

Client Alert

September 2020

Regulation S-K Modernization

On August 26, 2020, the Securities and Exchange Commission (“SEC”) adopted [final amendments](#) modernizing Regulation S-K Items 101 (Description of the Registrant’s Business), 103 (Legal Proceedings) and 105 (Risk Factors). The final amendments to Regulation S-K will be effective 30 days after publication in the Federal Register. For December 31 fiscal year-end filers, these new rules will apply for the Quarterly Report on Form 10-Q for the quarter ended September 30, 2020, if not sooner in a registration statement or other filing requiring this disclosure.

Attached as Exhibit A is a blackline showing the revisions to Regulation S-K Items 101, 103 and 105.

Executive Summary

- **Item 101(a) Description of the Registrant’s Business.** Requirement to discuss the business over the course of a three or five year period replaced with a principles-based framework. Only an update of the material developments to the business is required in subsequent filings. List of required business development disclosures replaced with a non-exclusive list of disclosures a registrant may need to discuss to the extent material to the understanding of the general development of the business.
- **Item 101(c) Business Narrative.** Required disclosure of specific items replaced with a non-exclusive list of possible topics a registrant should discuss to the extent material, including a description of the registrant’s human capital resources. Regulatory compliance disclosure to include all material government regulations, not just environmental laws.
- **Item 103 Legal Proceedings.** A hyperlink or cross reference to the same legal proceedings disclosure elsewhere in the same filing is expressly permitted in lieu of including duplicate disclosure. Threshold for disclosure of environmental proceedings is increased from \$100,000 to \$300,000 or an alternative threshold that does not exceed the lesser of \$1 million or one percent of the registrant’s consolidated current assets.
- **Item 105 Risk Factors.** If a registrant’s risk factors section exceeds 15 pages, a summary is required, which cannot exceed two pages. Risk factors should focus on “material” risks, rather than the “most significant” risks. Risk factors are to be grouped and organized under relevant headings, with generic risk factors that could apply to any registrant to be disclosed at the end of the risk factors section under the heading “General Risk Factors.”

Amendments to Item 101(a): Description of the Registrant’s Business

Item 101(a) currently requires a registrant to include a full description of its business over the course of the past five years (or three years in the case of smaller reporting companies) and requires disclosure of the following items:

- the nature and results of any bankruptcy, receivership or a similar proceeding with respect to the registrant or any of its significant subsidiaries;
- the nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries;
- the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and
- any material changes in the mode of conducting business.

Under amended Item 101(a), the five-year requirement (or three-year requirement for smaller reporting companies) is replaced with a materiality framework. Instead of discussing the past five-years, the registrant should disclose information material to understanding the general development of the business.

Under amended Item 101(a), where the registrant previously provided a fulsome description of the development of its business in a prior filing, only disclosure of the material developments since that filing is necessary. If the registrant chooses this option, it must incorporate by reference and include a hyperlink to the filing that includes the full discussion.¹

As noted above, Item 101(a) currently requires disclosure of specific business developments. Amended Item 101(a) only requires disclosure of a listed topic to the extent material to an understanding of the development of the registrant's business. In addition, amended Item 101(a) adds as a disclosure topic material changes to a registrant's previously disclosed business strategy. The SEC acknowledged that a registrant is not required to disclose its business strategy. However, if a registrant chooses to disclose its business strategy, the SEC noted that a discussion of changes to that strategy would be appropriate to the extent material to an understanding of the development of the registrant's business.

Amendments to Item 101(c): Business Narrative

Item 101(c) currently requires a narrative description of the business done and intended to be done by the registrant with a focus on the registrant's dominant segment or each reportable segment. The disclosure must cover 10 specified topics with respect to each such segment and two specified topics with respect to the registrant's business in general, many of which have not been amended since 1973. Recognizing that businesses, markets and technology have changed over time, the SEC noted that some of the specified topics are no longer relevant to all registrants. As a result and consistent with the other principles-based revisions to Item 101, the SEC revised Item 101(c) to replace the current list of specified topics with a non-exclusive list of seven disclosure topic examples that should be discussed to the extent material to an understanding of the registrant's business.

