

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 210, 229, 230, 239, 240, and 249**

**[Release No. 33-10890; 34-90459; IC-34100; File No. S7-01-20]**

**RIN 3235-AM48**

**Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to modernize, simplify, and enhance certain financial disclosure requirements in Regulation S-K. Specifically, we are eliminating the requirement for Selected Financial Data, streamlining the requirement to disclose Supplementary Financial Information, and amending Management’s Discussion & Analysis of Financial Condition and Results of Operations (“MD&A”). These amendments are intended to eliminate duplicative disclosures and modernize and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants.

**DATES:** *Effective date:* The final rules are effective February 10, 2021.

*Compliance date:* See Section II.F for further information on transitioning to the final rules.

**FOR FURTHER INFORMATION CONTACT:** Angie Kim, Special Counsel, Office of Rulemaking, at (202) 551-3430, or Ryan Milne, Associate Chief Accountant, Office of the Chief Accountant, at (202) 551-3400 in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments to:

Commission Reference		CFR Citation (17 CFR)
Regulation S-X		§§ 210.1-01 through 210.13-02
	Item 1-02(bb)	§ 210.1-02(bb)
Regulation S-K		§§ 229.10 through 229.1406
	Item 10	§229.10
	Item 301	§ 229.301
	Item 302	§ 229.302
	Item 303	§ 229.303
	Item 914	§ 229.914
Regulation AB		§§ 229.1100 through 229.1125
	Item 1112	§ 229.1112
	Item 1114	§ 229.1114
	Item 1115	§ 229.1115
Securities Act of 1933 <sup>1</sup> (“Securities Act”)	Rule 419	§ 230.419
	Form S-1	§ 239.11
	Form S-20	§ 239.20
	Form S-4	§ 239.25
	Form F-1	§ 239.31
	Form F-4	§ 239.34
Securities Exchange Act of 1934 <sup>2</sup> (“Exchange Act”)	Rule 14a-3	§ 240.14a-3
	Schedule 14A	§ 240.14a-101
	Form 20-F	§ 249.218
	Form 40-F	§ 249.220f
	Form 8-K	§ 249.308
	Form 10-K	§ 249.310
Securities Act and Investment Company Act of 1940 <sup>3</sup> (“Investment Company Act”)	Form N-2	§§ 239.14 and 274.11a-1

<sup>1</sup> 15 U.S.C. 77a *et seq.*

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 15 U.S.C. 80a-1 *et seq.*

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## I. INTRODUCTION

### A. Background

On January 30, 2020, the Commission proposed amendments to Regulation S-K,<sup>4</sup> and related rules and forms to: (1) eliminate Item 301, Selected Financial Data and Item 302, Supplementary Financial Information; and (2) modernize, simplify, and enhance the disclosure requirements in Item 303, MD&A.<sup>5</sup> The Commission also proposed certain parallel amendments to financial disclosure requirements applicable to foreign private issuers (“FPIs”).<sup>6</sup> The proposed amendments were part of an ongoing, comprehensive evaluation of our disclosure requirements<sup>7</sup> and focused on modernizing and improving disclosure by reducing costs and burdens while continuing to provide investors with all material information.

Many commenters supported the objectives of the proposed amendments or were generally in favor of the proposals.<sup>8</sup> We also received suggestions to modify or further consider

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<sup>4</sup> 17 CFR 229.10 through 229.1406.

<sup>5</sup> See Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10750 (Jan. 30, 2020) [85 FR 12068 (Feb. 28, 2020)] (the “Proposing Release”).

<sup>6</sup> An FPI is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents; and (2) any of the following: (i) a majority of its executive officers or directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States. See 17 CFR 230.405. See also 17 CFR 240.3b-4(c).

<sup>7</sup> See Proposing Release at Section I.A.

<sup>8</sup> Comment letters for the Proposing Release are available at <https://www.sec.gov/comments/s7-01-20/s70120.htm>. Unless otherwise indicated, comment letters cited in this release are to the Proposing Release. In addition, the SEC’s Investor Advisory Committee adopted recommendations (“IAC Recommendation”) with respect to the proposal and other disclosure matters, asking the Commission and staff to: reconsider whether to permit all companies to omit fourth quarter information from annual reports; closely monitor accounting developments relating to reverse factoring; continue to monitor the use of non-GAAP measures by reporting companies; and reconsider whether to permit omission of the tabular contractual obligations information in annual reports. See U.S. Securities & Exchange Commission Investor Advisory Committee, Recommendation of the SEC Investor Advisory Committee Relating to Accounting and Financial Disclosure (May 21, 2020), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/accounting-and-financial-disclosure.pdf>. See also letter from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee dated April 27, 2020.

aspects of the proposed amendments that commenters believed could be clarified or improved.<sup>9</sup>

After reviewing and considering the public comments, we are adopting the majority of the amendments as proposed. As discussed further below, in certain cases, we are adopting the proposed rules with modifications that are intended to address comments received.

## **B. Overview of the Final Amendments**

We are adopting changes to Items 301, 302, and 303 of Regulation S-K that would reduce duplicative disclosure and focus on material information. Our amendments:

- Eliminate Item 301 (Selected Financial Data); and
- Modernize, simplify, and streamline Item 302(a) (Supplementary Financial Information) and Item 303 (MD&A). Specifically, these amendments will:
  - Revise Item 302(a) to replace the current requirement for quarterly tabular disclosure with a principles-based requirement for material retrospective changes;
  - Add a new Item 303(a), *Objective*, to state the principal objectives of MD&A;

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<sup>9</sup> In addition, some commenters provided input addressing whether there is a need for additional disclosure requirements relating to environmental, social, or governance issues (“ESG”) and sustainability matters. See letters from RSM US LLP dated April 20, 2020 (“RSM”); Edison Electric Institute and American Gas Association dated April 28, 2020 (“EEI & AGA”); U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness dated May 4, 2020 (“Chamber”); Principles for Responsible Investment dated April 28, 2020; Institute for Policy Integrity, New York University School of Law dated April 28, 2020; E. Warren, United States Senator dated April 28, 2020; Center for Audit Quality dated April 28, 2020 (“CAQ”); Ernst & Young, LLP dated April 28, 2020 (“E&Y”); The Forum for Sustainable and Responsible Investment dated June 17, 2020. These commenters reflected a range of views. For example, some commenters broadly supported the establishment of comprehensive ESG disclosure requirements, while others recommended prescriptive line-item requirements specifically addressing climate risk disclosures. Other commenters asserted that the existing disclosure principles in Regulation S-K are sufficient to elicit disclosure of material information and objected to new rules that would require all registrants to include topic-specific disclosure on ESG and sustainability matters irrespective of the applicability to registrants’ particular operations and finances. In keeping with the Commission’s principles-based approach to MD&A, we are not adding any new requirements to Item 303 with respect to ESG or sustainability matters, and continue to emphasize the Commission’s existing guidance on these topics. See Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 8, 2010) [75 FR 6290 (Feb. 8, 2010)].

- Amend Item 303(a), *Full fiscal years* (amended Item 303(b)) and Item 303(b), *Interim periods* (amended Item 303(c)) to modernize, clarify, and streamline the items;
- Replace Item 303(a)(4), *Off-balance sheet arrangements*, with an instruction to discuss such obligations in the broader context of MD&A;
- Eliminate Item 303(a)(5), *Tabular disclosure of contractual obligations*, and amend Item 303(b)(1), *Liquidity and Capital Resources*, to specifically require disclosure of material cash requirements from known contractual and other obligations as part of an enhanced liquidity and capital resources discussion; and
- Add a new Item 303(b)(3), *Critical accounting estimates*, to clarify and codify Commission guidance on critical accounting estimates.<sup>10</sup>

We are also adopting certain parallel amendments to Forms 20-F and 40-F, including Item 3.A of Form 20-F (Selected Financial Data), Item 5 of Form 20-F (Operating and Financial Review and Prospects), General Instruction B.(11) of Form 40-F (Off-Balance Sheet Arrangements), and General Instruction B.(12) of Form 40-F (Tabular Disclosure of Contractual Obligations).<sup>11</sup> The following table summarizes some of the changes we are adopting, as described more fully in Section II (Final Amendments):<sup>12</sup>

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<sup>10</sup> See *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operation*, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056 (Dec. 29, 2003)] (the "2003 MD&A Interpretive Release").

<sup>11</sup> We discuss the amendments that affect FPIs in Section II.D *infra*. We are adopting corresponding changes for FPIs to all items, except for Items 302(a) and 303(b).

<sup>12</sup> The information in this table is not comprehensive and is intended only to highlight some of the more significant aspects of the final amendments. It does not reflect all of the amendments or all of the rules and forms that are affected. All changes are discussed in their entirety below. As such, this table should be read together with the referenced sections and the complete text of this release.

<b>Current Item or Issue</b>	<b>Summary Description of Amended Rules</b>	<b>Principal Objective(s)</b>	<b>Discussed Below In Section</b>
<b>Item 301, Selected financial data</b>	Registrants will no longer be required to provide 5 years of selected financial data.	Modernize disclosure requirement in light of technological developments and simplify disclosure requirements.	<b>II.A</b>
<b>Item 302(a), Supplementary financial information</b>	Registrants will no longer be required to provide 2 years of tabular selected quarterly financial data. The item will be replaced with a principles-based requirement for material retrospective changes.	Reduce repetition and focus disclosure on material information. Modernize disclosure requirement in light of technological developments.	<b>II.B</b>
<b>Item 303(a), MD&amp;A</b>	Clarify the objective of MD&A and streamline the fourteen instructions.	Simplify and enhance the purpose of MD&A.	<b>II.C.1.a</b>
<b>Item 303(a)(2), Capital resources</b>	Registrants will need to provide 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.	Modernize and enhance disclosure requirements to account for capital expenditures that are not necessarily capital investments.	<b>II.C.2 and II.C.7</b>
<b>Item 303(a)(3)(ii), Results of operations</b>	Registrants will need to disclose known events that are reasonably likely to 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.	Clarify item requirement by using a disclosure threshold of “reasonably likely,” which is consistent with the Commission’s interpretative guidance on forward-looking statements.	<b>II.C.3</b>
<b>Item 303(a)(3)(iii), Results of operations</b>	Clarify that a discussion of material changes in net sales or revenue is required (rather than only material increases).	Clarify MD&A disclosure requirements by codifying existing Commission guidance.	<b>II.C.4</b>
<b>Item 303(a)(3)(iv), Results of operations</b> <b>Instructions 8 and 9 (Inflation and price changes)</b>	The item and instructions will be eliminated. Registrants will still be required to discuss these matters if they are part of a known trend or uncertainty that has had, or the registrant reasonably expects to have, a material favorable or unfavorable impact on net sales, or revenue, or income from continuing operations.	Encourage registrants to focus on material information that is tailored to a registrant’s businesses, facts, and circumstances.	<b>II.C.5</b>
<b>Item 303(a)(4), Off-balance sheet arrangements</b>	The item will be replaced by a new instruction to Item 303. Under the new instruction, 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 even when the arrangement results in no obligation being reported in the registrant’s consolidated balance sheets.	Prompt registrants to consider and integrate disclosure of off-balance sheet arrangements within the context of their MD&A.	<b>II.C.6</b>
<b>Item 303(a)(5), Contractual obligations</b>	Registrants will no longer be required to provide a contractual obligations table. A discussion of material contractual	Promote the principles-based nature of MD&A and simplify disclosures.	<b>II.C.7 and II.C.2</b>



<b>Current Item or Issue</b>	<b>Summary Description of Amended Rules</b>	<b>Principal Objective(s)</b>	<b>Discussed Below In Section</b>
	obligations will remain required 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.		
<b>Instruction 4 to Item 303(a) (Material changes in line items)</b>	Incorporate a portion of the instruction into amended Item 303(b). Clarify in amended Item 303(b) that where there are material changes in a line item, including where material changes within a line item offset one another, disclosure of the underlying reasons for these material changes in quantitative and qualitative terms is required.	Enhance analysis in MD&A. Clarify MD&A disclosure requirements by codifying existing Commission guidance on the importance of analysis in MD&A.	<b>II.C.1.b</b>
<b>Item 303(b), <i>Interim periods</i></b>	Registrants will be permitted to compare their most recently completed quarter to either the corresponding quarter of the prior year or to the immediately preceding quarter. Registrants subject to Rule 3-03(b) of Regulation S-X will be afforded the same flexibility.	Allow for flexibility in comparison of interim periods to help registrants provide a more tailored and meaningful analysis relevant to their business cycles.	<b>II.C.9</b>
<b>Critical Accounting Estimates</b>	Registrants will be explicitly required to disclose critical accounting estimates.	Facilitate compliance and improve resulting disclosure. Eliminate disclosure that duplicates the financial statement discussion of significant policies. Promote meaningful analysis of measurement uncertainties.	<b>II.C.8</b>

We discuss the final amendments below in the order that each Item appears in Regulation S-K.

## **II. DESCRIPTION OF THE FINAL AMENDMENTS**

### **A. Selected Financial Data (Item 301)**

#### **1. Proposed Amendments**

Current Item 301<sup>13</sup> requires registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. Instruction 1 to Item 301 states that the purpose of the item is to supply in a convenient and readable format selected financial data that highlights certain significant trends in the registrant's financial condition and results of operations. Instruction 2 to Item 301 lists specific items that must be included, subject to

<sup>13</sup> See also *infra* Section II.D for a discussion of related amendments to Form 20-F.

appropriate variation to conform to the nature of the registrant’s business, and provides that registrants may include additional items they believe would enhance an understanding of, and highlight, other trends in their financial condition and results of operations.<sup>14</sup>

Smaller reporting companies<sup>15</sup> are not required to provide Item 301 information.<sup>16</sup> Emerging growth companies (“EGCs”)<sup>17</sup> that are providing the information called for by Item 301 in a Securities Act registration statement need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with the EGC’s initial public offering (“IPO”) of its common equity securities.<sup>18</sup> In addition, an EGC that is providing the information called for by Item 301 in a registration statement, periodic report, or other report filed under the Exchange Act need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with its first registration statement that became effective under the Exchange Act or Securities Act.<sup>19</sup>

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<sup>14</sup> Instruction 2 to Item 301 of Regulation S-K states that, subject to appropriate variation to conform to the nature of the registrant’s business, the following items shall be included in the table of financial data: net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock (including long-term debt, capital leases, and redeemable preferred stock); and cash dividends declared per common share.

<sup>15</sup> Item 10(f)(1) of Regulation S-K defines a smaller reporting company (“SRC”) as a registrant that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not an SRC that: had a public float of less than \$250 million; or had annual revenues of less than \$100 million, and had either no public float or a public float of less than \$700 million. Business development companies (“BDCs”) do not fall within the SRC definition and are a type of closed-end investment company that is not registered under the Investment Company Act.

<sup>16</sup> Item 301(c) of Regulation S-K [17 CFR 229.301(c)].

<sup>17</sup> An EGC is defined as a company that has total annual gross revenues of less than \$1.07 billion during its most recently completed fiscal year and, as of December 8, 2011, had not sold common equity securities under a registration statement. A company continues to be an EGC for the first five fiscal years after it completes an IPO, unless one of the following occurs: its total annual gross revenues are \$1.07 billion or more; it has issued more than \$1 billion in non-convertible debt in the past three years; or it becomes a “large accelerated filer,” as defined in Exchange Act Rule 12b-2. *See* Securities Act Rule 405 and Exchange Act Rule 12b-2.

<sup>18</sup> Item 301(d)(1) of Regulation S-K [17 CFR 229.301(d)(1)].

<sup>19</sup> Item 301(d)(2) of Regulation S-K [17 CFR 229.301(d)(2)].

The Commission proposed to eliminate Item 301 in part because of advances in technology since the item’s adoption in 1970 that allow for easy access to the information required by this item on the Commission’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”).<sup>20</sup> The Commission also noted that Item 301 was originally intended to elicit disclosure of material trends and that requiring five years of selected financial data is not necessary to achieve this because of the requirement for discussion and analysis of trends in Item 303.<sup>21</sup>

## 2. Comments

Commenters broadly supported the proposals.<sup>22</sup> A few commenters stated that Item 301 creates additional complexity or costs when evaluating whether to recast earlier years or when recasting earlier years, such as when there is a new accounting standard or change in business.<sup>23</sup> For example, one commenter stated that the costs of providing the earlier two years can be significant and elaborated that these costs include: internal costs to prepare any restatement and disclosures; implementation of internal controls; and external costs such as legal and audit fees.<sup>24</sup> Another commenter stated that it recently disposed of a portion of its business and revising the

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<sup>20</sup> See Proposing Release at Section II.A.

<sup>21</sup> See Proposing Release at Section II.A.

<sup>22</sup> See, e.g., letters from PriceWaterhouseCoopers LLP dated April 23, 2020 (“PWC”); Pfizer, Inc. dated April 24, 2020 (“Pfizer”); Eli Lilly and Company dated April 24, 2020 (“Eli Lilly”); EEI and AGA; KPMG LLP dated April 28, 2020 (“KPMG”); CAQ; FedEx dated April 28, 2020 (“FedEx”); Nasdaq, Inc. dated April 28, 2020 (“Nasdaq”); Nareit dated April 28, 2020 (“Nareit”); Financial Executives International dated April 28, 2020 (“FEI”); SIFMA dated April 28, 2020 (“SIFMA”); Institute of Management Accountants dated April 28, 2020 (“IMA”); E&Y; UnitedHealth Group dated April 28, 2020 (“UnitedHealth”); Medtronic dated April 29, 2020 (“Medtronic”); Chamber; ABA Business Law Section dated June 5, 2020 (“ABA”); Society for Corporate Governance dated June 22, 2020 (“Society”).

<sup>23</sup> See, e.g., letters from Eli Lilly; EEI & AGA; FEI.

<sup>24</sup> See letter from FEI.

full five years under Item 301 was difficult and time consuming, and it believed that the disclosure was not useful to investors.<sup>25</sup>

Some commenters opposed the proposal and recommended retaining this item.<sup>26</sup> These commenters suggested that eliminating the item would increase the time and costs for investors to obtain the same disclosure through other means.<sup>27</sup> Some of these commenters also stated that eliminating Item 301 would result in the loss of disclosure, noting specifically the loss of the earlier two years where a corporation discontinues its operations, changes its accounting standards, or otherwise materially restates prior period results.<sup>28</sup> A few commenters also expressed the view that the proposal would negatively impact trend disclosure, especially for the full five years, because, in their observation, registrants do not typically provide this disclosure despite requirements in Item 303 and Commission guidance calling for it.<sup>29</sup> These commenters stated that they “have not noted [trend] disclosure being provided by registrants in MD&A to any significant extent, and have certainly not seen evidence of this type of disclosure encompassing a full five-year trend analysis.”<sup>30</sup>

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<sup>25</sup> See letter from Eli Lilly.

<sup>26</sup> See, e.g., letters from NASAA dated April 28, 2020 (“NASAA”); California Public Employees’ Retirement Systems dated April 28, 2020 (“CalPERS”); CFA Institute and Council of Institutional Investors dated April 28, 2020 (“CFA & CII”); Dan Jamieson dated May 1, 2020 (“D. Jamieson”).

<sup>27</sup> See *id.*

<sup>28</sup> See letters from NASAA (observing loss of information where there is a change in accounting standard or restatement, noting that in both scenarios the lost disclosure would be particularly significant); CFA & CII (observing loss of information where there are discontinued operations or restatements); D. Jamieson.

<sup>29</sup> See letters from CFA & CII; D. Jamieson.

<sup>30</sup> See *id.*

A few commenters, while not objecting to the proposed elimination of the item, recommended continued consideration of investor input as to the overall utility of Item 301.<sup>31</sup> One of these commenters stated that many registrants disclose trends for the periods covered by the financial statements, and if Item 303 is intended to elicit five-year trend disclosure, Item 303 should be clarified to make this objective clear.<sup>32</sup>

### 3. Final Amendments

We are adopting the amendments to eliminate Item 301 as proposed. We agree with commenters that the earlier two years required by Item 301 can create additional costs and complexity. We acknowledge the input of some commenters that the earlier two years required by Item 301 can help illustrate material trends. However, this disclosure is typically available in prior filings on EDGAR.<sup>33</sup> We also continue to believe that the disclosures required by Item 303 should continue to elicit material trend disclosure. Item 303 currently requires disclosure of trend data,<sup>34</sup> and will continue to require this information under the amendments,<sup>35</sup> and we reiterate Commission guidance that has emphasized the importance of this disclosure in

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<sup>31</sup> See letters from Grant Thornton dated April 28, 2020 (“Grant Thornton”) (encouraging “the SEC to continue outreach to investors on the overall utility of selected financial data and supplementary financial information prior to finalizing rulemaking in this area”); BDO USA, LLP dated April 28, 2020 (“BDO”) (stating its belief that “investors are best positioned to provide feedback about whether the Selected Financial Data . . . should be eliminated or retained”).

<sup>32</sup> See letter from BDO.

<sup>33</sup> In addition, filings are generally available on registrants’ websites and other third-party websites. We note that the elimination of Item 301 includes the exchange rate disclosure requirements for FPI’s in Instruction 5 of Item 301. This is consistent with the Commission’s prior removal of exchange rate data disclosure requirements in former Item 3.A.3 of Form 20-F, in which the Commission similarly cited the ready availability of exchange rate disclosure information on a number of websites as a basis for eliminating that requirement. See Disclosure Update and Simplification, Release No. 33-10532 (Aug. 17, 2018) [83 FR 38768 (Aug. 7, 2018)]. *Id.* at 107.

<sup>34</sup> See, e.g., Item 303(a)(1) and (a)(2)(ii).

<sup>35</sup> See, e.g., amended Item 303(a), Item 303(b)(1)(i), Item 303(b)(1)(ii)(B), and Item 303(b)(2)(ii).

MD&A.<sup>36</sup> In light of these requirements, we do not anticipate that eliminating Item 301 will discourage trend disclosure or otherwise reduce disclosure of material trends. We acknowledge commenters that stated that our amendments may increase the time and costs to investors to obtain historical disclosures elsewhere. However, we expect that these search costs are likely to decrease over time as investors adjust to new disclosure formats.<sup>37</sup>

Notwithstanding the amendments to eliminate Item 301, we encourage registrants to consider whether trend information for periods earlier than those presented in the financial statements may be necessary as part of MD&A's objective to "provide material information relevant to an assessment of the financial condition and results of operations."<sup>38</sup> We also encourage registrants to consider whether a tabular presentation of relevant financial or other information, as part of an introductory section or overview, including to demonstrate material trends, may help a reader's understanding of MD&A.<sup>39</sup>

This Commission guidance also states that registrants could benefit from adding an introductory section or overview.<sup>40</sup> Notwithstanding the amendments to eliminate Item 301, registrants should continue to consider whether such tabular disclosure as part of an introductory section or overview, including to demonstrate material trends, would be appropriate.

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<sup>36</sup> See, e.g., 2003 MD&A Interpretive Release.

<sup>37</sup> See *infra* Section IV.C.2.a.

<sup>38</sup> See amended Item 303(b).

<sup>39</sup> See 2003 MD&A Interpretive Release at Section III.A.

<sup>40</sup> See *id.*

## **B. Supplementary Financial Information (Item 302)**

### **1. Proposed Amendments**

Current Item 302(a)(1) requires disclosure of selected quarterly financial data of specified operating results,<sup>41</sup> and current Item 302(a)(2) requires disclosure of variances in these results from amounts previously reported on a Form 10-Q.<sup>42</sup> Item 302(a) does not apply to SRCs or FPIs and, because it only applies to companies that already have a class of securities registered under Section 12 of the Exchange Act at the time of filing, it does not apply to first-time registrants conducting an IPO and registrants that are only required to file reports pursuant to Section 15(d) of the Exchange Act.<sup>43</sup> When Item 302(a) applies, it requires certain information for each full quarter within the two most recent fiscal years and any subsequent period for which financial statements are included or required by Article 3 of Regulation S-X.<sup>44</sup> Item 302(a)(3) requires a description of the effect of any discontinued operations and unusual or infrequently occurring items recognized in each quarter, as well as the aggregate effect and the nature of year-end or other adjustments that are material to the results of that quarter.<sup>45</sup> If a registrant's financial statements have been reported on by an accountant, Item 302(a)(4) requires that

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<sup>41</sup> Item 302(a)(1) of Regulation S-K [17 CFR 229.302(a)(1)]. Item 302(a)(1) specifies disclosure of: net sales; gross profit (net sales less costs and expenses associated directly with or allocated to products sold or services rendered); income (loss) from continuing operations; per share data based upon income (loss) from continuing operations; net income (loss); and net income (loss) attributable to the registrant.

<sup>42</sup> Item 302(a)(2) of Regulation S-K [17 CFR 229.302(a)(2)]. When the data supplied pursuant to Item 302(a) varies from amounts previously reported on the Form 10-Q filed for any quarter, such as when a combination between entities under common control occurs or where an error is corrected, the registrant must reconcile the amounts given with those previously reported and describe the reason for the difference.

<sup>43</sup> Item 302(a)(5) and (c) of Regulation S-K [17 CFR 229.302(a)(5) and (c)].

<sup>44</sup> Item 302(a)(1) and (a)(3) [17 CFR 229.302(a)(1) and (a)(3)].

<sup>45</sup> Item 302(a)(3) of Regulation S-K [17 CFR 229.302(a)(3)]. The requirement applies to items recognized in each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included.

accountant to follow appropriate professional standards and procedures regarding the data required by Item 302(a).<sup>46</sup>

The Commission proposed to eliminate Item 302(a), intending to address the largely duplicative disclosures that result from this prescriptive requirement. However, the Commission recognized that, while most of the financial data required by Item 302(a) can be found in prior quarterly reports on EDGAR, the item requires separate disclosure of certain fourth quarter information, which is not otherwise required to be disclosed. The Commission also recognized that the proposal may result in the loss of the effect of a retrospective change in the earliest of the two years.<sup>47</sup> In the Proposing Release, the Commission stated that, where fourth quarter results are material or there is a material retrospective change, existing requirements, such as those in Item 303 would still elicit this disclosure.<sup>48</sup>

The Commission also proposed to eliminate Item 302(b) (Supplementary Financial Information – Information about Oil and Gas Producing Activities) due to overlap with a U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) requirement.<sup>49</sup>

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<sup>46</sup> Item 302(a)(4) of Regulation S-K [17 CFR 229.302(a)(4)].

<sup>47</sup> Because Item 302(a)(2) requires disclosure of variances in results from amounts previously reported for the two most recent fiscal years, the effect of a retrospective change in any quarter for which a Form 10-Q is filed in the more recent of the two fiscal years will be disclosed in the selected quarterly data. However, absent Item 302(a)(2), this variance would not be specifically required to be disclosed until the following year in the corresponding fiscal quarter in which the retrospective change occurred. Additionally, disclosure in the Form 10-Q for this corresponding fiscal quarter would not include the effects of this change in the earliest of the two years presented in the Form 10-K, as this Form 10-Q would be limited to the current and prior-year interim periods.

<sup>48</sup> See Proposing Release at Section II.B.1.

<sup>49</sup> See ASC 932-235-50. See also Proposing Release at Section II.B.2.



## 2. Comments

The proposal generated a wide range of responses. Many commenters supported the proposal.<sup>50</sup> A number of these commenters suggested that fourth quarter information is easily derived, such as by subtracting the third quarter from year-to-date amounts<sup>51</sup> or is otherwise frequently disclosed in registrants' earnings releases.<sup>52</sup> Other commenters expressed the view that registrants would voluntarily present Item 302(a) disclosure absent a requirement.<sup>53</sup> One of these commenters, while supportive of the proposal, expressed concern about the loss of certain fourth quarter information and the effects of material retrospective changes.<sup>54</sup> This commenter recommended revising the instructions to Item 303 to require (i) a discussion of the fourth quarter in MD&A but only when this quarter differs materially from previously reported quarterly information and (ii) disclosure of material retrospective changes.

A number of commenters, however, opposed the proposal to eliminate Item 302(a).<sup>55</sup> All of these commenters suggested that a separate presentation of fourth quarter data is useful to investors,<sup>56</sup> with one of these commenters stating that for "a significant number of companies, fourth quarter results cannot be derived from annual results."<sup>57</sup> A few of these commenters also

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<sup>50</sup> *See, e.g.*, letters from PWC; Pfizer; Eli Lilly; EEI & AGA; KPMG; CAQ; FedEx; Nasdaq; Nareit; FEI; SIFMA; IMA; UnitedHealth; Medtronic; Chamber; ABA; Society.

<sup>51</sup> *See, e.g.*, letters from Eli Lilly; FEI; SIFMA; IMA; UnitedHealth; Medtronic; Society.

<sup>52</sup> *See* letter from UnitedHealth.

<sup>53</sup> *See* letters from KPMG; CAQ.

<sup>54</sup> *See* letter from ABA.

<sup>55</sup> *See, e.g.*, letters from E&Y; NASAA; CalPERS; CFA & CII; D. Jamieson. *See also* IAC Recommendation.

<sup>56</sup> *See id.*

<sup>57</sup> *See* IAC Recommendation.

questioned the cost savings, if any, to registrants if Item 302(a) were eliminated, stating that registrants already have the procedures in place to disclose this information.<sup>58</sup>

Several commenters opposing the proposal stated that eliminating Item 302(a) would result in either delays in the disclosure of retrospective revisions until the following Form 10-Q or a loss of disclosure on the effect of a retrospective change on the earliest of the two years for such revisions.<sup>59</sup> Some of these commenters questioned whether the loss of the fourth quarter data may be mitigated by disclosure elicited under Item 303<sup>60</sup> and/or Accounting Standards Codification 270 (Interim Reporting).<sup>61</sup> One of these commenters expressed the view that registrants would voluntarily report fourth quarter data, but noted that eliminating Item 302(a) would result in investors losing the benefit of having an auditor review of the fourth quarter.<sup>62</sup> One of these commenters recommended that, if Item 302(a) were retained, the line items required for presentation be conformed to key subtotals in the registrant's interim statement of comprehensive income in order to eliminate the potential for inconsistencies between the item requirements and the registrant's financial statements.<sup>63</sup>

A few commenters, while not objecting to the proposed elimination of Item 302(a), recommended continued consideration of investor input on the utility of Item 302(a) before finalizing any rulemaking.<sup>64</sup> All of these commenters suggested revisions to provide for

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<sup>58</sup> See, e.g., letters from NASAA; CalPERS. See also IAC Recommendation.

<sup>59</sup> See, e.g., letters from E&Y; CFA & CII; D. Jamieson. See *supra* footnote 47.

<sup>60</sup> See letters from E&Y; NASAA.

<sup>61</sup> See letter from E&Y.

<sup>62</sup> See *id.*

<sup>63</sup> See letter from E&Y.

<sup>64</sup> See, e.g., letters from RSM; Grant Thornton; BDO.

disclosure of material retrospective changes, either by revising Item 302(a),<sup>65</sup> or through revisions to Item 303.<sup>66</sup> Some commenters also recommended revising Item 302(a) to allow newly reporting registrants to exclude this data for interim periods prior to those presented in its IPO registration statement.<sup>67</sup>

Several commenters recommended coordinating with the Public Company Accounting Oversight Board (PCAOB) to clarify the requirement in Accounting Standard (AS) 4105.06, which requires auditors to review fourth quarter data where an annual report includes Item 302(a) disclosure.<sup>68</sup>

With respect to the proposal to eliminate Item 302(b), one commenter specified that it supported the proposal,<sup>69</sup> and no commenters specifically opposed the proposal.

### **3. Final Amendments**

We are adopting amendments to Item 302(a), with modifications from what was proposed in response to comments received. Specifically, we are retaining the item and streamlining its requirements to require disclosure only when there are one or more retrospective changes that pertain to the statements of comprehensive income 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 included by Article 3 of Regulation S-X and that, individually or in the

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<sup>65</sup> See letter from RSM.

<sup>66</sup> See letters from Grant Thornton (questioning whether current Item 303 would elicit this disclosure); BDO (stating that, if Item 303 is expected to elicit disclosure of material retrospective changes, this should be clarified in the item).

<sup>67</sup> See letters from Grant Thornton; E&Y.

<sup>68</sup> See, e.g., letters from PWC; KPMG; CAQ; RSM; Grant Thornton; BDO; Deloitte & Touche, LLP dated April 28, 2020 (“Deloitte”). The text of AS 4105.06 is *available at* <https://pcaobus.org/Standards/Auditing/Pages/AS4105.aspx>.

<sup>69</sup> See letter from Chamber.

aggregate, are material.<sup>70</sup> Our amendments will require registrants to provide an explanation of the reasons for such material changes and to disclose, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the statements of comprehensive income (as specified in Rule 1-02(bb)(ii) of Regulation S-X) and earnings per share reflecting such changes. The affected quarters may include, depending on the facts and circumstances, a single quarter in which the material retrospective change applies, or it may flow through to subsequent quarters during the relevant look-back period (i.e., the quarters within the two most recent fiscal years and any subsequent interim period for which financial statements are included or required to be included by Article 3 of Regulation S-X).<sup>71</sup> Consistent with a commenter's suggestion,<sup>72</sup> we are amending Item 302(a) to refer to amended Rule 1-02(bb)(ii). This will link amended Item 302(a) to the summarized financial information related to the statements of comprehensive income specified in amended Rule 1-02(bb)(1)(ii) of Regulation S-X,<sup>73</sup> thereby providing registrants flexibility in the line items presented. We are also adopting

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<sup>70</sup> Some examples of a retrospective change that may trigger Item 302(a) disclosure include: correction of an error; disposition of a business that is accounted for as discontinued operations; a reorganization of entities under common control; or a change in an accounting principle. These examples are not intended to be an exhaustive list, and may not always be material such that disclosure would be required under amended Item 302(a). Further, not all changes in accounting principles would result in a retrospective change. For example, certain calendar year-end EGCs that elected to take advantage of the extended transition period for new or revised financial accounting standards in their initial public offerings, will adopt in accordance with U.S. GAAP ASC 842, *Leases* for the full fiscal year in their 2022 Form 10-K filed in 2023 and will not adopt ASC 842 in interim periods until the Forms 10-Q filed in 2023. We do not view the adoption of ASC 842 in the 2022 Form 10-K, in this scenario, to constitute a retrospective change that should trigger disclosure under Item 302(a) in the registrant's 2022 Form 10-K. By contrast, a registrant that loses EGC status as of December 31, 2022, would have a retrospective change that would require evaluation of materiality under Item 302(a) because the registrant would be required to adopt ASC 842 in the 2022 Form 10-K for both the full fiscal year and interim periods within that fiscal year.

<sup>71</sup> In the previous example of a registrant that loses EGC status, the affected quarters would include all four since the material retrospective change was as of January 1st.

<sup>72</sup> See letter from E&Y.

<sup>73</sup> Rule 1-02(bb)(1)(ii) generally refers to the same line items required by current Item 302(a).

amendments to Rule 1-02(bb), as proposed, to clarify that the disclosure of summary financial information may vary, as appropriate, to conform to the nature of the entity's business.<sup>74</sup> Lastly, our amendments retain all Item 302(a) references in our rules and forms.<sup>75</sup>

The final amendments do not revise the population of registrants that are not required to provide disclosure pursuant to Item 302(a),<sup>76</sup> including, but not limited to, first time registrants conducting an IPO or registrants that are only required to file reports pursuant to Section 15(d).

We continue to believe that requiring quarterly financial data when there have not been one or more retrospective changes that are material, either individually or in the aggregate, would duplicate disclosures provided elsewhere, such as in Forms 10-Q or, in the case of fourth quarter results, can be derived from annual results disclosed in the Form 10-K. Our amendments eliminate these duplicative disclosures. We do, however, agree with commenters that timely disclosure of the effects of material retrospective changes may be important to investors, and lack of such disclosure could impact the ability to derive fourth quarter information when there have been such changes. As discussed in the Proposing Release, Item 303 should elicit some disclosure where there has been a material retrospective change. However, we believe that the amended Item 302(a) disclosures will further aid investors' understanding of the reasons for the material retrospective change and the related quantitative effect on the quarterly periods affected. Accordingly, our amendments are intended to address this discrete area.

We also believe amended Item 302(a) will better highlight material retrospective changes, as disclosure will only be required where there are such changes, which may be

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<sup>74</sup> See Proposing Release at footnote 337.

<sup>75</sup> See discussion in Section II.E. *infra*.

<sup>76</sup> See amended Rule 302(a)(2).

important to investors. For this reason, we believe amended Item 302(a) may be important in the context of both Exchange Act and Securities Act forms and accordingly, are retaining requirements to provide disclosure pursuant to this item in these forms.<sup>77</sup> Further, by limiting the disclosure only to affected quarters, we believe the final amendments will balance the costs to registrants of preparing such disclosures, while providing investors with material information regarding the impact of material changes.

We acknowledge commenters who stated that, absent Item 302(a), fourth quarter results may not always be available or readily derived from annual results. We continue to believe that, in most instances, fourth quarter information can be readily derived from annual results, and as such, amended Item 302(a) does not generally require fourth quarter disclosure on a standalone basis.<sup>78</sup> Our amendments are intended to address the most common reason why fourth quarter data would not be easily calculable.

Additionally, and as some commenters stated, we expect that some registrants will voluntarily provide fourth quarter disclosure or disclosure of selected quarterly financial

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<sup>77</sup> See discussion in Section II.E. *infra*.

