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The SEC Adopts New Round of Amendments to Simplify and Modernize Disclosure Requirements

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On August 26, 2020, the Securities and Exchange Commission (“**SEC**”) announced amendments to further simplify and modernize disclosure requirements relating to the description of business, legal proceedings, and risk factors. The new amendments to Items 101, 103, and 105 of Regulation S-K mark the first time in over 30 years that these disclosure items have undergone significant revisions and have the dual purpose of both improving disclosures for investors and simplifying compliance for registrants.

The amendments were adopted in connection with the SEC’s objective of reviewing and improving disclosure requirements.

The full text of the final rule may be accessed [here](#). For additional information regarding the SEC’s previous disclosure simplification updates, please see our April 2019 alert [here](#) and our October 2018 alert [here](#).

Amendments

The following table, which is not intended to be comprehensive, summarizes the amendments to Items 101, 103, and 105 of Regulation S-K:

RULE	AMENDMENTS SUMMARY
<p>Description of Business</p> <p>Reg. S-K Items 101(a) and 101(c)</p>	<p><u>General Development of Business (Item 101(a))</u></p> <p>The amendments create a more flexible, principles-based approach by replacing the previously prescribed five-year timeframe (and three-year timeframe applicable to smaller reporting companies) with a materiality framework that requires disclosure of information material to an understanding of the general development of the business.</p> <p>The new rules clarify that disclosure of developments is required only to the extent such information is material to an understanding of the general development of the company’s business, and they replace the previous list of prescribed disclosure requirements with a non-exclusive list of topics, including:</p> <ul style="list-style-type: none"> • Any bankruptcy, receivership, or similar proceedings • The effects of any material reclassification, merger, or consolidation • The acquisition or disposition of a material amount of assets not in the ordinary course of business • Material changes to a company’s previously disclosed business strategy <p>Furthermore, the amendments will allow registrants who have already made an initial filing of a registration statement to provide only an update on – rather than a full discussion of – the general development of the business. Such update must focus on material developments that have occurred since the registrant’s most recent filing in which the registrant has provided a full discussion of the general development of the company’s business, and the full discussion will be incorporated by reference through a single hyperlink to such prior filing.</p>

	<p><u>Narrative Description of Business (Item 101(c))</u></p> <p>The amendments provide a non-exclusive list of seven topics that a company may disclose regarding the business. Disclosure of a topic is only required to the extent that it is material to understanding the company's business taken as a whole. The list includes several existing topics as well as some new topics:</p> <ul style="list-style-type: none"> • Key activities, products and services, and dependence on certain customers • Development efforts for new or enhanced products, trends in market demand and competitive conditions • Material resources and the duration and effect of intellectual property • Businesses subject to renegotiation or termination of government contracts • Seasonality • Compliance with material government regulations, including but not limited to environmental regulations • Human capital resources, including the number of persons employed (although "human capital" is purposefully left undefined in light of the fact that this concept is tailored to the circumstances and objectives of individual companies) <p>References to the following current topics are deleted:</p> <ul style="list-style-type: none"> • Disclosure about new segments • The dollar amount of backlog orders • Working capital practices
<p>Legal Proceedings</p> <p>Reg. S-K Item 103</p>	<p><u>Cross-References</u></p> <p>The amendments expressly state that the information required by this item may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document (such as in the notes to the financial statements, the risk factors, or in the MD&A section) to avoid duplicative disclosure.</p> <p><u>Environmental Proceedings Disclosure</u></p> <p>The new rules also implement a modified disclosure threshold for environmental proceedings to which the government is a party by increasing the current threshold from \$100,000 to \$300,000. Alternatively, the new rules also allow a company 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 \$1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis. If a company chooses to select a different threshold, it must disclose such threshold (including any change thereto) in each subsequent Form 10-K and Form 10-Q.</p>

<p>Risk Factors</p> <p>Reg. S-K Item 105</p>	<p><u>Risk Factor Summary</u></p> <p>Where risk factor disclosures exceed 15 pages, the amendments will now require a summary risk factor disclosure of no more than 2 pages. The risk factor summary disclosure must be in the form of bulleted or numbered statements that summarize the principal risk factors that make an investment in the registrant or the offering speculative or risky. This summary disclosure must appear at the forepart of the filing.</p> <p><u>Focus on “Material” Risk Factors</u></p> <p>The new rules now require disclosure of the “material” factors—rather than the “most significant” factors—that make an investment in the registrant or offering speculative or risky. The term “material” encompasses both investment and voting decisions and is defined under Rule 12b-2 of the Securities Exchange Act of 1934, as amended, and Rule 405 of the Securities Act of 1933, as amended. As the SEC has previously stated, the definition of “material” is consistent with the Supreme Court’s decision in <i>TSC Industries</i>, which held that information 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.</p> <p><u>Risk Factor Subheadings</u></p> <p>The amendments require registrants to organize risk factors under relevant headings, in addition to the subcaptions that are already required. With the addition of subcaptions, the SEC stated that it is not requiring registrants to prioritize the order in which risk factors are presented.</p> <p><u>Generic Risk Factors</u></p> <p>Importantly, any generic or boilerplate risk factors that could apply to any company or offering must appear at the end of the risk factor section under the caption “General Risk Factors.” The SEC encourages registrants to tailor risk factor disclosure, showing a specific relationship to the registrant, to avoid the need to include risk factors under the “General Risk Factors” heading.</p>
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Effective Dates of Amendments

The amendments will become effective 30 days following publication in the Federal Register. While the actual publication date remains uncertain, there is a possibility that the new rules will become effective before the end of the third quarter reporting period for reporting issuers with a fiscal year ending on December 31, thereby impacting their Form 10-Q filings. At the latest, we expect the new rules to become effective before Form 10-K filings for year-end reporting issuers.

In anticipation of a possible roll-out date by the end of the third quarter, we recommend that issuers begin preparations for the updated legal proceedings disclosures for their upcoming Form 10-Q filing and updated business description and risk factor disclosures for their next Form 10-K filing.

For additional information, please contact any member of Haynes and Boone’s [Capital Markets and Securities Practice Group](#).