

August 31, 2020

SEC Adopts Amendments to Regulation S-K Disclosure Requirements

Amendments Make Disclosures of Business and Risk Factors More Principles-Based, Add a New Human Capital Disclosure Requirement and Update Certain Requirements for Disclosure of Legal Proceedings

SUMMARY

On August 26, 2020, the Securities and Exchange Commission adopted its previously proposed amendments to business, legal proceedings and risk factor disclosure requirements under Regulation S-K.¹ Our Memorandum to Clients, published on [August 12, 2019](#), summarized key aspects of the proposed rules. The amendments were adopted substantially as proposed with certain changes. The SEC approved the final amendments by a 3-to-2 vote, with Commissioners Lee and Crenshaw dissenting. Of note, the final amendments include a new requirement to disclose material “human capital” measures or objectives (if any). Over the objections of Commissioners Lee and Crenshaw, the amendments do not include any new requirements in respect of climate change risks.

The amendments will become effective 30 days after publication in the Federal Register.

AMENDMENTS TO REGULATION S-K

Regulation S-K is a regulation under the Securities Act of 1933 that provides detailed reporting and disclosure requirements applicable to filings under the Securities Act and the Securities Exchange Act of 1934. In remarks issued on August 26, 2020, Chairman Clayton noted that the “amendments are part of the Commission’s broader efforts to retroactively review and improve our public company disclosure framework and related requirements,” particularly as many aspects of Regulation S-K had not undergone significant revision in over 30 years. Chairman Clayton also highlighted the new disclosure requirement relating to human capital, which will require disclosure of any human capital measures or objectives that

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management focuses on in managing the business to the extent those are material to an understanding of the registrant's business.

The amendments represent the continuation of a shift away from prescriptive disclosure requirements to a more principles-based disclosure regime. In his statement on the amendments, Commissioner Roisman noted that the amendments "will allow our public reporting companies to present more clearly the information that they consider material in running their businesses."

The final amendments include:

Items 101(a) and (c) (Business). The amendments eliminate the specific five-year timeframe for disclosure regarding the general development of a registrant's business and instead require a discussion of the general development of the business, with no prescribed timeframe. In addition, after the initial registration statement, registrants are permitted to provide only an update that focuses on material developments since the last full discussion, along with a hyperlink to the registrant's most recent filing containing the full discussion. Despite this flexibility, many registrants may decide to include a full description of their business in their Forms 10-K because, per SEC guidance in the adopting release, "a filing that includes an update and incorporates by reference the more complete [description] could not be incorporated by reference into a subsequent filing, such as a Form S-3 or Form S-4" due to the limitations under Rules 411(e) and 12b-23(e) on incorporating by reference disclosure from a report if that report incorporates pertinent information from another filing.²

In addition, Item 101(a)(1) has been amended to include a non-exclusive list of the types of information that a registrant may need to disclose, with disclosure of a particular topic only required to the extent such information is material to an understanding of the general development of the registrant's business. The list of disclosure topics includes:

- material changes to a previously disclosed business strategy;
- material bankruptcy, receivership or any similar proceeding;
- 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.

Existing Item 101(c), which requires a narrative description of the registrant's business, sets forth a non-exclusive list of disclosure areas that registrants are required to address to the extent material. The amendments to Item 101(c):

- clarify that the specified disclosure topics are required to be addressed only to the extent material to an understanding of the business;
- revise the list of disclosure topics to include only a subset of the topics currently contained in Item 101(c) (for example, removing items relating to working capital practices and backlog orders from

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the list of disclosure topics but noting they would still need to be included if material to an understanding of the business and not otherwise disclosed);

- add human capital resources as a new disclosure area; and
- modify the regulatory compliance disclosure requirement to cover not only environmental regulations, but also other material government regulations.

With respect to human capital, Item 101(c) requires a registrant to include, to the extent material to an understanding of its business, a description of the registrant's human capital resources, including the number of employees and any human capital measures or objectives that the registrant focuses on in managing the business, such as measures or objectives that address the development, attraction and retention of personnel. In the adopting release, the SEC emphasizes that "these are examples of potentially relevant subjects, not mandates" and that "[e]ach registrant's disclosure must be tailored to its unique business, workforce, and facts and circumstances."³

Item 103 (Legal Proceedings). The amendments to Item 103:

- expressly permit disclosure regarding material legal proceedings to be provided by including hyperlinks or cross-references to legal proceedings information located elsewhere in the document (for example, in the notes to the financial statements) in order to avoid duplicative disclosure; and
- update the \$100,000 threshold for disclosure of environmental proceedings to which the government is a party to \$300,000, while also affording a registrant the flexibility to select a different threshold reasonably designed to result in disclosure of material environmental proceedings so long as the threshold does not exceed the lesser of \$1 million or one percent of the registrant's and its consolidated subsidiaries' current assets. In the event that a registrant elects to use a threshold other than \$300,000, it must disclose this threshold in each annual and quarterly report.

Item 105 (Risk Factors). The amendments to Item 105:

- if the risk factor section exceeds 15 pages, require a concise, bulleted or numbered summary, not to exceed two pages, of the principal factors that make an investment in the registrant or offering speculative or risky;⁴
- change the disclosure standard from requiring disclosure of the "most significant" risk factors to requiring disclosure of "material" risk factors;
- require risk factors to be organized with relevant headings; and
- continue to discourage the presentation of generic risk factors, but also require that, to the extent risk factors that apply generically to any registrant or offering are presented, such risk factors be disclosed at the end of the risk factor section under a separate "General Risk Factors" heading.

In the adopting release, the SEC noted that "despite longstanding Commission and staff guidance stating that risk factors should be focused on the 'most significant' risks and should not be boilerplate, it is not uncommon for companies to include generic risks" and that the requirement of summary disclosure is intended to both "enhance the ability of investors to process relevant information" and require issuers to focus on materiality. According to the SEC, the 15-page requirement is expected to affect approximately 40 percent of filers.

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The final amendments, apart from requiring the “General Risk Factors” heading for generally applicable risk factors, do not specify, or provide examples of, the risk factor headings that registrants should use in their public filings. As the SEC notes, “many registrants already organize their risk factor disclosure through groupings of related risk factors and the use of headings.” With respect to disclosure of generic risk factors, the SEC noted that registrants are already in the position to make a determination as to which risk factors are “generic” and that it does not believe “additional clarification is necessary regarding the types of risks that would constitute a general risk factor.”

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ENDNOTES

- 1 For the full text of the final rule, see “Modernization of Regulation S-K Items 101, 103, and 105,” available at <https://www.sec.gov/rules/final/2020/33-10825.pdf> (the “adopting release”).
- 2 Adopting release, at 19, footnote 41.
- 3 The adopting release notes that “while the final amendments do not require registrants to use a disclosure standard or framework to provide human capital disclosure, as recommended by some commenters, a principles-based approach affords registrants the flexibility to tailor their disclosures to their unique circumstances, including by providing disclosure in accordance with some or all of the components of any current or future standard or framework that facilitates human capital resource disclosure that is material to an understanding of the registrant’s business taken as a whole.”
- 4 The SEC notes that “the risk summary is not required to contain all of the risk factors identified in the full risk factor discussion, [and] registrants may prioritize certain risks and omit others.”

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