

INSIGHTS

## Guidance Recap for the Upcoming Annual Report and Proxy Season

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As reporting companies advance in preparations of their 2019 annual report and 2020 proxy statement, this update includes a recap of some of the more significant disclosure rules adopted and other announcements published by the Securities and Exchange Commission during 2019.

### Disclosure Simplifications

Below are some of the key disclosure simplifications adopted by the Commission under the Fixing America's Surface Transportation Act (FAST Act) that will change the way companies draft their Form 10-K disclosures.

The FAST Act mandated that the SEC recommend changes to disclosure requirements to reduce costs and burdens on reporting companies and improve readability while continuing to provide investors with all material information.

Our prior summaries of significant FAST Act-related disclosure changes are available [here](#) and [here](#).

*Regulation S-K Item 303 – Management's Discussion and Analysis of Financial Condition and Results of Operations*

Reports, such as Form 10-K, that are required to include three years of financial statements may exclude from MD&A a discussion of the earliest of the three years, as long as a discussion of that year has been included in a prior filing. If a registrant elects to exclude discussion of the earliest year, it will be required to include in MD&A a statement identifying the location of the omitted discussion in the prior filing.

In addition, year-to-year comparisons in MD&A are no longer required. Instead, a registrant may use any presentation that, in its judgment, enhances a reader's understanding of the registrant's financial condition, changes in financial condition and results of operations. However, in the adopting release, the Commission noted that it anticipates that many registrants will continue to use year-to-year comparisons because that manner of presentation is familiar and appropriate in many cases.

*Regulation S-K Item 601 – Exhibits*

## Omission of Schedules and Similar Attachments to Exhibits

Registrants are no longer required to file schedules and similar attachments to exhibits that are required to be filed, provided that the attachments do not contain material information that is not otherwise disclosed in the exhibit or the related filing. Previously, registrants were permitted to omit such attachments from plans of acquisition, reorganization, arrangement, liquidation or succession required to be filed as exhibits pursuant to Item 601(b)(2) of Regulation S-K, but not from material contracts required to be filed as exhibits pursuant to Item 601(b)(10) or other required exhibits.

## Omission of Confidential Information without Request for Confidential Treatment

Registrants may redact confidential information from a plan filed as an exhibit pursuant to Item 601(b)(2) or a material contract filed as an exhibit pursuant to Item 601(b)(10) without submitting a request for confidential treatment if the redacted information is not material and would likely cause competitive harm to the registrant if publicly disclosed. As amended, Item 601 preserves existing requirements for marking of redacted information in filed exhibits and allows the staff of the SEC to request information similar to that currently required in confidential treatments requests in connection with the staff's review of a filing.

## Elimination of Two-Year Look-Back for Material Contracts for Previously Reporting Registrants

Item 601(b)(10) previously required filing of material contracts that either (1) are to be performed in whole or in part after the applicable filing or (2) were entered into not more than two years before the filing. Now, only "newly reporting registrants" (as defined in the Item) are required to file material contracts that were entered into in the previous two years but that are not to be performed in whole or in part after the applicable filing.

## Description of the Registrant's Securities

Registrants must include as an exhibit to Form 10-K the information required by Item 202(a)-(d) and (f) describing the registrant's securities. Registrants may incorporate by reference to an exhibit previously filed in satisfaction of Item 601(b)(4)(vi) so long as there has not been any change to the information called for by Item 202 since the filing date of the linked filing.

### *Regulation S-K Item 102 – Description of Property*

Registrants must provide disclosure in their Form 10-K under Item 102 about a physical property only to the extent that it is material to the registrant.

### *Regulation S-K Item 405 – Compliance with Section 16(a) of the Exchange Act*

Registrants are no longer required to include on the cover page of Form 10-K a checkbox to reflect any delinquent Section 16 filers. Also, if any delinquent Section 16 filers are to be disclosed in the registrant's proxy statement, the heading for such disclosure has been changed from "Section 16(a) Beneficial Ownership Reporting Compliance" to "Delinquent Section 16(a) Reports".

### *Hyperlinks*

Registrants are no longer required to file as an exhibit any document or part of a document that is incorporated by reference in a filing, but instead are required to hyperlink to information or documents that are available on EDGAR that have been incorporated by reference.

### **Shareholder Proposal Process**

In September 2019, the Commission made an announcement regarding the Staff of the Division of Corporation Finance's process of administering Exchange Act Rule 14a-8 governing shareholder proposals, including its conclusions as to whether changes to its then-existing processes were warranted. Rule 14a-8 addresses when a company must include a shareholder's proposal in its proxy statement, and companies may request that the Staff state its informal, non-binding view on whether it concurs there is a legal basis to exclude a shareholder proposal from its proxy statement under Rule 14a-8.

Starting with the current proxy season, the Commission stated that it may respond to some no-action requests orally instead of in writing. The Staff's responses to Rule 14a-8 no-action requests issued on or after November 21, 2019 will be publicly disclosed through its shareholder proposal no-action responses chart available on the Commission's website, which indicates whether the Staff responded by letter (available [here](#)).