

SEC Updates Disclosure of Business, Legal Proceedings, and Risk Factors

By Jeffrey T. Haughey
September 8, 2020

On August 26, 2020, the SEC [updated rules in Regulation S-K](#) requiring business, legal proceedings, and risk factor disclosures that become effective 30 days after publication in the Federal Register. The updates include the following:

General Development of Business (Item 101(a))

Look-Back Eliminated. Under the amendments, existing public companies will no longer be required to look-back five years (three years for smaller reporting companies) in disclosing material developments of their businesses.

Hyperlinks Permitted. Rather than repeating a full discussion of the general development of a company's business, companies are now permitted to hyperlink to a prior filing that is incorporated by reference into the report or prospectus, and provide only an update of material developments since that prior full discussion of the general development of business. Multiple hyperlinks are not permitted. We'll see if companies take advantage of this update or continue to provide a full discussion of the general development of their businesses in their annual reports.

Disclosure Topic Examples. The amendments now focus companies on the need to disclose only information material to an understanding of the general development of the business and eliminated the need to discuss a specific list of topics. The revised rule provides a shorter list of topics that companies need only consider disclosing. For instance, the year and form of organization was deleted. The biggest change is the need to update the business strategy, if it was previously disclosed. Most of the topics listed are topics that companies already describe when applicable.

Business Description (Item 101(c))

Human Capital. The SEC will now require disclosure of human capital to the extent it is material to an understanding of a company's business. Companies should consider disclosure of human capital resources, including the number of employees, as well as measures and objectives that address the development, attraction, and retention of personnel, depending on the nature of the business and workforce. The SEC expects that disclosures will vary widely given the differences between companies and industries.

Government Regulations. Companies will now be required to disclose the impact of all government regulations, not just environmental regulations, to the extent material to the business. Many companies already do this.

Other Topics. Once again, the SEC has gone from a prescribed list of topics to a list of examples to be considered to the extent material to an understanding of the business taken as a whole, including market demand. In general, companies are already disclosing these topics. The SEC did not add other ESG topics to this list, such as diversity and climate change, which drew dissent from two commissioners.

Legal Proceedings (Item 103)

Hyperlinks/Cross-References Permitted. Companies will now be expressly allowed to hyperlink or cross-reference to the disclosure of legal proceedings elsewhere in the document.

Threshold for Environmental Sanctions Increased. The amendments increased the dollar threshold to disclose legal proceedings with a governmental authority that seeks monetary sanctions under environmental laws from \$100,000 to \$300,000. In the alternative, companies may choose their own dollar threshold that does not exceed the lesser of \$1 million or 1% of the current assets of the company and its subsidiaries on a consolidated basis as long as it is reasonably designed to disclose material proceedings. The company's threshold and any changes to it must be disclosed in each annual and quarterly report.

Risk Factors (Item 105)

Standard. Companies are now required to disclose "material" risk factors rather than those that are the "most significant."

Headings. In addition to the existing subcaptions for each risk factor, companies must also organize the risk factors under applicable headings, which many companies already provide. The SEC continues to discourage listing risks applicable to all companies, but if companies do so, they should be at the end of the risk factor section under a "General Risk Factors" heading.

Summary of Risk Factors. If a company's risk factors are more than 15 pages long, the company must include a summary of the risks factors in concise, bulleted or numbered statements on two pages or less in the forepart of the annual report or prospectus. Many companies already do so.

Company Considerations

It is unclear whether these amendments will be in force when filing upcoming quarterly reports for calendar year companies, but they should be in effect for upcoming annual reports. The following is a list of actions companies should consider taking:

- Review and update Disclosure Controls and Procedures to address these changes, including determination of materiality of disclosure topics and memorializing such decisions;
- Provide for more management time for the review and update of applicable disclosure for the next 10-K and registration statements, including review of the non-exclusive list of disclosure topics provided in the revised rules;
- Determine whether any other material characteristics or developments not covered by the SEC's non-exclusive lists of topics need to be disclosed, and whether an update of the business strategy is required;
- Analyze and prepare disclosures related to human capital resources, if material to an understanding of the business; and
- Organize Risk Factors under applicable headings and include a summary if the Risk Factor section is more than 15 pages long.

For questions regarding these disclosure amendments, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



[Jeffrey T. Haughey](#)

918-595-4837

jhaughey@gablelaw.com

www.gablelaw.com

This article is provided for educational and informational purposes only and does not contain legal advice or create an attorney-client relationship. The information provided should not be taken as an indication of future legal results; any information provided should not be acted upon without consulting legal counsel.