Specifically, amended Item 101(c) lists the following topic examples:

- a description of revenue-generating activities, products and/or services;
- disclosure of the status of development efforts for new or enhanced products and trends;
- raw materials disclosure to include all resources material to the registrant's business;
- 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;
- the extent to which the business may be seasonal;

¹ Note, however, that under Securities Act Rule 411(c) and Exchange Act Rule 12b-23(e), a filing that includes an update to the business development description and incorporates by reference the complete Item 101(a) discussion would not be permitted to be incorporated by reference into a subsequent filing, such as a Form S-3 or Form S-4.

- material effects of compliance with all governmental regulations (in addition to environmental regulations, as previously required); and
- a description of the registrant's human capital resources.

Items no longer listed in the non-exclusive disclosure topics list include: the practices of the registrant and the industry relating to working capital items (current Item 101(c)(1)(vi)) and the dollar amount of backlog orders believed to be firm (current Item 101(c)(1)(viii)).

Item 101(c)(1)(xii) currently requires disclosure of the material effects of compliance with environmental laws on the capital expenditures, earnings, and the competitive position of the registrant and its subsidiaries. Registrants commonly disclose other governmental proceedings in response to current Item 101(c)(1)(xii), in addition to environmental proceedings. Codifying this practice, amended Item 101(c) requires, to the extent material to an understanding of the registrant's business taken as a whole, disclosure of 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. This analysis should include estimated capital expenditures for environmental control facilities for the current fiscal year and any other subsequent period material to the registrant. The SEC emphasized the new rule "should improve the ability of each registrant to tailor its disclosure to discuss only those governmental regulations that are of particular importance to it" and noted that "the Item does not call for, or require, a recitation of every regulation that affects a registrant's business and operations."

Currently, a registrant must disclose the number of persons it employs. The amended rule will require a more comprehensive description of the registrant's human capital resources. The new disclosure should include any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the registrant's business. Some examples of relevant human capital measures or objectives include measures or objectives that address the attraction, development, and retention of personnel. The SEC specifically declined to adopt a definition of "human capital" because this term may evolve over time and could be a company-specific definition. In a statement issued in connection with adoption of the amendments, Chairman Jay Clayton stated that "under the principles-based approach, I do expect to see meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs."²

Amendment to Item 103: Legal Proceedings

Item 103 currently requires disclosure of any pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is subject. Item 103 and U.S. GAAP have overlapping disclosure requirements in the context of legal proceedings, which could result in duplicative disclosure. Under amended Item 103, a registrant will be expressly permitted to satisfy its disclosure requirement by including a hyperlink or cross reference to the same legal proceedings disclosure included elsewhere in a filing, such as in the Management's Discussion & Analysis, risk factors or notes to the financial statements.

² That said, in considering their SEC disclosure obligations companies must also bear in mind their obligations under state and federal anti-discrimination laws. We expect to elaborate further on human capital reporting in a forthcoming client alert solely on that topic.

Amendments to Item 103 Instructions: Government Environmental Proceedings

Under the current Instruction 5.C. to Item 103, a registrant must disclose any proceeding under environmental laws to which a governmental authority is a party unless the registrant reasonably believes it will not result in sanctions of \$100,000 or more. The amended threshold for disclosure of proceedings under environmental laws to which a governmental authority is a party is increased from \$100,000 to \$300,000. Additionally, the registrant has discretion to adopt a different threshold “reasonably designed to result in disclosure of material environmental proceedings.” If the registrant elects to adopt a different threshold, such threshold must be disclosed in each annual and quarterly report. However, irrespective of any alternative 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 one percent of the current assets of the registrant and its subsidiaries on a consolidated basis.

Amendment to Item 105: Risk Factor Disclosures

Item 105 currently requires a registrant to disclose the most significant factors that make an investment speculative or risky, discourages disclosure of boilerplate or generic risk factors that could apply to any registrant and requires that the disclosure be concise and organized logically. In the adopting release, the SEC notes that risk factor disclosures by registrants have generally increased over time and that registrants have continued to include boilerplate and generic risk factors, despite clear guidance from the SEC to include the “most significant” risks facing the particular registrant. To address these concerns, amended Item 105(b) requires disclosure of material risks tailored to the registrant. If the risk factors section exceeds 15 pages, amended Item 105 requires a summary of the risk factors that cannot exceed two pages long.