<sup>78</sup> We acknowledge the view expressed in the IAC Recommendation regarding the ability to derive fourth quarter results based on the assessment described in their letter of selected net income data from the years 2010 through 2019. See IAC Recommendation. The information provided in the IAC Recommendation was not sufficient for us to replicate the referenced study, and the data and methodology were not otherwise in a publicly available source. Nevertheless, it appears that the data provided in the IAC Recommendation is not inconsistent with the staff's observations and conclusions regarding the ability to calculate fourth quarter data in most instances. Based on the information provided in the IAC Recommendation, assuming that the fewest number of companies studied (3,000) and the largest incidents of difference reported (300) occurred in the same year, it follows that there would have been no difference between reported and derived fourth quarter results for 90% of companies in such year. The data presented further suggests that, in the year where the greatest number of differences were observed between reported and derived fourth quarter results, 100 companies had less than a 1% difference and only 30 companies had a greater than 10% difference. We believe these findings are consistent with our view that in the substantial majority of cases, fourth quarter data is readily derivable. Based on our own observations and calculations, in most if not all instances, any differences that would cause fourth quarter data to not be derivable from year-end and third-quarter year-to-date results would be due to a retrospective change or changes. Under the final amendments, when there is a material retrospective change or changes, fourth quarter financial data would be required.

information. In such instances, that information would be subject to the PCAOB AS 2710 requirements for auditors to read and consider such information for material inconsistencies with the audited financial statements. These procedures are lesser in scope as compared to the review procedures required by AS 4105.06 that are to be performed on fourth quarter data when presented in an annual report pursuant to Item 302(a).<sup>79</sup>

In a change from current Item 302(a), amended Item 302(a) will apply beginning with the first filing on Form 10-K after the registrant's initial registration of securities under sections 12(b) or 12(g) of the Exchange Act.<sup>80</sup> We are making this change because we agree with commenters that it would be unnecessarily burdensome for registrants to provide disclosure for interim periods prior to those presented in an IPO registration statement.<sup>81</sup> Although some commenters suggested that disclosure should not be required for any quarterly periods not previously presented on a standalone basis, such as in a Form 10-Q,<sup>82</sup> we believe that such an approach would unduly delay disclosure of the impact of material retrospective changes. For this reason, and because the commenters' suggestions related primarily to current Item 302(a), which requires disclosure in every annual report, while amended Item 302(a) will require disclosure in more limited circumstances, we believe that it is appropriate to require newly

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<sup>79</sup> The text of AS 4105.06 is *available at* <https://pcaobus.org/Standards/Auditing/Pages/AS4105.aspx>. The final amendments update the outdated reference in current Item 302(a)(4) from the Statements of Auditing Standards issued by the Auditing Standards Board of the American Institute of Certified Public Accountants to the current reference of the Auditing Standards issued by the Public Company Accounting Oversight Board.

<sup>80</sup> *See* amended Item 302(a)(2). *See also* footnote 70 *supra*.

<sup>81</sup> *See, e.g.*, letters from Grant Thornton and E&Y.

<sup>82</sup> *See, e.g.*, letters from Grant Thornton; E&Y (recommending that "new registrants be exempted from providing the disclosure until their second annual report, and in registration statements thereafter, to avoid requiring selected quarterly data to be presented for interim periods not previously presented in any periodic quarterly reports.").

reporting registrants to provide Item 302(a) disclosure, if applicable, beginning in their first Form 10-K. Nonetheless, when a new registrant has a material retrospective change to its year-to-date interim period information in its most recent registration statement, but has not yet disclosed that interim period information in quarterly increments, we would not object if Item 302(a) disclosures are presented for the affected year-to-date interim period and the fourth quarter in the affected year.<sup>83</sup>

Finally, we proposed to eliminate Item 302(b), disclosure of oil and gas producing activities, on the condition that the FASB finalize amendments to U.S. GAAP that would require incremental disclosure called for by Item 302(b). The FASB has not yet finalized the amendments, so we are retaining Item 302(b) and may reconsider the proposal in the future.

### **C. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)**

Item 303 of Regulation S-K requires disclosure of information relevant to assessing a registrant's financial condition, changes in financial condition, and results of operations. The disclosure requirements for full fiscal years in Item 303(a) include five components: liquidity, capital resources, results of operations, off-balance sheet arrangements, and contractual obligations.<sup>84</sup> Item 303(b) covers interim period disclosures and requires registrants to discuss material changes in the items listed in Item 303(a), other than the impact of inflation and changing prices on operations.<sup>85</sup> Item 303(c) acknowledges the application of a statutory safe

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<sup>83</sup> For example, after conducting an IPO, a registrant files its first Form 10-K in which Item 302(a) information would be required. The Item 302(a)-triggering material retrospective change occurred during a quarter that has only been presented as a part of the year-to-date interim period statement of comprehensive income filed in the IPO registration statement. In this circumstance, we would 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), along with the fourth quarter, in the affected year.

<sup>84</sup> Item 303(a)(1)-(5) of Regulation S-K [17 CFR 229.303(a)(1)-(5)].

<sup>85</sup> See Item 303(b) and Instruction 7 to Item 303(b) of Regulation S-K [17 CFR 229.303(b)].



harbor for forward-looking information provided in off-balance sheet arrangements and contractual obligations disclosures. Item 303(d) provides certain accommodations for SRCs.

The Commission proposed amendments to Item 303 of Regulation S-K that were intended to modernize, simplify, and enhance the MD&A disclosures for investors while reducing compliance burdens for registrants.<sup>86</sup> After consideration of the comments received, and as discussed in more detail below, amended Item 303 will provide the following:

- New Item 303(a) states the objectives of MD&A that will apply throughout amended Item 303. It also incorporates much of the substance of Instructions 1, 2, and 3 to current Item 303(a).
- Amended Item 303(b) provides the requirements for full fiscal year disclosure and comprises three main requirements:
  - Item 303(b)(1) provides the overarching requirements for liquidity and capital resources disclosures, and reflects an enhanced principles-based requirement focused on material short- and long-term cash requirements, including those from known contractual and other obligations. Items 303(b)(1)(i) and (ii) provide the specific disclosure requirements for liquidity and capital resources, respectively.
  - Item 303(b)(2) provides the requirements for results of operations disclosures, and includes minor amendments such as eliminating the current requirement to discuss the impact of inflation and changing prices where material; and

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<sup>86</sup> We discuss *infra* in Section II.D our amendments that will make certain parallel changes to Item 5 of Form 20-F (Operating and Financial Review and Prospects), General Instruction B.(11) of Form 40-F (Off-Balance Sheet Arrangements), and General Instruction B.(12) of Form 40-F (Tabular Disclosure of Contractual Obligations).

- Item 303(b)(3), requires disclosure of critical accounting estimates, and largely clarifies and codifies Commission guidance in this area.
- The instructions to amended Item 303(b) have been streamlined, such as by eliminating unnecessary cross-references to industry guides, and replace the requirement for off-balance sheet arrangement disclosures (current Item 303(a)(4)) with an instruction to discuss these obligations in the broader context of MD&A disclosure.
- Amended Item 303(c) provides for interim disclosure requirements, and will allow for more flexibility in the interim periods compared. The item’s instructions have also been streamlined by eliminating certain instructions and providing cross-references to similar instructions to Item 303(b); and
- Current Item 303(a)(5) will be eliminated, and current Items 303(c) and (d) will be eliminated as conforming changes.

The following table outlines the new structure of Item 303 as a result of these amendments:<sup>87</sup>

Current Structure	Amended Structure	Discussed In Section(s)
N/A	Item 303(a), <i>Objective</i>	II.C.1
Item 303(a), <i>Full fiscal years</i>	Item 303(b), <i>Full fiscal years</i>	II.C.1
Item 303(a)(1), <i>Liquidity</i>	Item 303(b)(1), <i>Liquidity and Capital Resources</i> (i) Liquidity (ii) Capital Resources	II.C.2 and II.C.7
Item 303(a)(2), <i>Capital resources</i>		
Item 303(a)(3), <i>Results of operations</i> (i) Unusual or infrequent events (ii) Known trends or uncertainties (iii) Material increases (iv) Inflation and changing prices	Item 303(b)(2), <i>Results of operations</i> (i) Unusual or infrequent events (ii) Known trends or uncertainties (iii) Material changes	II.C.3, II.C.4, & II.C.5
Item 303(a)(4), <i>Off-balance sheet arrangements</i>	Replace with Instruction 8 to Item 303(b)	II.C.6

<sup>87</sup> The information in this table is not comprehensive and is intended only to highlight the general structure of the current rules and final amendments. It does not reflect all of the amendments or all of the rules and forms that are affected. All changes are discussed in their entirety throughout this release. As such, this table should be read together with the referenced sections and the complete text of this release.

<b>Current Structure</b>	<b>Amended Structure</b>	<b>Discussed In Section(s)</b>
Instructions 1, 2, 3, 4, and 5 to Item 303(a)(4)		
Item 303(a)(5), <i>Tabular disclosure of contractual obligations</i> .	Eliminate (with some content incorporated into Item 303(b)(1) (Liquidity and Capital Resources) and Instruction 4 to Item 303(b))	II.C.2 and II.C.7
2003 MD&A Interpretative Release, Critical accounting estimates	Item 303(b)(3), <i>Critical accounting estimates</i>	II.C.8
Instruction 1 to Item 303(a)	Instruction 1 to Item 303(b) (with amendments)	II.C.1
Instruction 2 to Item 303(a)	Eliminate (with content incorporated into <i>Objective</i> )	II.C.1
Instruction 3 to Item 303(a)	Eliminate (with content incorporated into <i>Objective</i> )	II.C.1
Instruction 4 to Item 303(a)	Instruction 2 to Item 303(b) (with amendments and some content incorporated into Item 303(b))	II.C.1 and II.C.4
N/A	Instruction 3 to Item 303(b)	II.C.7
Instruction 5 to Item 303(a)	Instruction 4 to Item 303(b) (with amendments and content incorporated into Item 303(b)(1) (Liquidity and Capital Resources))	II.C.2 and II.C.7
Instruction 6 to Item 303(a)	Instruction 5 to Item 303(b) (with minor amendments)	II.C.1
Instruction 7 to Item 303(a)	Instruction 6 to Item 303(b)	II.C.10
Instruction 8 to Item 303(a)	Eliminate	II.C.5
Instruction 9 to Item 303(a)	Eliminate	II.C.5
Instruction 10 to Item 303(a)	Instruction 7 to Item 303(b)	II.C.1
Instruction 11 to Item 303(a)	Instruction 9 to Item 303(b) (with amendments)	II.D.3
Instruction 12 to Item 303(a)	Instruction 10 to Item 303(b) (with non-substantive amendments)	II.C.1
Instruction 13 to Item 303(a)	Eliminate	II.C.1
Instruction 14 to Item 303(a)	Eliminate	II.C.1
Item 303(b), <i>Interim periods</i>	Item 303(c), <i>Interim periods</i>	
(1) Material changes in financial condition	(1) Material changes in financial condition	
(2) Material changes in results of operations, Rule 3-03(b) of Regulation S-X matters	(2) Material changes in results of operations (i) Material changes in results of operations (year-to-date) (ii) Material changes in results of operations (quarter comparisons)	II.C.9
Instruction 1 to Item 303(b)	Instruction 1 to Item 303(c) (with amendments to reference Instructions 2, 3, 4, 6, 8, and 11 to proposed Item 303(b))	II.C.9
Instruction 2 to Item 303(b)	Eliminate	II.C.9
Instruction 3 to Item 303(b)	Eliminate	II.C.9
Instruction 4 to Item 303(b)	Instruction 2 to Item 303(c)	II.C.9

<b>Current Structure</b>	<b>Amended Structure</b>	<b>Discussed In Section(s)</b>
Instruction 5 to Item 303(b)	Eliminate	II.C.9
Instruction 6 to Item 303(b)	Eliminate	II.C.9
Instruction 7 to Item 303(b)	Eliminate	II.C.9
Instruction 8 to Item 303(b)	Instruction 11 to Item 303(b)	II.C.9
Item 303(c), <i>Safe harbor</i>	Eliminate	II.C.10
Item 303(d), <i>Smaller reporting companies</i>	Eliminate	II.C.11

## **1. Restructuring and Streamlining**

### *a. Objective of MD&A (new Item 303(a))*

#### *i. Proposed Amendments*

The first paragraph of current Item 303(a) instructs registrants to discuss their financial condition, changes in financial condition, and results of operations for full fiscal years.<sup>88</sup> The paragraph then sets forth the items that must be included in this discussion, including liquidity, capital resources, results of operations, off-balance sheet arrangements, contractual obligations, and any other information a registrant believes would be necessary to understand its financial condition, changes in financial condition, and results of operations.

The Commission proposed adding a new Item 303(a) to succinctly state the objectives of MD&A by incorporating a portion of the substance of current Instruction 1, and much of the substance of current Instructions 2 and 3 into the item.<sup>89</sup> As part of new Item 303(a), the

<sup>88</sup> Item 303(a) of Regulation S-K [17 CFR 229.303(a)].

<sup>89</sup> See Proposing Release at Section II.C.1. As a result of this proposed amendment, the remainder of Item 303 was proposed to be renumbered. Herein we distinguish the rule numbering prior to these amendments from the amended rule numbering by reference to “current” and “amended.”

Commission also proposed codifying guidance that states that a registrant should provide a narrative explanation of its financial statements that enables investors to see a registrant “through the eyes of management.”<sup>90</sup> By emphasizing the purpose of MD&A at the outset of Item 303, the proposal was intended to provide clarity and focus to registrants as they consider what information to discuss and analyze. The proposal was also intended to facilitate a thoughtful discussion and analysis, and encourage management to disclose factors specific to the registrant’s business, which management is in the best position to know, and underscore materiality as the overarching principle of MD&A.<sup>91</sup>

## ii. Comments

Most commenters supported the proposal to add new Item 303(a) to state the purposes of MD&A at the forefront.<sup>92</sup> One of these commenters nonetheless expressed concern with incorporating, as part of new Item 303(a), guidance that MD&A is “from management’s perspective,” stating that this is such a broad statement that compliance could be difficult and it could be interpreted to mandate disclosure of otherwise confidential information (*e.g.*, competitive advantages, target markets).<sup>93</sup> A few commenters questioned the proposal.<sup>94</sup> Some of these commenters, while not opposed to the proposal, did not believe it would improve MD&A.<sup>95</sup> Instead, these commenters suggested more explicit and prescriptive requirements, such as providing examples of the types of items to be discussed.

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<sup>90</sup> See 2003 MD&A Interpretative Release, at 75056. See also 1989 Interpretative Release, at 22428.

<sup>91</sup> See Proposing Release at Section II.C.1.

<sup>92</sup> See, *e.g.*, letters from Grant Thornton; Nasdaq; FEI; IMA; RSM; Society.

<sup>93</sup> See letter from RSM.

<sup>94</sup> See, *e.g.*, letters from ABA; CFA & CII; D. Jamieson.

<sup>95</sup> See letters from CFA & CII; D. Jamieson.

One commenter objected to replacing the word “should” with “must” both in proposed Item 303(a) and throughout the item, stating these terms are not interchangeable.<sup>96</sup> This commenter stated that only “should” allows the requisite flexibility appropriate for MD&A whereas “must” results in a “checklist item” that creates exposure to absolute liability and second guessing. Another commenter suggested revising proposed Item 303(a) and the remainder of the item to account for the statement of cash flows, stating that existing MD&A rules largely pre-date the requirement in U.S. GAAP to provide statements of cash flows.<sup>97</sup>

### iii. Final Amendments

We are adopting the amendments largely as proposed. Amended Item 303(a) calls for the following disclosure, which is expected to better allow investors to view the registrant from management’s perspective:

- Material information relevant to an assessment of the financial condition and results of operations of the registrant, 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.

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<sup>96</sup> See letter from ABA.

<sup>97</sup> See letter from E&Y (stating that the statement of cash flows has not been integrated in MD&A like the balance sheet and income statement and recommended replacing “changes in financial condition” with “cash flows” throughout Item 303 and adding “cash flows” to proposed Item 303(a)).

- 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.

Registrants should regularly revisit these objectives in Item 303(a) as they prepare their MD&A and consider ways to enhance the quality of the analysis provided. These objectives provide the overarching requirements of MD&A and apply throughout amended Item 303. As such, they emphasize a registrant’s future prospects and highlight the importance of materiality and trend disclosures to a thoughtful MD&A.<sup>98</sup> These amendments are intended to remind registrants that MD&A should provide an analysis that encompasses short term results as well as future prospects.<sup>99</sup> Consistent with this amendment and current guidance, and in a slight modification from our proposals, amended Item 303(a) specifies that the disclosure must include matters that are reasonably likely, based on “management’s assessment” to have a material impact on future operations.<sup>100</sup>

Consistent with this approach, our amendments also incorporate current guidance that MD&A is intended to provide disclosures from “management’s perspective.” In response to the input of one commenter, we have slightly reframed the reference to “management’s perspective”

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<sup>98</sup> As proposed, our amendments replace the word “shall” with “must” throughout Item 303 to clarify the rule and avoid any ambiguity associated with the use of “shall.” Our amendments to Item 303 do not replace “should” in the current requirements with “must.” However, in some instances our amendments update Form 20-F by replacing “should” with “must” to conform the requirements to Item 303, consistent with our other amendments to Form 20-F. We do not believe the use of “must” in these instances modifies the overall flexibility of MD&A’s principles-based approach.

<sup>99</sup> *See, e.g.*, 2003 MD&A Interpretive Release and 1989 MD&A Interpretive Release.

<sup>100</sup> This language codifies Commission guidance on forward-looking information where the Commission stated, that as part of the two-step test, “management must make two assessments.” *See* 1989 MD&A Interpretive Release, at 22330. *See also* footnote 145 below.

to make clear that disclosure that meets the requirements of the item generally is expected to better allow an investor to view the registrant from management’s perspective.

In response to one commenter’s suggestion, we are slightly revising our proposals to explicitly incorporate cash flows as part of MD&A’s objective.<sup>101</sup> Amended Item 303(a) specifies that MD&A must include financial and other statistical data that will enhance a reader’s understanding of the registrant’s financial condition, “cash flows,” and other changes in financial condition and results of operations. In light of this amendment and existing references to cash flows, we do not believe it is necessary to replace every reference to “changes in financial condition” with “cash flows,” as suggested by this commenter. Given the historical and continued importance of materiality in MD&A, we are not, as suggested by some commenters, adopting modifications to be more explicit or prescriptive. Rather, we continue to believe that MD&A’s materiality-focused and principles-based approach facilitates disclosure of complex and often rapidly evolving areas, without the need to continuously amend the text of the rule to update or impose additional prescriptive requirements.<sup>102</sup> These amendments are intended to further emphasize these goals.

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<sup>101</sup> See *supra* footnote 97. Amended Item 303(a)’s reference to “the amounts and certainty of cash flows from operations and from outside sources,” which is in current Instruction 2 to Item 303(a), predates the cash flow statement. See Amendments to Annual Report Form, Related Forms, Rules, Regulations and Guides; Integration of Securities Act Disclosure Systems, Release No. 33-6231, (Sept. 2, 1980) [45 FR 63630 (Sept. 25, 1980)].

<sup>102</sup> See Proposing Release at footnote 95 and corresponding text.



b. *Reasons underlying material changes (Amended Item 303(b))*

i. Proposed Amendments

In light of the proposal to add new Item 303(a), the Commission proposed re-captioning current Item 303(a) as Item 303(b), which would continue to apply to all MD&A disclosures.<sup>103</sup> The Commission also proposed moving to the amended Item 303(b) the portion of current Instruction 4 that provides that where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described.<sup>104</sup> The Commission also proposed to amend that portion of current Instruction 4 to clarify that MD&A requires a narrative discussion of the “reasons underlying” material changes rather than only the “causes” for material changes.<sup>105</sup> This proposal was intended to encourage registrants to provide a more meaningful discussion of the underlying reasons that may be contributing to material changes in line items. The Commission also proposed amending the item to clarify that registrants should discuss material changes within a line item even when such material changes offset each other, consistent with prior Commission guidance.<sup>106</sup>

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<sup>103</sup> Current Item 303(b) of Regulation S-K, which relates to interim periods requires a “discussion of material changes in those items specifically listed in [Item 303(a)], except that the impact of inflation and changing prices on operations for interim periods need not be addressed.” See 1989 MD&A Interpretive Release at n. 38 and 39 and corresponding text (“The second sentence of Item 303(b) states that MD&A relating to interim period financial statements ‘shall include a discussion of material changes in those items specifically listed in paragraph (a) of this Item, except that the impact of inflation and changing prices on operations for interim periods need not be addressed.’ As this sentence indicates, material changes to each and every specific disclosure requirement contained in paragraph (a), with the noted exception, should be discussed.”); 2003 MD&A Interpretive Release (“Disclosure in MD&A in quarterly reports is complementary to that made in the most recent annual report and in any intervening quarterly reports.”).

<sup>104</sup> Instruction 4 to Item 303(a) of Regulation S-K [17 CFR 229.303(a)].

<sup>105</sup> See Proposing Release at Section II.C.1.

<sup>106</sup> See, e.g., 1989 MD&A Interpretive Release (providing an example of a description of the effects of offsetting developments in material changes in revenue: “Revenue from sales of single-family homes for 1987 increased 6 percent from 1986. The increase resulted from a 14 percent increase in the average sales price per home, partially offset by a 6 percent decrease in the number of homes delivered. Revenues from sales of single-family

## ii. Comments

Some commenters supported this proposal, stating that it effectively codifies prior guidance.<sup>107</sup> Some commenters recommended revising the proposal to limit the requirement to provide quantitative disclosure where it is “reasonably available” and material, stating that registrants often struggle with isolating reasons for material changes as they can be highly interrelated.<sup>108</sup> Other commenters suggested expanding the proposal to provide examples of the type of “causes” of changes to be discussed, stating this would facilitate a meaningful discussion.<sup>109</sup>

## iii. Final Amendments

We are adopting the amendments largely as proposed, with a slight modification. The Commission has focused on improving the analysis in MD&A for many years. Yet, despite specific instructions in Item 303(a) that “the discussion shall not merely repeat numerical data contained in the consolidated financial statements,”<sup>110</sup> the Commission has previously observed that many registrants simply recite the amounts of changes from year to year that are readily

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homes for 1986 increased 2 percent from 1985. The average sales price per home in 1986 increased 6 percent, which was offset by a 4 percent decrease in the number of homes delivered.”).

<sup>107</sup> See letters from IMA; Society.

<sup>108</sup> See letters from RSM; E&Y (also observing that this quantitative disclosure can be challenging when such factors are not already quantified for internal purposes and that the resulting disclosure often yields discussion of individual drivers of change that are not material).

<sup>109</sup> See letters from CFA & CII (providing the following as examples: economic trends and industry conditions that impact sales and costs related to key products and services including whether sales or revenues are attributable to changes in prices or to changes in volume of goods or services that are sold; information on fixed and variable costs in the cost structure; information on primitive value drivers of most businesses such as materials, labor costs, and the maintenance capex needed to survive as a business; currency effects on every line item; large acquisitions as a separate segment or required discussion so that investors can discern whether the synergies are actually emerging as expected; and the productivity of new investments (capex, R&D) as opposed to older investments); D. Jamieson.

<sup>110</sup> See Instruction 4 to current Item 303(a) of Regulation S-K.

computable from their financial statements.<sup>111</sup> Similarly, the staff continues to seek greater analysis in MD&A,<sup>112</sup> and others, including commenters, have also observed that the quality of analysis in MD&A could be improved.<sup>113</sup>

In light of these observations and our efforts seeking greater analysis, we continue to believe these amendments are necessary. Accordingly, we are adopting the amendments largely as proposed to enhance the analysis in MD&A. By moving a portion of current Instruction 4 to Item 303(a) to the main text of amended Item 303(b) and clarifying that the provision requires underlying reasons for material changes in quantitative and qualitative terms, our amendments underscore the importance of the analysis provided in MD&A. In a change from what was proposed, we are eliminating language in current Instruction 4 that the reasons for material changes must be described to the extent necessary to an understanding of the registrant's business as a whole. We believe this language is duplicative of the language in amended Item 303(a) and the amendments discussed in this section.

Consistent with MD&A's principles-based approach, we are not adopting the suggestion of some commenters to provide examples of the types of changes to be discussed.<sup>114</sup> Also consistent with MD&A's principles-based approach, and as proposed, the amendments require discussion of underlying reasons only for "material" changes. We believe these amendments

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<sup>111</sup> See *Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (Apr. 13, 2016) [81 FR 23915 (Apr. 22, 2016)] ("S-K Concept Release") at Section IV.B.3.b.i.

<sup>112</sup> See S-K Concept Release at Section IV.B.4.b. See also SEC Comment Letter Trends available at <https://www.pwc.com/us/en/cfodirect/publications/sec-comment-letter-trends.html>

<sup>113</sup> See, e.g., letter from CFA & CII. See also letter from Better Markets to the S-K Concept Release dated July 21, 2016. Comment letters related to the S-K Concept Release are available at <https://www.sec.gov/comments/s7-06-16/s70616.htm>. We refer to these letters throughout as "S-K Concept Release Letters."

<sup>114</sup> See letters from CFA & CII; D. Jamieson.

will encourage registrants to provide a more meaningful discussion of the underlying reasons that may be contributing to material changes in line items, and avoid simply reciting amounts of changes. We acknowledge, as suggested by some commenters, that isolating reasons for specific material changes, and quantifying such isolated reasons, can sometimes be challenging because they can be highly interrelated. In such circumstances, we encourage registrants to acknowledge this fact, and to explain such interrelated circumstances to the extent possible.<sup>115</sup>

c. *“Segment information...other subdivisions (e.g., geographic areas product lines)” (Amended Item 303(b))*

i. Proposed Amendments

Item 303(a) currently requires that, where in the registrant’s judgment a discussion of segment information and/or other subdivisions (e.g., geographic areas) of the registrant’s business would be appropriate to an understanding of such business, the discussion shall focus on each relevant “reportable” segment and/or other subdivision. The Commission proposed removing the reference to a “reportable” segment and, instead, proposed requiring a discussion of “each relevant segment and/or other subdivision.” The Commission also proposed adding “product lines” as another example of a subdivision of a registrant’s business that should be discussed where necessary to an understanding of the registrant’s business. Finally, the Commission proposed certain other amendments to streamline the text of Item 303.

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<sup>115</sup> See Securities Act Rule 409 [17 CFR 230.409] and Exchange Act Rule 12b-21 [17 CFR 240.12b-21], which generally states that information required need be given only insofar as it is known or reasonably available to the registrant.

## ii. Comments

Commenters were generally opposed to removing the term “reportable” before segment.<sup>116</sup> Many of these commenters suggested that registrants typically focus their MD&A on reportable segments, consistent with the financial statements.<sup>117</sup> Some of these commenters questioned whether removal of the term “reportable” was intended to effect a substantive change and sought clarification.<sup>118</sup> Another of these commenters stated that the proposal could create uncertainty among registrants about what must be disclosed and could lead to greater detail than is reasonably useful to investors.<sup>119</sup> Only one commenter provided input on the addition of “product lines” as an example of a subdivision, stating that the proposal could be interpreted as a requirement rather than an example.<sup>120</sup>

## iii. Final Amendments

We are adopting the amendments largely as proposed, with some modifications in response to comments received. Specifically, we are retaining the term “reportable” segment in amended Item 303(b). As a result, and similar to current Item 303, the amendments require that the discussion focus on each “reportable segment” and/or other subdivision of the business and on the registrant as a whole. While the proposal to remove the term “reportable” was not intended to suggest a further disaggregation of MD&A beyond the reportable segment level, we acknowledge commenter feedback about the potential confusion that could be created by removal of the term.

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<sup>116</sup> See, e.g., letters from RSM; KPMG; FEI; Medtronic; E&Y; Deloitte.

<sup>117</sup> See, e.g., letters from RSM; KPMG; IMA; Deloitte; E&Y.

<sup>118</sup> See letters from Deloitte; E&Y.

<sup>119</sup> See letter from IMA.

<sup>120</sup> See letter from KPMG.

We are adopting the proposed amendment to include “product lines” as an example of a subdivision of a registrant’s business that should be discussed where, in the registrant’s judgment, it is necessary to an understanding of the registrant’s business. This additional example is not intended to require product line disclosure where, in the registrant’s judgment, it is not necessary to an understanding of the registrant’s business. Rather, it is intended to remind registrants of the type of disclosure that may be required.

Lastly, we are adopting as proposed several amendments that will further streamline the text of Item 303:

- Instruction 8 to current Item 303(b) indicates that the term “statement of comprehensive income” is defined by Rule 1-02 of Regulation S-X.<sup>121</sup> We are moving this language to the full fiscal year requirement in amended Item 303(b) as Instruction 11 to clarify that the instruction applies to both full fiscal year and interim period MD&A disclosure.<sup>122</sup>
- We are also eliminating current Instructions 13 and 14 to Item 303(a) to simplify the item. These instructions call the attention of bank holding companies and property-casualty insurance companies to Guide 3<sup>123</sup> and Guide 6,<sup>124</sup> respectively. Registrants

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<sup>121</sup> 17 CFR 210.1-02(cc). Rule 1-02 defines a “statement of comprehensive income” as follows: “[t]he term statement(s) of comprehensive income means a financial statement that includes all changes in equity during a period except those resulting from investments by owners and distributions to owners. . . . A statement of operations or variations thereof may be used in place of a statement of comprehensive income if there was no other comprehensive income during the period.” Thus, references to a statement of comprehensive income would include a statement of operations prepared by certain issuers, such as BDCs.

<sup>122</sup> See Section II.C.9.

<sup>123</sup> 17 CFR 229.801(c) and 17 CFR 229.802(c). We recently adopted rules relating to Guide 3. See *Update of Statistical Disclosures for Bank and Savings and Loan Registrants*, Release No. 33-10835 (Sept. 11, 2020) [85 FR 66108 (Oct. 16, 2020)]. The new rules update the disclosures that investors receive, codify certain Guide 3 disclosures and eliminate other Guide 3 disclosures that overlap with Commission rules, U.S. GAAP, or International Financial Reporting Standards (“IFRS”). In addition, the Commission relocated the codified disclosures to a new subpart of Regulation S-K and rescinded Guide 3.

<sup>124</sup> 17 CFR 229.801(f).

that apply industry guides should still consider them in preparing their disclosures generally, but we do not believe the cross-reference is necessary to an understanding of the requirements of Item 303.

## **2. Capital Resources – Material Cash Requirements (New Item 303(b)(1) and Amended Item 303(b)(1)(ii))**

### *a. Proposed Amendments*

Current Item 303(a)(2) requires a registrant to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, and to indicate the general purpose of and the anticipated sources of funds needed to fulfill such commitments.<sup>125</sup> A registrant also must discuss, among other things, any known material trends, favorable or unfavorable, in its capital resources, and indicate any expected material changes in the mix and relative cost of such resources.<sup>126</sup>

The Commission proposed amending current Item 303(a)(2) to specify, consistent with the Commission’s 2003 MD&A Interpretive Release, that a registrant should broadly disclose material cash commitments, including but not limited to capital expenditures. Specifically, the Commission proposed requiring a registrant to describe its material cash “requirements,” including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements, and the general purpose of such requirements.<sup>127</sup>

The proposal was intended to require registrants to disclose known material cash requirements and to modernize Item 303(a)(2) by specifically requiring this disclosure in

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<sup>125</sup> Item 303(a)(2)(i) of Regulation S-K [17 CFR 229.303(a)(2)(i)].

<sup>126</sup> Item 303(a)(2)(ii) [17 CFR 229.303(a)(2)(ii)].

<sup>127</sup> See 2003 MD&A Interpretive Release, at 75063.

addition to capital expenditures. The Commission recognized that, while capital expenditures remain important in many industries, certain expenditures and cash commitments that are not necessarily capital investments in property, plant, and equipment may be increasingly important to companies, especially those for which human capital or intellectual property are key resources. The proposals were intended to encompass these and other material cash requirements. The proposal was also intended to enhance the discussion of capital resources and complement the proposed deletion of the contractual obligations table.<sup>128</sup>

b. *Comments*

While commenters generally supported the proposal to amend Item 303(a)(2) to broaden the disclosure beyond capital expenditures,<sup>129</sup> a few commenters stated that use of material cash “requirements” was too broad and provided recommendations on how to limit the requirement to facilitate compliance.<sup>130</sup> These commenters stated that registrants would struggle to identify which commitments to disclose<sup>131</sup> and that the proposals could result in extensive new record keeping and controls.<sup>132</sup> These commenters recommended limiting the proposal by requiring “material cash commitments” instead of “material cash requirements,”<sup>133</sup> focusing on material cash commitments outside of normal operations,<sup>134</sup> or providing guidance on the expected

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<sup>128</sup> See also Section II.C.7 *infra*.

<sup>129</sup> See, e.g., letters from EEI & AGA; FEI; IMA; Chamber; Society; CFA & CII; D. Jamieson.

<sup>130</sup> See, e.g., letters from FEI; IMA; E&Y.

<sup>131</sup> See letters from E&Y; FEI (stating that the term “requirements” is too broad, registrants have numerous cash requirements including the payment of operating expenses (e.g., salaries and wages, raw materials, utilities, taxes) and the change from “commitments” to “requirements” would lead to inconsistent application).

<sup>132</sup> See letter from IMA.

<sup>133</sup> See letter from FEI.

<sup>134</sup> See letter from IMA.



content of these disclosures, including examples.<sup>135</sup> One of these commenters recommended modernizing the liquidity and capital resources requirements, such as by merging and streamlining the two sections.<sup>136</sup>

Another commenter stated that the proposal may broaden the current capital resources requirement.<sup>137</sup> This commenter recommended limiting the proposal to require only a discussion of cash to fund current operations (*i.e.*, working capital cash requirements), but only if working capital is insufficient for the next 12 months. Other commenters supported the proposal and recommended enhancing it by retaining the contractual obligations table.<sup>138</sup>

### *c. Final Amendments*

We are adopting amendments to the capital resources requirement as proposed. We acknowledge commenter suggestion to use the term material cash “commitments.” However, we are retaining the term material cash “requirements” as we believe this term is more consistent with the intended purpose of MD&A and with prior Commission guidance.<sup>139</sup> The Commission has consistently emphasized the need for attention to disclosure of cash requirements.<sup>140</sup>

We acknowledge commenters’ concerns that registrants have numerous cash requirements and that the amendments could therefore result in extensive new record keeping

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<sup>135</sup> See letter from E&Y.

<sup>136</sup> See *id.*

<sup>137</sup> See letter from SIFMA (also recommending restating, in any final release, guidance from the 2003 MD&A Interpretive Release that a discussion of working capital cash requirements is required where there are material trends or uncertainties relating to the sufficiency of cash funding sources through working capital).

<sup>138</sup> See letters from CFA & CII; D. Jamieson.

<sup>139</sup> See 2003 MD&A Interpretive Release at 75062, which states that a “company is required to include in MD&A, to the extent material, . . . the existence and timing of commitments for capital expenditures and other known and reasonably likely cash requirements.”

<sup>140</sup> See 2003 MD&A Interpretive Release.

and controls. As noted above, we do not expect that registrants would have to deviate substantially from current practices with respect to an assessment of material cash requirements as the amendments reflect current Commission guidance and resulting disclosure practices.<sup>141</sup> Further, our amendments are limited to and address only those cash requirements that are material and accordingly, do not reflect a new threshold for these disclosures and should not require extensive or new procedures or controls. We are not, as suggested by one commenter limiting the amendments to require only disclosure of material cash requirements outside of normal operations, as registrants can and do have cash requirements related to their normal operations that are material. Additionally, and consistent with the suggestion of one commenter, our amendments create Item 303(b)(1) to provide the overarching requirements for liquidity and capital resources disclosures in order to clarify the liquidity and capital resources requirements, as discussed in more detail below in Section II.C.7.

### **3. Results of Operations – Known Trends or Uncertainties (Amended Item 303(b)(2)(ii))**

#### *a. Proposed Amendments*

Item 303(a)(3)(ii) currently requires a registrant to describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations.<sup>142</sup> In addition, if the registrant knows of events that will cause a material change in the relationship between costs and revenues, the change in the relationship must be disclosed.<sup>143</sup>

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<sup>141</sup> Commission staff has observed that registrants have provided discussion of material cash requirements pursuant to the requirements of MD&A and consistent with the 2003 MD&A Interpretive Release.

<sup>142</sup> Item 303(a)(3)(ii) of Regulation S-K [17 CFR 229.303(a)(3)(ii)].

<sup>143</sup> Examples given include known future increases in costs of labor or materials or price increases or inventory adjustments. *See id.*

The Commission proposed amending Item 303(a)(3)(ii) to provide that when a registrant knows of events that are *reasonably likely* to cause (as opposed to *will* cause) a material change in the relationship between costs and revenues, such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments, the reasonably likely change must be disclosed. This proposed amendment was intended to conform the language in this paragraph to other Item 303 disclosure requirements for known trends,<sup>144</sup> and align Item 303(a)(3)(ii) with the Commission’s guidance on forward-looking disclosure, which specifies that, where a trend, demand, commitment, event, or uncertainty is known, management must make an assessment consistent with the two-step test the Commission articulated for disclosure of forward-looking information.<sup>145</sup>

b. *Comments*

Commenters were mixed in their support for or opposition to the proposal. Several commenters either generally opposed the two-step test<sup>146</sup> or specified opposition to the “reasonably likely” standard for MD&A.<sup>147</sup> Some of these commenters stated the two-step test

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<sup>144</sup> See, e.g., Item 303(a)(1), which requires registrants to “[i]dentify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant’s liquidity increasing or decreasing in any material way.” Item 303(a)(1) of Regulation S-K [17 CFR 229.303(a)(1)].

<sup>145</sup> See 1989 MD&A Interpretive Release, at 22430, where the Commission articulated a two-step test for assessing when forward-looking disclosure is required in MD&A; Where a trend, demand, commitment, event or uncertainty is known, management must make two assessments: (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required. (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant’s financial condition or results of operations is not reasonably likely to occur.

