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GLOBAL PUBLIC COMPANY ACADEMY

U.S. DISCLOSURE AND REPORTING UPDATES

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Agenda

- Modernization of Regulation S-K Items 101, 103 and 105 (SEC Release No. 33-10825)
- Proposed Modernization of Regulation S-K Items 301, 302 and 303 (SEC Release No. 33-10750)
- Amendments to Financial Disclosures about Acquired/Disposed Businesses (SEC Release No. 33-10786)
- Guidance from the SEC Staff Regarding Disclosures Related to COVID-19
- Amendments to Accelerated Filer And Large Accelerated Filer Definitions (SEC Release No. 34-88365)
- Amendments to "Accredited Investor" and "Qualified Institutional Buyer" Definitions (SEC Release No. 33-10824)

SEC RELEASE NO. 33-10825

MODERNIZATION OF REGULATION S-K ITEMS 101, 103 AND 105

Adopted Amendments

- On August 8, 2019, the SEC issued Release No. 33-10668 regarding proposed modifications to Regulation S-K Item 101 (Business Description), Item 103 (Legal Proceedings) and Item 105 (Risk Factors)
- On August 26, 2020, the SEC adopted the modifications, substantially as proposed but with a few changes in response to comments received by the SEC
- The new rules are effective 30 days after publication in the Federal Register, although we assume they will be in place in time to apply to third quarter Form 10-Q filings for calendar-year companies and Form 10-K filings for companies with a September 30 fiscal year-end

Amendments to Item 101 of Regulation S-K

- The amendments to Item 101(a) relating to disclosure of general business development revise the disclosure requirements to be largely principles-based by:
  - requiring disclosure of information material to an understanding of the general development of the business, and eliminating a prescribed timeframe for such disclosure; and
  - permitting a registrant, in filings made after the registrant's initial filing, to provide only an update of the general development of the business focused on material developments that have occurred since its most recent full discussion of the development of its business, which must be incorporated by reference through an active hyperlink
- The amendments to Item 101(c) relating to narrative business description:
  - clarify and expand the principles-based approach, with a nonexclusive list of disclosure topic examples;
  - require a description of the registrant's human capital resources, to the extent such disclosure would be material to an understanding of the registrant's business; and
  - include material government regulations as a disclosure topic, expanding the focus beyond just environmental laws to other material government regulations

Amendments to Item 103 of Regulation S-K

- The amendments to Item 103 relating to disclosure of legal proceedings:
  - indicate that the required information under Item 103 may be provided by including hyperlinks or cross-references to legal proceedings disclosure located elsewhere in the filing; and
  - revise the $100,000 threshold for disclosure of environmental proceedings where the government is a party to $300,000, in order to adjust for inflation
- In addition to increasing the disclosure threshold to $300,000, Item 103 will now also allow a registrant to use another threshold of the registrant's choice. The conditions for this alternative threshold are:
  - the registrant must determine it is reasonably designed to result in disclosure of any legal proceeding that is material to the business or financial condition;
  - the registrant discloses such threshold (including any change thereto) in each annual and quarterly report; and
  - the threshold does not exceed the lesser of $1 million or 1% of the current assets of the registrant and its subsidiaries on a consolidated basis. Regardless of the alternative threshold adopted by the registrant, disclosure will be required in all cases for any proceeding when the potential monetary sanctions exceed the lesser of $1 million or 1% of the current assets.

Amendments to Item 105 of Regulation S-K

- The amendments to Item 105 relating to disclosure of risk factors:
  - requires a summary of risk factor disclosure if the risk factor section exceeds 15 pages
  - requires risk factor disclosure to focus on "material" risks, as opposed to the current SEC guidance to focus on the "most significant" factors
  - requires risk factors to be organized under relevant headings, with any risk factors that may generally apply to any registrant or an investment in securities disclosed at the end of the risk factor section under a separate caption entitled "General Risk Factors"
- For calendar-year companies getting ready to file their third quarter Form 10-Qs it seems like the new rules will be most relevant to companies that include their entire risk factor section in the 10-Q as opposed to just providing material updates from the 10-K
- The changes will be relevant to all companies in the filing of their next 10-K and sufficient advance planning will be required to decide whether to reduce the risk factor section to less than 15 pages to avoid having to provide the risk factor summary or whether a risk factor summary needs to be prepared

What Does It All Mean?

