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Preparing Your 2020 Form 10-K: A Summary of Recent Key Disclosure Developments, Priorities, and Trends

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This Sidley Practice Note highlights certain key disclosure considerations for preparing your annual report on Form 10-K for fiscal year 2020, including recent amendments to U.S. Securities and Exchange Commission (SEC) disclosure rules and other developments that will affect 2020 Form 10-K filings, as well as certain significant disclosure trends and current areas of SEC staff focus for disclosures. Appendix A to this Practice Note sets forth a summary checklist of significant Regulation S-K amendments affecting 2020 Form 10-K filings, which are discussed in further detail in this Practice Note. As always, we invite you to contact us with any questions on these topics or any other SEC reporting and compliance matters.

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2020 Amendments to Regulation S-K

The SEC adopted substantial amendments to Regulation S-K items in both August and November 2020. The August 2020 amendments amended Items 101, 103, and 105, including Human Capital Management and Risk Factor disclosures, and became effective November 9, 2020. The November 2020 amendments amend Items 301, 302, and 303, including Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A), and will become effective for most registrants beginning with their 2021 Form 10-K, with early adoption permitted. We outline below some of the more notable changes applicable to Form 10-K. A more detailed discussion of these changes can be found in our Sidley Update on the August 2020 amendments and our Sidley Update on the November 2020 amendments.

Amendments to Business Description, Legal Proceedings, and Risk Factors

In August 2020, the SEC adopted amendments to the disclosure requirements set forth in Items 101 (Business), 103 (Legal Proceedings), and 105 (Risk Factors) of Regulation S-K as part of its ongoing Disclosure Effectiveness Initiative. These amendments were generally intended to simplify compliance, modernize the disclosure requirements to reflect changes in the capital markets and the economy in the more than 30 years since their adoption, and give each registrant more flexibility to tailor the description of its business to its particular circumstances.

These amendments became effective November 9, 2020.

Item 101 — Business

The amendments to Item 101(a) of Regulation S-K include the following changes:

- eliminating the five-year timeframe (and the three-year timeframe for smaller reporting companies) and instead requiring disclosure of information material to an understanding of the development of the registrant's business, without regard to any specific timeframe

- clarifying that disclosure of developments is required only to the extent such information is *material* to an understanding of the general development of the registrant's business

- allowing a registrant, after its initial registration statement, to provide only an update on — rather than a full discussion of — the general development of the business that focuses on any material developments since the most recent registration statement or report that includes a full discussion of the general development of the registrant's business[1]

- providing a non-exclusive list of four topics (three retained from the prior rule and one new) that a registrant should discuss if material: (1) any bankruptcy proceeding, (2) the effects of any material business combination; (3) the acquisition or disposition of a material amount of assets

[1] When taking this approach, the registrant will be required to incorporate by reference the earlier disclosure into the updated filing by including *one* active hyperlink to one previous filing that contains the full discussion of the general development of the business. The amendments prohibit the use of multiple hyperlinks to prior filings. FAQs released by the SEC staff in November 2020 clarify that registrants are not required to use this updating method and indicate that the staff anticipates that the updating method will apply mainly to registration statements.

not in the ordinary course of business; and (4) material changes to a registrant's previously disclosed business strategy

The SEC also adopted amendments to Item 101(c) of Regulation S-K. The amendments adopt a more principles-based approach and include a non-exclusive list of seven topics that a registrant may need to discuss to the extent material to an understanding of the registrant's business taken as a whole, including some existing topics and some new topics:

(1) revenue-generating activities, products, and services and any dependence on activities, key products, services, product families, or customers

(2) new products and competitive conditions

(3) sources and availability of raw materials and the duration and effect of specified intellectual property (which disclosure requirements will now be combined to refocus disclosure on all resources material to a registrant's business)

(4) business subject to renegotiation or termination of government contracts

(5) seasonality of the business

(6) the material effects that compliance with government regulations, including environmental regulations, may have on the registrant's capital expenditures, earnings, and competitive position

(7) a description of the registrant's human capital resources, including the number of employees

Spotlight: Human Capital Resources

The description of human capital resources is the most noteworthy new requirement in these amendments. The amended rule will require registrants to discuss any human capital measures or objectives that they focus on in managing the business, to the extent material to an understanding of the business, such as measures or objectives that address the attraction, development, and retention of personnel. In Forms 10-K that have been filed since the rule was adopted, there have been a range of quantitative and qualitative disclosures responsive to this requirement, including the following:

- additional demographic details regarding the workforce, including the number of full-time and part-time employees, contractors, unionized employees, employees by segment or function, and similar disclosures

- recruitment and retention strategies, including compensation, training, educational opportunities, and other benefits

- turnover and tenure

- diversity and inclusion initiatives, including pay equity

- health and safety initiatives (including with respect to COVID-19)
- employee engagement initiatives
- governance initiatives
- corporate culture principles

Item 103 — Legal Proceedings

The amendments expressly provide for the use of hyperlinks or cross-references to legal proceedings disclosure that appears elsewhere in the filing (e.g., in the notes to the financial statements, which is already a common practice, or the MD&A or Risk Factor section) to avoid repetitive disclosure.

Additionally, the amendments implement a modified disclosure threshold for environmental proceedings to which the government is a party that increases the current threshold from $100,000 to $300,000 and allows a registrant to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings so long as this registrant-specific 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. The amendments are intended to adjust for inflation since the current threshold was adopted in 1982 as well as provide flexibility to use a disclosure threshold that is most indicative of materiality on a registrant-specific basis. If a registrant chooses to use a registrant-specific threshold rather than the bright-line threshold of $300,000, it must disclose the tailored threshold (including any change thereto) in each Form 10-K and 10-Q filing.

Item 105 — Risk Factors

The amendments to Item 105 replace the requirement to disclose the “most significant” risk factors with “material” risk factors, bringing the disclosure threshold more in line with other provisions of Regulation S-K and federal securities regulations more generally. Additionally, there were several changes intended to better organize the disclosures in this section and promote more tailored disclosures.

First, the amendments require summary risk factor disclosure if the risk factor section exceeds 15 pages (which the SEC estimates is true for approximately 40% of current filers).

- The summary disclosure must consist of a bulleted or numbered list summarizing the principal risk factors that is no longer than two pages and appears at the forepart of the filing.
- The summary disclosure need not contain all of the risk factors identified in the full risk factor discussion.
- Though there have been a limited number of filings subject to this disclosure requirement since its adoption, the most common placement for the summary risk factors appears to be following the table of contents in Form 10-K or at the beginning of the Risk Factors section.

Second, the amendments require registrants to organize their risk factors under relevant headings (which is already common practice), and, if a registrant discloses any generic risk factors that could apply to any registrant or offering, they must appear at the end of the risk factor section under the caption "General Risk Factors." The SEC encourages registrants to tailor their risk factor disclosures to highlight the specific relationship of the risk to the registrant to avoid the need to include the risk under the general risk heading, which is consistent with the SEC's longstanding view that boilerplate risk factors are of little value to investors.

FAQs

In November 2020, the SEC staff released transitional FAQs on the amendments discussed above. These FAQs, among other things, clarify that amended Item 101 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 Form 10-K.

Amendments to Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information

In November 2020, the SEC adopted amendments to the disclosure requirements set forth in Items 301 (Selected Financial Data), 302 (Supplementary Financial Information), and 303 (MD&A) of Regulation S-K. These amendments emphasize the principles-based approach that the SEC has favored for the past several years and eliminate several more prescriptive and duplicative requirements.

These amendments will become effective February 10, 2021. However, as noted above, registrants will not be required to apply the amended rules until the periodic report relating to their first fiscal year ending on or after August 9, 2021 (the mandatory compliance date). For calendar year-end domestic registrants, that means that compliance will first be required with respect to the Form 10-K for the year ending December 31, 2021. Additionally, registrants will be required to apply the amended rules 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. Registrants may choose to adopt the amendments for any affected item prior to the mandatory compliance date, so long as they provide disclosure responsive to an amended item in its entirety.

Item 301 — Selected Financial Data

Item 301, which previously required registrants to furnish selected financial data in comparative tabular form for each of their last five fiscal years and any additional fiscal years necessary to keep the information from being misleading, has been eliminated.

Item 302 — Supplementary Financial Information

The amendments replace the requirement to provide two years of tabular selected quarterly financial data with a new principles-based requirement to disclose material retrospective changes. Disclosure is required only when there are one or more retrospective changes that pertain to the income statements for any of the quarters within the two most recent fiscal years and any subsequent interim period for which financial statements are included or required to be required (the lookback period) that are material, either individually or in the aggregate.

The SEC provided a non-exhaustive list of examples of retrospective changes that may, if material, require disclosure, including (1) correction of an error, (2) disposition of a business that is accounted for as discontinued operations, (3) a reorganization of entities under common control, and (4) a change in accounting principle (depending on the circumstances).

Where this disclosure is required, registrants must also explain the reasons for material retrospective changes and provide, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the income statements and earnings per share reflecting the changes.

The amendments also revised the definition of “summarized financial information” in Rule 1-02(bb)(1) of Regulation S-X to clarify that the disclosure of summary financial information may vary to conform to the nature of the registrant’s business.

Item 303* — *MD&A

Objectives

The amendments to Item 303(a) emphasize the overarching objectives of the MD&A disclosures, including codifying the guidance that MD&A “is expected to better allow investors to view the registrant from management’s perspective.” Amended Item 303(a) requires disclosure of:

- material information relevant to an assessment of the registrant’s financial condition and results of operations, and the amended rule now explicitly includes reference to an evaluation of the *amounts and certainty of cash flows from operations and from outside sources*

- material events and uncertainties known to management that are *reasonably likely* to cause (as opposed to *will* cause) reported financial information not to be indicative of future operating results or of future financial condition, including descriptions and amounts of matters that have had a material impact on reported operations as well as matters that are reasonably likely, based on management’s assessment, to have a material impact on future operations

- the material financial and statistical data that the registrant believes will enhance a reader’s understanding of the registrant’s financial condition, cash flows, and other changes in financial condition and results of operations

Liquidity and Capital Resources

The rules pertaining to liquidity and capital markets disclosures have been expanded to elicit disclosure of capital expenditures that are not necessarily capital investments. The amended rule specifically requires disclosure of 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 such requirements.

Off-Balance Sheet Arrangements and Contractual Obligations

Additionally, the requirements to provide separately captioned disclosure regarding off-balance sheet arrangements and to provide a contractual obligations table have been eliminated. Instead, registrants will 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 registrant’s financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources (including off-balance sheet arrangements) in the broader discussion of liquidity and capital resources. Registrants will also be required to discuss material cash requirements from known contractual and other obligations as part of the liquidity and capital resources discussion.

