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SEC Update

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Principles matter: SEC amends disclosure rules for business, legal proceedings, and risk factors

On August 26 the SEC adopted far-reaching amendments to Regulation S-K items that govern disclosures on business, legal proceedings, and risk factors in filings under the Securities Act of 1933 and the Securities Exchange Act of 1934. The amendments represent the most significant changes to these items in over 30 years.

The amendments represent a shift by the SEC towards a more principles-based approach to disclosure and away from prescriptive requirements that specify the content and manner of disclosure. The amended rules afford registrants greater flexibility to determine which information is material to an understanding of their business and how to present the information. In many cases, registrants will have to consider how to recast the current description of their business, based largely on line-item disclosure requirements, into a presentation more closely tailored to their particular business and financial circumstances.

The SEC's adopting release describing the amendments (Nos. 33-10825 and 34-89670) may be accessed here.

Effectiveness of amendments

The amendments will become effective 30 days after their publication in the Federal Register, which had not occurred as of the release of this *SEC Update*.

The adopting release does not provide guidance regarding the transition from compliance with the current rules to compliance with the amendments. In the absence of other direction from the SEC staff, registrants will be required to comply with the amendments in filings made on or after the effective date.

Registrants are required to provide disclosures under the amended items in periodic reports, some proxy statements, and registration statements filed under the Exchange Act, as well as in registration statements filed under the Securities Act. For many registrants, the amendments will be addressed first in the Form 10-K annual report, which requires disclosures covering all three items. For other registrants, compliance initially could be required in a Form 10-Q quarterly report, which may necessitate new or updated disclosures on legal proceedings or risk factors.

Background

The amendments change disclosure requirements in three Regulation S-K items:

- Item 101, which contains requirements for "Description of Business";
- Item 103, which contains requirements for disclosure on "Legal Proceedings"; and
- Item 105, which contains requirements for disclosure on "Risk Factors."

The amendments represent the most recent milestone in the SEC's ongoing "disclosure effectiveness initiative." The Fixing America's Surface Transportation Act (FAST Act) of 2015 requires the SEC to study the disclosure requirements in Regulation S-K with a goal of recommending ways to streamline those requirements, reduce compliance costs and burdens, improve the readability and navigability of disclosure, and discourage repetition and the disclosure of immaterial information. In 2019 the SEC adopted amendments to Regulation S-K and related forms and rules in accordance with this mandate.

In its adopting release for the most recent amendments, the SEC characterizes the amendments as a "modernization" of its disclosure requirements that is intended to "improve disclosure for investors" and to "simplify compliance for registrants." In adopting the amendments, the SEC considered comments on a 2016 concept release and other public invitations to comment on its business and financial disclosure requirements, as

well as on the rule proposal for the amendments that it issued last year.

Registrants subject to amendments

The amendments will affect disclosure obligations of domestic registrants and, to a limited extent, foreign private issuers.

- *Domestic registrants:* The amendments will affect all domestic registrants.
- *Foreign private issuers that file on domestic forms:* The amendments also will affect the small number of foreign private issuers that have elected to file on domestic disclosure forms under the Securities Act and the Exchange Act.
- *Foreign private issuers that file on foreign registration forms:* Most foreign private issuers will be affected only by the amendments to Item 105 (risk factors), since Form 20-F and Securities Act Forms F-1, F-3 and F-4 applicable to foreign private issuers specifically refer to that item. The amendments to Items 101 (description of business) and 103 (legal proceedings) will not affect such foreign private issuers, whose disclosures on those topics are subject to different requirements specified in Form 20-F.

The SEC did not extend the amendments to all of the corresponding disclosure rules applicable to foreign private issuers filing on foreign forms because it believed that doing so might reduce the ability of those issuers to use a single disclosure document to satisfy requirements of multiple jurisdictions. As a result, absent additional rule changes, the requirements for business and legal proceedings disclosures by such foreign private issuers will remain largely prescriptive in nature.

Regulatory considerations

Two noteworthy regulatory considerations underpin the SEC's approach to this latest round of disclosure changes.

Movement to principles-based disclosure

Prescriptive versus principles-based disclosure. Regulation S-K currently reflects a mix of principles-based and prescriptive disclosure elements. In the latest amendments, the SEC has moved more towards a principles-based disclosure approach, although it has retained some prescriptive features in the amended items.

