

SEC Continues Disclosure Simplification and Modernization

April 30, 2019

Capital Markets and Securities

Overview. For the better part of this decade, the U.S. Securities and Exchange Commission (the “SEC”) has been assessing and soliciting input on, and proposing and adopting changes to, the public company disclosure regime. A principal goal of this exercise has been to improve the quality of disclosure while reducing compliance costs and other burdens on public companies. Consistent with this goal, on March 20, 2019, the SEC adopted further amendments to its rules and forms¹ pursuant to its mandate under the JOBS Act and FAST Act.² The amendments range from minor tweaks to significant changes in practice and leave in their wake some interesting questions for disclosure lawyers and their clients.³

These amendments provide periodic reporting registrants greater leeway in disclosure matters, in large part without changing the rules of play in any material, substantive manner. In so doing, the SEC’s changes in disclosure requirements trace a subtle common thread. Whether intentionally or not, many of the changes reflect a softer “voice,” stepping away from instructional examples and suggestions and allowing registrants instead to make judgments more singularly focused on the “materiality” lodestar - that elusive disclosure principle amalgamated from decades of court decisions, SEC guidance, practice conventions and experience. As a result, we believe registrants are incrementally more empowered to tell their stories how they think best.

In a similar regulatory approach, the SEC also restricted its role as gatekeeper for confidential treatment of material agreements, no longer requiring registrants to submit

¹ Adopting Release: *FAST Act Modernization and Simplification of Regulation S-K*, <https://www.sec.gov/rules/final/2019/33-10618.pdf> (the “Adopting Release”). The Adopting Release also promulgated harmonizing amendments applicable to investment companies and investment advisers. Those changes, which relate to incorporation by reference and hyperlinking, are not addressed in this client alert.

² Jumpstart Our Business Startups Act (2012), Pub. L. 112-106; Fixing America’s Surface Transportation Act (2015), Pub. L. 114-94.

³ The initial impetus for these changes was the JOBS Act, which Congress passed in 2012. In Appendix A we trace the SEC’s “modernization and simplification” efforts from the JOBS Act to the present.

confidential treatment requests to explain the rationale supporting redactions in material contracts.

The amendments relating to confidential treatment requests became effective upon filing in the Federal Register on April 2, 2019. Most other changes will become effective on May 2, 2019, while a new requirement for tagging cover page data will have a delayed implementation period. Many registrants will be filing periodic reports around the effective date. For registrants filing on or after May 2, changes to keep in mind include the updated cover pages for Forms 10-K, 10-Q and 8-K, hyperlinking of incorporated information that has been filed on EDGAR and the updated exhibit rules.

The Adopting Release provides a useful table of amendment descriptions and references. For ease of reference, a slimmed-down version is attached to this client alert as Appendix B. Many of the SEC's changes can be understood by quick reference to this table.

We discuss below what we view as some of the most significant changes that affect public company reporting.

The Last Gasp of MD&A's "Out Year?" Item 303(a)(3) of Regulation S-K is the regulatory prompt for the period-to-period analysis of the results of operations virtually all registrants include in their "Management's Discussion and Analysis of Financial Condition and Results of Operations" ("MD&A"). Generally, registrants are required to file three years of audited income statements in their annual reports on Form 10-K⁴ and, prior to the Regulation S-K amendments, to speak to results of operations for each of these years as part of their "through the eyes of management" MD&A narrative. Instruction 1 to Item 303(a) prompts registrants to discuss and analyze those financial statements and other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition, and results of operations. This instruction also provides that, generally, the discussion must cover the three years included in the financial statements and either use year-to-year comparisons or another format that in the registrant's judgment would enhance a reader's understanding. Most registrants have defaulted to year-to-year comparisons, perhaps preferring not to test the limits of when a different format might "enhance a reader's understanding."