<sup>146</sup> See, e.g., letters from Nareit; FEI; ABA.

<sup>147</sup> See, e.g., letters from SIFMA; ABA; CalPERS.

or the term “reasonably likely” is unclear,<sup>148</sup> with some stating that the current two-step test is not well understood and thus not well applied.<sup>149</sup> One of these commenters recommended replacing the two-step test with the probability/magnitude test in *Basic v. Levinson*, stating this test is simple, understandable, and already applied regularly in other contexts.<sup>150</sup> This commenter also recommended, if the two-step test is retained, replacing the negative presumption in the test with an affirmative determination. This commenter stated that the negative presumption elicits disclosure that may not be material.<sup>151</sup> Another of these commenters requested clarification on whether use of the term “reasonably likely” is intended to expand the scope of required disclosure.<sup>152</sup> This commenter also requested additional Commission guidance on the timeframe for which management should consider its outlook.

Several commenters, however, supported the proposal,<sup>153</sup> with some of these commenters stating that it reflects current practice.<sup>154</sup> One of these commenters further stated that because the second step in the two-step test requires a registrant to prove a negative while the proposal does not specifically incorporate this negative, the final release should state the two-step test is being superseded by the proposed language.<sup>155</sup> This commenter further recommended replacing

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<sup>148</sup> See, e.g., letters from ABA; FEI; SIFMA.

<sup>149</sup> See letters from ABA; FEI.

<sup>150</sup> See letter from ABA citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (“*Basic*”).

<sup>151</sup> This commenter recommended making the two-step test a preliminary note to Item 303 and rewording it as follows: Where a trend, demand, commitment, event or uncertainty is known, management should make two assessments: (1) Does management reasonably expect that the known trend, demand, commitment, event or uncertainty will occur?, and (2) If so, the registrant should assess materiality as if the known trend, demand, commitment, event or uncertainty will occur, and provide disclosure if the impact on financial condition, results of operations or liquidity would be material.

<sup>152</sup> See letter from Nareit.

<sup>153</sup> See, e.g., letters Pfizer; EEI & AGA; SIFMA; Chamber; Society.

<sup>154</sup> See letters from IMA; EEI & AGA.

<sup>155</sup> See letter from Society.

throughout Item 303 the term “reasonably likely” with “reasonably expects,” stating the latter is a clearer standard in practice.

*c. Final Amendments*

We are adopting Item 303(b)(2)(ii) with these amendments substantially as proposed, but with slight modifications to clarify that the “reasonably likely” threshold applies throughout Item 303. Furthermore, our amendments to Item 303(a) state that, as part of MD&A’s objectives, whether a matter is “reasonably likely” to have a material impact on future operations is based on “management’s assessment.” We believe that using a consistent threshold for forward-looking disclosure throughout MD&A will help avoid both potential confusion and inconsistent application that could result from disparate thresholds. Additionally, our amendments reflect a standard that is consistent with longstanding Commission guidance, and we agree with those commenters that stated this term reflects current practice.

We acknowledge that some commenters stated that the term “reasonably likely” may be unclear or not well understood. After careful consideration of these comments, we continue to believe that the “reasonably likely” threshold is the appropriate standard for prospective matters and forward-looking information that is required under Item 303. In response to commenters who suggested that the two-step test is unclear, not well understood, or difficult to apply, we are clarifying and explaining further how registrants should analyze and disclose information regarding known trends, demands, commitments, or uncertainties. In doing so, we reiterate the Commission’s longstanding emphasis that analysis in this area should be based on objective reasonableness.<sup>156</sup>

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<sup>156</sup> See 1989 MD&A Interpretive Release at Section III.B (stating “Each final determination resulting from the assessments made by management must be objectively reasonable, viewed as of the time the determination is made.”).

As the Commission has previously stated with respect to the evaluation of whether a known trend or uncertainty is reasonably likely, “the development of MD&A disclosure should begin with management’s identification and evaluation of what information...is important to providing investors and others an accurate understanding of the company’s current and prospective financial position and operating results.”<sup>157</sup> When considering whether disclosure of a known event or uncertainty is required,<sup>158</sup> the analysis is based on materiality and what would be considered important by a reasonable investor in making a voting or investment decision.<sup>159</sup> The “reasonably likely” threshold does not require disclosure of any event that is known but for which fruition may be remote, nor does it set a bright-line percentage threshold by which disclosure is triggered. Rather, this threshold requires a thoughtful analysis that applies an

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<sup>157</sup> See 2002 Commission Statement at 3747.

<sup>158</sup> See 1989 MD&A Interpretive Release at 22429 (“Required disclosure is based on currently known trends, events, and uncertainties that are reasonably expected to have material effects. . . . In contrast, optional forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty.”).

<sup>159</sup> See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) at 231, quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (“TSC Industries”) at 449 (“to fulfill the materiality requirement, ‘there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”). See also Exchange Act Rule 12b-2 [17 CFR § 240.12b-2] (“The term “material,” when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.”); Securities Act Rule 405 [17 CFR § 230.405] (“The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.”); Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380 (Mar. 16, 1982)] (noting that the definitions in Rule 12b-2 and Rule 405 were “based on the definition as set forth by the Supreme Court in *TSC Industries*”); S-K Concept Release at Section III.B.1 (quoting the Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 8, 2010) [75 FR 6290 (Feb. 8, 2010)] at 6292-6293 in stating that “materiality standards for disclosure under the federal securities laws . . . provide that information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, put another way, if the information would alter the total mix of available information.”).

objective assessment of the likelihood that an event will occur balanced with a materiality analysis regarding the need for disclosure regarding such event.<sup>160</sup>

Taking these concepts into account, when applying the “reasonably likely” threshold, registrants should consider whether a known trend, demand, commitment, event, or uncertainty is *likely* to come to fruition. If such known trend, demand, commitment, event or uncertainty would reasonably be likely to have a material effect on the registrant’s future results or financial condition, disclosure is required. 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 registrant’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 registrant’s disclosures.<sup>161</sup> This analysis should be made objectively and with a view to providing investors with a clearer understanding of the potential material consequences of such known forward-looking events or uncertainties. Because the analysis does not call for disclosure of immaterial or remote future events, it should not result in voluminous disclosures or unnecessarily speculative information.<sup>162</sup>

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<sup>160</sup> We are not adopting the suggested “reasonably expects” threshold suggested by some commenters. Consistent with our discussion herein, we believe the analysis should focus on an objective determination of the likelihood of an event occurring, rather than on whether management’s expectation of such event occurring would be objectively reasonable.

<sup>161</sup> *Id.*

<sup>162</sup> *See, e.g.*, Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release at 5985 (stating “We believe that the ‘reasonably likely’ threshold best promotes the utility of the disclosure requirements by reducing the possibility that investors will be overwhelmed by voluminous disclosure of insignificant and possibly unnecessarily speculative information.”). *See also* *Matrixx Initiatives, Inc. v. Siracusano*, 131 U.S. 1309 (2011) (“*Matrixx Initiatives*”) at 1318, quoting *TSC Industries* at 449. In *Matrixx Initiatives*, the Court applied the materiality standard, as set forth in *TSC Industries* and *Basic*. In articulating these standards, the Supreme Court recognized that setting too low of a materiality standard for purposes of liability could cause management to “bury shareholders in an avalanche of trivial information.” *Id.* at 1318, quoting *TSC Industries* at 448-449.

As noted above, some commenters also indicated that application of the two-step test as the Commission articulated it in 1989 may result in disclosure that is not material or present challenges to registrants, such as by requiring a registrant to prove a negative. This was not the intended result of that test, and we believe that the clarifications we have provided above regarding the appropriate application of the analysis should alleviate these concerns. The “reasonably likely” threshold, which requires that management evaluate the consequences of the known trend, demand, commitment, event, or uncertainty, is grounded in whether disclosure of the event or uncertainty would be material to investors. We remind registrants that this approach is not intended to, nor does it require, registrants to affirm the non-existence or non-occurrence of a material future event.<sup>163</sup> Instead, it requires management to make a thoughtful and objective evaluation, based on materiality, including where the fruition of future events is unknown.<sup>164</sup>

We are not, as recommended by one commenter, adopting the probability/magnitude test of *Basic*. In *Basic*, the Supreme Court framed the issue of materiality of forward-looking disclosure as depending on a balancing of both “the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”<sup>165</sup> We agree with commenters that the probability/magnitude test could result in disclosure of issues that are large in potential magnitude but low in probability.<sup>166</sup> The

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<sup>163</sup> We are not, as suggested by a commenter, reformulating the language to require an affirmative determination. Such reformulated language would substantively alter the called for disclosures as it would not account for circumstances where management cannot determine whether a known trend, demand, commitment, event or uncertainty is likely to come to fruition.

<sup>164</sup> Accordingly, we are not, as suggested by one commenter, providing specific guidance on a timeframe for which management should consider its outlook for forward-looking information as such timeframe will depend on the nature of and the facts and circumstances surrounding the forward-looking disclosure.

<sup>165</sup> See *Basic* (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

<sup>166</sup> See S-K Concept Release Letter from Stephen Percoco dated July 24, 2016.



probability/magnitude test in *Basic* was developed in the context of a potential merger, where the probability of the event, the potential timing, and the expected effects may be readily estimated. Some commenters have noted that the probability/magnitude test can be difficult to apply where there is uncertainty as to the probability, timing, and magnitude of the financial impact of future events.<sup>167</sup> As articulated above, we believe that the “reasonably likely” threshold provides registrants with a tailored and meaningful framework from which to objectively analyze whether forward-looking information is required and provides specific guidance on how registrants should evaluate known events or uncertainties where the likelihood of fruition cannot be ascertained.

#### **4. Results of Operations – Net Sales and Revenues (Amended Item 303(b)(2)(iii))**

##### *a. Proposed Amendments*

Item 303(a)(3)(iii) currently specifies that, to the extent the “financial statements” disclose “material increases” in net sales or revenues, a registrant must provide a narrative discussion of the extent to which such “increases” are attributable to increases in prices, or to increases in the volume or amount of goods or services being sold, or to the introduction of new products or services.<sup>168</sup> The Commission previously clarified that a results of operations discussion should describe not only increases but also decreases in net sales or revenues.<sup>169</sup> Accordingly, the Commission proposed amending Item 303(a)(3)(iii) to apply to disclosures in the “statement of comprehensive income,” codify prior guidance, and clarify the requirement by

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<sup>167</sup> See, e.g., S-K Concept Release Letters from the Sustainability Accounting Standards Board dated July 1, 2016; See also letters from Edward D. White dated July 20, 2016; Thomas F. Steyer dated July 20, 2016; Michael R. Bloomberg dated July 26, 2016; Brita Voss dated July 6, 2016 (supporting the recommendations of the Sustainability Accounting Standards Board).

<sup>168</sup> Item 303(a)(3)(iii) of Regulation S-K [17 CFR 229.303(a)(3)(iii)].

<sup>169</sup> See 1989 MD&A Interpretative Release, at n. 36 (“Although Item 303(a)(3)(iii) speaks only to material increases, not decreases, in net sales or revenues, the Commission interprets Item 303(a)(3)(i) and Instruction 4 as seeking similar disclosure for material decreases in net sales or revenues.”).

tying the required disclosure to “material changes” in net sales or revenues, rather than solely to “material increases” in these line items.

b. *Comments*

Several commenters specifically supported this proposal,<sup>170</sup> with one of these commenters stating that registrants already provide this disclosure.<sup>171</sup> No commenters specifically opposed this proposal.

c. *Final Amendments*

We are adopting Item 303(b)(2)(iii) with these amendments as proposed. We believe clarifying in the rule text that disclosure is required of “material changes” in net sales or revenues will facilitate compliance. This clarification is consistent with MD&A’s focus on the importance of an analysis that should consist of material substantive information and present a balanced view of the underlying dynamics of the business.<sup>172</sup> We also believe this amendment will complement our change to Item 303(b) which will require that, where the financial statements reveal material changes from period-to-period in one or more line items, registrants must describe the underlying reasons for these material changes in quantitative and qualitative terms.

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<sup>170</sup> See, e.g., letters from FEI; IMA; Chamber; Society; CFA & CII; D. Jamieson.

<sup>171</sup> See letter from FEI.

<sup>172</sup> See 2003 MD&A Interpretive Release at Section III.B.4.

## **5. Results of Operations – Inflation and Price Changes (Current Item 303(a)(3)(iv), and Current Instructions 8 and 9 to Item 303(a))**

### *a. Proposed Amendments*

Item 303(a)(3)(iv)<sup>173</sup> generally requires registrants, either for the three most recent fiscal years or for those fiscal years in which the registrant has been engaged in business, whichever period is shorter, to discuss the impact of inflation and price changes on their net sales, revenue, and income from continuing operations. Instruction 8 to Item 303(a) clarifies that a registrant is only required to provide this disclosure to the extent material. The instruction further states that the discussion may be made in whatever manner appears appropriate under the circumstances and that no specific numerical financial data is required, except as required by Rule 3-20(c) of Regulation S-X,<sup>174</sup> which applies to FPIs. Instruction 9 to Item 303(a) states that registrants that elect to disclose supplementary information on the effects of changing prices may combine such disclosures with the Item 303(a) discussion and analysis or provide it separately (with an appropriate cross-reference).<sup>175</sup>

The Commission proposed eliminating Item 303(a)(3)(iv) and Instructions 8 and 9 to encourage registrants to focus their MD&A on material information that is tailored to their respective facts and circumstances. In the Proposing Release, the Commission stated that a specific reference to inflation and changing prices may give undue attention to the topic.<sup>176</sup> Registrants are already expected to discuss the impact of inflation or price changes if they are

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<sup>173</sup> Item 303(a)(3)(iv) of Regulation S-K [17 CFR 229.303(a)(3)(iv)].

<sup>174</sup> Rules 3-20(c) and 3-20(d) of Regulation S-X provide the situations when a registrant must discuss hyperinflation. Rule 3-20(d) generally describes a hyperinflationary environment as one that has cumulative inflation of approximately 100 percent or more over the most recent three-year period.

<sup>175</sup> Instruction 9 to Item 303(a).

<sup>176</sup> See Proposing Release at Section II.C.5.

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, revenue, or income from continuing operations.<sup>177</sup>

b. *Comments*

Commenters generally supported eliminating Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a), as proposed.<sup>178</sup> Some commenters stated that registrants should focus their MD&A on registrant-specific material information and that eliminating this item and the related instructions would aid in that endeavor.<sup>179</sup> Other commenters stated that where inflation is material, registrants would still be required to disclose this under current rules.<sup>180</sup> One commenter noted that in order to satisfy this item, many registrants provide “boilerplate disclosures” and stated that as a result, few, if any, disclosures in response to this item have been of value to investors.<sup>181</sup> No commenters specifically opposed this proposal.

c. *Final Amendments*

We are eliminating Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a) as proposed. Consistent with the discussion above and in the Proposing Release, under amended Item 303, registrants will be required to discuss the impact of inflation or changing prices if they are part of a known trend or uncertainty that had, or is reasonably likely to have a material impact on net sales, revenue, or income from continuing operations. Further, amended Item 303 requires that, where the financial statements reveal material changes from period-to-period in

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<sup>177</sup> See Item 303(a)(3)(ii) [CFR 229.303(a)(3)(ii)] and amended Item 303(b)(2)(ii).

<sup>178</sup> See, e.g., letters from EEI & AGA; FedEx; Nasdaq; FEI; IMA; Chamber; Society.

<sup>179</sup> See, e.g., letters from EEI & AGA; Nasdaq.

<sup>180</sup> See, e.g., letters from FEI; IMA.

<sup>181</sup> See letter from IMA.

one or more line items, registrants must describe the underlying reasons for these material changes in quantitative and qualitative terms, which may also implicate a discussion of inflation and changing prices.<sup>182</sup>

## **6. Off-Balance Sheet Arrangements (New Instruction 8 to Item 303(b))**

### *a. Proposed Amendments*

In 2002, the Sarbanes-Oxley Act<sup>183</sup> was enacted and added Section 13(j) to the Exchange Act, which required the Commission to adopt rules providing that each annual and quarterly financial report required to be filed with the Commission disclose all material off-balance sheet arrangements.<sup>184</sup> To implement Section 13(j), in 2003, the Commission adopted specific disclosure requirements for off-balance sheet arrangements in current Item 303(a)(4).<sup>185</sup> When adopting Item 303(a)(4), the Commission reiterated that, while at that time only one item in Item 303 specifically identified off-balance sheet arrangements,<sup>186</sup> other requirements “clearly require[d] disclosure of off-balance sheet arrangements if necessary to an understanding of a registrant’s financial condition, changes in financial condition or results of operations.”<sup>187</sup> The 2003 amendments supplemented and clarified the disclosures that registrants must make about

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<sup>182</sup> See amended Item 303(b).

<sup>183</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (Jul. 2002) (“Sarbanes-Oxley Act”).

<sup>184</sup> Section 401(a) of the Sarbanes-Oxley Act added Section 13(j) to the Exchange Act [15 U.S.C. 78m(j)], which directed the Commission to adopt rules requiring each annual and quarterly financial report filed with the Commission to disclose “all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.”

<sup>185</sup> See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release, at 5983.

<sup>186</sup> Item 303(a)(2)(ii) of Regulation S-K [17 CFR 229.303(a)(2)(ii)].

<sup>187</sup> See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release, at 5983.

off-balance sheet arrangements and required registrants to provide those disclosures in a separately designated section of MD&A.<sup>188</sup>

In the release proposing Item 303(a)(4), the Commission recognized that parts of the proposed off-balance sheet arrangements disclosure requirements might overlap with disclosure presented in the footnotes to the financial statements.<sup>189</sup> The Commission stated, however, that the proposed rules were designed to provide more comprehensive information and analysis in MD&A than the disclosure that U.S. GAAP required in footnotes to financial statements.<sup>190</sup>

Since the adoption of Item 303(a)(4), as described further in the Proposing Release,<sup>191</sup> the FASB has issued additional requirements that have caused U.S. GAAP to further overlap with the item.<sup>192</sup> In the Commission staff's experience, this overlap often leads to registrants providing cross-references to the relevant notes to their financial statements or providing disclosure that is duplicative of information in the notes in response to Item 303(a)(4).

As a result, and consistent with the other proposed amendments intended to promote the principles-based nature of MD&A, the Commission proposed that the current more prescriptive off-balance sheet arrangement definition and related disclosure requirement in Item 303(a)(4) be

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<sup>188</sup> *See id.*

<sup>189</sup> *See Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments*, Release No. 33-8144 (Nov. 4, 2002) 67 FR 68054 (Nov. 8, 2002), at n.72.

<sup>190</sup> *See id.*

<sup>191</sup> *See* Proposing Release at Section II.C.6.

<sup>192</sup> In June 2009, the FASB Issued SFAS No. 166, *Accounting for Transfers of Financial Assets an amendment of FASB Statement No. 140*, which requires enhanced disclosures about transfers of financial assets and a transferor's continuing involvement with transfers of financial assets accounted for as sales. Also in June 2009, the FASB issued SFAS No. 167, *Amendments to FASB Interpretation No. 46(R)*, which requires enhanced disclosures about an enterprise's involvement in a variable interest entity, including unconsolidated entities. SFAS No. 166 and 167 have been codified as ASC Topics 860 (Transfers and Servicing) and 810 (Consolidation), respectively. *See also* Section II.D.1.b and *see infra* note 344 for a discussion of IFRS requirements that overlap with Item 5.E of Form 20-F.

replaced with a new Instruction to Item 303(b). This proposed instruction would require registrants 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources.<sup>193</sup> This proposed instruction was intended to build on the current requirement in Item 303(a)(2) that specifically requires consideration of off-balance sheet financing arrangements as part of the capital resources discussion.<sup>194</sup>

b. *Comments*

Many commenters supported the proposal to replace Item 303(a)(4) with a principles-based instruction.<sup>195</sup> One of these commenters further recommended modifying the proposal to allow registrants discretion to make this disclosure under a separate caption within the capital resources section.<sup>196</sup> Another commenter stated that if there are concerns about specific matters that are not addressed under U.S. GAAP, these concerns should be addressed by the FASB.<sup>197</sup> One commenter recommended reiterating that the amendment is not intended to broaden or narrow the scope of off-balance sheet arrangements disclosure requirements in MD&A, but rather, it is intended to incorporate this disclosure in a more holistic, principles-based discussion.<sup>198</sup>

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<sup>193</sup> See Proposing Release at Section II.C.6.

<sup>194</sup> See Item 303(a)(2)(ii) of Regulation S-K [17 CFR 302(a)(2)(ii)].

<sup>195</sup> See, e.g., letters from EEI & AGA; FedEx; FEI; SIFMA; IMA; E&Y; Medtronic; Chamber; and Society.

<sup>196</sup> See letter from EEI & AGA.

<sup>197</sup> See letter from IMA.

<sup>198</sup> See letter from Society.

Several commenters expressed concern with the proposal.<sup>199</sup> One commenter cautioned that the proposed amendments may result in the loss of discussion of the nature and business purpose of off-balance sheet arrangements and any known event, demand, commitment, trend, or uncertainty that will result, or is likely to result, in a material change in the availability of the off-balance sheet arrangement.<sup>200</sup> Another commenter stated that the separate section for off-balance sheet arrangements remains important because the overlapping information required to be disclosed in the financial statements is dispersed.<sup>201</sup> One commenter stated that the proposed amendments would allow management to hide off-balance sheet arrangements.<sup>202</sup> Additionally, some commenters recommended that we provide illustrative guidance.<sup>203</sup>

*c. Final Amendments*

We are adopting the amendments to replace Item 303(a)(4) with a principles-based instruction as proposed.<sup>204</sup> For the reasons discussed in the Proposing Release, we continue to believe that the updates to U.S. GAAP since the adoption of Item 303(a)(4), as well as the current amendments designed to emphasize the principles-based nature of MD&A, justify the replacement of the current, more prescriptive requirement with a principles-based instruction.<sup>205</sup>

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<sup>199</sup> See, e.g., letters from Pfizer; CalPERS; CFA & CII; and D. Jamieson.

<sup>200</sup> See letter from Pfizer.

<sup>201</sup> See letter from CFA & CII.

<sup>202</sup> See letter from CalPERS.

<sup>203</sup> See letters from Pfizer and Society.

<sup>204</sup> For the same reasons discussed in the Proposing Release, we believe our amendments are consistent with the statutory mandate in Section 13(j) of the Exchange Act. See Proposing Release at Section II.C.6.

<sup>205</sup> We are also adopting the amendments to Items 2.03 and 2.04 of Form 8-K as proposed to include the definition of “off-balance sheet arrangements” that is currently in Item 303(a)(4). As stated in the Proposing Release, we believe it is appropriate to retain the current definition of “off-balance sheet arrangements” in Form 8-K in light of the Form’s four business day filing requirement. See Proposing Release at footnotes 188 and 189. In addition, we are making technical amendments to Item 2.03 of Form 8-K to refer to FASB ASC Topic 842, which has superseded FASB ASC Topic 840.



With respect to commenters that suggested that the amendments may result in a loss of discussion of the nature and business purpose of off-balance sheet arrangements or other information, we continue to believe that new Instruction 8 would mitigate any potential loss of information by requiring, among other things, a discussion of material matters of liquidity, capital resources, and financial condition as they relate to off-balance sheet arrangements.<sup>206</sup> Furthermore, we highlight that current Item 303(a)(4) does not require disclosure of certain types of off-balance sheet arrangements that do not meet the specific definition in Item 303(a)(4)(ii). For example, many registrants in the pharmaceutical industry are contingently obligated to make milestone payments to licensors of drug compounds. These milestone payments are not covered by the definition of “off-balance sheet arrangement” in Item 303(a)(4) and currently are not required to be disclosed in the separately-captioned section called for by that item. We have nonetheless observed that registrants typically discuss these contingent milestone payments in MD&A to provide investors with an appropriate understanding of their liquidity and capital resources, which we believe can be useful to a broader understanding of the impact of off-balance sheet arrangements to a registrant’s financial condition, and the nature and purpose of such arrangements. Accordingly, we believe that the principles of MD&A, supplemented with the new instruction, and the requirements of U.S. GAAP will elicit discussion sufficient to enable an understanding of the off-balance sheet arrangement.

By no longer requiring this disclosure in a separately-captioned section, we expect that a registrant will incorporate its discussion of off-balance sheet arrangements into its broader discussion of liquidity and capital resources. We also acknowledge the commenters that stated

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<sup>206</sup> For a discussion of the requirements in Item 303(a)(4) that overlap with U.S. GAAP see the Proposing Release at Section II.C.6.

that a separately-captioned section is useful. We continue to believe that a discussion of off-balance sheet arrangements that is more integrated with other aspects of MD&A will produce better disclosure and facilitate a more meaningful understanding of the impact of such arrangements; however, to the extent that a registrant determines that some discussion of off-balance sheet arrangements should be highlighted separately or in a separately captioned section in order to facilitate an understanding of such disclosure, or to highlight particularly material information about such arrangements, it has the discretion to do so.<sup>207</sup> Finally, we have not given examples or guidance for the disclosure of off-balance sheet arrangements, as suggested by some commenters. Disclosures will need to be tailored to a registrant's arrangements and circumstances, and we do not want to promote a checklist approach to the disclosures.

## **7. Contractual Obligations Table (Current Item 303(a)(5)) and Amended Item 303(b)(1) - *Liquidity and Capital Resources*)**

### *a. Proposed Amendments*

Under Item 303(a)(5),<sup>208</sup> registrants other than SRCs must disclose in tabular format their known contractual obligations. The item requires a registrant to arrange its table to disclose contracts by type of obligations,<sup>209</sup> the overall payments due, and by four prescribed periods.<sup>210</sup> A registrant may disaggregate the categories of obligations, but it must disclose all obligations falling within the prescribed five categories and for the prescribed time periods. A registrant

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<sup>207</sup> See, e.g., Instruction 3 to amended Item 303(b).

<sup>208</sup> Item 303(a)(5) of Regulation S-K [17 CFR 229.303(a)(5)].

<sup>209</sup> The types of obligations required to be included are long-term debt obligations, capital lease obligations, operating lease obligations, purchase obligations, and other long-term liabilities reflected on the registrant's balance sheet under GAAP.

<sup>210</sup> The payment obligations must be disclosed for the following timeframes: less than one year; one to three years; three to five years; and more than five years.

may provide footnotes to the table to the extent such information is necessary to understand the disclosures in the contractual obligations table. There is no materiality threshold for this item, meaning registrants must disclose all contractual obligations falling within the prescribed five categories.<sup>211</sup>

When the Commission implemented this disclosure requirement, its purpose was to ensure that aggregated information about contractual obligations was presented in one place and to improve transparency of a registrant's short- and long-term liquidity and capital resources needs and demands.<sup>212</sup> This was intended to aid investors in determining the effect such obligations would have in the context of off-balance sheet arrangements.<sup>213</sup> Commission guidance that followed the implementation of this requirement encouraged registrants to include narratives to the table to provide more context and analysis for the numbers presented.<sup>214</sup>

The Commission proposed eliminating Item 303(a)(5). As part of its rationale, the Commission stated its belief that eliminating the requirement would not result in a loss of material information to investors given the overlap with information required in the financial

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<sup>211</sup> The first three categories of obligations required under current Item 303(a)(5) (i.e., long-term debt, capital leases, and operating leases) are defined by reference to the relevant U.S. GAAP accounting pronouncements that require disclosure of these obligations in the financial statements or notes thereto. The fourth category, purchase obligations, is defined as an agreement to purchase goods or services that is enforceable, legally binding on the registrant and specifies all significant terms. The fifth category of contractual obligations captures all other long-term liabilities that are reflected on the registrant's balance sheet under generally accepted accounting principles applicable to the registrant.

<sup>212</sup> See *Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release* at 5990. See also *Off-Balance Sheet Arrangements and Contractual Obligations Proposing Release*.

<sup>213</sup> See *id.*

<sup>214</sup> See *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis*, Release No. 33-9144 (Sept. 17, 2010) [75 FR 59894 (Sept. 28, 2010)] ("2010 MD&A Interpretive Release"), at 59896.

statements and in light of the concurrent proposed expansion of the capital resources requirement, discussed above in Section II.C.2.<sup>215</sup>

b. *Comments*

Many commenters supported eliminating this item,<sup>216</sup> while a few commenters opposed the proposal.<sup>217</sup> Of the commenters who supported eliminating this item, a few emphasized the burdens imposed by the table.<sup>218</sup> One of these commenters stated that producing the table is burdensome because, as a multinational company with hundreds of subsidiaries, the table “takes a significant amount of time...especially as the information is not referenced in how we operate our business.”<sup>219</sup> Another commenter stated that the contractual obligations table requires resources beyond those needed for the financial statements and involves departments across their organization including, but not limited to, accounting, information technology, real estate, legal, tax, and merchandising.<sup>220</sup>

Commenters that opposed the proposal questioned the cost savings to registrants from the proposal and suggested the proposal would increase burdens to investors to gather this data.<sup>221</sup> A few of these commenters stated that the table is more important during a crisis such as the

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<sup>215</sup> See Proposing Release at Section II.C.7.

<sup>216</sup> See, e.g., letters from Pfizer; EEI & AGA; FedEx; Nasdaq; Nareit; FEI; SIFMA; IMA; E&Y; UnitedHealth; Costco Wholesale Corporation dated April 28, 2020 (“Costco”); Chamber; Society.

<sup>217</sup> See, e.g., letters from CalPERS; CFA & CII; D. Jamieson. See also IAC Recommendation.

<sup>218</sup> See, e.g., letters from Eli Lilly; FEI; UnitedHealth; Costco.

<sup>219</sup> See letter from Eli Lilly (also opposing retaining the table in modified form).

<sup>220</sup> See letter from Costco.

<sup>221</sup> See letters from CalPERS (stating that registrants already have systems in place to provide this disclosure while investors do not have the technology to efficiently find these disclosures elsewhere); CFA & CII; D. Jamieson. See also IAC Recommendation.

COVID-19 crisis.<sup>222</sup> Some of these commenters stated that during periods of liquidity stress, such as the COVID-19 pandemic, investors find it extremely useful to have aggregated disclosure of cash commitments in a single location.<sup>223</sup> Another of these commenters observed that this requirement was adopted during an economic crisis.<sup>224</sup> A few of these commenters also specified that the information in the table is useful and material and suggested augmenting the table,<sup>225</sup> such as with internal hyperlinks<sup>226</sup> or by requiring the data be tagged and accompanied with a narrative.<sup>227</sup> Some of these commenters also stated that the table is not entirely duplicative of disclosures elsewhere and instead is critical to assessing the cadence or funding of liabilities.<sup>228</sup>

*c. Final Amendments*

We are eliminating Item 303(a)(5) as proposed and, in consideration of comments received, we are also amending Item 303(b) to specifically require disclosure of material cash requirements from known contractual and other obligations as part of a liquidity and capital resources discussion. As discussed in the Proposing Release, the Commission believed that eliminating current Item 303(a)(5) should not result in the loss of material information. The Commission stated that, in addition to disclosure in the financial statements, registrants would,

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<sup>222</sup> See letters from CalPERS; CFA & CII; D. Jamieson.

<sup>223</sup> See letter from CFA & CII; D. Jamieson.

<sup>224</sup> See letter from CalPERS.

<sup>225</sup> See letters CFA & CII; D. Jamieson. See also IAC Recommendation (providing, as an example of the potential materiality of the table, a recent analyst report on the cruise line industry during the COVID-19 crisis and the report's reliance on the table to juxtapose the mismatch between revenue shortfalls and near-term obligations).

<sup>226</sup> See, e.g., letters from CFA & CII; D. Jamieson. See also IAC Recommendation.

<sup>227</sup> See, e.g., letters from CFA & CII; D. Jamieson.

<sup>228</sup> See letters from CFA & CII and D. Jamieson (providing purchase obligations as an example of disclosure in the table that is not duplicated elsewhere).

under the proposals to amend the discussion of capital resources, be required to discuss material cash requirements, which would include material contractual obligations.<sup>229</sup> The amendments described below further clarify and enhance this point.

We are adopting amendments to the liquidity and capital resources requirements in Item 303(b) that are a change from what was proposed. These changes are in response to commenter input on the proposed elimination of Item 303(a)(5) and on the proposals related to the liquidity and capital resource requirements. The amendments to Item 303(b) are intended to clarify the requirements while continuing to emphasize a principles-based approach focused on material short- and long-term liquidity and capital resources needs, while also specifying that material cash requirements from known contractual and other obligations should be considered as part of these disclosures. Specifically, these amendments:

- Create a new Item 303(b)(1) to provide the overarching requirements for liquidity and capital resources disclosures in order to clarify these requirements;<sup>230</sup>
- Incorporate in Item 303(b)(1) portions of current Instruction 5 to Item 303(a), which defines “liquidity” as the ability to generate adequate amounts of cash to meet the needs for cash, clarifying its applicability to the liquidity and capital resources requirements more generally;
- Codify prior Commission guidance that specifies that short-term liquidity and capital resources covers cash needs up to 12 months into the future while long-term liquidity and capital resources covers items beyond 12 months;<sup>231</sup>

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<sup>229</sup> See Proposing Release at Section II.C.7.

<sup>230</sup> See Section II.C.2 *supra*.

<sup>231</sup> See 1989 MD&A Interpretive Release.

- Require the discussion on both a short-term and long-term basis;
- Require the discussion to analyze material cash requirements from known contractual and other obligations and such disclosures to specify the type of obligation and the relevant time period for the related cash requirements;
- Include a new instruction that states 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 registrant's balance sheet; and
- Include a new instruction that states, consistent with prior Commission guidance,<sup>232</sup> the analysis for all of Item 303(b) should be in a format that facilitates easy understanding and does not duplicate disclosure already provided in the filing.<sup>233</sup>

The Commission's objective in adopting current Item 303(a)(5) was to provide aggregated information about contractual obligations in a single location and to improve transparency of a registrant's short- and long-term liquidity and capital resources needs and demands.<sup>234</sup> Much of the disclosure required by current Item 303(a)(5) is now provided in the financial statements, unlike when the requirement was first adopted. As a result, much of this information is also required to be tagged in XBRL, allowing users to extract and compare this data. Given these developments since the adoption of the contractual obligations table, and

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<sup>232</sup> *See, e.g.,* 2003 MD&A Interpretive Release.

<sup>233</sup> Notwithstanding the adoption of Item 303(b)(1) that sets forth the overarching requirements for a liquidity and capital resources discussion and the related elimination of language in Item 303 indicating that discussions of liquidity and capital resources may be combined whenever the two topics are interrelated, this new instruction would, for example, continue to allow registrants flexibility to either combine or separate the two topics.

<sup>234</sup> *See* Off-Balance Sheet Arrangements and Contractual Obligations Proposing Release.

consistent with the long-standing principles-based focus of MD&A, we are eliminating Item 303(a)(5) as proposed. Combined with the amended liquidity and capital resource requirements, our amendments are intended to improve the transparency of a registrant's short- and long-term liquidity and capital resources needs and demands while reducing undue burdens to prepare such disclosure.

Our amendments are also intended to address commenters' concerns about the challenges imposed by the current contractual obligations table. We recognize that, because the current contractual obligations table does not have a materiality threshold, the burdens imposed by the table on registrants can include identifying, evaluating, and aggregating contracts that are not material. By eliminating the prescriptive requirement to prepare a contractual obligations table and refocusing instead on a principles-based approach that requires a robust discussion of liquidity and capital resources, including a discussion of contractual obligations, our intent is to relieve registrants of these burdens while continuing to provide investors with material information.

Our amendments allow registrants flexibility in discussing material cash requirements from known contractual and other obligations. To that end, while amended Instruction 4 provides examples of the types of known contractual obligations that may be included that are generally consistent with those required by current Item 303(a)(5), unlike the current requirement, the amendments do not prescribe specific categories of contractual obligations. We acknowledge a commenters' observation that the current table is not entirely duplicative of U.S. GAAP, and therefore the elimination of Item 305(a)(5) could result in a loss of certain



information.<sup>235</sup> Examples in amended Instruction 4 are deliberately not tied to U.S. GAAP to provide flexibility for company-specific disclosure, avoid unnecessary duplication with the financial statements, and allow registrants to consider disclosing other categories of contractual obligations appropriate for its business.<sup>236</sup> Additionally, as registrants prepare their financial statements in accordance with U.S. GAAP, and with the exception of certain purchase obligations, they are already required to assess currently prescribed categories of contractual obligations. To the extent obligations under these currently prescribed categories are material, they are required to be discussed in MD&A, regardless of whether our rules prescribe these categories. Likewise, our amendments do not specify or provide examples of “other obligations” that may be material to a registrant, allowing registrants flexibility to determine what may be material and necessary to be disclosed.

While the current table requires disclosure of all contractual obligations aggregated by type of obligation and for specified periods, we recognize not all obligations presented nor the periods for which they are presented are material. Accordingly, our amendments to Item 303(b)(1) further require that the disclosures specify the type of obligation and relevant time period for the related cash requirements, in recognition of commenter concerns that such information may be lost with the elimination of Item 303(a)(5). Our amendments are intended to focus only on material disclosures and specifically, disclosure of those periods where the cash requirements or reasonably likely effect of these cash requirements on liquidity and capital resources is material. For example, if a financial obligation is reasonably likely to have a

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<sup>235</sup> For example, information relating to certain purchase obligations is not specifically called for under U.S. GAAP and is therefore not typically disclosed in the financial statements. Additionally, information related to the “payments due by period” currently required by the item may not be required to be disclosed in a registrant’s financial statements.

<sup>236</sup> *See also* amended Instruction 3 to Item 303(b).

material effect on liquidity and capital resources over a number of subsequent periods or sometime within a range of future periods, these amendments would require registrants to identify and discuss this obligation and related effects.