Results of Operations

The amended rules emphasize the importance of trends disclosures. As amended, Rule 303(a) requires registrants to address known trends, demands, commitments, events, or uncertainties that are *reasonably likely* to cause (as opposed to *will* cause) reported financial information not to be necessarily indicative of future operating results or of future financial condition. The amendments also clarify that this "reasonably likely" standard applies throughout Item 303.

Spotlight: Trends Disclosures

The SEC staff has long focused on trends disclosures in its review of periodic reports, and these rule amendments both reflect and underscore the importance of these disclosures. In conjunction with the SEC's focus on liquidity and capital resources and the ongoing and evolving effects of COVID-19, registrants should carefully evaluate their disclosures in this regard and ensure that they accurately reflect management's perspective on the trends that are reasonably likely to affect financial condition or results of operations.

Additional amendments to the substantive disclosure requirements of Item 303 including the following:

- *Changes in net sales or revenues:* The amendments clarify that a discussion of the *underlying reasons* for (as opposed to causes of) *material changes* (as opposed to material increases) in net sales or revenues is required.

- *Critical accounting estimates:* The amended rules explicitly require disclosure of critical accounting estimates, including qualitative and quantitative information necessary to understand the estimation uncertainty and the effect the critical accounting estimate has had or is reasonably likely to have on financial condition of results of operations (to the extent the information is material and reasonably available).

- *Inflation:* The requirement for all registrants to discuss the effect of inflation and price changes on net sales, revenues, and income from continuing operations has been eliminated. Of course, to the extent that these factors represent trends that may have a material effect or underlying reasons for material changes in net sales or revenues, disclosure would still be required under the amended rules.

Interim Disclosures

Finally, while not applicable to Form 10-K, the amendments provide additional flexibility by allowing registrants 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.

- If a registrant elects to discuss changes from the immediately preceding quarter, it will be required to provide summary financial information that is the subject of the discussion for that quarter or identify the prior EDGAR filing that presents such information so investors have ready access to the relevant prior quarter financial information.

- If a registrant changes the comparison from the prior interim period comparison, it will be required to explain the reason for the change and present both comparisons in the filing where the change is announced.

2020 Amendments to Regulation S-X

In March 2020, the SEC adopted amendments to Rules 3-10 and 3-16 of Regulation S-X, which became effective on January 4, 2021, relating to financial disclosures about guarantors and issuers of guaranteed securities and affiliates whose securities collateralize a registrant's securities. These amendments were adopted, in part, to facilitate debt offerings on a registered basis. While many companies early adopted these rules in Forms 10-Q filed during 2020, others should consider the implications for their 2020 Form 10-K filings.

Rule 3-10

Rule 3-10 requires financial statements to be filed for all issuers and guarantors of registered securities, subject to certain exceptions. The March 2020 amendments liberalize the exceptions and thus permit the omission of separate financial statements of subsidiary issuers and guarantors in more cases. As amended, the rule permits omission of separate financial statements of subsidiary issuers and guarantors when:

- a subsidiary issuer or guarantor is consolidated in the parent's consolidated financial statements (as opposed to 100% owned by the parent)[2]

- the parent company provides supplemental financial and non-financial disclosure (as opposed to condensed consolidating financial information) about the subsidiary issuers and/or guarantors and the guarantees

The amended rule requires the disclosures to be included in the parent's filings for as long as an issuer or guarantor has a reporting obligation under the Securities Exchange Act of 1934 (Exchange Act) with respect to the guaranteed securities. Such disclosures may be provided outside the footnotes to the parent company's audited annual and unaudited interim consolidated financial statements in all filings.

[2] Where a consolidated subsidiary issues the security, or co-issues it with one or more other consolidated subsidiaries of the parent company, the security must be guaranteed fully and unconditionally by the parent company for the subsidiary's separate financial statements to be eligible for omission.

Rule 3-16

Among other things, the amendments to Rule 3-16:

- replace the existing requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with amended financial and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement

- replace the requirement to provide disclosure only when the pledged securities meet or exceed a numerical threshold relative to the securities registered or being registered with a requirement to provide the proposed financial and non-financial disclosures in all cases, unless they are immaterial

COVID-19 Disclosures

In April 2020, then-Chairman Jay Clayton and Director of the Division of Corporation Finance William Hinman released a joint statement highlighting the importance of disclosure in the context of changes and disruptions resulting from COVID. The joint statement urged public companies "in their earnings releases and analyst calls, as well as in subsequent communications to the marketplace, to provide as much information as is practicable regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions," including "[d]etailed discussions of current liquidity positions and expected financial resource needs" and robust forward-looking disclosures. The statement further encouraged registrants to take advantage of safe harbors for forward-looking statements in order to facilitate such disclosures, which investors are likely to regard as more useful than historical disclosures in a rapidly changing economic and business environment.

To assist registrants in providing meaningful and sufficiently detailed disclosures regarding the effects of COVID-19, the Division of Corporation Finance released Disclosure Guidance Topics 9 and 9A in March 2020 and June 2020, respectively, setting forth a framework for disclosure and other securities law obligations that registrants should consider in connection with the COVID-19 pandemic. These guides identified open-ended examples of questions and topics that registrants should consider in determining the impact of COVID-19 and related governmental and societal responses thereto, including but not limited to the following:

- changing trends and impact on future operating results and financial condition

- liquidity position and outlook, including sources and uses of cash and changes or reductions in capital expenditures

- availability and terms of financing and ability to meet debt service obligations and comply with covenants

- impact on balance sheet, including fair value measurements

- material impairments

- effect of remote work arrangements, safety protocols, and travel restrictions on operations, sales activities, other business activities

- effect on controls and access by internal and external auditors to relevant materials and documents
- supply chain impact
- changes in inputs or use of metrics

The guidance emphasized that disclosures should be tailored to a registrant's particular facts and circumstances, should permit investors to "evaluate the current and expected impact of COVID-19 through the eyes of management," and should be proactively reevaluated and revised as circumstances change. In evaluating whether and where to include such disclosures, registrants should consider risk factors, MD&A (and in particular trends disclosures), and financial statements in particular.

Additionally, the guidance identified other areas where registrants should consider the impact of COVID-19 on their disclosures, including those described below.

Reporting Earnings and Financial Results

Recognizing that U.S. generally accepted accounting principles (GAAP) metrics may take more time to prepare in light of the impact of COVID-19 and thus may not be available at the time a registrant releases its quarterly or annual earnings information, the guidance indicated that "the Division would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results." The guidance also reminded registrants that it is not appropriate to present non-GAAP or other metrics for the sole purpose of presenting a more favorable view of the company, and that such metrics should be used "for the purpose of sharing with investors how management and the Board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results."

CARES Act Assistance

The guidance indicated that registrants that received loans, tax relief, or other benefits pursuant to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) "should consider the short- and long-term impact of that assistance on their financial condition, results of operations, liquidity, and capital resources, as well as the related disclosures and critical accounting estimates and assumptions." Additionally, registrants that qualified for such relief should ensure that their broader discussion of liquidity and capital resources is not inconsistent with the factors that led to their qualification for the relief.

Going Concern Issues

A registrant facing financial difficulties should assess whether such circumstances raise substantial doubt about its ability to meet its obligations as they become due within one year after the issuance of the financial statements. A registrant that is facing going concern issues must include certain disclosures regarding these challenges in its financial statements, MD&A disclosures, and risk factor disclosures. This analysis should be revisited regularly to determine whether any changes are needed in periodic report disclosures.

Risk Factors

To the extent material, registrants should provide tailored risk factor disclosures discussing the effects of COVID-19 and related governmental, societal, or business actions or conditions that may affect their business, results of operations, or financial condition. These disclosures should be detailed enough to understand the specific impact on the registrant. For example, depending on their facts and circumstances, registrants should consider whether to address the following topics (this list is not exhaustive):

- access to capital on favorable terms or at all
- disruptions to the supply chain, including availability of raw materials or suppliers
- the effects of reduced travel and social distancing on operations and sales
- costs relating to social distancing measures, including telework, or employee illness
- effects on customers or the market for a registrant's products or services

In general, as with other risk factors, registrants should consider at least quarterly whether they need to make updates or revisions to these risk factors. Additionally, registrants should be careful not to characterize as hypothetical risks that have already manifested or begun to affect them. For additional considerations for drafting risk factors in your 2020 Form 10-K, see "Risk Factor Disclosure Topics and Trends" below.

Financial Statement Disclosures

In preparing financial statements for inclusion in the Form 10-K (or quarterly reports on Form 10-Q), registrants should consider and consult with their auditors regarding the effects of COVID-19 on their financial statements. In addition to the factors identified above and in Disclosure Guidance Topics 9 and 9A, registrants should consider whether there may be changes to their revenue recognition practices (e.g., estimates of variable consideration, write-offs, and reserves) that require disclosure.

Lessons from Recent SEC Enforcement Actions

Recent SEC enforcement actions offer lessons in effective COVID-19 disclosures. In December 2020, the SEC settled charges with a restaurant operator for misleading disclosures regarding the impact of COVID-19 on its operations and financial condition. The settlement order outlined in detail how the registrant's internal and external disclosures regarding the impact of the pandemic were inconsistent. In its SEC filings on March 23 and April 3, 2020, the company stated that its restaurants were "operating sustainably" during the COVID-19 pandemic. According to the order, the filings were materially false and misleading because the company's internal documents at the time showed that the company was losing approximately $6 million in cash per week and that it projected that it had only 16 weeks of cash remaining. The order finds that although the company did not disclose this internal information in its March 23 and April 3 filings, the company did share this information with potential private equity investors or lenders in connection with an effort to seek additional liquidity. The order also finds that, although the March 23 filing described actions the company had undertaken to preserve financial flexibility during the pandemic, it failed to disclose that the company had already informed its landlords that it would not pay rent in April due to the effects that COVID-19 inflicted on its business.

These charges indicate that the SEC is carefully scrutinizing disclosure regarding the impact of COVID-19, as it said it would, broadening its scrutiny as compared to run-of-the-mill fraud cases that the SEC pursued against developers of COVID-19 tests and other COVID-19-related equipment in the early months of the pandemic. In light of these charges, registrants should consider their disclosure controls and procedures in connection with monitoring and assessing 2020 and future potential effects of COVID-19 (and any potential future pandemics) on their businesses and, where material, disclosure of such exposure and effects in their Form 10-K. Public disclosures regarding COVID-19's impact on a registrant's business operations and financial condition should be accurate, timely, industry- and registrant-specific, vetted with all relevant internal constituents, and consistent with internal communications.

Cover Page, Exhibits, and Signatures

Amendments to Filer Definitions

In March 2020, the SEC adopted amendments to the definitions of "accelerated filer" and "large accelerated filer" in Rule 12b-2 of the Exchange Act. The amendments exclude from the accelerated filer and large accelerated filer definitions an issuer that is eligible to be a smaller reporting company (SRC) and had annual revenues of less than $100 million in the most recently completed fiscal year. Therefore, SRCs with less than $100 million in revenues are exempt from the requirement to provide an auditor's attestation of management's assessment of internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act and are exempt from the accelerated reporting deadlines (meaning an additional 15 days to file annual reports and five days to file quarterly reports).