As discussed in the adopting release, prescriptive disclosure requirements use bright-line, quantitative or other thresholds to identify required disclosures, or enumerate required disclosure topics that direct companies to disclose the same type of information. Principles-based rules, on the other hand, require a company's management to evaluate the significance of information in the context of the company's particular business and financial circumstances, and to determine whether disclosure is necessary in light of established principles of materiality and how to present any such disclosure.

The SEC concurs with the view, expressed by many commenters on the 2016 concept release and the rule proposal, that principles-based disclosure should enable a company to provide investors with more tailored disclosure and reduce disclosure that is immaterial, irrelevant, or outdated. The SEC acknowledges the concerns, conveyed in the comment process by some investors, that principles-based rules give management too much leeway in deciding whether information is material and in determining the way in which information will be provided. The SEC recognizes that, without specific disclosure guidelines, registrants may "misjudge what information is material." It expects, however, that this risk will be mitigated by the operation of internal controls, board oversight of the disclosure process, the SEC staff's filing review program, the registrant's engagement with investors, and the application of the antifraud provisions of the securities laws.

Some commenters also objected that the elimination of disclosure benchmarks applicable to all registrants would reduce the comparability of disclosures across registrants and industries. The SEC concedes that less comparability might be one cost of a principles-based approach, but suggests that in some cases investors may place too much weight on comparisons that are not appropriate due to differences among registrants.

Meaning of "material" information. The SEC emphasizes in the adopting release that disclosure must be guided by management's judgment regarding the materiality of particular information. The agency reminds registrants that the term "material" as used in Items 101, 103, and 105 is defined under Exchange Act Rule 12b-2 and Securities Act Rule 405 in a manner consistent with decisions of the U.S. Supreme Court. Those rules define material information as information regarding "those matters to which there is a substantial likelihood that a reasonable investor would attach importance" in determining whether to buy or sell the applicable securities.

Increased use of hyperlinks

The amendments also reflect the SEC's continuing efforts to increase the use of hyperlinks in order to reduce redundant disclosures in filings, better integrate disclosures within and across filings, and facilitate investor access to prior disclosures. In recent years the SEC has adopted rules requiring an active hyperlink to each exhibit included in a filing's exhibit index, as well as an active hyperlink to information incorporated by reference into a registration statement or report if the information is publicly available on EDGAR. As discussed below, the SEC has now further expanded the use of hyperlinks in disclosures regarding business and legal proceedings.

Summary of amendments

The amendments make the following changes to the three items:

Amendments to Item 101 (description of business)

General development of business (Item 101(a)). The amendments eliminate the current requirement under Item 101(a) that a registrant provide a description of the development of its business during the past five years (or any shorter period in which the registrant has been engaged in business) and afford registrants more flexibility to tailor this disclosure to their particular circumstances.

The current item requires disclosure of the year in which the registrant was organized and the registrant's form of organization. With reference to the five-year timeframe, the registrant is required to disclose: any bankruptcy or similar proceedings affecting the registrant; the nature and results of any material reclassification, merger, or consolidation affecting the registrant or any significant subsidiary; the acquisition or disposition of a material amount of assets outside the ordinary course of business; and any material changes in the registrant's mode of conducting business. The item also requires disclosure for earlier periods if material to an understanding of the general development of the registrant's business.

The SEC amended this item to make it more principles-based and permit registrants to provide information they consider material to an understanding of the development of their business. Among other changes, the amendments:

- *Eliminate the five-year timeframe:* Registrants may now provide business development disclosure for the period of time they consider material, which, the SEC notes, may be shorter, but also longer, than five years.
- *Permit updates rather than a full description:* The current item requires the complete business development disclosure in Form 10-K reports and some registration statements. By contrast, under the amended item, following its initial registration statement, the registrant may elect to provide only an update of its business development disclosure that describes material developments, if any, during the reporting period. If a registrant chooses the update approach, rather than repeating the full disclosure in each filing, it will be required to incorporate by reference the most recently filed full discussion of the general development of its business. The full disclosure must be incorporated by one active hyperlink to the registrant's most recent filing containing the discussion.
- *Replace prescribed disclosure topics with non-exclusive disclosure examples:* The amendments replace the list of prescribed disclosure topics with a non-exclusive list of the types of information that a registrant "may include" in its business development description. Under this principles-based change, the registrant would be required to address a disclosure topic only to the extent it considers the topic to be material to an understanding of the general development of its business. The new list duplicates most of the current disclosure topics, but eliminates required disclosure of the registrant's year and form of organization, as well as a description of changes in the mode of conducting the registrant's business. The SEC cautions, however, that a registrant would be required to address the topics dropped from the current list if they are material to an understanding of the general development of its business.
- *Include material changes to previously disclosed business strategy as a disclosure example:* The SEC included in its list of non-exclusive disclosure examples information by a registrant concerning "[a]ny material changes to a previously disclosed business strategy." The SEC did not add annual disclosure of a registrant's business strategy as a disclosure requirement or a non-exclusive disclosure topic. In the SEC's view, however, once a registrant has disclosed its business strategy, "it is appropriate for it to discuss changes to that strategy, to the extent material to an understanding of the development of the registrant's business." The SEC adds that the principles-based approach of the amended item gives registrants flexibility to determine the appropriate level of detail for business strategy disclosures that will not reveal competitively harmful information.

