

November 24, 2020

SEC Updates Form 20-F and Form 40-F MD&A and Other Financial Disclosure Requirements

The SEC has adopted amendments to the financial disclosure requirements of Regulation S-K, including the requirements (set out in Item 303) governing the presentation of Management's Discussion and Analysis (MD&A) (available [here](#)). These amendments are a part of the SEC's modernization initiatives, and are intended to better focus disclosure on material information while reducing compliance efforts for SEC reporting companies. For a summary of the changes to Regulation S-K, please see our separate Client Alert, "[SEC Updates MD&A and Other Financial Disclosure Requirements](#)." The amendments make several conforming changes to Form 20-F and Form 40-F to ensure that the existing MD&A requirements for foreign private issuers (FPIs) mirror the substantive MD&A requirements set forth in revised Item 303 and the elimination of Item 301 of Regulation S-K.

Form 20-F

Consistent with the elimination of Item 301 of Regulation S-K, the amendments eliminate current Item 3.A of Form 20-F, which requires FPIs to disclose selected financial data for the most recent five fiscal years. The trend disclosure required by this Item will instead be provided in response to Item 5 of Form 20-F.

In order to align current Item 5 of Form 20-F, *Operating and Financial Review and Prospects*, with revised Item 303 of Regulation S-K, the final rules amend Item 5 to:

- clarify that the "reasonably likely" threshold should be applied consistently to the disclosure requirements in Item 5;
- eliminate the requirement to provide tabular disclosure of contractual obligations in Item 5.F;
- add to Item 5.B a new principles-based requirement regarding liquidity and capital resources disclosures that requires disclosure of liquidity and capital resources on a short-term and long-term basis, including an analysis of material cash requirements;
- modify Item 5.E to explicitly require disclosure of critical accounting estimates to the extent reasonably available and material;
- revise the forepart of Item 5 to clarify the purpose of MD&A and highlight its objectives by specifying that Item 5 disclosure should:

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- include statistical data that will improve a reader’s understanding of the registrant’s financial condition, changes in financial condition and results of operations;
 - focus on material events and uncertainties known to management that would result in reported financial information not being indicative of future operating results or future financial condition;
 - include quantitative and qualitative description of the reasons underlying material changes, including where material changes within a line item offset each other;
 - provide a narrative explanation of the registrant’s financial statements that enables investors to see the registrant “through the eyes of management;” and
 - provide information relating to the registrant’s other subdivisions, such as geographic areas or product lines;
- delete Item 5.E, which requires disclosure of off-balance sheet arrangements, and replace it with a principles-based instruction;
 - eliminate from Item 5.A.2 the requirement to discuss the impact of inflation, and require only the disclosure of the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited financial statements are filed; and
 - amend Item 5.D, which currently requires FPIs to identify “the most significant recent trends,” to instead require disclosure of “material trends,” consistent with the MD&A’s focus on materiality.

Form 40-F

The amendments revise Form 40-F to align it with revised Item 303 of Regulation S-K, including:

- a replacement of the contractual obligations disclosure requirement with a principles-based instruction that requires, to the extent it is not already provided in the MD&A required under Canadian law, analysis of material cash requirements from known contractual and other obligations; and
- a replacement of the off-balance sheet arrangements disclosure requirement with a principles-based instruction that requires, to the extent it is not already provided in the MD&A required under Canadian law, a discussion of off-balance sheet arrangements that have or are reasonably likely to have a material current or future effect on the registrant’s financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources.

Effectiveness and Transition

The amendments will be effective 30 days after publication in the *Federal Register*. Registrants will be required to apply the amended rules for the first fiscal year ending on or after the date that is 210 days after publication in the *Federal Register* (the “compliance date”), and will be required to apply the amended rules in registration statements and prospectuses that at the time of the initial filing are required to contain financial statements for a period on or after the compliance date.

Registrants may comply with the amended requirements at any time after the effective date, so long as they comply with any amended item in its entirety.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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