CLIENT ALERTS & INSIGHTS

REMINDER: Regulation S-K Amendments Effective November 9, 2020

NOVEMBER 2, 2020

Authors: Megan L. Mehalko

As part of the ongoing efforts by the Securities and Exchange Commission ("SEC") to modernize public company disclosures, the changes to Regulation S-K announced in late August will become effective on **Monday, November 9.**

Specifically, the amendments adopted by the SEC affect the disclosure requirements under Items 101 (Description of Business), 103 (Legal Proceedings), and 105 (Risk Factors) of Regulation S-K, as summarized below:

Item 101(a) - General Development of Business

- **Shift to Principles-Based Disclosure, Removal of Fixed Lookback Period:** Under the existing rule, Item 101(a) requires a description of the general business of the company during the past 5 years (or shorter time, as applicable, if the company has not been engaged in the business for 5 years). The revised Item 101(a) instead is more principles-based and requires disclosure of material information about the general development of the business and removes the 5-year lookback (and 3-year lookback for smaller reporting companies).

- **Updates:** After a company's initial filing, the company is only required to provide an update of the general development of the business, including all material developments since the company's last filing that contained the full general development of the business discussion.

Item 101(c) - Narrative Description of Business

- **Continued Emphasis on Principles-Based Disclosure:** Under the existing rule, Item 101(c) requires a narrative description of the company's business. The amendments continue the theme of principles-based disclosure and provide the following non-exclusive list of topics for disclosure:
  - revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers;
  - status of development efforts for new or enhanced products, trends in market demand and competitive conditions;
  - 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;
  - 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; and
  - the extent to which the business is or may be seasonal.

- **Human Capital Disclosure:** Requires a description of the company's human capital resources to the extent material to the company's business.
- **More Broadly Regulatory Compliance-Focused:** The existing rule calls for disclosure of the material effects of compliance with environmental regulations. Under the amended rule, the focus is instead more generally on regulatory compliance, not just compliance with environmental regulations.

Item 103 - Legal Proceedings

- **Hyperlink/Cross-References:** Information about legal proceedings that is required to be disclosed can be provided via hyperlink or cross-reference to responsive disclosure that is located elsewhere in the filing/document.

- **Updated Disclosure Threshold for Environmental Proceedings:** Increases the disclosure threshold for governmental environmental proceedings from $100,000 to $300,000, plus provides companies with some flexibility to elect a different threshold that "it determines is reasonably designed to result in disclosure of material environmental proceedings"; however, that threshold may not exceed the lesser of $1 million or 1% of the current assets of the registrant and its subsidiaries on a consolidated basis.

Item 105 - Risk Factors

- **Risk Factor Summary:** Requires companies provide a bullet point summary of their risk factor disclosure if the risk factor section exceeds 15 pages. The summary can be no more than 2 pages.

- **Material (vs. Significant) Risks:** The amendments provide that companies should disclose material risks (versus the current obligation to disclose the "most significant" risks).
- **Risk Factor Organization:** Risk factors should be organized under relevant headings and any risk factors that are generally applicable to an investment in securities should be presented at the end of the risk factor section and under a separate caption of "General Risk Factors".

With the effective date of November 9, 2020, these changes will go into effect for companies filing their Quarterly Reports on Form 10-Q (or Annual Report on Form 10-K) after November 9.

The final rule adopted by the SEC can be found here.

If you have any questions regarding the above, please contact a member of Benesch's Corporate & Securities Practice Group.

Megan L. Mehalko at mmehalko@beneschlaw.com or (216) 363-4487.