

Legal Update

Follow-Up on Regulation S-K Modernization and Simplification

As described in our Legal Update “SEC Adopts Rules to Modernize and Simplify Disclosure,” dated March 27, 2019,¹ the US Securities and Exchange Commission (SEC) adopted amendments intended to modernize and simplify certain disclosure requirements of Regulation S-K and related rules and forms.² The SEC’s adopting release was published in the *Federal Register* on April 2, 2019. As a result, the amendments to the rules governing redaction of confidential information in material contracts became effective on that date. Most of the remaining amendments will become effective on May 2, 2019.

In addition, on April 1, 2019, the staff of the SEC’s Division of Corporation Finance (Staff) announced guidance with respect to the new rules and procedures for the filing of exhibits containing immaterial, competitively harmful information.³

The amendments to Item 601(b) of Regulation S-K require companies to identify the location of information that has been omitted from an exhibit by doing the following:

- Marking the exhibit index to indicate that portions of the exhibit or exhibits have been omitted,
- Including a prominent statement on the first page of a redacted exhibit that certain identified information has been excluded because it both (i) is not material and (ii) would be competitively harmful if publicly disclosed, and
- Indicating through the use of brackets where information has been omitted from the filed version.

The Staff indicated that it will be reviewing filings for compliance with the new rules. If the review is also being made in connection with a review of the related filing, the Staff will separate requests for supplemental information related to redacted exhibits from its regular filing review comments. Companies should respond separately to any requests for supplemental information with respect to compliance with the new rules regarding redacted exhibits.

In the guidance, the Staff indicated it will initiate a redacted exhibit review request by a letter requesting a paper copy of the complete exhibit that is marked to highlight the redacted information. After the Staff reviews the unredacted materials, it may ask for further substantiation of the redaction decisions. If the Staff has questions regarding potential immateriality or competitive harm, it

will communicate those comments to the company separately from comments on the associated filing. The Staff will also send the company a letter confirming when its compliance review of redacted exhibits is complete.

With respect to registration statements filed under the Securities Act of 1933, as amended, companies should resolve questions relating to redacted exhibits before submitting a request for acceleration of the effective date.

In terms of what is made public about the exhibit-redaction review process, the Staff's initial request for an unredacted exhibit and the closing of review letter will be publicly posted on EDGAR. However, to avoid public disclosure of competitively harmful information, neither the Staff's comments regarding redacted exhibits nor company responses to those comments will be posted publicly.

Companies are permitted to request confidential treatment of supplemental materials while they are in the SEC's possession pursuant to Rule 83. The Staff will provide specific delivery instructions for supplemental material when requesting unredacted exhibits.

The new rules did not change the rules for new or pending confidential treatment requests (CTR), which can continue to be made and will continue to be processed. Orders granting confidential treatment that are still in effect will remain in effect until the date stated in the order. Companies have the option to withdraw a pending CTR in favor of reliance on the new rules for exhibit redaction. The Staff has stated that in such situations a company **must** amend its filing to conform to the new rule requirements.

Practical Considerations

Given how quickly the new requirements come into effect, companies should be reviewing the amendments to Regulation S-K and related forms as soon as possible—especially if they will be filing reports or registration statements with the SEC in May—to determine the extent to which the rule changes impact their upcoming filings.

To maintain confidentiality, companies that receive a request from the Staff for copies of complete exhibits or other supplemental material relating to unredacted exhibits should follow the specific delivery instructions that the Staff will provide when requesting such material. Companies should **not** deviate from the specialized delivery instructions for such material by sending them directly to the Staff member who made the request.

For more information about the topics raised in this Legal Update, please contact the author, Laura D. Richman, any of the following lawyers or any other member of our Corporate & Securities practice.

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¹ Available at <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/03/skmodernizationadopted.pdf>.

² Available at <https://www.sec.gov/rules/final/2019/33-10618.pdf>.

³ Available at <https://www.sec.gov/corpfin/announcement/new-rules-and-procedures-exhibits-containing-immaterial>.

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