- These amendments, along with the FAST Act changes enacted last year, show the SEC's movement toward more principles-based requirements
- These changes are intended to allow companies greater flexibility in their disclosures while minimizing unnecessary or duplicative disclosures
- While generally a revision of existing disclosure requirements, these amendments also include newly required disclosures that companies will need to prepare for, including the human capital disclosure requirements

SEC RELEASE NO. 33-10750

MODERNIZATION OF REGULATION S-K ITEMS 301, 302 AND 303

Proposed Eliminations and Amendments

- On January 30, 2020, the SEC issued Release No. 33-10750 regarding proposed eliminations of Regulation S-K Item 301 (Selected Financial Data) and Item 302 (Supplementary Financial Information) and modifications to Item 303 (MD&A)
- Comments were due April 28, 2020

Proposed Elimination of Item 301 of Regulation S-K

- Item 301 of Regulation S-K requires a registrant to provide five years of selected financial information in tabular format. The original reason for the requirement was to supply the information in one place to highlight significant trends in the registrant's historical financial condition.
- The SEC has proposed eliminating Item 301 of Regulation S-K, noting that the information required to be provided by Item 301 is now easily accessible through EDGAR and other online resources

Proposed Elimination of Item 302 of Regulation S-K

- Item 302(a) of Regulation S-K requires registrants to disclose selected quarterly financial data and to discuss any variances between the data presented and those previously reported on a Form 10-Q filing
- Item 302(b) of Regulation S-K requires disclosure of certain oil and gas production activities, most of which is already required disclosure under U.S. GAAP
  - The FASB has proposed an amendment that would fold in all of the additional requirements of Item 302(b) to be required under U.S. GAAP, effectively making Item 302(b) superfluous
- The SEC proposes eliminating Item 302(a), noting that the information required to be provided by Item 301 is now easily accessible through EDGAR and other online resources, and Item 302(b), pending confirmation of the amendment to U.S. GAAP that would require the disclosures currently required by Item 302(b)

Proposed Amendments to Item 303 of Regulation S-K

- Item 303 of Regulation S-K contains the requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations, commonly referred to as MD&A
- The SEC is proposing multiple changes to both annual and quarterly MD&A disclosures, including focusing on a more principles-based approach similar to the recently approved revisions to the Business description and codifying SEC guidance since the last rewrite of this Item
- These changes include:
  - A new subsection explicitly stating the SEC's purposes behind the MD&A disclosures
  - An updated explanation of the requirements for discussion of period-to-period changes and the underlying reasons behind them
  - Requiring discussion of material cash requirements among other "capital resources" disclosures
  - Replacing the "off-balance sheet arrangement" disclosure requirement with an instruction to the rules advising companies to disclose such arrangements in the broader context of results
  - The elimination of the contractual obligations table
  - Permitting companies to choose to compare current quarter results to either the prior year period or the preceding quarter

SEC RELEASE NO. 33-10786

AMENDMENTS TO FINANCIAL DISCLOSURES ABOUT ACQUIRED/DISPOSED BUSINESSES

Background

- On May 20, 2020, the SEC adopted amendments to the rules relating to disclosure requirements for financial statements of newly acquired or disposed businesses
- These rules are effective as of January 1, 2021, although companies may elect to comply with the new rules before that date
  - If a company does decide to comply with the new rules, it must comply with all of the new rules (i.e. no picking and choosing)

