

# KIRKLAND & ELLIS

Kirkland Alert

## SEC Scales Back Disclosure Requirements

27 March 2019

On March 20, 2019, the SEC adopted amendments to modernize and simplify disclosure requirements in Regulation S-K that apply to periodic reports, proxy statements and registration statements.

The amendments are part of an initiative by the SEC's Division of Corporation Finance to review disclosure requirements and consider improvements for the benefit of investors and companies. They reflect the SEC's efforts to implement the Fixing America's Surface Transportation (FAST) Act to reduce disclosure burdens on companies while still providing investors with material information. The amendments are generally consistent with those proposed by the SEC in October 2017.

The summary below focuses on those amendments that are expected to be most relevant to the reporting obligations of U.S. public companies.

### Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) (Item 303)

**Two vs. Three Years of Financial Information.** An SEC reporting company will be required to include two (instead of three) years of financial information in MD&A, so long as it included the earliest year of the three-year period in a prior filing and identifies the location in the prior filing where the omitted prior-year discussion may be found.

**Year-Over-Year Comparisons Not Required.** An SEC reporting company will not be required to present year-over-year comparisons to explain the financial information presented in MD&A, and can instead use any presentation that in the company's judgment enhances a reader's understanding of the company's financial condition and results of operations, but the SEC indicated that it expects that most companies will

continue to include year-over-year comparisons, as they are generally the most familiar and appropriate means of explaining the financial information presented in MD&A.

## Exhibits (Item 601)

**Material Contracts – Confidential Treatment Requests.** An SEC reporting company will be allowed to redact confidential information from material contracts filed as exhibits to SEC filings without submitting a confidential treatment request to the SEC, so long as the information is (i) not material and (ii) would likely cause competitive harm if publicly disclosed.

The redacted information must be clearly marked as omitted, and the redactions remain subject to scrutiny by the SEC after filing. The new rule will apply to material contracts (S-K 601(b)(10) and Item 1.01 of 8-K) and acquisition agreements and bankruptcy plans (S-K 601(b)(2)), but not to other exhibits. Companies with pending confidential treatment requests may (but are not required to) withdraw the requests.

**Material Contracts – Fully Performed Contracts.** An SEC reporting company will generally only be required to file material contracts not made in the ordinary course of business if the contract must be performed in whole or in part at or after the filing of the report or registration statement, and will no longer be required to also file every material contract not made in the ordinary course of business if the contract was entered into within the two years before such filing.

Only a “newly reporting registrant” will still have to file all material contracts entered into in the last two years. The SEC defined a “newly reporting registrant” as companies not subject to the SEC’s reporting requirements, companies that suspended reporting obligations and have not filed an annual report since the suspension, and certain shell companies.

**Material Contracts – Schedules and Similar Attachments to Exhibits.** An SEC reporting company will no longer have to file schedules or attachments to exhibits unless they contain material information not otherwise disclosed in the exhibit or disclosure document. Prior to this amendment – except with respect to material plans of acquisition, reorganization, arrangement, liquidation or succession filed pursuant to Item 601(b)(2) – companies were required to file every required exhibit under Item 601, including with respect to material agreements filed under Item 601(b)(10), in its entirety, irrespective of the materiality of information in the schedules and exhibits.

However, public companies had increasingly in practice started omitting immaterial schedules and attachments from material contract exhibits, in some cases with explicit oral authorization from the SEC staff, but in other cases resulting in an SEC comment requesting the company to include the complete schedules and attachments.

The new rules end the uncertainty around the SEC's position, and make clear that immaterial schedules and attachments can be omitted from material contract exhibits. If a company excludes schedules or attachments to exhibits, however, it must include in the exhibit a list briefly identifying the content of each schedule or attachment, unless that information is already included in the exhibit in a manner that conveys the subject matter of the omission.

**Personal Information in Exhibits.** The SEC codified its current practice of allowing reporting companies to redact personal information from exhibits, such as bank account numbers, social security numbers, home addresses and similar information, without submitting a confidential treatment request, if disclosure of the personal information would constitute a clearly unwarranted invasion of personal privacy.

**Description of Securities.** The SEC added a requirement that an SEC reporting company file a description of its securities as an exhibit to its Form 10-K (not only as part of a registration statement). The description can be incorporated by reference and hyperlinked from the registration statement.

## Properties (Item 102)

**Material Disclosure.** An SEC reporting company will only be required to provide disclosure about a physical property if it is material to the company. The SEC retained existing industry-specific guidelines for mining, real estate, and oil and gas.

## Directors and Executives (Item 401)

**Proxy vs. 10-K.** The SEC clarified that information about the identity and background of an SEC reporting company's directors, executive officers and significant employees does not need to be duplicated in the proxy statement and 10-K. An SEC reporting company can choose where to present the information and incorporate it by reference in the other filing.

**Caption.** If an SEC reporting company chooses to include information about its executive officers in its 10-K instead of its proxy statement, the caption for that information will be required to read “Information about our Executive Officers” (instead of “Executive officers of the registrant”).

## Section 16 Beneficial Ownership Reporting Compliance (Item 405)

**Copies of Section 16 Reports.** Item 405 requires SEC reporting companies to disclose reporting persons who failed to file Section 16 reports on a timely basis. The amendments permit reporting companies to rely on EDGAR filings to determine if there will be any disclosure required of delinquent Section 16 filings. Directors and officers will no longer be required to provide companies with a copy of each Section 16 beneficial ownership report they file.

