

NOVEMBER 25, 2020

SEC Amends Selected & Supplementary Financial and MD&A Disclosure Rules and Adopts New and Amended Rules on Electronic Signatures

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Overview

Selected & Supplementary Financials and MD&A

On November 19, 2020, the US Securities and Exchange Commission (SEC) issued a [final rule release](#) amending its rules on **Selected & Supplementary Financials** and Management's Discussion & Analysis (MD&A) disclosure required in **10-Ks** and **registration statements**. The amendments are intended to ease disclosure burdens, including by eliminating entirely selected financials and the contractual obligations table.

The amendments are part of a greater effort to simplify disclosure and modernize the disclosure regime in light of technological developments. They signal a move towards a principles-based regime (including a newly stated overarching objective of MD&A), an increased focus on materiality, and codify existing guidance.

Parallel amendments were adopted for 20-Fs (foreign private issuers) and 40-Fs (Canadian companies), and Smaller Reporting Companies.

The rule amendments will become effective 30 days after publication in the Federal Register, which is expected shortly, but compliance with the amended rules won't be required until a company's first fiscal year ending on or after the date that is 210 days after publication in the Federal Register. For calendar-year companies, that will mean mandatory compliance will begin with their **Form 10-K for the 2021 fiscal year that is filed in 2022**.

For **registration statements**, companies will be required to apply the amended rules if the registration statement on its initial filing date is required to contain financial statements for a period on or after the mandatory compliance date. For calendar-year companies, that will mean mandatory compliance for filings including financials for the fiscal year ended December 31, 2021.

Once effective, **early application** of the amended rules is permitted so long as companies provide disclosure responsive to an amended item in its entirety.

Selected Financials

CURRENT DISCLOSURE REQUIREMENT	CHANGES	AMENDED DISCLOSURE REQUIREMENT
5 years of tabular selected annual financial information required to be included <i>Regulation S-K, Item 301</i>	Eliminated	No selected financial information required

- ▶ Still need to disclose **material trends**
 - SEC encouraged companies to consider including a **tabular presentation** of financial information as part of an MD&A **introductory section or overview** to demonstrate material trends

ESG

- ▶ In a note to the adopting release, the SEC noted that in keeping with its principles-based approach to MD&A, it is **not** adding any new requirements to Item 303 with respect to environmental, social or governance (ESG) issues or sustainability matters.
- ▶ In light of a potential change in administration, it should be noted that the two Democratic-appointed Commissioners voted against the amendments noting that the amendments fail to “completely address climate risk.” The joint statement by the dissenting Commissioners notes that improved climate disclosure is important to understand “the systemic risks that climate change poses to global financial stability” and that, in their view, a principles-based approach to disclosure is not sufficient because, to the extent that information is disclosed, it is not uniform and standardized.

Supplementary Financial Information

CURRENT DISCLOSURE REQUIREMENT

2 years of tabular selected **quarterly** financial information required to be included

Regulation S-K, Item 302(a)

CHANGES

Hard requirement replaced with principles-based requirement

AMENDED DISCLOSURE REQUIREMENT

When will supplementary financial information be required?

Supplementary financial information will only be required if 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**

What supplementary financial information will be required to be disclosed?

An explanation of the reasons for such material changes and, 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 which already allows flexibility in the line items presented and was also amended by the SEC further to clarify that the disclosure of summary financial information may vary to conform to the nature of the entity's business) and earnings per share reflecting such changes

Regulation S-K, Item 302(a)

- ▶ **Examples of material changes:** correction of an error; disposition of a business that is accounted for as discontinued operations; a reorganization of entities under common control; or a change in an accounting principle.
- ▶ **IPO companies** and companies reporting solely under Exchange Act Section 15(d) will continue to be exempt from disclosing supplementary financial information
- ▶ Supplementary financial information for affected quarters will be required beginning with the first filing on Form 10-K after the company's initial registration of securities.
- ▶ Post-IPO pre-10-K supplementary financial information will continue to be required in registration statements.
- ▶ Companies can still **voluntarily** provide fourth quarter disclosure or other supplementary financial information, in which case the information would need to be **reviewed** for consistency with the audited financials by the **auditors** under PCAOB AS 2710 (as compared to the more fulsome auditor review under AS 4105.06 that would be required if the supplementary financial information were required to be included)

MD&A

The Objective of MD&A

CURRENT DISCLOSURE REQUIREMENT

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CHANGES

Added new item to state the principal objectives of MD&A

AMENDED DISCLOSURE REQUIREMENT

The objective of MD&A is to disclose:

- ▶ material information relevant to an assessment of the financial condition and results of operations of the company, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources
- ▶ 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. This includes descriptions and amounts of matters that have had a material impact on reported operations as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations.
- ▶ material financial and statistical data that the company believes will enhance a reader's understanding of the company's financial condition, cash flows and other changes in financial condition, and results of operations.