New Rules

- Among other things, the new rules:
  - Update the significance tests used under applicable rules to generally improve their application and assist registrants in making more meaningful significance determinations
  - Expand the use of pro forma financial information (as opposed to historical financial information, which may no longer be meaningful as a practical matter) in measuring significance
  - Conform significance thresholds and tests for disposed businesses to those of acquired businesses
  - Require the financial statements of the acquired business to cover only up to the two most recent fiscal years (as opposed to the potential for up to three years under the current rules)
  - Permit disclosure of abbreviated financial statements for certain acquisitions of a component of an entity, which can be helpful in the case of acquisitions of, for example, a division of a selling entity
  - Align Rule 3-14 of Regulation S-X (the requirement relating to acquisitions of real estate operations) with Rule 3-05 of Regulation S-X, so long as no unique industry considerations exist
  - Amend the pro forma financial information requirements to improve the content and relevance of such information, including by permitting greater presentation of anticipated synergies
  - Make corresponding changes to the smaller reporting company requirements in Article 8 of Regulation S-X

Amendments to Significance Tests

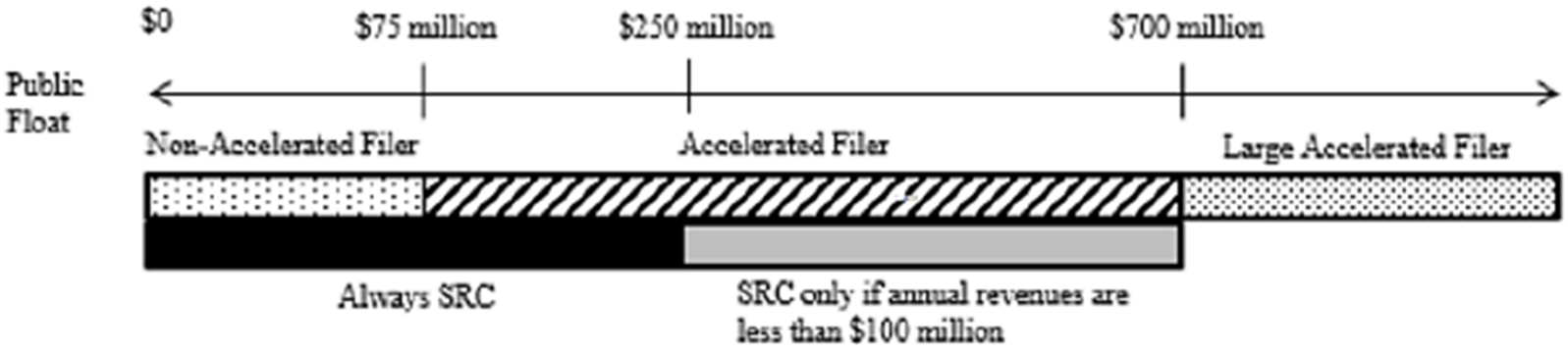
- Investment Test:
  - Existing -> the registrant's investment in the acquired business is compared to the *total assets* of the registrant reflected in its most recent annual financial statements
  - New -> compare registrant's investment in the acquired business to the *aggregate worldwide market value* of the registrant's voting and nonvoting common equity, which value *does* include shares held by affiliates
- Income Test:
  - Existing -> measure the target's pre-tax income as reflected in the target's most recent annual pre-acquisition financial statements, as compared to the same measure reflected in the registrant's most recent annual financial statements
  - New -> a new revenue component to the income test is added to compare the target's consolidated total revenues (after intercompany eliminations) to the consolidated total revenues of the registrant for the most recently completed fiscal year
    - This new revenue component does not apply if each of the registrant and the target did not have material revenue during the prior two years
    - If new revenue test applies, both components must be met for transaction to be considered significant
    - If transaction is significant under both tests, registrant may use the lower of the two tests in determining what financial statements are required

SEC RELEASE NO. 34-88365

AMENDMENTS TO ACCELERATED FILER AND LARGE ACCELERATED FILER DEFINITIONS

After the Smaller Reporting Company Amendments

- The definition of an "accelerated filer" was not changed when the SEC approved the amendment to the SRC definition, which led to several companies qualifying as both an SRC and an accelerated filer



