

SEC AMENDS REGULATION S-K'S REQUIREMENTS FOR BUSINESS DESCRIPTION, LEGAL PROCEEDINGS AND RISK FACTOR DISCLOSURES

In late August 2020, the U.S. Securities and Exchange Commission ("SEC") adopted amendments to Regulation S-K to modernize and update the requirements for business description, legal proceedings and risk factor disclosures (the "Reg. S-K Amendments"). The SEC's final rule release for these amendments is available [here](#). As amended, these disclosure requirements will be more principles-based and offer registrants additional flexibility in an effort to reduce duplicative or immaterial disclosures. These amendments will become effective on November 9, 2020.

Executive Summary

The table that appears on the right hand side of this page provides a summary of the Reg. S-K Amendments and identifies which SEC forms these amendments affect. Regulation S-K is the primary U.S. regulation governing the information that must be disclosed in registration statements for public offerings and ongoing SEC reports. Offering participants in Rule 144A offerings, which are exempt from U.S. registration requirements, also use Regulation S-K as a guide when considering whether they are disclosing all material information to investors in their offering documents.

Amended Disclosure Requirements of Regulation S-K	Affected Forms	
	Securities Act Registration Statements	Exchange Act Reports and Statements
Item 101 – Business Description <ul style="list-style-type: none"> • More principles-based disclosure requirement • Eliminates five-year time frame • Provides option to update and incorporate by reference previously filed disclosure regarding general development of a registrant's business • Adds material changes to business strategy as a disclosure topic • Adds human capital resources, measures and objectives as a disclosure topic • Adds material government (and not just environmental) regulations as a disclosure topic 	S-1 S-4	10 10-K Sch. 14A Sch. 14C
Item 103 – Legal Proceedings <ul style="list-style-type: none"> • Allows use of cross-references or hyperlinks to discourage repetitive disclosure • Raises the disclosure threshold for governmental environmental proceedings to reduce disclosure of immaterial proceedings 	S-1 S-4 S-11	10 10-K 10-Q Sch. 14A Sch. 14C
Item 105 – Risk Factors <ul style="list-style-type: none"> • Risk factors summary (not to exceed two pages) to be included if risk factor section exceeds 15 pages • Changes standard for disclosure to "material" risks • Risk factors to be organized under relevant headings • Risk factors that apply generally to investments in securities to be grouped under "General Risk Factors" heading 	S-1 S-3 S-4 S-11 SF-1 SF-3	F-1 F-3 F-4 10 10-K

As indicated in the above table, foreign private issuers using Form 20-F for their annual reports will only be directly affected by the Reg. S-K Amendments with respect to the risk factors sections in any registrations statement they file using Form F-1, F-3, or F-4. As discussed below in more detail, in certain circumstances it may be advantageous for foreign private issuers to consider voluntarily complying with other changes made by the Reg. S-K Amendments in connection with their annual reports on Form 20-F.

Background

The Reg. S-K Amendments are part of the SEC's disclosure modernization efforts arising from two legislative mandates. First, the Jumpstart Our Business Startups Act of 2012 tasked the SEC with conducting a comprehensive analysis of the disclosure requirements of Regulation S-K. Second, the Fixing America's Surface Transportation Act of 2015 mandated additional study of Regulation S-K to determine how best to modernize and simplify such requirements in a manner that reduces the costs and burdens on issuers while still providing all material information. The resulting amendments are generally principles-based and facilitate a registrant-specific approach to disclosure. In formulating these amendments, the SEC considered capital markets and economic developments that have occurred in the more than 30 years since the adoption of these requirements.

Principles-based, registrant-specific disclosure approach. The SEC's disclosure requirements, while prescriptive in some respects, are rooted in materiality and are designed to facilitate an understanding of an individual registrant's business, financial condition and prospects through the lens through which management and the board of directors manage and assess the performance of the registrant. In this context, information regarding a registrant is "material" if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.

The following sections discuss the Reg. S-K Amendments in more detail.

