

# SEC ADOPTS AMENDMENTS TO MODERNIZE DISCLOSURES OF BUSINESS, LEGAL PROCEEDINGS, AND RISK FACTORS UNDER REGULATION S-K

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## U.S. Corporate Alert

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On 26 August 2020, the Securities and Exchange Commission (the Commission) adopted amendments to modernize certain disclosure requirements set forth in Regulation S-K. The amendments relate to the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosure (Item 105) that public companies are required to make pursuant to Regulation S-K. These Items are now designed for the relevant disclosures to be presented on a basis consistent with the scope that management and the board of directors use to manage and evaluate the company's performance. The modernization of these Items is intended to elicit improved company-specific disclosures and add efficiencies to the compliance efforts of public companies. The amendments, [available here](#), will be effective 30 days after publication in the Federal Register.

Currently, Item 101(a) requires a description of the general development of the business of the company during the past five years, or a shorter period as the company may have been engaged in business. Likewise, with respect to Item 101(c), a narrative description of the business done and intended to be done by the company and its subsidiaries is required, focusing upon the company's dominant segment about which financial information is presented in its financial statements.

Item 103 currently requires disclosure of material pending legal proceedings, including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties involved, a description of the factual basis alleged for the proceeding, and the relief sought. Similar information is to be included for any proceedings known to be contemplated by governmental authorities. There is also a threshold for disclosure based on a specified dollar amount (US\$100,000) for proceedings related to federal, state, or local environmental protection laws.

Item 105 requires disclosure of the most significant factors that make an investment in the company or offering speculative or risky and specifies that the discussion should be concise, organized logically, and furnished in plain English. It also states that companies should set forth each risk factor under a sub-caption that adequately describes the risk. Additionally, it directs companies to explain how each risk affects the company or the securities being offered and discourages disclosure of risks that could apply to any company.

The following summarizes key provisions of the final amendments:

## **AMENDMENTS TO DESCRIPTION OF BUSINESS - ITEM 101(A) AND (H) OF REGULATION S-K**

- Requires disclosure of information material to an understanding of the general development of the business to be principles-based, and eliminates the previously prescribed five-year timeframe;
- Eliminates the three-year timeframe with respect to smaller reporting companies; and
- Clarifies that companies, in filings made after a company's initial filing, may provide an update of the general development of the business rather than a full discussion. The update must disclose all of the material developments that have occurred since the company's most recent filing containing a full discussion of the general development of its business, and incorporate by reference that prior discussion.

## **AMENDMENTS TO DESCRIPTION OF BUSINESS - ITEM 101(C) OF REGULATION S-K**

- Eliminates the requirement for a discussion of transactions or events that affect the company's operations required in Management's Discussion and Analysis of Financial Conditions and Results of Operations;
- Clarifies and expands the principles-based approach of Item 101(c), with a non-exclusive list of disclosure topic examples, including revenue-generating activities, product development and market conditions, material resources, government contracts, and seasonality (drawn in part from the topics currently contained in Item 101(c));
- Includes, as a disclosure topic, a description of the company's human capital resources to the extent such disclosures would be material to an understanding of the company's business; and
- Refocuses the regulatory compliance disclosure requirement by including as a topic all material government regulations, not just environmental laws.

## **AMENDMENTS TO LEGAL PROCEEDINGS - ITEM 103 OF REGULATION S-K**

- Expressly states that the required information may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document to avoid duplicative disclosure; and
- Implements a modified disclosure threshold that increases the existing quantitative threshold for disclosure of environmental proceedings to which the government is a party from US\$100,000 to US\$300,000, but that also affords a company the flexibility to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings so long as the threshold does not exceed the lesser of US\$1 million or one percent of the company's current assets.

## **AMENDMENTS TO RISK FACTORS - ITEM 105 OF REGULATION S-K**

- Requires summary, bulleted, or numbered risk factor disclosure of the most material applicable risks of no more than two pages if the risk factor section exceeds 15 pages;
- Refines the principles-based approach of Item 105 by requiring disclosure of "material" risk factors; and

- Requires risk factors to be organized under relevant headings in addition to the sub-captions currently required, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

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