

## MODERNIZING REGULATION S-K AMENDMENTS - TRANSITIONAL FAQs FROM THE SEC

Nov 20, 2020

As covered in our [blog post](#) dated August 26, 2020, the SEC recently adopted amendments to Regulation S-K Items 101 (business description), 103 (legal proceedings), and 105 (risk factors) aimed at modernizing disclosure requirements. The amended rules became effective on November 9, 2020.

The SEC Staff (the “Staff”) recently published [three transitional FAQs](#) addressing questions that have arisen regarding the amendments:

*FAQ (1) - Applicability of Amended Items 101, 103 and 105 to Form S-3 Prospectus Supplements Filed on or after November 9, 2020.*

- The Staff confirmed that because Form S-3 requires only *incorporation by reference* – and not express disclosure – under Items 101 and 103, a registrant is *not* required to comply with amended Items 101 and 103 when, on or after November 9, 2020, it files a prospectus supplement to a Form S-3 registration statement that became effective prior to November 9, 2020. The registrant also is *not* required to amend the Form 10-K that is incorporated by reference into the Form S-3 to comply with amended Items 101 and 103.
- The Staff noted that because Form S-3 requires that Item 105 disclosure be expressly included (i.e., the disclosure cannot be incorporated by reference), Securities Act Rule 401(a) would ordinarily require that the prospectus supplement comply with amended Item 105. The Staff indicated that it will not object, however, if the prospectus supplement is filed without amending the Form S-3 to comply with amended Item 105. The registrant will, however, be required to comply with amended Item 105 in the next Form S-3 that it files with the SEC for Section 10(a)(3) purposes.

*FAQ (2) - Form 10-K Disclosure under Amended Item 101 – Clarification of Time Period Covered.*

- Amended Item 101 requires that a registrant describe the general development of its business over the period for which information would be material – i.e., there is no defined time period. Item 1 of Form 10-K, which might appear to be inconsistent, requires Item 101 disclosure for

the period since the beginning of the fiscal year covered by the Form 10-K. The Staff clarified that amended Item 101 does *not* change the time period set forth in Item 1 of Form 10-K.

*FAQ (3) – Conditions for Omitting Amended Item 101 Disclosure from Registration Statements and Form 10-Ks.*

- The Staff confirmed that amended Item 101(a)(2) permits a registrant to omit full Item 101(a) (or Item 101(h) in the case of smaller reporting companies) disclosure from a registration statement (other than an initial registration statement) or Form 10-K, *provided* the registrant: (1) discloses in the filing all material business developments occurring since the most recently filed registration statement or report that includes full Item 101(a) disclosure, (2) includes a hyperlink to such filing, and (3) incorporates such full disclosure by reference to such registration statement or report.
- The Staff noted that registrants are not required to use this updating method, and that it anticipates that the method will apply mainly to registration statements.

The above is an overview only; please refer to the [Transitional FAQs](#) for additional information.

## **RELATED CAPABILITIES**

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