regulation S-K, which covers a broad category of business information and is not specific to securities offerings. All relevant SEC Forms that refer to this disclosure requirement will be amended to refer to Item 105 instead of Item 503(c).

In addition, new Item 105 will no longer include the five specific examples of factors that may make an offering speculative. These examples are the same as those first articulated in 1964 as part of guidance regarding risk factor disclosures. The SEC now considers the inclusion of these examples to be inconsistent with the principles-based approach of this disclosure requirement. Registrants should continue to provide risk factor disclosures tailored to their particular circumstances.

Amendments permitting the omission of certain information from exhibits

Omission of schedules to exhibits containing non-material confidential information

A new paragraph (a)(5) will be added to Item 601 to Regulation S-K to permit registrants to omit schedules (or similar attachments) from filed exhibits so long as they do not contain any material information, and the information in the schedule is confidential. When registrants choose to omit any such schedules, the filed exhibit must contain a list briefly identifying the contents of all omitted schedules. No separate list of omitted schedules need be produced if the filed exhibit contains an index of schedules that conveys the subject matter of the omitted schedules. The SEC staff may request to review a copy of any omitted schedule or similar attachment.

Redaction of personal confidential information

A new paragraph (a)(6) will be added to Item 601 of Regulation S-K to permit registrants to redact information the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy" without the need to apply for a confidential treatment order. Examples of this type of information include:

- bank account numbers;
- social security numbers;
- home addresses; and

- personnel files.

Redaction of non-material competitively sensitive information

Effective April 2, 2019, registrants are able to redact confidential information in exhibits filed with registration statements or periodic reports pursuant to Items 601(b)(2) (M&A agreements and plans of reorganization), 601(b)(10) (material contracts) or the equivalent exhibit requirements of Form 20-F, without having to apply for a confidential treatment order from the SEC staff. These redactions will be permitted if the confidential information:

- is not material and
- would likely cause competitive harm to the registrant if publicly disclosed.

While an application for a confidential treatment order will no longer be required, registrants are required to comply with the following procedures to take advantage of this regulatory relief:

1. Mark the exhibit index to indicate which exhibits have had competitively sensitive information redacted;
2. Include a prominent statement on the first page of the redacted exhibit indicating that portions have been omitted; and
3. Use brackets to indicate where information has been taken out.

SEC staff will continue to selectively review filings with the ability to request to see any of the information redacted by registrants from their filings on a case-by-case basis. Upon request, registrants would be expected to provide a paper copy of the unredacted exhibit marked to highlight the redacted information. The SEC staff will review the unredacted materials and may ask for further information, such as an analysis of why the redacted information is not material and would be competitively harmful if disclosed.

If faced with such a staff request, registrants may accompany their response with a request for confidential treatment of any such supplemental materials pursuant to Rule 83.

Furthermore, pursuant to Rule 418 under the Securities Act and Rule 12b-4 under the Exchange Act, the staff will return supplemental materials to the registrant following review so long as the following conditions are met:

- the request for the return of the supplemental materials is made when such materials are furnished to the staff and
- the return of such materials is consistent with the protection of investors and the Freedom of Information Act.

Rule 418 under the Securities Act imposes an additional requirement that the information to be returned was not filed in electronic format.

The following chart summarizes the scope of the amendments related to the omission of certain information from filed exhibits and the relevant effective dates.

Amended / New Provisions	Summary of Amendment	Scope of Application	Effective Date
Reg. S-K Item 601 (a)(5) & the fifth paragraph of the introductory section of Instructions to Exhibits of Form 20-F	Will permit omission of schedules to exhibits unless they contain material information	All types of exhibits	May 2, 2019
Reg. S-K Item 601 (a)(6) & the sixth paragraph of the introductory section of Instructions to Exhibits of Form 20-F	Will permit redaction of information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy	All types of exhibits	May 2, 2019
Reg. S-K Item 601(b)(2) and (b)(10)(iv) & Paragraph 4(a) of Instructions to Exhibits of Form 20-F	Permits redaction of non-material, competitively sensitive confidential information with applying for a confidential treatment order	Only exhibits that constitute material contracts not made in the ordinary course of business, including plans of acquisition, reorganization, arrangement, liquidation or succession	April 2, 2019

New exhibit requirement for annual reports on Form 10-K or Form 20-F: "Description of Securities"

For annual reports filed after May 2, 2019, registrants will be required to provide a "Description of Securities" exhibit to their annual reports on Form 10-K or Form 20-F containing the information specified in Item 202 of Regulation S-K.