The amendments, as initially proposed, would have permitted the registrant to omit altogether Item 303 disclosures regarding the earliest of the three years because, except in the case of IPOs and other newly-minted registrants (which would not be eligible to omit the earliest-year information), investors could refer to prior-year filings to find this disclosure. However, omitting discussion of the earliest year would **not** have been permitted if this information was "material to an understanding of the registrant's financial condition, changes in financial condition and results of operations." During the comment period, a debate developed over the merits of this disqualifying factor. In addition, some commenters voiced concerns with definitional matters, including the meaning of "material to an understanding" and the significance

⁴ Today, smaller reporting companies may limit their financial statements to two years, and emerging growth companies ("EGCs") may do the same for their initial public offering of common equity securities.

(if any) of variations in usage of the term “material” and its derivatives in Item 303 and elsewhere in Regulation S-K.

After weighing commenter concerns, the SEC opted to allow registrants to omit disclosures regarding the earliest year so long as (i) that disclosure is contained in any of the registrant’s prior EDGAR filings that required disclosure in compliance with Item 303 and (ii) the registrant identifies, in the current filing, the location in the prior filing where the omitted discussion may be found.⁵ As adopted, therefore, the amendment to Item 303 will permit registrants to omit the earliest-year information *regardless* of its materiality, provided the conditions mentioned above are met.⁶

The rule changes also deleted the following guidelines (previously included in Instruction 1 to Item 303):

- the inference that the year-over-year presentation is the “default” disclosure method; and
- the suggestion that reference to the five-year selected financial data included under Item 301 may be necessary when explaining financial trends.

Decline of the CTR. The SEC’s disclosure regime requires registrants to file copies of material agreements on EDGAR. Registrants are permitted to redact from filed contracts information that is not otherwise public, is not material, and satisfies one of the nine exemptions in the Freedom of Information Act.⁷ The condition most frequently cited by registrants has been “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Additionally, registrants could request to redact non-material personally identifiable information.

To obtain confidential treatment, registrants were previously required to submit to the staff of the SEC (the “Staff”) an unredacted copy of the pertinent exhibit, a copy of the exhibit showing the registrant’s proposed redactions, and a legal analysis supporting the breadth and duration of confidentiality sought for each proposed redaction (collectively, a “confidential treatment request,” or “CTR”). Once submitted, the Staff would (in the case of IPOs) and could (for other registrants) review the CTR and then engage with the registrant on the merits of its

⁵ Referring to an earlier filing this way raises technical issues if the later-filed document is incorporated by reference into a registration statement under the Securities Act of 1933 (the “Securities Act”). Presumably the earlier-year information included in a prior filing and referenced as required by Item 303 would be considered part of the body of information investors consider to make an investment decision in an offering. If so, investors would be charged with knowing the Item 303-referenced disclosure, and prospective Section 11 or 12 defendants would be subject to liability if the Item 303-referenced disclosure contained material misstatements or omissions. Exactly how those dots get connected in the registration statement, the prospectus and the underwriting papers will require either Staff guidance or a consensus among practitioners.

⁶ At the same time, though, the SEC cautioned that it was not suggesting that materiality is irrelevant to management’s consideration of what information to include and what to omit. Reconciling those two thoughts is left to the practitioner and to the divining rod of “facts and circumstances.”

⁷ Pub. L. 89-487 (1966).

request. If the Staff did not agree with the registrant's position, it could require that the scope or duration of the request be scaled back. Until the registrant cleared any Staff comments, and the CTR was granted, the Staff would not declare effective any pending registration statement.

Under the new rules, information included in an exhibit filed as a material contract under Regulation S-K Item 601(b)(10) may be omitted if it is both (i) not material, and (ii) likely to cause competitive harm to the registrant if publicly disclosed. The registrant draws its own conclusions as to permissible redactions based on the rule's criteria but without the need for Staff concurrence. The registrant then files the exhibit, as redacted, without any accompanying CTR, and without the unredacted agreement.

The redacted version of the contract must satisfy these additional conditions:

- the exhibit index must state that portions of an exhibit or exhibits have been redacted;
- the first page of any redacted agreement must contain a prominent statement to the effect that portions of the contract have been excluded because those portions are not material and because public disclosure of those portions would likely be competitively harmful; and
- brackets must be inserted in the exhibit to indicate where information has been omitted.