The amendments make corresponding changes to Item 101(h) of Regulation S-K, which extends to smaller reporting companies a scaled back version of the business development disclosures that apply to other registrants under Item 101(a). Under the current rule, smaller reporting companies must provide these disclosures for a three-year timeframe, a requirement that has now been eliminated.

Narrative description of business (Item 101(c)). The amendments to Item 101(c) are intended to make the item more clearly principles-based by replacing 12 mandatory disclosure topics in the current rule with five non-exclusive examples of disclosure subjects that registrants "may include" in their filings if material to an understanding of their business.

Non-exclusive disclosure examples. Amended Item 101(c)(1) lists the following five non-exclusive disclosure topics registrants may address in the narrative description of their business and reportable segments based on their materiality determinations:

- *Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers:* The SEC believes that disclosure of these items "generally would be material to an investment decision."
- *Status of development efforts for new or enhanced products, trends in market demand and competitive conditions:* The SEC believes that the principles-based nature of the item should provide registrants with sufficient flexibility to disclose this information, if material, without exposing proprietary or other competitively sensitive data.
- *Resources material to a registrant's business, such as (a) sources and availability of raw materials, and (b) the duration and effect of all patents, trademarks, licenses, franchises, and concessions held:* The SEC believes that information about raw materials should be provided in the description of businesses whose products or services depend on raw materials. In response to comments on the rule proposal, the SEC decided not to refer in this example to potential disclosure of information about the duration and effect of copyright and trade secret protections.
- *A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government:* The SEC highlights in the adopting release the ways in which laws and regulations relating to procurement and performance of U.S. government contracts impose terms and rights that typically differ from those associated with commercial contracts.
- *The extent to which the business is or may become seasonal:* In listing seasonality as a potential topic for discussion in the narrative description of the business, the SEC also deleted the current requirement to address seasonality in management's discussion and analysis.

Disclosure of government regulations and human capital resources. The amended item retains some prescriptive features but permits registrants to shape the disclosure based on their materiality evaluations. Item 101(c)(2) requires a registrant to include the following two disclosures "with respect to, and to the extent material to an understanding of, the registrant's business taken as a whole, except that, if the information is material to a particular segment, [the registrant] should additionally identify that segment":

- *The material effects that compliance with government regulations, including environmental regulations, may have upon capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period:* The SEC has expanded its requirement in current Item 101(c)(1)(xii) mandating disclosure of the material effects of compliance with environmental laws to compliance with governmental regulations generally because many registrants already recognize the materiality of, and provide information regarding, government regulation. The SEC acknowledges that registrants may be required to address the impact of government regulation in management's discussion and analysis. The Item 101(c) requirement, however, seeks to elicit information about government regulation material to an understanding of the registrant's business as a whole, which the SEC intends to have a "broader" focus than an analysis of regulatory effects on the registrant's financial condition, liquidity, or operating results. The SEC calls on registrants to make appropriate materiality determinations about which government regulations to describe, and affirms that the item "does not call for, or require, a recitation of

every regulation that affects a registrant's business and operations."

