

SEC Adopts Final Amendments to Modernize, Simplify and Enhance Regulation S-K Financial Disclosure Requirements



On Nov. 19, the U.S. Securities and Exchange Commission (SEC) adopted final amendments, [available here](#), to Regulation S-K, and related rules and forms, to further “modernize, simplify and enhance” certain financial disclosure requirements in Regulation S-K. Specifically, the amendments eliminate Item 301 (Selected Financial Data) in its entirety and update and simplify Item 302(a) (Supplementary Financial Information) and Item 303 (Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A)). The SEC intends these amendments to eliminate duplicative disclosures, enhance the focus of financial disclosures on material information for the benefit of investors and simplify compliance efforts for companies.

Background

On Jan. 30, the SEC proposed amendments to Regulation S-K, and related rules and forms, to eliminate Item 301 and Item 302 in their entirety and to update, simplify and enhance the disclosure requirements in Item 303. The SEC proposed these amendments as part of its ongoing review and assessment of disclosure requirements in Regulation S-K, which focuses on modernizing and improving disclosure while reducing compliance costs for companies and continuing to provide investors with material information. The final amendments described here reflect the SEC’s consideration of comment letters received in response to the proposed amendments and significant changes in the regulatory and business landscape since the initial adoption of Regulation S-K.

Description of Final Amendments

The following table summarizes the final amendments to Regulation S-K.

Regulation S-K Item	Current Framework	Amended Framework
Current Item 301 Selected Financial Data	Item 301 requires certain companies to furnish selected financial data in comparative tabular form for each of the company's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading.	The final amendments eliminate Item 301. Although companies need not provide tabular disclosure of selected financial data, the SEC encourages companies to consider whether tabular disclosure of relevant financial information as part of an introductory section or overview to MD&A would be appropriate.
Current Item 302 Supplemental Financial Information	Item 302(a) requires certain companies to disclose selected quarterly financial data for each of the two most recent fiscal years, variances in these results from amounts previously reported on Form 10-Q, and the effect of any discontinued operations and unusual or infrequently occurring items, as well as the aggregate effect and the nature of year-end or other adjustments that are material to the results of that quarter.	The final amendments retain Item 302(a) but require disclosure only if a company reports material retrospective changes for any of the quarters within the two most recent fiscal years (and any applicable interim periods). Amended Item 302(a) requires companies to explain such material changes and to disclose, for each affected quarterly period and the fourth quarter in the affected year, financial information reflecting such changes. Amended Item 302(a) applies to the first filing on Form 10-K after a company's initial registration of securities under Sections 12(b) or 12(g) of the Exchange Act.
New Item 303(a) Objective of MD&A	Item 303(a) instructs companies to discuss their financial condition, changes in financial condition and results of operations for full fiscal years, and it lists the items that must be included in this discussion, including liquidity, capital resources, results of operations, off-balance sheet arrangements and contractual obligations.	The final amendments rename Item 303(a) as Item 303(b) and add a new Item 303(a) to succinctly state the objectives of MD&A. New Item 303(a) requires companies to disclose the following: <ul style="list-style-type: none"> ■ Material information relevant to an assessment of financial condition and results of operations. ■ 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 financial condition. ■ Material financial and statistical data that the company believes will enhance an investor's understanding of financial condition, cash flows and other changes in financial condition, and results of operations. New Item 303(a) codifies SEC guidance that a company must provide a discussion and analysis of financial condition that enables investors to see the company "through the eyes of management."
New Item 303(b)(1) and Amended Item 303(b)(1)(ii) Liquidity and Capital Resources – Material Cash Requirements	Item 303(a)(2) requires a company to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, and to discuss the general purpose of and the anticipated sources of funds needed to fulfill such commitments.	The final amendments create new Item 303(b)(1), which sets forth the requirements for liquidity and capital resources disclosures. New Item 303(b)(1) requires a company to broadly disclose its material cash "requirements," including 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.
Amended Item 303(b)(2)(ii) Results of Operations – Known Trends or Uncertainties	Item 303(a)(3)(ii) requires a company to disclose (a) any known trends or uncertainties that have had, or that the company reasonably expects will have, a material impact on revenues or income from continuing operations and (b) any known events that will cause a material change in the relationship between the company's costs and revenues.	Amended Item 303(b)(2)(ii) requires a company to disclose any known events that are <i>reasonably likely</i> to cause (as opposed to <i>will</i> 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 SEC explained that when a company considers whether disclosure of a known event is required, the analysis is based on materiality and what would be considered important by a reasonable investor in making a voting or investment decision. The reasonably likely threshold does not require disclosure of any remote events nor does it set a bright-line percentage threshold by which disclosure is triggered. Rather, the threshold requires an objective assessment of the likelihood that an event will occur balanced with a materiality analysis. If a known trend, demand, commitment, event or uncertainty would reasonably be likely to have a material effect on future results or financial condition, disclosure is required.

