

November 23, 2020

SEC Adopts Amendments to Regulation S-K

Amendments to Regulation S-K Modernize, Simplify and Enhance MD&A and Other Financial Disclosures

SUMMARY

On November 19, 2020, the Securities and Exchange Commission adopted amendments to modernize, simplify and enhance disclosure requirements in Regulation S-K. The amendments are intended to eliminate duplicative disclosures and to focus on material information for the benefit of investors, while simplifying compliance efforts for registrants. The amendments, which were adopted substantially as proposed with certain modifications, reflect an ongoing, comprehensive evaluation of the existing disclosure requirements as well as comments received in response to the SEC's January 2020 proposing release. Our [Memorandum to Clients](#), published on February 5, 2020, summarized key aspects of the proposed rules.

The final amendments are available [here](#). The amendments will become effective 30 days after publication in the Federal Register, and registrants will be required to apply the amended rules for their first fiscal year ending on or after the mandatory compliance date, which is the date that is 210 days after publication of the amendments in the Federal Register. For calendar year registrants, the rules will apply to annual reports for the year ending December 31, 2021. Registrants will be required to apply the amendments in a registration statement and prospectus that on its initial filing date is required to contain financial statements for a period on or after the mandatory compliance date. Prior to the mandatory compliance date, registrants may voluntarily elect to provide disclosure consistent with the final amendments at any time after the effective date, so long as they provide disclosure responsive to an amended item in its entirety.

BACKGROUND

In December 2013, the SEC Staff released its “Report on Review of Disclosure Requirements in Regulation S-K” (the “Report”), which was mandated by Section 108 of the Jumpstart Our Business Startups Act. Based on a recommendation in the Report, the SEC initiated a comprehensive evaluation of its disclosure requirements, which included an assessment of the information that the SEC’s rules require registrants to disclose how and where this information is presented, and how the SEC can better use technology as part of these efforts. Additionally, the Fixing America’s Surface Transportation Act requires the SEC to study ways that Regulation S-K can be modernized and simplified while continuing to provide investors with all material information.

AMENDMENTS

The final amendments address multiple items of Regulation S-K and related rules. Of particular note are the following aspects:

- ***Elimination of Certain Requirements.*** The final amendments eliminate certain requirements in order to reduce duplicative disclosure and focus on material information. Specifically, the amendments eliminate:
 - ***Item 301 (Selected Financial Data).*** Registrants will no longer be required to provide five years of selected financial data.

In the adopting release, the SEC encourages registrants to consider whether trend information for periods earlier than those presented in the financial statements may be necessary in light of the objectives of MD&A disclosure. The SEC also encourages registrants to consider whether tabular presentation of relevant information, in particular as part of an introductory section or overview, may help a reader’s understanding of MD&A.
 - ***Item 303(a)(5) (Tabular disclosure of contractual obligations).*** Registrants will no longer be required to provide a contractual obligations table given the amended disclosure requirements for liquidity and capital resources and certain overlap with information required in the financial statements, and to promote the principles-based nature of MD&A.
- ***Item 302(a) (Selected Quarterly Financial Data).*** Registrants will no longer be required to provide tabular disclosure of two years of selected quarterly financial data. In order to reduce repetition and focus disclosure on material information, Item 302(a) has been revised to have a streamlined requirement to disclose material retrospective changes that pertain to the income statement for any of the quarters within the registrant’s two most recent fiscal years and any subsequent interim period. Amended Item 302(a) will also require registrants to provide an explanation of the reasons for the changes and to disclose summarized financial information for the income statement and earnings per share reflecting the changes.
- ***Item 303 (Management’s Discussion and Analysis (“MD&A”)).*** The amendments also include changes intended to modernize, simplify and enhance the disclosure requirements of Item 303. Specifically, the amendments:
 - Add a new Item 303(a) (Objective) describing the principal objectives of MD&A. The new Item 303(a) incorporates a portion of the substance of current Instruction 1 and much of the substance of current Instructions 2 and 3 to current Item 303(a) and codifies SEC guidance that MD&A is intended to provide disclosures “from management’s perspective.” The amendments are also intended to remind registrants as they prepare their MD&A that the

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general purpose of the disclosure is to provide both a historical and prospective analysis of the registrant's financial condition and results of operations, with particular emphasis on the registrant's prospects for the future. Current Items 303(a) (Full Fiscal Years) and 303(b) (Interim Periods) have been retained and re-captioned as Items 303(b) and 303(c), respectively.