- *A description of 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 (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel):* The issue of human capital disclosure attracted a heavy volume of comments and inspired a rulemaking petition by investor groups requesting the SEC to require registrants to disclose information about their human capital management, policies, practices, and performance. In amending current Item 101(c)(1)(xiii), consistent with its rule proposal, the SEC decided in favor of a largely principles-based standard for disclosure on human capital resources issues, eschewing bright-line quantitative metrics that either would constitute the core of the disclosure or "ground" a principles-based discussion. To guide registrants' consideration of human capital disclosure, the amended item recites, as non-exclusive examples of metrics that may be material, "measures or objectives that address the development, attraction and retention of personnel." The SEC makes the following observations of note in the adopting release:
  - The SEC believes that "in many cases, human capital disclosure is important information for investors."
  - The SEC decided not to define the term "human capital" because the term "may evolve over time and may be defined by different companies in ways that are industry specific."
  - The metrics referred to in the item are "examples of potentially relevant subjects" for disclosure, "not mandates."
  - In a departure from the rule proposal, a registrant will be required to disclose the number of persons employed in its business "to the extent material to an understanding of the registrant's business."
  - Under the principles-based approach of this requirement, the registrant must disclose the numbers of its part-time employees, full-time employees, independent contractors and contingent workers, and employee turnover, in all or a portion of the registrant's business, if this information "is material to an understanding of the registrant's business."

Amendments to Item 103 (legal proceedings)

In amending Item 103, the SEC adopted what it labels a "hybrid" approach in changing disclosure requirements for certain environmental proceedings to which the government is a party. The amendments shift the disclosure determination from one based solely on a bright-line quantitative threshold applicable to all registrants to one requiring disclosure of any such proceeding that involves a threshold falling within a prescribed range of monetary values selected by the registrant to result in disclosure of material information.

Disclosure of environmental proceedings to which the government is a party. Current Item 103 requires registrants to disclose any proceeding under environmental laws to which a government authority is a party unless the registrant reasonably believes the proceeding will not result in monetary sanctions, exclusive of interest and costs, of US$100,000 or more, and permits registrants to group or describe generally such proceedings that are similar in nature. The item thus requires disclosure of an environmental proceeding that may involve monetary sanctions of at least US$100,000 even if the registrant does not consider the proceeding to be material to its business or financial condition.

The SEC retained a quantitative threshold in Item 103 by increasing the minimum disclosure threshold of potential monetary sanctions from US$100,000 to US$300,000 (to account for inflation), but also permits the registrant to select a higher threshold, subject to a limit, if it determines that a threshold other than US$300,000 "is reasonably designed" to result in disclosure of an environmental proceeding that is "material to the business or financial condition" of the registrant. Any company-specific disclosure threshold above US$300,000 may not exceed the lesser of US$1 million and 1 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. The SEC believes that the new approach "avoids a mandatory one-size-fits-all disclosure threshold that may potentially result in the disclosure of information that is not material."

If a registrant chooses to use a threshold other than US$300,000, it must disclose the other threshold, including any changes to it, in each annual and quarterly report.

Disclosure by hyperlink or cross-reference. The Item 103 amendments clarify that registrants are permitted to provide disclosure responsive to Item 103 by hyperlink or cross-reference to legal proceedings disclosed elsewhere in the filing, such as in management's discussion, risk factors, or a note to the financial statements. This change will bring Item 103 disclosure into line with the practice of many registrants, who commonly include a cross-reference to disclosures concerning legal proceedings contained in a note to the financial statements or elsewhere in a filing. Since any such hyperlink must be to disclosure located within the same document, rather than in a different document, the SEC decided not to place a restriction on registrants' ability to use multiple hyperlinks in providing legal proceedings disclosure.

Amendments to Item 105 (risk factors)

Item 105 currently reflects a principles-based approach by requiring registrants to disclose the most significant factors that make an investment in the registrant or the securities being offered speculative or risky. The SEC believes, however, that the materiality of much current risk factor disclosure is undermined by excessive length and the recitation of generic risk factors that are not tailored to the registrant's individual business. The SEC has adopted new presentation requirements for this disclosure tethered to a materiality standard to provide "an incentive for registrants to give due consideration to the risk factors that are material to investors" and move away from overly long disclosure studded with "boilerplate" risks.

Summary risk factor disclosure if risk factor section exceeds 15 pages. If the registrant's risk factor disclosure is longer than 15 pages, Item 105(b) requires the registrant to include a summary of the risk factor disclosure in accordance with the following requirements:

- *Content:* The summary must summarize "the principal factors that make an investment in the registrant or offering speculative or risky." The SEC clarifies that the summary is not required to contain all of the risk factors discussed in the main risk factor disclosure, and that "registrants may prioritize certain risks and omit others."
- *Maximum length:* The summary may be "no more than two pages." The SEC believes that the two-page limit will give the registrant an incentive to focus on risk factors relevant to its business and securities that are material to investors.
- *Format:* The summary must consist of "a series of concise, bulleted or numbered statements."
- *Location:* Item 105(b) states that the summary must appear "in the forepart of the prospectus or annual report."