Registrants will need to provide the specified information regarding all classes of securities that:

- are registered under Section 12 of the Exchange Act as of the end of the period covered by the annual report with which the exhibit is filed and
- have not been retired by the end of such period.

A registrant must update this information annually to report certain modifications to the rights of security holders, similar to the requirements of Form 8-K. A registrant may incorporate by reference and provide an active hyperlink to a prior periodic filing containing the disclosure required to be included in this new exhibit so long

as there has not been any change to the relevant information since the date of the linked filing.

The SEC estimates that registrants will, on average, spend approximately 30 additional minutes per annual report to prepare this new exhibit. The following charts summarize the disclosure requirements that will apply to the new "Description of Securities" exhibit.

Disclosure Requirements for the new "Description of Securities" exhibit to Annual Reports on Form 10-K	
Regulation S-K	Summary of the Disclosure Requirement
Item 202(a)	For registered equity securities, provide specified information regarding the rights of shareholders
Item 202(b)	For registered debt securities, provide specified information regarding the material terms of the debt securities
Item 202(c)	For registered warrants and rights, provide specified information regarding exercise rights and other material terms
Item 202(d)	For any registered securities other than equity, debt, warrants or rights, a description of the rights evidenced by the securities
Item 202(f)	For companies with ADR facilities, the name of the depository, the address of its principal executive office, the title of the ADRs and the deposited securities as well as a brief description of the terms of the deposit

Disclosure Requirements for the new "Description of Securities" exhibit to Annual Reports on Form 20-F	
Form 20-F	Summary of the Disclosure Requirement
Item 9.A.3	For registered equity securities, Reasons for any restrictions or withdrawals of any pre-emptive purchase rights
Item 9.A.5	Information regarding form of securities, arrangements for transfer and restrictions on free transferability
Item 9.A.6	Description of any limitations or restrictions on the rights of security holders by rights evidenced by any other class of securities or by the provisions of any contract
Item 9.A.7	Outline of rights evidenced by securities other than common or ordinary shares
Item 10.B.3	Description of the rights, preferences and restrictions attaching to each class of shares
Item 10.B.4	Description of what actions would be necessary to change the rights of the holders of the stock
Item 10.B.6	Description of any limitations on the rights to own securities, including any limitations on the rights of non-resident or foreign shareholders to exercise voting rights
Item 10.B.7	Description of any change of control provisions in a registrant's articles of association, charter or bylaws that would operate only with respect to a merger, acquisition or corporate restructuring

Item 10.B.8	Indicate any bylaw provisions governing the ownership threshold above which shareholder ownership must be disclosed
Item 10.B.9	Explanation of significant differences between relevant home country corporate law and US corporate law
Item 10.B.10	Description of conditions imposed by articles of association or charter governing changes in the capital, to the extent they are more stringent than required by law
Item 12.A	For registered debt securities, provide specified information regarding the material terms of the debt securities
Item 12.B	For registered warrants and rights, provide specified information regarding exercise rights and other material terms
Item 12.C	For any registered securities other than equity, debt, warrants or rights, a description of the rights evidenced by the securities
Item 12.D.1	For companies with ADR facilities, the name of the depository and the address of its principal executive office
Item 12. D.2	For companies with ADR facilities, the title of the ADRs and the deposited securities as well as a brief description of the terms of the deposit

Limitation of the two-year look back for material contracts

The requirement of Item 602(b)(10) of Regulation S-K to file certain material contracts as exhibits to registration statements and annual reports has included certain contracts entered into not more than two years before the filing date even when fully performed before the filing date. To streamline reporting obligations, this two-year look back will only apply to "newly reporting registrants." This category of registrants— includes those that:

- are not subject to Exchange Act reporting requirements at the time of filing;
- have not filed an annual report since the revival of a previously suspended reporting obligation; or
- complete a transaction that caused it to cease being a public shell company and have not yet filed annual report subsequent to that transaction.