The summary of the risk factors should be a series of concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky. Risk factors must now be organized under relevant headings in addition to the currently required subcaptions, with any generally applicable risk factors disclosed at the end of the section under a separate caption titled “General Risk Factors.”³ The SEC’s adopting release is clear, however, that companies need not attempt to prioritize the order in which they discuss risk factors.

Next Steps and Conclusion

Registrants should begin planning for the effectiveness of the disclosure amendments and taking steps to ensure their disclosure complies with the newly adopted requirements. Specifically, registrants should consider the following action items:

- **Description of Business.** Review description of business in Part I of Form 10-K to identify necessary updates to reflect revisions to Item 101 of Regulation S-K. Specifically, registrants will need to begin planning their human capital disclosure, including qualitative and quantitative metrics actually used by management. Given the current COVID-19 pandemic environment, registrants may even consider expanding this disclosure to discuss health and safety measures taken with respect to employees and other actions taken in light of the pandemic. Likewise, registrants should prepare expanded regulatory environment disclosures

³ The Supreme Court has held that information is material if a reasonable investor would consider the information important in making an investment decision. Omitted information that was material would have altered the “total mix” of information available. *Basic Inc. v. Levinson* p. 79 485 U.S. 224, 231 (1988) quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)

to cover all governmental regulations, including environmental regulations, material to the registrant.

- **Risk Factors.** Review current risk factors to ensure disclosure focuses on “material” risks – with specific emphasis on eliminating factors that are outdated, too generic or no longer relevant. Additionally, registrants should begin to “group” risk factors under relevant headings in a logical and organized manner and, if required, prepare a short summary of the risk factors.
- **Environmental Legal Proceeding Threshold.** For registrants facing regular environmental proceedings with the government, consider adopting a monetary threshold for disclosure of such proceedings higher than \$300,000.

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Exhibit A

§229.101 (Item 101) Description of business.

(a) *General development of business.* Describe the general development of the business of the registrant, its subsidiaries, and any predecessor(s) ~~during the past five years, or such shorter period as the registrant may have been engaged in business. Information shall be disclosed for earlier periods if material to an understanding of the general development of the business.~~

(1) In describing developments, ~~information shall be given as to matters such as the following: the year in which the registrant was organized and its form of organization;~~ only information material to an understanding of the general development of the business is required. Disclosure may include, but should not be limited to, the following topics:

(i) Any material changes to a previously disclosed business strategy;

~~(ii) The~~ The nature and ~~results~~ effects of any material bankruptcy, receivership, or any similar ~~proceedings~~ proceeding with respect to the registrant or any of its significant subsidiaries;

~~(iii) The~~ The nature and ~~results~~ effects of any ~~other~~ material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; and

~~(iv) The~~ The acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; ~~and any material changes in the mode of conducting the business.~~

(2) Notwithstanding the provisions of §230.411(b) or §240.12b-23(a) of this chapter, as applicable, a registrant may only forgo providing a full discussion of the general development of its business for a filing other than an initial registration statement if it provides an update to the general development of its business, disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business. In addition, the registrant must incorporate by reference, and include one active hyperlink to one registration statement or report that includes, the full discussion of the general development of the registrant's business.

~~(23)~~ Registrants:

(i) Filing a registration statement on Form S-1 (§239.11 of this chapter) under the Securities Act or on Form 10 (§249.210 of this chapter) under the Exchange Act;

(ii) Not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act immediately before the filing of such registration statement; and

(iii) That (including predecessors) have not received revenue from operations during each of the three fiscal years immediately before the filing of such registration statement, shall provide the following information:

(A) If the registration statement is filed prior to the end of the registrant's second fiscal quarter, a description of the registrant's plan of operation for the remainder of the fiscal year; or

(B) If the registration statement is filed subsequent to the end of the registrant's second fiscal quarter, a description of the registrant's plan of operation for the remainder of the fiscal year and for

the first six months of the next fiscal year. If such information is not available, the reasons for it not being available shall be stated. Disclosure relating to any plan shall include such matters as:

(1) In the case of a registration statement on Form S-1, a statement in narrative form indicating the registrant's opinion as to the period of time that the proceeds from the offering will satisfy cash requirements and whether in the next six months it will be necessary to raise additional funds to meet the expenditures required for operating the business of the registrant; the specific reasons for such opinion shall be set forth and categories of expenditures and sources of cash resources shall be identified; however, amounts of expenditures and cash resources need not be provided; in addition, if the narrative statement is based on a cash budget, such budget shall be furnished to the Commission as supplemental information, but not as part of the registration statement;

(2) An explanation of material product research and development to be performed during the period covered in the plan;

(3) Any anticipated material acquisition of plant and equipment and the capacity thereof;

(4) Any anticipated material changes in number of employees in the various departments such as research and development, production, sales or administration; and

(5) Other material areas which may be peculiar to the registrant's business.

(b) [Reserved]

(c) ~~Narrative description~~ Description of business. (1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. ~~To the extent~~ When describing each segment, only information material to an understanding of the ~~registrant's~~ business taken as a whole, ~~the description of each such segment shall~~ is required. Disclosure may include, but should not be limited to, the information specified in paragraphs (c)(1) (i) through (xv) of this section. ~~The matters specified in paragraphs (c)(1) (xi) through (xiii) of this section shall be discussed with respect to the registrant's business in general; where material, the segments to which these matters are significant shall be identified.~~

(i) Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers;

(ii) Status of development efforts for new or enhanced products, trends in market demand and competitive conditions;

~~(i) 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.~~

~~(ii) 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.~~

~~(iii)~~ Resources material to a registrant's business, such as:

~~(iiiA)~~ The sources Sources and availability of raw materials; and

~~(ivB)~~ The importance to the segment and the The duration and effect of all patents, trademarks, licenses, franchises, and concessions held; -

~~(v)~~ The extent to which the business of the segment is or may be seasonal.

~~(vi) 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).~~

~~(vii) 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.~~

~~(viii) 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.)~~

~~(ix)~~ (v) 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; and -

(v) The extent to which the business is or may be seasonal.

~~(x) 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.~~

~~(xi) [Reserved]~~

~~(xii) 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.~~

~~(xiii) The number of persons employed by the registrant.~~

(2) Discuss the information specified in paragraphs (c)(2)(i) and (ii) of this section with respect to, and to the extent material to an understanding of, the registrant's business taken as a whole, except that, if the information is material to a particular segment, you should additionally identify that segment.

(i) 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; and

(ii) 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).

(d) [Reserved]

(e) *Available information.* Disclose the information in paragraphs (e)(1), (e)(2) and (e)(3) of this section in any registration statement you file under the Securities Act (15 U.S.C. 77a *et seq.*), and disclose the information in paragraph (e)(3) of this section in your annual report on Form 10-K (§249.310 of this chapter). Further disclose the information in paragraph (e)(4) of this section if you are an accelerated filer or a large accelerated filer (as defined in §240.12b-2 of this chapter) filing an annual report on Form 10-K (§249.310 of this chapter):

(1) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the SEC.

(2) State that the SEC maintains an internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (<http://www.sec.gov>).

(3) Disclose your Internet address, if you have one.

(4)(i) Whether you make available free of charge on or through your Internet website, if you have one, your annual report on Form 10-K, quarterly reports on Form 10-Q (§249.308a of this chapter), current reports on Form 8-K (§249.308 of this chapter), and amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) as soon as reasonably practicable after you electronically file such material with, or furnish it to, the SEC;

(ii) If you do not make your filings available in this manner, the reasons you do not do so (including, where applicable, that you do not have an Internet website); and

(iii) If you do not make your filings available in this manner, whether you voluntarily will provide electronic or paper copies of your filings free of charge upon request.

(f) *Reports to security holders.* Disclose the following information in any registration statement you file under the Securities Act:

(1) If the SEC's proxy rules or regulations, or stock exchange requirements, do not require you to send an annual report to security holders or to holders of American depository receipts, describe briefly the nature and frequency of reports that you will give to security holders. Specify whether the reports that you give will contain financial information that has been examined and reported on, with an opinion expressed "by" an independent public or certified public accountant.