The SEC also amended the transition thresholds for exiting accelerated or large accelerated filer status. The amendments adjust the transition threshold for exiting large accelerated filer status to $560 million to align with the SRC transition threshold, and adjust the transition threshold for becoming a non-accelerated filer to $60 million. The amendments also add the revenue test of the SRC definition as another prong when determining whether an issuer is eligible to exit accelerated or large accelerated filer status.

For additional information, see our Sidley Update *SEC Amends Filer Definitions to Exempt More Issuers From Sarbanes-Oxley 404(b) Auditor Attestation Requirement*.

New Sarbanes-Oxley Act 404(b) Checkbox

As part of the amendments to the filer definitions described above, the Form 10-K cover page now includes a checkbox indicating whether the registrant has filed an auditor's attestation of management's assessment of internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act.

Public Float Calculations

For purposes of determining a registrant's filer status, public float is calculated as of the last business day of the most recently completed second fiscal quarter (for calendar year-end companies, June 30, 2020). For purposes of determining a registrant's status as a well-known seasoned issuer (WKSI), public float is calculated as of a date within 60 days of filing the Form 10-K. In light of the significant stock price volatility experienced by many companies during the pandemic, registrants are reminded to evaluate whether there has been any change to their status as a large accelerated filer, accelerated filer, non-accelerated filer, SRC, or WKSI.

Inline XBRL Tagging

Subject to the three-year phased compliance schedule described below, registrants are required to tag all the data on the cover pages of Form 10-K and other periodic reports (rather than only certain data points as previously required) using Inline XBRL, which embeds XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate document.

Currently, only large accelerated filers and accelerated filers that prepare their financial statements in accordance with GAAP are subject to the Inline XBRL rules. They were the first filers required to begin tagging cover pages using Inline XBRL, beginning with their first Form 10-Q filed for a fiscal quarter ending on or after June 15, 2019 and June 15, 2020, respectively. Accordingly, the 2020 Form 10-K will be the first Form 10-K subject to Inline XBRL tagging for accelerated filers. All other filers will be required to tag cover pages using Inline XBRL beginning with their first Form 10-Q filed for a fiscal quarter ending on or after June 15, 2021.

To implement the cover page data tagging requirements, large accelerated filers and accelerated filers are required to file with their Form 10-K a "Cover Page Interactive Data File" (i.e., the machine-readable computer code that presents the cover page information in Inline XBRL electronic format). In August 2019, the staff of the SEC's Division of Corporation Finance (Corp Fin) published nine C&DIs to help clarify the Inline XBRL requirements, including how registrants subject to Inline XBRL requirements should list exhibits in SEC filings and the impact of voluntarily filing documents that contain Inline XBRL (see Questions 101.01 through 101.09). Registrants should ensure that their exhibit index disclosures for Inline XBRL-related exhibits are consistent with these C&DIs, which require, among other things, that the exhibit index include the word "Inline" within the title description for each Inline XBRL-related exhibit. The C&DIs also provide that interactive data files should be identified as Exhibit 101 in the exhibit index. In addition, the cover page interactive data file must be identified as Exhibit 104 in the exhibit index. Exhibit 104 must include the word "Inline" within the exhibit index title description and should cross-reference the interactive data files submitted under Exhibit 101.

Exhibit 4 — Description of Registered Securities

We remind registrants that 2019 amendments to Regulation S-K Item 601(b)(4) require an exhibit to Form 10-K providing a brief description of all classes of securities registered under Section 12 of the Exchange Act and outstanding as of the end of the period covered by the report. The securities covered by this exhibit are the same as those required to be listed on the Form 10-K cover page. For each security listed, the exhibit must include information required by Regulation S-K Item 202(a) through (d) and (f). While registrants should have included this exhibit with their 2019 Form 10-K, registrants will need to consider whether amendments to this description are needed or whether additional classes of securities registered under Section 12 of the Exchange Act during 2020 must be included. If no changes are necessary, registrants may incorporate by reference to the exhibit filed with the 2019 Form 10-K.

Exhibit 22 — List of Subsidiary Guarantors, Issuers, and Co-Issuers

As discussed above under "2020 Amendments to Regulation S-X," in March 2020, the SEC adopted amendments to Rules 3-10 and 3-16 of Regulation S-X, which became effective on January 4, 2021, relating to financial disclosures about guarantors and issuers of guaranteed securities and affiliates whose securities collateralize a registrant's securities. These amendments require a new Exhibit 22 to be filed with a registrant's Form 10-K, and other filings, that lists each of the subsidiaries or affiliates of the registrant that are covered by new Rules 13-01 and 13-02, if applicable. Under new Item 601(b)(22) of Regulation S-K, Exhibit 22 must identify each such subsidiary or affiliate and the related securities. The exhibit may be incorporated by reference to an earlier filing, if the information has not changed since that filing.

2019 Amendments to Exhibit Requirements, Including Redactions Without a Confidential Treatment Request, Omission of Schedules and Similar Attachments, and Limitation of Lookback Period for Material Contracts

As a reminder, 2019 amendments to Regulation S-K permit registrants to redact or omit confidential information from material plans of acquisition and material contracts filed as exhibits to SEC filings under Items 601(b)(2) and 601(b)(10) of Regulation S-K, respectively, without concurrently submitting a written confidential treatment request (CTR) to the SEC, where such information is both not material and would likely cause competitive harm to the registrant if publicly disclosed. Instead, registrants are required to mark the exhibit index to indicate that portions of the exhibit have been omitted and include a prominent statement on the first page of the redacted exhibit that information in the marked sections of the exhibit has been omitted from the filed version of the exhibit. The exhibit also should reflect the redactions with brackets to indicate where information has been omitted. Redaction should be limited to the text necessary to prevent competitive harm to the registrant.

The amendments also codified the prior practice of permitting registrants to omit personally identifiable information if disclosure "would constitute a clearly unwarranted invasion of personal privacy" (e.g., bank account numbers, Social Security numbers, home addresses and similar information) without submitting a CTR or requiring any further justification regarding materiality or competitive harm.

The amendments also permit registrants to omit entire schedules and similar attachments from any exhibit filings, including material contracts (rather than just material plans of acquisition as previously permitted), unless they contain material information that is not otherwise disclosed in the exhibit or the disclosure document. A list briefly identifying the contents of all omitted schedules and attachments must be filed with each exhibit, unless such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments (e.g., a reasonably detailed table of contents). Registrants may be required to provide a copy of any omitted schedule or attachment to the SEC staff upon request (but no longer need to include with their list of omitted schedules and attachments an explicit agreement to furnish a supplemental copy of any omitted schedule or attachment to the SEC upon request).

Finally, the amendments limit to "newly reporting registrants" (generally, registrants that recently became subject to Exchange Act reporting obligations due to an initial public offering (IPO), filing of a Form 10, or similar event and certain shell companies) the requirement to file material contracts not made in the ordinary course of business that were entered into within two years of the applicable registration statement or report. Accordingly, all other registrants should evaluate the 2020 Form 10-K exhibit list to eliminate any material contracts that were fully performed during 2020. All registrants will continue to be required to file as exhibits material contracts not made in the ordinary course of business that are to be performed in whole or in part at or after the filing of the Form 10-K.

For additional information, see our 2019 Form 10-K Practice Note.

Use of Electronic Signatures

In November 2020, the SEC adopted amendments to Rule 302(b) of Regulation S-T to permit the use of electronic signatures when executing authentication documents in connection with EDGAR filings, including Form 10-Ks. Rule 302(b) of Regulation S-T previously required that each signatory to an electronic filing manually sign a signature page or other document ("authentication document") before or at the time of the electronic filing to authenticate the signature that appears in typed form within the electronic filing. The Rule 302(b) amendments now permit a signatory to an electronic filing who follows certain procedures to sign an authentication document through an electronic signature. The amendments became effective December 4, 2020, with early adoption permitted.

Under the amended signature requirements, a signatory must manually sign "a document attesting that the signatory agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual's manual signature for purposes of authenticating the signature to any filing for which it is provided" (i.e., an "initial electronic signature authentication document"). After the initial electronic signature document is obtained, the signing process for an electronic signature must, at a minimum:

- require the signatory to present a physical, logical, or digital credential that authenticates the signatory's individual identity
- reasonably provide for non-repudiation of the signature
- provide that the signature be attached, affixed, or otherwise logically associated with the signature page or document being signed
- include a timestamp to record the date and time of the signature

An electronic filer must retain the initial electronic signature authentication document for a minimum period of seven years after the date of the most recent electronically signed authentication document and must furnish a copy to the SEC or its staff upon request. Other requirements of Rule 302(b) remain unchanged, including the requirement that an electronic filer retain each authentication document for a period of five years and furnish a copy to the SEC or its staff upon request.

Risk Factor Disclosure Topics and Trends

The risk factor and other disclosure topics and trends discussed below are among the SEC's key areas of focus this reporting season. As registrants prepare their upcoming Forms 10-K, they should take the opportunity to reevaluate their existing disclosures and determine whether any updates are warranted in light of these matters. Disclosures in multiple sections of the Form 10-K may be affected and should be reviewed, including risk factors, MD&A, the Business section, and the financial statements and accompanying notes. In addition, registrants may want to revisit, and consider enhancing, their disclosures regarding board risk oversight given the SEC's interest in the nature of the board's risk oversight role with respect to these matters. Registrants should also be mindful of how material risks may affect their disclosure controls and procedures.

Although the risks described below are potentially applicable to a broad range of registrants, each registrant's disclosure about them, to the extent material, should be specifically calibrated to its unique facts and circumstances and should provide tailored insight into how management views, and seeks to address, the risks posed to the registrant's business and operations. As many of these risks are constantly evolving, registrants should continually assess their materiality, updating their disclosures, as appropriate, to ensure they remain current.

Complex, Uncertain, and Evolving Risks

In March 2019, Corp Fin Director Bill Hinman delivered a noteworthy address about the SEC's principles-based disclosure requirements and how they can best be applied to complex, uncertain, and evolving risks, such as London Interbank Offered Rate (LIBOR) discontinuation and transition, the UK's exit from the European Union (Brexit), cybersecurity, sustainability, and, most recently, COVID-19.

Hinman emphasized that risk factor disclosure should address the most significant things that make an investment in a registrant and its securities subject to uncertainties or risk. Concise and focused disclosure explaining how each risk affects the registrant is most useful for investors. Registrants should take care not to bury the reader in generic boilerplate or laundry lists of risks that might apply to any registrant.