Regulation S-K Item	Current Framework	Amended Framework
<p>Amended Item 303(b)(2)(iii)</p> <p>Results of Operations – Net Sales and Revenues</p>	<p>Item 303(a)(3)(iii) states that if a company's financial statements disclose material increases in net sales or revenues, the company must discuss the factors that led to such material increases (such as price increases).</p>	<p>Amended Item 303(b)(2)(iii) requires a company to discuss those factors that led to material changes in net sales or revenues rather than material increases only. If a company's financial statements reveal material changes from period to period in one or more line items, the company must discuss the underlying reasons for these material changes in quantitative and qualitative terms.</p>
<p>Current Item 303(a)(3)(iv) and Current Instructions 8 and 9 to Item 303(a)</p> <p>Results of Operations – Inflation and Price Changes</p>	<p>Item 303(a)(3)(iv) generally requires companies to discuss the impact of inflation and price changes on their net sales, revenue, and income from continuing operations for the three most recent fiscal years.</p> <p>Instruction 8 to Item 303(a) clarifies that a company is only required to provide this disclosure to the extent material.</p> <p>Instruction 9 to Item 303(a) states that companies that elect to disclose this supplementary information may combine such disclosures with the Item 303(a) discussion and analysis or provide it separately (with an appropriate cross-reference).</p>	<p>The final amendments eliminate Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a).</p> <p>Under Amended Item 303, companies must discuss the impact of inflation or changing prices if they are part of a known trend that had, or is reasonably likely to have, a material impact on net sales, revenue or income from continuing operations.</p> <p>Amended Item 303 also requires that, where financial statements reveal material changes from period to period in one or more line items, companies must describe the underlying reasons for these material changes in quantitative and qualitative terms.</p>
<p>New Instruction 8 to Item 303(b)</p> <p>Off-Balance Sheet Arrangements</p>	<p>Item 303(a)(4) requires a company to disclose, in a separately captioned section, its off-balance sheet arrangements that have, or are reasonably likely to have, a current or future effect on its financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources.</p>	<p>The final amendments replace the prescriptive off-balance sheet arrangement definition and disclosure requirement in Item 303(a)(4) with a new “principles-based” Instruction to Item 303(b). The new Instruction requires companies to discuss commitments or obligations, including contingent obligations, arising from arrangements that have, or are reasonably likely to have, a material effect on financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources.</p> <p>The SEC stated that a discussion of off-balance sheet arrangements that is integrated with other aspects of MD&A will produce better disclosure and provide investors a more meaningful understanding of the impact of such arrangements.</p>
<p>Current Item 303(a)(5) and Amended Item 303(b)(1)</p> <p>Contractual Obligations Table</p>	<p>Under Item 303(a)(5), certain companies must disclose in tabular format their known contractual obligations by type, overall payments due, and by four prescribed periods.</p>	<p>The final amendments eliminate Item 303(a)(5) and amend Item 303(b) to require disclosure of material cash requirements from known contractual and other obligations as part of a liquidity and capital resources discussion. The amendments to Item 303(b) emphasize a principles-based approach focused on material short-term (i.e., 12 months) and long-term (i.e., greater than 12 months) 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.</p>
<p>New Item 303(b)(3)</p> <p>Critical Accounting Estimates</p>	<p>Item 303(a) does not require companies to disclose critical accounting estimates. The SEC's 2003 MD&A Interpretive Release addressed critical accounting estimates, stating that, while preparing MD&A, companies should consider whether accounting estimates and judgments could materially affect reported financial information.</p>	<p>The final amendments add new Item 303(b)(3), which explicitly requires disclosure of critical accounting estimates in MD&A. New Item 303(b)(3) defines critical accounting estimates as “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 financial condition or results of operations.”</p> <p>For each critical accounting estimate, a company must disclose 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.</p> <p>Such disclosure should provide quantitative and qualitative information, if quantitative information is reasonably available and material, and should supplement but not duplicate any related disclosures contained in the notes to financial statements.</p>

