

SEC Modernizes Business Disclosures, Legal Proceedings and Risk Factors under Regulation S-K

September 2, 2020

On August 26, 2020, the Securities and Exchange Commission (SEC) announced the adoption of rule amendments intended to simplify and modernize its disclosure requirements relating to description of business, description of legal proceedings and risk factors.

Highlighted below are key changes under the rule amendments. For a full description of all adopted amendments, the full text of the rule amendments is available [here](#). References below to “Item” are to the applicable Item in Regulation S-K unless otherwise noted.

HIGHLIGHTS

Business Disclosures

- *General Development of Business*: Shifts disclosure under Item 101(a) to a principles-based approach, requiring disclosure of information material to an understanding of the general development of the business irrespective of specific time frame.
- Replaces the previously prescribed five-year time frame in Item 101(a) (and three-year time frame for smaller companies in Item 101(h)) with a materiality framework.
- Permits the registrant, after its initial registration statement filing, to provide only an update of material developments that have occurred since its most recent full discussion of the development of its business in a previously filed registration statement or report. Registrants that elect to provide an update instead of a complete discussion must incorporate by reference and hyperlink to one registration statement or report that includes the registrant’s last complete discussion of its business development.

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- Eliminates the requirement in Item 101(a) to disclose the year that the registrant was organized, its form of organization and any material changes in the mode of conducting the registrant's business.
 - Replaces the existing disclosure topics relating to the development of the registrant's business under Item 101(a) with the following nonexclusive list of topics: any material changes to a registrant's previously disclosed business strategy; the nature and effects of any material bankruptcy, receivership, or any similar proceeding with respect to the registrant or any of its significant subsidiaries; the nature and effects of any material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; and the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business.
 - *Narrative Description of Business*: Clarifies and expands the principles-based disclosure approach under Item 101(c), replacing the existing required 12 disclosure topics with a nonexclusive list of seven disclosure topic examples (drawn from the prior list of 12). The amendments remove references from 101(c) to disclosures regarding new segments, the dollar amount of backlog orders and working capital practices.
 - Introduces as one of the seven disclosure topics under Item 101(c) a new disclosure topic regarding the registrant's human capital resources, including a discussion about the attraction, development and retention of personnel, to the extent such disclosures would be material to an understanding of the registrant's business.
 - Expands the prior regulatory compliance disclosure requirement in Item 101(c) by including as a topic all material government regulations, not just environmental laws.

Legal Proceedings

- Expressly permits the disclosure of updates to the status of legal proceedings required by Item 103 to be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document to avoid duplicative disclosure.
- Increases the current \$100,000 disclosure threshold in Item 103 for environmental proceedings in which the government is a party to: 1) \$300,000 or 2) a different threshold that the registrant determines is reasonably designed to result in disclosure of material environmental proceedings, provided that the threshold does not exceed the lesser of \$1 million or one percent of the registrant's consolidated current assets.

Risk Factors

- As amended, Item 105 requires the registrant to include in the forepart of the document (*i.e.*, the introductory section referenced in Item 501) a summary risk factor disclosure of no more than two pages, consisting of a series of concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky, if the risk factor section exceeds 15 pages.
- Replaces the requirement in Item 105 to discuss the “most significant” risks with “material” risks to reduce disclosure of generic risk factors and reduce the length of risk factor discussion.
- Requires that risk factors be organized under relevant headings in addition to the subcaptions currently required. Additionally, registrants are now instructed by Item 105 to present risks that could apply generally to any company or offering of securities at the end of the risk factor section under the caption “General Risk Factors.”

APPLICATION TO FOREIGN PRIVATE ISSUERS

The final amendments to Items 101 and 103 will affect only domestic registrants and “foreign private issuers” that have elected to file on domestic forms subject to Regulation S-K disclosure requirements. Regulation S-K does not apply to foreign private issuers unless a form reserved for foreign private issuers (such as Securities Act Form F-1, F-3 or F-4) specifically refers to Regulation S-K. None of Forms F-1, F-3 or F-4 nor any other form reserved for use by foreign private issuers specifically refers to Items 101 or 103 of Regulation S-K. In contrast, the amendments to Item 105 will affect both domestic and foreign registrants because Forms F-1, F-3 and F-4 all refer to that Item.

BACKGROUND

The rule amendments were adopted pursuant to Section 108 of the Jumpstart Our Business Startups Act (“JOBS Act”), which mandated that the SEC conduct a review of Regulation S-K to determine how requirements could be updated to modernize and simplify the registration process for emerging growth companies. The final rule amendments are largely consistent with those proposed by the SEC on August 8, 2019 with certain modifications.

TIMING

The rules will be effective 30 days after publication in the Federal Register.

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Please do not hesitate to contact us with any questions.

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