As a result of this shift in process, for non-IPO-related filings the SEC would have occasion to review (and potentially challenge) a registrant's redactions only in connection with the Staff's selective review of the registrant's filings. For IPOs, we understand that the Staff intends to continue its review of exhibits filed with redactions. In this scenario, while the registrant need not prepare a CTR, effectiveness of the IPO registration statement would still be conditioned on the Staff's clearance of the exhibit, which may well involve the registrant's submission of a justification for its redactions.

This development will no doubt be viewed as a godsend by disclosure lawyers (and the clients that pay for them), who previously would spend hours researching and composing CTRs. However, the rule change may not be quite so providential, as registrants will still need to evaluate the legal rationale for redactions and be prepared to defend their conclusions. Registrants will also want to maintain written records of their analyses in case they are subsequently challenged, which would diminish the burden-reducing effect of eliminating the CTR.

Note that the Staff has developed well-defined criteria regarding the substantive pre-conditions to confidential treatment, such as the type of information that qualifies for redaction (confidential commercial terms and trade secrets and other confidential intellectual property information, for example) and the type of information that is presumptively material, and should generally not be redacted (a key supplier's name, indemnification provisions and financial covenants in material credit agreements, for example).⁸ Registrants will want to follow that guidance and use past practice as a compliance road map—and potentially as a shield against

⁸ See Legal Bulletins 1 and 1A available on the SEC's website at <https://www.sec.gov/interps/legal/slbcf1.txt> and <https://www.sec.gov/interps/legal/slbcf1r.htm>.

efforts by aggressive counterparties who may see the rule change as an opportunity for overreaching.⁹ Time will tell how the SEC reacts to registrants it thinks have gone too far.

One other point regarding this change: under prior practice, registrants needed not only to identify the information they were seeking to redact, but also were required to state, and defend, the time period for which confidential treatment was being sought—and “forever” was not an approvable request. Specific disclosures would be granted confidential treatment for a discrete period of time tailored to the circumstances. Under the new procedure, without the CTR framework that required a claimed time frame for confidential treatment, confidentiality will not be time-limited, absent intervention by the Staff with filings under review. Registrants filing under the new rules will need to self-enforce by refiling redacted exhibits when and as necessary to disclose information that no longer qualifies for confidential treatment. Failure to do so could result in “out-of-date” redacted contracts forming the basis for claims of inadequate disclosure. In theory, that exposure should be minimal, because material information does not qualify for confidential treatment in the first place—another reason to pay attention to the SEC’s previously issued guidance regarding the requirements for confidential treatment.

Subsequent to issuance of the Adopting Release, the Staff published guidance, “New Rules and Procedures for Exhibits Containing Immaterial, Competitively Harmful Information,” clarifying certain procedures the Staff will implement as a result of these changes.¹⁰ In short:

- The Staff will initiate a review of redacted exhibits by sending a letter to the registrant requesting an unredacted version of the contract, highlighting the redacted text.
- If the Staff has no comments, it will confirm that in a letter to the registrant. Otherwise the Staff will request substantiation of the registrant’s redactions. These requests will be separate from comments the Staff may have on other filings of the registrant under review. When the Staff’s comments have been resolved, the Staff will so indicate by letter.
- The Staff will post on EDGAR only its initial request for an unredacted copy of the exhibit and the Staff’s close-out letter. It will not upload to EDGAR the Staff’s specific requests for substantiation of the redactions or the registrant’s responses.
- In a continuation of its historical practice, the Staff will not entertain requests for effectiveness of a Securities Act registration statement during the pendency of an exhibit review, even when the exhibit bears no relation to the registration statement (e.g., a review of a material agreement filed with a Form 10-Q could delay effectiveness of a Form S-3 or Form S-4 registration statement).
- As a transition matter, registrants with currently pending CTRs may (but need not) request to withdraw their CTRs and instead file a redacted version of the contract

⁹ See Commissioner Robert J. Jackson, Jr., “*Statement on Final Rules Implementing FAST Act*,” available at <https://www.sec.gov/news/public-statement/statement-jackson-032619>.

