

LEGAL ALERT

Securities Law and Practice Updates

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SEC Modernizes Business, Legal and Risk Factor Disclosure Items of Regulations S-K

On August 26, 2020, the Securities and Exchange Commission (the "SEC") adopted amendments to modernize the business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosure requirements of Regulation S-K under the Securities Act of 1933, as amended (the "Securities Act"), which are applicable to periodic reports and registration statements filed by public companies.

The amendments reflect the SEC's ongoing efforts to emphasize a principles-based, registrant-specific, approach to disclosure rather than prescriptive disclosure requirements. Prescriptive requirements employ bright-line, quantitative or other thresholds to identify when disclosure is required, or require registrants to disclose the same types of information. Principles-based requirements, on the other hand, provide registrants with the flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information. Principles-based disclosure requirements articulate an objective and look to management to exercise judgment in satisfying that objective by providing appropriate disclosure when necessary.

The term "material" as used in the amendments is defined as follows: "The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."

We are able to provide counsel and guidance in SEC and New Mining Disclosure matters. For additional information, please contact the attorneys named below or the attorney with whom you have a primary relationship.

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The Supreme Court has held that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information available.

The table below briefly summarizes the updated disclosure requirements:

Regulation S-K Item	Summary of Existing Item Requirements	Summary of the Amendments
Item 101(a)	Requires a description of the general development of the business of the registrant during the past five years, or such shorter period as the registrant may have been engaged in business.	<p>Revises Item 101(a) to:</p> <ul style="list-style-type: none"> • Be largely principles-based, requiring disclosure of information material to an understanding of the general development of the business, and eliminating the previously prescribed five-year timeframe. <p>Revises Item 101(h) to:</p> <ul style="list-style-type: none"> • Eliminate the three-year timeframe with respect to smaller reporting companies. <p>Revises Items 101(a) and (h) to clarify that:</p> <ul style="list-style-type: none"> • Registrants, in filings made after a registrant'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 registrant's most recent filing containing a full discussion of the general development of its business, and incorporate by reference that prior discussion.

Regulation S-K Item	Summary of Existing Item Requirements	Summary of the Amendments
Item 101(c)	<p>Requires a narrative description of the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in its financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment must include disclosure of several specific matters.</p>	<p>Revises Item 101(c) to:</p> <ul style="list-style-type: none"> • Clarify and expand the principles-based approach of Item 101(c), with a non-exclusive list of disclosure topic examples (drawn in part from the topics currently contained in Item 101(c)); • Include, as a disclosure topic, a description of the registrant's human capital resources to the extent such disclosures would be material to an understanding of the registrant's business; and • Refocus the regulatory compliance disclosure requirement by including as a topic all material government regulations, not just environmental laws.
Item 103	<p>Requires disclosure of any material pending legal proceedings including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Similar information is to be included for any such proceedings known to be contemplated by governmental authorities.</p> <p>Contains a threshold for disclosure based on a specified dollar amount (\$100,000) for proceedings related to Federal, State, or local environmental protection laws.</p>	<p>Revises Item 103 to:</p> <ul style="list-style-type: none"> • Expressly state 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 \$100,000 to \$300,000, but that also affords a registrant the flexibility to 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 and its subsidiaries on a consolidated basis.

Regulation S-K Item	Summary of Existing Item Requirements	Summary of the Amendments
Item 105	Requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky and specifies that the discussion should be concise, organized logically, and furnished in plain English. The Item also states that registrants should set forth each risk factor under a subcaption that adequately describes the risk. Additionally, Item 105 directs registrants to explain how each risk affects the registrant or the securities being offered and discourages disclosure of risks that could apply to any registrant.	<p>Revises Item 105 to:</p> <ul style="list-style-type: none"> • Require summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages; • Refine the principles-based approach of Item 105 by requiring disclosure of “material” risk factors; and • Require risk factors to be organized under relevant headings in addition to the subcaptions 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 the caption “General Risk Factors”.

Additional information concerning the amendments may be found in the SEC’s Adopting Release at: <https://www.sec.gov/rules/final/2020/33-10825.pdf>

The amendments will become effective thirty (30) days after the Adopting Release is published in the federal register.