
Transitional FAQs Regarding Amended Regulation S-K Items 101, 103 and 105

We have received questions about the disclosure requirements and related rules adopted in the Modernization of Regulation S-K Items 101, 103, and 105 rulemaking ([Securities Act Release No. 33-10825](#)).^[1] We refer to these recently amended requirements as the “new” rules and the disclosure requirements that were changed as the “old” rules. The new rules are effective on November 9, 2020.

(1) Question:

A registrant has a Registration Statement on Form S-3 that became effective before November 9, 2020. If the registrant files a prospectus supplement to the Form S-3 on or after November 9, 2020, must the prospectus supplement comply with the new rules?

Answer:

The prospectus supplement does not need to comply with new Items 101 and 103 because Form S-3 does not expressly require Item 101 or Item 103 disclosure but rather requires the incorporation by reference from Exchange Act reports containing that information. A registrant also need not amend its Form 10-K that is incorporated by reference into the Form S-3 pursuant to Item 12(a)(1) of Form S-3 to comply with new Items 101 and 103.

In contrast, Securities Act Rule 401(a) requires that the form and contents of a prospectus supplement conform to the applicable rules and forms as in effect on the initial filing date of the prospectus supplement. Despite the fact that Item 3 of Form S-3 expressly requires Item 105 disclosure, the staff will not object if the prospectus supplement complies with old Item 105 until the next update to the Registration Statement on Form S-3 for Section 10(a)(3) purposes.

(2) Question:

Does new Item 101 require registrants to disclose information in their Report on Form 10-K for more than the fiscal year covered by the Report?

Answer:

No, the new rules did not change Item 1 of Form 10-K, which only requires disclosures regarding the development of the registrant’s business for the fiscal year covered by the Report on Form 10-K. [See also Item 10(a) of Regulation S-K.]

(3) Question:

Must a registrant always provide a full discussion of the general development of its business pursuant to new Item 101(a) (or new Item 101(h) for a smaller reporting company) in an annual report or registration statement that requires Item 101 disclosure?

Answer:

Not necessarily. For a filing other than an initial registration statement, subject to Securities Act Rule 411(e) and Exchange Act Rule 12b-23(e), new Item 101(a)(2) and (h) permit a registrant to omit the full discussion of the general development of its business if the registrant: (1) provides an update to the general development of its business, disclosing all material developments that have occurred since the most recent registration statement or report that includes the full discussion; (2) includes one active hyperlink to the registration statement or report that includes the full discussion; and (3) incorporates the full discussion by reference to the registration statement or report. A registrant is not required to use this updating method. The staff anticipates that the updating method will apply mainly to registration statements.

[1] The answers to these questions represent the views of the staff of the Division of Corporation Finance. They are not rules, regulations, or statements of the Securities and Exchange Commission (“Commission”). Further, the Commission has neither approved nor disapproved them.

Modified: Nov. 5, 2020