

## Looking Ahead to 2022: Overhauling Your MD&A and Other Financial Disclosures

On November 19, 2020, the Securities and Exchange Commission (“SEC”) adopted amendments to Items 301 (Selected Financial Data), 302 (Supplemental Financial Data) and 303 (Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”)) of Regulation S-K.<sup>1</sup> The aim of these amendments is to promote the principles-based nature of MD&A disclosures and, specifically, “to eliminate duplicative disclosures and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants.”

The amendments became effective on February 10, 2021. While registrants are required to comply with the new rules beginning with their first fiscal year ending on or after August 9, 2021 (meaning that a registrant with a December 31<sup>st</sup> fiscal year end will first have to comply with the amended rule in its annual report for the year ending December 31, 2021), registrants have been permitted to early adopt the amended rules at any time after the effective date (on an item-by-item basis), so long as they provide disclosure responsive to an amended item in its entirety.<sup>2</sup> Registrants will also be required to provide disclosure pursuant to the amended rules in any registration statement or prospectus that on its initial filing date is required to contain financial statements for a period beginning on or after the mandatory compliance date. For public companies that have not already early adopted the amended rules and intend to implement them in connection with the next annual report on Form 10-K, now is a good time to think about the new required MD&A and other disclosures.

The following table summarizes the key amendments to Regulation S-K and may provide assistance as you begin to look ahead to the 2022 reporting season.

Current Rule*	Amended Rule
<b>Selected Financial Data</b>	
Item 301 requires certain registrants to disclose specific items in comparative tabular form for each of their last five fiscal years, as well as for any additional fiscal years necessary to keep the information from being misleading.	<p>Registrants are no longer required to provide selected financial data; however, they are encouraged to consider whether they may need to present trend information within the MD&amp;A for periods earlier than those periods presented in the financial statements.</p> <p>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.</p>
<b>Selected Quarterly Financial Data</b>	
Under current Item 302(a), certain registrants are	Amended Item 302(a) eliminates the blanket requirement that registrants provide two years of quarterly selected financial data. Rather, registrants must provide

<sup>1</sup> See SEC Release No. 33-10890 (Nov. 19, 2020), available at <https://www.sec.gov/rules/final/2020/33-10890.pdf>.

<sup>2</sup> For example, an issuer may now cease to provide disclosure pursuant to former Item 301, and may voluntarily provide disclosure pursuant to amended Item 303 before the mandatory compliance date. If it does so, however, it must (i) provide disclosure pursuant to each provision of amended Item 303 in its entirety and (ii) adhere to the amended rule in any applicable filings going forward.

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<p>required to disclose quarterly financial data of specified operating results and variances in these results from amounts previously reported in a Form 10-Q. Such registrants must provide quarterly 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. Item 302(a) also requires disclosure related to effects of any discontinued operations and unusual or infrequently occurring items, as well as the aggregate effect and nature of year-end or other adjustments that are material to the results of that quarter.</p>	<p>disclosure <i>only</i> 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 aggregate, are material.</p> <p>Registrants must provide (i) an explanation of the reasons for such material changes and (ii) 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 the disclosure 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).</p> <p>Finally, registrants must continue to disclose the effects of any discontinued operations and unusual or infrequently occurring items recognized in each quarter, as well as the aggregate effect and nature of year-end or other adjustments that are material to the results of that quarter.</p> <p>Amended Item 302(a) will apply beginning with the first filing on Form 10-K after a registrant's initial registration of securities under Section 12(b) or 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").</p>
<b>Objective of MD&amp;A</b>	
<p>Item 303 does not contain a succinct objective for MD&amp;A but rather goes straight into the disclosure requirements.</p>	<p>The final rule renames current Item 303(a) as Item 303(b) and establishes a new Item 303(a) covering the purpose of the MD&amp;A. The amended Item 303(a) states that the objective of the MD&amp;A is to provide material information relevant to an assessment of the financial condition and results of operations, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources.</p> <p>The MD&amp;A must focus on:</p> <ul style="list-style-type: none"> <li>• 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; and</li> <li>• Material financial and statistical data that the registrant believes will enhance a reader's understanding of financial condition, cash flows and other changes in financial condition and results of operations.</li> </ul>
<b>Liquidity and Capital Resources</b>	
<p>Item 303(a)(1) requires a registrant to disclose any known trends or any known</p>	<p>The final rule creates a new Item 303(b)(1) that provides overarching requirements related to liquidity and capital resources. Registrants will need to provide material cash "requirements" from known contractual and other</p>