Regulation S-K, Item 303(a)

Segment Information

CURRENT DISCLOSURE REQUIREMENT

If appropriate, must discuss each reportable segment or subdivision (e.g. geographic area)

Item 303(a)

CHANGES

Added product line

AMENDED DISCLOSURE REQUIREMENT

If appropriate, must discuss each relevant segment, subdivision (e.g. geographic area) and **product line**

Item 303(b)

Liquidity & Capital Resources

CURRENT DISCLOSURE REQUIREMENT

Must discuss in MD&A material commitments for capital expenditures as of the end of the latest fiscal period, and indicate the general purpose of and the anticipated sources of funds needed to fulfill such commitments.

Regulation S-K, Item 302(a)(2)

CHANGES

Added requirement to disclose material cash requirements (not just capital expenditures)

AMENDED DISCLOSURE REQUIREMENT

New requirement to disclose **material cash requirements**, 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

Regulation S-K, Item 303(b)(1)

- Discussion must include an analysis of material cash requirements from known contractual and other obligations (such as lease / purchase obligations), including the type of obligation and the relevant time period

Contractual Obligations Table

CURRENT DISCLOSURE REQUIREMENT

Must include a table of contractual obligations
Regulation S-K, Item 303(a)(5)

CHANGES

Eliminated

AMENDED DISCLOSURE REQUIREMENT

Discussion of material contractual obligations required by the enhanced principles-based liquidity and capital resources requirement described above

Regulation S-K, 303(b)(1)

MD&A — Interim Periods

CURRENT DISCLOSURE REQUIREMENT

If a company is required or elects to provide an income statement for the most recent fiscal quarter, the discussion must also cover material changes with respect to that fiscal quarter and the corresponding fiscal quarter in the **preceding fiscal year**.

Regulation S-K Item 303(b)(2)

Companies subject to Rule 3-03(b) of Regulation S-X (oil and gas producing companies) providing statements of comprehensive income for the twelve-month period ended as of the date of the most recent interim balance sheet must discuss material changes of that twelve-month period as compared to the **preceding fiscal year** rather than the preceding period.

Regulation S-K Item 303(b)(2)

CHANGES

Added option to compare to immediately preceding quarter

Deleted such that rules will not be applied differently under S-X 3-03(b) anymore

AMENDED DISCLOSURE REQUIREMENT

Can compare most recently completed quarter to **either** the corresponding quarter of the **preceding fiscal year or** to the **immediately preceding quarter**

Regulation S-K, Item 303(c)

Companies subject to Rule 3-03(b) of Regulation S-X providing statements of comprehensive income for the twelve-month period ended as of the date of the most recent interim balance sheet must compare most recently completed quarter to **either** the corresponding quarter of the **preceding fiscal year or** to the **immediately preceding quarter**

Regulation S-K, Item 303(c)

- ▶ If a company elects to discuss changes from the immediately preceding quarter, the registrant must provide summary financial information that is the subject of the discussion for that quarter or identify the prior EDGAR filing that presents such information so that a reader may have ready access to the prior quarter financial information being discussed.
- ▶ If in a subsequent Form 10-Q, a company **changes the comparison** from the comparison presented in the immediately prior Form 10-Q, the company would be required to explain the reason for the change and present both comparisons in the filing where the change is announced.
- ▶ Still required to discuss any **material changes** in results of operations between the most recent **year-to-date** interim period(s) and the corresponding period(s) of the preceding fiscal year for which statements of comprehensive income are provided (Regulation S-K, Item 303(c))

Off-Balance Sheet Arrangements

CURRENT DISCLOSURE REQUIREMENT

Must disclose certain specified information about off-balance sheet arrangements in a separately captioned section

Regulation S-K, Item 303(a)(4)

CHANGES

Hard requirement item replaced by principles-based instruction

AMENDED DISCLOSURE REQUIREMENT

No separately captioned section required; expected to be incorporated into Liquidity section

Required to 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 the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources even when the arrangement results in no obligation being reported in the company's consolidated balance sheets

Regulation S-K, Instruction 8 to Item 303(b)

Reasons Underlying Material Changes

CURRENT DISCLOSURE REQUIREMENT

MD&A requires narrative discussion of the **causes** of material changes

Regulation S-K, Instruction 4 to Item 303(a)

CHANGES

Changed causes to underlying reasons to emphasize that companies should not just disclose that numerical amounts changed, but more importantly, why

AMENDED DISCLOSURE REQUIREMENT

MD&A requires narrative discussion of the **underlying reasons** for material changes

Regulation S-K, Item 303(b)

Known Trends & Uncertainties

CURRENT DISCLOSURE REQUIREMENT

Must describe any known trends or uncertainties that have had or that the company reasonably expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations.

