SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 239, 240, and 249

[Release No. 33–10750; 34–88093; IC–33795; File No. S7–01–20]

RIN 3235–AM48

Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to modernize, simplify, and enhance certain financial disclosure requirements in Regulation S–K. Specifically, we are proposing to eliminate Item 301 of Regulation S–K, Selected Financial Data and Item 302 of Regulation S–K, Supplementary Financial Information because they are largely duplicative of other requirements and to amend Item 303 of Regulation S–K, Management's Discussion & Analysis of Financial Condition and Results of Operations (''MD&A'') to modernize and enhance MD&A disclosures. In combination, the proposed amendments are intended to eliminate duplicative disclosures and modernize and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants.

DATES: Comments should be received by April 28, 2020.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment forms (*https://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–01–20 on the subject line.

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–01–20. This file number should be included in the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*https://www.sec.gov/rules/proposed.shtml*). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Angie Kim, Special Counsel, or Courtney Lindsay, Special Counsel, Office of Rulemaking, at (202) 551–3430, or Ryan Milne, Associate Chief Accountant, Office of the Chief Accountant, at (202) 551–3400 in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing to remove and reserve 17 CFR 229.301 (''Item 301'') and 17 CFR 229.302 (''Item 302'') of Regulation S–K under the Securities Act of 1933 (the ''Securities Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act''). The Commission is also proposing to amend 17 CFR 210.1–02(bb) of Regulation S–X (''Rule 1–02(bb)''); 17 CFR 229.303 (''Item 303'') and 17 CFR 229.914 (''Item 914'') of Regulation S–K under the Securities Act and the Exchange Act; 17 CFR 229.1112 (''Item 1112''), 17 CFR 229.1114 (''Item 1114'') and 17 CFR 229.1115 (''Item 1115'') of Regulation AB (a subpart of Regulation S–K) under the Securities Act and the Exchange Act; 17 CFR 239.11 (''Form S–1''), 17 CFR 239.20 (''Form S–20''), 17 CFR 239.25 (''Form S–4''), 17 CFR 239.31 (''Form F–1'') and 17 CFR 239.34 (''Form F–4'') under the Securities Act; 17 CFR 240.14a–101 (''Schedule 14A'') under the Exchange Act; and 17 CFR 249.220f (''Form 20–F''), 17 CFR 249.240f (''Form 40–F''), and 17 CFR 249.308 (''Form 8–K'') under the Exchange Act.

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I. Introduction

A. Background

We are proposing certain amendments to Regulation S–K, and related rules and forms. Specifically, we are proposing (1)

to eliminate Item 301, Selected Financial Data and Item 302, Supplementary Financial Information; and (2) to modernize, simplify, and enhance the disclosure requirements in Item 303, MD&A.[1] We are also proposing certain parallel amendments applicable to financial disclosures provided by foreign private issuers (''FPIs'').[2]

Based on a recommendation in the *Report on Review of Disclosure Requirements in Regulation S–K* (''S–K Study''),[3] Commission staff initiated a comprehensive evaluation of the Commission's disclosure requirements, which included an assessment of the information our rules require registrants to disclose, how and where this information is presented, and how we can better leverage technology as part of these efforts (collectively, the ''Disclosure Effectiveness Initiative'').[4] The objective of the Disclosure Effectiveness Initiative is to improve our disclosure regime for the benefit of both investors and registrants. In connection with the S–K Study and the launch of the Disclosure Effectiveness Initiative, Commission staff received public input on how to improve registrant disclosures.[5] Additionally, in a concept release issued in 2016,[6] the Commission solicited comment on the business and financial disclosure requirements in Regulation S–K. Specifically, the Commission solicited comment on whether these requirements provide the material information that investors need to make informed investment and voting decisions, and whether any of our rules have become outdated or unnecessary, or could otherwise be improved. These proposals also are informed by the objectives of the Fixing America's Surface Transportation Act (the ''FAST Act''), which, among other things, required the Commission to study ways that Regulation S–K could be modernized and simplified.[7] The JOBS Act and the FAST Act, and the work on the Disclosure Effectiveness Initiative and the S–K Study, have focused on modernizing and improving disclosure to reduce costs and burdens while continuing to provide investors with all material information. These proposals continue that work with a particular focus on performance and financial disclosure.

In developing the proposed amendments, we considered input from comment letters the Commission received on the initiatives described above. We also took into account the staff's experience with Regulation S–K arising from the Division of Corporation Finance's disclosure review program and changes in the regulatory and business landscape since the adoption of Regulation S–K over 40 years ago. Regulation S–K was adopted in 1977 to foster uniform and integrated disclosure for registration statements under both the Securities Act and the Exchange Act, and other Exchange Act filings, including periodic and current reports.[8] In 1982, the Commission expanded and reorganized Regulation S–K to be the central repository for its non-financial statement disclosure requirements.[9] The Commission's goals in adopting integrated disclosure were to revise or eliminate overlapping or unnecessary disclosure requirements wherever possible, thereby reducing burdens on registrants and enhancing readability

[1] Concurrent with this release we are issuing guidance on key performance indicators and metrics in MD&A. *See* Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33–10751 (Jan. 30, 2020) (the ''Companion Guidance'').

[2] *See* Section II.D below. An FPI is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents; and (2) any of the following: (i) A majority of its officers or directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States. *See* 17 CFR 230.405. *See also* 17 CFR 240.3b–4(c).

While the disclosure requirements for Item 9 of Form 1–A for Regulation A issuers are similar to the MD&A requirements under Item 303, we are not proposing to amend Form 1–A at this time. *See* Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Release No. 33–9741 (Mar. 25, 2015) [80 FR 21805 (Apr. 20, 2015)], at 21830. With that said, in the preparation of Part II of Form 1–A, Regulation A issuers have the option of disclosing either the information required by (i) the Offering Circular format (including Item 9 referenced above) or (ii) Part I of Forms S–1 or S–11 (except for the financial statements, selected financial data, and supplementary information called for by those forms). Thus, even though the proposed changes would not amend Item 9 of Form 1–A, they would still impact Regulation A issuers that choose to disclose the information required by Part I of Forms S–1 or S–11. *See* Section (a)(1)(ii) of Part II of Form 1–A.

[3] *See Report on Review of Disclosure Requirements in Regulation S–K* (Dec. 2013), available at *https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.* The report was mandated by Section 108 of the Jumpstart Our Business Startups Act (''JOBS Act''). Public Law 112–106, Sec. 108, 126 Stat. 306 (2012). Section 108 required the Commission to conduct a review of Regulation S–K to comprehensively analyze the current registration requirements and to determine how such requirements can be updated to modernize and simplify the registration process and to reduce the costs and other burdens associated with these requirements for emerging growth companies. Section 108 also required the Commission to provide a report on this review to Congress.