We are mindful of commenters who stated that the current table is an easy-to-use format as it aggregates disclosure in a single location or otherwise requested that the table be retained and expanded. We also acknowledge input from registrants who emphasized that preparation of the table can be burdensome and costly. On balance, we believe our amendments help ensure that material information of contractual obligations continues to be provided to investors, while reducing some of the burdens and costs associated with the prescriptive requirements of current Item 303(a)(5).

We further believe that, consistent with the objectives in the Proposing Release of enhancing and clarifying certain requirements in MD&A, the changes we are making to Item 303(b)(1) will assist registrants in considering what disclosure is needed in that context, both in connection with the impact of contractual obligations on those areas and more generally.<sup>237</sup>

## **8. Critical Accounting Estimates (New Item 303(b)(3))**

### *a. Proposed Amendments*

While not specified in Item 303, the Commission has stated in prior guidance that, while preparing MD&A, registrants should consider whether accounting estimates and judgments could materially affect reported financial information. Specifically, the Commission addressed critical accounting estimates in the 2003 MD&A Interpretive Release.<sup>238</sup> The Commission

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<sup>237</sup> See Section II.C.2.c *supra*. With respect to the application of the enhanced liquidity and capital resource requirements on SRCs, see Section II.C.11. *infra*.

<sup>238</sup> See 2003 MD&A Interpretive Release. Prior to this release, the Commission reminded registrants that, under the existing MD&A disclosure requirements, a registrant should address material implications of uncertainties

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.<sup>239</sup> This guidance further stated that if critical accounting estimates or assumptions are identified, a registrant 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. This guidance also stated that a registrant should analyze its specific sensitivity to change based on other outcomes that are reasonably likely to occur. Any disclosure should supplement, not duplicate, the description of accounting policies that are already 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.<sup>240</sup>

The Commission proposed amending Item 303 to add new Item 303(b)(4), which would explicitly require disclosure of critical accounting estimates in order to clarify the required disclosures of critical accounting estimates, facilitate compliance, and improve the resulting disclosure. Because registrants often repeat the information in the financial statement footnotes about significant accounting policies, the proposals were also intended to eliminate disclosure

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associated with the methods, assumptions, and estimates underlying the registrant's critical accounting measurements, and encouraged companies to explain the effects of the critical accounting policies applied and the judgments made in their application. *See Cautionary Advice Regarding Disclosure*, Release No. 33-8040 (Dec. 12, 2001) [66 FR 65013 (Dec. 17, 2001)].

<sup>239</sup> *See id.*

<sup>240</sup> *See id.*

that duplicates the financial statement discussion of significant accounting policies and, instead, promote enhanced analysis of measurement uncertainties.

As proposed, critical accounting estimates were defined as those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the registrant's financial condition or results of operations. By focusing the definition on estimation uncertainties, the Commission stated that it intended to avoid any unnecessary repetition of significant accounting policy footnotes.<sup>241</sup> For each critical accounting estimate, the proposal would require registrants to disclose, to the extent material, why the estimate is subject to uncertainty, how much each estimate has changed during the reporting period, and the sensitivity of the reported amounts to the methods, assumptions, and estimates underlying the estimate's calculation.<sup>242</sup> Lastly, the proposal specified that the discussion should provide quantitative as well as qualitative information when quantitative information is reasonably available and will provide material information to investors.

b. *Comments*

Commenters were generally supportive of the proposed amendments to add critical accounting estimates to Item 303.<sup>243</sup> However, many commenters raised concerns with the proposed requirements to disclose the sensitivity of the reported amounts to the methods,

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<sup>241</sup> Additionally, the proposals included an instruction stating that critical accounting estimate disclosure should supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements

<sup>242</sup> These proposed requirements are similar to those found in IFRS. *See* IAS 1, paragraph 129.

<sup>243</sup> *See, e.g.*, letters from CFA & CII; D. Jamieson ; RSM; PWC; Pfizer; EEI & AGA; Deloitte; KPMG; Grant Thornton; CAQ; BDO; FEI; SIFMA; IMA; UnitedHealth; Medtronic; Chamber; ABA; E&Y; Society.

assumptions, and estimates underlying the estimate’s calculation and how much each estimate has changed during the reporting period.<sup>244</sup>

Some commenters supported the proposed requirement to disclose a sensitivity analysis and requested that it be rigorously enforced.<sup>245</sup> In contrast, several commenters suggested this requirement—by virtue of the nature of some critical accounting estimates, the potential interrelatedness of assumptions, and the degree of inputs used to arrive at the estimate—would result in investor confusion, disclosure that is not useful to investors, unwarranted questioning of past judgments, or heightened liability exposure.<sup>246</sup>

Many commenters stated that a sensitivity analysis is challenging for registrants to provide,<sup>247</sup> with a number of these commenters stating that quantitative disclosures can be particularly challenging or costly.<sup>248</sup> Several commenters asked the Commission to allow management discretion in providing the disclosure based on consideration of factors such as whether: a sensitivity or quantitative analysis would be meaningful or relevant;<sup>249</sup> a reasonably likely change to an assumption would be material;<sup>250</sup> or a sensitivity analysis is either

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<sup>244</sup> See, e.g., letters from RSM; PWC; Pfizer; EEI & AGA; Deloitte; KPMG; Grant Thornton; CAQ; BDO; FEI; SIFMA; IMA; UnitedHealth; Medtronic; Chamber; ABA; E&Y; Society.

<sup>245</sup> See, e.g., letters from CFA & CII and D. Jamieson.

<sup>246</sup> See, e.g., letters from PWC; Pfizer; KPMG; CAQ; BDO; SIFMA; UnitedHealth; Medtronic; ABA.

<sup>247</sup> See, e.g., letters from RSM; PWC; Pfizer (stating that, for the pharmaceutical industry, critical accounting estimates are often based on many complex judgments and assumptions that can be inherently uncertain and unpredictable, including qualitative changes in the industry and that disclosing sensitivity of the reported amounts to the assumptions would be highly subjective and not provide additional insight); KPMG; CAQ; BDO; FEI; SIFMA (stating that “[it understood] from discussions with outside auditors that preparation of these kinds of quantitative disclosures, which are required under IFRS, is extremely burdensome on both registrants and their auditors”); IMA; E&Y (noting concerns about disclosing potentially confidential assumptions); UnitedHealth; ABA.

<sup>248</sup> See, e.g., letters from KPMG, CAQ, BDO, FEI, SIFMA, E&Y,

<sup>249</sup> See, e.g., letters from FEI; UnitedHealth; Medtronic; PWC; ABA.

<sup>250</sup> See, e.g., letters from RSM; KPMG; CAQ; E&Y.

practicable<sup>251</sup> or produced in the ordinary course of business rather than solely to satisfy the disclosure requirement.<sup>252</sup> Other commenters recommended limiting the disclosure to only qualitative disclosure, which they believed would be more meaningful to investors than quantitative disclosure,<sup>253</sup> or disclosures of rough ranges due to the difficulty in quantifying sensitivities.<sup>254</sup> One commenter asked the Commission to specify that registrants are not required to quantify individual assumptions underlying their critical accounting estimates as long as they quantify how reasonably likely changes would materially affect the critical accounting estimates.<sup>255</sup> Another commenter stated that, if the final rule requires a quantitative sensitivity analysis and it is impracticable to disclose the extent of the possible effects on an assumption, the rule should state that the registrant can disclose that it is reasonably possible that outcomes within the next fiscal year that are different than the assumption could require a material adjustment, similar to disclosure required under IFRS about estimation uncertainty.<sup>256</sup>

Several commenters asked the Commission to clarify the period over which the changes in estimates should be described (*i.e.*, most recent period or all periods presented, including interim periods).<sup>257</sup> A few commenters opposed the proposed requirement to disclose how much an estimate has changed over the reporting period,<sup>258</sup> stating that the disclosure either could

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<sup>251</sup> See, e.g., letters from KPMG; Chamber.

<sup>252</sup> See letter from SIFMA.

<sup>253</sup> See letter from SIFMA (stating the current proposal's language of "reasonably available" would, in the event of a lawsuit predicated on omission of this information, still require resolution of the factual issue of whether this information was reasonably available).

<sup>254</sup> See letter from IMA.

<sup>255</sup> See letter from E&Y.

<sup>256</sup> See letter from KPMG (citing International Accounting Standards (IAS) 1, paragraph 131).

<sup>257</sup> See, e.g., letters from RSM; Deloitte; KPMG; CAQ.

<sup>258</sup> See, e.g., letters from Medtronic; ABA; Society.

result in confusion and unwarranted questioning of past judgments<sup>259</sup> or would be reflected in amounts that are reported in the financial statements and discussed in Item 303(a) pursuant to requirements to discuss material changes.<sup>260</sup> One commenter recommended that an “estimate” in this context be the key assumptions or inputs underlying the estimate recognized in the financial statements.<sup>261</sup> Two commenters that opposed disclosure of how much an estimate has changed over the reporting period stated their belief that ASC Topic 275 (Risks and Uncertainties) acknowledges that actual results and estimates can differ and that such differences are not necessarily an indication of an error or deviation from U.S. GAAP so long as the risks and uncertainties relating to such estimates are disclosed.<sup>262</sup>

We received several comments related to aspects of the proposal other than disclosure of sensitivity analysis and changes in estimates. One commenter stated that it is challenging for registrants to determine “a reference point (*i.e.*, at the assumption level or at the financial statement level) in determining materiality for disclosure of the methods, assumptions and estimates underlying the calculation of the critical accounting estimate.”<sup>263</sup> Several commenters expressed support for the proposed instruction stating that critical accounting estimate disclosure is intended to supplement, not repeat, the description of significant accounting policies in the notes to the financial statements,<sup>264</sup> though one commenter asked that this be moved to the rule

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<sup>259</sup> See letter from Medtronic.

<sup>260</sup> See letters from ABA and Society.

<sup>261</sup> See letter from KPMG.

<sup>262</sup> See letters from PWC; Medtronic.

<sup>263</sup> See letter from RSM.

<sup>264</sup> See, *e.g.*, letters from Grant Thornton; BDO; Chamber; ABA; Society.

itself to elevate its prominence.<sup>265</sup> Several commenters recommended that the Commission provide illustrative examples of critical accounting estimate disclosures<sup>266</sup> or further guidance<sup>267</sup> to facilitate application of the final rule. Some commenters recommended clarifying whether this proposal is intended to modify current Commission guidance on critical accounting estimates or to change existing practice.<sup>268</sup>

In response to the Commission’s request for comment, a few commenters stated that they did not perceive any issues with or overlap between critical accounting estimates and critical audit matters.<sup>269</sup> One commenter recommended aligning the definition of critical accounting estimates with the definition of critical accounting estimate used by the Public Company Accounting Oversight Board in AS 1301: *Communications with Audit Committees* (“AS 1301”).<sup>270</sup> While we did not specifically solicit comment on the submission format of critical accounting estimates, one commenter recommended that information provided be submitted in machine-readable format, stating that tagged critical accounting estimates disclosure may help investors compare critical accounting estimates with critical audit matters.<sup>271</sup>

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<sup>265</sup> See letter from Grant Thornton.

<sup>266</sup> See, e.g., letters from KPMG; BDO; IMA; Society.

<sup>267</sup> See letter from IMA.

<sup>268</sup> See letters from Deloitte; E&Y (recommending this clarification specifically for quantitative disclosures).

<sup>269</sup> See, e.g., letters from IMA; Chamber; BDO.

<sup>270</sup> See letter from RSM. AS 1301 defines critical accounting estimate as “[a]n accounting estimate where (a) the nature of the estimate 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 (b) the impact of the estimate on financial condition or operating performance is material.” This definition is consistent with that contained in the 2003 MD&A Interpretive Release.

<sup>271</sup> See letter from CFA.



c. *Final Amendments*

We are adopting new Item 303(b)(3)<sup>272</sup> substantially as proposed for the reasons described in the Proposing Release and above, but with certain modifications in response to commenters' concerns to make clear that: (i) the application of the material and reasonably available qualifier applies to all parts of the disclosure, not just to quantitative information; (ii) the discussion on how much each estimate has changed may also be met through a discussion of changes in the assumptions during the period; and (iii) the disclosure of changes in the estimate/assumption will cover a "relevant period," rather than a "reporting period."<sup>273</sup>

We agree with commenters who raised concerns that, as proposed, the requirements to disclose the sensitivity of reported amounts to the methods, assumptions, and estimates underlying a calculation and how much each estimate has changed during the reporting period for each critical accounting estimate could have been read to require disclosure that is not material, or that was costly or otherwise challenging to prepare. Specifically, these commenters stated that the proposed requirement could suggest that registrants are required to provide quantification for "every" critical accounting estimate,<sup>274</sup> have limited flexibility in presenting

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<sup>272</sup> Proposed as Item 303(b)(4).

<sup>273</sup> Consistent with the proposal, new Item 303(b)(3) does not require a registrant to submit the critical accounting estimates disclosure in a machine-readable format as requested by a commenter, who stated that this may help investors compare critical accounting estimates with critical audit matters. *See* letter from CFA. The communications auditors are expected to provide on critical audit matters in an audit report have a different objective than disclosures related to critical accounting estimates. Critical audit matters provide insight into matters that are especially challenging, subjective, and complex to audit from the perspective of the auditor. On the other hand, critical accounting estimates disclosure should provide management's insights into estimation uncertainties that have had or are reasonably likely to have a material impact on reported financial statements. *See* Proposing Release at Section II.C.8. Likewise, we are not adopting any new XBRL requirements for this Item more broadly. *See* Section IV.E *infra* for discussion on alternatives considered for Item 303 of Regulation S-K, including submission in a machine readable format.

<sup>274</sup> *See* letter from ABA.

such disclosures,<sup>275</sup> or are subject to a different standard than the rest of MD&A.<sup>276</sup> In order to clarify that this was not our intent, new Item 303(b)(3) more clearly states that the reasonably available and material qualifier applies to all information about a critical accounting estimate that has had or is reasonably likely to have a material impact on financial condition or results of operations, whether qualitative or quantitative, including whether the information relates to sensitivity of the reported amount or how much the estimate has changed.<sup>277</sup>

While some commenters asked the Commission to adopt different thresholds, such as when “practicable” or “in the ordinary course of business and not solely for purposes of disclosure,” we believe that “reasonably available” is the appropriate standard as it is familiar to registrants and consistent with current Commission rules.<sup>278</sup> We believe that, in practice, if the disclosure is “impracticable” to provide, it would not be “reasonably available.” In addition, limiting the discussion to material information is intended to avoid disclosure that is not useful to investors and is consistent with the principles-based nature of MD&A.

New Item 303(b)(3) will require registrants to disclose how much an estimate and/or assumption has changed over a relevant period. This is intended to allow an investor to better evaluate the uncertainty associated with the critical accounting estimate by observing changes in estimates or assumptions over time. The revised item also specifically references “assumptions” in addition to estimates because, as suggested by one commenter, this would make clear that

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<sup>275</sup> See letter from PWC.

<sup>276</sup> See letter from E&Y.

<sup>277</sup> For both qualitative and quantitative information, the disclosure requirement is only triggered if the information is necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations.

<sup>278</sup> See, e.g. Securities Act Rule 409 [17 CFR 230.409] and Exchange Act Rule 12b-21 [17 CFR 240.12b-21] which generally state that information required need be given only insofar as it is known or reasonably available to the registrant.

registrants have flexibility to provide appropriate context in the discussion of changes underlying a critical accounting estimate. This disclosure requirement, along with the required sensitivity disclosure, is not intended to yield discussions of quantitative changes to reported amounts, which would be disclosed in response to other requirements in Item 303, such as the discussion of results of operations under new Item 303(b)(2). Instead, our intent is for registrants to provide investors with a greater understanding of the variability that is reasonably likely to affect the financial condition or results of operations so investors can adequately evaluate the estimation uncertainty of a critical accounting estimate.

We also believe that such information would not be duplicative of financial statement disclosures, as suggested by some commenters. While U.S. GAAP requires discrete disclosure of the underlying assumptions for certain accounting estimates,<sup>279</sup> it does not require a discussion of material changes in those assumptions over a relevant period, and there is no general requirement to disclose underlying assumptions for all material accounting estimates included in the financial statements. For that reason, we believe that quantification of certain assumptions, when material and reasonably available, may be necessary to facilitate understanding of the material critical accounting estimate and allow an investor to better understand the degree of estimation uncertainty. To the extent the financial statements include information about specific changes in the estimate or underlying assumptions, the amendments include an instruction<sup>280</sup> that specifies that critical accounting estimates should supplement, but not duplicate, the description

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<sup>279</sup> For example, ASC 820 *Fair Value* requires disclosure of the valuation techniques and inputs used to arrive at a measure of fair value, including judgments and assumptions made. We also note that while ASC 275, *Risks and Uncertainties* requires a discussion of estimates, it includes specific criteria including a reasonably possible “change in the near term due to one or more future confirming events.” By contrast, the critical accounting estimate requirement is broader as it is not tied only to changes in the near term and encompasses items that may not be affected by future events, such as the range in methods a registrant may use in estimation.

<sup>280</sup> See amended Instruction 3 to Item 303(b).

of accounting policies or other disclosures in the notes to the financial statements. Further, unlike existing requirements in U.S. GAAP, our amendments emphasize forward-looking information as they are intended to provide investors with greater insight into estimation uncertainty that is reasonably likely to have a material impact on financial condition and operating performance. We remind registrants that the principle that MD&A should not be a recitation of financial statements in narrative form extends to disclosure of critical accounting estimates.<sup>281</sup>

Our proposal would have required disclosure of how much estimates changed during a “reporting period,” and several commenters asked the Commission to specify this period. New Item 303(b)(3) will require disclosure of changes in each estimate and/or assumption over a “relevant period,” but does not specify the period over which a registrant should discuss the changes in the estimate or assumption. This approach is intended to give registrants the flexibility to determine the relevant period necessary to describe material changes in estimates or assumptions that would facilitate an understanding of estimation uncertainty, consistent with the principles-based nature of MD&A. For certain estimates or assumptions, providing information about estimates and/or assumptions only as of the balance sheet date may be appropriate to inform investors about the nature of the estimation uncertainty and how reported amounts bear the risk of change. In contrast, other estimates or assumptions may require disclosure over the number of years presented in the financial statements to facilitate an understanding of the estimation uncertainty. We do not believe that the requirement to disclose changes in the estimate and/or assumption over a relevant period is inconsistent with the provisions of ASC

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<sup>281</sup> See 2003 MD&A Interpretive Release.

Topic 275, *Risks and Uncertainties*, that were cited by some commenters.<sup>282</sup> In this regard, disclosure of changes in an estimate/assumption should not be implied to mean that the earlier estimate was made in error. Rather, the disclosure provides insight into the estimation uncertainty and the variability that could result over time.

Some commenters recommended specifying a reference point (*i.e.*, assumption-level or financial statement-level) in determining materiality for disclosure of the methods, assumptions, and estimates underlying the calculation of the critical accounting estimate. We are not specifying a reference point in order to allow flexibility to discuss the level that provides material information to an investor about the critical accounting estimate. Similarly, we have not given examples or guidance for particular estimates at this time, as suggested by some commenters. Disclosures will need to be tailored to a registrant's particular business, uncertainties underlying its financial statement line items, and other circumstances, and we do not want to promote a checklist approach to the disclosures. In addition, although a commenter requested that we conform the definition of critical accounting estimate to that found in AS 1301, *Communications with Audit Committees*,<sup>283</sup> we continue to believe that the rule's definition, which places greater focus on describing the estimation uncertainty, will promote disclosure that avoids any unnecessary repetition of significant accounting policy footnotes.

We acknowledge commenters' request for clarification on whether the proposed critical accounting estimate disclosure requirements are intended to change how registrants currently approach these disclosures.<sup>284</sup> We believe the principles of new Item 303(b)(3) are not materially different from the guidance on critical accounting estimates set forth in the 2003

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<sup>282</sup> See letters from PWC and Medtronic.

<sup>283</sup> See letter from RSM.

<sup>284</sup> See letters from Deloitte; E&Y (recommending this clarification specifically for quantitative disclosures).

MD&A Interpretive Release. Our amendments, including the modifications to the proposed amendments, are intended to clarify the required disclosures under this requirement, facilitate compliance, and improve the resulting disclosure.

In addition, as required by current Item 303(b), new Item 303(c) will continue to require that MD&A disclosure for interim periods include a discussion of the material changes in items specified in the full fiscal year requirements in amended Item 303(b).<sup>285</sup> As this applies to critical accounting estimates disclosure in discussion of interim periods, registrants would be required to discuss material changes to the full fiscal year disclosures.

## **9. Interim Period Discussion (Amended Item 303(c))**

### *a. Proposed Amendments*

Current Item 303(b) requires registrants to provide MD&A disclosure for interim periods that enables market participants to assess material changes in financial condition and results of operations between certain specified periods.<sup>286</sup> Current Item 303(b)(1) requires registrants to discuss any material change in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet.<sup>287</sup> Current Item 303(b)(2) requires registrants to discuss any material changes in their results of operations for the most recent fiscal year-to-date period presented in their income statement, along with a similar discussion of the corresponding year-to-date period of the preceding fiscal year. If a registrant is required or elects to provide an

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<sup>285</sup> See *infra* Section II.C.9.

<sup>286</sup> Item 303(b) of Regulation S-K [17 CFR 229.303(b)].

<sup>287</sup> If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding year, the registrant must also discuss any material changes in financial condition from that date to the date of the most recent interim balance sheet provided. At their discretion, registrants may combine discussions of changes from both the end and the corresponding interim date of the preceding fiscal year when such discussions are required. See Item 303(b)(1).

income statement for the most recent fiscal quarter, the discussion must also cover material changes with respect to that fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year.<sup>288</sup> Current Item 303(b)(2) also states that registrants subject to Rule 3-03(b) of Regulation S-X<sup>289</sup> providing statements of comprehensive income for the twelve-month period ended as of the date of the most recent interim balance sheet must discuss material changes of that twelve-month period as compared to the preceding fiscal year rather than the preceding period.

The Commission proposed amending current Item 303(b) (to be renumbered as proposed Item 303(c)) to allow for flexibility in comparisons of interim periods and to simplify the item. Specifically, the Commission proposed permitting registrants to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) *or* the immediately preceding quarter. Under the proposal, if a registrant elects to discuss changes from the immediately preceding quarter, the registrant must 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 that a reader may have ready access to the prior quarter financial information being discussed. In addition, under the proposed amendment, if in a subsequent Form 10-Q, a registrant changes the comparison from the comparison presented in

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<sup>288</sup> In addition, if the registrant elects to provide a statement of comprehensive income for the twelve-month period ended as of the date of the most recent interim balance sheet provided, the registrant must also discuss material changes with respect to that twelve-month period and the twelve-month period ended as of the corresponding interim balance sheet date of the preceding fiscal year. *See* Item 303(b)(2).

<sup>289</sup> These registrants include those primarily engaged in: the generation, transmission, or distribution of electricity; the manufacture, mixing transmission, or distribution of gas; the supplying or distribution of water; or the furnishing of telephone or telegraph services; or in holding securities of companies engaged in such business.

the immediately prior Form 10-Q, the registrant would be required to explain the reason for the change and present both comparisons in the filing where the change is announced.<sup>290</sup>

b. *Comments*

Commenters generally supported amending current Item 303(b) as proposed.<sup>291</sup> Some of these commenters recommended allowing registrants additional flexibility by revising the existing requirement to compare current year-to-date information to prior year-to-date information and giving registrants discretion to decide whether this disclosure would be meaningful.<sup>292</sup> Two of these commenters also stated that investors do not use the year-to-date comparative information.<sup>293</sup> Both of these commenters recommended amending the year-to-date comparative information requirement to make such information optional, with greater guidance provided to registrants to help them determine whether to include such information.<sup>294</sup>

Two commenters opposed the proposal to allow registrants flexibility in comparisons of interim periods.<sup>295</sup> Both of these commenters stated that current prescribed disclosure requirements “provide uniformity of information essential to making assessments.”<sup>296</sup> Both commenters also stated that if a comparison to the prior quarter were relevant or material, the

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<sup>290</sup> The Commission also proposed eliminating language in current Item 303(b)(2) relating to requirements for registrants subject to Rule 3-03(b) of Regulation S-X. *See* Proposing Release at Section II.C.9.

<sup>291</sup> *See, e.g.*, letters from Pfizer; Nareit (noting, however, that some members of their task force “reasoned that a requirement to only disclose information in one manner could mislead investors if a company had a material transaction that was not reflected in the comparative period presented”); FEI; SIFMA; IMA; Medtronic; Chamber; Society.

<sup>292</sup> *See, e.g.*, letters from FEI; Medtronic; Chamber.

<sup>293</sup> *See, e.g.*, letters from FEI; Medtronic.

<sup>294</sup> *See id.*

<sup>295</sup> *See, e.g.*, letters from CFA & CII; D. Jamieson.

<sup>296</sup> *See id.*



current structure provides the registrants the flexibility to make such comparisons in addition to the year-to-date comparative information.<sup>297</sup>

*c. Final Amendments*

We are adopting Item 303(c) with the amendments as proposed. We acknowledge commenters' concerns regarding the benefits of uniform disclosures. However, we continue to believe that the flexibility provided by these amendments will help registrants provide a more tailored and meaningful analysis that is relevant to their specific business cycles while also providing investors with material information to assess quarterly performance. Because not all businesses are seasonal, a comparison to the corresponding quarter of the preceding year may not be as meaningful as a comparison to the preceding quarter. Additionally, by requiring registrants not only to explain the reasons for a change in comparison from prior periods but also to provide both comparisons when there is such a change, we believe investors will benefit from greater insight into a registrant's decision making and have sufficient disclosure to understand any period-over-period change.

We are not, as suggested by some commenters, amending the year-to-date comparative information requirement in current Item 303(b) to make it optional. When adopting the precursor to current Item 303(b), the Commission noted the item was intended to complement discussion in annual reports.<sup>298</sup> At that time, the Commission stated "that the most meaningful discussion of financial condition for interim reporting purposes would deal with the end of the

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<sup>297</sup> *See id.*

<sup>298</sup> *See New Interim Financial Information Provisions and Revisions of Form 10-Q for Quarterly Reporting*, Release No. 33-6288 (Feb. 9, 1981), 46 FR 12480 (Feb. 17, 1981) (adopting current Item 303(b) of Regulation S-K as then Item 11(b) of Regulation S-K) ("Item 303(b) Adopting Release"). *See also* 1982 Integrated Disclosure Adopting Release (reorganizing Regulation S-K to, among other things, move the substance of Item 11(b) of Regulation S-K to Item 303(b) of Regulation S-K).

preceding fiscal year and the date of the most recent interim balance sheet provided.”<sup>299</sup> We continue to believe that a discussion of material year-to-date changes remains valuable and complements the MD&A provided in annual reports. We also believe that a comparative year-to-date discussion provides important context for the current quarter.

Additionally, we are adopting as proposed several amendments that will further streamline the item. These amendments will:

- Eliminate the text that states that registrants need not provide a discussion of the impact of inflation and changing prices, consistent with the amendments described above;<sup>300</sup> and
- Amend current Item 303(b)(2) (amended Item 303(c)(2)) material changes in results of operations—to break the requirements into two subsections:
  - Amended Item 303(c)(2)(i) will continue to require registrants to discuss any material changes in their results of operations between the most recent year-to-date interim period(s) and the corresponding period(s) of the preceding fiscal year for which statements of comprehensive income are provided; and
  - Amended Item 303(c)(2)(ii) will, as discussed above, require registrants to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) *or* the immediately preceding quarter.<sup>301</sup>

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<sup>299</sup> See Item 303(b) Adopting Release.

<sup>300</sup> See *supra* discussion at Section II.C.5.

<sup>301</sup> As described above, if a registrant changes the comparison from the prior interim period comparison, the registrant would be required to explain the reason for the change.

Additionally, amended Item 303(c) will continue to require that the interim discussion and analysis must include a discussion of the material changes in items specified in the full fiscal year requirements in amended Item 303(b).

We are also amending as proposed the item to eliminate language requiring registrants subject to Rule 3-03(b) of Regulation S-X<sup>302</sup> that elect to provide a statement of comprehensive income for the 12-month period ended as of the date of the most recent interim balance sheet to discuss material changes in that 12-month period with respect to the preceding fiscal year, rather than the corresponding preceding period. These amendments are intended to give these registrants the same flexibility as other registrants to make the most meaningful comparisons in their interim period MD&A.

Finally, as proposed, and for the reasons discussed in the Proposing Release, our amendments delete Instructions 2, 3, 5, 6, 7, and 8 to current Item 303(b) to help streamline the item and eliminate unnecessary instructions.<sup>303</sup> The following table outlines the current and amended structure of amended Item 303(c):<sup>304</sup>

<b>Current Structure</b>	<b>Amended Structure</b>
Item 303(b), <i>Interim periods</i> (1) Material changes in financial condition (2) Material changes in results of operations, Rule 3-03(b) of Regulation S-X matters	Item 303(c), <i>Interim periods</i> (1) Material changes in financial condition (2) Material changes in results of operations (i) Material changes in results of operations (year-to-date) (ii) Material changes in results of operations (quarter comparisons)
Instruction 1 to Item 303(b)	Instruction 1 to Item 303(c) (with amendments to reference Instructions 2, 3, 4, 6, 8, and 11 to amended Item 303(b))
Instruction 2 to Item 303(b)	Eliminate

<sup>302</sup> See *supra* footnote 289.

<sup>303</sup> Instruction 5 to Item 303(b) is currently reserved.

<sup>304</sup> The information in this table is not comprehensive and is intended only to highlight the general structure of the current rules and amendments. It does not reflect all of the substance of the amendments or all of the rules and forms that will be affected. All changes are discussed in their entirety throughout this release. As such, this table should be read together with this Section II.C.9.

Instruction 3 to Item 303(b)	Eliminate
Instruction 4 to Item 303(b)	Instruction 2 to Item 303(c)
Instruction 5 to Item 303(b)	Eliminate
Instruction 6 to Item 303(b)	Eliminate
Instruction 7 to Item 303(b)	Eliminate
Instruction 8 to Item 303(b)	Instruction 11 to amended Item 303(b)

## 10. Safe Harbor for Forward-Looking Information (Current Item 303(c))

### a. *Proposed Amendments*

Item 303(c)<sup>305</sup> currently states that the safe harbors provided in Section 27A of the Securities Act and Section 21E of the Exchange Act (together, “statutory safe harbors”) apply to all forward-looking information provided in response to current Item 303(a)(4) (off-balance sheet arrangements) and current Item 303(a)(5) (tabular disclosure of contractual obligations), provided such disclosure is made by certain enumerated persons.<sup>306</sup> For current Item 303(a)(4), current Item 303(c) further states that the “meaningful cautionary statements” element of the statutory safe harbors is satisfied if a registrant satisfies all of current Item 303(a)(4)’s requirements.<sup>307</sup>

<sup>305</sup> Item 303(c) of Regulation S-K [17 CFR 229.303(c)].

<sup>306</sup> Such persons are the issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

<sup>307</sup> Item 303(c)(2)(ii) of Regulation S-K [17 CFR 229.303(c)(2)(ii)].

The Commission added current Item 303(c) in 2003 when it adopted Items 303(a)(4) and (5).<sup>308</sup> Item 303(c) was intended to remove possible ambiguity about the application of the statutory safe harbors to these items and to promote more meaningful disclosure.<sup>309</sup>

Because the Commission proposed to eliminate both Items 303(a)(4) and (5), it also proposed eliminating current Item 303(c), which specifically and exclusively refers to those disclosure requirements. The proposed amendments were not intended to alter the application of the statutory safe harbors, which protect eligible forward-looking statements in MD&A against private legal actions that are based on allegations of a material misstatement or omission, with certain exceptions.<sup>310</sup> The Proposing Release also reiterated the availability of the safe harbors in Securities Act Rule 175<sup>311</sup> and Exchange Act Rule 3b-6<sup>312</sup> (the “regulatory safe harbors”), which expressly apply to forward-looking information in MD&A disclosure.<sup>313</sup>

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<sup>308</sup> See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release at 5992 (“To encourage the type of information and analysis necessary for investors to understand the impact of off-balance sheet arrangements and to reduce the burden of estimating the payments due under contractual obligations, the amendments include a safe harbor for forward-looking information.”).

<sup>309</sup> See *id.*

<sup>310</sup> See Sections 27A of the Securities Act and 21E of the Exchange Act. The statutory safe harbors by their terms do not apply to forward-looking statements included in financial statements prepared in accordance with generally accepted accounting principles. Notably, the statutory safe harbors also would not apply to MD&A disclosure if the MD&A forward-looking statements were made: (1) in connection with an initial public offering; a tender offer; an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program, an offering of securities by a blank check company; a roll-up transaction; or a going private transaction; or (2) or by an issuer of penny stock. See Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act. Also, the statutory safe harbors do not, absent a rule, regulation, or Commission order, apply to forward-looking statements by issuers covered by Section 27A(b)(1)(A) of the Securities Act and Section 21E(b)(1)(A) of the Exchange Act. Because the statutory safe harbors only apply to forward-looking statements made by or on behalf of an issuer that is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, they would not apply to forward-looking statements made in connection with an offering under Regulation A unless the issuer is a reporting company and no other exclusions from the safe harbor apply.

<sup>311</sup> [17 CFR 230.175].

<sup>312</sup> [17 CFR 240.3b-6].

<sup>313</sup> See Proposing Release at Section II.C.10.

b. *Comments*

A few commenters recommended revising the proposal to expand the safe harbors available to registrants.<sup>314</sup> One of these commenters recommended harmonizing the treatment of forward-looking information in MD&A and the financial statements.<sup>315</sup> This commenter also asked the Commission to reiterate, in any final release, its statements in the Proposing Release regarding its commitment to the statutory safe harbors and that the amendments are not intended to alter application of this safe harbor. Another commenter asked the Commission to “expand the statutory safe harbors to apply to all forward-looking statements wherever they appear in MD&A, for all transactions and registrants.”<sup>316</sup> This commenter also asked the Commission to “expand the . . . statutory safe harbors to cover any forward-looking critical accounting estimates disclosure for all types of companies and transactions (including IPOs).”<sup>317</sup>

c. *Final Amendments*

We are adopting amendments to eliminate current Item 303(c) as proposed. As the Commission stated when adopting Item 303(c), the item was intended to remove possible ambiguity about the application of the statutory safe harbors to the specific disclosures called for by current Items 303(a)(4) and (5).<sup>318</sup> While the final amendments continue to require disclosure regarding off-balance sheet arrangements and contractual obligations,<sup>319</sup> such disclosure will now be integrated into a registrant’s broader MD&A discussion. We therefore believe the potential ambiguity that motivated the Commission to adopt current Item 303(c) in the context of

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<sup>314</sup> See letters from SIFMA; Chamber.

<sup>315</sup> See letter from Chamber.

<sup>316</sup> See letter from SIFMA.

<sup>317</sup> See *id.*

<sup>318</sup> See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release.

<sup>319</sup> See amended Instruction 8 to Item 303(b).

the prescriptive requirements of Item 303(a)(4) and (5) no longer exists. Rather, whether and the extent to which disclosure related to contractual obligations or off-balance sheet arrangements constitutes forward-looking statements that fall under the protections of either the statutory or regulatory safe harbors would be evaluated consistently with other forward-looking disclosures in MD&A.

Because our amendments to eliminate current Item 303(c) do not alter the availability or scope of the statutory and regulatory safe harbors, and because we are eliminating the prescriptive requirements associated with Items 303(a)(4) and (5), we are eliminating the item, as proposed. While we acknowledge the suggestion of one commenter to consider expanding the scope of the statutory safe harbors to apply more broadly, including to cover all transactions and issuers, an expansion would warrant a broader review of the statutory and regulatory safe harbors and any areas where expansion may be necessary or appropriate. It is therefore beyond the scope of the current rulemaking.

As requested by a commenter, we explicitly confirm that eliminating current Item 303(c) does not alter the application or availability of the statutory safe harbors or the regulatory safe harbors for all of amended Item 303, including the new requirement to disclose critical accounting estimates.<sup>320</sup> We continue to believe that the statutory and regulatory safe harbors for eligible forward-looking statements have encouraged greater disclosure of forward-looking information that has benefited investors and our markets. As registrants prepare their MD&A disclosures under the amendments, we remind registrants of the availability and scope of these safe harbors and encourage greater disclosure of forward-looking information.

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<sup>320</sup> Instruction 7 to Item 303(a) of Regulation S-K [17 CFR 229.303(a)], Securities Act Rule 175 [17 CFR 230.175], and Exchange Act Rule 3b-6 [17 CFR 240.3b-6]. Our amendments to Item 303 retain Instruction 7 to current Item 303(a), which will be renumbered as Instruction 6 to amended Item 303(b).

## 11. Smaller Reporting Companies (Current Item 303(d))

### a. *Proposed Amendments*

Current Item 303(d)<sup>321</sup> states that an SRC may provide current Item 303(a)(3)(iv) information for the most recent two fiscal years if it provides financial information on net sales and revenues and income from continuing operations for only two years. Item 303(d) also states that an SRC is not required to provide the contractual obligations table specified in Item 303(a)(5). Because the Commission proposed to eliminate current Items 303(a)(3)(iv) and (a)(5), the Commission also proposed eliminating current Item 303(d), which specifically and exclusively references these two disclosure requirements.