SEC Adoption of Prior Proposal

- On May 9, 2019, the SEC issued Release No. 34-85814 regarding proposed new definitions for "accelerated filer" and "large accelerated filer"
- The proposed amendments would exclude companies that qualify as an SRC and that have annual revenues of less than $100 million from the "accelerated filer" and "large accelerated filer" definitions (effectively reinstating past practice before the SRC amendments)
- On March 12, 2020, the SEC issued Release No. 34-88365 largely adopting the proposed revisions

Prior Standards

Existing Relationships between SRCs and Non-Accelerated and Accelerated Filers		
Status	**Public Float**	**Annual Revenues**
SRC and Non-Accelerated Filer	Less than $75 million	N/A
SRC and Accelerated Filer	$75 million to less than $250 million	N/A
	$250 million to less than $700 million	Less than $100 million
Accelerated Filer (not SRC)	$250 million to less than $700 million	$100 million or more

New Standards

Relationships between SRCs and Non-Accelerated, Accelerated, and Large Accelerated Filers under the Final Amendments		
Status	**Public Float**	**Annual Revenues**
SRC and Non-Accelerated Filer	Less than $75 million	N/A
	$75 million to less than $700 million	Less than $100 million
SRC and Accelerated Filer	$75 million to less than $250 million	$100 million or more
Accelerated Filer (not SRC)	$250 million to less than $700 million	$100 million or more
Large Accelerated Filer (not SRC)	$700 million or more	N/A

Changes to "Accelerated Filer" and "Large Accelerated Filer" Transition Thresholds

Final Amendments to the Public Float Thresholds			
Initial Public Float Determination	**Resulting Filer Status**	**Subsequent Public Float Determination**	**Resulting Filer Status**
$700 million or more	Large Accelerated Filer	$560 million or more	Large Accelerated Filer
		Less than $560 million but $60 million or more	Accelerated Filer
		Less than $60 million	Non-Accelerated Filer
Less than $700 million but $75 million or more	Accelerated Filer	Less than $700 million but $60 million or more	Accelerated Filer
		Less than $60 million	Non-Accelerated Filer

Previously:
$560M = $500M
$60M = $50M

These amounts were adjusted to be equal to 80% of the initial qualification thresholds, similar to what was done to the SRC thresholds in 2018

Addition of SRC Revenue Test

- Under the final amendments, an accelerated filer will remain an accelerated filer until its public float falls below $60 million or its annual revenues fall below the applicable revenue threshold ($80 million (if the company initially did not qualify as an SRC) or $100 million), at which point it will become a non-accelerated filer.
- A large accelerated filer will become an accelerated filer at the end of its fiscal year if its public float falls to between $60 million and $560 million and its annual revenues are not below the applicable revenue threshold ($80 million or $100 million).
- The large accelerated filer will become a non-accelerated filer if its public float falls below $60 million or its public float falls below $560 million (in most cases) and its annual revenues fall below the applicable SRC revenue threshold.

GUIDANCE FROM THE SEC STAFF REGARDING DISCLOSURES RELATED TO COVID-19

SEC Staff Disclosure Guidance

- CF Disclosure Guidance Topic No. 9 – Released in March, the SEC Staff encouraged companies to assess and disclose the effects COVID-19 has had, and those that the company expects it will have, on the business, including:
  - Financial condition and results of operations, including liquidity
  - Any adverse effects of remote work arrangements
  - Reduced demand for products or services
  - Any adverse effects on human capital resources
  - Impact of travel restrictions and border closures
- CF Disclosure Guidance Topic No. 9A – Released in June, the SEC Staff followed up their previous guidance with more pointed guidance on issues companies should consider when disclosing their financial position and the effects of COVID-19