¹⁰ Available at <https://www.sec.gov/corpfin/announcement/new-rules-and-procedures-exhibits-containing-immaterial>.

pursuant to the revised process, so long as they comply with the applicable requirements of the rule.¹¹

Finally, we note that the new rules do not affect the status of confidential treatment orders that are currently in effect under the prior rules. Accordingly, registrants should continue to monitor their CTRs and request extensions of expiring confidential treatment orders to the extent redacted information remains competitively sensitive. This can be done using the traditional method of submitting the unredacted documents and supporting analysis, or by using a new “short-form” application for confidential treatment extensions released by the Staff on April 16, 2019.¹² The short-form application consists of a single page and need not be accompanied by the unredacted exhibit or the supporting analysis so long as the analysis and exhibit remain the same as originally provided to the SEC. Rather, a registrant must affirm in its application that the most recent CTR submission continues to be true, complete and accurate regarding the information for which the registrant seeks continued confidential treatment. The short-form application may be emailed to the Staff, rather than submitted via paper copies as with the traditional confidential treatment applications and extension requests. It may only be used to request extensions of confidential treatment and may not be used to seek confidential treatment for an exhibit in the first instance. We expect the use of this short-form application by registrants will significantly reduce the time and administrative burden associated with obtaining an extension of an expiring confidential treatment order.

Changes to Risk Factor Disclosure. The SEC’s amendments address risk factor disclosure requirements, not from a substantive standpoint but rather to clean up presentation and generally bring the disclosure requirements into line with changes in SEC forms and disclosure practices. A structural change moves the risk factor requirements out of Item 503 of Regulation S-K, which is focused on Securities Act filings, and into its own, new Item 105. Also, as previously written, the risk factor requirements provided, by way of guidance, a handful of examples that could be considered as possible risk factors. The SEC deleted these examples in new Item 105, in part based on the concern that their inclusion “could anchor or skew the registrant’s risk analysis.”¹³ Here, again, the SEC lets the rules speak for themselves without suggestions or interpretations.

Descriptions of Property: “Material” It Is, Then. Item 102 of Regulation S-K requires disclosure regarding a registrant’s property. The SEC pointed out that prior Item 102 used a mixed bag of disclosure triggers — “principal,” “materially important,” and “major,” for example — and worried that registrants might be confused as to whether the different words used to denote magnitude, significance and importance might actually signify varying standards being applied by the SEC. Commenters agreed with this concern.

The amended rule provides that a discussion of properties is required only if the property described is material to the registrant. In the SEC’s words, “The revised item makes clear that, unless otherwise specified, **disclosure need only be provided to the extent that it is material to the registrant**” [emphasis added].¹⁴

¹¹ Questions on transition matters may be directed to RedactedExhibits@sec.gov.

¹² Available at <https://www.sec.gov/corpfin/streamlined-procedure-confidential-treatment-extensions>.

¹³ See the Adopting Release, *supra* note 1 at 105.

¹⁴ *Id.*, at 37.

Counter to the theme in this package of rule changes, however, the SEC left intact its specific disclosure requirements for registrants engaged in the mining, oil and gas, and real estate industries, which are particularly dependent on registrants' physical properties.

Beware of NSMIA Issues! Item 501(b)(10) requires certain legends on the cover of a preliminary prospectus. One of those legends, since 1958, has required a statement to the effect that the preliminary prospectus does not constitute an offer to sell, or a solicitation of an offer to buy, the securities covered by the prospectus in any state where doing so is not permitted. This was a nod to the applicability of state "blue sky" securities laws and the fact that any given offering might not be "cleared" for sale into all states. However, with enactment in 1996 of the National Securities Markets Improvement Act ("NSMIA"),¹⁵ state securities laws became largely preempted by federal law.

