

# Clients & Friends Memo

## SEC Adopts Amendments to Regulation S-K Requirements

August 28, 2020

The Securities and Exchange Commission is adopting amendments to the business description, legal proceedings and risk factor disclosures required by registered companies in annual and quarterly reports and registration statements. The amendments were proposed in August 2019<sup>1</sup> and are intended to modernize disclosure requirements, including by eliminating certain duplicative requirements and improving the usability of filings for investors. The SEC expects the amendments to elicit disclosures that are tailored to registrants' particular circumstances.

The amendments will go into effect 30 days after publication in the Federal Register.

### General Development of Business (Item 101(a))

The amendments to Item 101(a) of Regulation S-K reflect the SEC's shift towards a "principles-based" approach, where disclosure objectives are set and registrants have more flexibility in determining what disclosure is important for their particular business, and away from the "prescriptive" approach requiring all registrants to disclose the same types of information.

- Qualification of Required Disclosure. Under current Item 101(a) of Regulation S-K, a registrant must make disclosure regarding the general development of the registrant's business, including: bankruptcy and receivership proceedings, merger or consolidation of the registrant or its major subsidiaries, and the acquisition or disposition of a material amount of assets. The new rules will require disclosure on these topics only to the extent that the disclosure would be material to understanding the general development of the registrant's business.
- Broadening Discussion Topics. "Material changes to a registrant's previously disclosed business strategy" will be added to the list of disclosure topics. However, the list will also be made non-exclusive, and the registrant will be required to disclose information not otherwise contemplated

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<sup>1</sup> See Cadwalader, Wickersham & Taft, SEC Proposes Amendments to Modernize Disclosure Requirements, available at <https://www.cadwalader.com/resources/clients-friends-memos/sec-proposes-amendments-to-modernize-disclosure-requirements>

by the list of disclosure topics if such information would be material to understanding the general development of the registrant's business.

- Elimination of the Five-Year Timeframe. Discussion of the general development of the registrant's business will be made without respect to a specific timeframe. Instead, the registrant will be required to provide information material to an understanding of the development of the business, regardless of the specific timeframe.
- Require Only Updated Disclosure. The new rules will allow registrants, in filings made after a registrant's initial filing, to include only disclosure of all material developments that have occurred, if any, since the most recent full discussion of the general development of its business disclosed in a previously filed registration statement or report. If a registrant chooses this approach, it must incorporate by reference the most recent full discussion of the development of its business.

#### **Narrative Description of Business (Item 101(c))**

The amendments to Item 101(c) of Regulation S-K follow the "principles-based" approach of the changes to Item 101(a) of Regulation S-K by eliminating the required disclosure of specific information, and instead requiring the registrant to make disclosures that are more relevant to such registrant's particular business.

- Qualification of Required Disclosure. The current rule regarding the narrative description of a registrant's business lists twelve specific items that must be disclosed to the extent material to an understanding of the registrant's business taken as a whole. The amendments will shorten this list and make the items non-exclusive.
- Human Capital Resources. The new rules will add the requirement that, to the extent such disclosure is material to an understanding of the registrant's business taken as a whole, a registrant must include a description of the registrant's human capital resources, including any human capital measures or objectives that the registrant focuses on in managing the business, which may change depending on the registrant's industry.
- Government Regulation Compliance. The new rules will broaden the current required discussion of the material impact of environmental regulations on the registrant's business to a required discussion of the material effects of compliance with any government regulations, including environmental regulations, on the registrant's business.

#### **Legal Proceedings (Item 103)**

Changes to the legal proceedings disclosure requirements in Item 103 of Regulation S-K are meant to modernize the requirements by eliminating duplicative disclosure and using more up-to-date and tailored dollar thresholds.

- Cross-references. A registrant will be able to provide required disclosure about legal proceedings by using cross-references or hyperlinks to discussion elsewhere in the filing, such as the registrant’s financial statements.
- Higher Threshold for Certain Governmental Environmental Proceedings. Current rules require that registrants disclose certain governmental environmental proceedings that could result in sanctions of \$100,000 or greater. The amendments will increase this threshold to \$300,000. A registrant may also select a different threshold that it 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 current assets of the registrant. A registrant selecting a different threshold must disclose the threshold in each annual and quarterly report.

### **Risk Factors (Item 105)**

Changes to the risk factors disclosure requirements in Item 105 of Regulation S-K are meant to facilitate an investor’s review of those risk factors that are particularly relevant to investing in the registrant. The SEC noted that the amendments are intended to address the lengthy and generic risk factors presented by many registrants.<sup>2</sup>

- Materiality Standard. The new rules will replace the “most significant” risk factors standard with a “material” risk factors standard, which will focus disclosure on “the risks to which reasonable investors would attach importance in making investment or voting decisions.”
- Summary for Lengthy Disclosure. Under the amendments, risk factor disclosures exceeding 15 pages will need to be accompanied by a summary aimed at increasing the utility of the section for an investor. The summary is limited to no more than two pages.
- Headings and General Risk Factors. The new amendments will require that risk factors be organized under relevant headings, and that any risk factors that could apply generally to other companies or securities offerings be disclosed at the end of the section under the “General Risk Factors” caption.

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<sup>2</sup> For additional information on risk factor disclosure related to SEC-registered securitizations, see Cadwalader, Wickersham & Taft, SEC Adopts Amendments to Modernize Risk Factor Disclosure Requirements, available at <https://www.cadwalader.com/resources/clients-friends-memos/sec-adopts-amendments-to-modernize-risk-factor-disclosure-requirements>