

SEC Proposes Amendments to MD&A and Issues Guidance on Key Performance Indicators

JANUARY 30, 2020

Today the SEC released proposed amendments to certain disclosure requirements in Regulation S-K.^[1] According to the SEC, the amendments aim to modernize, simplify, and enhance existing disclosure requirements. A companion release also released today provides additional guidance on key performance indicators and metrics disclosed in MD&A.^[2]

The proposals are based on recommendations from the staff under its recent review of disclosure requirements mandated by Section 108 of the Jumpstart Our Business Startups Act.

Proposed Amendments to Regulation S-K

Highlights of the proposed amendments including the following:

- Elimination of Item 301 (selected financial data), Item 302 (supplementary financial data), Item 303(a)(5) (tabular disclosure of contractual obligations);
- Amendment of Item 303 (MD&A) provisions including adding a new Item 303(a) (objectives) providing for a statement of principal objectives, expanding Item 303 (critical accounting estimates) to reflect existing SEC guidance, revising Item 303(b) (interim MD&A) to allow issuers to compare most recently completed quarter to immediately preceding quarter; and
- Replacement of Item 303(a)(4) (off-balance sheet arrangements) instruction with a revised instruction encouraging registrants to discuss off-balance sheet arrangements in the broader context of MD&A.

The proposal will have a 60-day public comment period following its publication in the Federal Register.

Commission Guidance on Key Performance Indicators and Metrics

The guidance issued today by the SEC addresses key performance indicators and other metrics that issuers disclose under Item 303(a) of Regulation S-K. This item requires disclosure of information not specifically referenced in the item that the issuer believes is necessary to an understanding of its financial condition and results of operations.

The new guidance instructs registrants to consider existing MD&A requirements and other existing regulatory disclosure frameworks (such as GAAP, Regulation G or Item 10 of Regulation S-K) when including metrics in

disclosure filings. According to the SEC, the purpose of this instruction is to ensure that the presentation of any metric, in light of the circumstances under which it is presented, is not misleading to investors. The SEC also expects that registrants consider what additional information may be necessary to provide adequate context for an investor to understand the metric provided. In this regard, the SEC generally expects registrants to include the following disclosures to accompany the metric:

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

Particular attention should be paid to instances when a company changes the method by which it calculates or presents the metric from one period to another. The guidance provides a list of items that may need to be disclosed if material. Potential disclosures in this regard include:

- the differences in the way the metric is calculated or presented compared to prior periods,
- the reasons for such changes,
- the effects of any such change on the amounts or other information being disclosed and on amounts or other information previously reported, and
- such other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.

The SEC also encourages registrants to consider whether a recast of prior metrics to conform to the current presentation is necessary in order to place the current disclosure in an appropriate context.

Finally, the SEC reminds companies in its release to maintain effective disclosure controls and procedures when disclosing material key performance indicators that are derived from the company's internal information.

[1] <https://www.sec.gov/rules/proposed/2020/33-10750.pdf>

[2] <https://www.sec.gov/rules/interp/2020/33-10751.pdf>

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