The amendments adopted by the SEC allow the Item 501(b)(10) language relating to blue sky laws to be omitted. But, this would not be appropriate for all offerings. The amendment says that the language may be omitted so long as the offering is not prohibited by state law. For those working with "plain vanilla," registered offerings of listed common stock, or with debt securities of companies with listed common stock or other listed securities junior to the offered securities, NSMIA will preempt state securities law, and the state law portion of the legend may safely be omitted. In those cases, the offering *won't* violate state law because it *can't* violate state law, due to NSMIA preemption. But, there are other scenarios. It is not uncommon, for example, for small-cap companies engaged in a common stock offering to add a warrant "sweetener" to the offering if the market is otherwise unreceptive. It is unlikely the warrants are, or will be at closing, listed on a national exchange or otherwise eligible for preemption by NSMIA. Because the decision to include warrants in the offering usually occurs at the last minute, registrants might consider leaving the blue sky language in the legend, or at least be prepared to add it into a revised preliminary and/or final prospectus.

Our "Lightning Round." The SEC adopted numerous other changes in the Adopting Release. We think the ones below are worth a mention. Please refer to the tables in Appendix B and the Adopting Release for the full listing of changes.

- ***Section 16 Reports.*** Section 16 reporting persons will not need to furnish their Section 16 filings to the registrant.
- ***Section 16 Compliance Disclosure.*** Registrants may, but are not required to, rely on Section 16 reports filed on EDGAR in assessing whether there are any disclosable delinquencies under Section 16. Registrants should assess their methods for compiling this information and update their disclosure controls and procedures as necessary. Also, the SEC changed the required caption for disclosure of Section 16 filing delinquencies to "Delinquent Section 16(a) Reports" from "Section 16(a) Beneficial Ownership Reporting Compliance." Further, the new rules eliminate the Form 10-K cover page checkbox for signaling inclusion of delinquent-filer information.
- ***Description of Registrants' Securities.*** Registrants must include a new exhibit to their Annual Report on Form 10-K or Form 20-F that provides a description of each class of securities of the registrant that is registered under Section 12 of the Exchange Act

¹⁵ Pub. L. No. 108-290, 110 Stat. 3416 (1996).

containing the disclosure required by Item 202(a) through (d) and (f) of Regulation S-K. This information will necessarily overlap with the disclosure found in a registrant's publicly available registration statements and be in addition to existing requirements to file other exhibits, such as a registrant's articles of incorporation and bylaws. Registrants are permitted to incorporate by reference to and hyperlink previously filed exhibits that satisfy this new requirement, provided the Item 202 information in those exhibits remains accurate.

- *Schedules and Attachments to Exhibits.* Schedules (and similar attachments) may be omitted from the filed version of an exhibit so long as any omitted schedule does not contain material information and the omitted information is not otherwise disclosed in the exhibit or disclosure document. The exhibit must contain a list or other method of identifying the contents of the omitted schedule.
- *Financial Statements and Incorporating by Reference or Cross-Referencing.* Registrants may not incorporate by reference into, or cross-reference from, the financial statements unless specifically permitted or required by GAAP, IFRS, or the SEC's rules. This is not a reversal of the SEC's efforts to eliminate redundancies and overlap so much as to remove uncertainty on the part of readers as to which financial information has been audited or reviewed by the registrant's independent auditor.
- *Material Contract Filing.* Registrants, other than newly reporting companies (as defined), will not need to file as an exhibit a material contract solely because the contract was entered into during the two years prior to the filing of the relevant registration statement or report with which the contract is filed as an exhibit unless that contract is, at least in part, to be performed after the filing. Newly reporting companies will still need to file as exhibits those material contracts that were entered into within the two years preceding the filing, in addition to all other material contracts that have not yet been fully performed.
- *Other Cover Page Changes.* Registrants will need to disclose on the cover page of Forms 10-K, 20-F and 40-F, along with the title of each class of securities registered under Section 12(b) of the Exchange Act and each exchange on which they are registered, the trading symbols for those securities. In addition, the cover page of Forms 10-Q and 8-K will call for identification of each class of securities registered pursuant to Section 12(b) of the Exchange Act, the exchange(s) on which they are registered, and their trading symbols, bringing these forms into conformity with the corresponding requirements for Forms 10-K, 20-F and 40-F. Registrant must also tag all of the information on the cover pages of Forms 10-K, 10-Q, 8-K, 20-F and 40-F in Inline XBRL.