[4] *See SEC Spotlight on Disclosure Effectiveness,* available at *https://www.sec.gov/spotlight/disclosure-effectiveness.shtml.*

[5] In connection with the S–K Study, the Commission received public comments on regulatory initiatives to be undertaken in response to the JOBS Act. *See* Comments on SEC Regulatory Initiatives Under the JOBS Act: Title I—Review of Regulation S–K, available at *http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk.shtml.*

Similarly, to facilitate public input on the Disclosure Effectiveness Initiative, members of the public were invited to submit comments. *See* Request for Public Comment, available at *http://www.sec.gov/spotlight/disclosure-effectiveness.shtml.* Public comments received to date on the Disclosure Effectiveness Initiative are available on our website. *See* Comments on Disclosure Effectiveness, available at *https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.*

[6] *See Business and Financial Disclosure Required by Regulation S–K,* Release No. 33–10064 (Apr. 13, 2016) [81 FR 23915 (Apr. 22, 2016)] (''Concept Release''). Comment letters related to the Concept Release are available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.* Unless otherwise indicated, comments cited in this release are to the public comments on the Concept Release.

[7] Public Law 114–94, Sec. 72003, 129 Stat. 1311 (2015) (requiring, among other things, that the SEC conduct a study, issue a report, and issue a proposed rule on the modernization and simplification of Regulation S–K). Among other things, the FAST Act directed the Commission to study Regulation S–K to: Determine how to best modernize and simplify such requirements in a manner that reduces costs and burdens on registrants while continuing to provide all material information; emphasize a company-by-company approach that allows relevant and material information to be disseminated without boilerplate language or static requirements while preserving completeness and comparability of information across registrants; and evaluate methods of information delivery and presentation and explore methods for discouraging repetition and the disclosure of immaterial information. In 2016, the staff published the Report on Modernization and Simplification of Regulation S–K (the ''FAST Act Report''). *See Report on Modernization and Simplification of Regulation S–K* (Nov. 23, 2016), available at *https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf.* Comment letters received in response to the FAST Act Report are available at *https://www.sec.gov/comments/fast/fast.htm.*

In connection with the FAST Act Report, the Commission proposed and then adopted certain amendments to Regulation S–K. *See FAST Act Modernization and Simplification of Regulation S–K,* Release No. 33–10425 (Oct. 11, 2017) [82 FR 50988 (Nov. 2, 2017)] (''FAST Act Proposing Release'') and *FAST Act Modernization and Simplification of Regulation S–K,* Release No. 33–10618 (Mar. 20, 2019) [84 FR 12674 (Apr. 20, 2019)] (''FAST Act Adopting Release'').

[8] The Commission adopted the initial version of Regulation S–K following issuance of the report by the Advisory Committee on Corporate Disclosure led by former Commissioner A.A. Sommer, Jr., which recommended adoption of a single integrated disclosure system. *See H. Comm. on Interstate and Foreign Commerce, Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission,* 95th Cong., 1st Sess., at 95–29 (Comm. Print 1977), available at *http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.* This version of Regulation S–K included only two disclosure requirements—a description of business and a description of properties.

[9] *See Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380 (Mar. 16, 1982)] (''1982 Integrated Disclosure Adopting Release'').

without affecting the provision of material information to investors.[10] The amendments we are proposing in this release would continue to advance these goals.

Additionally, we reviewed Items 301, 302, and 303 in light of advancements in technology (in particular the availability of past financial statements and other disclosure made in filings on the Commission's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system) and changes in requirements under U.S. Generally Accepted Accounting Principles (''U.S. GAAP''). We also considered the benefits and appropriateness of a principles-based approach in reviewing these Items and our proposals are intended to promote the principles-based nature of MD&A.[11]

B. Overview of the Proposed Amendments

We are proposing changes to Items 301, 302, and 303 of Regulation S–K that would reduce duplicative disclosure and focus on material information. Specifically, we propose to eliminate:

- Item 301—Selected Financial Data;
- Item 302—Supplementary Financial Information; and
- Item 303(a)(5)—MD&A, *Tabular disclosure of contractual obligations.*

We are also proposing changes to modernize, simplify, and enhance disclosure requirements in Item 303 in order to improve these disclosures for investors and simplify compliance efforts for registrants. Specifically, these proposed revisions would:

- Add a new Item 303(a), *Objective,* to state the principal objectives of MD&A;
- Amend Item 303(a), *Full fiscal years* (proposed Item 303(b)) and Item 303(b), *Interim periods* (proposed Item 303(c)) to modernize, clarify, and streamline the items;
- Replace Item 303(a)(4), *Off-balance sheet arrangements,* with an instruction regarding the need to discuss such obligations in the broader context of MD&A;
- Add a new Item 303(b)(4), *Critical accounting estimates,* to clarify and codify Commission guidance on critical accounting estimates; [12]
- Eliminate current Item 303(c), *Safe harbor,* in light of the proposed replacement of Item 303(a)(4) and elimination of Item 303(a)(5); and
- Eliminate Item 303(d), *Smaller reporting companies* [13] in light of the proposed elimination of Items 303(a)(3)(iv) and 303(a)(5).

We are also proposing certain parallel amendments to Forms 20–F and 40–F, including Item 3.A of Form 20–F (Selected Financial Information), Item 5 of Form 20–F (Operating and Financial Review and Prospects), General Instruction B.(11) of Form 40–F (Off-Balance Sheet Arrangements), and General Instruction B.(12) of Form 40–F (Tabular Disclosure of Contractual Arrangements).[14] The following table summarizes some of the changes we are proposing, as described more fully in Section II (Proposed Amendments): [15]

Current item or issue	Summary description of proposal	Principal objective(s)	Corresponding FPI change(s)?	Discussed below in section
Item 301, *Selected financial data*.	Registrants would no longer be required to provide 5 years of selected financial data.	Modernize disclosure requirement in light of technological developments and simplify disclosure requirements.	Yes	II.A & II.D.1.
Item 302(a), *Supplementary financial information*.	Registrants would no longer be required to provide 2 years of selected quarterly financial data.	Reduce repetition and focus disclosure on material information. Modernize disclosure requirement in light of technological developments.	N/A	II.B.1.
Item 303(a), *MD&A*	Clarify the objective of MD&A and streamline the fourteen instructions.	Simplify and enhance the purpose of MD&A	Yes	II.C.1 & II.D.1.
Item 303(a)(2), *Capital resources*.	Registrants would 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.	Modernize and enhance disclosure requirements to account for capital expenditures that are not necessarily capital investments.	Yes	II.C.2 & II.D.1.
Item 303(a)(3)(ii), *Results of operations*.	Registrants would disclose known events that are reasonably likely 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.	Clarify item requirement by using a disclosure threshold of ''reasonably likely,'' which is consistent with the Commission's interpretative guidance on forward-looking statements.	Yes	II.C.3 & II.D.1.
Item 303(a)(3)(iii), *Results of operations*.	Clarify that a discussion of the *reasons* underlying material *changes* in net sales or revenues is required.	Clarify MD&A disclosure requirements by codifying existing Commission guidance.	Yes	II.C.4 & II.D.1.