More specifically, he articulated the following framework to help guide registrants in making disclosure decisions (though his remarks made particular reference to Brexit, cybersecurity, and sustainability, they apply broadly to all complex, uncertain, and evolving risks, including those related to COVID-19). Notably, he advised that registrants look to their communications with the board to inform the timing and content of disclosures to investors (a recommendation he and other SEC officials have publicly reiterated numerous times since), noting there should not be a significant gap between the risks discussed at the board level and those disclosed to investors:

> [I]nvestors are better served by understanding the lens through which each company's management looks at its exposure. How does management assess and analyze Brexit-related risks and the potential impacts on the company and its operations? What is management doing to mitigate and manage these risks? What is the nature of the board's role in overseeing the management of these risks? Depending on the facts and circumstances of each company, the answers to these questions should provide material information to investors seeking to understand the risks attendant to Brexit for that company. One analytical tool to evaluate disclosure in this context is to consider how management discusses Brexit-related risks with its board of directors. Obviously not all discussions between management and the board are appropriate for disclosure in public filings, but there should not be material gaps between how the board is briefed and how shareholders are informed. For those of you involved in crafting disclosure documents, you can ask yourself a straightforward question: would these disclosures satisfy the curiosity of a thoughtful, deliberative board member considering the potential impact of Brexit on the company's business, operations and strategic plans?

Effects of COVID-19 and Potential Future Pandemics

In a 2020 public statement, Chairman Clayton announced that he has directed the SEC staff to monitor and provide guidance and other assistance to registrants and other market participants regarding disclosures related to the current and potential effects of COVID-19. He acknowledged that this is an uncertain issue and that the effects will depend on many factors beyond registrants' knowledge and control and thus may be difficult to assess or predict with any meaningful precision, but stated that "how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision." As COVID-19 effects transpired during 2020, substantially all issuers addressed the effects and risks of COVID-19 in subsequent Form 10-K and Form 10-Q filings. For additional SEC guidance regarding COVID-19 risk factor disclosures, see "COVID-19 Disclosures" above.

LIBOR Transition

The SEC staff continues to focus on registrants' disclosures about the expected market transition from LIBOR. Based on 2020 announcements from the LIBOR administrator, publication of LIBOR is projected to cease permanently for one-week and two-month USD LIBOR settings immediately following the LIBOR publication on December 31, 2021, with publication of the remaining USD LIBOR settings ceasing immediately following the LIBOR publication on June 30, 2023.

The SEC staff is monitoring the extent to which registrants keep investors informed about their progress toward identifying and addressing LIBOR transition-related risks and the anticipated effect on their operations, if material. During 2019, SEC Chairman Clayton warned that the consequences and complexities presented by LIBOR's planned cessation — which he identified as a key macroeconomic risk area — are greatly underestimated, particularly with respect to registrants' legacy assets and liabilities, and encouraged early preparation and consultation with the SEC staff to ensure a successful transition.

In July 2019, the SEC staff issued detailed guidance urging registrants to manage proactively their transition away from LIBOR. To assist registrants in deciding what disclosures are relevant and appropriate, the staff advised that (i) registrants should consider disclosing the status of their efforts to date to evaluate and mitigate associated risks as well as the significant matters yet to be addressed; (ii) if registrants identified a material exposure to LIBOR but do not yet know or cannot yet reasonably estimate the expected impact, they should consider disclosing that fact; and (iii) disclosures that allow investors to see this issue through the eyes of management are likely to be the most useful for investors (such as information used by management and the board in assessing and monitoring how transitioning from LIBOR may affect the registrant). The staff also noted that registrants should consider discussing LIBOR transition not only in their Risk Factors section but also in other areas such as MD&A and the financial statements and accompanying notes. In other public remarks, SEC officials have emphasized that disclosures also should address the nature of the board's role in overseeing the management of LIBOR risk.

While the extension of certain LIBOR publication will enable many issuers to avoid LIBOR transition issues under current agreements, many issuers with LIBOR terms that will not mature in this period will need to address their specific risks and/or anticipated solutions under those agreements.

Cybersecurity

Cybersecurity is another area where the SEC staff continues to monitor, and evaluate the sufficiency of, registrants' disclosures carefully. Chairman Clayton has observed that investors are entitled to be sufficiently informed about the material cybersecurity risks and incidents affecting the companies in which they invest.

Registrants should be mindful of their disclosure obligations in this area in light of the SEC's February 2018 interpretive guidance relating to disclosure of cybersecurity risks and incidents. The guidance outlines several factors that registrants should consider when evaluating whether to disclose a cybersecurity incident, and registrants should align their disclosure practices with this guidance. Factors to examine include the nature, extent, and potential magnitude of the incident; the importance of any compromised information and of the impact of the incident on the registrant's operations; and the potential range of harm to the registrant, which might be harm to the registrant's reputation, financial performance, or customer and vendor relationships as well as potential litigation or regulatory investigations.

Disclosures about cyberbreaches should not be so boilerplate or generic that they would not be helpful to an investor but rather should be narrowly tailored to the registrant's particular facts and circumstances. As with other risks, disclosures that allow investors to see the issue through the eyes of management and the board will be of greatest use to investors. If the SEC staff sees stories about a data breach in the media but does not see the breach addressed in the registrant's disclosures, the staff will ask why the breach was not disclosed.

In addition, the guidance reminds registrants that they may have a duty to correct a prior disclosure that they determine was untrue (or omitted material facts necessary to make the disclosure not misleading) at the time it was made, or a duty to update disclosure that becomes materially inaccurate after it is made.

Material cybersecurity risks and incidents may need to be disclosed in multiple sections of the Form 10-K, including risk factors, MD&A, the business description, legal proceedings, and the financial statements and accompanying notes. In addition, to the extent cybersecurity risks are material to a registrant's business, the registrant's disclosure should discuss the nature of the board's role in overseeing the management of cyber risks.

The guidance also stresses the importance of disclosure controls and procedures that enable registrants to make accurate and timely disclosures of material cybersecurity events and of insider trading policies that protect against corporate insiders trading in advance of disclosures of material cyber incidents.

Significantly, if a material cybersecurity incident has happened in the past or is currently happening, it would not be sufficient for registrants to merely disclose that such an event "may" or "could" occur. Recent enforcement cases caution against framing risk factor disclosures in hypothetical terms when the risks have, in fact, materialized. See "—Hypothetical Risk Factors" below.

International IP and Technology

In December 2019, Corp Fin released disclosure guidance encouraging registrants to assess the risks related to the potential theft or compromise of their technology, data, or intellectual property in connection with their international operations as well as how the realization of these risks may affect their business, including their financial condition and results of operations, and any effects on their reputation, stock price, and long-term value. The guidance focuses on business conducted outside the United States, particularly in jurisdictions that do not have comparable levels of protection of corporate proprietary information and assets such as intellectual property, trademarks, trade secrets, know-how, and customer information and records.

To assist registrants in assessing these risks and their related disclosure obligations, the guidance includes a series of questions to consider, such as whether they conduct business in a foreign jurisdiction or through a joint venture that may be subject to state secrecy or other laws and whether they have controls and procedures in place to adequately protect technology and intellectual property from potential compromise or theft. Registrants that do business in non-U.S. jurisdictions should pay special attention to their technology, data, and intellectual property risks and review this guidance carefully to determine whether they need to augment their existing disclosures.

Where material, these risks should be disclosed in a manner specifically tailored to the registrant's unique facts and circumstances and that would allow investors to evaluate them through the eyes of the registrant's management. Disclosure may be necessary in MD&A, the business description, legal proceedings, disclosure controls and procedures, and the financial statements and accompanying notes. As this is an evolving area of risk, materiality should be reassessed on an ongoing basis.

Additionally, the guidance makes clear that where a registrant's technology, data, or intellectual property is being or previously was materially compromised, stolen, or otherwise illicitly accessed, hypothetical disclosure of potential risks is not sufficient to satisfy the registrant's reporting obligations. See "—Hypothetical Risk Factors" below.

Risk Factors of China-based Issuers

In light of the increased investment of U.S. investors in companies based in or with the majority of their operations in China ("China-based Issuers"), in November 2020 the SEC issued guidance detailing disclosure considerations for China-based Issuers. The disclosure considerations, which are intended to encourage fulsome disclosures of material risks related to operations in China, include the following topics:

- risks related to high-quality and reliable financial reporting, in light of current restrictions on the ability of the Public Company Accounting Oversight Board (PCAOB) to inspect audit work and practices of PCAOB-registered public accounting firms in China and on the PCAOB's ability to inspect audit work with respect to China-based Issuer audits by PCAOB-registered public accounting firms in Hong Kong

- risks related to access to information and regulatory oversight, in light of the restrictions on U.S. regulators' ability to investigate or pursue remedies with respect to China-based Issuers

- risks related to organizational structure, in light of the limitation on foreign investment in Chinese companies operating in certain industries

- risks related to the regulatory environment, in light of the differences between China's legal system and that in the United States

- risks related to limitations on shareholder rights and recourse, in light of the potential unavailability of remedy in U.S. courts or the inability to enforce a U.S. court judgement

- risks related to corporate law and corporate governance differences, to the extent that China-based Issuers may be organized in jurisdictions outside of the United States

- risks related to reporting differences, to the extent China-based Issuers may qualify as foreign private issuers

China-based Issuers should closely evaluate their risk factors against this guidance, and the guidance may also be helpful in guiding disclosures of registrants operating in emerging markets or foreign private issuers more generally.

Sustainability, Climate Change, and ESG

Sustainability, climate change, and environmental, social, and corporate governance (ESG) continue to grow as disclosure topics in which investors, including institutional investors such as BlackRock, State Street, and Blackstone, have expressed an intent or commenced actions to integrate into asset management.

The scope of "sustainability" disclosures and metrics monitored remains a moving target with numerous disclosure regimes. In response to generic, untailored sustainability metrics promulgated by certain investor service groups (such as Sustainalytics, Refinitiv, and Rhodium), a number of industry groups have adopted templates for sustainability metrics that they believe are relevant for use and comparisons of peers within an industry. These industry templates include those published by Edison Electric Institute and Energy Infrastructure Counsel. We expect other industry groups to respond with similar tailored templates for comparative reporting among peer companies.

Guidance for disclosing complex, uncertain, and evolving sustainability risks is similar to other areas such as LIBOR transition and cybersecurity. As market-led approaches develop in this area, the SEC staff is actively comparing the information registrants voluntarily provide (typically outside of their SEC filings, such as in their sustainability reports or on their websites) with their disclosure filed with the SEC.

Corp Fin Director Hinman reiterated in his March 2019 address that registrants' disclosures, including on sustainability, should be sufficiently detailed to provide insight as to how management plans to mitigate material risks and that how management engages with board members on these issues can be helpful to consider. SEC disclosures also should discuss the nature of the board's role in overseeing the management of material risks. With respect to climate-related disclosures, Hinman specifically noted that the SEC's February 2010 climate change disclosure guidance remains a relevant and useful tool for registrants when evaluating their disclosure obligations concerning climate change and extreme weather matters.