Non-GAAP Financial Measures and Key Performance Indicators

- Non-GAAP Financial Measures
  - Disclosure Guidance Topic No. 9 also included guidance from the SEC regarding companies' use of Non-GAAP financial measures, particularly when adjusting for the effects of the COVID-19 pandemic
  - As with other non-GAAP measures, those adjusting for the effects of the pandemic must follow Regulation G and Item 10(e)
- Key Performance Indicators
  - In January, the SEC released guidance on the use of KPIs and changes to KPI calculations
  - KPI disclosures should include a clear definition of how the KPI is calculated and an explanation of why it is useful to investors
  - If a company changes how it calculates a KPI, it should consider explaining what has changed, the reasons for the change, and the effects of the change on prior disclosures

SEC RELEASE NO. 33-10824

AMENDED "ACCREDITED INVESTOR" DEFINITION

Background

- In December 2019, the SEC issued proposed amendments to the definitions of "accredited investor" and "qualified institutional buyer", intended to identify those that have sufficient knowledge and expertise to participate in riskier types of investments
- The amendments to the "accredited investor" definition did not change the financial thresholds for individuals
- Rather, the amendments added several new non-financial metrics by which an individual can qualify as an accredited investor
- In addition, the amendments to the "accredited investor" and "qualified institutional buyer" definitions add several new categories of entities that qualify

Accredited Investor – Individuals

- The two new categories of individual that will qualify as "accredited investor" are:
  - Those with certain professional certifications and designations;
    - Including individuals holding Series 7, 65 and 82 certifications
  - "knowledgeable employees" of a private fund
    - A concept taken from the 1940 Act
    - Typically individuals at a private fund that participate in the investment activities of the fund
- Other changes are to expand the term "spouse" to now include "spousal equivalents"

Accredited Investor – Entities

- The amended rules now include several additional types of entities that qualify as "accredited investors", including:
  - LLCs that meet the conditions required of corporations
  - All registered investment advisers
  - Any entity that owns investments in excess of $5 million that was not formed for the express purpose of making the investment
  - Rural business investment companies (RBICs)
  - Family offices with at least $5 million in assets under management

Changes to Institutional Accredited Investor Definition

- The SEC also expanded the definition of "institutional accredited investor" to include:
  - LLCs and RBICs, as long as those entities own or invest at least $100 million in securities
  - Any other accredited investor that is an institution that meets the $100 million threshold

Changes to Qualified Institutional Buyer Definition

- Changes to definition of "qualified institutional buyer" in Rule 144A made to align it more closely with the revised accredited investor definition.
- The rule amendments expand the definition of "qualified institutional buyer" to include RBICs and limited liability companies if such entities meet the $100 million threshold for securities owned and invested.
- The amendments add to the list of enumerated qualified institutional buyers any institutional investors included in the accredited investor definition so long as such investors satisfy the $100 million threshold.
- New note to Rule 144A clarifies that an entity seeking qualified institutional buyer status under that paragraph—unlike an accredited investor seeking qualification as an accredited investor— may be formed for the purpose of acquiring the securities being offered.

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QUESTIONS?

Biography

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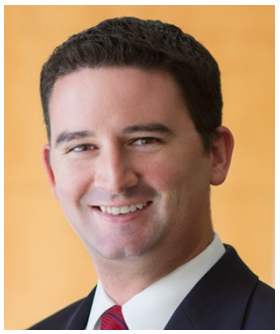
Sean M. Donahue counsels public companies and their Boards of Directors on securities regulation and activist defense matters. Sean uses his experience as a former staff member of the SEC's Division of Corporation Finance to counsel public companies on securities compliance, SEC public reporting, corporate governance, capital markets transactions, and NYSE and Nasdaq compliance issues. As a member of the firm's shareholder activism defense practice, he advises public companies in high-profile proxy contests, activist shareholder campaigns, contests for corporate control, and negotiated and contested mergers and acquisitions.

Prior to joining Morgan Lewis, Sean served as an attorney-adviser with the SEC in the Division of Corporation Finance. While at the SEC, Sean worked on a number of transactional and securities compliance matters. He uses his extensive experience with SEC disclosure issues to advise public companies in connection with securities regulatory and activist defense matters.

