

SEC Staff Releases FAQs on Regulation S-K Amendments

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In response to commonly asked questions, the SEC staff has released three FAQs related to amendments to the business description, legal proceedings and risk factor disclosure requirements in Regulation S-K Items 101, 103, and 105, discussed here. The rulemaking became effective on November 9, 2020.

Compliance for Form S-3 Registration Statements and Prospectus Supplements

The first FAQ clarifies that for registration statements on Form S-3 that became effective before November 9, 2020, Form 10-Ks incorporated by reference into the registration statements do not need to be amended to comply with the new requirements for business descriptions and legal proceedings in Items 101 and 103. Furthermore, even though Form S-3 expressly requires risk factor disclosure pursuant to Item 105, related prospectus supplements filed on or after November 9, 2020 do not need to comply with the amendments until the next update to the related registration statement on Form S-3 for Section 10(a)(3) purposes. In other words, issuers are not required to amend the risk factor disclosure set forth in their last 10-K until they file their next 10-K, at which time the risk factor disclosure included in the new 10-K will automatically supersede the previous risk factor disclosure.

Presumably, a registration statement on Form S-3 that becomes effective after November 9, 2020 will need to comply with the updated risk factor requirements, either by incorporating by reference an earlier Exchange Act filing that complies with such updated requirements or by restating the risk factors in the body of the registration statement. However, the staff has not specifically addressed this scenario.

Business Development - Period to be Covered in Form 10-K

Under amended Item 101(a), issuers are to provide a description of the general development of their businesses for the period over which information would be material. However, Item 1 of Form 10-K indicates that this description only needs to cover developments since the beginning of the fiscal year for which the report is filed. The

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second FAQ confirms that that Form 10-Ks only need to cover developments since the beginning of the fiscal year. However, in light of the principles-based approach underlying the Regulation S-K amendments, we would advise companies to take a broader view of the time period covered by amended Item 101(a) if appropriate to provide for a full discussion of the general development of the business in all material respects.

Business Development – Incorporation by Reference of Full Discussion

The SEC staff clarifies that for filings other than an initial registration statement, an issuer may omit the full discussion of the general development of its business if the issuer (1) provides an update to the general development of its business, disclosing all material developments that have occurred since the most recent registration statement or report that includes the full discussion; (2) includes one active hyperlink to the registration statement or report that includes the full discussion; and (3) incorporates the full discussion by reference to the registration statement or report. The SEC clarifies that an issuer is not required to use this updating method, though the staff anticipates that the updating method will apply mainly to registration statements.

The rulemaking notes that a filing that includes an update and incorporates by reference the more complete business development discussion could not be incorporated by reference into a subsequent filing, such as a Form S-3 or Form S-4. This prohibition may limit the amendment's usefulness for registration statements. Rule 12b-23 of the Securities Exchange Act and Rule 411 of the Securities Act provide that information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing, such as incorporating by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document.