### b. *Comments*

One commenter supported the proposal to eliminate current Item 303(d).<sup>322</sup> Some commenters, while not commenting on this specific proposal, indicated they generally opposed any further accommodations allowing SRCs to provide scaled disclosure.<sup>323</sup>

### c. *Final Amendments*

In light of the elimination of current Items 303(a)(3)(iv) and (5), we are adopting amendments to current Item 303(d) as proposed. Notwithstanding the elimination of current Item 303(a)(5), new Item 303(b) specifically requires disclosure of material cash requirements from known contractual and other obligations as part of a liquidity and capital resources discussion.<sup>324</sup> SRCs are currently required to provide MD&A disclosure addressing liquidity and capital resources, and we believe that SRCs should continue to provide this disclosure under

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<sup>321</sup> Item 303(d) of Regulation S-K [17 CFR 229.303(d)].

<sup>322</sup> See letter from Chamber.

<sup>323</sup> See letters from CFA & CII; D. Jamieson.

<sup>324</sup> See Section II.C.7 *supra*.



the amended requirements. Excluding SRCs from the relevant discussion of liquidity and capital resources would be inconsistent with the objectives and requirements stated in amended Item 303(a), as such disclosure may be necessary to an understanding of the registrant's financial condition, cash flows, and other changes in financial condition and results of operations.

Although SRCs are not currently required to include a contractual obligations table, they are already required under U.S. GAAP to assess most of the currently prescribed categories that would otherwise be included in this table. Additionally, some of the revisions to the liquidity and capital resources disclosure requirements codify current MD&A guidance, which already applies to SRCs.<sup>325</sup>

When adopting the contractual obligations table requirement, the Commission excluded the predecessor to SRCs, small business issuers, stating that the exclusion was consistent with the policies of facilitating capital raising by small businesses and reducing the compliance burdens placed on these registrants by the federal securities laws.<sup>326</sup> Because the basis for current Item 303(d) was a reduction in the burdens associated with the preparation of the contractual obligations table itself, and because we are eliminating that prescriptive requirement, we believe that the elimination of current Item 303(d) is likewise appropriate.

#### **D. Application to Foreign Private Issuers**

We are adopting corresponding amendments that will apply to FPIs providing disclosure required by Form 20-F or Form 40-F largely as proposed.<sup>327</sup> We are also adopting amendments to current Instruction 11 to Item 303 as proposed, which specifically applies to FPIs that choose

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<sup>325</sup> See 1989 MD&A Interpretive Release and 2003 MD&A Interpretive Release.

<sup>326</sup> See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release. See also Small Business Initiatives, Release No. 33-6949 (July 30, 1992) [57 FR 36442 (Aug. 13, 1992)].

<sup>327</sup> To the extent that other forms, such as Form F-1, require information provided by Form 20-F, these amendments to Form 20-F will also apply to those other forms.

to file on domestic forms. Similar to our discussions above and for the reasons discussed in greater detail below, our amendments to these forms are intended to modernize, clarify, and streamline these disclosure requirements.

Generally, commenters did not specifically comment on the proposed amendments related to FPIs. One commenter stated that, unless otherwise specified, its comments apply to all registrants, including FPIs.<sup>328</sup>

## **1. Form 20-F**

### *a. Selected Financial Data (Item 3.A of Form 20-F)*

#### *i. Proposed Amendments*

Similar to Item 301, Item 3.A of Form 20-F requires FPIs to provide selected historical financial data for the most recent five financial years (or such shorter period that the company has been in operation). Also similar to Item 301, Item 3.A specifies the information that must be included in the selected financial data and provides that EGCs are not required, in a Securities Act registration statement, to present selected financial data for any period prior to the earliest audited financial statements presented in connection with the registrant's initial public offering of its common equity securities.<sup>329</sup> In a registration statement, periodic report, or other report filed under the Exchange Act, an EGC need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with the EGC's first registration statement that became effective under the Exchange Act or the Securities Act.<sup>330</sup> However, unlike Item 301, Item 3.A also permits a FPI to omit either or both of the earliest two years of data if it represents that it cannot provide the information, or cannot provide the

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<sup>328</sup> See letter from CAQ.

<sup>329</sup> See Instruction 3 to Item 3.A.

<sup>330</sup> *Id.*

information on a restated basis, without unreasonable effort or expense. Given the similarities between Item 3.A and Item 301, the Commission proposed deleting Item 3.A and the related instructions.

## ii. Final Amendments

For reasons similar to those discussed above with respect to the elimination of Item 301, we are eliminating Item 3.A of Form 20-F, as proposed.<sup>331</sup> We recognize that, unlike Item 301, Item 3.A. permits an FPI in certain situations to omit either or both of the earliest two years of data. However, as with Item 301, trend disclosure elicited by Item 3.A typically would be discussed in response to Item 5 of Form 20-F, which requires MD&A disclosure similar to Item 303. Despite the deletion of Item 3.A., FPIs should continue to consider whether such tabular disclosure as part of an introductory section or overview, including to demonstrate material trends, would be appropriate.<sup>332</sup>

## b. *Operating and Financial Review and Prospects (Item 5 of Form 20-F)*

### i. Proposed Amendments

The disclosure requirements for Item 5 of Form 20-F (Operating and Financial Review and Prospects) are substantively comparable to the MD&A requirements under Item 303 of Regulation S-K.<sup>333</sup> To maintain a consistent approach to MD&A for domestic registrants and

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<sup>331</sup> See *supra* Section II.A.

<sup>332</sup> See 2003 MD&A Interpretive Release (“Companies should consider whether a tabular presentation of relevant financial or other information may help a reader’s understanding of MD&A.”). See also footnote 1 of 2003 MD&A Interpretive Release which states that the guidance in that release is intended to apply to FPIs.

<sup>333</sup> When the Commission revised the wording of Item 5 of Form 20-F in 1999, the adopting release noted that the requirements correspond with Item 303 of Regulation S-K. See *International Disclosure Standards*, Release No. 33-7745 (Sept. 28, 1999) [64 FR 53900 (Oct. 5, 1999)], at 53904 (“International Disclosure Standards Release”).

FPIs, the Commission proposed amendments to Form 20-F that generally conformed to the proposed amendments to Item 303.<sup>334</sup>

## ii. Final Amendments

We are adopting the amendments to Item 5 of Form 20-F largely as proposed, with some modifications to conform to our amendments to Item 303 by incorporating any relevant changes made to Item 303 in response to comments received. Specifically, and for reasons similar to those discussed above with respect to the amendments to Item 303, we are adopting, the amendments modify the proposals for Item 5 of Form 20-F by:

- Consistently using the term “reasonably likely” throughout;<sup>335</sup>
- Eliminating the contractual obligations table and amending the item to include a principles-based liquidity and capital resources requirement focused on material short- and long- term cash requirements from known contractual and other obligations;<sup>336</sup> and
- Modifying the critical accounting estimate proposal to emphasize that this disclosure is only required to the extent reasonably available and material.<sup>337</sup>

More generally, similar to our amendments to Item 303 and consistent with what was proposed, we are amending the forepart of Item 5 to specify the purpose of MD&A and highlight the item’s objective. These amendments state that the disclosure responsive to Item 5 must:

- Include other statistical data that will enhance a reader’s understanding of the company’s financial condition, changes in financial condition, and results of operations;

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<sup>334</sup> See Proposing Release at Section II.D.

<sup>335</sup> See *supra* Section II.C.3.

<sup>336</sup> See *supra* Section II.C.7.

<sup>337</sup> See *supra* Section II.C.8.

- Focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or future financial condition;
- Provide a narrative explanation of the financial statements that enables investors to see a registrant “through the eyes of management”;<sup>338</sup> and
- Provide information relating to other subdivisions, such as geographic areas or product lines, in addition to providing information relating to all separate segments.<sup>339</sup>

Additionally, the amendments:

- Amend Item 5 to specify that the discussion must include a quantitative and qualitative description of the reasons underlying material changes, including where material changes within a line item offset one another;<sup>340</sup>
- Revise the liquidity and capital resources requirement in Item 5.B to specify that a registrant must broadly disclose material cash commitments, including but not limited to capital expenditures;<sup>341</sup>
- Amend Item 5.A.2, which currently requires disclosure of inflation, if material, and hyperinflation if the currency in which the financial statements are presented is of a

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<sup>338</sup> See 2003 MD&A Interpretative Release, at 75056. See also 1989 Interpretative Release, at 22428.

<sup>339</sup> See *supra* Section II.C.1.c.

<sup>340</sup> See *supra* Section II.C.1.b.

<sup>341</sup> See *supra* Sections II.C.2 and II.C.7.

country that has experienced hyperinflation,<sup>342</sup> to require only disclosure of hyperinflation;<sup>343</sup> and

- Replace Item 5.E, which covers off-balance sheet arrangements, with a principles-based instruction.<sup>344</sup>

Our rationale for these amendments is consistent with the rationale discussed above for amending corresponding provisions of Item 303.

Some of the amendments to Form 20-F are unique to this form but consistent with MD&A’s focus on materiality. Specifically, as proposed and for the reasons discussed in the Proposing Release, we are amending:

- Item 5.D of Form 20-F to require disclosure of “material trends” instead of “the most significant recent trends”;<sup>345</sup> and

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<sup>342</sup> Rules 3-20(c) and 3-20(d) of Regulation S-X provide the situations when a foreign private issuer must reflect hyperinflation in its financial statements. Rule 3-20(d) generally describes a hyperinflationary environment as one that has cumulative inflation of approximately 100 percent or more over the most recent three-year period.

<sup>343</sup> See *supra* Section II.C.5. Consistent with our proposals, our amendments do not alter the requirement in Item 5.A.2 as it relates to hyperinflation. Instruction 1 to Item 5.A states that disclosure of hyperinflation must be provided if hyperinflation has occurred in any of the periods for which an FPI is required to provide audited financial statements or unaudited interim financial statements. We continue to believe that for FPIs in a hyperinflationary economy, hyperinflation is a salient issue such that it merits specific mention.

<sup>344</sup> See amended Instruction 7 to Item 5 of Form 20-F. For FPIs filing on Forms 20-F and 40-F that apply IFRS, the overlap between the requirements of those Forms and IFRS are similar to the overlap between Item 303(a)(4) and U.S. GAAP, as described in *supra* Section II.C.6. Certain IFRS standards require some disclosures that substantially overlap with the requirements of Item 5.E. of Form 20-F including but without limitation: Information that enables users of the financial statements to evaluate the nature and extent of risks arising from financial instruments to which the entity is exposed or has continuing involvement in at the end of the reporting period and how those risks have been managed (*see* Paragraphs 31, 32 and 42A of IFRS 7, Financial Instruments; Disclosures (“IFRS 7”)) such as: credit risk relating to financial guarantee contracts (*see* Paragraph 35M of IFRS 7); risk relating to continuing involvement in transferred financial assets (*see* Paragraphs 42B(b), 42C and 42E of IFRS 7); and obligations under interests in unconsolidated entities (*see* Paragraphs 1 and 24 to 31 of IFRS 12, Disclosure of Interests in Other Entities).

<sup>345</sup> See, e.g., 2003 MD&A Interpretive Release, at 75060.

- Instruction 1 to Item 5 to add references to the 2002 Commission Statement,<sup>346</sup> 2003 MD&A Interpretive Release, 2010 MD&A Interpretive Release, and the 2020 MD&A Interpretive Release<sup>347</sup> to explicitly direct FPIs to this guidance.

These and all of our amendments to Item 5 of Form 20-F are intended to ensure that existing MD&A requirements for FPIs continue to mirror the substantive MD&A requirements in Item 303.<sup>348</sup>

## **2. Form 40-F**

### *a. Proposed Amendments*

Form 40-F generally permits eligible Canadian FPIs to use Canadian disclosure documents to satisfy the Commission’s registration and disclosure requirements. As a result, the MD&A contained in Forms 40-F is largely prepared in accordance with Canadian disclosure standards. The Commission proposed replacing the off-balance sheet disclosure requirement in General Instruction B.(11) of Form 40-F with a principles-based instruction and deleting General Instruction B.(12), the contractual obligations disclosure requirement. The proposal would only require disclosure of off-balance sheet arrangements to the extent disclosure is not already provided under the MD&A required by Canadian law. Lastly, and consistent with the Item 303 proposals, the Commission proposed to eliminate General Instruction B.(13), which acknowledges application of the statutory safe harbor, and specifically and exclusively applies to General Instructions B.(11) and B.(12).

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<sup>346</sup> Commission Statement about Management’s Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8056 (Jan. 22, 2002) [67 FR 3746 (Jan. 25, 2002)] (“2002 Commission Statement”).

<sup>347</sup> See Commission Guidance on Management’s Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-10751 (Jan. 30, 2020) [85 FR 10568 (Feb. 25, 2020)].

<sup>348</sup> See International Disclosure Standards Release. See also Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release.

b. *Final Amendments*

We are adopting the amendments to Form 40-F largely as proposed, with modifications to conform to our amendments to Item 303 by incorporating relevant changes made to Item 303 in response to comments received. For the reasons discussed above with respect to the liquidity and capital resources requirements in Item 303(b), we are replacing the contractual obligations disclosure requirement in General Instruction B.(12) with a principles-based instruction that expands the MD&A discussion to require analysis of material cash requirements from known contractual and other obligations.<sup>349</sup> In addition, as proposed, we are amending the form to replace General Instruction B.(11) with a principles-based instruction.<sup>350</sup> As noted above, unlike Item 303 and Form 20-F, the MD&A required under Form 40-F is defined as required by Canadian law.<sup>351</sup> Accordingly, our amendments to Form 40-F only require disclosure of off-balance sheet arrangements and an analysis of material cash requirements to the extent it is not already provided under the MD&A required by Canadian law. Lastly, and as proposed, we are eliminating General Instruction B.(13), which acknowledges application of the statutory safe harbor and specifically and exclusively applies to General Instructions B.(11) and B.(12).<sup>352</sup> Notwithstanding this deletion and consistent with the amendments we are making to Item 303, given that eligible Canadian FPIs may still need to disclose certain contractual obligations and off-balance sheet transactions, the statutory safe harbors and regulatory safe harbors will continue to cover forward-looking statements, if applicable.

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<sup>349</sup> See *supra* Section II.C.7.

<sup>350</sup> See *supra* Section II.C.6. We believe our amendments to General Instruction B.(11) of Form 40-F is consistent with the statutory mandate in Section 13(j) of the Exchange Act for the same reasons discussed in the Proposing Release. See Proposing Release at Section II.C.6.

<sup>351</sup> See General Instruction B.(3) of Form 40-F.

<sup>352</sup> See *supra* Section II.C.10.



### 3. Item 303 of Regulation S-K (Hyperinflation Requirement in Item 303 for FPIs)

#### a. *Proposed Amendments*

FPIs may voluntarily choose to file on forms that would require disclosure under Item 303. Current Instruction 11 to Item 303 requires “foreign private registrants” to discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by United States nationals.<sup>353</sup> The Commission proposed amending this FPI instruction to incorporate the requirement for FPIs to discuss hyperinflation in a hyperinflationary economy. The Commission also proposed replacing the reference to “foreign private registrants” with the defined term “foreign private issuer.”<sup>354</sup>

#### b. *Final Amendments*

For consistency with the requirements of Form 20-F,<sup>355</sup> we are adopting amendments to Item 303 as proposed. Specifically, current Instruction 11 to Item 303(a) is being amended as Instruction 9 to Item 303(b) to require a “foreign private issuer” to consider the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited financial statements are filed. This modification is intended to align the requirement in Item 303 more closely with Form 20-F.

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<sup>353</sup> See Instruction 11 to Item 303(a) of Regulation S-K.

<sup>354</sup> See Rule 405 and Rule 3b-4(c).

<sup>355</sup> See *supra* Section II.D.1.

## E. Additional Conforming Amendments

The Commission proposed additional conforming amendments, consistent with the rationale for the proposals.<sup>356</sup> No commenters opposed these proposals.

### 1. Roll-up Transactions – Item 914 of Regulation S-K

#### a. Proposed Amendments

The Commission proposed deleting references to Items 301 and 302 in Item 914(a) of Regulation S-K. This item applies to roll-up transactions, which, subject to certain exceptions, generally involve the combination or reorganization of one or more partnerships, directly or indirectly, where some or all of the investors in any such partnerships will receive new securities or securities in another entity.<sup>357</sup> Item 914(a) provides that, for each partnership to be included in a roll-up transaction, certain financial information, including disclosure under Item 301 and Item 302, must be provided.

#### b. Final Amendments

We are adopting amendments to Item 914(a) to eliminate the reference to Item 301, as proposed, but will retain the reference to Item 302 in light of our final amendments to retain that

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<sup>356</sup> In addition to the conforming amendments discussed in this section, we are also amending certain rules and forms to update references to the items we are amending, as follows: remove references to Item 301 or Item 3.A of Form 20-F (Item 10 of Regulation S-K [17 CFR 229.10]; Forms S-1 [17 CFR 239.11], N-2 [17 CFR 274.11a-1], S-11 [17 CFR 239.18], S-4 [17 CFR 239.25], F-1 [17 CFR 239.31], F-4 [17 CFR 239.34], 1-A [17 CFR 239.90], 10 [17 CFR 249.208c], and 10-K [17 CFR 249.310]; Schedule 14A [17 CFR 240.14a-101]; and Exchange Act Rule 14a-3 [17 CFR 240.14a-3]); and update references to subparagraphs of Item 303 (Securities Act Rule 419 [17 CFR 230.419]). While the disclosure requirements for Item 9 of Form 1-A for Regulation A issuers are similar to the MD&A requirements under Item 303, we did not propose amendments to Form 1-A. See Proposing Release at footnote 2. However, in the preparation of Part II of Form 1-A, Regulation A issuers have the option of disclosing either the information required by (i) the Offering Circular format (including Item 9 referenced above) or (ii) Part I of Forms S-1 or S-11 (except for the financial statements, selected financial data, and supplementary information called for by those forms). Accordingly, while the final rules do not amend Item 9 of Form 1-A, they would still impact Regulation A issuers that choose to disclose the information required by Part I of Forms S-1 or S-11. See Paragraph (a)(1)(ii) of Part II of Form 1-A.

<sup>357</sup> See Rule 901(c) of Regulation S-K [17 CFR 229.901(c)].

item.<sup>358</sup> For Item 301, we recognize that, in the context of Item 914(a), disclosure provided under this item would not be duplicative of the financial statements and would otherwise be unavailable. However, Item 914(a) requires disclosure of other specified financial information<sup>359</sup> and states that additional or other information should be provided if material to an understanding of each partnership proposed to be included in a roll-up transaction. In light of these other requirements, we continue to believe that our amendment deleting references to Items 301 in Item 914(a) would not result in a loss of material information. As discussed above, our amendments to Item 302(a) are intended to address discrete areas of disclosure that we believe may be important to investors. Accordingly, we are retaining current references to Item 302(a).

## **2. Regulation AB – Items 1112, 1114, and 1115**

### *a. Proposed Amendments*

Item 1112 of Regulation AB requires disclosure of financial information required by Item 301 or Item 3.A of Form 20-F about significant obligors of pool assets if the pool assets relating to the significant obligor represent 10% or more, but less than 20%, of the asset pool in an asset-backed securities (“ABS”) transaction. Similarly, Items 1114 and 1115 of Regulation AB require disclosure of financial information required by Item 301 or Item 3.A of Form 20-F about credit enhancement providers and derivatives counterparties, respectively, whose support represents a similar level of concentration in an ABS transaction. As a result of the proposal to

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<sup>358</sup> We are also including a technical amendment to Item 914 to eliminate the reference to the ratio of earnings to fixed charges. *See* Disclosure Update and Simplification, Release No. 33-10532 (Aug. 17, 2018) [83 FR 50234 (Oct. 4, 2018)] at Section III.B.1.f.

<sup>359</sup> In addition to disclosure under Items 301 and 302, Item 914(a) calls for the following financial disclosures: Ratio of earnings to fixed charges, cash and cash equivalents, total assets at book value, total assets at the value assigned for purposes of the roll-up transaction (if applicable), total liabilities, general and limited partners’ equity, net increase (decrease) in cash and cash equivalents, net cash provided by operating activities, distributions; and per unit data for net income (loss), book value, value assigned for purposes of the roll-up transaction (if applicable), and distributions (separately identifying distributions that represent a return of capital).

eliminate Item 301 and Item 3.A of Form 20-F for corporate issuers, financial information about these third parties to an ABS transaction, including any trend information comparable to information required by Item 303 or Item 5 of Form 20-F, would not otherwise be available. Accordingly, the Commission proposed replacing in Regulation AB those requirements to disclose selected financial data under Item 301 or Item 3.A of Form 20-F with requirements to disclose summarized financial information, as defined by Rule 1-02(bb) of Regulation S-X,<sup>360</sup> for each of the last three fiscal years (or the life of the relevant entity or group of entities, if less).

b. *Final Amendments*

We are adopting amendments to Items 1112, 1114, and 1115 of Regulation AB as proposed. We continue to believe the information required under Rule 1-02(bb) is similar to the information currently required and is consistent with other types of financial statement disclosures that are required to be disclosed when certain significance thresholds have been met.<sup>361</sup> The amendments require disclosure of the same periods as the historical data that the ABS registrant is required to provide for the pool assets under Item 1111 of Regulation AB.<sup>362</sup> We recognize that the amendments would generally result in fewer periods being presented under these items. However, we do not believe requiring disclosure beyond three years is necessary as such disclosure would cover periods beyond those presented for the underlying pool assets to which the third-party financial information would relate.

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<sup>360</sup> [17 CFR 210.1-02(bb)].

<sup>361</sup> We are also amending Rule 1-02(bb) of Regulation S-X as proposed, which calls for disclosure of summary financial information. To eliminate any implication that a registrant would need to prepare disclosure that is not consistent with the disclosure in the entity's financial statements, the amendments clarify that the disclosure of summary financial information may vary, as appropriate, to conform to the nature of the entity's business.

<sup>362</sup> While ABS registrants are generally not required to provide financial statements, under Item 1111 of Regulation AB, ABS registrants must provide historical data on the pool assets as appropriate (*e.g.*, the lesser of three years or the time such assets have existed) to allow material evaluation of the pool data. *See* 17 CFR 229.1111.

### 3. Summary Prospectus in Forms S-1 and F-1

#### a. *Proposed Amendments*

The Commission proposed replacing references to Item 301 and Item 3.A of Form 20-F in Form S-1 and Form F-1, respectively, with Rule 1-02(bb) of Regulation S-X, where these forms provide for use of a summary prospectus under Rule 431.<sup>363</sup> A summary prospectus is intended to provide prospective investors with a condensed statement of the more important information in the registration statement.<sup>364</sup> Consistent with this purpose, the Instructions as to Summary Prospectuses in Forms S-1 and F-1 call for disclosure of selected financial data under Item 301 or Item 3.A of Form 20-F, respectively. These instructions also state that, with the exception of these items, the summary prospectus shall not contain any other financial information.<sup>365</sup>

#### b. *Final Amendments*

We are adopting amendments to Forms S-1 and F-1 as proposed. To preserve disclosure of financial information in summary prospectuses, our amendments replace the requirement for selected financial data in Forms S-1 and F-1 with summarized financial information under Item 1-02(bb) of Regulation S-X. We continue to believe the information required under Rule 1-02(bb) is similar to the information currently required and is consistent with other types of financial statement disclosures that should be included when certain significance thresholds have been met.

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<sup>363</sup> See 17 CFR 230.431. See also Instruction 1(f) under Instructions as to Summary Prospectuses in Form S-1 and Instruction 1(c)(v) under Instructions as to Summary Prospectuses in Form F-1.

<sup>364</sup> See Adoption of Summary Prospectus Rule and Amendments to Form S-1 and S-9, Release No. 33-3722 (Nov. 26, 1956) [21 FR 9642 (Dec. 6, 1956)].

<sup>365</sup> See Instruction 2 under Instructions as to Summary Prospectuses for Form S-1 and Form F-1.

#### **4. Business Combinations – Form S-4, Form F-4, and Schedule 14A**

##### *a. Proposed Amendments*

The Commission proposed eliminating references to Items 301 and 302 in Form S-4, Form F-4, and Schedule 14A. Where these forms are used in conjunction with a business combination, pro forma financial statements for the most recent fiscal year and interim period under Article 11 of Regulation S-X are required.<sup>366</sup> Additionally, Item 3(e) and (f) in both Forms S-4 and F-4 require Item 301 or Item 3.A of Form 20-F information, respectively, on a pro forma basis. Item 14(b)(9) and (10) of Schedule 14A generally call for similar pro forma information in the context of a business combination. A related instruction stipulates that, for a business combination accounted for as a purchase, financial information is required for the same periods required by Article 11 of Regulation S-X. Because these pro forma requirements are effectively duplicative of the pro forma financial statements required elsewhere by the form, the Commission proposed deleting them.<sup>367</sup>

Similarly, the Commission proposed eliminating references to Item 301 and Item 3.A of Form 20-F in Item 17(b)(3) of both Form S-4 and Form F-4. Lastly, the Commission proposed deleting the reference to Item 302 in Item 17(b)(4) of Form S-4. Because Item 17(b) of Forms S-4 and F-4 applies to non-reporting target companies in a business combination, this disclosure may not be available elsewhere. In connection with this, the Commission stated its belief that the requirement for discussion and analysis of trends in Item 303 would also be sufficient to address material information related to a target company in a business combination context.

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<sup>366</sup> See Item 5 under Part 1 of Forms F-4 and S-4.

<sup>367</sup> The Commission also proposed deleting the related instruction to these items.

b. *Final Amendments*

We are adopting amendments to Form S-4, Form F-4, and Schedule 14A, to eliminate the reference to Item 301, as proposed, but will retain the reference to Item 302 in light of our final amendments, which will retain that item. As discussed above, our amendments to Item 302(a) are intended to address discrete areas of disclosure that we believe may be important to investors. Accordingly, we are retaining current references to Item 302(a), including in Form S-4 and Schedule 14A.

**5. Form S-20**

a. *Proposed Amendments*

The Commission proposed a conforming change to Form S-20 to remove references to Item 302 of Regulation S-K.<sup>368</sup> Form S-20 is used to register standardized options under the Securities Act and requires limited information about the clearing agency registrant and the options being registered. Since the adoption of Rule 238 in 2002, which exempts from Securities Act Section 5 the registration of offerings of standardized options that are issued by a registered clearing agency and traded on a national securities exchange, Form S-20 is rarely used.<sup>369</sup>

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<sup>368</sup> 17 CFR 239.20. Current references in Form S-20 to Item 302 are references to the item's predecessor, Item 12.

<sup>369</sup> See *Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934*, Release No. 33-8171 (Dec. 23, 2002) [68 FR 188 (Jan. 2, 2003)] ("New Securities Act Rule 238 does not make Form S-20 obsolete. We are retaining Form S-20 for use by an issuer of standardized options that is not a clearing agency registered under Section 17A of the Exchange Act, such as a foreign clearing agency, or for use by issuers of standardized options that do not trade on a registered national securities exchange or on a registered national securities association."). Since the effective date of Rule 238 in 2003, we estimate that approximately one entity has used Form S-20.

b. *Final Amendments*

As discussed above, our amendments to Item 302(a) are intended to address discrete areas of disclosure that we believe may be important to investors. Accordingly, we are retaining current references to Item 302(a), including in Form S-20.<sup>370</sup>

**F. Compliance Date**

The final rules are effective February 10, 2021. After considering feedback from commenters,<sup>371</sup> registrants will be required to apply the amended rules for their first fiscal year ending on or after August 9, 2021 (the “mandatory compliance date”). 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.

Although registrants will not be required to apply the amended rules until their mandatory compliance date, they may provide disclosure consistent with the final amendments any time after the effective date, so long as they provide disclosure responsive to an amended item in its entirety. For example, upon effectiveness of the final amendments, a registrant may immediately cease providing disclosure pursuant to former Item 301, and may voluntarily

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<sup>370</sup> We are making a technical amendment to Form S-20 to update the reference from Item 12, the predecessor to Item 302, to reference Item 302.

<sup>371</sup> *See, e.g.*, letters from RSM; Nareit; SIFMA; CalPERS; E&Y; ABA; Society; CAQ; Chamber. Commenters generally supported a transition period greater than 180 days. *See, e.g.*, letters from RSM; Nareit; SIFMA; CalPERS; E&Y; ABA; Society. Several of these commenters stated that registrants may need more time to transition to certain of the proposed amendments, such as to prepare disclosures in response to the proposed critical accounting estimate requirements. *See, e.g.*, letters from RSM; SIFMA; E&Y; Society. Some commenters recommended a longer transition period because of the COVID-19 pandemic. *See* letters from Nareit; CalPERS. Other commenters recommended modifying the compliance date to require compliance in the first annual report on Form 10-K or Form 20-F that is due on or after the proposed effective date of 180 days, thereby allowing registrants a minimum of 180 days and requiring initial compliance on an annual report. *See* letters from ABA and Society. However, a few commenters supported a transition period of 180 days. *See* letters from Chamber; CAQ.



provide disclosure pursuant to amended Item 303 before its mandatory compliance date. In this case, the registrant must provide disclosure pursuant to each provision of amended Item 303 in its entirety, and must begin providing such disclosure in any applicable filings going forward.<sup>372</sup>

### **III. OTHER MATTERS**

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provisions or application.

Pursuant to the Congressional Review Act,<sup>373</sup> the Office of Information and Regulatory Affairs has designated these rules as not a “major rule,” as defined by 5 U.S.C. 804(2).

### **IV. ECONOMIC ANALYSIS**

#### **A. Introduction**

As discussed above, we are adopting amendments to modernize, simplify, and enhance certain financial disclosure requirements in Regulation S-K. Specifically, the final amendments will (1) eliminate Item 301 of Regulation S-K, Selected Financial Data, (2) streamline Item 302 of Regulation S-K, Supplementary Financial Information; and (3) amend Item 303 of Regulation S-K, Management’s Discussion & Analysis of Financial Condition and Results of Operations. The amendments are intended to eliminate duplicative disclosures and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants.

Overall, investors and registrants may benefit from the amendments to the extent that they help avoid duplicative disclosure and result in more tailored disclosures that allow investors

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<sup>372</sup> To the extent that registrants have questions about application of the amended rules in advance of their mandatory compliance date, they should reach out to Commission staff for additional transition guidance.

<sup>373</sup> 5 U.S.C. 801 *et seq.*

to better understand the registrant's business through the eyes of management. We acknowledge the risk that modernizing and simplifying the approach to MD&A may result in the loss of certain information to investors. However, we believe that any loss of information would be limited because the disclosures eliminated as a result of the amendments are mostly duplicative. Additionally, under the principles-based approach we are adopting, registrants will still be required to disclose material information relevant to an assessment of the financial condition and results of operations, further mitigating the effects of any potential loss of information.

We are mindful of the costs and benefits of the final amendments. The discussion below addresses the potential economic effects of these amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation.<sup>374</sup> At the outset, we note that, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final amendments. In many cases, however, we are unable to quantify the potential economic effects because we lack information necessary to provide a reasonable estimate. For example, we are unable to reasonably quantify the costs to investors of accessing and assessing alternative information sources, such as the footnotes to financial statements or voluntary earnings announcements. We are also unable to quantify the potential information processing cost savings that may arise from the elimination of disclosures that are duplicative or immaterial. No

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<sup>374</sup> Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

commenters provided data or estimates that would allow us to quantify benefits or costs generated by the amendments. Where we are unable to quantify the economic effects of the final amendments, we provide a qualitative assessment of their potential effects.

Two commenters expressed their concerns regarding the cost estimates in the proposal.<sup>375</sup> One of these commenters stated that we failed to quantify the negative impact on investors.<sup>376</sup> Further, one of these commenters stated that we should empirically study the costs and benefits of the proposed rule, and cited to specific studies.<sup>377</sup> We have qualitatively discussed the costs and benefits of the rule below, including those to investors.<sup>378</sup> However, as discussed above, in many cases, we are unable to accurately quantify the potential economic effects of the final amendments, and we lack information necessary to undertake empirical study of the final rule. For example, we are unable to quantify the costs to investors of the increased flexibility provided to registrants under the final amendments because we lack the data (*e.g.*, search or information processing costs) necessary for such quantification. Commenters did not provide data or estimates on such costs. We have, however, addressed the additional studies referenced by these commenters.<sup>379</sup>

## **B. Baseline and Affected Parties**

The current disclosure requirements under Items 301, 302, and 303 of Regulation S-K, and the related requirements under Items 3.A and 5 of Form 20-F, and General Instructions

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<sup>375</sup> See CalPERS and PRI Letters.

<sup>376</sup> See CalPERS Letter.

<sup>377</sup> See PRI Letter.

<sup>378</sup> See *infra* Section C.

<sup>379</sup> See *infra* Section IV(C)(1).

B.(11), (12), and (13) of Form 40-F, together with the current disclosure practices registrants have adopted to comply with these requirements, form the baseline from which we estimate the likely economic effects of the final amendments.<sup>380</sup> The disclosure requirements apply to various filings, including registration statements, periodic reports, and certain proxy statements filed with the Commission. Thus, the parties that are likely to be affected by the amendments include investors and other market participants that use the information in these filings (such as financial analysts, investment advisers, and portfolio managers), as well as registrants subject to the relevant disclosure requirements discussed above.

One commenter stated that we did not attempt to identify who uses the disclosures affected by the rule and why.<sup>381</sup> We continue to believe that investors, financial analysts, investment advisers, and portfolio managers use the information in these filings. We believe that these parties use the information in these filings in connection with making investment decisions, such as comparing information across companies, valuing companies, investing in companies, exercising control of voting securities, etc. Investors affected by the final amendments may directly hold a variety of types of securities issued by reporting companies, such as stocks or bonds, or they may indirectly hold these securities by investing in funds that hold securities issued by reporting companies. In addition, prospective investors may also be affected by the rule as they may derive information from those filings affected by the final amendments. Because the final amendments would affect current and potential individual and institutional investors, both large and small investors will be affected.

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<sup>380</sup> See *supra* Section I.

<sup>381</sup> See CalPERS Letter.

The final amendments may affect both domestic registrants and FPIs.<sup>382</sup> We estimate that during calendar year 2019 there were approximately 6,987 registrants that filed on domestic forms<sup>383</sup> and 849 FPIs that filed on F-forms, other than registered investment companies. Among the registrants that filed on domestic forms, approximately 30 percent were large accelerated filers, 18.5 percent were accelerated filers, and 51.5 percent were non-accelerated filers. In addition, we estimate that approximately 43 percent of these domestic issuers were SRCs and 21.1 percent were EGCs. The final amendments will also affect ABS issuers. ABS issuers are required to file on Forms SF-1 and SF-3 and, as a result, may be subject to the changes to Regulation AB requirements in this release. We estimate that during calendar year 2019, there were 24 unique depositors filing at least one Form SF-1 or Form SF-3.

### **C. Potential Benefits and Costs of the Amendments**

In this section, we discuss the anticipated economic benefits and costs of the final amendments. We first analyze the overall economic effects of the amendments. We then discuss the potential benefits and costs of specific amendments.

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<sup>382</sup> The number of domestic registrants and FPIs affected by the final amendments is estimated as the number of unique companies, identified by Central Index Key (CIK), that filed a Form 10-K, Form 20-F, and Form 40-F, an amendment thereto, or both a Form 10-Q and a Form S-1, S-3, or S-4 with the Commission during calendar year 2019. For purposes of this economic analysis, these estimates do not include registrants that filed only a Securities Act registration statement during calendar year 2019, or only a Form 10-Q not preceded by a Securities Act registration statement, in order to avoid including entities, such as certain co-registrants of debt securities, which may not have an independent reporting obligation and therefore would not be affected by the amendments. We believe that most registrants that have filed a Securities Act registration statement or a Form 10-Q not preceded by a Securities Act registration statement, other than such co-registrants, would be captured by this estimate. The estimates for the percentages of SRCs, EGCs, accelerated filers, large accelerated filers, and non-accelerated filers are based on data obtained by Commission staff using a computer program that analyzes SEC filings, with supplemental data from Ives Group Audit Analytics.

<sup>383</sup> This number includes fewer than 20 FPIs that filed on domestic forms in 2019 and approximately 100 BDCs.

## 1. Overall Potential Benefits and Costs

We anticipate the final amendments<sup>384</sup> will benefit registrants and investors in several ways. First, by eliminating certain duplicative disclosure requirements, the amendments could reduce registrants' disclosure burden and associated compliance costs. Second, by modernizing and simplifying Item 303 disclosure requirements, the final amendments may benefit registrants and investors by reducing disclosure burdens and associated compliance costs. In addition, to the extent the amendments result in more tailored and informative disclosure, they could potentially reduce information asymmetry between registrants and investors, which could enhance the investment decision process, improve firms' liquidity, and decrease the cost of capital. Finally, certain of the amendments emphasize a more principles-based approach to MD&A, which we believe will benefit registrants and investors by underscoring the flexibility available in presenting financial results that are more indicative of their business and accordingly provide investors with better information on which to base decisions.<sup>385</sup> A more principles-

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<sup>384</sup> See *supra* Sections II.A. through II.F.

<sup>385</sup> A number of academic studies have explored the use of prescriptive thresholds and materiality criteria. Many of these papers highlight a preference for principles-based materiality criteria. See, e.g., Eugene A. Imhoff Jr. and Jacob K. Thomas, *Economic consequences of accounting standards: The lease disclosure rule change*, 10 J. Acct. & Econ. 277 (1988) (providing evidence that management modifies existing lease agreements to avoid crossing rules-based criteria for lease capitalization); Cheri L. Reither, *What are the best and the worst accounting standards?*, 12 Acct. Horizons 283 (1998) (documenting that due to the widespread abuse of bright-lines in rules for lease capitalization, SFAS No. 13 was voted the least favorite FASB standard by a group of accounting academics, regulators, and practitioners); Christopher P. Agoglia, Timothy S. Douppnik, and George T. Tsakumis, *Principles-based versus rules-based accounting standards: The influence of standard precision and audit committee strength on financial reporting decisions*, 86 The Acct. Rev. 747 (2011) (conducting experiments in which experienced financial statement preparers are placed in a lease classification decision context and finding that preparers applying principles-based accounting are less likely to make aggressive reporting decisions than preparers applying a more precise rules-based standard and supporting the notion that a move toward principles-based accounting could result in better financial reporting); Usha Rodrigues and Mike Stegemoller, *An inconsistency in SEC disclosure requirements? The case of the "insignificant" private target*, 13 J. Corp. Fin. 251 (2007) (providing evidence, in the context of mergers and acquisitions, where rule-based [disclosure] thresholds deviate from investor preferences). Papers that highlight a preference for rules-based materiality criteria are cited below in footnote 391.

based approach, however, could lead to registrants incurring increased costs associated with assessing materiality.