[10] *See id.*

[11] *See Concept Release on Management's Discussion and Analysis of Financial Condition and Operations,* Release No. 33–6711 (Apr. 23, 1987) [52 FR 13715 (Apr. 24, 1987)] (stating that when the Commission adopted MD&A as a separate disclosure requirement, the rules remained intentionally general in nature: ''The Commission believed that a flexible approach would elicit more meaningful disclosure and avoid boilerplate discussions which a more specific approach could foster. Further, the Commission reasoned that, because each registrant is unique, no one checklist could be fashioned to cover all registrants comprehensively.'').

[12] *See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operation,* Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056 (Dec. 29, 2003)] (the ''2003 MD&A Interpretive Release'').

[13] Item 10 of Regulation S–K defines a smaller reporting company (''SRC'') as a registrant that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not an SRC that: Had a public float of less than $250 million; or had annual revenues of less than $100 million, and either no public float or a public float of less than $700 million. Business development companies (''BDCs'') do not fall within the SRC definition and are a type of closed-end investment company that is not registered under the Investment Company Act.

[14] We discuss our proposals that would affect FPIs in Section II.D below.

[15] The information in this table is not comprehensive and is intended only to highlight some of the more significant aspects of the current rules and proposed amendments. It does not reflect all of the proposed amendments or all of the rules and forms that are affected. All changes are discussed in their entirety below. As such, this table should be read together with the referenced sections and the complete text of this release.

Current item or issue	Summary description of proposal	Principal objective(s)	Corresponding FPI change(s)?	Discussed below in section
Item 303(a)(3)(iv), *Results of operations*. Instructions 8 and 9 (Inflation and price changes).	The item and instructions would be eliminated. Registrants would still be required to discuss these matters if they are part of a known trend or uncertainty that has had, or the registrant reasonably expects to have, a material favorable or unfavorable impact on net sales, or revenue, or income from continuing operations.	Encourage registrants to focus on material information that is tailored to a registrant's businesses, facts, and circumstances.	Yes	II.C.5.
Item 303(a)(4), *Off-balance sheet arrangements*.	The item would be replaced by a new instruction added to Item 303. Under the new instruction, registrants would be 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 such registrant'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 registrant's consolidated balance sheets.	Prompt registrants to consider and integrate disclosure of off-balance sheet arrangements within the context of their MD&A.	Yes	II.C.6, II.D.1, & II.D.2.
Item 303(a)(5), *Contractual obligations*.	Registrants would no longer be required to provide a contractual obligations table.	Promote the principles-based nature of MD&A and simplify disclosures by reducing redundancy.	Yes	II.C.7, II.D.1, & II.D.2.
Instruction 4 (Material changes in line items).	Incorporate a portion of the instruction into proposed Item 303(b). Clarify that where there are material changes in a line item, including where material changes within a line item offset one another, disclosure of the underlying reasons for these material changes in quantitative and qualitative terms is required.	Enhance analysis in MD&A. Clarify MD&A disclosure requirements by codifying existing Commission guidance on the importance of analysis in MD&A.	Yes	II.C.1 & II.D.1.
Item 303(b), *Interim periods*	Registrants would be permitted to compare their most recently completed quarter to either the corresponding quarter of the prior year or to the immediately preceding quarter. Registrants subject to Rule 3–03(b) of Regulation S–X would be afforded the same flexibility.	Allow for flexibility in comparison of interim periods to enhance the disclosure provided to investors.	N/A	II.C.9.
Critical Accounting Estimates ...	Explicitly require disclosure of critical accounting estimates.	Facilitate compliance and improve resulting disclosure. Eliminate disclosure that duplicates the financial statement discussion of significant policies. Promote meaningful analysis of measurement uncertainties.	Yes	II.C.8 & II.D.1.

We discuss the proposed amendments below in the order that each Item appears in Regulation S–K. We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposals. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

II. Description of the Proposed Amendments

A. Selected Financial Data (Item 301)

Item 301 [16] requires registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. Instruction 1 to Item 301 states that the purpose of the item is to supply in a convenient and readable format selected financial data that highlights certain significant trends in the registrant's financial condition and results of operations. Instruction 2 to Item 301 lists specific items that must be included, subject to appropriate variation to conform to the nature of the registrant's business, and provides that registrants may include additional items they believe would enhance an understanding of, and highlight, other trends in their financial condition or results of operations.[17]

SRCs are not required to provide Item 301 information.[18] Emerging growth companies (''EGCs'') [19] that are providing the information called for by Item 301 in a Securities Act registration statement, need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with the EGC's initial public offering (''IPO'') of its common equity securities.[20] In addition, an EGC that is providing the information called for by Item 301 in a registration statement, periodic report, or other report filed under the Exchange Act need not present selected financial

[16] *See also* Section II.D below for a discussion of related amendments to Form 20–F.

[17] Instruction 2 to Item 301 of Regulation S–K states that, subject to appropriate variation to conform to the nature of the registrant's business, the following items shall be included in the table of financial data: Net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock (including long-term debt, capital leases, and redeemable preferred stock); and cash dividends declared per common share.

[18] Item 301(c) of Regulation S–K [17 CFR 229.301(c)].

[19] An EGC is defined as a company that has total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year and, as of December 8, 2011, had not sold common equity securities under a registration statement. A company continues to be an EGC for the first five fiscal years after it completes an IPO, unless one of the following occurs: Its total annual gross revenues are $1.07 billion or more; it has issued more than $1 billion in non-convertible debt in the past three years; or it becomes a ''large accelerated filer,'' as defined in Exchange Act Rule 12b–2. *See* Securities Act Rule 405 and Exchange Act Rule 12b–2.

[20] Item 301(d)(1) of Regulation S–K.

data for any period prior to the earliest audited financial statements presented in connection with its first registration statement that became effective under the Exchange Act or Securities Act.[21]

In the Concept Release, the Commission solicited comment on whether to retain, modify, or eliminate Item 301.[22] The Commission also solicited comment on the cost of this disclosure and whether information on the earliest two of the last five fiscal years is available without unreasonable cost or expense. Additionally, the Commission solicited comment on the utility of this disclosure.