Biography



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Bryan S. Keighery represents life science and technology companies in a range of corporate and securities transactions. He handles a variety of corporate finance transactions for public companies, including initial public offerings, follow-on offerings, registered direct offerings (RDOs), and private investments in public equity (PIPEs), as well as venture capital and other financing transactions for privately held companies. Additionally, Bryan counsels both public and privately held companies on general corporate law, mergers and acquisitions, and other business matters.

Bryan also regularly counsels public companies in annual, quarterly, and periodic reports; proxy statements and SEC compliance under US federal securities laws; and corporate governance requirements of various stock exchanges, including NYSE and Nasdaq.

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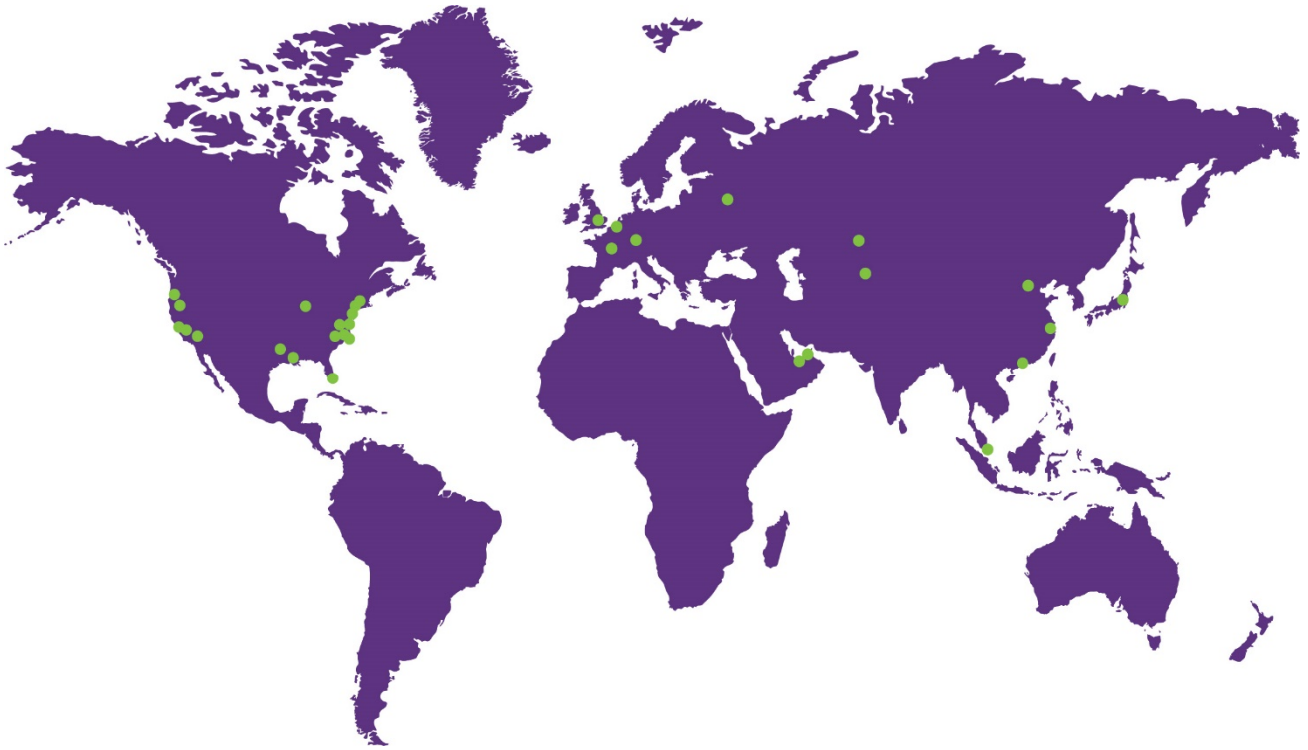

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