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SEC AMENDS RULES TO MODERNIZE AND SIMPLIFY DISCLOSURE

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On March 20, 2019, the Securities and Exchange Commission (“SEC”) approved rule amendments intended to “modernize and simplify” disclosure as mandated by the Fixing America’s Surface Transportation (“FAST”) Act. Among other things, these amendments:

- allow public companies to omit confidential information without filing a confidential treatment request with the SEC;
- simplify Management’s Discussion and Analysis (“MD&A”) disclosure by excluding discussion of the earliest year of financials;
- fine-tune the materiality threshold for real property disclosure;
- streamline the information required on a prospectus cover page; and
- implement other technical changes.

Elimination of Confidential Treatment Request Process

The rule amendments allow registrants to omit confidential information from material contracts and other exhibits that it files with the SEC without filing a confidential treatment request with the SEC if the omitted information (i) is not material and (ii) would likely cause competitive harm to the registrant if disclosed. The registrant will need to mark the exhibit index to indicate that portions of the exhibit(s) have been omitted and include a prominent statement on the first page of each redacted exhibit that information in the marked sections of an exhibit has been omitted from the filed version of the exhibit. The registrant will need to indicate with brackets where the information has been omitted from the filed version of the exhibit. Upon request, the SEC Staff may require registrants to promptly provide supplemental materials to the SEC Staff similar to the information currently required in confidential treatment requests. It would be advisable for registrant to, contemporaneously with omitting information from an exhibit, prepare a memo outlining its rationale for omitting the competitively harmful information in the event the analysis is requested by the SEC Staff.

Simplification of MD&A

MD&A has been updated to only require a registrant to provide a period-to-period comparison between the two most recent fiscal years presented in the financial statements. Registrants that elect not to include the comparison between the second and third year of financial statements disclosed should identify the location where the comparison can be found in prior filings. This amendment does not affect Smaller Reporting Companies or Emerging Growth Companies which may already limit their MD&A disclosure to the two year period comparison.

Fine Tuning Real Property Disclosure

The rule amendments clarify that only disclosure of “materially important” real property is required and not disclosure of all real property owned by the registrant. For example, a manufacturing plant would be “materially important” to a registrant in the manufacturing business and should be disclosed, whereas office space used as a service company’s headquarters could be easily substituted with other office space and would not be “materially important” to the registrant. The SEC Staff expects that this will reduce disclosure of immaterial information about registrants’ real property.

Streamlined Prospectus Cover Page

The SEC created a new instruction that allows registrants, when it is impracticable to state an offering price to the public, to move details of an offering price method or formula from the cover page to another location in the prospectus. This change allows registrants to state on the cover page that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus, along with a cross-reference (including the page number) to the more detailed offering price disclosure. If the securities being offered are not listed on a national securities exchange, the new instruction requires disclosure on the prospectus cover page of the principal U.S. market for the securities being offered and its corresponding trading symbol. The SEC also streamlined the legends required on the cover page of the prospectus by allowing registrants to exclude from the prospectus the portion of the legend relating to state law prohibitions on offers or sales when it would not apply.

Other Technical Changes

The FAST Act amendments also simplify the exhibit index to registration statements and periodic reports by:

- Providing that newly reporting registrants will only be required to file material contracts that were entered into within two years of the applicable registration statement or report.
- Providing that registrants are not required to file attachments, such as schedules or exhibits, to material contracts if such attachments do not contain material information and were not otherwise disclosed.
- Adding an instruction to explicitly permit registrants to omit personally identifying information such as bank account numbers, social security numbers, and home addresses from exhibits.

In addition, the rule amendments remove the checkbox on the Form 10-K cover page for delinquent Section 16 reporting. The SEC also updated the required heading for Section 16 reporting in the proxy statement to “Delinquent Section 16(a) Reports” and clarified that the heading is only required if the registrant has a late filing to report.

The rule amendments also require registrants to include the following information on the cover page of their periodic reports: (i) national exchange or principal U.S. market for their securities; (ii) their trading symbol; and (iii) the title of each class of securities. In addition, registrants will be required to tag all cover page data in Inline XBRL. As a final matter, the rule amendments add a new exhibit to the periodic report that requires disclosure of the securities registered under the Securities and Exchange Act of 1934. Previously, this information was only required to be disclosed in registration statements.

What to Do Now

Generally the rules will become effective on May 2, 2019, which is thirty days after the rules were published in the Federal Register. Registrants should update their periodic reports and registration statements to take advantage of these changes and to include the new exhibit and other disclosures required. Further, registrants should create new procedures around omitting confidential information from periodic reports and registration statements.

If you would like more information regarding these amendments and how they may impact your company, please contact a member of Harter Secrest & Emery LLP's Securities and Capital Markets Group. For more information, visit www.hselaw.com.

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