Many commenters recommended eliminating Item 301 completely or questioned its usefulness.[23] One of these commenters stated that ''absent a requirement to provide narrative discussions of trends, the current requirement under [Item 301] seems less useful in an electronic era where historical financial information is easily accessible.'' [24] Another commenter stated that it did not believe that presenting five years of information is useful to an investor and similarly noted that the information is accessible through EDGAR.[25] An additional commenter questioned whether selected financial data was necessary in light of data-tagged financial statements.[26] A number of commenters recommended revising the item to reduce burdens, if retained.[27]

One of these commenters noted the potentially significant costs in public offerings for comfort letters associated with this disclosure.[28] This commenter stated that where prior years have been audited by a different accounting firm, companies typically incur significant additional costs, both in terms of direct costs and internal resources, to obtain comfort letters. Additionally, this commenter stated that if Item 301 information is required for periods where no audited financial statements are otherwise required, the costs can be much more substantial.

Another commenter encouraged the Commission to ask investors whether the utility of the information provided in response to Item 301 justify the costs of presenting it.[29] This commenter stated that, while this required disclosure is limited to a small number of line items, certain of these items effectively require preparation of a full income statement and balance sheet to derive information for the earlier two years.

Many commenters recommended revising Item 301 to allow registrants to omit the earliest two years.[30] Some of these commenters noted that providing disclosure of the earliest two years often creates challenges for registrants, including non-EGC issuers conducting IPOs.[31] A few of these commenters recommended a practicability exception allowing registrants to omit the earliest two years when the information cannot be provided without unreasonable cost or expense.[32] Others recommended that the earliest two years should be required only when necessary to make the current financial data not misleading,[33] or to illustrate material trends.[34]

A few commenters supported retaining Item 301.[35] Some of these commenters stated that having the information in one place keeps investors from having to review multiple sources to obtain this information,[36] with one of these commenters noting that investors sometimes rely on printed copies.[37] Two of the commenters also stated that requiring this disclosure for five years is an appropriate timeframe,[38] with one stating that five years is more likely to capture the effects that business cycles may have on a registrant.[39] Another stated that Item 301 information should be easy for companies to disclose because the information is already in company records.[40]

We propose to eliminate Item 301. When the precursor to Item 301 was adopted in 1970, prior annual reports were not quickly and easily accessible.[41] Today, the information required by Item 301 can be readily accessed and compiled through prior filings on EDGAR.[42] In addition, this information is tagged using eXtensible Business Reporting Language (''XBRL'') data format. As noted above, there are currently certain exceptions to Item 301 for EGC and SRC registrants.[43] Our proposals would not affect these exceptions or result in any further loss of information from these registrants.[44]

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[21] Item 301(d)(2) of Regulation S–K.

[22] *See* Concept Release, at 23940.

[23] *See, e.g.,* letters from New York State Society of Certified Public Accountants (July 19, 2016) (''NYSSCPA''), Aflac, Inc. (July 19, 2016) (''AFLAC''), Ernst & Young LLP (July 21, 2016) (''E&Y''), PNC Financial Services Group (July 21, 2016) (''PNC''), Edison Electric Institute and American Gas Association (July 21, 2016) (''EEI and AGA''), XBRL US, Inc. (July 21, 2016), Chevron Corporation (July 22, 2016) (''Chevron''), Fenwick West LLP (Aug. 1, 2016) (''Fenwick''), Grant Thornton LLP (July 21, 2016) (''Grant Thornton''), Northrop Grumman Corporation (Sept. 27, 2016) (''Northrop Grumman''), General Motors Company (Sept. 30, 2016) (''General Motors''), and Financial Executives International (Oct. 3, 2016) (''FEI'').

[24] *See* letter from Grant Thornton.

[25] *See* letter from NYSSCPA.

[26] *See* letter from E&Y. This commenter also suggested that the Commission ''encourage registrants to include tables of selected financial data in the summary section of their annual reports if the information would highlight the key content and developments disclosed in the full report.''

[27] *See, e.g.,* letters from NYSSCPA, AFLAC, E&Y, Fenwick, General Motors, and FEI. These commenters suggested: Limiting the disclosure requirement to two or three years (letters from NYSSCPA and AFLAC); making disclosure of the earlier years voluntary and allowing all registrants to adopt a ''build up'' approach to Item 301 similar to the option available to EGCs (letters from E&Y and Fenwick); making the selected financial data table voluntary and permitting registrants to present only a retroactive accounting change for the periods presented in the financial statements if the periods prior to those presented in the financial statements cannot be recast without unreasonable effort or cost (letter from General Motors); and allowing hyperlinks to access five-year data if placed within a separate 'company profile' section of EDGAR (letter from FEI).

[28] *See* letter from Fenwick.

[29] *See* letter from PricewaterhouseCoopers LLP (July 21, 2016) (''PWC'') (stating that providing the earliest two years can be time consuming and costly, such as in circumstances where the information has not been previously provided (*e.g.,* in an initial registration statement)).

[30] *See, e.g.,* letters from Deloitte & Touche LLP (July 15, 2016) (''Deloitte''), BDO USA, LLP (July 20, 2016) (''BDO''), U.S. Chamber of Commerce (Jul. 20, 2016) (''Chamber''), FedEx Corporation (''FedEx'') (Jul. 21, 2016), Corporate Governance Coalition for Investor Value (July 20, 2016) (''CGCIV''), Center for Audit Quality (July 21, 2016) (''CAQ''), Securities Industry and Financial Markets Association (July 21, 2016) (''SIFMA''), National Association of Real Estate Investment Trusts (July 21, 2016) (''NAREIT''), Allstate Insurance Company (July 21, 2016) (''Allstate''), Davis Polk & Wardwell LLP (July 22, 2016) (''Davis Polk''), Stephen Percoco (July 24, 2016) (''S. Percoco''), and Shearman & Sterling LLP (Aug. 31, 2016) (''Shearman'').

[31] *See, e.g.,* letters from Deloitte and CAQ.

[32] *See, e.g.,* letters from BDO, Davis Polk, and S. Percoco.

[33] *See, e.g.,* letters from Chamber, FedEx, and CGCIV.

[34] *See, e.g.,* letters from NAREIT and SIFMA.

[35] *See, e.g.,* letters from R.G. Associates, Inc. (July 6, 2016) (''RGA''), California Public Employees' Retirement System (July 21, 2016) (''CalPERS''), California State Teachers' Retirement System (July 21, 2016), and CFA Institute (Oct. 6, 2016).

[36] *See* letters from RGA and CFA Institute.

[37] *See* letter from RGA.

[38] *See* letters from CalPERS and CFA Institute.

[39] *See* letter from CFA Institute.

[40] *See* letter from CalPERs.