For foreign private issuers filing annual reports on Form 20-F, equivalent relief will be provided by amended Paragraph 4(a) of in the Instructions as to Exhibits of Form 20-F.

Registrants with established reporting histories will only need to file as exhibits those material contracts that have not been fully performed prior to the relevant filing date.

Elimination of the five-year limit on incorporation by reference

Item 10(d) of Regulation S-K included a prohibition on the incorporation by reference of any documents in SEC filings if they have been on file with the SEC for more than five years, subject to broad exceptions. The SEC has concluded this limitation serves little purposes and may lead to confusion about which documents may be incorporated by reference. Accordingly, it has adopted an amendment that removes this limitation from Item 10.

Modernization of Undertakings

The following paragraphs will be removed from Item 512 of Regulation S-K because they have been identified as duplicative or obsolete:

- (c) – offerings of warrants;
- (d) – competitive bidding;
- (e) – delivery of incorporated annual report; and
- (f) – securities certificates.

Limits on Incorporation by Reference in audited financial statements

With respect to a registrant's audited financial statements included in registration statements or periodic reports, the SEC will only permit incorporation by reference or cross-references to information outside of those financial statements when it is specifically permitted or required by:

- the SEC's rules or
- U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board (whichever is used by the registrant).

Conclusion

The SEC's recently adopted amendments update and simplify a wide variety of disclosure requirements. Notably, these include changes simplifying the process for omitting certain sensitive information from exhibit filings and a new "Description of Securities" exhibit requirement for Form 10-K or Form 20-F filers. In addition, many of these recent amendments provide clarifications meant to avoid disclosure of immaterial or duplicative information.

CONTACTS

Americas

Jay Bernstein
Partner

T +1 212 878 8527
E jay.bernstein
@cliffordchance.com

Gary Brooks
Partner

T +1 212 878 8242
E gary.brooks
@cliffordchance.com

Andrew Epstein
Partner

T +1 212 878 8332
E andrew.epstein
@cliffordchance.com

Jacob Farquharson
Partner

T +1 212 878 3302
E jacob.farquharson
@cliffordchance.com

Larry Medvinsky
Partner

T +1 212 878 8149
E larry.medvinsky
@cliffordchance.com

Jason Myers
Partner

T +1 212 878 8324
E jason.myers
@cliffordchance.com

Anand Saha
Partner

T +1 212 878 8301
E anand.saha
@cliffordchance.com

Hugo Triaca
Partner

T +1 212 878 3222
E hugo.triaca
@cliffordchance.com

Kathleen Werner
Partner

T +1 212 878 8526
E kathleen.werner
@cliffordchance.com

Jon Zonis
Partner

T +1 212 878 3250
E jonathan.zonis
@cliffordchance.com

Asia

Liu Fang
Partner

T +852 2825 8919
E fang.liu
@cliffordchance.com

Johannes Juette
Partner

T +65 6410 2293
E johannes.juette
@cliffordchance.com

Richard Lee
Partner

T +852 2825 8911
E richard.lee
@cliffordchance.com

Alex Lloyd
Foreign Legal
Consultant

T +852 2826 3447
E alex.lloyd
@cliffordchance.com

Jean Thio
Partner

T +65 6506 1956
E jean.thio
@cliffordchance.com

Europe

Alex Bafi
Partner

T +33 1 4405 5267
E alex.bafi
@cliffordchance.com

Per Chilstrom
Partner

T +44 207006 1544
E per.chilstrom
@cliffordchance.com

John Connolly
Partner

T +44 207006 2096
E john.connolly
@cliffordchance.com

Michael Dakin
Partner

T +44 207006 2856
E michael.dakin
@cliffordchance.com

George Hackett
Partner

T +49 69 7199 3103
E george.hackett
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2019

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.