If the company knows of events that **will cause** a material change in the relationship between costs and revenues, the change in the relationship must be disclosed.

Regulation S-K, Item 303(a)(3)(ii)

CHANGES

Changed “will cause” to “reasonably likely” to cause

AMENDED DISCLOSURE REQUIREMENT

Must disclose known events that are **reasonably likely (based on management’s assessment)** to 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

Regulation S-K, Item 303(b)(2)(ii)

Is Disclosure Required under the “Reasonably Likely” Standard?

	REMOTE	UNKNOWN	LIKELY
YES	✗	✓	✓
Is it reasonably likely the event would have a material effect if it did come to fruition?		if a reasonable investor would consider omission of the information as significantly altering the mix of available information	
NO	✗	✗	✗

Critical Accounting Estimates

CURRENT DISCLOSURE REQUIREMENT	CHANGES	AMENDED DISCLOSURE REQUIREMENT
<p>When preparing MD&A, companies should consider whether accounting estimates and judgments could materially affect reported financial information</p> <p><i>2003 MD&A Interpretive Release (not codified)</i></p>	<p>Codified guidance as a requirement</p>	<p>Explicitly required to disclose critical accounting estimates</p> <p><i>Regulation S-K Item 303(b)(3)</i></p>

- ▶ SEC defined “**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 the registrant’s financial condition or results of operations
- ▶ Should not just repeat **significant accounting policies** from financials footnotes
- ▶ For each critical accounting estimate, must disclose, to the extent material, why the estimate is subject to uncertainty, how much each estimate has changed (or changes in the assumptions) during the relevant period (doesn’t necessarily have to be the reporting period), and the sensitivity of the reported amounts to the methods, assumptions, and estimates underlying the estimate’s calculation
- ▶ Must provide **quantitative** as well as **qualitative** information when reasonably available and will provide material information to investors

Electronic Signatures for SEC Filings

On November 17, 2020, the SEC issued a [final rule release](#) adopting new and amended rules on **electronic signatures** of SEC filings, following the temporary relief the SEC had provided earlier in 2020 in response to the COVID-19 pandemic.

The electronic signature rules amendments will become effective upon publication in the Federal Register, which is expected shortly.

CURRENT MANUAL SIGNATURE REQUIREMENT

- ▶ Each signatory to an electronic SEC filing must manually sign a signature page or “authentication” document before or at the time of the electronic filing to authenticate or otherwise adopt the signature that appears in typed form in the electronic filing
- ▶ Must retain the signature for 5 years, and furnish a copy upon request by the SEC

NEW / AMENDED ELECTRONIC SIGNATURE REQUIREMENT

- ▶ Can electronically sign authentication document if:
 - signatory presents a physical, logical, or digital credential that authenticates the signatory’s individual identity
 - the signing process reasonably provides for non-repudiation of the signature
 - ▶ The SEC defined non-repudiation as “assurance that an individual cannot falsely deny having performed a particular action”
 - the signature is attached, affixed, or otherwise logically associated with the signature page or document being signed
 - the document includes a timestamp to record the date and time of the signature
- ▶ Must still retain the signature for 5 years, and furnish a copy upon request by the SEC
- ▶ Before the first use of an electronic signature, the signatory must **manually** sign a document “attesting that the signatory agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual’s manual signature for purposes of authenticating the signature.”
- ▶ The company must retain the manually signed **attestation** for the duration of time that the signatory may use an electronic signature, and at least for a minimum of seven years after the date of the most recent electronically signed authentication document, and must furnish a copy to the SEC upon request
- ▶ The manually signed attestation can be stored electronically

Electronic Signatures for SEC Filings

Sample Attestation

FOR MANUAL SIGNATURE AUTHORIZING ELECTRONIC SIGNATURES FOR SEC FILINGS

ATTESTATION

I, [Insert Name], hereby attest that pursuant to Regulation S-T Rule 302(b) my electronic signature on any signature page filed with or furnished to the U.S. Securities and Exchange Commission relating to [COMPANY NAME] (the “Company”), or on any other document authenticating, acknowledging or otherwise adopting my typed conformed signature, constitutes the legal equivalent of my manual signature. The Company is authorized to insert my typed conformed signature (“/s/ [NAME]”) in such SEC filings upon receipt by the Company of an email from me approving such SEC filing. I acknowledge that I may not repudiate any electronic signature delivered by me pursuant to this Attestation. This Attestation will expire upon the earlier of (i) such time as I am no longer serving as a director or officer of the Company, except with respect to any required Section 16 filings and (ii) a revocation by me in writing.