[41] Before adopting the precursor to Item 301, the Commission implemented a microfiche system in 1968 that supplemented its hard copy reproduction service and was intended to ''facilitate wider, more economical and more rapid distribution'' of Exchange Act reports. *See Disclosure to Investors—A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts, Policy Study,* Mar. 27, 1969, available at *http://www.sechistorical.org/museum/galleries/tbi/gogo_d.php,* at 313.

[42] In addition, filings are generally available on registrants' websites and other third-party websites.

[43] We recognize an exception to this accessibility would be SRCs and EGCs that are either filing an initial registration statement or those that have not been public for at least two fiscal years following their initial registration statement.

[44] Based on Ives Group's Audit Analytics data, during the period from April 5, 2012 through December 31, 2018, EGC issuers accounted for approximately 1,267 out of 1,440, or approximately 88%, of priced exchange-listed IPOs (excluding deals identified as mergers, spin-offs, or fund offerings). SRCs are often also EGCs so these statistics of IPOs conducted by EGCs likely

In adding the requirement for selected financial data to Regulation S–K, the Commission stated that Item 301 was ''relevant primarily where it can be related to trends in the registrant's continuing operations.'' [45] However, Item 303 specifically calls for disclosure of material trend information.[46] In addition, since Item 301 has been incorporated into Regulation S–K, the Commission has issued guidance emphasizing trend disclosure in MD&A.[47] In light of the requirement for discussion and analysis of trends in Item 303, we believe requiring five years of selected financial data is not necessary to achieve the original purpose of providing trend disclosure. Registrants may, however, continue to include a tabular presentation of relevant financial or other information discussed in MD&A, to the extent they believe that such a presentation would be useful to an understanding of the disclosure. We believe that eliminating Item 301 would continue to allow registrants the flexibility to present a meaningful MD&A discussing material trend information, while easing compliance burdens on registrants.

We acknowledge that some commenters suggested we revise Item 301 to require only presentation of the same number of years as included in the financial statements, or otherwise provide accommodations to limit the number of years presented. However, we believe that such an approach would result in disclosure that would be largely duplicative of information in the financial statements, and therefore may have limited utility. We also acknowledge that some commenters recommended that we retain Item 301 without any revisions or enhance the item requirement. We believe, however, that the incremental utility of having a full five years of selected financial information is not justified by the cost to prepare such disclosures, particularly since Item 303 already requires disclosure of material trends and such other information necessary to an understanding of the registrant's financial conditions, changes in financial condition, and results of operations.[48]

Request for Comment

1. Should we eliminate Item 301, as proposed? Would eliminating Item 301 result in the loss of material information that is otherwise not available to investors, such as through prior filings on EDGAR? If so, what information would be lost, and are there alternatives we should consider that would capture this information?

2. Is the option for investors to compile selected financial information from current or prior filings an adequate substitute for the separate presentation of that information in Item 301? Do current XBRL-tagging requirements facilitate compilation and comparison of selected financial information?

3. Are the requirements of Item 303 sufficient to provide investors with necessary disclosure regarding trends in a registrant's results of operations and financial condition?

4. Alternatively, if Item 301 should be retained, should registrants be allowed to provide less than five years of selected financial data? If so, what is the appropriate number of years that should be provided, and in what circumstances?

5. What are the costs to registrants of providing five years of selected financial data? Would those costs significantly decrease if the Commission limited selected financial data to only those years presented in the filing's historical financial statements?

6. How do market participants use the selected financial data disclosures? Do market participants rely on any particular fiscal year or years more than others (*e.g.,* the most recent two or three years)? Would there be a cost to obtain selected financial data disclosures elsewhere and, if so, what would that cost be?

7. Would registrants continue to provide selected financial data even if they are no longer required to do so? If so, for how many years?

8. If we were to retain Item 301, should we modify the line items required to be included in the presentation pursuant to Instruction 2? [49] For example, should we allow registrants more discretion regarding which line items to present?

9. The Commission recently proposed to extend to BDCs the requirement for registered closed-end investment companies to disclose ''financial highlights.'' [50] The disclosure required by Item 301 and the financial highlights requirement is similar in many respects. If we were to adopt the financial highlights requirement and retain Item 301, should we specifically exclude BDCs from the Item 301 requirement?

B. Supplementary Financial Information (Item 302)

1. Supplementary Financial Information (Item 302(a))

Item 302(a)(1) requires disclosure of selected quarterly financial data of specified operating results [51] and Item 302(a)(2) requires disclosure of variances in these results from amounts previously reported on a Form 10–Q.[52] Item 302(a) does not apply to SRCs or FPIs and, because it only applies to companies that already have a class of securities registered under Section 12 of the Exchange Act at the time of filing, it does not apply to first time registrants conducting an IPO and registrants who are only required to file reports pursuant to Section 15(d) of the Exchange Act.[53] When Item 302(a) applies, it requires certain information for each full quarter within the two most recent fiscal years and any subsequent period for which financial statements are included or required by Article 3 of Regulation S–X.[54] Item 302(a)(3) requires a description of the effect of any discontinued operations and unusual or infrequently occurring items recognized in each quarter, as well as the aggregate effect and the nature of year-end or other adjustments that are material to the results of that quarter.[55]

encompass the majority of IPOs conducted by SRCs. In addition, for reasons discussed in this release, registrants would still be required to discuss and analyze material trends, which was one of the intended purposes of Item 301. Accordingly, in the majority of instances, we believe that our proposal would not result in a loss of disclosure.

[45] *Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides; Integration of Securities Acts Disclosure Systems,* Release No. 33–6231 (Sept. 2, 1980) [45 FR 63630 (Sept. 25, 1980)] (''1980 Form 10–K Adopting Release'').

[46] *See, e.g.,* Item 303(a)(3).

[47] *See, e.g., Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures,* Release No. 33–6835 (May 18, 1989) [54 FR 22427 (May 24, 1989)] (the ''1989 MD&A Interpretative Release'') and 2003 MD&A Interpretive Release.

[48] *See* Item 303(a).

[49] *See* Instruction 2 to Item 301, *supra* note 17.

[50] *See Securities Offering Reform for Closed-End Investment Companies,* Release No. 33–10619 (Mar. 20, 2019) [84 FR 14448 (Apr. 10, 2019)], at 14472.

[51] Item 302(a)(1) of Regulation S–K [17 CFR 229.302(a)(1)]. Item 302(a)(1) specifies disclosure of: Net sales; gross profit (net sales less costs and expenses associated directly with or allocated to products sold or services rendered); income (loss) from continuing operations; per share data based upon income (loss) from continuing operations; net income (loss); and net income (loss) attributable to the registrant.

[52] Item 302(a)(2) of Regulation S–K [17 CFR 229.302(a)(2)]. When the data supplied pursuant to Item 302(a) varies from amounts previously reported on the Form 10–Q filed for any quarter, such as when a combination between entities under common control occurs or where an error is corrected, the registrant must reconcile the amounts given with those previously reported and describe the reason for the difference.