**Caption.** The caption for disclosing delinquent Section 16 filings will be “Delinquent Section 16(a) Reports” (instead of “Section 16(a) Beneficial Ownership Reporting Compliance”), and companies are encouraged not to include such section and heading if there are no delinquencies to report.

**Cover Page of Form 10-K.** The SEC deleted the checkbox on the cover page of Form 10-K that indicates whether there is disclosure of delinquent filers in the Form 10-K (or to the best knowledge of the company will be in the proxy statement).

## Corporate Governance (Item 407)

**Updated PCAOB Reference.** The SEC amended an outdated reference to AU 380 by referring more broadly to applicable requirements of the PCAOB and the SEC, which accommodates future changes to PCAOB and SEC rules.

**EGCs Not Required to Include Compensation Committee Report.** The SEC clarified its rules that emerging growth companies (EGCs) are not required to provide a compensation committee report since such companies are not required to include a compensation discussion and analysis (CD&A) section.

## Cover Pages

**Stock Exchange Listing.** An SEC reporting company will be required to include the following on the cover pages of its 10-K, 10-Q, 8-K, 20-F and 40-F filings: (i) the stock exchange that lists its securities; (ii) its trading symbol; and (iii) the title of each class of its securities.

**Inline XBRL.** An SEC reporting company will be required to tag all cover page data in Inline XBRL on Forms 10-K, 10-Q, 8-K, 20-F and 40-F.

## Incorporation by Reference

**Hyperlinks.** An SEC reporting company will be required to hyperlink documents incorporated by reference. However, if a company includes an inaccurate hyperlink to an incorporated document in an SEC filing (including an effective registration statement), the company will not be required to file an amendment, unless the filing was a pre-effective registration statement.

**Elimination of Five-Year Sunset.** The SEC eliminated the prohibition on incorporating documents by reference that have been on file with the SEC for more than five years.

## Financial Statements

**Cross References.** An SEC reporting company will no longer be permitted in its filed financial statements to cross-reference other parts of the filing, or incorporate by reference from other filings, unless a reference is otherwise explicitly permitted by SEC rules, U.S. GAAP or IFRS. For example, acquired business financials filed on a Form 8-K can continue to be incorporated by reference into a Form S-3 registration statement, and financial statements filed on Forms 10-K and 10-Q can continue to be incorporated by reference into a Form S-4 merger registration statement.

## Registration Statement/Prospectus

**Cover Page.** The SEC revised certain rules proscribing what and how information must be presented on the cover of a prospectus to give issuers greater flexibility in designing the cover page:

- **Name** – The SEC eliminated the requirement that an issuer change its name if it is the same as that of a well-known company or leads to a misleading inference about the issuer’s line of business.
- **Offering price** – Issuers are required to include the offering price on the cover of a prospectus, and, if not practicable, issuers were permitted to explain the method by which the price would be determined. The new rules permit issuers to include a statement on the cover page that the offering price will be determined by a method or formula that is more fully explained in the prospectus, with a cross-reference to the location in the prospectus of the explanation.
- **Stock exchange** – An issuer will be required to include on the cover page of a prospectus the principal U.S. market for the securities being offered and the trading symbol, even if the market is not a national securities exchange, if the issuer, through the engagement of a registered broker-dealer, actively obtained a quotation on such market.
- **Legend** – The SEC eliminated the requirement that an issuer include in a red herring legend a statement that the prospectus is not an offer to sell or a solicitation of an offer to buy securities in any state where the offer or sale is not permitted.

**Risk factors.** The SEC eliminated the list of examples of potential risk factors.

**Plan of Distribution.** The SEC added a definition of “sub-underwriter” (for which disclosure of discounts or commissions is required in the Plan of Distribution section) to be 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.

**Undertakings.** The SEC eliminated the requirement to include undertakings in a registration statement related to warrants and rights offerings, competitive bids, incorporated annual and quarterly reports, and equity offerings of nonreporting companies (S-K 512 (c)-(f)).

## Effectiveness of These Amendments

The amendments will be effective 30 days after publication in the Federal Register, which is expected shortly, except the new rules on confidential treatment of material contracts are immediately effective upon publication in the Federal Register, and the new rules on applying Inline XBRL to cover pages of SEC filings will have phased-in effectiveness as follows:

- for large accelerated filers that report in U.S. GAAP, effective for reports for fiscal periods ending on or after June 15, 2019;
- for accelerated filers that report in U.S. GAAP, effective for reports for fiscal periods ending on or after June 15, 2020; or
- for all other filers, effective for reports for fiscal periods ending on or after June 15, 2021.

The SEC's March 20, 2019 final rules on disclosure simplification can be found [here](#).

## Authors

[Christine Strumpfen-Darrie](#)

Partner / [New York](#)

[Joshua N. Korff, P.C.](#)

Partner / [New York](#)

[Ross M. Leff, P.C.](#)

Partner / [New York](#)

## Related Services

Practices

- [Capital Markets](#)
- [Transactional](#)

## Suggested Reading

- [27 March 2019 Press Release Kirkland Represents Nautic Partners in Raising of Nautic Partners IX for \\$1.5 Billion](#)
- [27 March 2019 Press Release Kirkland Represents Carlyle Group on Acquisition of Weiman Products](#)
- [27 March 2019 Press Release Kirkland Represents WellCare on Combination with Centene for \\$17.3 Billion](#)

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

© 2019 KIRKLAND & ELLIS LLP. All rights reserved