Amendments to Item 101(a): General Development of Business

Item 101(a) of Regulation S-K, as amended, will require registrants to describe the general development of the business of the registrant, its subsidiaries, and any predecessors. In describing developments, only information material to an understanding of the general development of the business will be required.

Elimination of five-year time frame. This disclosure requirement had directed registrants to describe their business development during the past five years (or such shorter period as the registrant had engaged in business). Amended Item 101(a) will no longer include this five-year timeframe. Registrants will be required to provide information material to an understanding of the development of their business, irrespective of a specific timeframe. The SEC would expect a registrant to disclose information for periods earlier than five years if the information is material to an understanding of the general development of the registrant's business.

Non-exclusive list of disclosure topics. Item 101(a) has also been amended to become a more principles-based disclosure requirement by providing a non-exclusive list of the types of information that a registrant may need to disclose to provide information regarding the general development of the registrant's business.

Notably, this list includes material changes to a previously disclosed business strategy. The SEC included this as a new topic because it is customary for companies to discuss their business strategies in their IPO registration statements. For these companies, the SEC believes that a material change to a previously disclosed business strategy may be material to investors.

Other topics included in the list of disclosure topics are:

- 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.

Disclosure with respect to any listed topic will only be required to the extent such information is material to an understanding of the general development of a registrant's business.

Amended Item 101(a) will no longer prescribe disclosure of the year in which the registrant was organized, its form of organization, or any material changes in the mode of conducting business. Nevertheless, the SEC continues to expect registrants to provide this information to the extent that it is material to an investor's understanding of the general development of the registrant's business.

The SEC has not made any equivalent amendments to Item 4.A. (History and development of the company) of Form 20-F. Nevertheless, foreign private issuers who have voluntarily disclosed their business strategy in connection with their US IPOs may want to consider whether any subsequent change in their business strategy constitutes information material to investors. For annual reports using Form 20-F, disclosure of a change in previously disclosed business strategy could be included in response to Item 4.A.

Option to update previously filed business development disclosures. Item 101(a), as amended, will permit a registrant to provide an update regarding the general development of its business to focus on material developments since its most recent filing (registration statement or periodic report) in lieu of providing a full discussion of the general development of the registrant's business.

To take advantage of this option, a registrant will need to incorporate by reference, and include an active hyperlink to, a single filing that contains a full discussion of the general development of the registrant's business. The SEC has acknowledged that this approach is more restrictive than existing incorporation by reference requirements, which allows registrants to provide disclosure by incorporating by reference some or all of it from more than one previously filed document.

Registrants considering whether to use the new updating option should be aware that if an annual report on Form 10-K includes an update and incorporates by reference the more complete Item 101(a) discussion in a prior filing (such as an IPO prospectus), Rule 411(e) under the Securities Act of 1933 would disallow the incorporation by reference of such disclosure into a subsequent filing (such as a Form S-3). We anticipate that registrants with effective shelf registration statements

(or expecting to file a shelf registration statement in the near future) will likely continue providing complete Item 101(a) discussions in their annual reports.

The SEC has adopted corresponding amendments to Item 101(h) for smaller reporting companies. The SEC has not adopted any similar amendments to Form 20-F.

Amendments to Item 101(c): Description of Business

The narrative business description requirements of Item 101(c) of Regulation S-K, as amended, clarify and expand its principles-based approach by providing a non-exclusive list of disclosure topics to be addressed by registrants to the extent such disclosures would be material to an understanding of the registrant's business taken as a whole.

Human capital resources. Notably, these disclosure topics will include the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business. The SEC declined to include more prescriptive requirements because exact measures and objectives included in human capital related disclosures may evolve over time and may vary significantly based on factors such as the registrant's industry, the various regions or jurisdictions in which a registrant operates, and its general strategic position.

The requirement in Item 6.D. of Form 20-F to provide information regarding a company's employees has not been amended. Foreign private issuers who use Form 20-F for their annual reports may nevertheless want to consider whether adding disclosure related to any human capital measures or objectives used in managing the business in response to either Item 6.D. (Employees) or Item 4.B. (Business Overview) would provide material information to investors.

