



KIRKLAND & ELLIS

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The SEC Adopts New Amendments to Regulation S-K

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S-K Amendments — Business, Legal Proceedings & Risk Factors

- ▶ On August 26, 2020, the [SEC adopted amendments](#) to Regulation S-K:
 - Item 101: [Business Description](#)
 - Item 103: [Legal Proceedings](#)
 - Item 105: [Risk Factors](#)
- ▶ These are the first amendments to Regulation S-K in 30 years
- ▶ The amendments will become effective 30 days after publication in the Federal Register, which is expected shortly

Press Release

SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K

FOR IMMEDIATE RELEASE
2020-192

Washington D.C., Aug. 26, 2020 — The Securities and Exchange Commission today announced that it voted to adopt amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosures (Item 105) that registrants are required to make pursuant to Regulation S-K. These disclosure requirements have not undergone significant revisions in over 30 years. The amendments the Commission is adopting today update these items to reflect the many changes in our capital markets and the domestic and global economy in recent decades.

"Today we modernized our public company business disclosure rules for essentially the first time in over 30 years," said SEC Chairman Jay Clayton. "Building on our time-tested, principles-based disclosure framework, the rules we adopt today are rooted in materiality and seek to elicit information that will allow today's investors to make more informed investment decisions. I am particularly supportive of the increased focus on human capital disclosures, which for various industries and companies can be an important driver of long-term value. I applaud the staff for their dedication and thoughtful approach to modernizing and improving these rules and adding efficiency and flexibility to our disclosure framework."

S-K Amendments — Business Description *Item 101(a) & (h)*

Current Requirement

Business section must describe the company's business for the last five years (or three years for Smaller Reporting Companies)(or shorter period the company has existed)

Amended Requirement

Timeframe

- ▶ Five-year timeframe eliminated
 - ▶ Three-year timeframe eliminated for Smaller Reporting Companies
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Material

- ▶ Business section must include all information material to an understanding of the general development of the business
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Updates

- ▶ In filings after a company's first filing, a company can opt to (but is not required to) limit the Business section to an update on the general development of the company's business
 - ▶ 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
 - ▶ The update must incorporate by reference a full prior discussion from a single previously filed document (cannot incorporate multiple discussions to build a complete discussion)
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Principles-Based

- ▶ Shifted from time-based disclosure requirement to "principles-based" disclosure requirement
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S-K Amendments — Business Strategy *Item 101(a)(1)*

Business Strategy Disclosure Topics

Prescribed list of disclosure topics relating to business strategy that must be covered in the Business Section

TOPIC	CURRENT PRESCRIBED DISCLOSURE TOPIC*	AMENDED DISCLOSURE TOPIC EXAMPLES**
Year Founded	“the year in which the registrant was organized and its form of organization”	Deleted
Bankruptcy	“the nature and results of any bankruptcy, receivership or similar proceedings with respect to the registrant or any of its significant subsidiaries“	“The nature and effects of any material bankruptcy, receivership, or any similar proceeding with respect to the registrant or any of its significant subsidiaries”
M&A	“the nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries”	“The nature and effects of any material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries”
Asset Sales / Acquisitions	“the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business”	Retained verbatim
Changes	“material changes in the mode of conducting the business”	“Any material changes to a previously disclosed business strategy ”

* Required to be disclosed

** Not required, but provided as a non-exhaustive list of examples of the types of information a company should consider disclosing

S-K Amendments — Business Description *Item 101(c)*

Business Description Disclosure Topics

Business section must include a narrative description of the business done and intended to be done by the company, guided by a **non-exhaustive list of disclosure topic examples**

TOPIC	CURRENT DISCLOSURE TOPIC EXAMPLES	AMENDED DISCLOSURE TOPIC EXAMPLES
Principal Products / Services	“The principal products produced and services rendered by the registrant in the segment and the principal markets for, and methods of distribution of, the segment's principal products and services. In addition, state for each of the last three fiscal years the amount or percentage of total revenue contributed by any class of similar products or services which accounted for 10 percent or more of consolidated revenue in any of the last three fiscal years or 15 percent or more of consolidated revenue, if total revenue did not exceed \$50,000,000 during any of such fiscal years”	“Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families”
Customers	“The dependence of the segment upon a single customer, or a few customers, the loss of any one or more of which would have a material adverse effect on the segment. The name of any customer and its relationship, if any, with the registrant or its subsidiaries shall be disclosed if sales to the customer by one or more segments are made in an aggregate amount equal to 10 percent or more of the registrant's consolidated revenues and the loss of such customer would have a material adverse effect on the registrant and its subsidiaries taken as a whole. The names of other customers may be included, unless in the particular case the effect of including the names would be misleading. For purposes of this paragraph, a group of customers under common control or customers that are affiliates of each other shall be regarded as a single customer.”	“any dependence on ... customers, including governmental customers”