Many commenters agreed that the final amendments would decrease compliance costs for registrants.<sup>386</sup> Some commenters, however, questioned whether the elimination of duplicative disclosure would result in cost savings, stating that registrants already have the procedures in place to disclose this information.<sup>387</sup> However, the elimination of disclosure requirements, even where the information must be disclosed elsewhere and registrants already have the disclosure procedures in place, would lead to certain costs savings to registrants. For example, registrants will not need to devote time or resources to preparing or reviewing the duplicative disclosure. The resulting cost savings may be small, but we do not believe they are negligible.

We believe the final amendments could provide various benefits to investors. First, the amendments that clarify and codify existing guidance, such as the amendments related to critical accounting estimates and capital resources, could enhance MD&A disclosure. More robust and informative disclosure on these topics could facilitate investors' decision making and enhance investor protection. Second, if the amendments result in enhanced and improved disclosure, they could allow investors to more efficiently process the disclosure and make better-informed investment decisions. In particular, investors may benefit from more tailored disclosures that allow them to better understand the registrant's business through the eyes of management. Investors also could benefit from the reduction of duplicative disclosure, because reducing such

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<sup>386</sup> See letters from PWC; Pfizer; Eli Lilly; EEI & AGA; KPMG; CAQ; FedEx; Nasdaq; Nareit; FEI; SIFMA; IMA; E&Y; UnitedHealth; Medtronic; Chamber; ABA; Society.

<sup>387</sup> See letters from NASAA; CalPERS. See also IAC Recommendation.

duplication may improve the readability and conciseness of the information provided, help investors focus on material information, and facilitate more efficient information processing.<sup>388</sup>

However, investors could incur certain transition costs under the final amendments. For example, investors who are used to the current disclosure format might experience costs when adjusting to the new format. Several commenters expressed concern that eliminating duplicative disclosure could result in greater work for investors to locate this disclosure, with particular burdens on investors who lack skills to navigate EDGAR effectively, and potential direct and indirect impacts of having to adjust to operating in this way.<sup>389</sup> Investors could incur monetary costs such as database subscriptions, or opportunity costs such as time spent, if they need to obtain or reconstruct information through alternative sources. However, any such costs should decrease over time as investors become more familiar with the new disclosure format. In a similar vein, some commenters stated that the elimination of certain disclosure items as a result of the final amendments would increase the time and costs for investors to obtain such disclosure through other means.<sup>390</sup> However, we do not expect such costs to be significant since registrants

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<sup>388</sup> See Alastair Lawrence, *Individual Investors and Financial Disclosure*, 56 J. Acct. & Econ., 130 (2013). Using data on trades and portfolio positions of 78,000 households, this article shows that individuals invest more in firms with clear and concise financial disclosures. This relation is reduced for high frequency trading, financially literate investors, and speculative individual investors. The article also shows that individuals' returns increase with clearer and more concise disclosures, implying such disclosures reduce individuals' relative information disadvantage. A one standard deviation increase in disclosure readability and conciseness corresponds to return increases of 91 and 58 basis points, respectively. The article acknowledges that, given the changes in financial disclosure standards and the possible advances in individual investor sophistication, the extent to which these findings, which are based on historical data from the 1990s, would differ from those today is unknown. Recent advances in information processing technology, such as machine learning for textual analysis, may also affect the generalizability of these findings.

<sup>389</sup> See letters from CalPERS; CFA & CII; D. Jamieson; NASAA. See also IAC Recommendation.

<sup>390</sup> See letters from NASAA; CalPERS; CFA & CII; D. Jamieson; E&Y. See also IAC Recommendation.



would still need to disclose material information relevant to an assessment of the financial condition and results of operations.

There could be certain additional costs associated with the amendments to the extent that they result in the elimination of disclosure material to an investment decision if registrants misjudge what information is material, or if disclosure becomes less comparable across firms.<sup>391</sup> The risk of misjudgment may be mitigated by factors including accounting, financial reporting, and disclosure controls or procedures,<sup>392</sup> as well as the antifraud provisions of the securities laws.<sup>393</sup> There also may be incentives for registrants to voluntarily disclose additional information if the benefits of reduced information asymmetry exceed the disclosure costs. One commenter further cited academic studies it believes indicate how issuers could respond to the increased flexibility provided under the final rule, including through the increased use of boilerplate disclosure.<sup>394</sup> For example, one study shows that MD&A disclosure has become longer and its usefulness (measured by stock market reaction to changes in MD&A) has

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<sup>391</sup> See Mark W. Nelson, *Behavioral Evidence on the Effects of Principles-and Rules-Based Standards*, 17 *Acct. Horizons* 91 (2003); and Katherine Schipper, *Principles-based accounting standards*, 17 *Acct. Horizons* 61 (2003) (noting potential advantages of rules-based accounting standards, including: increased comparability among firms, increased verifiability for auditors, and reduced litigation for firms). See also Randall Rentfro and Karen Hooks, *The effect of professional judgment on financial reporting comparability*, 1 *J. Acct. & Fin. Res.* 87 (2004) (finding that comparability in financial reporting may be reduced under principles-based standards, which rely more heavily on the exercise of professional judgment, but comparability may improve as financial statement preparers become more experienced and hold higher organizational rank); Andrew A. Acito, Jeffrey J. Burks, and W. Bruce Johnson, *The Materiality of Accounting Errors: Evidence from SEC Comment Letters*, 36 *Contemp. Acct. Res.* 839, 862 (2019) (studying managers' responses to SEC inquiries about the materiality of accounting errors and finding that managers are inconsistent in their application of certain qualitative considerations and may omit certain qualitative considerations from their analysis that weigh in favor of an error's materiality).

<sup>392</sup> See, e.g., Exchange Act Rules 13b-2b [17 CFR 240.13b-2b], 13a-15e [17 CFR 240.13a-15e], and 13a-15f [17 CFR 240.13a-15f].

<sup>393</sup> See, e.g., Exchange Act Rule 10b-5(b) [17 CFR 240.10b-5(b)].

<sup>394</sup> See PRI Letter.

declined.<sup>395</sup> This study, however, acknowledges that its documented decrease in the usefulness of MD&A disclosure could be due to a host of factors (e.g., increased corporate interim disclosures, more media outlets, faster information dissemination, ease of private information search), and not necessarily the use of more principles-based disclosure requirements in MD&A. Two of the academic studies cited by the commenter also purport to provide evidence of increasing use of boilerplate disclosure in companies' annual reports, and a correlation between boilerplate disclosure and liquidity as well as analyst coverage.<sup>396</sup> However, one of the studies presents evidence that three specific disclosure requirements that are not part of MD&A – fair value, internal controls, and risk factors – play a significant role in any increase in boilerplate disclosure.<sup>397</sup> To the extent that the increased flexibility of the final amendments may encourage opportunistic behavior by management of the registrants, this could result in boilerplate disclosure in some circumstances. However, we continue to believe that this potential risk may be mitigated by other factors including accounting disclosure requirements, financial reporting, and disclosure controls or procedures, as well as the antifraud provisions of the securities laws. To the extent that the final amendments will increase the relevancy and materiality of the information disclosed in the registrants filings, investors would benefit from the final rule.

Another commenter suggested that we did not make an effort to examine the impacts on investors seeking to compare different issuers.<sup>398</sup> We acknowledge the more principles-based

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<sup>395</sup> See, e.g. Stephen V. Brown and Jennifer Wu Tucker, *Large-Sample Evidence on Firms' Year-over-Year MD&A Modifications*, 49 J. Acct. Res. 309 (2011)

<sup>396</sup> See, e.g. Travis Dyer, Mark H. Lang and Lorien Stice-Lawrence, *The Evolution of 10-K Textual Disclosure: Evidence from Latent Dirichlet Allocation*, J. Acct. & Econ., forthcoming, at Fig. 5, panel B (Mar. 7, 2016); Mark Lang & Lorien Stice-Lawrence, *Text Analysis and International Financial Reporting: Large Sample Evidence*, J. Acct. & Econ., forthcoming, at 17 (Mar. 13, 2014).

<sup>397</sup> Travis Dyer, Mark H. Lang and Lorien Stice-Lawrence, *The Evolution of 10-K Textual Disclosure: Evidence from Latent Dirichlet Allocation*, J. Acct. & Econ., forthcoming.

<sup>398</sup> See letter from CalPERS.

approach resulting from certain final amendments may lead to decreased comparability among different registrants. However, to the extent that such an approach will result in the disclosure of important information for each issuer, we believe that it will be beneficial to investors despite the potential decrease in comparability. With respect to costs related to comparability of information provided by a single issuer over time, to the extent that investors may incur costs in comparing such information, we expect such costs to be limited to the initial adjustment period for investors, and to decline over time as investors become more familiar with the amended disclosures. The potential loss of comparability within the same registrant over time, for example, from the elimination of selected historical financial data, should be minimal as investors in most instances can pull that data from previously filed financial statements via XBRL.

The final amendments likely would affect individual registrants and investors differently. For example, any compliance cost reduction might be more beneficial to smaller registrants that are financially constrained. Similarly, although eliminating information that is not material should benefit all investors, retail investors could benefit more as they are less likely to have the time and resources to devote to reviewing and evaluating disclosure. On the other hand, retail investors could also incur additional costs as a result of the amendments because they may need to obtain information from alternative sources, which could involve monetary costs, such as database subscriptions, or opportunity costs, such as time spent searching for alternative sources. These costs may be higher for retail investors than for institutional investors. One commenter broadly stated that we did not attempt to examine the impacts on investment decisions across different asset classes.<sup>399</sup> We believe that investors, whether shareholders, bondholders, or

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<sup>399</sup> See CalPERS Letter.

holders of other securities, use information derived from registrants' filings to make informed investment decisions. We do not anticipate different effects of the final amendments on investors of different asset classes.

## **2. Benefits and Costs of Specific Amendments**

We expect the final amendments to result in costs and benefits to registrants and investors, and we discuss those costs and benefits item by item in this section. The changes to each item would impact the compliance burden for registrants in filing forms that require disclosures that are responsive to such items. Overall, we expect the net effect of the amendments on a registrant's compliance burden to be limited. As explained in this section, we expect certain aspects of the proposed amendments to increase compliance burdens, and others to decrease the burdens. The quantitative estimates of changes in those burdens for purposes of the Paperwork Reduction Act of 1995 ("PRA")<sup>400</sup> are further discussed in Section V below. For purposes of the PRA, we estimate that the effect of the amendments would vary for different forms. However, taken together, the amendments are likely to result in a net decrease in burden hours for all forms, ranging from 0.1 to 5.9 burden hours per form.<sup>401</sup> Similarly, we believe the final amendments will not have significant economic effect on investors overall. Investors would benefit from the increased relevance and materiality of the disclosure resulting from the amendments, but in the meantime, investors may incur some costs to adapt to the new form of disclosure.

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<sup>400</sup> 44 U.S.C. § 3501 et seq.

<sup>401</sup> See *infra* Section V.B.

a. *Selected Financial Data (Item 301)*

Current Item 301 requires certain registrants<sup>402</sup> to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading.<sup>403</sup> The purpose of this disclosure is to supply in a convenient and readable format selected financial data that highlights certain significant trends in the registrant's financial conditions and results of operations. For certain registrants, information disclosed under Item 301 has also been disclosed in historical financial data and related XBRL data submissions that can be accessed through prior filings on EDGAR. Several commenters noted that much information disclosed under Item 301 is readily available in such prior filings.<sup>404</sup>

The current disclosure requirement under Item 301 can result in duplicative disclosure, and it can be costly for registrants to provide such disclosures under certain circumstances.<sup>405</sup> For example, providing disclosure of the earliest two years often creates challenges for registrants when such information has not been previously provided.<sup>406</sup> Therefore, eliminating this requirement may facilitate capital raising activity and increase efficiency for non-EGC issuers contemplating an IPO. Overall, we expect the elimination of Item 301 will benefit

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<sup>402</sup> As discussed *supra* in Section II.A, SRCs are not required to provide Item 301 information and an EGC that is providing the information called for by Item 301 in a Securities Act registration statement need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with the EGC's IPO of its common equity securities. In addition, an EGC that is providing the information called for by Item 301 in a registration statement, periodic report, or other report filed under the Exchange Act need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with its first registration statement that became effective under the Exchange Act or Securities Act. *See* Item 301(c) of Regulation S-K; Item 301(d)(1) of Regulation S-K.

<sup>403</sup> *See supra* Section II.A.

<sup>404</sup> *See* letters from FEI; Eli Lilly; UnitedHealth.

<sup>405</sup> *See* letters from FEI; Eli Lilly; UnitedHealth; and [EEI & AGA]

<sup>406</sup> *See supra* Section II.A. *See also* Proposing Release at Section II.A.

registrants by eliminating duplicative disclosures and reducing compliance costs. We also note that the benefit associated with eliminating the costs of providing Item 301 disclosure may be offset by the costs associated with making materiality determinations under a principles-based disclosure framework. In general, we do not expect the elimination of Item 301 will affect the cost of capital given that the eliminated disclosures are largely duplicative. To the extent that there is information loss under certain circumstances, such as in the case of non-EGC IPOs, these registrants could potentially experience an increase in the cost of capital as a result of reduced disclosure. However, if the increase in the cost of capital were significant, registrants would likely voluntarily provide the disclosures.

To the extent the final amendments result in the elimination of disclosure that is not material, investors may benefit. In particular, if the readability and conciseness of the information provided improves,<sup>407</sup> investors may be able to process information more effectively by focusing on the material information. Also, the other amendments we are making to Item 303, as well as our reiteration of prior Commission MD&A guidance, may permit or encourage registrants to present more tailored information, which also may benefit investors by allowing them to better understand the registrant's business.

Investors may incur costs to the extent the amendments result in a loss of information.<sup>408</sup> While we do not anticipate significant information loss from the elimination of Item 301, we recognize that selected financial data for the two earliest years would no longer be disclosed in non-EGC IPOs. However, the purpose of the item is to highlight certain significant trends in the

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<sup>407</sup> See *supra* footnote 388.

<sup>408</sup> See letter from NASAA.

registrant's financial condition and results of operations, and we expect that any material trend information that would have been disclosed pursuant to Item 301 would be disclosed under Item 303.<sup>409</sup> We also recognize investors may incur certain other costs that, for example, result from the inability to view the information required by Item 301 in one place.<sup>410</sup> In particular, investors would incur search costs if they have to spend more time to retrieve the information from prior filings and to the extent investors are used to the current format and rely on the compiled comparable data, they may incur costs to adjust to new disclosure formats. One commenter expressed concern that our analysis fails to quantify the costs to investors.<sup>411</sup> We do not, however, believe that it is feasible to accurately measure and quantify these costs because we lack information necessary to provide a reasonable estimate. For example, we are unable to quantify search costs and costs of adjustment to the new disclosure format because they would differ among different investors (*e.g.*, retail investors or institutional investors) and investors of different degrees of sophistication. In addition, one commenter stated that the loss of this information may ease pressure on registrants to explain results, and therefore weaken management discipline, which could harm long-term investors.<sup>412</sup> We believe, however, that pressure on registrants to explain results will remain as a result of Item 303 disclosure requirements, among other factors.

Elimination of Item 301 will also affect the financial information disclosure by ABS issuers. As discussed above, Items 1112, 1114, and 1115 of Regulation AB require disclosure of financial information required by Item 301 or Item 3.A of Form 20-F about certain significant

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<sup>409</sup> Commission guidance has also emphasized the importance of trend disclosure in MD&A. *See, e.g.*, 2003 MD&A Interpretive Release.

<sup>410</sup> *See* letters from CFA & CII and CalPERS.

<sup>411</sup> *See* CalPERS letter.

<sup>412</sup> *See* letter from NASAA.

obligors of pool assets, credit enhancement providers, and derivatives counterparties. By eliminating Item 301 and Item 3.A of Form 20-F for corporate issuers, this financial information about these third parties to an ABS transaction, including any trend information comparable to information required by Item 303 or Item 5 of Form 20-F, may not otherwise be available. To mitigate this potential information loss, the final amendments will replace in Regulation AB those requirements to disclose selected financial data under Item 301 or Item 3.A of Form 20-F with requirements to disclose summarized financial information, as defined by Rule 1-02(bb) of Regulation S-X, for each of the last three fiscal years (or the life of the relevant entity or group of entities, if less).

Since the changes related to ABS issuers are intended to conform to the other changes related to selected financial data and MD&A, our analysis of the costs and benefits for registrants and their investors under the amendments to Item 301 and Item 3.A of Form 20-F can be carried over to ABS issuers. In addition, while this amendment would generally result in the presentation of fewer periods, we do not expect this amendment to have a significant effect on ABS issuers and their investors. The presentation of the earlier years will cover periods beyond those presented for the underlying pool assets. ABS investors mainly rely on the information relating to the underlying pool assets.

b. *Supplementary Financial Information (Item 302(a))*

Under current Item 302(a), certain registrants are required to disclose quarterly financial data of specified operating results and variances in these results from amounts previously reported on a Form 10-Q.<sup>413</sup> Such registrants must provide quarterly information for each full

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<sup>413</sup> As discussed in Section II.B.1, SRCs, FPIs, issuers conducting an IPO, and registrants that have a class of securities registered under Section 15(d) of the Exchange Act are not subject to Item 302(a).



quarter within the two most recent fiscal years and any subsequent period for which financial statements are included or required by Article 3 of Regulation S-X. Item 302(a) also requires disclosure related to effects of any discontinued operations and unusual or infrequently occurring items. As discussed above, we are amending Item 302(a) to only require disclosure where there are one or more retrospective changes to the statements of comprehensive income for any of the quarters within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by Article 3 of Regulation S-X that, individually or in the aggregate, are material. In such cases, the disclosure must provide an explanation of the reasons for such material changes, and include, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the statements of comprehensive income and earnings per share reflecting such changes.

Since the information required under the current item, other than fourth quarter data and the effect of a retrospective change in the earliest of the two years,<sup>414</sup> typically can be found in prior quarterly filings through EDGAR, the prescriptive requirements under current Item 302(a) typically result in duplicative disclosures. By eliminating these duplicative disclosures and reducing the associated compliance costs, the final amendments would benefit registrants. We do not expect the elimination of these duplicative disclosures to affect registrants negatively. While a decrease in disclosure could potentially increase the company's cost of capital in general, the final amendments should elicit information regarding material retrospective changes that should mitigate this risk. Additionally, a registrant can always choose to disclose the information required under the current item in its filings or through other channels. For example,

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<sup>414</sup> See *supra* footnote 47 and corresponding text.

as some commenters indicated, separate fourth quarter information is often disclosed in earnings releases.

Investors could benefit to the extent that the final amendments result in less duplicative disclosure and less disclosure of immaterial information. The final amendments may result in improved readability and conciseness of the information provided, helping investors focus on material information and facilitating more efficient information processing by investors. The amendments will also allow registrants to present financial information that is more reflective of their own industry and firm operating cycles, which could allow investors to better understand their business.

We anticipate information loss from the elimination of fourth quarter financial information currently required under Item 302(a), other than where there has been a material retrospective change during the year that would require disclosure of fourth quarter information. It is generally expected that fourth quarter financial data could be calculated from annual report and cumulative third quarter data. Nonetheless, calculating or otherwise obtaining fourth quarter data may be costly for investors. While such costs might be minimal for institutional investors, which have both resources and sophistication to obtain the needed financial information, for retail investors, the search costs might be substantially larger, which could involve monetary costs such as database subscriptions, or opportunity costs such as time spent searching for alternative sources and cross-referencing. Additionally, investors could make mistakes in deriving the fourth quarter financial information. To the extent that there is a lack of accurate fourth quarter information which cannot be obtained through alternative means, investors' decision making could be affected.<sup>415</sup>

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<sup>415</sup> See letter from NASAA

However, such potential loss of information will be mitigated by the fact that the final amendments will require disclosure of fourth quarter financial information where there has been a material retrospective change during the fiscal year. Also, the potential information loss from the amendments to Item 302(a) might be mitigated under MD&A's principles-based framework. We believe that fourth quarter data may not be material to all registrants or in every fiscal year. For example, for investors in companies with long operating cycles, fourth quarter data might not be as incrementally important as annual data. However, to the extent that there are material trends or events in the fourth quarter or throughout the fiscal year, registrants would be required to address those matters in their MD&A.

*c. Item 303(a) Restructuring and Streamlining*

The final rules include multiple changes that are intended to clarify and streamline the requirements of Item 303. For example, we are adopting a new Item 303(a) to provide a succinct and clear description of the purpose of MD&A. As discussed above, emphasizing the purpose of MD&A at the outset of the item is intended to provide clarity and focus to registrants as they consider what information to discuss and analyze, which could encourage management to disclose those factors that are most specific and relevant to a registrant's business. Other changes include restructuring and streamlining language in Item 303 and the related instructions.

We anticipate that the amendments will provide registrants with more clarity on disclosure requirements. When there is confusion related to disclosure requirements, registrants may either over-disclose and incur additional compliance costs, or under-disclose and face increased litigation risk. To the extent that the final amendments reduce registrants' confusion, registrants could potentially benefit from reduced compliance costs and litigation risk. More informative disclosure could potentially benefit both registrants and investors by reducing information asymmetry in the market. Reduced information asymmetry could help investors

make more informed investment decisions, which may benefit registrants in their capital raising. For registrants, reduced information asymmetry could also potentially improve firm liquidity and reduce cost of capital.

d. *Capital Resources (Item 303(b)(1)(ii))*

Current Item 303(a)(2), which requires a registrant to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, does not define the term “capital resources.” The lack of specificity was intended to provide management flexibility for a meaningful discussion when this disclosure requirement was adopted in 1980. Nonetheless, the Commission has previously provided guidance to clarify this requirement.<sup>416</sup> Further, while the required disclosure of material commitments of capital expenditures historically relates to physical assets, such as buildings and equipment, this requirement may not fully reflect market developments. While capital expenditures remain important in many industries, certain expenditures that are not necessarily capital investments may be increasingly important to companies. For example, expenditures for human resources or intellectual property may be essential for companies in certain industries. The amendments to current Item 303(a)(2) (new Item 303(b)(1)(ii)) are intended to encompass these types of expenditures. The amendments will also explicitly require, consistent with the Commission’s 2003 MD&A Interpretive Release that registrants broadly disclose material cash commitments, including but not limited to capital expenditures. We believe the final amendments will modernize the requirement and make the disclosure more reflective of current and future industry outlays.

We believe that the final amendments could benefit registrants by providing additional clarity on the term “capital resources” and reducing confusion, thereby eliciting appropriate

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<sup>416</sup> See 2003 MD&A Interpretive Release.

disclosure from registrants and potentially decreasing litigation risk. Capital expenditures vary across industries. While firms in traditional industries rely more on physical assets, firms in other industries such as the technology sector may invest more heavily in intellectual property and human capital. By specifying only capital expenditures, the rule may not be clear about what information should be provided. As a result, registrants may over-disclose and incur additional compliance costs, or under-disclose and face increased litigation risk. Further, we expect that registrants will benefit from decreased compliance costs to the extent that the amendments reduce the need to consult existing Commission guidance to process and understand the disclosure requirements. As many registrants may already be following relevant Commission guidance, this effect is not expected to be significant.

The amendments should also benefit investors through improved disclosure. As discussed above, lack of clarity might lead to under- or over-disclosure by registrants. For example, disclosure focusing only on capital expenditures rather than on material cash commitments more generally might lead to under-disclosure for less capital intensive industries. As a result, investors might not receive adequate or consistent information to make informed investment decisions. By providing clarity on the requirement, the amendments may facilitate more informative disclosure.

The amendments might increase the disclosure burden for some registrants by prompting disclosure of material investments in non-physical assets that registrants might not otherwise be disclosing. However, we do not anticipate a significant increase in compliance costs. As discussed above, some registrants already include disclosure beyond capital expenditures, which the Commission's MD&A guidance has encouraged.<sup>417</sup> Also, better disclosure may eventually

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<sup>417</sup> See *supra* Section II.C.2 and 2003 MD&A Interpretive Release.

benefit registrants, because it could reduce information asymmetry between management and investors, reduce the cost of capital, and thereby improve firms' liquidity and their access to capital markets.<sup>418</sup>

e. *Results of Operations – Known Trends or Uncertainties (Item 303(b)(2)(ii))*

Current Item 303(a)(3)(ii) requires a registrant to describe any known trends or uncertainties that have had or that the registrant expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations. As discussed above, we are adopting the amendments to Item 303(b)(2)(ii) substantially as proposed but with a slight modification to use a “reasonably likely” disclosure threshold throughout amended Item 303. For example, the final amendments clarify that when a registrant knows of events that are reasonably likely to 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 reasonably likely change must be disclosed. This amendment aligns

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<sup>418</sup> See Douglas W. Diamond and Robert E. Verrecchia, *Disclosure, Liquidity, and the Cost of Capital*, 46 J. Fin. 1325 (1991) (finding that revealing public information to reduce information asymmetry can reduce a firm's cost of capital through increased liquidity). See also Christian Leuz and Robert E. Verrecchia, *The Economic Consequences of Increased Disclosure*, 38 J. Acct. Res. 91 (2000) (providing empirical evidence that increased disclosure leads to lower information asymmetry component of the cost of capital in a sample of German firms); Christian Leuz and Peter D. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, 54 J. Acct. Res. 525 (2016) (providing a comprehensive survey of the literature on the economic effect of disclosure). Studies that provide both theoretical and empirical evidence on the link between information asymmetry and cost of capital include Thomas E. Copeland and Dan Galai, *Information Effects on the Bid-Ask Spread*, 38 J. Fin. 1457 (1983) (proposing a theory of information effects on the bid-ask spread); David Easley and Maureen O'Hara, *Price, Trade Size, and Information in Securities Markets*, 19 J. Fin. Econ. 69 (1987) (using a model to provide explanation for the price effect of block trades); David Easley and Maureen O'Hara, *Information and the Cost of Capital*, 59 J. Fin. 1553 (2004) (showing that differences in the composition of information between public and private information affect the cost of capital, with investors demanding a higher return to hold stocks with greater private information); Yakov Amihud and Haim Mendelson, *Asset Pricing and the Bid-Ask Spread*, 17 J. Fin. 223 (1986) (predicting that market-observed expected return is an increasing and concave function of the spread, and providing empirical results that are consistent with the predictions of the model).

current Item 303(a)(3)(ii) with the Commission's guidance on forward-looking disclosure.<sup>419</sup> Since many registrants may already be following relevant Commission guidance, the marginal increase in compliance costs is not expected to be significant.

As discussed above, the language in current Item 303(a)(3)(ii) differs from other Item 303 disclosure requirements for forward-looking information.<sup>420</sup> This differing language may have led to confusion and inconsistent practice regarding what events should be disclosed. While the Commission has sought to alleviate some of these concerns by clarifying the standard for forward-looking information in its MD&A guidance,<sup>421</sup> the amendments could further benefit registrants by reducing any residual confusion, eliciting more consistent disclosure, and potentially decreasing compliance costs and litigation risk. In addition, a consistent disclosure threshold throughout Item 303 may allow investors to make more meaningful comparisons across firms and make more informed investment decisions. One commenter suggested that the changes could result in the disclosure of various alternative scenarios that could confuse or mislead investors,<sup>422</sup> but we believe that this increased consistency throughout Item 303 will decrease the likelihood of confusing disclosure overall.

Some registrants may experience an increased cost of compliance under the final amendments to the extent that these registrants, for example, have been disclosing events that *will* cause a material change in the relationship between costs and revenues as opposed to events that are *reasonably likely* to cause the change. One commenter, for example, noted that the

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<sup>419</sup> See *supra* footnote 145.

<sup>420</sup> See *supra* Section II.C.3. See also *supra* footnote 144 and 145.

<sup>421</sup> See 1989 MD&A Interpretive Release.

<sup>422</sup> See letter from FEI.

amended Item 303(a)(3)(ii) will require new processes and controls to manage relevant judgments.<sup>423</sup> Also, some registrants might need to spend resources to evaluate the future likelihood that such events might occur. However, such registrants might be few in light of existing Commission guidance, and the increase in compliance costs could be offset by the potential decrease in the cost of capital as a result of enhanced disclosure and reduced information asymmetry.<sup>424</sup>

f. *Results of Operations – Net Sales and Revenues (Item 303(b)(2)(iii))*

Current Item 303(a)(3)(iii) requires management to discuss certain factors, such as changes in prices or volume, that led to certain material increases in net sales or revenues. The final amendments broaden the current requirement, which focuses on “material increases in net sales or revenue” in the “financial statements” to instead require disclosure of “material changes from period to period in one or more line items” in the “statement of comprehensive income.” Item 303(b) would similarly clarify that MD&A requires a narrative discussion of the underlying reasons for material changes in quantitative and qualitative terms.

The final amendments are intended to codify Commission guidance on results of operations disclosure. The Commission has previously stated that MD&A disclosure should include both qualitative and quantitative analysis and clarified that a results of operations discussion should describe increases or decreases in any line item, including net sales or revenues.<sup>425</sup> The need for registrants to consult both current Item 303(a)(3)(iii) and the Commission’s guidance to understand the requirement could lead to confusion and inconsistent disclosure practice among registrants. The additional clarity provided by the amendments could

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<sup>423</sup> *See id.*

<sup>424</sup> *See supra* footnote 418.

<sup>425</sup> *See, e.g.*, 2003 MD&A Interpretative Release and 1989 MD&A Interpretative Release.



benefit registrants by reducing any confusion, eliciting more consistent disclosure, and potentially decreasing compliance costs and litigation risk.

The final amendments could increase disclosure burdens for registrants, thus potentially increasing compliance costs. However, since many registrants may already be following relevant Commission guidance, the marginal increase in compliance costs is not expected to be significant.<sup>426</sup> Additionally, to the extent that registrants do incur additional compliance costs, such costs could be offset by the potential decrease in the cost of capital as a result of improved disclosure and reduced information asymmetry.<sup>427</sup>

The amendments will require registrants to provide a nuanced discussion of the underlying reasons that may be contributing to material changes in line items, and therefore should enhance the disclosure. More consistent and informative disclosure would allow investors to make more meaningful comparisons across firms and make more informed investment decisions. However, any potential benefits to investors may be limited to the extent registrants already are following the relevant Commission guidance.

*g. Results of Operations – Inflation and Price Changes (Current Item 303(a)(3)(iv), Instruction 8, and Instruction 9)*

The final amendments will eliminate current Item 303(a)(3)(iv) and related Instructions 8 and 9, which generally require that registrants specifically discuss the impact of inflation and price changes on their net sales, revenue, and income from operations for the three most recent fiscal years, to the extent material. The purpose of the elimination is to streamline Item 303 by eliminating the specific reference to these topics, which may not be material to most registrants. This change is consistent with the principles-based disclosure framework of Item 303.

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<sup>426</sup> See letter from FEI.

<sup>427</sup> See *supra* footnote 418.

We do not believe that these changes will result in a loss of material information for market participants.<sup>428</sup> Registrants will still be required to discuss in their MD&A the impact of inflation and changing prices, if material, as is currently required.

The elimination of this item could benefit registrants by streamlining Item 303 and reducing compliance costs. Similar to what we have discussed above,<sup>429</sup> to the extent that the elimination encourages registrants that currently disclose inflation and changing prices even if not material to modify such disclosure,<sup>430</sup> investors could potentially benefit from a focus on material information, which would allow them to process information more effectively. Similarly, emphasizing a principles-based approach may encourage registrants to present more tailored information, which also may benefit investors.

h. *Off-Balance Sheet Arrangements (Instruction 8 to Item 303(b))*

Current Item 303(a)(4) requires, in a separately-captioned section, disclosure of a registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures, or capital resources that is material to investors. The final amendments will replace Item 303(a)(4) with a new principles-based instruction that will require registrants 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 a registrant's

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<sup>428</sup> See letter from FEI.

<sup>429</sup> See *supra* Section III.B.2.i.

<sup>430</sup> See *supra* footnote 385.

financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources.

We do not believe the amendments will lead to significant information loss, as we expect the principles-based instruction will continue to elicit material information about off-balance sheet arrangements.<sup>431</sup> As discussed above, we believe that the amendments will encourage registrants to consider and integrate disclosure of off-balance sheet arrangements in the context of their broader MD&A disclosures and may avoid boilerplate disclosure that either duplicates information in the financial statements, or cross-references the financial statements without additional disclosure to put such information into appropriate context. We acknowledge that the flexibility associated with the principles-based approach might lead to certain opportunistic firm behavior if registrants cherry pick the information to be disclosed, although we do not believe this risk is significant.

The amendments could benefit registrants by avoiding duplicative disclosure and reducing compliance costs. As discussed above, to the extent the amendments improve the readability and conciseness of the information provided, they may help investors process information more effectively. Also, emphasizing a principles-based approach may encourage registrants to provide disclosure that is more tailored and informative, which could benefit investors.

One commenter noted that obtaining a complete picture of an entity's off-balance sheet exposures can be challenging for some investors because this information may be dispersed throughout a registrant's financial statements.<sup>432</sup> We believe that investors might need to spend

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<sup>431</sup> See letter from FEI.

<sup>432</sup> See letter from CFA & CII.

time searching for the information and adjusting to the new format and location of the disclosure as the final amendments will no longer require the relevant disclosure in a separately captioned section. Retail investors are likely to be affected more than institution investors. Nevertheless, such costs are likely to be one-time or decrease over time for both retail and institutional investors.

i. *Tabular Disclosure of Contractual Obligations (Current Item 303(a)(5))*

Under current Item 303(a)(5), registrants other than SRCs must disclose in tabular format their known contractual obligations. There is no materiality threshold for this item. A registrant must arrange its table to disclose the aggregate amount of contractual obligations by type and with subtotals by four prescribed periods. The Commission originally adopted this requirement so that aggregated information about contractual obligations was presented in one place and to improve transparency of a registrant's short- and long-term liquidity and capital resources needs and demands.<sup>433</sup> However, as discussed above, most of the information presented in response to this requirement is already included in the notes to the financial statements. In order to promote the principles-based nature of MD&A and streamline disclosures by reducing overlapping requirements, the final amendments will eliminate Item 303(a)(5) and enhance the liquidity and capital resources requirements to specifically require disclosure of material cash requirements from known contractual and other obligations. The amendments also specify that such disclosures must include the type of obligation and the relevant time period for the related cash requirements. Under this approach, registrants will be relieved of the burden associated with the

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<sup>433</sup> See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release, at 5990. See also Off-Balance Sheet Arrangements and Contractual Obligations Proposing Release.

current prescriptive table and be afforded more flexibility to integrate a discussion of contractual obligations in the broader context of its liquidity and capital resources disclosures.

We believe the amendments could lead to reduced compliance costs by avoiding duplicative, prescriptive disclosures, therefore benefiting registrants, while also providing important information to investors regarding the registrants' liquidity and capital resource needs.<sup>434</sup> We recognize that there might be increased costs associated with assessing the materiality of contractual obligations under the principles-based approach. However we do not expect such costs to be significant given that the materiality standard is already used by registrants when preparing MD&A disclosures. As discussed above, to the extent the elimination of redundant or immaterial disclosure improves the readability and conciseness of the information provided, the amendments could potentially benefit investors by helping them process information more effectively. Also, since a principles-based approach allows registrants to present more tailored information, it could lead to more informative disclosure, which would benefit investors.

We recognize that there could be a loss of certain information due to the elimination of the item. As discussed in Section II.C.7, some of the information in the contractual obligations table such as purchase obligations is not specifically called for under U.S. GAAP and is therefore not typically disclosed in the financial statements. Additionally, information related to the "payments due by period" currently required by the item may be difficult to ascertain from a registrant's financial statements. However, since the final amendments will encompass material cash requirements from known contractual and other obligations, are not limited to those called for by U.S. GAAP, and will require that such disclosures specify the type of obligation and the

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<sup>434</sup> See, e.g., letters from Costco; Eli Lilly; FEI

relevant time period for the related cash requirements, we believe any loss of information will not be significant.

We expect investors could experience certain additional costs. A centralized location and tabular format make it convenient for investors to extract and analyze information.<sup>435</sup> Under the amendments, the absence of a centralized location and tabular format may cause investors to incur search costs to derive the data from the financial statements or from information embedded in MD&A, or monetary costs to obtain the information through alternative channels, such as database subscriptions. Investors may also incur opportunity costs, such as time spent searching for alternative sources, and these costs may fall more heavily on retail investors than on other types of investors, such as institutional investors. Additionally, one commenter suggested that the preparation of the contractual obligations table is a useful exercise for management to obtain a “picture of such obligations,”<sup>436</sup> and to the extent that management needs but does not otherwise have such information, management and investors could be subjected to costs. However, to the extent management needs such a table to conduct its duties or the benefits of collecting this information in one place outweighs the costs, we expect that management will continue to obtain this information without the additional costs of preparing related disclosure.

j. *Critical Accounting Estimates (Item 303(b)(3))*

Item 303(a) does not currently explicitly require registrants to disclose critical accounting estimates. U.S. GAAP requires disclosure of significant accounting policies in the notes to the financial statements, but does not require similar disclosure of estimates and assumptions, except

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<sup>435</sup> See letter from CFA & CII.

