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SEC's Proposed Amendments to Financial Disclosure Requirements in Regulation S-K and New Guidance on Metrics in MD&A

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On January 30, 2020, the Securities and Exchange Commission (SEC) announced its proposal to amend certain financial disclosure requirements in Regulation S-K for the purpose of eliminating duplicative disclosures and modernizing and enhancing disclosures in Management's Discussion and Analysis (MD&A) for the benefit of investors, while reducing compliance burdens and costs for companies. This proposal is part of a comprehensive evaluation of the SEC's disclosure requirements that was recommended in the SEC staff's Report on Review of Disclosure Requirements in Regulation S-K in December 2013, which was mandated by Section 108 of the Jumpstart Our Business Startups Act of 2012.

The proposed amendments would eliminate Item 301 *(selected financial data)* and Item 302 *(supplementary financial data)* due to their duplicative nature, and amend Item 303 *(management's discussion and analysis)* with the main changes summarized as below:

- **Add a new Item 303(a),** *Objective* (and recaption current Item 303(a), *Full fiscal years* as Item 303(b)), to include much of the substance in Instructions 1, 2 and 3 of the current Item 303(a), which state the principal objectives of MD&A for both full fiscal years and interim periods. This proposed amendment is intended to provide clarity to companies as they consider what information to discuss and analyze in MD&A, in order to provide both a historical and prospective analysis of their financial condition and results of operations, with particular emphasis on their prospects for the future;

- **Replace Item 303(a)(4),** *Off-balance sheet arrangements,* with a principles-based instruction to discuss off-balance sheet arrangements in the broader context of MD&A. Under the new instruction, companies would be required to discuss commitments or obligations, including contingent obligations, arising from arrangements with unconsolidated entities or persons that have, or are reasonably likely to have, a material current or future effect on such company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources, even when the arrangement results in no obligation being reported in the company's consolidated balance sheets;

- **Eliminate Item 303(a)(5),** *Tabular disclosure of contractual obligations,* given the overlap with information required in the financial statements and to promote the principles-based nature of MD&A;

- **Add a new Item 303(b)(4),** *Critical accounting estimates*, to clarify and codify existing SEC guidance in this area;

- **Eliminate current Item 303(c),** *Safe harbor,* in light of the proposed replacement of Item 303(a)(4) and elimination of Item 303(a)(5); and

- **Amend current Item 303(b),** *Interim periods* **(recaptioned as Item 303(c))**, to provide flexibility by allowing companies to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter.

The proposal also includes certain conforming amendments, including to Form 20-F and Form 40-F, applicable to financial disclosures provided by foreign private issuers.

The proposal will have a 60-day public comment period following its publication in the Federal Register. We will continue to follow developments in this matter.

Concurrent with the proposal, the SEC also issued guidance on key performance indicators and metrics in MD&A, which says that when companies disclose key performance indicators and metrics in MD&A, they may also want to consider whether additional disclosures are necessary in order to make the presentation of the indicators and metrics, in light of the circumstances under which they are presented, not misleading. In addition, the SEC reminds companies 1) of the requirements in Rules 13a-15 and 15d-15 under the Securities Exchange Act of 1934 to maintain effective disclosure controls and procedures and 2) that companies may want to consider whether they have effective controls and procedures in place to process information related to the disclosure of key performance indicators and metrics in a manner that ensures consistency as well as accuracy.

FOR MORE INFORMATION

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