- Replace current Item 303(a)(4) (Off-balance sheet arrangements) with a principles-based instruction prompting registrants to discuss off-balance sheet arrangements in the broader context of MD&A when those obligations have had, or are reasonably likely to have, a material effect on a registrant's financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources. By contrast, current Item 303(a)(4) requires off-balance sheet disclosure to be in a separately captioned section and contains prescriptive requirements that overlap with the requirements of U.S. GAAP.
- Add a new disclosure requirement to Item 303 (Critical accounting estimates) (new Item 303(b)(3)) to clarify and codify existing SEC guidance by explicitly requiring disclosure of critical accounting estimates, which are defined as estimates made in accordance with GAAP that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the registrant's financial condition or results of operations. For each critical accounting estimate, the amendments require registrants to disclose why the estimate is subject to uncertainty and, to the extent information is material and reasonably available, how much each estimate and/or assumption has changed during the relevant period, and the sensitivity of the reported amounts to the methods, assumptions and estimates underlying the estimate's calculation. New Item 303(b)(3) also requires quantitative as well as qualitative information necessary to understand the estimation uncertainty and the impact the estimate has had or is reasonably likely to have on the registrant's financial condition or results of operations, to the extent the information is reasonably available and material. In the adopting release, the SEC notes that registrants often repeat the information in the financial statement footnotes about significant accounting policies and that the amendments are intended to eliminate duplicative disclosures and, instead, promote enhanced analysis of measurement uncertainties to supplement the disclosure in the financial statements.
- Revise the interim MD&A requirement in current Item 303(b) (Interim periods) (new Item 303(c)) to provide flexibility by allowing registrants to compare the results of operations for their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. If a registrant switches the basis of comparison, the registrant will be required to discuss the reasons for the change and provide both comparisons when the change is first made. Item 303(c)(2) retains the current requirement to discuss any material changes in a registrant's results of operations between the most recent fiscal year-to-date interim period and the corresponding period of the preceding fiscal year.
- Other amendments, summarized in the Appendix, are incremental changes to Item 303 that clarify MD&A disclosure requirements, codify existing SEC guidance and reduce repetitive and immaterial disclosure.

The SEC also adopted certain corresponding amendments that will apply to foreign private issuers ("FPIs") providing disclosure required by Form 20-F, including eliminating the requirement to provide five years of selected financial data by deleting Item 3.A and the related instructions and amending Item 5 (Operating and Financial Review and Prospects) to ensure that MD&A requirements for FPIs continue to mirror the substantive MD&A requirements in Item 303 of Regulation S-K. The amendments to Item 5 include eliminating the requirement to provide a contractual obligations table and shifting to principles-based liquidity and capital resources disclosure and providing additional guidance to issuers regarding the purpose

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of MD&A and related disclosure considerations. Certain corresponding amendments will also apply to eligible Canadian FPIs providing disclosure required by Form 40-F that use Canadian disclosure documents to satisfy the SEC's registration and disclosure requirements.

The amendments were adopted by the SEC by a vote of 3 - 2, with Commissioners Lee and Crenshaw dissenting. In a [joint statement](#), Commissioners Lee and Crenshaw note that the amendments fail "completely to address climate risk." In a note to the adopting release, the SEC noted that in keeping with its principles-based approach to MD&A, it is not adding any new requirements to Item 303 with respect to environmental, social or governance ("ESG") issues or sustainability matters. The joint statement notes that improved climate disclosure is important to understand "the systemic risks that climate change poses to global financial stability" and that, in their view, a principles-based approach to disclosure is not sufficient because, to the extent that information is disclosed, it is not uniform and standardized. They advocate for a new rulemaking initiative to address climate, human capital and other ESG risks.

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APPENDIX

Additional amendments to Item 303 (Management's Discussion and Analysis ("MD&A")) of Regulation S-K include the following:

- Amend Instruction 4 to current Item 303(a) to clarify that MD&A requires a narrative discussion of the "underlying reasons" for material changes from period to period in one or more line items in quantitative and qualitative terms, rather than only the "cause" for material changes, and to clarify in new Item 303(b) that registrants should discuss material changes within a line item even when such material changes offset each other.
- Amend current Item 303(a)(2) (Capital resources) (new Item 303(b)(1)(ii)) to specify that a registrant should broadly disclose material cash commitments including, but not limited to, capital expenditures. Item 303(a)(2) currently requires a registrant to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, and to indicate the general purpose of such commitments and the anticipated sources of funds needed to fulfill such commitments. New Item 303(b)(1) requires a registrant to describe its material cash requirements, including commitments for capital expenditures, as of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements, and the general purpose of the requirements.
- Amend the second sentence of current Item 303(a)(3)(ii) (Known trends or uncertainties) to provide that when a registrant knows of events that are *reasonably likely* to cause (as opposed to *will* cause) a material change in the relationship between costs and revenues, such reasonably likely change must be disclosed. The SEC clarified that the "reasonably likely" threshold applies throughout Item 303 in order to provide a consistent threshold for forward-looking disclosure throughout MD&A, which the SEC believes will help avoid potential confusion and inconsistent application of disparate thresholds. The SEC added that the amendments reflect a standard consistent with its longstanding guidance.
- Amend current Item 303(a)(3)(iii) (Net sales and revenues), which currently requires disclosure related to material *increases* in net sales or revenues, to clarify that a results of operations discussion should describe not only increases but also decreases in net sales or revenues.
- Eliminate current Item 303(a)(3)(iv), which requires registrants to discuss the impact of inflation and changing prices where material, along with the related Instructions 8 and 9 to Item 303(a), in order to encourage registrants to focus their MD&A on material information that is tailored to their respective facts and circumstances.
- Eliminate current Items 303(c) (Safe harbor for forward-looking information) and (d) (Smaller reporting companies) as conforming changes. The elimination of current Item 303(c) will not alter the availability of the regulatory safe harbors in Securities Act Rule 175 and Exchange Act Rule 3b-6, which expressly apply to forward-looking information in MD&A disclosure in certain filings. Current Item 303(d) has been eliminated because it specifically and exclusively references items that the amendments eliminate.
- Eliminate current Instructions 13 and 14 to Item 303(a), which cross-reference to industry guides, as simplifying amendments.