

DIVIDED SEC AMENDS REGULATION S-K RULES TO MODERNIZE DESCRIPTIONS OF BUSINESS, LEGAL PROCEEDINGS AND RISK FACTORS

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On August 26, 2020, by a 3-2 party-line vote, the SEC adopted amendments to Regulation S-K that aim to modernize the descriptions of business and legal proceedings, and risk factor disclosure requirements. The amendments reflect a principles-based approach in which disclosure objectives are set and management is permitted to exercise judgment on how to satisfy those objectives – tailored to the particular registrant – to the extent such information is material to an understanding of the topic.

We have prepared a client alert describing the amendments in more detail. The following is a brief summary.

Description of Business (Items 101(a) and (c)). The amendments provide a nonexclusive list of the types of information that a company may need to disclose, based on a principles-based approach. For example, a company would describe its dependence on key products and services that are material instead of focusing on products and services that meet the quantitative thresholds based on revenue currently prescribed in Item 101(c)(1)(i).

Among other things, the revised list of disclosure topics relating to the general development of a company's business and accompanying business description:

- Eliminates the look-back in Item 101(a) – generally five years, or three years for smaller reporting companies – to focus on material developments of a company's business, regardless of a specific time frame.
- Revises and expands the list of disclosure topics in Item 101(c) with a principles-based, non-exclusive list of topics.
- Require, to the extent material, new disclosures regarding "human capital resources," which includes any human capital measures or objectives that management focuses on in managing the business. Depending on the nature of the company's business and workforce, this would

require disclosure of measures or objectives that address the attraction, development and retention of personnel.

- Expands the current requirement to disclose the impact of environmental regulations to cover all material government regulations.

Legal Proceedings (Item 103). The amendments, among other changes:

- Clarify that hyperlinks or cross-references to legal proceedings disclosure elsewhere in the same document (e.g., notes to the financial statements) are permitted to avoid duplication.
- Establish alternative disclosure thresholds, where disclosure would be required for environmental proceedings to which a governmental authority is a party if such proceeding involves potential monetary sanctions, unless the registrant reasonably believes such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than:
 - \$300,000 or more – tripled from the current \$100,000 level; or
 - At the election of the registrant, such other amount that the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to its business or financial condition; however, the threshold may not exceed the lesser of \$1 million or 1% of the current assets of the registrant on a consolidated basis.

Risk Factors (Item 105). The amendments, among other changes:

- Require a summary – that does not exceed two pages – if the risk factors section exceeds 15 pages.
- Replace the disclosure standard from “most significant” to “material” risk factors to focus on factors that make an investment in the registrant or offering speculative or risky.
- Require 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 (“General Risk Factors”).

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