[Manual Signature]

Name: []

Title: []

Date []

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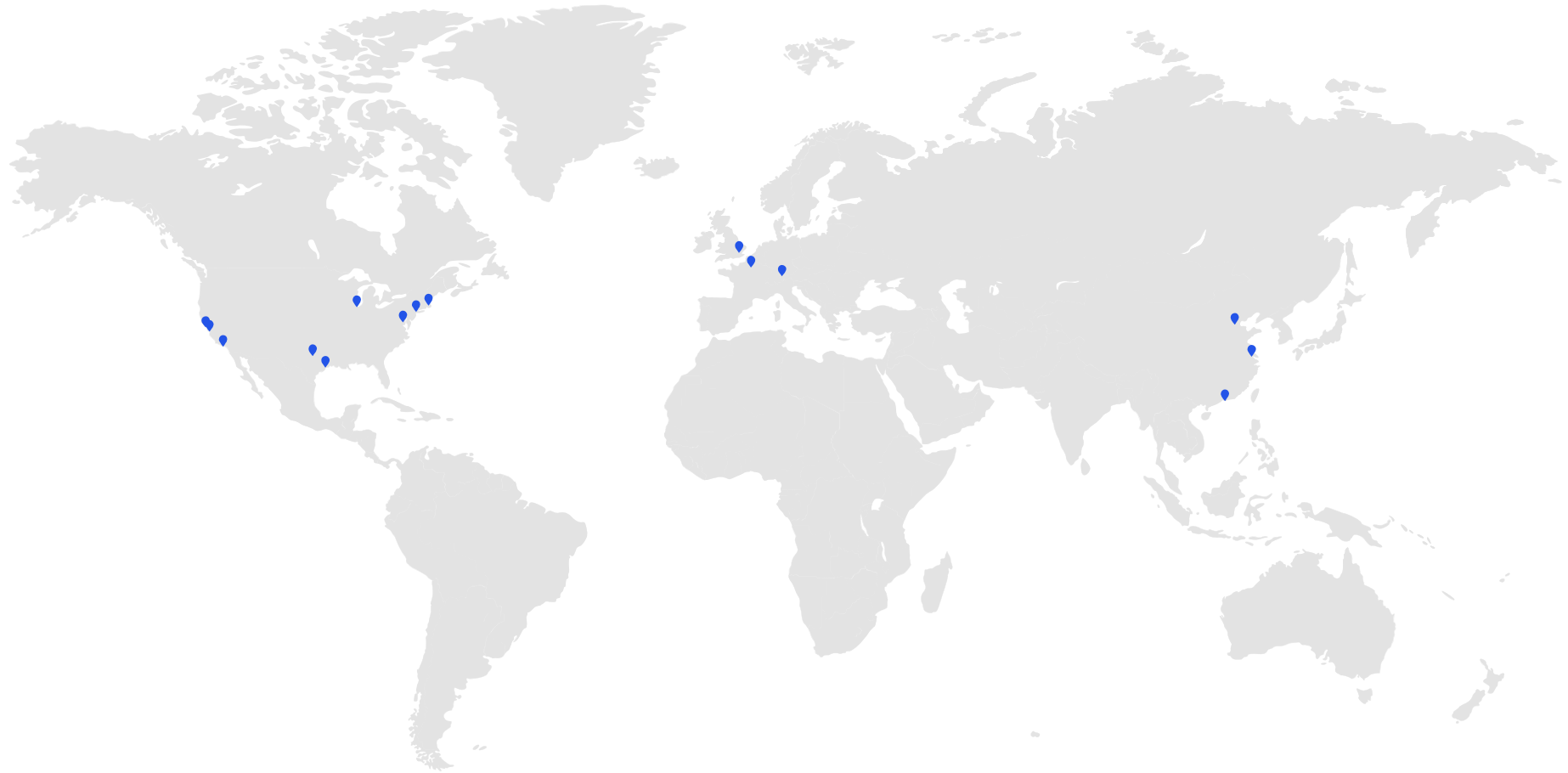
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