(2) For a foreign private issuer, if the report will not contain financial information prepared in accordance with U.S. generally accepted accounting principles, you must state whether the report will include a reconciliation of this information with U.S. generally accepted accounting principles.

(g) *Enforceability of civil liabilities against foreign persons.* Disclose the following if you are a foreign private issuer filing a registration statement under the Securities Act:

(1) Whether or not investors may bring actions under the civil liability provisions of the U.S. Federal securities laws against the foreign private issuer, any of its officers and directors who are residents of a foreign country, any underwriters or experts named in the registration statement that are residents of a foreign country, and whether investors may enforce these civil liability provisions when the assets of the issuer or these other persons are located outside of the United States. The disclosure must address the following matters:

(i) The investor's ability to effect service of process within the United States on the foreign private issuer or any person;

(ii) The investor's ability to enforce judgments obtained in U.S. courts against foreign persons based upon the civil liability provisions of the U.S. Federal securities laws;

(iii) The investor's ability to enforce, in an appropriate foreign court, judgments of U.S. courts based upon the civil liability provisions of the U.S. Federal securities laws; and

(iv) The investor's ability to bring an original action in an appropriate foreign court to enforce liabilities against the foreign private issuer or any person based upon the U.S. Federal securities laws.

(2) If you provide this disclosure based on an opinion of counsel, name counsel in the prospectus and file as an exhibit to the registration statement a signed consent of counsel to the use of its name and opinion.

(h) *Smaller reporting companies.* A smaller reporting company, as defined by §229.10(f)(1), may satisfy its obligations under this Item by describing the development of its business ~~during the last three years~~ pursuant to this paragraph (h). In describing developments under paragraphs (h)(1) through (3), information should be provided for the period of time that is material to an understanding of the general development of the business. Notwithstanding the provisions of §230.411(b) or §240.12b-23(a) of this chapter as applicable, a smaller reporting company may only forgo providing a full discussion of the general development of its business for a filing other than an initial registration statement if it provides an update to the general development of its business disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business. In addition, the smaller reporting company must incorporate by reference, and include one active hyperlink to one registration statement or report that includes, the full discussion of the general development of the registrant's business. If the smaller reporting company has not been in business for three years, ~~give~~ provide the same information for predecessor(s) of the smaller reporting company if there are any. This business development description should include:

(1) Form and year of organization;

(2) Any bankruptcy, receivership or similar proceeding; and

(3) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(4) *Business of the smaller reporting company.* Briefly describe the business and include, to the extent material to an understanding of the smaller reporting company:

(i) Principal products or services and their markets;

(ii) Distribution methods of the products or services;

(iii) Status of any publicly announced new product or service;

(iv) Competitive business conditions and the smaller reporting company's competitive position in the industry and methods of competition;

(v) Sources and availability of raw materials and the names of principal suppliers;

(vi) Dependence on one or a few major customers;

(vii) Patents, trademarks, licenses, franchises, concessions, royalty agreements or labor contracts, including duration;

(viii) Need for any government approval of principal products or services. If government approval is necessary and the smaller reporting company has not yet received that approval, discuss the status of the approval within the government approval process;

(ix) Effect of existing or probable governmental regulations on the business;

(x) [Reserved]

(xi) Costs and effects of compliance with environmental laws (federal, state and local); and

(xii) Number of total employees and number of full-time employees.

(5) *Reports to security holders.* Disclose the following in any registration statement you file under the Securities Act of 1933:

(i) If you are not required to deliver an annual report to security holders, whether you will voluntarily send an annual report and whether the report will include audited financial statements;

(ii) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the Commission; and

(iii) State that the Commission maintains an internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (<http://www.sec.gov>). Disclose your internet address, if available.

(6) *Foreign issuers.* Provide the information required by Item 101(g) of Regulation S-K (§229.101(g)).