Effective Dates. As stated above, the amendments to the rules governing redaction of confidential information in material contracts became effective on April 2, 2019 (upon the rules' publication in the Federal Register). Most other amendments will become effective on May 2, 2019 (30 days after the rules' publication in the Federal Register), however, Inline XBRL data tagging requirements for cover pages will be implemented in accordance with the SEC's previously established deadline for adoption of Inline XBRL, as set forth in Appendix B.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Capital Markets and Securities practice:

<u>Eric Blanchard</u>	+1 212 841 1111	eblanchard@cov.com
<u>Kerry Burke</u>	+1 202 662 5297	kburke@cov.com
<u>Christopher DeCresce</u>	+1 212 841 1017	cdecresce@cov.com
<u>David Engvall</u>	+1 202 662 5307	dengvall@cov.com
<u>David Martin</u>	+1 202 662 5128	dmartin@cov.com
<u>Donald Murray</u>	+1 212 841 1101	dmurray@cov.com
<u>Michael Reed</u>	+1 202 662 5988	mreed@cov.com
<u>Michael Riella</u>	+1 202 662 5168	mriella@cov.com
<u>Brian Rosenzweig</u>	+1 212 841 1108	brosenzweig@cov.com
<u>Matt Franker</u>	+1 202 662 5895	mfranker@cov.com
<u>Matthew Gehl</u>	+1 212 841 1113	mgehl@cov.com
<u>Reid Hooper</u>	+1 202 662 5984	rhooper@cov.com
<u>Stephanie Bignon</u>	+1 202 662 5393	sbignon@cov.com
<u>Anna Abramson</u>	+1 202 662 5923	aabramson@cov.com
<u>Mark Edlund</u>	+1 212 841 1284	medlund@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

APPENDIX A

Disclosure Modernization and Simplification Milestones: From the JOBS Act to Today

In April 2012, Section 108 of the JOBS Act directed the SEC to review Regulation S-K, the laundry list of disclosure requirements from which many SEC forms pull their non-financial disclosure requirements, to determine how Regulation S-K could be modified to modernize and simplify the process by which EGCs, a new category of registrants created by the JOBS Act, registered capital-raising transactions. As a preliminary step to that mandated review, the Staff decided to expand its review beyond provisions that affect the registration process for EGCs and review instead the entirety of Regulation S-K to identify *any* provisions that would benefit from the modernizing/simplifying exercise. In December 2013, the Staff issued its report. See [SEC Issues Staff Report on Public Company Disclosure, https://www.sec.gov/news/press-release/2013-269](https://www.sec.gov/news/press-release/2013-269).

In December 2015, Congress passed the Fixing America's Surface Transportation Act (the "FAST Act"), which, among other things, included two directives for the SEC. First, it required that the SEC amend Regulation S-K to further scale back or eliminate requirements imposed on EGCs and other smaller registrants to reduce the administrative burden imposed by the SEC's disclosure regime without compromising the flow of material information to investors. Second, it directed the SEC to carry out a further study of Regulation S-K, issue a report of its findings and recommendations within 360 days of the FAST Act's enactment, and propose rules implementing those recommendations within 360 days of the report's issuance.

In April 2016, the SEC published a concept release, *Business and Financial Disclosure Required by Regulation S-K*, <https://www.sec.gov/rules/concept/2016/33-10064.pdf> (the "Concept Release"). The Concept Release was part of the SEC's ongoing initiative to review and assess potential improvements to business and financial disclosures required in registrants' periodic reports.