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S-K Amendments — Business Description *Item 101(c)* (cont'd)

TOPIC	CURRENT DISCLOSURE TOPIC EXAMPLES	AMENDED DISCLOSURE TOPIC EXAMPLES
New Products / Segments	“A description of the status of a product or segment (e.g. whether in the planning stage, whether prototypes exist, the degree to which product design has progressed or whether further engineering is necessary), if there has been a public announcement of, or if the registrant otherwise has made public information about, a new product or segment that would require the investment of a material amount of the assets of the registrant or that otherwise is material. This paragraph is not intended to require disclosure of otherwise nonpublic corporate information the disclosure of which would affect adversely the registrant's competitive position.”	“Status of development efforts for new or enhanced products”
Competitors	“Competitive conditions in the business involved including, where material, the identity of the particular markets in which the registrant competes, an estimate of the number of competitors and the registrant's competitive position, if known or reasonably available to the registrant. Separate consideration shall be given to the principal products or services or classes of products or services of the segment, if any. Generally, the names of competitors need not be disclosed. The registrant may include such names, unless in the particular case the effect of including the names would be misleading. Where, however, the registrant knows or has reason to know that one or a small number of competitors is dominant in the industry it shall be identified. The principal methods of competition (e.g., price, service, warranty or product performance) shall be identified, and positive and negative factors pertaining to the competitive position of the registrant, to the extent that they exist, shall be explained if known or reasonably available to the registrant”	“trends in market demand and competitive conditions”

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S-K Amendments — Business Description *Item 101(c)* (cont'd)

TOPIC	CURRENT DISCLOSURE TOPIC EXAMPLES	AMENDED DISCLOSURE TOPIC EXAMPLES
Raw Materials	“The sources and availability of raw materials”	“Resources material to a registrant’s business, such as: (A) Sources and availability of raw materials”
Intellectual Property	“The importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held”	“Resources material to a registrant’s business, such as: ... (B) The duration and effect of all patents, trademarks, licenses, franchises, and concessions held”
Seasonality	“The extent to which the business is or may be seasonal”	Retained verbatim
Government Contracts	“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”	Retained verbatim
Regulatory Compliance	“Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem materials”	“The material effects that compliance with government regulations, including environmental regulations, may have upon the 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”

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S-K Amendments — Business Description *Item 101(c)* (cont'd)

TOPIC	CURRENT DISCLOSURE TOPIC EXAMPLES	AMENDED DISCLOSURE TOPIC EXAMPLES
Working Capital	<p>“The practices of the registrant and the industry (respective industries) relating to working capital items (e.g., where the registrant is required to carry significant amounts of inventory to meet rapid delivery requirements of customers or to assure itself of a continuous allotment of goods from suppliers; where the registrant provides rights to return merchandise; or where the registrant has provided extended payment terms to customers).”</p>	<p>Deleted</p> <p><i>Continues to be required if company consider it material to an understanding of the general development of the business</i></p>
Backlog	<p>“The dollar amount of backlog orders believed to be firm, as of a recent date and as of a comparable date in the preceding fiscal year, together with an indication of the portion thereof not reasonably expected to be filled within the current fiscal year, and seasonal or other material aspects of the backlog. (There may be included as firm orders government orders that are firm but not yet funded and contracts awarded but not yet signed, provided an appropriate statement is added to explain the nature of such orders and the amount thereof. The portion of orders already included in sales or operating revenues on the basis of percentage of completion or program accounting shall be excluded.)”</p>	<p>Deleted</p> <p><i>Continues to be required if company consider it material to an understanding of the general development of the business</i></p>
Employees / Human Capital Management	<p>“The number of persons employed by the registrant”</p>	<p>“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)”</p>

S-K Amendments — Legal Proceedings *Item 103*

Current Requirement

Must disclose material pending legal proceedings, with a \$100,000 *de minimis* threshold for disclosure of environmental proceedings

Amended Requirement

Hyperlink

- ▶ Legal proceedings disclosure can be provided by hyperlink or cross-reference to disclosure located elsewhere in the filing
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\$ Thresholds

- ▶ Threshold for disclosure of environmental proceedings increased to:
 - \$300K or
 - an amount selected by the company so long as:
 - ▶ the threshold is reasonably designed to result in disclosure of material environmental proceedings
 - ▶ the threshold does not exceed the lesser of \$1m or 1% of consolidated current assets
 - ▶ the company discloses the threshold in each annual and quarterly report filed with the SEC
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S-K Amendments — Risk Factors *Item 105*