Instructions to Item 101: 1. In determining what information about the segments is material to an understanding of the registrant's business taken as a whole and therefore required to be disclosed, pursuant to paragraph (c) of this Item, the registrant should take into account both quantitative and qualitative factors such as the significance of the matter to the registrant (e.g., whether a matter with a relatively minor impact on the registrant's business is represented by management to be important to its future profitability), the pervasiveness of the matter (e.g., whether it affects or may affect numerous items in the segment information), and the impact of the matter (e.g., whether it distorts the trends reflected in the segment information). Situations may arise when information should be disclosed about a segment, although the information in quantitative terms may not appear significant to the registrant's business taken as a whole.

2. Base the determination of whether information about segments is required for a particular year upon an evaluation of interperiod comparability. For instance, interperiod comparability would require a registrant to report segment information in the current period even if not material under the criteria for reportability of FASB ASC Topic 280, *Segment Reporting*, if a segment has been significant in the immediately preceding period and the registrant expects it to be significant in the future.

3. The Commission, upon written request of the registrant and where consistent with the protection of investors, may permit the omission of any of the information required by this Item or the furnishing in substitution thereof of appropriate information of comparable character.

* * * *

§229.103 (Item 103) Legal proceedings.

(a) Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the ~~proceeding~~ proceedings and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

Information may be provided by hyperlink or cross reference to legal proceedings disclosure elsewhere in the document, such as in Management's Discussion & Analysis (MD&A), Risk Factors and notes to the financial statements.

(b) No information need be given under this section for proceedings:

(1) That involve negligence or other claims or actions if

~~Instructions to Item 103: 1. If the business ordinarily results in such claims or actions for negligence or other claims, no such action or, unless the claim or action need be described unless it~~ departs from the normal kind of such claims or actions; or.

~~(2) 2. No information need be given with respect to any proceeding t~~That involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal ~~and or~~ factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

~~(3) 3. Notwithstanding paragraph (b) of this section, Instructions 1 and 2, disclosure under this section shall include, but shall not be limited to:~~

~~(1) a~~Any material bankruptcy, receivership, or similar proceeding with respect to the registrant or any of its significant subsidiaries ~~shall be described;~~

~~(2) 4. Any material proceedings to which any director, officer or affiliate of the registrant, any owner of record or beneficially of more than five percent of any class of voting securities of the registrant, or any associate of any such director, officer, affiliate of the registrant, or security holder is a party adverse to the registrant or any of its subsidiaries or has a material interest adverse to the registrant or any of its subsidiaries also shall be described;~~

~~(3) 5. Notwithstanding the foregoing, an a~~Administrative or judicial proceedings (including, ~~for purposes of A and B of this Instruction,~~ proceedings which present in large degree the same issues) arising under any Federal, State, or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment. Such proceedings shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:

~~(i) A.~~ Such proceeding is material to the business or financial condition of the registrant;

~~(ii) B.~~ Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or

~~(iii) C.~~ A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than ~~\$100,000~~ \$300,000 or, at the election of the registrant, such other threshold that (A) the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to the business or financial condition is disclosed, (B) the registrant discloses (including any change

thereto) in each annual and quarterly report, and (C) does not exceed the lesser of \$1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis; provided, however, that such proceedings ~~which~~ that are similar in nature may be grouped and described generically.

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§229.105 (Item 105) Risk factors.

(a) Where appropriate, provide under the caption “Risk Factors” a discussion of the ~~most significant~~ material factors that make an investment in the registrant or offering speculative or risky. This discussion must be ~~concise and~~ organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk. The presentation of ~~Do not present~~ risks that could apply generically to any registrant or any offering is discouraged, but to the extent generic risk factors are presented, disclose them at the end of the risk factor section under the caption “General Risk Factors.”

(b) ~~Explain~~ Concisely explain how ~~the~~ each risk affects the registrant or the securities being offered. ~~Set forth each risk factor under a subcaption that adequately describes the risk. If the discussion is longer than 15 pages, include in the forepart of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky.~~ If the risk factor discussion is included in a registration statement, it must immediately follow the summary section required by §229.503 (Item 503 of Regulation S-K). If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on Rule 430A (§230.430A ~~(a)~~ of this chapter). The registrant must furnish this information in plain English. See §230.421(d) of Regulation C of this chapter.

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