Effects of compliance with governmental regulations. Amended Item 101(c) will require, to the extent material to an understanding of a registrant's business taken as a whole, disclosure of the material effects that compliance with government regulations (including environmental regulations) may have upon the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries. In the adopting release, the SEC assures registrants that this amended item will not call for, or require, a recitation of every regulation that affects a registrant's business and operations. Although Item 101 has not previously required disclosure of government regulations that may be material to a registrant's business, it has been common practice for many registrants to voluntarily include this type of disclosure in response to Item 101(c). Accordingly, the SEC expects the increased compliance burden associated with this amendment to be minimal.

Amendments to Item 103: Legal Proceedings

Item 103 of Regulation S-K requires registrants to describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Amended Item 103 of Regulation S-K will encourage registrants to avoid duplicative disclosures by expressly permitting the provision of required disclosures by including hyperlinks or cross-references to legal proceedings related disclosure located elsewhere in the document (for example, in risk factors, MD&A or a financial statement footnote).

Amended disclosure threshold regarding environmental proceedings.

Amended Item 103 includes an increased threshold for disclosure of environmental proceedings to which the government is a party to adjust for inflation. The threshold was \$100,000 and will be \$300,000. Recognizing that the application of a \$300,000 threshold to large registrants could result in disclosure of information that is not material, amended Item 103 will permit a registrant to choose an alternate threshold in an amount that the registrant determines is reasonably designed to result in disclosure of environmental proceedings that are material to its business or financial condition. Any alternate threshold may not exceed the lesser of:

- \$1 million; or
- 1% of the current assets of the registrant and its subsidiaries on a consolidated basis.

For example, a registrant that has \$90 million in consolidated current assets may choose to apply an alternate threshold amount up to \$900,000 that it determines is reasonably designed to result in disclosure of material environmental proceedings. If using such an alternate threshold, a registrant will need to disclose the amount of threshold (and any changes to the amount) in each annual and quarterly report.

Amendments to Item 105: Risk Factors

The SEC's recent revisions to Item 105 of Regulation S-K are generally intended to address the lengthy and sometimes generic nature of risk factor disclosures presented by many public companies.

Risk factor summary. Item 105 directs registrants to concisely explain how each risk affects them or the securities being offered. If a registrant's risk factor section is longer than 15 pages, amended Item 105 will require registrants to include in the forefront of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky. The risk factor summary must not exceed two pages, and it is not required to contain all of the risk factors identified in the full risk factor discussion. Registrants may choose to prioritize certain risks and omit some. Based on an analysis of past filings, the SEC staff estimates that approximately 40% of filers will likely be affected by this 15-page threshold. In the adopting release for these amendments, the SEC acknowledged that this requirement is similar to the risk factor summary requirement set forth in Item 3(b) of Form S-11, and that Form S-11 filings provide an appropriate model for the risk factor summaries required by amended Item 105. Risk factor summaries included in Form S-11 filings typically consist of a series of bulleted or numbered statements comprising no more than one page on average.

Issuers seeking to use the same disclosures for retail offerings in both the United States and the European Union should note that the EU prospectus regulation (Regulation (EU) 2017/1129) requires a risk factor summary to provide no more than 15 specific risks considered to be most relevant to an investor making an investment decision.

The risk factor disclosure requirement in Item 3.D. of Form 20-F has not been amended. As a result, foreign private issuers that use Form 20-F for their annual reports will not be required to provide a risk factor summary if the risk factor section in their annual report exceeds 15 pages. Foreign private issuers registering

securities using Form F-1, F-3 or F-4 will, however, be affected by this amendment because these forms incorporate Item 105 of Regulation S-K. Item 105 may be interpreted to require a risk factor summary in the forepart of a registration statement on F-1, F-3 or F-4 if it incorporates by reference an annual report on Form 20-F that includes a risk factor section longer than 15 pages. Accordingly, foreign private issuers expecting to use shelf registration statements for ongoing offerings may want to consider voluntarily including a risk factor summary in their annual reports to facilitate incorporation by reference when the risk factor section exceeds 15 pages.