[53] Item 302(a)(5) and (c) of Regulation S–K [17 CFR 229.302(a)(5) and (c)].

[54] Item 302(a)(1) and (a)(3) [17 CFR 229.302(a)(1) and (a)(3)].

[55] Item 302(a)(3) of Regulation S–K [17 CFR 229.302(a)(3)]. The requirement applies to items recognized in each full quarter within the two most

Continued

If a registrant's financial statements have been reported on by an accountant, Item 302(a)(4) requires that accountant to follow appropriate professional standards and procedures regarding the data required by Item 302(a).[56]

In the Concept Release, the Commission solicited input on whether to retain, eliminate, or modify Item 302(a). The Commission also solicited input on the importance of information required by Item 302(a) that is not duplicative of previously provided information, such as a separate presentation of certain fourth quarter information and the effect of a retrospective change in the earliest of the two years.[57] The Commission also sought input on the costs and benefits of this disclosure item.

A few commenters recommended retaining and expanding Item 302(a).[58] One of these commenters stated that it ''sense[d] that investors find it useful to see fourth quarter results presented discretely, rather than having to infer them based on the annual results and the interim results through the third quarter.'' [59] The commenter also stated that, where the data changes from what was previously reported, having the revised data in an annual report allows investors to understand the effects of the changes sooner. Another of these commenters noted the importance of fourth quarter data, stating that, in the absence of a Form 8–K filing containing such information, analysts must derive the information from the annual report and the three previously filed quarterly reports and that ''any numbers derived from this method are at best approximate.'' [60] This commenter stated that, ''if a requirement to file a full fourth-quarter report is too onerous . . . [Item 302(a)] could be enhanced to include more data from the income statement beyond revenues, net income, and earnings per share.'' Yet another commenter recommended that Item 302(a) be revised to ensure the information is presented in a consistent manner across registrants.[61]

Multiple commenters recommended streamlining Item 302(a).[62] Several of these commenters recommended revising Item 302(a)(5) to accommodate newly reporting registrants in an annual report or a follow-on offering where the registrant would be required to provide Item 302(a) data for interim periods prior to those presented in the IPO registration statement.[63] Another commenter recommended only requiring Item 302(a) disclosure when there is a material retrospective change in the financial statements that has not been previously filed.[64] The commenter also stated that some companies voluntarily provide fourth quarter data in earnings releases.

Most commenters recommended eliminating Item 302(a) altogether,[65] with many of these commenters stating that this item is duplicative of disclosures provided in prior filings.[66] Two of these commenters stated that ''the disclosure required under Item 302(a) is yet another example of duplicative information that unnecessarily complicates and lengthens disclosure documents, while increasing burdens for registrants and offering little value to investors.'' [67] Another commenter stated that, though the original intent of the item was ''to help investors understand the pattern of corporate activities throughout a fiscal year,'' not all businesses are seasonal and the information provided by Item 302(a) is already available in Form 10–Qs.[68] This commenter supported a flexible approach for Item 302(a) disclosure that would allow registrants to determine when and if this disclosure would be relevant and enhance an investor's understanding of the business throughout the year. This commenter also stated that fourth quarter data can be easily derived from prior filings without needing to separately reference the fourth quarter information.

We propose to eliminate Item 302(a). Like many commenters, we believe that this prescriptive requirement largely results in duplicative disclosures. The precursor to Item 302 was adopted at a time when quarterly data was ''reported on an extremely abbreviated basis.'' [69] The item was intended to help investors understand the pattern of corporate activities throughout a fiscal period by disclosing trends over quarterly periods to reflect seasonal patterns.[70] Today, most of the financial data required by Item 302(a) can be found in prior quarterly reports, which are readily available on EDGAR. While Item 302(a) requires separate disclosure of certain fourth quarter information, which is not otherwise required to be disclosed, we believe this data generally can be calculated from a registrant's Form 10–K and third quarter Form 10–Q. We believe that eliminating this prescriptive requirement will encourage registrants to take a more principles-based approach to presenting information called for by Item 302(a) in their filings and specifically, in MD&A.

Eliminating Item 302(a) may result in the loss of a separate presentation of certain fourth quarter information and, where applicable, the effect of a retrospective change in the earliest of the two years.[71] Where fourth quarter results are material or there is a material retrospective change, existing requirements would still elicit this disclosure. Specifically, Item 303 requires registrants to discuss unusual events that materially affected reported income and other matters that are necessary to understand their results of operations.[72] The item also requires

recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included.

[56] Item 302(a)(4) of Regulation S–K [17 CFR 229.302(a)(4)].

[57] Because Item 302(a)(2) requires disclosure of variances in results from amounts previously reported for the two most recent fiscal years, the effect of a retrospective change in any quarter for which a Form 10–Q is filed in the more recent of the two fiscal years will be disclosed in the selected quarterly data. However, absent Item 302(a)(2), this variance would not be specifically required to be disclosed until the following year in the corresponding fiscal quarter in which the retrospective change occurred. Additionally, disclosure in the Form 10–Q for this corresponding fiscal quarter would not include the effects of this change in the earliest of the two years presented in the Form 10–K, as this Form 10–Q would be limited to the current and prior-year interim periods.

[58] *See* letters from BDO, Bloomberg LP (July 21, 2016) (''Bloomberg''), and CFA Institute.

[59] *See* letter from BDO.

[60] *See* letter from Bloomberg.

[61] *See* letter from CFA Institute.

[62] *See, e.g.,* letters from Fenwick, Deloitte, CAQ, E&Y, Grant Thornton, and PWC.

[63] *See, e.g.,* letters from Deloitte, CAQ, E&Y, Grant Thornton, and PWC. Suggested accommodations included: Requiring registrants to begin presenting selected quarterly data in their second annual report (*see* letters from E&Y, PWC, and CAQ); and allowing new registrants to present supplementary financial data in registration statements and annual reports that ''build'' from the quarterly information that has been separately filed in Exchange Act reports subsequent to an IPO (*see* letters from Deloitte, CAQ, E&Y, Grant Thornton, and PWC).

[64] *See* letter from Fenwick. In this commenter's view, outside of such situations, quarterly financial information in a registrant's annual report is redundant with information available on EDGAR. *See also* letter from Crowe.

[65] *See, e.g.,* letters from AFLAC, Chamber, FedEx, CGCIV, UnitedHealth Group, Inc. (July 21, 2016) (''United Health''), SIFMA, PNC, EEI and AGA, NAREIT, Davis Polk, S. Percoco, National Investor Relations Institute (''NIRI''), Northrop Grumman, FEI, and General Motors.