Regulation S-K Item	Current Framework	Amended Framework
Amended Item 303(c) <i>(Interim Period Discussion)</i>	Item 303(b) requires companies to discuss (a) any material change in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet and (b) any material changes in their results of operations for the most recent fiscal year-to-date period presented in their income statement.	The final amendments amend Item 303(b) (to be renumbered as Item 303(c)) to give companies the flexibility to compare their most recently completed quarter to either the corresponding quarter of the prior year (as currently required) or the immediately preceding quarter. If a company elects to discuss changes from the immediately preceding quarter, the company must provide summary financial information for the immediately preceding quarter or identify the EDGAR filing that presents such information so that it is accessible to the reader. If a company changes the comparison in a subsequent Form 10-Q, it must explain the reason for the change and present both comparisons in the filing where it announces the change.
Current Item 303(c) <i>Safe Harbor for Forward-Looking Information</i>	Item 303(c) states that the safe harbors provided in Section 27A of the Securities Act and Section 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) (tabular disclosure of contractual obligations).	The final amendments eliminate Item 303(c) (because, as discussed above, the final amendments eliminate both Items 303(a)(4) and (5)). While the final amendments still require disclosure of off-balance sheet arrangements and contractual obligations, such disclosure will be integrated into a company's MD&A. The SEC confirmed that eliminating Item 303(c) does not alter the availability of applicable safe harbors for all of amended Item 303.
Current Item 303(d) <i>Smaller Reporting Companies</i>	Item 303(d) states that a smaller reporting company (SRC) may provide Item 303(a)(3)(iv) information for the most recent two fiscal years if it provides financial information on net 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).	The final amendments eliminate Item 303(d). SRCs must provide MD&A disclosure addressing liquidity and capital resources, including disclosure of material cash requirements from known contractual and other obligations pursuant to new Item 303(b).

Compliance Date

The final rules are effective 30 days after their publication in the Federal Register. Companies must apply the amended rules to their first fiscal year ending on or after the date that is 210 days after the publication date (mandatory compliance date). This means that a calendar-year filer must begin complying with the amended disclosure requirements in its annual report on Form 10-K for the fiscal year ending Dec. 31, 2021. A calendar-year filer need not comply with the amended disclosure requirements in any quarterly report on Form 10-Q during the 2021 calendar year. However, prior to the mandatory compliance date such filers may comply with the amended disclosure requirements, on an item-by-item basis, at any time after the effective date as long as they comply with the amended disclosure requirements of the applicable item in its entirety. Companies must 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.

If you are interested in learning more about these amendments, please contact Michael L. Lawhead at mlawhead@bakerlaw.com, Janet A. Spreen at jspreen@bakerlaw.com or your regular BakerHostetler representative.

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