The Staff published its FAST Act report on November 23, 2016, [Report on Modernization and Simplification of Regulation S-K, https://www.sec.gov/files/sec-fast-act-report-2016.pdf](https://www.sec.gov/files/sec-fast-act-report-2016.pdf) (the "FAST Act Report"). According to the SEC, the FAST Act Report drew from the inquiry and analysis culminating in the Concept Release, public comment on the Concept Release and other disclosure topics, the Staff's experience with its disclosure review program, and its review of the origins and evolution of Regulation S-K. The Staff also consulted with the SEC's Investor Advisory Committee and its Advisory Committee on Small and Emerging Companies. In October 2017, the SEC published its proposed rules on [FAST Act Modernization and Simplification of Regulation S-K, https://www.sec.gov/rules/proposed/2017/33-10425.pdf](https://www.sec.gov/rules/proposed/2017/33-10425.pdf) (the "Proposing Release"), and as referenced above the Adopting Release was issued in March 2019. In the meantime, the SEC adopted final rules amending the smaller reporting company definition and made a host of updates and "simplifications" to the disclosure regime generally, in both cases on the authority of the FAST Act. See [Smaller Reporting Company Definition, https://www.sec.gov/rules/final/2018/33-10513.pdf](https://www.sec.gov/rules/final/2018/33-10513.pdf); see also [Disclosure Update and Simplification, https://www.sec.gov/rules/final/2018/33-10532.pdf](https://www.sec.gov/rules/final/2018/33-10532.pdf).

APPENDIX B

<u>Affected Rule or Form</u>	<u>Changes</u>
Item 303 of Reg. S-K Item 5 of Form 20-F	<ul style="list-style-type: none"> ■ Eliminates reference to year-to-year comparisons. Now allows registrants to use any 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, without suggesting that any one presentation is preferable to another. ■ Eliminates reference to five-year selected financial data. ■ Allows registrants providing three years of financial statements in a filing to omit discussion of the earliest of those 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. ■ These changes were applied consistently to Item 5 of Form 20-F.
Item 601(b) of Reg. S-K Form 20-F Form 8-K	<ul style="list-style-type: none"> ■ Permits registrants to omit confidential information from material contracts filed under Item 601(b)(10) and plans of acquisitions, reorganization, etc. under Item 601(b)(2) if that information is not material and would likely cause competitive harm if publicly disclosed. ■ These changes were applied consistently to Form 20-F and Form 8-K.
Rule 411 Rule 12b-23 Rule 0-4 Form S-1 Form S-3 Form S-11 Form F-1	<ul style="list-style-type: none"> ■ Generally prohibits cross-references in financial statements to disclosure in other parts of a filing. ■ Generally prohibits incorporation by reference from other filings into financial statements. ■ In both cases, does not prohibit the reference when the reference is expressly permitted or required by SEC rules, GAAP, or IFRS.
Item 102 of Reg. S-K	<ul style="list-style-type: none"> ■ Clarifies that disclosure of physical properties is only required to the extent material to the registrant.
Item 401 of Reg. S-K	<ul style="list-style-type: none"> ■ Moves location of Instruction 3 (allowing a registrant to include required information about its executive officers in Part I of Form 10-K instead of in its proxy statement) from Item 401(b) to Item 401 generally. ■ Changes caption from “Executive Officers of the Registrant” to “Information About Our Executive Officers.”

<u>Affected Rule or Form</u>	<u>Changes</u>
<p>Item 405 of Reg. S-K Rule 16a-3(e) Form 10-K</p>	<ul style="list-style-type: none"> ■ Eliminates the requirement that Section 16 reporting persons furnish Section 16 reports to the registrant. ■ Clarifies that registrants may, but are not required to, rely on Section 16 reports in assessing whether there are Section 16 delinquencies to disclose. ■ Changes required caption from “Section 16(a) Beneficial Ownership Reporting Compliance” to “Delinquent Section 16(a) Reports” and encourages registrants to exclude heading altogether when there are no delinquencies to disclose. ■ Eliminates “checkbox” on cover page of Form 10-K regarding Section 16 delinquent filers.
<p>Item 407</p>	<ul style="list-style-type: none"> ■ Previously, in the case of a proxy statement relating to a stockholder meeting at which directors are being elected or written consents are being provided, the registrant must have stated whether its audit committee has discussed with the independent auditor the matters required by AU section 380. Changes required language to refer more broadly to applicable requirements of the Public Company Accounting Oversight Board and the SEC. ■ Excludes emerging growth companies from requirement that compensation committee state whether it recommended to the board of directors that the compensation discussion and analysis be included in the registrant’s annual report, proxy statement, or information statement.