<sup>436</sup> See letter from CFA & CII.

in limited circumstances. IFRS does require disclosures regarding sources of estimation uncertainty and judgments made in the process of applying accounting policies that have the most significant effect on the amounts recognized in the financial statements.<sup>437</sup> Although the Commission has issued guidance on disclosure of critical accounting estimates, many registrants repeat the discussion of significant accounting policies from the notes to the financial statements in their MD&A and provide limited additional discussion of critical accounting estimates. We are amending Item 303 to explicitly require such disclosure due to the importance of critical accounting estimates in providing meaningful insight into the uncertainties related to these estimates and reported financials and how accounting policies of registrants faced with similar facts and circumstances may differ, and also to eliminate disclosure that duplicates the financial statement discussion of significant accounting policies. Providing a clear disclosure framework could benefit registrants by reducing confusion and duplicative disclosure, thereby decreasing compliance costs.

A number of commenters expressed concerns that the required disclosure of critical accounting estimates may result in information that is not material and costly or otherwise challenging to prepare.<sup>438</sup> To allay such concerns, the final amendments will clarify that the material and reasonably available qualifier applies to all parts of the disclosure, not just to quantitative information.

Investors will likely benefit from the amendments. The amendments could elicit more informative disclosure from registrants related to their estimates and assumptions, which would help investors better understand any potential risk or uncertainty related to these estimates and

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<sup>437</sup> See IAS 1, paragraphs 122 to 133.

<sup>438</sup> See letters from RSM; PWC; Pfizer; EEI & AGA; Deloitte; KPMG; Grant Thornton; CAQ; BDO; FEI; SIFMA; IMA; UnitedHealth; Medtronic; Chamber; ABA; E&Y; Society.

make more informed investment decisions. The amendments could also promote more consistent disclosure practices among registrants by providing more clarity, allowing investors to make more meaningful comparisons across registrants and better informed investment decisions.

We recognize that this disclosure requirement could introduce additional costs to market participants. While we do not anticipate that investors would incur any direct costs (other than information processing costs) associated with this amendment, compliance costs might increase for registrants because of the more explicit disclosure requirement compared to the existing Commission guidance. However, some of these costs may be minimized because this disclosure requirement only applies to the extent the information is material and reasonably available. Additionally, the potential increase in compliance costs might decline over time as registrants become more accustomed to the new filing requirements. We also note that, consistent with Commission guidance, some registrants may already provide disclosures related to critical accounting estimates that do not duplicate the financial statement disclosures, thus the increase in compliance costs might be minimal to those registrants. Finally, the increase in compliance costs could be offset by a potential decrease in registrants' cost of capital, because such disclosure could reduce information asymmetry between investors and firms.<sup>439</sup>

k. *Interim Period Discussion (Item 303(c))*

Current Item 303(b) requires registrants to provide MD&A disclosure for interim periods that enables market participants to assess material changes in financial condition and results of operations between certain specified periods. The final rules will amend current Item 303(b) (renumbered as Item 303(c)), to allow for flexibility in comparisons of interim periods and to streamline the item. Specifically, under Item 303(c), registrants will be allowed to compare their

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<sup>439</sup> See *supra* footnote 418.



most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. The amendments will also streamline the instructions to current Item 303(b), consistent with the amendments to current Item 303(a) and the related instructions.

This more flexible approach is intended to allow registrants to provide an analysis that is better tailored to their business cycles. This may result in more informative disclosure that could reduce information asymmetry and firms' cost of capital, benefiting registrants.<sup>440</sup> In addition, streamlining the item could avoid duplicative disclosure and reduce associated compliance costs.

Investors also may benefit from the amendments. As noted above, the amendments will provide registrants flexibility to choose the interim period presented, which could allow them to provide a more tailored analysis. This, in turn, could allow investors to make better informed investment decisions. While this flexibility may encourage certain registrants to be opportunistic in terms of what to disclose, thus potentially negatively affecting investors, we do not anticipate this risk to be significant because we believe that other disclosure obligations are likely to provide material disclosure. More flexibility in disclosure could also decrease comparability across firms, potentially increasing the cost of investors' decision-making. However, we do not expect the flexibility in reporting to significantly reduce comparability, because registrants in the same industry are likely to have similar business cycles and choose similar interim periods. Therefore, concerns about a reduction of comparability across firms in the same industry could be mitigated. The resulting reduction of duplicative disclosure might increase the effectiveness of information processing by investors, thus helping them make more informed decisions.

Investors will also benefit from the requirement that companies that choose to change the method

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<sup>440</sup> *See id.*

of their presentation must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made. This requirement is intended to prevent companies from using a change in presentations to obscure negative information, and to discourage frequent switching between them from quarter to quarter.

1. *Safe Harbor for Forward-Looking Information (Current Item 303(c))*

Current Item 303(c)<sup>441</sup> states that the safe harbors provided in Section 27A of the Securities Act and 21E of the Exchange Act apply to all forward-looking information provided in response to Item 303(a)(4) (off-balance sheet arrangements) and Item 303(a)(5) (contractual obligations), provided such disclosure is made by certain enumerated persons.<sup>442</sup> The final amendments will eliminate this item to conform to the elimination of Items 303(a)(4) and (a)(5). As discussed above, the final amendments replace the current prescriptive off-balance sheet disclosure required by these items with more principles-based requirements located in other paragraphs of Item 303. We do not believe eliminating Item 303(c) will have any economic effect by itself because forward-looking disclosure responsive to the new principles-based requirements will continue to be protected by the existing statutory and regulatory safe harbors. Therefore, we do not expect changes in market behavior. To the extent that the elimination of the section may result in any confusion as to the application of the safe harbors, there could be a cost to registrants. However, we believe such cost should be minimal, as registrants are already familiar with analyzing the applicability of the safe harbors.

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<sup>441</sup> Item 303(c) of Regulation S-K.

<sup>442</sup> Such persons are: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

m. *Smaller Reporting Companies (Current Item 303(d))*

Current Item 303(d)<sup>443</sup> states that an SRC may provide Item 303(a)(3)(iv) information for the most recent two fiscal years if it provides financial information on net sales and revenues and income from continuing operations for only two years. Item 303(d) also states that an SRC is not required to provide the contractual obligations chart specified in Item 303(a)(5). To conform to the elimination of the prescriptive requirements of Item 303(a)(3)(iv) and (a)(5), the final rules will eliminate Item 303(d). SRCs may rely on Instruction 1 to Item 303(b),<sup>444</sup> which states that an SRC's discussion shall cover the two-year period required in §§ 210.8-01 through 210.8-08 (Article 8 of Regulation S-X).

The elimination of Item 303(d) will have the effect of subjecting SRCs to the newly-adopted disclosure requirements in Item 303(b), a principles-based liquidity and capital resources disclosure requirement that includes a requirement to discuss material contractual obligations in the context of that disclosure.<sup>445</sup> We do not believe that the preparation of such disclosure will be burdensome for SRCs because SRCs are currently required to provide a discussion and analysis that addresses material impacts on their liquidity and capital resources and are also required under U.S. GAAP to assess most of the currently prescribed categories of contractual obligations. We believe that this disclosure will have a benefit to investors because such disclosure may be necessary to an understanding of the registrant's financial condition, cash flows, and other changes in financial condition and results of operations.

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<sup>443</sup> Item 303(d) of Regulation S-K.

<sup>444</sup> Amended Item 303(b).

<sup>445</sup> *See supra* Section II.C.7 and II.C.9.

n. *Foreign Private Issuers*

The changes related to Item 3.A and Item 5 of Form 20-F and General Instructions B.(11), (12), and (13) of Form 40-F are intended to conform to the other changes related to selected financial data and MD&A. Therefore, our analysis of the costs and benefits for domestic issuers and their investors under the amendments to Item 301 can be carried over to FPIs and their investors under the amended items. The changes could benefit FPIs through a reduction in compliance costs, although the benefits are likely to be smaller given that current Item 3.A permits a FPI to omit either or both of the earliest two years of data under certain conditions and registrants that file on Form 40-F use Canadian disclosure documents to satisfy the Commission's registration and disclosure requirements. Since FPIs would have more flexibility to provide information that is better tailored to their industry or country, investors could benefit from more informative disclosure. However, investors might incur additional search costs when looking for information through alternative channels.

To maintain a consistent approach to MD&A for domestic registrants and FPIs, the final rules will make changes to Forms 20-F and 40-F that generally conform to the amendments to Item 303. Therefore, our discussion of the costs and benefits for domestic issuers and their investors under the amendments to Item 303 generally can be carried over to FPIs under the amended item. The final rules add to Item 303 the current Form 20-F instruction that requires FPIs that are not subject to the multijurisdictional disclosure system to discuss hyperinflation in a hyperinflationary economy. This disclosure can be beneficial to investors when analyzing FPIs, as hyperinflation in some FPIs' home countries might be an important risk factor for the firm's results of operations or financial health.

#### **D. Anticipated Effects on Efficiency, Competition, and Capital Formation**

We believe the final amendments could have positive effects on efficiency, competition, and capital formation. As discussed above, we expect the amendments could reduce duplicative disclosure and elicit disclosure that is more focused on material information and tailored to a registrant's business, making the disclosure more informative. We believe more informative disclosure could reduce information asymmetry between firms and investors, thereby improving firm liquidity and price efficiency.<sup>446</sup> We also believe the amendments could promote competition in the capital markets and facilitate capital formation. This is because more informative disclosure could allow investors to make more meaningful comparisons across firms and make more informed investment decisions, and as a result, more value-enhancing projects may receive more capital allocation.

However, as discussed above, since registrants no longer need to present certain information (*e.g.*, five-year comparable data), investors could incur costs when searching for alternative channels to obtain or reconstruct the information. Since each investor would have to consider the need for alternative sources of information, the final amendments could result in inefficiency in the information distribution process. Additionally, if registrants misjudge what information is material, there could be an increase in information asymmetries between registrants and investors, negatively affecting efficiency, competition, and capital formation. However, we expect this risk to be mitigated by factors such as accounting controls and the antifraud provisions of the securities laws.

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<sup>446</sup> See *supra* footnote 418. See also David Hirshleifer and Siew Hong Teoh, *Limited attention, information disclosure, and financial reporting*, 36 J. Acct. & Econ. 337 (2003) (developing a theoretical model where investors have limited attention and processing power and showing that, with partially attentive investors, the means of presenting information may have an impact on stock price reactions, misvaluation, long-run abnormal returns, and corporate decisions).

The amendments, in particular by simplifying and codifying certain positions expressed in various Commission guidance, might reduce the compliance costs of private companies considering going public. For companies considering an IPO, the benefit of easing the burdens associated with preparing these disclosures for the first time could decrease the costs of going public and thus leave more capital for future investment. This could lead to more efficient capital formation.

## **E. Alternatives**

### **1. Alternatives regarding Item 301**

As an alternative to the elimination of Item 301, which requires registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years, we considered amending the item to require only the same number of years of data as presented in the registrant's financial statements in that same filing. Similarly, another alternative we considered is expanding the current EGC accommodation to all initial registrants. The EGC accommodation generally provides that an EGC need not present selected financial data for any period prior to the earliest audited period presented in its initial filing.<sup>447</sup> This accommodation allows EGCs to build up to the full five years of selected financial data.

The benefit of these alternatives would be potential cost savings from a reduction in compliance burdens by not having to reproduce the earliest years of selected financial data. These alternatives might be sufficient for investors to make a quick comparison with the most recent financial data without cross-referencing to other sources. However, given the nature of electronic access to financial data through EDGAR, we think the potential benefits of these alternatives would be more limited than the elimination of Item 301. We decided not to adopt

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<sup>447</sup> See Item 301(d) of Regulation S-K [17 CFR 229.301].

the alternative of requiring the same number of years of data as presented in the registrant's financial statements in that same filing because such disclosure would be largely duplicative and therefore, have limited utility. Regarding the alternative that we expand the current EGC accommodation to all initial registrants, while this approach could provide cost savings to non-EGC initial registrants at the beginning, in the long run, these registrants would still face the same duplicative disclosure problem that other registrants do currently. As a result, we decided not to adopt this alternative.

As another alternative, we considered amending Item 301 to require the earliest years only in circumstances where the company can represent that the information cannot be provided without unreasonable effort and expense, as is currently allowed under Item 3.A of Form 20-F. Under this approach, registrants would experience reduced compliance costs under the exempted circumstances, albeit a smaller reduction compared to the final amendments, because they would still need to disclose selected financial data for the earliest years when it is deemed not time consuming and costly. At the same time, while investors would still incur search costs if they prefer to analyze five years' financial data, such costs would be smaller compared to the proposed approach. We decided not to adopt this alternative because the lack of a consistent or objective standard to determine when additional financial disclosure is required could be time consuming or burdensome for registrants.

## **2. Alternatives regarding Item 302**

Some commenters stated that, in some instances, it was difficult to calculate fourth quarter data from data disclosed elsewhere.<sup>448</sup> As an alternative to streamlining Item 302(a) to only require disclosure of retrospective changes from amounts previously reported within the last

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<sup>448</sup> See, e.g., letters from NASAA and CFA & CII,

two most recent fiscal years that, individually or in the aggregate, are material, we considered requiring a registrant to only disclose fourth quarter data elsewhere in its annual report, such as in MD&A. This approach could prevent or mitigate the potential loss of the fourth quarter financial data under the proposed approach. As discussed above, however, we believe that the revised disclosure requirements in Item 302(a) will allow investors to calculate this data in most instances without substantial costs, while also highlighting material retrospective changes better than the existing requirement. Therefore, we decided not to adopt this alternative.

### **3. Alternatives regarding Item 303**

We are amending current Item 303(a)(2) to specify that a registrant should broadly disclose material cash requirements, including but not limited to capital expenditures. We considered adopting a definition for the term “capital resources.” While defining the term could provide more clarity for registrants, it would also result in a disclosure requirement more prescriptive in nature, inconsistent with our current objective to promote the principles-based nature of MD&A. We therefore decided not to adopt this alternative.

Another alternative, as suggested by commenters, that we considered adopting was a term with a narrower meaning than material cash requirements such as “material cash commitments” or “material cash commitments outside of normal operations.”<sup>449</sup> According to those commenters, using “material cash requirements” could increase compliance costs in the form of new record keeping and controls. We have decided not to adopt this alternative because, as mentioned above, our amendments are limited to and address only those cash requirements that are material and hence should not require extensive or new procedures or controls. Since registrants can and do have cash requirements related to their routine operations that are material,

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<sup>449</sup> See letter from FEI and IMA.



such an alternative could also result in material information remaining undisclosed, thus negatively affecting investors.

As an alternative to the replacement of the Item 303(a)(4) off-balance sheet arrangements disclosure requirement, we considered allowing registrants discretion to make the disclosure currently required under Item 303(a)(4) under a separate caption within the capital resources section. Compared to the final amendments, such an alternative would have kept information on off-balance sheet items in a single location instead of such information being dispersed throughout the financial statements, thus making it easier for investors to locate. Such an alternative, however, would still result in duplicate disclosure and compliance costs for issuers.

As an alternative to the elimination of Item 303(a)(5), which requires registrants to disclose in tabular format contractual obligations by type of obligation, overall payments due and prescribed periods, we considered maintaining the prescriptive contractual obligations disclosure requirement in a modified form. For example, we considered reducing the prescribed time periods that need to be disclosed, or requiring disclosures of only short-term or long-term obligations rather than requiring disclosure to be grouped in the four time periods currently specified in Item 303(a)(5). While this approach could be more beneficial to investors by reducing their search costs compared to the final approach, it would result in redundant disclosure and higher compliance costs to registrants.

As an alternative to the adopted Item 303(b)(3), we considered issuing additional guidance on critical accounting estimates that enhances the guidance issued in the 2003 MD&A Release. While this alternative could save compliance costs for registrants because it would not create a new requirement, the savings might not necessarily be significant, given the existing Commission guidance on this topic. Further, we believe that by codifying existing guidance,

adopted Item 303(b)(3) should provide investors with more enhanced disclosure and protection by ensuring that companies consistently provide such disclosure. Therefore, we decided not to adopt this alternative.

Another alternative that we could have adopted is the use of different thresholds for information necessary to understand critical accounting estimates, such as when “practicable” or “in the ordinary course of business and not solely for purposes of disclosure.” As mentioned above, however, we believe that if the disclosure is “impracticable” to provide, it would not be “reasonably available.” In addition, limiting the discussion to material information is intended to avoid disclosure that is not useful to investors and is consistent with the principles-based nature of MD&A.

Another alternative that we considered was to require disclosure of how much a critical accounting estimate has changed during a reporting period. This alternative could have provided information on the quantitative changes to the reported amounts. But such an alternative could result in information that is not material and may impede investors’ assessments of the uncertainty associated with the critical accounting estimate. We believe that the adopted requirement which allows issuers to address the change in a critical accounting estimate through a discussion of the change in the assumptions of that estimate over a relevant period would provide investors with a greater understanding of the variability that is reasonably likely to impact the financial condition or results of operations.

Another alternative that some commenters suggested is to specify a relevant period for which this disclosure is required (*e.g.*, most recent period, all periods presented, etc.).<sup>450</sup> Such a specification would make it easier for issuers to comply and hence reduce their compliance costs.

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<sup>450</sup> *See, e.g.*, letters from RSM; Deloitte; KPMG; CAQ.

We note, however, that for different estimates the relevant disclosure may vary over different periods of time to facilitate an understanding of the estimation uncertainty. Thus, such an alternative would have restricted issuers' flexibility in determining the relevant period necessary to describe material changes in estimates or assumptions that would facilitate an understanding of estimation uncertainty. Therefore, we decided not to adopt this alternative.

Item 303(c) would allow flexibility for 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. As an alternative, we considered an approach under which registrants would be required to compare the most recent quarter to both the corresponding quarter of the prior year and the immediately preceding quarter. While this alternative approach would provide investors with more disclosure, it might not be clear to investors which time period is more representative of the registrant's business, and registrants would incur more compliance costs. Also, this alternative is less consistent with the principles-based nature of MD&A. Therefore, we decided not to adopt this alternative.

We proposed deleting Item 303(d) which, in part, provides that an SRC is not required to provide the contractual obligations table specified in Item 303(a)(5). In a change from the Proposing Release, the final amendments add a principles-based disclosure requirement for contractual obligations to Item 303 and, unlike the existing SRC carve-out in Item 303(d), do not carve out SRCs from this disclosure requirement. As an alternative, we could have carved out SRCs from this disclosure requirement. Such an alternative could have reduced SRCs' compliance costs. However, such an alternative could have discouraged the disclosure of material contractual obligations that may be important for investors. By adopting a principles-based approach that requires a robust discussion of material contractual obligations, the final

amendments will help ensure that investors are provided with information about material contractual obligations, without imposing significant new compliance burdens on SRCs.

#### **4. Alternatives regarding structured disclosure**

The final amendments do not require registrants to structure disclosures required by the amendments in a machine-readable format. An alternative suggested by some commenters<sup>451</sup> would be to require registrants to structure MD&A in the Inline XBRL format. Requiring registrants to structure MD&A disclosures could create benefits for investors (either through direct use of the data or through reliance on the data as extracted and analyzed by intermediaries) as well as other market participants by enabling more efficient retrieval, aggregation, and analysis of disclosed information and facilitating comparisons across issuers and time periods.<sup>452</sup> However, filers could incur increased costs under this alternative, with a block text and detail tagging requirement imposing greater costs than a block text tagging-only requirement. In the Proposing Release, the Commission noted that such costs would be incremental to the costs that registrants already incur to structure financial statement and cover page disclosures in the Inline XBRL format and that concerns as to filer cost might be partially alleviated by the overall decline in the costs of XBRL tagging over time, including for small public companies.<sup>453</sup> In

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<sup>451</sup> See letters from XBRL US dated April 28, 2020 (“XBRL US”); Data Coalition dated April 28, 2020 (“Data Coalition”); CFA & CII; D. Jamieson.

<sup>452</sup> See Rel. No. 33-10514 (Jun. 28, 2018), Inline XBRL Filing of Tagged Data [83 FR 40846 (Aug. 16, 2018)] (“Inline XBRL Adopting Release”), at 40851, footnote 71 and accompanying text, and 40862. See also, e.g., Mohini Singh, *Data and Technology: How Information is Consumed in the New Age*, CFA Institute: Data Technology (Jul. 3, 2018) (describing examples of analytical, benchmarking, and regulatory XBRL usage); Chunhui Liu, Tawei Wang, and Lee J. Yao, *XBRL’s Impact on Analyst Forecast Behavior: An Empirical Study*, 33 J. Acct. & Pub. Pol’y 69 (2014) (finding that XBRL adoption has significantly increased information quantity and quality, as measured by analyst following and forecast accuracy).

<sup>453</sup> A 2018 AICPA pricing survey of 1,032 reporting companies with \$75 million or less in market capitalization found an average cost of \$5,850 per year, a median cost of \$2,500 per year, and a maximum cost of \$51,500 per year for fully outsourced XBRL creation and filing, representing a 45% decline in average cost and a 69% decline in median cost since 2014. See AICPA, “XBRL costs for small reporting companies have declined 45%

response to a request for comment on whether current XBRL-tagging requirements reliably facilitate compilation and comparison of certain financial information, and a separate request for comment as to whether to require MD&A to be structured in Inline XBRL format, one commenter recommended reconsidering current XBRL requirements more broadly, stating concerns about the cost and data quality.<sup>454</sup> This commenter also stated that XBRL should be optional and provided specific information based on a survey finding that issuers incur substantial costs associated with XBRL despite the fact that less than ten percent “observ[e] active analyst or investor use of the XBRL data.”<sup>455</sup> As discussed above, the final amendments emphasize MD&A’s principles-based framework, which encourages registrants to provide meaningful disclosure that is tailored to their specific facts and circumstances. This may make MD&A less comparable across issuers, thereby reducing the benefits of this alternative. As a result, we did not adopt this alternative.

## V. PAPERWORK REDUCTION ACT

### A. Summary of the Collections of Information

Certain provisions of our rules, schedules, and forms that would be affected by the final

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since 2014,” *available at* <https://www.aicpa.org/InterestAreas/FRC/AccountingFinancialReporting/XBRL/DownloadableDocuments/XBRL%20Costs%20for%20Small%20Companies.pdf>. *See also* Mohini Singh, *The Cost of Structured Data: Myth vs. Reality*, CFA Institute: Survey (Aug. 2017), *available at* <https://www.cfainstitute.org/-/media/documents/survey/the-cost-of-structured-data-myth-vs-reality-august-2017.ashx>.

<sup>454</sup> *See* letter from Nasdaq.

<sup>455</sup> *Id.* (stating that a “2019 Nasdaq survey of 151 issuers found that they spend, on average, over \$334,000 per firm per quarter to outside vendors, lawyers, and other advisors to address the requirement of quarterly reporting, including \$20,000 per firm per quarter in XBRL costs alone. Meanwhile, only eight percent of issuers reported observing active analyst or investor use of XBRL data.”). *See also* letter from Nasdaq, Inc. dated March 21, 2019 to the Request for Comment on Earnings Releases and Quarterly Reports, Release No. 33-10588 (Dec. 18, 2018) [83 FR 65601 (Dec. 21, 2018)] (providing selected survey results including an average response of \$20,000, a median response of \$7,500, and a maximum response of \$350,000 in XBRL costs per quarter). Comment letters related to the Request for Comment on Earnings Releases and Quarterly Reports are *available at* <https://www.sec.gov/comments/s7-26-18/s72618.htm>.

amendments contain “collection of information” requirements within the meaning of the PRA.<sup>456</sup> The Commission published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>457</sup> The hours and costs associated with preparing, filing, and sending the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the collections of information are:

- “Form 1-A” (OMB Control No. 3235-0286);
- “Form 10” (OMB Control No. 3235-0064);
- “Form 10-Q” (OMB Control No. 3235-0070);
- “Form 10-K” (OMB Control No. 3235-0063);
- “Schedule 14A” (OMB Control No. 3235-0059);
- “Form 20-F” (OMB Control No. 3235-0288);
- “Form 40-F” (OMB Control No. 3235-0381);
- “Form F-1” (OMB Control No. 3235-0258);
- “Form F-4” (OMB Control No. 3235-0325);
- “Form N-2” (OMB Control No. 3235-0026);

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<sup>456</sup> 44 U.S.C. 3501 et seq.

<sup>457</sup> 44 U.S.C. 3507(d); 5 CFR 1320.11.

“Form S-1” (OMB Control No. 3235-0065);

“Form S-4” (OMB Control No. 3235-0324);

“Form S-11” (OMB Control No. 3235-0067);

The Commission adopted all of the existing regulations, schedules, and forms pursuant to the Securities Act, the Exchange Act, and/or the Investment Company Act. The regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions.

A description of the final amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the final amendments can be found in Section IV above.

#### **B. Summary of Comment Letters and Revisions to PRA Estimates**

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that directly addressed the PRA analysis of the proposed amendments. As discussed, above, however, we have made some changes to the proposed amendments as a result of comments received. We have revised our estimates from the Proposing Release accordingly, as discussed in more detail below.

### C. Effects of the Amendments on the Collections of Information

The following PRA Table 1 summarizes the estimated effects of the final amendments on the paperwork burdens associated with the affected collections of information listed in Section V.A.

**PRA Table 1. Estimated Paperwork Burden Effects of the Final Amendments**

Final Amendments and Effects	Affected Collections of Information	Estimated Net Effect*
<p><b>Item 301: Selected Financial Data</b></p> <ul style="list-style-type: none"> <li>• Elimination of Item 301 requirement to furnish selected financial data for each of the registrant’s last five fiscal years because Item 303 already calls for disclosure of material trend information, which would decrease the paperwork burden by reducing repetitive information about a registrant’s historical performance.</li> <li>• Replacing the reference to Item 301 with a reference to Rule 1-02(bb) of Regulation S-X in Items 1112, 1114, and 1115 of Regulation AB would generally result in similar disclosure being presented under these Items, and therefore not affect the burden estimate.</li> </ul>	<ul style="list-style-type: none"> <li>• Forms 10, 10-K, S-1, S-4, and S-11</li> <li>• Schedule 14A**</li> <li>• Form N-2<sup>±</sup></li> <li>• Forms SF-1 and SF-3</li> </ul>	<ul style="list-style-type: none"> <li>• 2 hour net decrease in compliance burden per form</li> <li>• 0.2 hour net decrease in compliance burden per schedule</li> <li>• 0.3 hour net decrease in compliance burden per form</li> <li>• No change in compliance burden per form</li> </ul>
<p><b>Item 302(a): Supplementary Financial Information</b></p> <ul style="list-style-type: none"> <li>• Streamlining Item 302(a) to eliminate disclosure requirement except when there are one or more retrospective changes to the statements of comprehensive income 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 included by Article 3 of Regulation S-X that, individually or in the aggregate, are material.</li> </ul>	<ul style="list-style-type: none"> <li>• Forms 10, 10-K, S-1, S-4, and S-11</li> <li>• Schedule 14A**</li> <li>• Form N-2<sup>±</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 2 hour net decrease in compliance burden per form</li> <li>• 0.2 hour net decrease in compliance burden per schedule</li> <li>• 0.3 hour net decrease in compliance burden per form</li> </ul>
<p><b>Item 303(a): Full Fiscal Years</b></p> <p><u>Restructuring and Streamlining:</u></p> <ul style="list-style-type: none"> <li>• Establishing a new paragraph Item 303(a), to emphasize the purpose of the MD&amp;A section at the outset to clarify and focus registrants is expected to have a minimal impact on the paperwork burden, as the change would codify existing guidance. <i>Estimated burden increase: 0.1 hour per form and per schedule.</i></li> <li>• Amendments to streamline the text of new Item 303 would have no effect on the paperwork burden because these amendments are clarifications of existing requirements.</li> </ul> <p><u>Liquidity and Capital Resources:</u></p> <ul style="list-style-type: none"> <li>• Expanding Item 303(b)(1)(ii) (current Item 303(a)(2)) to also require a discussion of material cash requirements, in</li> </ul>	<ul style="list-style-type: none"> <li>• Forms 10, 10-K, 10-Q, S-1, S-4, and S-11</li> <li>• Form 1-A<sup>^</sup></li> <li>• Schedule 14A**</li> <li>• Form N-2<sup>±</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 2.1 hour net increase in compliance burden per form</li> <li>• 0.3 hour net increase in compliance burden per form</li> <li>• 0.3 hour net increase in compliance burden per schedule</li> <li>• 0.5 hour net increase in compliance burden per form</li> </ul>



addition to commitments for capital expenditures, would increase the paperwork burden.

- Clarifying the liquidity and capital resources disclosure requirements of Item 303(b)(1), including to specifically require disclosure of material cash requirements from known contractual and other obligations.

*Estimated burden increase: 1.5 hour per form and 0.2 hour increase per schedule.*<sup>Ω</sup>

Results of Operations – Known Trends or Uncertainties:

- Amending Item 303(b)(2)(ii) (current Item 303(a)(3)(ii)) to clarify that a registrant should disclose *reasonably likely* changes in the relationship between costs and revenues would increase the paperwork burden, although this effect is expected to be minimal because the amendment is consistent with existing guidance. *Estimated burden increase: 1.0 hour per form and 0.1 hour increase per schedule.*

Results of Operations – Net Sales, Revenues, and Line Item Changes:

- Amending Item 303(b) (current Item 303(a)(3), Item 303(a)(3)(iii) and Instruction 4 to Item 303(a)) to clarify that a registrant should include in its MD&A a discussion of the reasons underlying material *changes* from period-to-period in one or more line items could marginally increase the paperwork burden by requiring a more nuanced discussion consistent with the overall objective of MD&A. *Estimated burden increase: 1.0 hour per form and 0.1 hour increase per schedule.*

Results of Operations – Inflation and Price Changes:

- Eliminating the specific reference to inflation within current Item 303(a)(3)(iv) for issuers should marginally reduce the paperwork burden, although such decrease is expected to be minimal. *Estimated burden decrease: 0.5 hours per form and 0.1 hour decrease per schedule.*

Off-Balance Sheet Arrangements:

- Replacing current Item 303(a)(4) with an instruction emphasizing a more principles-based approach with respect to off-balance sheet arrangement disclosures, would reduce duplicative disclosures and decrease the paperwork burden. *Estimated burden decrease: 1.0 hour per form and 0.1 hour decrease per schedule.*
- Amending Items 2.03 and 2.04 of Form 8-K to retain the definition of “off-balance sheet arrangements” that is in current Item 303(a)(4) would not result in any changes in reporting obligations under Item 2.03 and Item 2.04 of Form 8-K, and would therefore result in no change in paperwork burden for this form.

Contractual Obligations Table:

- Eliminating current Item 303(a)(5), the requirement that registrants provide a tabular disclosure of contractual obligations, would reduce duplicative disclosures and

<p>decrease the paperwork burden. <i>Estimated burden decrease: 2.0 hour per form and 0.2 hour decrease per schedule.</i></p> <p><u>Critical Accounting Estimates:</u></p> <ul style="list-style-type: none"> <li>• Adopting Item 303(b)(3) to explicitly require disclosure of critical accounting estimates would provide more clarity on the uncertainties involved in creating an accounting policy and how significant accounting policies of registrants may differ. This would increase the paperwork burden. <i>Estimated burden increase: 2.0 hours per form and 0.2 hour increase per schedule.</i></li> </ul>		
<p><b>Item 303(c): Interim Periods</b></p> <ul style="list-style-type: none"> <li>• Amending Item 303(c) (current Item 303(b)) to allow for more flexibility in interim periods compared and eliminating certain instructions and providing cross-references to similar instructions to Item 303(b) would decrease the paperwork burden.</li> </ul>	<ul style="list-style-type: none"> <li>• Forms 10, 10-K, 10-Q, S-1, S-4, and S-11</li> <li>• Form 1-A<sup>^</sup></li> <li>• Schedule 14A<sup>**</sup></li> <li>• Form N-2<sup>±</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 4.0 hour net decrease in compliance burden per form</li> <li>• 0.4 hour net decrease in compliance burden per form</li> <li>• 0.4 hour net decrease in compliance burden per schedule</li> <li>• 0.7 hour net decrease in compliance burden per form</li> </ul>
<p><b>Current Item 303(c): Safe Harbor for Forward-Looking Information</b></p> <ul style="list-style-type: none"> <li>• Eliminating current Item 303(c) as a conforming change would have no effect on the paperwork burden.</li> </ul>		
<p><b>Current Item 303(d): Accommodations for SRCs</b></p> <ul style="list-style-type: none"> <li>• Eliminating current Item 303(d) as a conforming change would have no effect on the paperwork burden.</li> </ul>		
<p><b>Effect on FPIs</b></p> <ul style="list-style-type: none"> <li>• Eliminating Item 3.A and generally conforming Item 5 of Form 20-F to the final amendments to Item 303 would reduce the paperwork burden.</li> <li>• Eliminating the contractual obligations disclosure requirement and replacing the off-balance sheet disclosure requirements in Forms 20-F and 40-F with a principles-based instruction would reduce the paperwork burden.</li> <li>• Amending current Instruction 11 to Item 303 to conform to the hyperinflation disclosure requirements of Form 20-F would not affect the paperwork burden.</li> </ul>	<ul style="list-style-type: none"> <li>• Form 20-F</li> <li>• Form 40-F</li> <li>• Forms F-1 and F-4</li> </ul>	<ul style="list-style-type: none"> <li>• 2.0 hour net decrease in compliance burden per form</li> <li>• 2.0 hour net decrease in compliance burden per form</li> <li>• 3.5 hour net decrease per form</li> </ul>
<p><b>Total</b></p>	<ul style="list-style-type: none"> <li>• Form 1-A</li> </ul>	<ul style="list-style-type: none"> <li>• 0.1 hour net decrease per form</li> </ul>

	<ul style="list-style-type: none"> <li>• Form 10-Q</li> <li>• Forms 10, 10-K, S-1, S-4, and S-11</li> <li>• Schedule 14A</li> <li>• Forms F-1 and F-4</li> <li>• Form 20-F</li> <li>• Form 40-F</li> <li>• Form N-2</li> </ul>	<ul style="list-style-type: none"> <li>• 1.9 hour net decrease per form</li> <li>• 5.90 hour net decrease per form</li> <li>• 0.5 hour net decrease per form</li> <li>• 3.5 hour net decrease per form</li> <li>• 2.0 hour net decrease per form</li> <li>• 2.0 hour net decrease per form</li> <li>• 0.8 hour net decrease per form</li> </ul>
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\*Estimated net effect expressed as an increase or decrease of burden hours *on average* and derived from Commission staff review of samples of relevant sections of the affected forms and schedules.

\*\*The lower estimated average incremental burden for Schedule 14A reflects the Commission staff estimates that no more than 10% of the Schedules 14A filed annually include Item 301–303 disclosures.

± Form N-2 states that disclosure under Items 301–303 of Regulation S-K is only required if “the Registrant is regulated as a business development company under the 1940 Act.” The estimated average incremental burden for Form N-2 reflects the fact that approximately 13% of registrants are BDCs (of the estimated 765 closed-end funds that could file on Form N-2 as of July 20, 2020, only 99 were BDCs. *See Use of Derivatives by Registered Investment Companies and Business Development Companies*, Release No IC-34084 (Nov. 2, 2020) at 273.). The estimated burden has been reduced to adjust for this percentage.

^ In the preparation of Part II of Form 1-A, Regulation A issuers have the option of disclosing either the information required by (i) the Offering Circular format or (ii) Part I of Forms S-1 or S-11 (except for the financial statements, selected financial data, and supplementary information called for by those forms). The burden associated with Form 1-A is affected only to the extent that an issuer chooses to use Part I of these forms. The Commission staff estimates that 10.6% of Form 1-A filings reflect this election.

Ω The estimated burden increase associated with these amendments has been increased from 1.0 hour per form and 0.1 hour per schedule that was reflected in the Proposing Release. *See Proposing Release at 12106.* The increase has been made to account for amended Item 303(b)(1) (clarifying the liquidity and capital resources disclosure requirements of the item).

ϕ The estimated burden decrease has been increased from 1.0 hour per form and 0.2 hours per schedule that was reflected in the Proposing Release. *See Proposing Release at 12106.* Input from commenters suggested that the original estimate did not sufficiently reflect the amount of time required to produce the table of contractual obligations. *See e.g.*, letters from Eli Lilly; FEI; UnitedHealth; Costco.

<sup>3</sup> To the extent that SRCs may face some increased burden as a result of this change, it is reflected in the estimated burden associated with amended Item 303(b)(1).

#### **D. Incremental and Aggregate Burden and Cost Estimates for the Final Amendments**

Below we estimate the incremental and aggregate reductions in paperwork burden as a result of the final amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the nature of their business. We do not believe that the final amendments would change the frequency of responses to the existing collections of information; rather, we estimate that the final amendments would change only the burden per response, as estimated above.

The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a registrant to prepare and review disclosure required under the final amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. PRA Table 2 below sets forth the percentage estimates we typically use for the burden allocation for each collection of information. We also estimate that the average cost of retaining outside professionals is \$400 per hour.<sup>458</sup>

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<sup>458</sup> We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of \$400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

**PRA Table 2. Standard Estimated Burden Allocation for Specified Collections of Information.**

Collection of Information	Internal	Outside Professionals
Forms 1-A, 10-K, 10-Q, 8-K, Schedule 14A	75%	25%
Forms S-1, S-4, S-11, F-1, F-4, SF-1, SF-3, and 10	25%	75%
Forms 20-F and 40-F	25%	75%
Form N-2	25%	75%

PRA Table 3 below illustrates the incremental change to the total annual compliance burden of affected collections of information, in hours and in costs, as a result of the final amendments.