[66] *See, e.g.,* letters from AFLAC, Chamber, FedEx, CGCIV, UnitedHealth Group, SIFMA, PNC, EEI and AGA, NAREIT, NIRI, Northrop Grumman, FEI, and General Motors.

[67] *See* letters from Chamber and CGCIV.

[68] *See* letter from FEI.

[69] *See Interim Financial Data: Proposals to Increase Disclosure,* Release No. 34–11142 (Dec. 19, 1974) [40 FR 1079 (Jan. 6, 1975)], at 1080.

[70] *See Interim Financial Reporting: Increased Disclosures,* Release No. 33–5611 (Sept. 10, 1975) [40 FR 46107 (Oct. 6, 1975)], at 46108.

[71] *See supra* note 51.

[72] Item 303(a)(3)(i) requires registrants to describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and indicate the extent to which income was so affected. In addition, the item requires registrants to describe any other significant

registrants to discuss known trends and uncertainties that have had or that registrants reasonably expect to have an impact on net sales, revenues, or operating income.[73] Also, U.S. GAAP requires disclosure of disposals of components of an entity and unusual or infrequently occurring items recognized for the fourth quarter if interim data and disclosures are not separately reported for the fourth quarter.[74] Additionally, Item 101(c)(1)(v) of Regulation S–K requires disclosure of the extent to which a business is seasonal.[75]

Request for Comment

10. Should we eliminate Item 302(a), as proposed? Would eliminating Item 302(a) result in the loss of material information that is otherwise not available to investors, such as through prior filings on EDGAR? If so, what material information would be lost, and are there alternatives we should consider that would capture this information?

11. Do market participants find Item 302(a) disclosures to be helpful? If so, how do market participants use the disclosures? Does the utility of the disclosures vary by industry or business? If so, for which industries or businesses are Item 302(a) disclosures helpful?

12. Is the option for investors to compile supplemental financial information through searches of prior filings an adequate substitute for Item 302(a)? Do current XBRL-tagging requirements reliably facilitate compilation and comparison of supplemental financial information? Would there be a cost to investors of compiling and/or calculating information presented in Item 302(a) from other sources and, if so, what would that cost be?

13. What are the burdens on registrants to provide the information required by Item 302(a)?

14. Is a separate presentation of certain fourth quarter data material to investors? If so, is such information material for all companies or industries? Are investors able to readily calculate this fourth quarter data from a registrant's Form 10–K and related third quarter Form 10–Q? What are the challenges to making such calculations?

15. Would registrants continue to provide fourth quarter data in the absence of a requirement to do so (*e.g.,* through voluntary earnings releases)? If we eliminate Item 302(a), should we require registrants to disclose certain fourth quarter data elsewhere in an annual report, such as in MD&A? What would be the cost of this approach? Should we require registrants to disclose any variances to its previously issued quarterly information that would inhibit the calculation of fourth quarter data by market participants? What would be the costs of this approach?

16. Should we retain Item 302(a) but allow a newly reporting registrant to exclude Item 302(a) data for interim periods prior to those presented in its IPO registration statement? [76]

2. Information About Oil and Gas Producing Activities (Item 302(b))

Item 302(b) [77] requires registrants engaged in oil and gas producing activities, other than SRCs, to disclose information about those activities for each period presented. The disclosure called for by Item 302(b) is also required by U.S. GAAP.[78] However, unlike the U.S. GAAP requirement, Item 302(b) incrementally requires that the disclosure be provided for each period presented.

In 2018, the Commission referred certain of its disclosure requirements to the FASB for potential incorporation into U.S. GAAP because these items largely overlapped with, but required information incremental to, U.S. GAAP.[79] Item 302(b) was among the items referred to the FASB.[80]

On May 6, 2019, the FASB issued proposed Accounting Standards Update, *Disclosure Improvements: Codification Amendments in Response to the SEC's Disclosure Update and Simplification,*[81] which would amend U.S. GAAP to require the incremental disclosure called for by Item 302(b), disclosure of oil and gas producing activities for each period presented. If FASB adopts amendments consistent with those it proposed, upon effectiveness of the amendments to U.S. GAAP, the requirements of Item 302(b) will be duplicative of U.S. GAAP. Therefore, we propose to eliminate Item 302(b), subject to the FASB finalizing its related amendments to U.S. GAAP.[82]

Request for Comment

17. As proposed, should we eliminate Item 302(b) if the FASB amends U.S. GAAP to require substantially similar disclosure?

C. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)

Item 303 of Regulation S–K requires disclosure of information relevant to assessing a registrant's financial condition, changes in financial condition, and results of operations. The disclosure requirements for full fiscal years in Item 303(a) specify five components: Liquidity, capital resources, results of operations, off-balance sheet arrangements, and contractual obligations.[83] Item 303(b) covers interim period disclosures and requires registrants to discuss material changes in the items listed in Item 303(a) (including the instructions), other than the impact of inflation and changing prices on operations and tabular disclosure of contractual obligations.[84] Item 303(c) acknowledges the application of a statutory safe harbor for forward-looking information provided in off-balance sheet arrangements and contractual obligations disclosures. Item 303(d) provides certain accommodations for SRCs.

The Concept Release solicited comment on the overall objectives of the current MD&A requirements, as well as specific subsections of Item 303, including how to improve the content and focus of MD&A. Many commenters responded to the Commission's request

components of revenues or expenses that, in the registrant's judgment, should be described in order to understand the registrant's results of operations.

[73] Item 303(a)(3)(ii) requires registrants to describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship must be disclosed.

[74] ASC 270–10–50–2 requires the disclosure of certain information if interim data and disclosures are not separately reported for the fourth quarter. This information includes ''disposals of components of an entity and unusual, or infrequently occurring items recognized in the fourth quarter, as well as the aggregate effect of year end adjustments that are material to the results of that quarter.''

[75] Item 101(c)(1)(v) [17 CFR 229.101(c)(1)(v)]. The Commission recently proposed changes to Item 101 and proposed retaining Item 101(c)(1)(v). *See Modernization of Regulation S–K Items 101, 103, and 105,* Release No. 33–10668 (Aug. 8, 2019) [84 FR 44358 (Aug. 23, 2019)].

[76] *See supra* note 63 and corresponding text.

[77] *See* Item 302(b) of Regulation S–K [17 CFR 229.302(b)].

[78] *See* ASC 932–235–50.

[79] *See Disclosure Update and Simplification,* Release No. 33–10532 (Aug. 17, 2018) [83 FR 50234 (Oct. 4, 2018)].

[80] *See id.*

[81] FASB, File Reference No. 2019–600, available at *https://www.fasb.org/jsp/FASB/Document_C/DocumentPage&cid=1176172611572.*

[82] Item 302(c) of Regulation S–K states that SRCs do not have to provide the information required by the Item. Since we are proposing to eliminate Items 302(a) and (b), we are likewise proposing to eliminate Item 302(c) since it will no longer be applicable.