During January 2020, Chairman Clayton issued a public statement summarizing the SEC's ongoing work related to environmental and climate-related securities law disclosures, which he characterized as an "evolving and complex area." He stated that environmental and climate-related disclosures should remain "rooted in materiality, including providing investors with insight regarding the issuer's assessment of, and plans for addressing, material risks to its business and operations." Clayton also highlighted the continued relevance of the SEC's February 2010 climate change disclosure guidance (with regard to which he noted the "staff has generally found robust efforts to comply"), which the Corp Fin staff continues to consider as part of its regular filing reviews. In addition, Clayton encouraged registrants to engage with the SEC regarding environmental and climate-related matters to help shape future regulation around this topic, noting he is especially interested in how registrants use environmental and climate-related models and metrics in their operations and planning.

Notwithstanding the views of Chairman Clayton and the principles-based disclosure approach, SEC Commissioner Allison Herren Lee stated in a public statement on January 30, 2020, her disagreement with a purely principles-based disclosure regime, and her views on the need for standardized disclosure, with respect to climate change risk. In connection with the MD&A and financial disclosure amendments in November 2020, SEC Commissioner Lee along with SEC Commissioner Caroline A. Crenshaw dissented from the adoption of the amendments, including an objection to the failure to include required ESG disclosures such as climate risks and human capital management, and argued that the principles-based approach historically taken by the SEC has not yielded useful disclosures in these areas.[3] In November 2020, SEC Commissioner Lee further stated her views in keynote remarks at Practising Law Institute's Annual Institute on Securities Regulation that climate change risk "looms even larger than the pandemic and could have even more grave human and economic costs than those we have witnessed in these last eight months." With respect to the role of the SEC in connection with climate change, she noted the "three pillars" of the SEC's role, with those being to "protect investors, facilitate capital formation, and maintain fair, orderly and efficient markets." She noted that the SEC will work together with other regulators to address systemic risks, and that to address such risk, "we need complete, accurate, and reliable information about those risks. That starts with public company disclosure and financial firm reporting, and extends into our oversight of various fiduciaries and others. Investors also need this information so they can protect their investments and drive capital toward meeting their goals of a sustainable economy." This speech and prior statements likely sets the tone for a new Biden administration and anticipated changes for the SEC's oversight and disclosure requirements for public companies, funds and advisers, credit rating agencies, and accounting standards.

Human Capital Management

As discussed above under "Amendments to Business Description, Legal Proceedings and Risk Factors — Item 101 — Business," the SEC adopted amendments to modernize the description of business, legal proceedings, and risk factor disclosures required under Regulation S-K. The changes to Item 101(c) (narrative description of the business) expanded on the requirement to disclose the number of employees with a broader, principles-based requirement to disclose a description of the registrant's human capital resources, "including 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" (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the attraction, development, and retention of personnel).

Hypothetical Risk Factors

Registrants should consider the implications of two recent enforcement cases that alleged materially misleading risk factor disclosures due to companies' continuing to describe risks as hypothetical when they have, in fact, happened. The cases offer useful insight into the SEC staff's views on risk factor disclosure, including the importance of maintaining robust disclosure controls and procedures.

In July 2019, the SEC settled charges with a social media platform in which it alleged that despite the company's discovery that a third-party developer had misused user data, the company described the risks of misuse of user data in its public filings as merely hypothetical and did not update those

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[3] "We certainly agree that how a company manages climate risk and human capital is material information subject to disclosure under a principles-based approach, and that the securities laws require companies to include that information, amongst other material information, in their discussions of MD&A, descriptions of business, legal proceedings, risk factor disclosures, and perhaps elsewhere too. However, many companies simply do not make these disclosures, the majority of U.S. based large companies have failed to acknowledge the financial risks of climate change in their filings. Moreover, research and analysis have shown that a principles-based approach, coupled with voluntary disclosure, results in non-standardized, inconsistent, and incomparable disclosures."

disclosures for more than two years following the initial discovery. Instead, the company made only generic disclosures about theoretical data-privacy risks, continuing to tell investors that its users' data ***may*** be improperly accessed, used, or disclosed. The complaint further alleged that the company (i) lacked specific policies and procedures to ensure that its risk factor disclosure was accurate and complete, (ii) did not maintain disclosure controls and procedures designed to analyze or assess incidents involving misuse of user data for potential disclosure in the company's periodic filings, and (iii) did not share information regarding the incident with its independent auditors and outside disclosure counsel in order to assess the company's disclosure obligations.

The SEC's press release announcing the settlement stated that public companies "must identify and consider the material risks to their business and have procedures designed to make disclosures that are accurate in all material respects, including not continuing to describe a risk as hypothetical when it has in fact happened."

In a similar case, in October 2019, the SEC announced settled charges with a pharmaceutical company in which it alleged that the company's annual reports included materially misleading risk factors stating that a governmental agency ***may*** take a position contrary to a position the company has taken when, in fact, the agency had already communicated to the company its disagreement. Instead of disclosing that the agency disagreed with the company, the company misleadingly presented a potential risk that the agency could disagree. The complaint alleged that the hypothetical framing created the misleading impression that the agency had not yet taken a position. A more detailed discussion and analysis of this case can be found in our Sidley Update *SEC Charges Highlight Need for Timely Disclosure of Loss Contingencies and Material Business Risks*.

In light of these recent actions, registrants should regularly revisit hypothetical language in their risk factor disclosures to ensure that risks are not framed in hypothetical terms if they have, in fact, happened or are happening. Registrants should also periodically reassess the effectiveness of their processes, policies, and procedures for identifying, monitoring, and evaluating disclosures.

Additional Areas of SEC Staff Focus

Critical Audit Matters

The PCAOB standards governing audit reports require that audit reports identify and discuss critical audit matters (CAMs) encountered during the course of the audit. These standards went into effect for large accelerated filers in June 2019, and accelerated filers, non-accelerated filers, and SRCs are now also subject to the CAM reporting requirements for audits of fiscal years ending on or after December 15, 2020. Emerging growth companies are exempt, though their auditors may voluntarily comply.

A CAM is defined as any matter arising from the audit of a registrant's financial statements that was communicated or is required to be communicated to the audit committee and (1) relates to accounts or disclosures that are material to the financial statements and (2) involved especially challenging, subjective, or complex auditor judgment. CAMs, in other words, are "the things that keep the auditor up at night." In determining whether a matter involved especially challenging, subjective, or complex auditor judgment, auditors consider the risks of material misstatement, the degree of auditor judgment involving management estimates, and the extent of auditor subjectivity and effort required, among other factors. For each CAM identified, auditors must describe the principal considerations that led them to determine that the matter is a CAM, describe how the CAM was addressed in the audit, and refer to the relevant financial statement accounts or disclosures. While the determination of CAMs is principles-based and is based on the facts and circumstances of each audit, the PCAOB expects that at least one CAM will be identified in connection with most audits.

In October 2020, the PCAOB staff published an interim analysis report and two accompanying white papers on the impact of CAM requirements on key stakeholders in the audit process. The report noted that among 2,420 audit reports containing CAMs, the number of CAMs communicated per registrant ranged from zero to seven, and the average number of CAMs communicated was 1.7. The SEC staff previously emphasized that CAMs are meant to be specific to audits for individual registrants, so an audit opinion containing more or fewer CAMs than another is not inherently negative or positive. Moreover, the PCAOB does not expect that CAMs will necessarily be the same each year. The most frequently communicated CAM was revenue recognition, followed by goodwill, other intangible assets, and business combinations.

Registrants should consider whether and how their existing Form 10-K disclosures (such as the financial statements and MD&A) may need to be enhanced or otherwise modified to address the areas identified as CAMs. Registrants should ensure that disclosures with respect to any matter identified as a CAM are consistent throughout the filing or that any dissymmetry is appropriate, in anticipation of potential increased investor and SEC attention on these disclosures.

See the PCAOB's new auditor's report implementation web page for a comprehensive collection of resources and tools, including all relevant PCAOB staff guidance documents, to facilitate implementation of the CAM reporting requirements.

Key Performance Indicators and Other Metrics in MD&A

In January 2020, the SEC provided guidance on the disclosure of key performance indicators (KPIs) and other metrics in MD&A. Given that the guidance became effective on February 25, 2020, relatively late in the 2019 Form 10-K preparation process for calendar year-end companies, registrants should consider the guidance as they prepare MD&A disclosures in their 2020 Form 10-K filings.

The guidance emphasizes that Item 303 of Regulation S-K requires the disclosure in MD&A of information not specifically referenced in the rule that the registrant believes is necessary to understand its financial condition, changes in financial condition, and results of operations as well as discussion and analysis of other statistical data that in the registrant's judgment enhances a reader's understanding of MD&A. In connection with this disclosure requirement, registrants should assess, disclose, and discuss those key variables and other qualitative and quantitative factors that are peculiar to and necessary for an understanding and evaluation of the individual registrant, such as KPIs and other metrics. The guidance states that, based on the particular facts and circumstances, the SEC generally expects to see the following disclosures in connection with KPIs and other metrics:

- a clear definition of the metric and how it is calculated
- a statement indicating the reasons why the metric provides useful information to investors
- a statement indicating how management uses the metric in managing or monitoring the performance of the business

The guidance further advises that registrants should be mindful of other disclosure requirements that might apply to disclosure of KPIs and other metrics, such as Regulation G and Item 10 of Regulation S-K with respect to non-GAAP measures as well as any additional information that may be necessary to provide adequate context for an investor to understand the indicators and metrics presented. Additionally, registrants should consider whether there are estimates or assumptions underlying the metric or its calculation and whether disclosure of such items is necessary for the metric not to be materially misleading. Similarly, if a registrant changes the method, calculation, inputs, or presentation it uses for a particular KPI or other metric from one reporting period to the next, the registrant should consider the need to disclose the change, the reasons therefor, and the expected effects thereof in its disclosure as well as whether it is necessary to recast prior metrics to conform to the current presentation and place the current disclosure in an appropriate context. Finally, the guidance reminds registrants of the importance of effective disclosure controls and procedures underlying the disclosure of KPIs and other metrics. Additional information can be found in our Sidley Update *SEC Provides Guidance on Disclosing Metrics in MD&A and Proposes Amendments to Financial Disclosure Requirements*.

The SEC continues to bring enforcement actions related to KPI disclosure. For example, the SEC settled charges against a financial institution and its officers for using "cross-sell" metrics that the registrant "characterized as a key component of its financial success" but that turned out to be inflated and misleading because they were based on "accounts and services that were unused, unneeded, or unauthorized." The SEC also settled charges against an alcohol producer for the failure to accurately disclose known trends where, due to pressure by the registrant, its customers were buying products in excess of demand enabling the registrant "to meet internal sales targets in the face of declining market conditions." As a result, the registrant met performance targets and reported "higher growth in key performance indicators that were closely followed by investors and analysts," but it failed to accurately disclose what led to the higher demand and the trend in declining demand.