Materiality standard. Item 105 of Regulation S-K has required a discussion of the most significant factors that make an investment in a company and its securities speculative or risky. This "most significant" standard was not separately defined by SEC rule and was generally understood to include, but not be limited to, all material risks. Amended Item 105 will require a discussion of the material factors that make an investment in a company or the offered securities speculative or risky. By switching to a materiality standard, the SEC seeks to focus registrants on disclosing the risks to which reasonable investors would attach importance in making investment decisions.

Use of headings to organize risk factors. Amended Item 105 will require risk factors to be organized logically under relevant headings. Except for a "General Risk Factors" heading discussed below, amended Item 105 will not require registrants to use any specific headings. Many registrants already organize their risk factor disclosure by grouping together related risk factors and using headings such as "Risks related to our business," "Competitive risks" or "Risks related to our indebtedness." These registrants will likely not need to significantly revise their existing risk factor disclosures to comply with amended Item 105.

Discouraging the use of generic risk factors. Amended Item 105 discourages, but does not completely prohibit, the presentation of risks that could apply generically to any registrant or any offering. If a registrant chooses to present a risk that could apply to other companies or securities offerings without explaining why the identified risk is specifically relevant to an investor in its securities, the risk factor would need to be placed at the end of the risk factor section under the caption "General Risk Factors."

We note that most registrants have been using risk factor disclosures to qualify for protection from liability for forward-looking statements in addition to satisfying Item 105 requirements. Pursuant to a judicially created "bespeaks caution" doctrine, specific and informative risk factor disclosure can help an issuer establish a defense to shareholder litigation involving claims that forward-looking statements were misleading. Similarly, when forward-looking statements are accompanied by meaningful cautionary statements, qualifying US public companies may also seek to take advantage of a liability safe harbor provided by the Private Securities Litigation Reform Act of 1995 ("**PSLRA**"). If a registrant includes a risk factor under a heading that identifies the risk factor as generic, there is a concern that the risk factor disclosure may not be sufficiently specific for purposes of the bespeaks caution doctrine or the PSLRA safe harbor. In the adopting release for these amendments, the SEC expresses its view that "if a registrant includes one or more risk factors under the 'General Risk Factor' caption, that fact alone should not affect the availability of the PSLRA safe harbor." A court considering claims in a securities

class action lawsuit may, however, disagree. To maximize the liability protection provided by risk factor disclosures, companies should consider revising any generic risk factors to indicate why the identified risk is specifically relevant to an investor in its securities (instead of placing it under the heading "General Risk Factors").

Issuers seeking to use the same disclosures for investors in both the United States and the European Union should note that the EU prospectus regulation generally requires risk factors to identify the specific manner in which the relevant risk may affect the issuer or payments on the securities. If a risk factor appears under the caption "General Risk Factors", there is a risk that the inclusion of that risk factor may be challenged by the relevant competent authority in the European Union.

Conclusion

The Reg. S-K Amendments modernize and update the SEC's requirements regarding business description, legal proceedings and risk factor disclosures. Notably, in terms of new requirements, Item 101 of Regulation S-K will be expanded to require disclosure of material information regarding human capital resources and changes in previously disclosed business strategy, and Item 105 of Regulation S-K will require summary risk factor disclosures depending on the length of the registrant's risk factor section. While the SEC has not amended Form 20-F, foreign private issuers may want to consider whether providing information about human capital resources and changes in previously disclosed business strategy would provide material information to their investors and whether to voluntarily include risk factor summaries. In addition, registrants will want to consider whether to take advantage of several optional provisions meant to discourage duplicative or immaterial disclosures, such as incorporating certain disclosures by reference or setting a customized disclosure threshold for certain environmental proceedings.

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