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<p>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.</p> <p>Under Item 303(a)(2), a registrant must also discuss (i) its material commitments for capital expenditures as of the end of the latest fiscal period, (ii) the general purpose of such commitments and the anticipated sources of funds needed to fulfill them, (iii) any known material trends, favorable or unfavorable, in the registrant's capital resources, and (iv) any expected material changes in the mix and relative cost of such capital resources.</p>	<p>obligations, 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. In addition, registrants must address cash requirements both for the short term (i.e., the next 12 months from the most recent fiscal period end) and long term (i.e., beyond 12 months), and such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. Material cash requirements are intended to encompass capital expenditures as well as expenditures for human capital, intellectual property, contractual obligations, off-balance-sheet arrangements, and other such requirements. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements.</p> <p>Registrants must also cover any known material trends, demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in liquidity increasing or decreasing in any material way. If a material deficiency is identified, registrants must indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency.</p>
<b>Results of Operations: Known Trends or Uncertainties</b>	
<p>Item 303(a)(3)(ii) requires a registrant to disclose (i) any known trends or uncertainties that have had or that the registrant reasonably expects will have a material impact on revenues or income and (ii) any known events that "will cause a material change" in the relationship between costs and revenues.</p>	<p>Amended Item 303(b)(2)(ii) requires a registrant to disclose (i) any known trends or uncertainties that have had or are reasonably likely to have (rather than "reasonably expects will have") a material impact on revenues or income and (ii) any known events that are reasonably likely to cause (rather than "will cause") a material change in the relationship between costs and revenues.</p> <p>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.</p>
<b>Results of Operations: Net Sales and Revenues</b>	
<p>Item 303(a)(3)(iii) requires a registrant to discuss certain factors (e.g., changes in</p>	<p>Amended Item 303(b)(2)(iii) was adopted to require disclosure of "material changes" in net sales or revenues (rather than solely "material increases" in these line items). Specifically, it requires registrants to discuss certain factors (e.g.,</p>

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<p>prices or volume) that led to material increases in net sales or revenues in the financial statements. In addition, Instruction 4 to Item 303(a) requires discussion of the causes of material changes from year to year in one or more line items in the consolidated financial statements.</p>	<p>changes in prices or volume) that led to material changes (both material increases and decreases) from period to period in net sales or revenues in the statement of comprehensive income. In addition, registrants must 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.</p>
<p><b>Results of Operations: Inflation and Price Changes</b></p>	
<p>Item 303(a)(3)(iv) requires a registrant to discuss the impact of inflation and changing prices on net sales, revenues, and income from continuing operations.</p>	<p>The amendments eliminate both Item 303(a)(3)(iv) and its related instructions (i.e., Instruction 8 and 9 to this item) in their entirety.</p> <p>Nevertheless, under the principles-based disclosure framework, registrants must still disclose the impact of inflation and price changes if such conditions are part of a known trend or uncertainty that has had, or is reasonably likely to have, a material impact on net sales, revenue, or income from continuing operations. In addition, the discussion of the underlying reasons for material changes from period-to-period may implicate a discussion of inflation and changing prices.</p>
<p><b>Off-Balance-Sheet Arrangements</b></p>	
<p>Under Item 303(a)(4), registrants must disclose, in a separately-captioned section of the MD&amp;A, off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on their financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures, or capital resources that is material to investors.</p>	<p>Registrants are no longer required to disclose their off-balance-sheet arrangements in a separately captioned section; however, a new Instruction 8 to Item 303(b) states that registrants must 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. This disclosure must be provided even when the arrangements result in no obligations being reported in the registrant's consolidated balance sheets.</p> <p>While the SEC indicated a preference for any discussion of off-balance sheet arrangements to be integrated with other aspects of the MD&amp;A (e.g., as part of the broader liquidity and capital resources discussion), it will grant registrants the discretion to continue to discuss off-balance sheet arrangements separately to the extent registrants determine that a separate section would facilitate an understanding of such disclosure or highlight particularly material information about such arrangements.</p>
<p><b>Contractual Obligations Table</b></p>	
<p>Under Item 303(a)(5), certain registrants must disclose, in a tabular format, the aggregate amount of their contractual obligations by</p>	<p>Registrants are no longer required to disclose the aggregate amount of their contractual obligations in a tabular format. Nevertheless, per the language added under "Liquidity and Capital Resources" (discussed above), amended Item 303(b)(1) will require the liquidity and capital resources discussion to include an analysis of the material cash requirements related to known contractual and</p>