Non-GAAP Financial Measures

Non-GAAP financial measures remain an area of sustained focus for investors and the SEC and figure prominently in comments by the SEC staff, as reflected in comment letters (where they have consistently ranked among the most frequent subjects of SEC comment), guidance, and speeches. Staff members' recent public remarks have focused on the following topics of concern:

- ***Individually tailored accounting principles.*** The staff continues to observe the use of non-GAAP measures based on "individually tailored accounting principles," which it views as highly objectionable. Questions the staff asks when reviewing registrants' non-GAAP measures to determine whether they are acceptable adjustments or represent misleading individually tailored accounting principles include whether the adjustment changes an item from an accrual to cash basis or from gross to net, or vice versa; proportionately consolidates an entity not eligible for that treatment under GAAP; reflects part, but not all, of an accounting concept (e.g., current income tax expense but not deferred income tax expense); or renders the measure inconsistent with the economic substance of a transaction.

- ***Non-GAAP margins.*** The staff has observed that it is seeing an increased number of disclosures containing non-GAAP margins (e.g., contribution margin) and noted that presentation of such measures is acceptable only, depending on the facts and circumstances, if the registrant also discloses a reconciliation from the non-GAAP measure to gross margin, as defined in GAAP (the most directly comparable GAAP measure), even if gross margin is not separately presented in the financial statements.

- ***Non-GAAP and new accounting standards*.** The staff has cautioned that registrants generally should not present a non-GAAP measure that excludes the impact of the new credit losses standard (CECL) (which larger registrants adopted on January 1, 2020), including any measures that exclude the effect of a registrant's allowance for credit losses in its entirety. Although the staff encourages detailed MD&A discussion that facilitates period-to-period comparability, it typically considers non-GAAP measures that unwind the effects of a newly adopted accounting standard such as CECL to be misleading, even when presented for the purposes of discussing comparability with prior periods, unless the standard requires similar information.

- ***Consistency*.** The staff has emphasized that non-GAAP measures should be calculated consistently from quarter to quarter so that results are comparable over time. Any changes made to measures or adjustments should be clearly disclosed. Such measures should also be consistent with the measures that management uses to operate the business (and not be prepared solely for disclosure to investors).

- ***Disclosure controls; audit committee oversight*.** The staff has highlighted the importance of well-developed controls and oversight around the disclosure of non-GAAP measures and has urged registrants to implement disclosure controls and procedures over the preparation and reporting of non-GAAP measures with the same rigor as with respect to GAAP, as investors are increasingly focused on this type of information and taking it into account when making decisions. Audit and compensation committee members have important roles to play in this regard and should be actively engaged in the evaluation of non-GAAP disclosure.

Loss Contingency Disclosure and Accrual

In August 2020, the SEC settled charges against a motor vehicle parts manufacturer for materially misstating its financial statements by failing to account for certain asbestos liabilities. The SEC's order found that from 2012 to 2016, the company failed to report over $700 million in liabilities associated with future asbestos claims and did not conduct any substantive quantitative analysis to estimate these asbestos claims. According to the order, the company erroneously relied on untested assumptions in concluding that it could not estimate its liabilities for these claims, including, for instance, that its products were unique among asbestos defendants and that industry benchmarks were inapplicable for purposes of calculating an estimate, which ultimately led to materially misstated financial statements. In the press release announcing the settlement, Carolyn Welshhans, Associate Director in the Division of Enforcement, warned that registrants "cannot claim an inability to reasonably estimate liabilities when the data they need to do so is available."

When subject to a government or regulatory investigation, threatened or potential legal proceedings, or other scenarios that could result in a loss, registrants should be mindful of their disclosure and accrual obligations and should consult with their legal and accounting advisers throughout the process. This analysis must be revisited regularly in light of new facts and developments. In light of this action, registrants should consider reexamining their process for booking loss contingencies by, among other things, reviewing their method for establishing whether a loss is probable and estimable. High-level assumptions should be subjected to substantive quantitative analysis, expert review (including, for example, actuarial assessments), industry benchmarking, and other applicable testing. In addition to disclosure and accrual obligations pursuant to GAAP, registrants should also consider whether circumstances giving rise to loss contingencies disclosures may also require disclosure pursuant to other requirements, such as material trends disclosure pursuant to Item 303 of Regulation S-K (MD&A), Item 103 of Regulation S-K (Legal Proceedings), Item 105 of Regulation S-K (Risk Factors), Form 8-K, and exchange rules.

Goodwill Testing

The SEC's recently-commenced action against a brand management company is a reminder that registrants should not ignore "clear, objective, quantitative evidence of likely impairment" when preparing their financial statements even if such evidence emerges after the completion of its annual goodwill impairment testing.

The SEC's complaint alleges that the company failed to properly assess its goodwill for potential impairment after several months of declining stock prices followed by a precipitous drop in early November 2016. According to the complaint, in December 2016, shortly after the company passed its annual goodwill testing, the company conducted internal calculations showing that, in light of the declining stock price, it would fail the first step of its disclosed two-step impairment test. The complaint alleges that the company ignored this objective evidence of impairment. Instead, the complaint alleges that the company performed a qualitative analysis that omitted any mention of its internal calculations, as well as numerous other negative developments in the company's business, leading it to unreasonably conclude that goodwill was not impaired.

Registrants should monitor all events and changes in circumstances, particularly in light of the dynamic nature of the COVID-19 pandemic, and confirm that its public disclosure on impairment testing methods, practices, and procedures is consistent with those followed by the registrant. In the complaint against the brand management company, the SEC cited, among other things, the registrant failure to take into account the registrant's declining stock price, engaging in result-driven impairment testing, failure to accurately disclose the change in methodology used by the registrant to assess impairment, and withholding evidence of likely impairment from its auditor as indicators that the registrant disclosure contained material misstatements or omitted to state material facts.

Earnings Management Practices

The SEC continues to use its enforcement powers to review registrants' earning management practices. In connection with its EPS Initiative, which uses risk-based data analytics to uncover potential accounting and disclosure violations, the SEC has settled actions with two registrants "for violations that resulted in the improper reporting of quarterly earnings per share (EPS) that met or exceeded analyst consensus estimates." One of the registrants made "unsupported, manual accounting adjustments that were not compliant with GAAP" often at times "when [its] internal forecasts indicated that it would likely not meet analyst consensus EPS estimates." The other registrant was found to have inaccurately presented its financial performance "when it belatedly reversed its valuation allowance, increasing its EPS by a penny in a quarter when it otherwise would have fallen short of consensus estimates," and in the process, the registrant "created the misleading appearance of consistent earnings across multiple reporting periods."

Sales practices undertaken by a technology company in an effort to meet quarterly sales and earnings targets also resulted in an SEC enforcement action. Regional managers of the registrant "used a variety of incentives to accelerate to accelerate … sales that they otherwise expected to materialize in later quarters." In an effort to meet revenue and earnings targets, "managers in one [of the registrant's] region[s] sold supplies at substantial discounts to resellers known to sell products outside of the resellers' designated territories, in violation of registrant's policy and distributor agreements." The SEC order found that the registrant failed to disclose known trends and uncertainties associated with these sales practices.

In light of these actions, registrants are reminded of the requirement to disclose trends that are likely to have a material impact on future revenues or operating profits in order to provide an accurate and complete picture of the registrant's financial condition.

Mining Property Disclosure Rules; Voluntary Early Compliance Permitted

In October 2018, the SEC adopted rules, applicable to Form 10-K and other filings, to modernize the property disclosure requirements and related guidance for registrants engaged in "material" mining operations, including royalty companies, previously set forth in Item 102 of Regulation S-K and Industry Guide 7. The amendments more closely align the SEC's disclosure regime for mining properties with current industry and global regulatory practices and standards, and require a registrant with material mining operations to provide both summary disclosure concerning its properties in the aggregate as well as more detailed disclosure about individually material properties. Under these rules, the SEC refers to subjective materiality standards determined pursuant to Rule 405 under the Securities Act and Rule 12b-2 under the Exchange Act (rather than a bright-line test) and uses such materiality standard to replace prior concepts of "significant mining operations," "principal" mines, and "other materially important" properties.

Mining registrants are not required to comply with the new rules, which have been consolidated and codified in new Subpart 1300 of Regulation S-K and are intended to replace Industry Guide 7, until the first fiscal year beginning on or after January 1, 2021. However, in May 2019, the SEC staff issued a statement announcing that early voluntary compliance is permitted immediately so long as registrants satisfy all the requirements under Subpart 1300. Industry Guide 7 will remain effective until all registrants are required to comply with the new rules, at which time it will be rescinded. Registrants not electing early compliance should continue to look to Industry Guide 7 for their mining property disclosures until compliance with the new rules is required.

Registrants that may not have deemed themselves covered under prior rules should consider the rules' definitions of "material" and "mining operations." For example, these definitions may encompass vertically integrated companies with material mining operations that are secondary to, or support, other principal business operations. Such materiality must be assessed based on both quantitative and qualitative factors — for example, whether the registrant relies on its ability to source the particular mineral from its own mining operations or whether such operations provide it with a material competitive advantage. Item 102 of Regulation S-K and Industry Guide 7 do not specifically address the issue of when such registrants would be required to make the required mining-related disclosures, but such registrants should consider anticipated future disclosures in connection with 2020 Form 10-K disclosures and begin updating its disclosure controls and procedures for future disclosures, including summary and individual property disclosures and related technical reports supporting mineral reserve and mineral resource disclosures.

Appendix A

Summary Checklist of 2020 Changes to Form 10-K, Including Significant S-K Amendments

Note: The following checklist does not address prior 2019 amendments and additional SEC interpretive guidance updates during 2020 covered elsewhere in the Practice Note. Compliance with the amended Items 301, 302, and 303 is optional; registrants may choose to adopt the amendments for any affected item prior to the mandatory compliance date, so long as they provide disclosure responsive to an amended item in its entirety.

Disclosure Requirement	**Summary of Amendment**
Form 10-K	
Cover Page	In March 2020, the SEC adopted amendments to the definitions of "accelerated filer" and "large accelerated filer" to exclude an issuer that is eligible to be a SRC and had annual revenues of <$100M in the most recently completed fiscal year; accordingly, SRCs with <$100M in revenues are exempt from the Sarbanes-Oxley Act 404(b) auditor attestation requirement and accelerated reporting deadlines (meaning 15 extra days to file a Form 10-K). As part of the March 2020 amendments to the filer definitions, the SEC also added a checkbox to the cover page of Form 10-K to indicate whether a Sarbanes-Oxley Act 404(b) auditor attestation is included in the filing; confirm that the following checkbox is included on the cover page immediately above the checkbox asking if the registrant is a shell company: Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. [ ]
Regulation S-K	
Description of Business *Item 101(a) and 101(c)*	***Item 101(a) — Description of the General Development of the Business*** Item 101(a) previously required a description of the general development of the company's business during the past five years (or earlier if material) or such shorter period as the company may have been engaged in the business. The required discussion included the year in which the company was organized and the nature and results of any bankruptcy proceeding or any merger of the company or its significant subsidiaries and any material changes in the mode of conducting the business.