The SEC estimates that about 40 percent of filers would currently be required to provide the summary risk factor disclosure.

Requirement to disclose "material" risk factors. The SEC provides in Item 105(a) that registrants must discuss the "material factors" that make an investment in the registrant or offering speculative or risky. The current item directs registrants to disclose the "most significant" factors. The SEC has changed the directive to "material factors" to align the item with the focus on principles-based disclosure of material information. The SEC believes that the reference to materiality will lead registrants to reduce their reliance on generic risk factors and excessively lengthy disclosure and instead tailor their discussion of risk factors to their particular facts and circumstances.

Organization of risk factors under "relevant headings" and "General Risk Factors." Current Item 105 directs registrants to set forth "each risk factor under a subcaption that adequately describes the risk." Item 105(a) adds to this requirement directions that the risk factor discussion be organized "with relevant headings," in addition to the subcaptions that are currently required, and that any "generic risk factors" be disclosed "at the end of the risk factor section under the caption 'General Risk Factors.'" The SEC intends the organizational changes to help readers understand lengthy risk factor disclosures and to distinguish risk factors that are specific to a registrant from those that could apply to any registrant or offering.

Other than the "General Risk Factors" heading, the amended item does not specify the risk factor headings registrants should use as "relevant headings," nor does the SEC suggest any specific headings. The SEC acknowledges that many registrants already organize their risk factor disclosures "through groupings of related risk factors" under headings that enhance the usefulness of the disclosures.

The SEC declined the invitation of some commenters to define further the types of risks that would qualify as "general risks." In the adopting release, the SEC refers to those risks as "generic, boilerplate risk factors" and cites the current directive in Item 105 for registrants

to avoid presentations of risks that could apply to any registrant or any offering of securities. The SEC indicates that, to avoid having to classify a particular risk factor as "general," the registrant should "emphasize the specific relationship of the risk to the registrant or the offering." The SEC did not agree with one commenter's concern that the characterization of a risk factor as "general" alone could disqualify the risk factor from treatment as a "meaningful cautionary statement" entitling the registrant to protection provided by the Private Securities Litigation Reform Act, and thereby increase the registrant's litigation risk.

After considering comments on the rule proposal, the SEC decided not to amend Item 105 to (a) require registrants to present risk factors in order of significance or (b) require registrants to explain how generic, boilerplate risk factors are material to investors and what actions, if any, management takes to address these risks. The SEC concluded that the latter concern will be adequately addressed by the requirement that a registrant explain how a risk affects it or the securities being offered.

Conclusion

The SEC's movement towards a more principles-based approach in the new Regulation S-K amendments should encourage registrants to revisit their current disclosure concerning description of the business, legal proceedings, and risk factors. Although the most extensive disclosure revisions may appear in the business sections of Form 10-K reports, which for calendar-year filers will not be due for several months, registrants should begin their consideration of potential changes sooner rather than later.

The concept of materiality will continue to play the central role in disclosure decisions. The new disclosures, like the current ones, will be anchored in management's determinations concerning what information is material to an understanding of the registrant's business. The operation of the current Regulation S-K items discussed above expressly requires such materiality judgments. Further, registrants also have long been subject to the mandate, contained in Exchange Act Rule 12b-20 and Securities Act Rule 408(a), that they disclose, in addition to any expressly required information, "such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."

The Item 101 amendments in particular provide greater scope for management's materiality determinations by eliminating mandatory disclosure topics that have served as a checklist for registrants' use in identifying potentially material information and organizing the presentation of their business. The specification of these topics has provided a starting point and baseline for disclosure and has encouraged consistency in the presentation of information by different registrants. The enhanced principles-based approach, by contrast, provides fewer sign posts for structuring disclosure. Under amended Item 101, the registrant will be primarily guided in the first instance by a limited list of non-exclusive disclosure examples in developing disclosure that presents information that is material to an understanding of the registrant's business and tailored to the registrant's individual circumstances.

The SEC recognizes the effort that will be required to provide disclosure under the new rules that is relevant to the registrant's specific context. In commenting on the expected costs of preparing disclosures under the amended items, the SEC observed that the rules under current Regulation S-K "may be easier to apply" than the new principles-based requirements, as prescriptive-based requirements "involve fewer judgments." The increased flexibility afforded to management in structuring disclosure could require re-examination of many disclosures that might not have received special attention for some time.

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