<u>Affected Rule or Form</u>	<u>Changes</u>
Item 501(b)	<ul style="list-style-type: none"> ■ Eliminates instruction to paragraph 501(b)(1), which had previously required companies with names similar to well-known company names to include information to eliminate the possible confusion. ■ Amends Instruction 2 to Item 501(b)(1)(3) to allow a more concise cover page statement, when applicable, that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus. ■ Amends Item 501(b)(10) to require that, if the securities being offered are not listed on a national securities exchange, but are quoted elsewhere as a result of the registrant’s active and successful efforts to achieve quotation through engagement of a registered broker-dealer, the registrant must disclose the principal U.S. market(s) where the offered securities are quoted. This does not affect the existing requirement to disclose the trading symbol(s) for such securities on such markets. ■ Amends Item 501(b)(10) to permit registrants to exclude from a preliminary prospectus the portion of the legend relating to state law for offerings that are not prohibited by state blue sky laws.
Item 503	<ul style="list-style-type: none"> ■ Eliminates examples of risk factors. ■ Moves risk factors section from Item 503(c) to new Item 105.
Rule 405 Item 508	<ul style="list-style-type: none"> ■ Defines “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 of the securities.
Item 512 of Reg. S-K	<ul style="list-style-type: none"> ■ Eliminates Item 512(c), (d), (e), and (f).

<u>Affected Rule or Form</u>	<u>Changes</u>
<p>Item 601 of Reg. S-K Item 1016 of Reg. M-A Form 20-F</p>	<ul style="list-style-type: none"> ■ Amends Item 601(b)(4) to require registrants to provide the information required by Item 202(a)-(d) and (f) as an exhibit to Form 10-K for each class of securities registered under Section 12 of the Exchange Act; permits incorporation by reference to a previously filed exhibit containing this information, provided it has not changed since such prior filing date. ■ Permits registrants to omit schedules and other attachments to exhibits provided the schedule or attachment does not contain material information and is not otherwise disclosed in the exhibit or disclosure document. ■ Permits registrants to omit personally identifiable information from required Item 601 exhibits without submitting a confidential treatment request for the information. ■ Limits two-year “look back” test for material contract filing to “newly reporting registrants” (those not subject to Exchange Act reporting requirements; those that have not filed an annual report since the revival of a previously suspended reporting obligation; and any registrant that was a shell company, other than a business combination related shell company, and has not filed a registration statement or Form 8-K as required by Items 2.01 or 5.06 of that form, since the completion of such transaction). ■ Consistent changes were made for foreign private issuers.
<p>Item 10(d) Rules 411, 12b-23, 12b-32</p>	<ul style="list-style-type: none"> ■ Eliminates prohibition on incorporation of items by reference that have been on file with the SEC for more than five years. ■ Eliminates requirement under the Exchange Act that copies of information incorporated be filed as an exhibit. ■ Requires hyperlinks to information that is incorporated by reference if that information is available on EDGAR. ■ Requires all filings that are subject to the hyperlinking requirements to be filed in HTML.

<u>Affected Rule or Form</u>	<u>Changes</u>
Rule 406 to Reg. S-T Item 601(b)(104) Form 20-F Form 40-F	<ul style="list-style-type: none"> ■ Requires all information on cover pages of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F to be tagged in Inline XBRL. ■ This requirement is subject to a three-year phase-in. The compliance dates are as follows: (1) for large accelerated filers that prepare their financial statements in accordance with U.S. GAAP, reports for fiscal periods ending on or after June 15, 2019; (2) for accelerated filers that prepare their financial statements in accordance with U.S. GAAP, reports for fiscal periods ending on or after June 15, 2020; and (3) for all other filers, reports for fiscal periods ending on or after June 15, 2021.
Form 10-K Form 20-F Form 40-F Form 10-Q Form 8-K	<ul style="list-style-type: none"> ■ In addition to the current requirement to disclose the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act and the exchange on which any such securities are registered, requires the cover page of Forms 10-K, 20-F and 40-F to disclose the symbol under which the registrant's securities trade. ■ Requires the cover page of Forms 10-Q and 8-K to disclose the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act, the exchange on which those securities are registered and the symbol under which those securities trade.