	Amendments The amendments transition to a more flexible, principles-based approach to elicit more informative disclosure by: • eliminating the five-year timeframe and requiring disclosure of information material to an understanding of the development of the company's business, without regard to any specific timeframe[1] • clarifying that disclosure of developments is required only to the extent such information is material to an understanding of the general development of the company's business • providing a non-exclusive list of four topics that a company should disclose pursuant to Item 101(a) if material. The SEC retained the current disclosure requirements addressing (1) any bankruptcy proceeding, (2) the effects of any material merger, and (3) the acquisition or disposition of a material amount of assets not in the ordinary course of business. The SEC added a new topic that will require disclosure of material changes to a company's previously disclosed business strategy. The amendments do not mandate disclosure of a company's business strategy if it has not been previously disclosed The amendments allow a company, after its initial registration statement, to provide only an update on — rather than a full discussion of — the general development of the business disclosure that focuses on any material developments since the most recent registration statement or report that includes a full discussion of the general development of the company's business. When taking this approach, the company will be required to incorporate by reference the earlier disclosure into the updated filing by including one active hyperlink to one previous filing that contains the full discussion of the general development of the business. The amendments prohibit the use of multiple hyperlinks to prior filings.[2] The SEC views this amendment as a clarification of current rules rather than a substantive change because Securities Act of 1933 Rule 411 and Exchange Act Rule 12b-23 permit companies to provide Item 101(a) disclosure by incorporating by reference some or all of the required disclosure from a previous filing. The amendments are intended to reduce repetitive disclosures and focus investors on recent material developments. ***Item 101(c)* — *Narrative Description of the Business*** Item 101(c) previously required a narrative description of the business done by a company and its subsidiaries and specified 12 items that must be disclosed generally only if material to an understanding of the company's business taken as a whole. The SEC observed that many companies seemed to interpret the

	prior rule as requiring disclosure of each of the 12 specified items even if they are not relevant, which resulted in immaterial disclosure. **Amendments** The amendments shift to a more principles-based approach by providing a non-exclusive list of seven topics that a company may need to disclose pursuant to Item 101(c), including some existing topics and some new topics, and clarifying that disclosure would be required only to the extent that it is material to an understanding of the company's business taken as a whole. As revised: • The amendments retain six existing disclosure topics as examples, with some changes: (1) principal products produced and services rendered, and dependence on certain customers, (2) new products and competitive conditions, (3) sources and availability of raw materials and the duration and effect of specified intellectual property (which disclosure requirements will now be combined to refocus disclosure on all resources material to a company's business), (4) business subject to renegotiation or termination of government contracts, (5) seasonality of the business, and (6) the number of persons employed. Despite numerous recommendations from commentators on the subject, the SEC did not expand the requirement to disclose the number of employees to prescribe disclosure of additional metrics (e.g., the breakdown of full-time, part-time, and contingent workers, and employee turnover). • The amendments require a description of the company's human capital resources, including any human capital measures or objectives that the company focuses on in managing the business, to the extent material to an understanding of the company's business taken as a whole. The SEC acknowledges that the exact measures or objectives will depend on the nature of the company's business and workforce but identifies as non-exclusive examples measures and objectives that address the development, attraction and retention of personnel. Disclosure must be tailored to a company's particular business, workforce and facts and circumstances, which will evolve over time.[3] • The amendments require, if material, disclosure of the material effects that compliance with "government regulations, including environmental regulations" — as opposed to only environmental laws under the current rule — may have upon the capital expenditures, earnings, and competitive position of the company and its subsidiaries. This expansion is consistent with current practice as many companies already provide voluntary disclosure about government regulations relevant to their business. • If the information elicited about human capital resources or the material effects of compliance with government regulations is material to a

	particular segment of the company's business, the company will also have to identify the segment. The amendments delete the explicit references in the current rule to the following topics: (1) disclosure about new segments, (2) the dollar amount of backlog orders, and (3) working capital practices. The SEC noted that it expects working capital to be discussed in the MD&A if material.
Legal Proceedings *Item 103*	Item 103 previously required disclosure of material pending legal proceedings and certain related information (e.g., the name of the court, the date instituted, the principal parties involved, and the alleged factual basis underlying the proceedings). An instruction to the prior rule required disclosure of any proceedings under environmental laws to which the government is a party unless the company reasonably believes that monetary sanctions resulting from the proceeding will be less than $100,000. **Amendments** The amendments expressly provide for the use of hyperlinks or cross-references to legal proceedings disclosure that appears elsewhere in the filing (e.g., in the notes to the financial statements, which is already a common practice, or the MD&A or risk factor section) to avoid repetitive disclosure. The amendments implement a modified disclosure threshold for environmental proceedings to which the government is a party that increases the current threshold from $100,000 to $300,000 and also allows a company to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings so long as this company-specific threshold does not exceed the lesser of $1 million or 1% of the current assets of the company and its subsidiaries on a consolidated basis. The amendments are intended to adjust for inflation since the current threshold was adopted in 1982 as well as provide flexibility to use a disclosure threshold that is most indicative of materiality on a company-specific basis. If a company chooses to use a company-specific threshold rather than the bright-line threshold of $300,000, it must disclose the tailored threshold (including any change thereto) in each Form 10-K and 10-Q filing.
Risk Factors *Item 105*	Item 105 previously required a concise and logically organized discussion of the "most significant" factors that make an investment in a company's securities speculative or risky. Under the prior rule, companies must not disclose risks that could apply generically to any company and must set forth each risk factor under a subcaption that describes the risk. **Amendments** The amendments seek to elicit material and concise risk factor disclosure that is tailored to the company's specific circumstances and organized in a way that gives greater prominence to the most salient risks. As revised:

	• The amendments require summary risk factor disclosure if the risk factor section exceeds 15 pages (which the SEC estimates is true for approximately 40% of current filers). The summary disclosure must consist of a bulleted or numbered list summarizing the principal risk factors that is no longer than two pages and appears at the forepart of the filing.[4] The summary disclosure need not contain all of the risk factors identified in the full risk factor discussion. The SEC acknowledges that the new rule may incentivize some companies to streamline their risk factor disclosure to avoid the summary disclosure requirement. • The amendments require disclosure of the "material" — rather than the "most significant" — risks facing the company to encourage companies to disclose the risks to which reasonable investors would attach importance in making investment decisions. Other than as described in the next bullet, the amended rule does not require companies to prioritize the order in which they discuss their risk factors. • The amendments require companies to organize their risk factors under relevant headings (which is already common practice), and, if a company discloses any generic risk factors that could apply to any company or offering, they must appear at the end of the risk factor section under the caption "General Risk Factors." The SEC encourages companies to tailor their risk factor disclosures to highlight the specific relationship of the risk to the company to avoid the need to include the risk under the general risk heading.
Selected Financial Data *Item 301*	Eliminated — Prior tabular disclosure of five years of selected financial data no longer required.
Supplementary Financial Data *Item 302(a)*	Item 302(a) previously required companies to disclose two years of selected quarterly financial data of specified operating results and variances in these results from amounts previously reported on a Form 10-Q. The purpose of the disclosure was to help investors understand the pattern of corporate activities throughout a fiscal period by disclosing trends over quarterly periods to reflect seasonal patterns. **Amendments** The amendments replace the requirement to provide two years of tabular selected quarterly financial data with a new principles-based requirement to disclose material retrospective changes. The amendments require disclosure only when there are one or more retrospective changes that pertain to the income statements for any of the quarters within the two most recent fiscal years and any subsequent interim

	period for which financial statements are included or required to be required (the look-back period) that are material, either individually or in the aggregate. *Examples:* The SEC provided a non-exhaustive list of examples of retrospective changes that may, if material, require disclosure, including (1) correction of an error, (2) disposition of a business that is accounted for as discontinued operations, (3) a reorganization of entities under common control, and (4) a change in accounting principle (depending on the circumstances). The amendments require disclosure explaining the reasons for material retrospective changes and providing, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the income statements and earnings per share reflecting the changes. Depending on the facts and circumstances, disclosure may be required only for a single quarter or for multiple quarters during the relevant lookback period. The amendments amend the definition of "summarized financial information" in Rule 1-02(bb)(1) of Regulation S-X to clarify that the disclosure of summary financial information may vary to conform to the nature of the company's business. The SEC also linked amended Rule 1-02(b)(1)(ii) to amended Item 302(a) to provide companies flexibility in the line items presented. The amendments require a newly public company to provide Item 302(a) disclosure, if applicable, beginning in the first Form 10-K filing after its IPO. However, if a newly public company has a material retrospective change to its year-to-date interim period information in its IPO registration statement but has not yet disclosed that interim period information in quarterly increments, the SEC will not object if the quantitative Item 302(a) disclosure in the Form 10-K comprised information for the same interim period previously presented in the registration statement (rather than for each affected quarter during that time) and the fourth quarter in the affected year.
MD&A *Item 303*	Item 303(a) previously required companies to discuss their financial condition, changes in financial condition, and results of operations for full fiscal years. The required discussion addressed liquidity, capital resources, results of operations, off-balance sheet arrangements, contractual obligations, and any other information a company believes would be necessary to understand its financial condition, changes in financial condition, and results of operations. Item 303(b) covered interim period disclosures and required companies to discuss material changes in the items listed in Item 303(a) other than the impact of inflation and changing prices on operations and tabular disclosure of contractual obligations. Prior Instructions 1, 2, and 3 to Item 303(a) addressed the objectives of MD&A, which are for companies to provide disclosure of specified material information to enable a reader to assess a company's financial condition and results of operation.

Under prior Item 303(a), where a discussion of segment information and/or of other subdivisions (e.g., geographic areas) of the company's business would be appropriate to an understanding of the business, the discussion should focus on each relevant, reportable segment and/or other subdivision of the business and on the company as a whole.

Amendments

The amendments establish a new paragraph 303(a) that incorporates much of the substance of prior Instructions 1, 2, and 3 (but with certain revisions) to emphasize the objective of MD&A at the outset. Amended Item 303(a) will require disclosure of:

- material information relevant to an assessment of the company's financial condition and results of operations, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources

- material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be indicative of future operating results or of future financial condition; this includes descriptions and amounts of matters that have had a material impact on reported operations as well as matters that are reasonably likely, based on management's assessment, to have a material impact on future operations

- the material financial and statistical data that the company believes will enhance a reader's understanding of the company's financial condition, cash flows and other changes in financial condition, and results of operations; the SEC added the explicit reference to cash flows as part of MD&A's objective in the final amendments in response to a suggestion from a commenter

The amendments incorporate guidance from the SEC's 2003 MD&A Interpretive Release by adding a statement in new Item 303(a) that disclosure that meets the requirements of the item is expected to better allow investors to view the company from management's perspective.