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<p>prescribed categories and periods.</p>	<p>other obligations, including specifying the type of obligation and the relevant time period for the related cash requirements.</p> <p>A new Instruction 4 to amended Item 303(b) also provides that the discussion of material cash requirements related to known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet.</p>
<b>Critical Accounting Estimates</b>	
<p>The SEC's 2003 interpretative release outlines the circumstances in which registrants must disclose critical accounting estimates (CAEs) or assumptions.</p>	<p>Amended Item 303(b)(3) codifies the SEC's 2003 interpretative release to explicitly require disclosure of CAEs in the MD&amp;A. It defines CAEs 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 financial condition or results of operations of the registrant." The SEC also added a new instruction specifying that this discussion should supplement, but not duplicate, the description of accounting policies in the notes to the financial statements.</p> <p>For each CAE, the amendments require a registrant provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the CAE 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. In addition, registrant is required to discuss, to the extent material and reasonably available, (i) why the CAE is subject to uncertainty, (ii) how much the CAE or assumption (or both) has changed during the relevant period, and (iii) the sensitivity of reported amounts to the methods, assumptions, and estimates underlying the CAE's calculation.</p> <p>The SEC also added a new instruction specifying that this discussion should supplement, but not duplicate, the description of accounting policies in the notes to the financial statements.</p>
<b>Interim Periods</b>	
<p>Item 303(b) requires a registrant to discuss any material changes in its results of operations presented in its statement of comprehensive income for (i) the most recent fiscal year-to-date period presented and (ii) the corresponding year-to-date period of the preceding fiscal year.</p> <p>The discussion must also cover material changes with respect to (i) the most recently completed fiscal</p>	<p>The requirement to discuss material changes in the results of operations between the most recent year-to-date interim period and the corresponding period of the preceding fiscal year is unchanged.</p> <p>However, registrants may choose to disclose their results of operations of the most recently completed fiscal quarter compared to either the corresponding fiscal quarter of the prior year or the immediately preceding fiscal quarter.</p> <p>A registrant that opts to compare the most recently completed fiscal quarter to the immediately preceding fiscal quarter should either (i) disclose summarized financial information for the preceding fiscal quarter or (ii) identify the prior filings on EDGAR that present such information.</p> <p>A registrant that changes the period used in its comparison is required to explain the reason for the change and present both comparisons in the filing in which the change is announced.</p>

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quarter and (ii) the corresponding fiscal quarter of the prior fiscal year.	
<b>Smaller Reporting Companies</b>	
Item 303(d) provides certain accommodations to smaller reporting companies from the disclosure requirements of Item 303(a).	Given that the final amendments eliminate the two sections referenced in Item 303(d), for which accommodations are provided to smaller reporting companies, this rule is eliminated in its entirety. Smaller reporting companies will, however, continue to be able to rely on Instruction 1 to amended Item 303(b), which provides that a smaller reporting company's MD&A shall cover the two-year period required in Article 8 of Regulation S-X.

\* This table does not address the conforming amendments to the financial disclosure requirements for foreign private issuers, including to Forms 20-F and 40-F, nor does it cover several other rule changes affecting, among other items, roll-up transactions, summary prospectuses, and prospectuses, and various technical and clarifying amendments (including various reporting forms).

For additional information about any of the above developments, or to discuss any questions that you may have, please contact a member of [Maynard Cooper's Public Company Advisory Group](#).

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