**PRA Table 3. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Final Amendments**

Collection of Information	Number of Estimated Affected Responses (A)*	Burden Hour Reduction per Current Affected Response (B)	Reduction in Burden Hours for Current Affected Responses (C) = (A) x (B)**	Reduction in Company Hours for Current Affected Responses (D) = (C) x 0.25 or 0.75	Reduction in Professional Hours for Current Affected Responses (E) = (C) – (D)	Reduction in Professional Costs for Current Affected Responses (F) = (E) x \$400
S-1	901	5.9	5,316	1,329	3,987	\$1,594,800
S-4	551	5.9	3,251	813	2,438	\$975,200
S-11	64	5.9	378	95	283	\$113,200
F-1	63	3.5	221	55	166	\$66,400
F-4	39	3.5	137	34	103	\$41,200
N-2	298	0.8	238	179	59	\$23,600
1-A	179	0.1	18	14	4	\$1,600
10	216	5.9	1,274	319	955	\$382,000
10-K	8,137	5.9	48,008	36,006	12,002	\$4,800,800
10-Q	22,907	1.9	43,523	32,642	10,881	\$4,352,400
20-F	725	2.0	1,450	363	1,087	\$434,800
40-F	132	2.0	264	66	198	\$79,200
Sch. 14A	5,586	0.5	2,793	2,095	698	\$279,200
Total	39,798	43.8	106,871	74,010	32,861	\$13,144,400

\*The number of estimated affected responses is based on the number of responses in the Commission’s current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average.

\*\*The estimated reductions in Columns (C), (D), and (E) are rounded to the nearest whole number.

The following PRA Table 4 summarizes the requested paperwork burden, including the estimated total reporting burdens and costs, under the final amendments.

**PRA Table 4. Requested Paperwork Burden under the Final Amendments**

Collection of Information	Current Burden			Program Change			Revised Burden		
	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Number of Affected Responses (D)	Reduction in Company Hours (E) <sup>†</sup>	Reduction in Professional Costs (F) <sup>‡</sup>	Annual Responses (G) = (A)	Burden Hours (H) = (B) - (E)	Cost Burden (I) = (C) - (F)
S-1	901	147,208	\$180,319,975	901	1,329	\$1,594,800	901	145,879	\$178,725,175
S-4	551	562,465	\$677,378,579	551	813	\$975,200	551	561,652	\$676,403,379
S-11	64	12,214	\$14,925,768	64	95	\$113,200	64	12,119	\$14,812,568
F-1	63	26,692	\$32,275,375	63	55	\$66,400	63	26,637	\$32,208,975
F-4	39	14,049	\$17,073,825	39	34	\$41,200	39	14,015	\$17,032,625
N-2	298	94,350	\$6,269,752	298	179	\$23,600	298	94,171	\$6,246,152
1-A	179	98,396	\$13,111,912	179	14	\$1,600	179	98,382	\$13,110,312
10	216	11,855	\$14,091,488	216	319	\$382,000	216	11,536	\$13,709,488
10-K	8,137	14,198,780	\$1,895,224,719	8,137	36,006	\$4,800,800	8,137	14,162,774	\$1,890,423,919
10-Q	22,907	3,209,558	\$425,120,754	22,907	32,642	\$4,352,400	22,907	3,176,916	\$420,768,354
20-F	725	479,304	\$576,875,025	725	363	\$434,800	725	478,941	\$576,440,225
40-F	132	14,237	\$17,084,560	132	66	\$79,200	132	14,171	\$17,005,360
Sch. 14A	5,586	551,101	\$73,480,012	5,586	2,095	\$279,200	5,586	549,006	\$73,200,812
Total	39,798	19,399,109	\$3,941,630,388	39,798	74,010	\$13,144,400	39,798	19,325,099	\$3,928,485,988

<sup>†</sup> From Column (D) in PRA Table 3.

<sup>‡</sup> From Column (F) in PRA Table 3.

## VII. FINAL REGULATORY FLEXIBILITY ACT CERTIFICATION

In connection with the Proposing Release, the Commission certified that the proposals would not, if adopted, have a significant economic impact on a substantial number of small entities. The certification, including the factual bases for the determination, was published with the Proposing Release in satisfaction of Section 605(b) of the Regulatory Flexibility Act (“RFA”).<sup>459</sup> The Commission requested comment on the certification and received none.

<sup>459</sup> 5 U.S.C. 601 *et seq.*

We are adopting the amendments as proposed with several minor changes and two substantive changes relating to Item 302(a), disclosure of selected quarterly financial data of specified operating results, and Item 303, disclosure of liquidity and capital resources. As discussed above, we believe that the impact on small entities as a result of these changes will not be significant.<sup>460</sup> We expect the final amendments will reduce the paperwork burden for all registrants, including small entities.<sup>461</sup> Although, we anticipate that the economic impact of the reduction in the paperwork burden will be modest, the reduction in the burden will be beneficial to all registrants, including small entities. Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the final amendments will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

#### **VIII. STATUTORY AUTHORITY**

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3(b), 12, 13, 14, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 8, 24, 30, and 38 of the Investment Company Act of 1940, as amended.

#### **List of Subjects**

#### **17 CFR Part 210**

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<sup>460</sup> This includes elimination of current Item 303(d), which provides, in relevant part, an accommodation for SRCs with respect to the contractual obligations table required by current Item 303(a)(5). Because the basis for current Item 303(d) was a reduction in the burdens associated with the preparation of the contractual obligations table itself, and because we are eliminating that prescriptive requirement, we do not believe that the elimination of current Item 303(d) will have a significant impact on SRCs. *See* Section II.C.11 *supra*.

<sup>461</sup> *See supra* Section V.D.

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and recordkeeping requirements, Securities, Utilities.

**17 CFR Parts 229, 239, 240, and 249**

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

**TEXT OF THE FINAL RULE AND FORM AMENDMENTS**

In accordance with the foregoing, we are amending title 17, chapter II of the Code of Federal Regulations as follows:

**PART 210 – FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975**

1. The authority citation for part 210 continues to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012), unless otherwise noted.

2. Amend § 210.1-02 by revising paragraphs (bb)(1) introductory text and (bb)(2) to read as follows:

**§ 210.1-02 Definitions of terms used in Regulation S-X (17 CFR part 210).**

\* \* \* \* \*

(bb) \* \* \*

(1) Except as provided in paragraph (bb)(2) of this section, *summarized financial information* referred to in this part shall mean the presentation of summarized information as to



the assets, liabilities and results of operations of the entity for which the information is required. Summarized financial information shall include the following disclosures, which may be subject to appropriate variation to conform to the nature of the entity's business:

\* \* \* \* \*

(2) Summarized financial information for unconsolidated subsidiaries and 50 percent or less owned persons referred to in and required by § 210.10-01(b) for interim periods shall include the information required by paragraph (bb)(1)(ii) of this section.

\* \* \* \* \*

**PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K**

3. The authority citation for part 229 continues to read as follows:

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78 mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq.*; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

**§ 229.10 [Amended]**

4. Amend § 229.10(f) introductory text in the table by removing entries for “Item 301” and “Item 303”.

**§ 229.301 [Removed and Reserved]**

5. Remove and reserve § 229.301.

6. Amend § 229.302 by revising paragraph (a) to read as follows:

**§ 229.302 (Item 302) Supplementary financial information.**

(a) *Disclosure of material quarterly changes.* When there are one or more retrospective changes to the statements of comprehensive income for any of the quarters within the two most recent fiscal years or any subsequent interim period for which financial statements are included or are required to be included by §§ 210.3-01 through 210.3-20 of this chapter (Article 3 of Regulation S-X) that individually or in the aggregate are material, provide an explanation of the reasons for such material changes and disclose, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the statements of comprehensive income as specified in § 210.1-02(bb)(1)(ii) of this chapter (Rule 1-02(bb)(1)(ii) of Regulation S-X) and earnings per share reflecting such changes.

(1) If the financial statements to which this information relates have been reported on by an accountant, appropriate professional standards and procedures, as enumerated in Auditing Standards issued by the Public Company Accounting Oversight Board (“PCAOB”), shall be followed by the reporting accountant with regard to the disclosure required by this paragraph (a).

(2) This paragraph (a) applies to any registrant, except a foreign private issuer, that has securities registered pursuant to sections 12(b) (15 U.S.C. 78l(b)) (other than mutual life insurance companies) or 12(g) of the Exchange Act (15 U.S.C. 78l(g)) after the registrant’s initial registration of securities under these sections.

(3) A registrant that qualifies as a smaller reporting company, as defined by § 229.10(f)(1), is not required to provide the information required by this section.

\* \* \* \* \*

7. Revise § 229.303 to read as follows:

**§ 229.303 (Item 303) Management’s discussion and analysis of financial condition and results of operations.**

(a) *Objective.* The objective of the discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources. The discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily 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 discussion and analysis must be of the financial statements and other 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. A discussion and analysis that meets the requirements of this paragraph (a) is expected to better allow investors to view the registrant from management's perspective.

(b) *Full fiscal years.* The discussion of financial condition, changes in financial condition and results of operations must provide information as specified in paragraphs (b)(1) through (3) of this section and such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Where the financial statements reflect material changes from period-to-period in one or more line items, including where material changes within a line item offset one another, describe the underlying reasons for these material changes in quantitative and qualitative terms. Where in the registrant's judgment a discussion of segment information and/or of other subdivisions (e.g., geographic areas, product lines) of the registrant's business would be

necessary to an understanding of such business, the discussion must focus on each relevant reportable segment and/or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity and capital resources.* Analyze the registrant's ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in the short-term (i.e., the next 12 months from the most recent fiscal period end required to be presented) and separately in the long-term (i.e., beyond the next 12 months). The discussion should analyze material cash requirements from known contractual and other obligations. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. As part of this analysis, provide the information in paragraphs (b)(1)(i) and (ii) of this section.

(i) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(ii) *Capital resources.* (A) Describe the registrant's material cash requirements, including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements and the general purpose of such requirements.

(B) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any reasonably likely material changes in the mix and relative cost of such resources. The discussion must consider changes among equity, debt, and any off-balance sheet financing arrangements.

(2) *Results of operations.* (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, would be material to an understanding of the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that are reasonably likely to 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 change in the relationship must be disclosed.

(iii) If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of goods or services being sold or to the introduction of new products or services.

(3) *Critical accounting estimates.* Critical accounting estimates are those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant. 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 or results of operations to the extent the information is material and reasonably available. This information

should include why each critical accounting 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 methods, assumptions and estimates underlying its calculation.

*Instructions to paragraph (b):* 1. Generally, the discussion must cover the periods covered by the financial statements included in the filing and the registrant may use any presentation that in the registrant's judgment enhances a reader's understanding. A smaller reporting company's discussion must cover the two-year period required in §§ 210.8-01 through 210.8-08 of this chapter (Article 8 of Regulation S-X) and may use any presentation that in the registrant's judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, discussion about the earliest of the three years may be omitted if such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with § 229.303 (Item 303 of Regulation S-K), provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found. An emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b-2 of this chapter (Rule 12b-2 of the Exchange Act), may provide the discussion required in paragraph (b) of this section for its two most recent fiscal years if, pursuant to Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)), it provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of the emerging growth company's common equity securities.

2. If the reasons underlying a material change in one line item in the financial statements also relate to other line items, no repetition of such reasons in the discussion is required and a

line-by-line analysis of the financial statements as a whole is neither required nor generally appropriate. Registrants need not recite the amounts of changes from period to period if they are readily computable from the financial statements. The discussion must not merely repeat numerical data contained in the financial statements.

3. Provide the analysis in a format that facilitates easy understanding and that supplements, and does not duplicate, disclosure already provided in the filing. For critical accounting estimates, this disclosure must supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

4. For the liquidity and capital resources disclosure, discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet. Except where it is otherwise clear from the discussion, the registrant must discuss those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition.

5. Where financial statements presented or incorporated by reference in the registration statement are required by § 210.4-08(e)(3) of this chapter (Rule 4-08(e)(3) of Regulation S-X) to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity must include a discussion of the nature and extent of such restrictions and the impact such restrictions have had or are reasonably likely to have on the ability of the parent company to meet its cash obligations.

6. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See 17 CFR 230.175 [Rule 175 under the Securities Act], 17 CFR 240.3b-6 [Rule 3b-6 under the Exchange Act], and Securities Act Release No. 6084 (June 25, 1979).

7. All references to the registrant in the discussion and in this section mean the registrant and its subsidiaries consolidated.

8. Discussion of 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity under U.S. GAAP.

9. If the registrant is a foreign private issuer, briefly discuss any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, its operations or investments by United States nationals. The discussion must also consider the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited interim financial statements are filed. See § 210.3-20(c) of this chapter (Rule 3-20(c) of Regulation S-X) for a



discussion of cumulative inflation rates that may trigger the requirement in this instruction 9 to this paragraph (b).

10. If the registrant is a foreign private issuer, the discussion must focus on the primary financial statements presented in the registration statement or report. The foreign private issuer must refer to the reconciliation to United States generally accepted accounting principles and discuss any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes are necessary for an understanding of the financial statements as a whole, if applicable.

11. The term *statement of comprehensive income* is as defined in § 210.1-02 of this chapter (Rule 1-02 of Regulation S-X).

(c) *Interim periods*. If interim period financial statements are included or are required to be included by 17 CFR 210.3 [Article 3 of Regulation S-X], a management's discussion and analysis of the financial condition and results of operations must be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (c)(1) and (2) of this section. The discussion and analysis must include a discussion of material changes in those items specifically listed in paragraph (b) of this section.

(1) *Material changes in financial condition*. Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also must be discussed. If discussions of changes from both the end and the corresponding interim date of

the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations.* (i) Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which a statement of comprehensive income is provided and the corresponding year-to-date period of the preceding fiscal year.

(ii) Discuss any material changes in the registrant's results of operations with respect to either the most recent quarter for which a statement of comprehensive income is provided and the corresponding quarter for the preceding fiscal year or, in the alternative, the most recent quarter for which a statement of comprehensive income is provided and the immediately preceding sequential quarter. If the latter immediately preceding sequential quarter is discussed, then provide in summary form the financial information for that immediately preceding sequential quarter that is subject of the discussion or identify the registrant's prior filings on EDGAR that present such information. If there is a change in the form of presentation from period to period that forms the basis of comparison from previous periods provided pursuant to this paragraph, the registrant must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

*Instructions to paragraph (c):* 1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information must be prepared pursuant to this paragraph (c) and the discussion of the full fiscal year's information must be prepared pursuant to paragraph (b) of this section. Such discussions may be combined. Instructions 2, 3, 4, 6, 8, and 11 to paragraph (b) of this section apply to this paragraph (c).

2. The registrant's discussion of material changes in results of operations must identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

8. Amend § 229.914 by revising paragraph (a) to read as follows:

**§ 229.914 (Item 914) Pro forma financial statements: selected financial data.**

(a) In addition to the information required by § 229.302 (Item 302 of Regulation S-K), for each partnership proposed to be included in a roll-up transaction provide: cash and cash equivalents, total assets at book value, total assets at the value assigned for purposes of the roll-up transaction (if applicable), total liabilities, general and limited partners' equity, net increase (decrease) in cash and cash equivalents, net cash provided by operating activities, distributions; and per unit data for net income (loss), book value, value assigned for purposes of the roll-up transaction (if applicable), and distributions (separately identifying distributions that represent a return of capital). This information must be provided for the previous two fiscal years. Additional or other information must be provided if material to an understanding of each partnership proposed to be included in a roll-up transaction.

\* \* \* \* \*

9. Amend § 229.1112 by revising paragraph (b)(1) and Instruction 3.a. to paragraph (b) to read as follows:

**§ 229.1112 (Item 1112) Significant obligors of pool assets.**

\* \* \* \* \*

(b) \* \* \*

(1) If the pool assets relating to a significant obligor represent 10% or more, but less than 20%, of the asset pool, provide summarized financial information, as defined by § 210.1-02(bb)

of this chapter (Rule 1-02(bb) of Regulation S-X), for the significant obligor for each of the last three fiscal years (or the life of the significant obligor and its predecessors, if less), provided, however, that for a significant obligor under § 229.1101(k)(2) (Item 1101(k)(2) of Regulation AB), only net operating income for the most recent fiscal year and interim period is required.

\* \* \* \* \*

*Instructions to Item 1112(b):* \* \* \*

3. \* \* \*

a. If the summarized financial information required by paragraph (b)(1) of this section is presented on a basis of accounting other than U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), then present a reconciliation to U.S. GAAP and 17 CFR part 210 (Regulation S-X), pursuant to Item 17 of Form 20-F. If a reconciliation is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the summarized financial information from those accepted in the U.S.

\* \* \* \* \*

10. Amend § 229.1114 by revising paragraph (b)(2)(i) and Instruction 4a. to paragraph (b) to read as follows:

**§ 229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) If any entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any offered class of the asset-backed securities, provide summarized financial information, as defined by § 210.1-02(bb) of this chapter (Rule 1-02(bb) of Regulation S-X), for each such entity or group of affiliated entities for each of the last three fiscal years (or the life of the entity or group of affiliated entities and any predecessors, if less).

\* \* \* \* \*

*Instruction 4 to Item 1114(b).* \* \* \*

a. If the summarized financial information required by paragraph (b)(1) of this section is presented on a basis of accounting other than U.S. GAAP or IFRS as issued by the IASB, then present a reconciliation to U.S. GAAP and 17 CFR part 210 (Regulation S-X), pursuant to Item 17 of Form 20-F. If a reconciliation is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the summarized financial information from those accepted in the U.S.

\* \* \* \* \*

11. Amend § 229.1115 by revising paragraph (b)(1) to read as follows:

**§ 229.1115 (Item 1115) Certain derivatives instruments.**

\* \* \* \* \*

(b) \* \* \*

(1) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 10% or more, but less

than 20%, provide summarized financial information, as defined by § 210.1-02(bb) of this chapter (Rule 1-02(bb) of Regulation S-X), for such entity or group of affiliated entities for each of the last three fiscal years (or the life of the entity or group of affiliated entities and any predecessors, if less).

\* \* \* \* \*

**PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

12. The authority citation for part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

\* \* \* \* \*

Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78, 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s).

\* \* \* \* \*

13. Amend § 230.419 by revising (f)(1) to read as follows:

**§ 230.419 Offering by blank check companies.**

\* \* \* \* \*

(f) \* \* \*

(1) Furnish to security holders audited financial statements for the first full fiscal year of operations following consummation of an acquisition pursuant to paragraph (e) of this section, together with the information required by § 229.303(b) of this chapter (Item 303(b) of Regulation S-K), no later than 90 days after the end of such fiscal year; and

\* \* \* \* \*

**PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

14. The authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

Sections 239.31, 239.32 and 239.33 are also issued under 15 U.S.C. 78l, 78m, 78o, 78w, 80a-8, 80a-29, 80a-30, 80a-37 and 12 U.S.C. 241.

\* \* \* \* \*

15. Amend Form S-1 (referenced in § 239.11) by:

- a. Removing and reserving Item 11(f) of Part I—Information Required in Prospectus;
- b. Revising paragraphs (f) and (g) of Instruction 1 under “Instructions as to Summary Prospectus”; and
- c. Adding paragraph (h) of Instruction 1 under “Instructions as to Summary Prospectus”.

The revisions and additions read as follows:

**Note: The text of Form S-1 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM S-1**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

**INSTRUCTIONS AS TO SUMMARY PROSPECTUSES**

1. \* \* \*

(f) As to Item 11, a brief statement of the general character of the business done and intended to be done and a brief statement of the nature and present status of any material pending legal proceedings;

(g) A tabular presentation of notes payable, long term debt, deferred credits, minority interests, if material, and the equity section of the latest balance sheet filed, as may be appropriate; and

(h) Subject to appropriate variation to conform to the nature of the registrant's business, provide summarized financial information defined by Rule 1-02(bb)(1)(i) and (ii) of Regulation S-X (§ 210.1-02(bb) of this chapter) in comparative columnar form for the periods for which financial statements are required by Regulation S-X (17 CFR part 210).

\* \* \* \* \*

16. Amend Form S-20 (referenced in § 239.20) by revising Item 7 and paragraph (1) to Item 8 to read as follows:

**Note: The text of Form S-20 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM S-20**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

**PART II INFORMATION NOT REQUIRED IN PROSPECTUS**

\* \* \* \* \*

**Item 7. Financial Statements.**



Include financial statements meeting the requirements of Regulation S-X [17 CFR 210] and the supplementary financial information specified by Item 302 of Regulation S-K [17 CFR 229.302].

**Item 8. Undertakings.**

Furnish the following undertakings:

1. The undersigned registrant hereby undertakes to file a post-effective amendment, not later than 120 days after the end of each fiscal year subsequent to that covered by the financial statements presented herein, containing financial statements meeting the requirements of Regulation S-X [17 CFR part 210] and the supplementary financial information specified by Item 302 of Regulation S-K [17 CFR 229.302].

\* \* \* \* \*

17. Amend Form S-4 (referenced in § 239.25) by:

**Note: The text of Form S-4 does not appear in the Code of Federal Regulations.**

a. Removing and reserving paragraphs (d), (e), and (f) of Item 3 (“Risk Factors, Ratio of Earnings to Fixed Charges and Other Information”) and the related subparagraphs in their entirety and removing the Instruction to paragraph (e) and (f) under Part I, Section A (“Information About the Transaction”);

b. Removing and reserving paragraph (b)(3)(iii) of Item 12 (“Information with respect to S-3 Registrants”) under Part I, Section B (“Information About the Registrant”);

c. Removing and reserving paragraph (a)(3)(iii) of Item 13 (“Incorporation of Certain Information by Reference”) under Part I, Section B (“Information About the Registrant”);

d. Removing and reserving paragraph (f) of Item 14 (“Information with Respect to Registrants Other Than S-3 Registrants”) under Part I, Section B (“Information About the Registrant”); and

e. Removing and reserving paragraphs (b)(3) and (4) of Item 17 (“Information with Respect to Companies Other Than S-3 Companies”) under Part I, Section C (“Information About the Company Being Acquired”).

18. Amend Form F-1 (referenced in § 239.31) by:

a. Revising the paragraph 1(c)(v) under “Instructions as to Summary Prospectuses”; and

b. Adding paragraph 1(c)(vi).

The revision and addition read as follows:

**Note: The text of Form F-1 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM F-1**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

**INSTRUCTIONS AS TO SUMMARY PROSPECTUSES**

1. \* \* \*

(c) \* \* \*

(v) As to Item 4, a brief statement of the general character of the business done and intended to be done and a brief statement of the nature and present status of any material pending legal proceedings;

(vi) Subject to appropriate variation to conform to the nature of the registrant’s business, provide summarized financial information defined by Rule 1-02(bb)(1)(i) and (ii) of Regulation S-X (§

210.1-02(bb) of this chapter) in comparative columnar form for the periods for which financial statements are required by Item 8.A. of Form 20-F. If interim period financial statements are included, the summarized financial information should be updated for that interim period, which may be unaudited, provided that fact is stated. If summarized financial data for interim periods is provided, comparative data from the same period in the prior financial year shall also be provided, except that the requirement for comparative balance sheet data is satisfied by presenting the year-end balance sheet information.

\* \* \* \* \*

19. Amend Form F-4 (referenced in § 239.34) by:

**Note: The text of Form F-4 does not appear in the Code of Federal Regulations.**

a. Removing and reserving paragraphs (d), (e), and (f) of Item 3 (“Risk Factors, Ratio of Earnings to Fixed Charges and Other Information”) and the related subparagraphs in their entirety and removing the Instruction to paragraph (e) and (f) under Part I, Section A (“Information About the Transaction”);

b. Removing and reserving paragraph (b)(3)(v) of Item 12 (“Information With Respect to F-3 Registrants”) under Part I, Section B (“Information About the Registrant”);

c. Removing and reserving paragraph (f) of Item 14 (“Information With Respect to Foreign Registrants Other Than F-3 Registrants”) under Part I, Section B (“Information about the Registrant”); and

d. Removing and reserving paragraph (b)(3) of Item 17 (“Information With Respect to Foreign Companies Other Than F-3 Companies”) under Part I, Section C (“Information About the Company Being Acquired”).

**PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

20. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

Sections 240.14a-1, 240.14a-3, 240.14a-13, 240.14b-1, 240.14b-2, 240.14c-1, and 240.14c-7 also issued under secs. 12, 15 U.S.C. 781, and 14, Pub. L. 99-222, 99 Stat. 1737, 15 U.S.C. 78n;

\* \* \* \* \*

**§ 240.14a-3 [Amended]**

21. Amend § 240.14a-3 by removing and reserving paragraph (b)(5)(i).

**§ 240.14a-101 [Amended]**

22. Amend § 240.14a-101 under Item 14 by removing and reserving paragraphs (b)(8) through (10), the instructions to paragraphs (b)(8), (b)(9), and (b)(10), and paragraph (d)(6).

**PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934**

23. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat.

309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

\* \* \* \* \*

Section 249.310 is also issued under secs. 3(a), 202, 208, 302, 406 and 407, Pub. L. 107-204, 116 Stat. 745.

\* \* \* \* \*

24. Amend Form 20-F (referenced in § 249.220f) by:

a. Removing and reserving General Instruction G(c);

b. Removing and reserving Item 3.A;

c. Removing Instructions to Item 3.A;

d. Revising Item 5;

e. In Instruction 3 of Instructions to Item 8.A.2, removing the final sentence; and

f. In Item 11(b), removing the reference “small business issuers” and adding in its place the term “smaller reporting companies”.

The revision reads as follows:

**Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 20-F**

\* \* \* \* \*

**Item 5. Operating and Financial Review and Prospects**

The purpose of this standard is to provide management's explanation of factors that have materially affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends which are anticipated to have a material effect on the company's financial condition and results of operations in future periods. A discussion and analysis that meets these requirements is expected to better allow investors to view the registrant from management's perspective. Discuss the company's financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required. The discussion must include a quantitative and qualitative description of the reasons underlying material changes, including where material changes within a line item offset one another, to the extent necessary for an understanding of the company's business as a whole. Information provided also must relate to all separate segments and/or other subdivisions (*e.g.*, geographic areas, product lines) of the company. The discussion must include other 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 discussion and analysis must also focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. Provide the information specified below as well as such other information that is necessary for an investor's understanding of the company's financial condition, changes in financial condition and results of operations.

***A. Operating results.*** Provide information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the company's income from operations, indicating the extent to which income was so affected. Describe any other

significant component of revenue or expenses necessary to understand the company's results of operations.

1. If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of products or services being sold or to the introduction of new products or services.

2. If the currency in which financial statements are presented is of a country that has experienced hyperinflation, disclose the existence of such inflation, a five year history of the annual rate of inflation and a discussion of the impact of hyperinflation on the company's business.

3. Provide information regarding the impact of foreign currency fluctuations on the company, if material, and the extent to which foreign currency net investments are hedged by currency borrowings and other hedging instruments.

4. Provide information regarding any governmental economic, fiscal, monetary or political policies or factors that have materially affected, or could materially affect, directly or indirectly, the company's operations or investments by host country shareholders.

***B. Liquidity and capital resources.*** Analyze the registrant's ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in the short-term (*i.e.*, the next 12 months from the most recent fiscal period end required to be presented) and separately in the long-term (*i.e.*, beyond the next 12 months). The discussion should analyze material cash requirements from known contractual and other obligations. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. As part of this analysis, provide the following information:

1. Information regarding the company's liquidity including:

(a) a description of the internal and external sources of liquidity and a brief discussion of any material unused sources of liquidity. Include a statement by the company that, in its opinion, the working capital is sufficient for the company's present requirements, or, if not, how it proposes to provide the additional working capital needed.

(b) an evaluation of the sources and amounts of the company's cash flows, including the nature and extent of any legal or economic restrictions on the ability of subsidiaries to transfer funds to the company in the form of cash dividends, loans or advances and the impact such restrictions have had or are reasonably likely to have on the ability of the company to meet its cash obligations.

2. Information regarding the type of financial instruments used, the maturity profile of debt, currency and interest rate structure. The discussion also must include funding and treasury policies and objectives in terms of the manner in which treasury activities are controlled, the currencies in which cash and cash equivalents are held, the extent to which borrowings are at fixed rates, and the use of financial instruments for hedging purposes.

3. Information regarding the company's material cash requirements, including commitments for capital expenditures, as of the end of the latest financial year and any subsequent interim period and an indication of the general purpose of such requirements and the anticipated sources of funds needed to satisfy such requirements.

**C. Research and development, patents and licenses, etc.** Provide a description of the company's research and development policies for the last three years.

**D. Trend information.** The company must identify material recent trends in production, sales and inventory, the state of the order book and costs and selling prices since the latest



financial year. The company also must discuss, for at least the current financial year, any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the company's net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition.

***E. Critical Accounting Estimates***

A registrant that does not apply in its primary financial statements IFRS as issued by the IASB must discuss information about its critical accounting estimates. This disclosure should supplement, not duplicate, the description of accounting policies in the notes to the financial statements.

Critical accounting estimates. Critical accounting estimates are those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant. 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 the registrant's financial condition or results of operations to the extent the information is material and reasonably available. This information should include why each critical accounting 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 amounts to the material methods, assumptions and estimates underlying its calculation.

***Instructions to Item 5:***

1. Refer to the Commission's interpretive releases (No. 33-6835) dated May 18, 1989, (No. 33-8056) dated January 22, 2002, (No. 33-8350) dated December 19, 2003, (No. 33-9144) dated September 17, 2010, and (No. 33-10751) dated January 30, 2020 for guidance in preparing this discussion and analysis by management of the company's financial condition and results of operations.

2. The discussion must focus on the primary financial statements presented in the document. You should refer to the reconciliation to U.S. GAAP, if any, and discuss any aspects of the differences between foreign and U.S. GAAP, not otherwise discussed in the reconciliation, that you believe are necessary for an understanding of the financial statements as a whole.

3. We encourage you to supply forward-looking information, but that type of information is not required. Forward-looking information is covered expressly by the safe harbor provisions of Section 27A of the Securities Act and Section 21E of the Exchange Act. Forward-looking information is different than presently known data which will have an impact on future operating results, such as known future increases in costs of labor or materials. You are required to disclose this latter type of data if it is material.

4. To the extent the primary financial statements reflect the use of exceptions permitted or required by IFRS 1, the issuer must:

- a. Provide detailed information as to the exceptions used, including:
  - i. An indication of the items or class of items to which the exception was applied; and
  - ii. A description of what accounting principle was used and how it was applied;
- b. Include, where material, qualitative disclosure of the impact on financial condition, changes in financial condition and results of operations that the treatment specified by IFRS would have had absent the election to rely on the exception.

5. An issuer filing financial statements that comply with IFRS as issued by the IASB must, in providing information in response to paragraphs of this Item 5 that refer to pronouncements of the FASB, provide disclosure that satisfies the objective of the Item 5 disclosure requirements. In responding to this Item 5, an issuer need not repeat information contained in financial statements that comply with IFRS as issued by the IASB.

6. Generally, the discussion must cover the periods covered by the financial statements and the registrant may use any format that in the registrant's judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, a discussion of the earliest of the three years may be omitted if such discussion was already included in any other of the registrant's prior filings on EDGAR that required disclosure in compliance with Item 5 of Form 20-F, provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found.

7. Discussion of 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations

related to derivative instruments that are both indexed to and classified in a registrant's own equity, or not reflected in the statement of financial position.

8. For the Liquidity and Capital Resources disclosure, discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet. Except where it is otherwise clear from the discussion, the registrant must indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition.

9. Provide the analysis in a format that facilitates easy understanding and that supplements, and does not duplicate, disclosure already provided in the filing.

Instruction to Item 5.A:

1. You must provide the information required by Item 5.A.2 with respect to hyperinflation if hyperinflation has occurred in any of the periods for which you are required to provide audited financial statements or unaudited interim financial statements in the document. See Rule 3-20(c) of Regulation S-X for a discussion of cumulative inflation rates that trigger this requirement.

\* \* \* \* \*

Item 8. Financial Information

\* \* \* \* \*

Instructions to Item 8.A.2:

\* \* \* \* \*

In initial registration statements, if the financial statements presented pursuant to Item 8.A.2 are prepared in accordance with U.S. generally accepted accounting principles, the earliest

of the three years may be omitted if that information has not previously been included in a filing made under the Securities Act of 1933 or the Securities Exchange Act of 1934.

\* \* \* \* \*

**Item 11. Quantitative and Qualitative Disclosures About Market Risk**

\* \* \* \* \*

(e) Smaller reporting companies. Smaller reporting companies, as defined in § 230.405 of this chapter and § 240.12b-2 of this chapter, need not provide the information required by this Item 11, whether or not they file on forms specially designated as smaller reporting company [or small business issuer] forms.

\* \* \* \* \*

25. Amend Form 40-F (referenced in § 249.240f) by:

- a. Revising General Instruction B.(11) and (12);
- b. Removing and reserving General Instructions B.(13); and
- c. Removing the Instructions following General Instruction B.(13).

The revision reads as follows:

**Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 40-F**

\* \* \* \* \*

B. Information To Be Filed on this Form

\* \* \* \* \*

(11) Off-balance sheet arrangements. To the extent not discussed in management's discussion and analysis that is provided pursuant to General Instruction B.(3) of this form, discuss the 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity, or not reflected in the statement of financial position.

(12) To the extent not discussed in management's discussion and analysis that is provided pursuant to General Instruction B.(3) of this form, analyze material cash requirements from known contractual and other obligations. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. Discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet.

(13) [Reserved]

\* \* \* \* \*

26. Amend Form 8-K (referenced in § 249.308) by revising Item 2.03(c) and 2.03(d) to

read as follows:

**Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 8-K**

\* \* \* \* \*

**INFORMATION TO BE INCLUDED IN THE REPORT**

\* \* \* \* \*

**Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

\* \* \* \* \*

(c) For purposes of this Item 2.03, *direct financial obligation* means any of the following:

(1) a *long-term debt obligation* means a payment obligation under long-term borrowings referenced in FASB ASC paragraph 470-10-50-1 (Debt Topic) as may be modified or supplemented);

(2) a *finance lease obligation* means a payment obligation under a lease that would be classified as a finance lease pursuant to FASB ASC Topic 842, Leases, as may be modified or supplemented;

(3) an *operating lease obligation* means a payment obligation under a lease that would be classified as an operating lease pursuant to FASB ASC Topic 840, as may be modified or supplemented; or

(4) a short-term debt obligation that arises other than in the ordinary course of business.

(d) For purposes of this Item 2.03, *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant has:

(1) Any obligation under a guarantee contract that has any of the characteristics identified in FASB ASC paragraph 460-10-15-4 (Guarantees Topic), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FASB ASC paragraphs 460-10-15-7, 460-10-25-1, and 460-10-30-1.

(2) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(3) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in stockholders' equity in the registrant's statement of financial position, and therefore excluded from the scope of FASB ASC Topic 815, *Derivatives and Hedging*, pursuant to FASB ASC subparagraph 815-10-15-74(a), as may be modified or supplemented; or

(4) Any obligation, including a contingent obligation, arising out of a variable interest (as defined in the FASB ASC Master Glossary), as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the registrant, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the registrant.

\* \* \* \* \*

27. Amend Form 10 (referenced in § 249.310) by revising Item 2 ("Financial Information") to read as follows:



**Note: The text of Form 10 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 10**

**GENERAL FORM FOR REGISTRATION OF SECURITIES  
Pursuant to Section 12(b) or (g) of The Securities Exchange Act of 1934**

\* \* \* \* \*

**INFORMATION REQUIRED IN REGISTRATION STATEMENT**

\* \* \* \* \*

**Item 2. Financial Information.**

Furnish the information required by Items 303 and 305 of Regulation S-K (§§ 229.303 and 229.305 of this chapter).

\* \* \* \* \*

28. Amend Form 10-K (referenced in § 249.310) by:

- a. Removing and reserving General Instruction J.(1)(g);
- b. Revising General Instruction I.(2)(a); and
- c. Removing and reserving Item 6 (“Selected Financial Data”) of Part II.

The revision reads as follows:

**Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 10-K**

**ANNUAL REPORT PURSUANT TO SECTION 13 OR 15D OF**

# THE SECURITIES EXCHANGE ACT OF 1934

## GENERAL INSTRUCTIONS

\* \* \* \* \*

2.\* \* \* \*

(a) Such registrants may omit the information called for by Item 7, Management's Discussion and Analysis of Financial Condition and Results of Operations provided that the registrant includes in the Form 10-K a management's narrative analysis of the results of operations explaining the reasons for material changes in the amount of revenue and expense items between the most recent fiscal year presented and the fiscal year immediately preceding it. Explanations of material changes should include, but not be limited to, changes in the various elements which determine revenue and expense levels such as unit sales volume, prices charged and paid, production levels, production cost variances, labor costs and discretionary spending programs. In addition, the analysis should include an explanation of the effect of any changes in accounting principles and practices or method of application that have a material effect on net income as reported.

\* \* \* \* \*

### **PART 274— FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940**

29. The general authority citation for part 274 continues to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

\* \* \* \* \*

30. Amend Form N-2 (referenced in referenced in §§ 239.14 and 274.11a-1) by revising

paragraph 2 of Item 4 to read as follows:

**Note: The text of Form N-2 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM N-2**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

**Part A – INFORMATION REQUIRED IN A PROSPECTUS**

\* \* \* \* \*

**Item 4. \* \* \***

**2. Business Development Companies.** If the Registrant is regulated as a business development company under the Investment Company Act, furnish in a separate section the information required by Items 302 and 303 of Regulation S-K.

\* \* \* \* \*

By the Commission.

Dated: November 19, 2020.

Vanessa A. Countryman,  
Secretary.