

Early Compliance with MD&A Amendments Possible for Upcoming 10-Ks

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Last November, the SEC finalized certain amendments that would eliminate selected financial data, two years of supplementary financial information, and MD&A provisions for the contractual obligations table and off-balance sheet disclosure, under certain circumstances, for SEC reports and registration statements.

Companies may now early adopt these amendments for filings made after the rulemaking's effective date of February 9, 2021, as long as they provide disclosure responsive to the amended item in Regulation S-K in its entirety. Compliance is mandatory for the first fiscal year ending on or after August 9, 2021 (210 days after publication in the Federal Register).

Those companies considering early adoption should be aware that certain SEC commissioners opposed the amendments, and particularly elimination of the contractual obligations table, which they consider to be useful disclosure not presented elsewhere. The amendments may be repealed or adjusted under the Biden administration.

We have summarized the amendments, and the applicable sections of Regulation S-K, below. The amendments:

Clarify the MD&A objective, with emphasis on cash flow and forward-looking information (Item 303(a))

Eliminate certain disclosure:

- Five years of selected financial data (Item 301)
- Two years of supplementary financial information; replaced with principles-based disclosure of material retrospective changes (Item 302(a))
- Inflation and price changes; replaced with new instruction to discuss inflation and price changes if they are part of a known trend or uncertainty (Item 303(a)(3)(ii) replaced by amended Item 303(b)(2)(ii))
- Off-balance sheet arrangements; replaced with requirement to discuss such

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arrangements if they are material (Item 303(a)(4) replaced by new Instruction 8 to Item 303(b))

- Contractual obligations table; replaced with principles-based discussion of material cash requirements from known contractual and other obligations in liquidity and capital resources section (Item 303(a)(5) replaced by new Item 303(b)(1))

Provide new flexibility to compare current quarter to *either* prior year period (ie, as is done currently) *or* to immediately preceding quarter (amended Item 303(c)(2)(ii))

Add or clarify certain disclosure:

- Known events that are “reasonably likely to cause a material change in relationship between costs and revenue,” such as increases/decreases in labor costs, pricing changes, inventory adjustments (amended Item 303(b)(2)(ii))
- Material *changes* (not just increases) in net sales or revenue (amended Item 303(b)(2)(iii))
- Underlying reasons for material changes in line items (amended Item 303(b))
- More detail around cash needs over short- (ie, 12 months) and long- (ie, beyond 12 months) term and sources of liquidity (amended Item 303(b)(1))
- Capital resources disclosure to focus on material cash requirements, anticipated sources of funds needed and general purposes of cash requirements (amended Item 303(b)(1))
- Explicit requirement to disclose critical accounting estimates (amended Item 303(b)(3))