The amendments add product lines as an example of a subdivision of a company's business (along with geographic areas) that should be discussed when the company believes necessary to understand its business.

The amendments renumber current Item 303(a) as Item 303(b).

Liquidity and Capital Resources *Current Item 303(a)(1) and (2)* *Amended Item 303(b)(1)*	Item 303(a)(2) previously required a company 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. **Amendments** The amendments expand this item to specifically require disclosure of known material cash requirements, including but not limited to commitments for capital expenditures. *Examples*: Funds necessary to maintain current operations, complete projects underway and achieve stated objectives or plans; or commitments for capital or other expenditures.
Results of Operations — Known Trends or Uncertainties *Current Item 303(a)(3)(ii)* *Amended Item 303(b)(2)(ii)*	Item 303(a)(3)(ii) previously required a company to describe any known trends or uncertainties that have had or that the company reasonably expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations. Furthermore, if a company knows of events that will cause a material change in the relationship between costs and revenues, it must disclose that change in the relationship. **Amendments** If the company 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 as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments, the amendments require disclosure of the reasonably likely change in the relationship. The amendments clarify that the “reasonably likely” threshold applies throughout Item 303. **Guidance** The SEC clarified in the adopting release how companies should analyze and disclose information regarding known trends, commitments or uncertainties. The “reasonably likely” threshold requires a thoughtful analysis that applies an objective assessment of the likelihood that an event will occur balanced with a materiality analysis regarding the need for disclosure about the event. • Known trends, demands, commitments, events, or uncertainties that are not remote, or where management cannot make an assessment as to the likelihood that they will come to fruition, and that would be reasonably likely to have a material effect on the company’s future results or financial condition were they to come to fruition, should be disclosed if a reasonable investor would consider omission of the

	• information as significantly altering the mix of information made available in the company's disclosures. • Management should make this determination objectively with the goal of helping investors clearly understand the potential material consequences of the known forward-looking statements or uncertainties.
Results of Operations — Net Sales and Revenues, Line Item Changes Current Item *303(a)(3)(iii) and Instruction 4 to Item 303(a)* *Amended Item 303*	Item 303(a)(3)(iii) currently requires management to discuss certain factors, such as changes in prices or volume, that led to certain material increases in net sales or revenues. Instruction 4 to Item 303(a) currently requires a description of the causes of material changes from year-to-year in line items of the financial statements to the extent necessary to an understanding of the company's business as a whole. **Amendments** The amendments require disclosure of material changes (rather than material increases as currently required) in net sales or revenue. Where there are material changes in a line item from period to period, even where such changes within a line item offset one another, the amendments require a narrative discussion in MD&A of the underlying reasons for (rather than only the causes of) the material changes in quantitative and qualitative terms. The amendments incorporate a portion of current Instruction 4 to Item 303(a) into amended Item 303(b) and delete the language in the instruction requiring a description of the reasons for material changes to the extent necessary to an understanding of the company's business as a whole. **Guidance** Where it is challenging to isolate and quantify reasons for specific material changes because they are interrelated, the SEC encourages companies to acknowledge this fact and explain the interrelated circumstances to the extent possible.
Results of Operations — Inflation and Price Changes *Current Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a) eliminated*	Item 303(a)(3)(iv) and Instruction 8 to Item 303(a) previously generally required companies, either for the three most recent fiscal years or for those fiscal years in which the company has been engaged in business, whichever period is shorter, to discuss the impact of inflation and price changes on their net sales, revenues, and income from continuing operations where material. **Amendments** The amendments eliminated Item 303(a)(3)(iv) and related Instructions 8 and 9 to Item 303(a).

	The amendment should not result in a loss of material disclosure because a discussion of the impact of inflation or changing prices will still be required if part of a known trend or uncertainty that has had, or is reasonably likely to have, a material favorable or unfavorable impact on net sales, revenues, or income from continuing operations. Disclosure about inflation and changing prices may also be implicated by amended Item 303(b)'s requirement to describe the underlying reasons for material changes in line items from period to period.
Off-Balance Sheet Arrangements *Current Item 303(a)(4)* *New Instruction 8 to Item 303(b)*	Item 303(a)(4) previously required companies to disclose, in a separately captioned section, off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures, or capital resources that is material to investors. **Amendments** The amendments no longer require a separately captioned section for off-balance sheet arrangements in MD&A. The amendments replace current Item 303(a)(4) with a new, principles-based instruction requiring companies 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 the 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.
Tabular Disclosure of Contractual Obligations *Current Item 303(a)(5)* *Eliminated; incorporated into Amended Item 303(b)(1) and Instruction 4 to Item 303(b)*	Item 303(a)(5) previously required companies (other than smaller reporting companies) to disclose in tabular format their known contractual obligations that fall within five prescribed categories. This disclosure requirement did not contain a materiality threshold. **Amendments** The amendments eliminate current Item 303(a)(5) and no longer require a contractual obligations table in MD&A; instead require a discussion of material contractual obligations through an enhanced principles-based liquidity and capital resources requirement focused on material short- and long-term cash requirements from known contractual and other obligations. The amendments introduce a new Item 303(b)(1) setting forth the overarching requirements for liquidity and capital resources disclosure. The amendments incorporate portions of current Instruction 5 to Item 303(a) into amended Item 303(b)(1) that defines "liquidity" as the ability to generate adequate amounts of cash to meet the needs for cash, to clarify its general applicability to the liquidity and capital resources requirements.

	The amendments codify prior SEC guidance specifying that short-term liquidity and capital resources cover cash needs up to 12 months into the future while long-term liquidity and capital resources cover items beyond 12 months. The amendments require the discussion on a short- and long-term basis. The amendments require the discussion to analyze material cash requirements from known contractual or other obligations and such disclosures to specify the type of obligation and the relevant time period for the related cash requirements. *Example:* If a financial obligation is reasonably likely to have a material effect on liquidity and capital resources over a number of subsequent periods or sometime within a range of future periods, a company must identify and discuss this obligation and related effects. The amendments add an instruction stating that the discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the company's balance sheet. However, unlike the current requirement, the final amendments do not prescribe specific categories of contractual obligations and instead allow companies flexibility to determine what may be material and required to be disclosed. The amendments add an instruction stating that, in line with prior SEC guidance, the analysis provided in response to amended Item 303(b) should be in a format that facilitates easy understanding and is not duplicative. In a footnote to the adopting release, the SEC noted that, notwithstanding the amendments, companies still have the discretion to either combine or separate the discussions of liquidity and capital resources.
Comparisons of Interim Periods *Current Item 303(b)* *Amended Item 303(c)*	Item 303(b) previously required companies to provide MD&A disclosure for interim periods that enabled market participants to assess material changes in financial condition and results of operations between certain specified periods. **Amendments** The amendments allow companies more flexibility when comparing interim periods. Companies will be permitted to compare their most recently completed quarter with either the corresponding quarter of the prior year (as currently required) or the immediately preceding quarter.[5] If a company elects to discuss changes from the immediately preceding quarter, the amendments will require it to provide summary financial information that is the subject of the discussion for that quarter or identify the prior EDGAR filing that presents such information so investors have ready access to the relevant prior quarter financial information.

	If a company changes the comparison from the prior interim period comparison, the amendments will require it to explain the reason for the change and present both comparisons in the filing where the change is announced. *Example:* If a company in its Q3 2020 Form 10-Q chooses to compare its results to the preceding quarter (Q2 2020) after the company had compared such quarter with the corresponding quarter of the previous year (Q2 2019) in its earlier report, the company would be required to present both comparisons (i.e., versus Q2 2020 and Q3 2019) in that Q3 2020 Form 10-Q and explain the reasons for the change in comparison. The amendments renumber current Item 303(b) as Item 303(c) and delete certain instructions in current Item 303(b) and provide cross-references to similar instructions in Item 303(b).
Critical Accounting Estimates *New Item 303(b)(3)*	Item 303(a) did not previously require companies to disclose critical accounting estimates. However, in its 2003 MD&A Interpretive Release, the SEC stated that when preparing MD&A disclosure, companies should consider whether they have made accounting estimates or assumptions where the nature of the estimates or assumptions is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change, and the impact of the estimates and assumptions on financial condition or operating performance is material. The guidance further stated that if critical accounting estimates or assumptions are identified, a company should analyze, to the extent material, factors such as how it arrived at the estimate, how accurate the estimate/assumption has been in the past, how much the estimate/assumption has changed in the past, and whether the estimate/assumption is reasonably likely to change in the future. Any disclosure should supplement (rather than duplicate) the description of accounting policies disclosed in the notes to the financial statements and provide greater insight into the quality and variability of information regarding financial condition and operating performance. **Amendments** The amendments clarify and codify the SEC's prior guidance by explicitly requiring disclosure of critical accounting estimates in MD&A. The amendments define a critical accounting estimate as an estimate made in accordance with generally accepted accounting principles that involves a significant level of estimation uncertainty and has had or is reasonably likely to have a material impact on the company's financial condition or results of operations. The amendments require companies to provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have on financial condition of results of operations to the extent the information is

	material and reasonably available. The SEC noted in the adopting release its view that disclosure that is impracticable to provide would not be "reasonably available." For each critical accounting estimate, the amendments require companies to disclose why the estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period, and the sensitivity of the reported amount to the material methods, assumptions, and estimates underlying its calculation. The SEC declined to specify the period over which a company should discuss the changes in the estimate or assumption, instead giving companies flexibility to make that determination consistent with the principles-based nature of MD&A. The SEC explained that it may be appropriate to provide disclosure only as of the balance sheet date for certain estimates or assumptions but over the number of years presented in the financial statements for others. The amendments add an instruction specifying that the disclosure of critical accounting estimates should be in a format that facilitates easy understanding and should supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

1 The SEC similarly eliminated the timeframe prescribed in Item 101(h), which currently requires smaller reporting companies to describe the development of their business during the past three years. As amended, Item 101(h) will direct smaller reporting companies, in describing the development of their business, to provide information for the period of time material to an understanding of the general development of the business. The SEC also issued a FAQ on November 5, 2020, clarifying that Item 1 of Form 10-K requires disclosures regarding the development of the company's business only for the fiscal year covered by the report.

2 The SEC adopted a corresponding amendment to Item 101(h) to permit a smaller reporting company, for filings after its initial registration statement, to provide an update to the general development of the business disclosure, instead of a full discussion, that complies with Item 101(a), including the option to provide one hyperlink to one previous filing that includes the full discussion of the general development of the company's business.

3 SEC Chair Clayton commented that, as is the case with non-GAAP financial measures, he expects companies to maintain any human capital metric definitions used constant from period to period or prominently disclose any changes to the metrics or definitions used.

4 As a model for summary risk factor disclosure, the SEC referred to the existing requirement in Form S-11.

5 An amendment will afford companies subject to Rule 3-03(b) of Regulation S-X the same flexibility.

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