Current Requirement

Must disclose the most significant risk factors, with a subcaption for each risk factor that describes the risk

Amended Requirement

Summary

- ▶ If the Risk Factor section exceeds 15 pages, the company must include a Summary Risk Factor section that is less than two pages
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Material

- ▶ Only “material” (instead of all “significant”) Risk Factors must be disclosed
 - ▶ “Material” means there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision or there is a substantial likelihood that disclosure of an omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information available
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Headings

- ▶ Risk Factors must be organized under relevant headings (in addition to continuing to include subcaptions)
 - ▶ Any Risk Factors that may generally apply to an investment in securities must be disclosed at the end of the Risk Factor section under a separate caption
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Authors

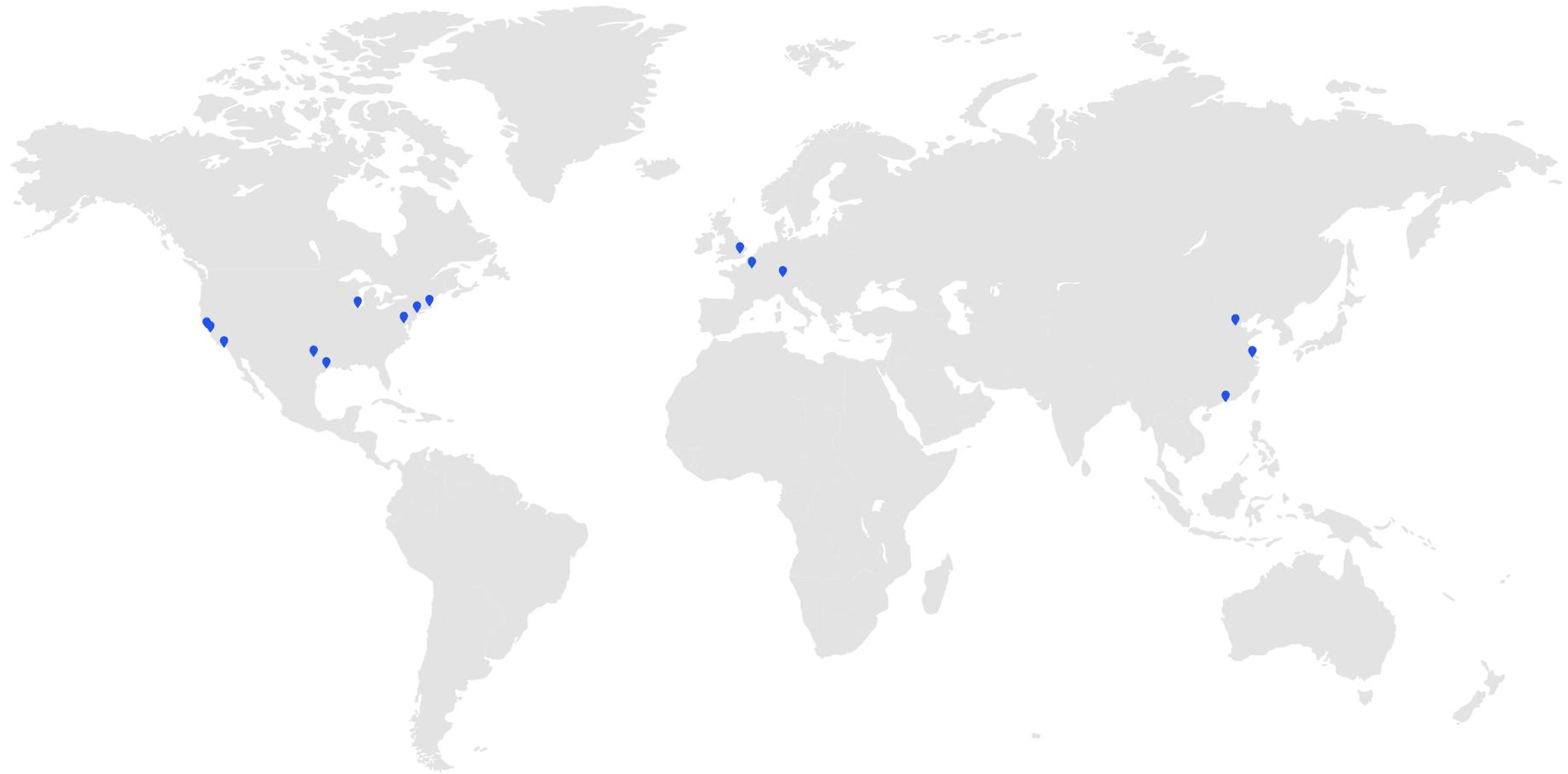
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