[83] Item 303(a)(1)-(5) of Regulation S–K [17 CFR 229.303(a)(1)–(5)].

[84] *See* Item 303(b) and Instruction 7 to Item 303(b) of Regulation S–K [17 CFR 229.303(b)].

for input with a variety of suggestions, which we discuss below. The Commission recently addressed some of the Item 303(a) disclosure requirements referenced in the Concept Release and by commenters when it adopted amendments to modernize and simplify certain disclosure requirements in Regulation S–K.[85]

We propose further amendments to Item 303 of Regulation S–K that are intended to modernize, simplify, and enhance the MD&A disclosures for investors while reducing compliance burdens for registrants.[86] Specifically, we are proposing to:

- Establish a new paragraph 303(a) that incorporates much of the substance of Instructions 1, 2, and 3 to current Item 303(a) to emphasize the objective of MD&A for both full fiscal years and interim periods;
- Reception current Item 303(a) as Item 303(b), and make the following additional changes:
  - Streamline current Item 303(a) by eliminating unnecessary cross-references to industry guides in Instructions 13 and 14;[87]
  - Amend current Item 303(a)(2) to modernize and enhance the current requirement, which is limited to capital expenditures, to specifically require a discussion of material cash requirements;
  - Amend current Item 303(a)(3)(ii) to clarify that a registrant should disclose reasonably likely changes in the relationship between costs and revenues;
  - Amend current Item 303(a)(3)(iii) and Instruction 4 to Item 303(a) to enhance analysis in MD&A by clarifying that a registrant should include in its MD&A a discussion of the reasons underlying material changes from period-to-period in one or more line items;
  - Eliminate current Item 303(a)(3)(iv), which requires registrants to discuss the impact of inflation and changing prices where material, along with the related Instructions 8 and 9 to Item 303(a);
  - Replace current Item 303(a)(4), the requirement that registrants provide off-balance sheet arrangement disclosures in a separately captioned section, with an instruction emphasizing the importance of discussing these obligations in the broader context of MD&A disclosure when such obligations have or are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources; and
  - Eliminate current Item 303(a)(5), the requirement that registrants provide a tabular disclosure of contractual obligations;
- Reception Item 303(b) as Item 303(c) and:
  - Amend current Item 303(b) to allow for more flexibility in interim periods compared; and
  - Simplify current Item 303(b) by eliminating certain instructions and providing cross-references to similar instructions in Item 303(a); and
- Eliminate current Items 303(c) and (d) as conforming changes.

The following table outlines the current and proposed structure of Item 303:[88]

Current structure	Proposed structure	Discussed in section(s)
Item 303(a), *Full fiscal years*	Item 303(a), *Objective*	II.C.1.
Item 303(a) (combined liquidity and capital resources discussions).	Instruction 2 to Item 303(b)	II.C.1.
Item 303(a)(1), *Liquidity*	Item 303(b)(1), *Liquidity*	II.C.2.
Item 303(a)(2), *Capital resources*	Item 303(b)(2), *Capital resources*	II.C.2.
(i) Capital expenditures	(i) Capital expenditures.	
(ii) Known material trends	(ii) Known material trends.	
Item 303(a)(3), *Results of operations*	Item 303(b)(3), *Results of operations*	II.C.3, II.C.4, & II.C.5.
(i) Unusual or infrequent events	(i) Unusual or infrequent events.	
(ii) Known trends or uncertainties	(ii) Known trends or uncertainties.	
(iii) Material increases	(iii) Material changes.	
(iv) Inflation and changing prices.		
Item 303(a)(4), *Off-balance sheet arrangements*	Replace with Instruction 8 to Item 303(b)	II.C.6.
Instructions 1, 2, 3, 4, and 5 to Item 303(a)(4)	Replace with Instruction 8 to Item 303(b)	II.C.6.
Item 303(a)(5), *Contractual obligations*	Eliminate	II.C.7.
2003 MD&A Interpretative Release, Critical accounting estimates.	Item 303(b)(4), *Critical accounting estimates*	II.C.8.
Instruction 1 to Item 303(a)	Instruction 1 to Item 303(b)(with amendments)	II.C.1.
Instruction 2 to Item 303(a)	Eliminate (with content incorporated into *Objective*)	II.C.1.
Instruction 3 to Item 303(a)	Eliminate (with content incorporated into *Objective*)	II.C.1.
Instruction 4 to Item 303(a)	Instruction 3 to Item 303(b)(with amendments and some content incorporated into Item 303(b)).	II.C.4.
Instruction 5 to Item 303(a)	Instruction 4 to Item 303(b)	II.C.1.
Instruction 6 to Item 303(a)	Instruction 5 to Item 303(b)	II.C.1.

[85] *See* FAST Act Adopting Release. Specifically, the Commission amended Item 303 to: Revise Instruction 1 to Item 303(a) to allow registrants that provide financial statements covering three years in a filing to omit discussion of the earliest of the three years if such discussion was already included in the registrant's prior filings on EDGAR; eliminate the reference to year-over-year comparisons in Instruction 1 to Item 303(a); and eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a).

[86] We discuss below in Section II.D our proposals to make certain parallel amendments to Item 5 of Form 20–F (Operating and Financial Review and Prospects), General Instruction B.(11) of Form 40–F (Off-Balance Sheet Arrangements), and General Instruction B.(12) of Form 40–F (Tabular Disclosure of Contractual Obligations).

[87] *See* 17 CFR 229.802.

[88] The information in this table is not comprehensive and is intended only to highlight the general structure of the current rules and proposed amendments. It does not reflect all of the substance of the proposed amendments or all of the rules and forms that may be affected. All changes are discussed in their entirety throughout this release. As such, this table should be read together with the referenced sections and the complete text of this release.

Current structure	Proposed structure	Discussed in section(s)
Instruction 7 to Item 303(a)	Instruction 6 to Item 303(b)	II.C.1.
Instruction 8 to Item 303(a)	Eliminate	II.C.5.
Instruction 9 to Item 303(a)	Eliminate	II.C.5.
Instruction 10 to Item 303(a)	Instruction 7 to Item 303(b)	II.C.1.
Instruction 11 to Item 303(a)	Instruction 9 to Item 303(b)(with amendments)	II.D.3.
Instruction 12 to Item 303(a)	Instruction 10 to Item 303(b)	II.C.1.
Instruction 13 to Item 303(a)	Eliminate	II.C.1.
Instruction 14 to Item 303(a)	Eliminate	II.C.1.
Item 303(b), *Interim periods*	Item 303(c), *Interim periods*	II.C.9.
(1) Material changes in financial condition	(1) Material changes in financial condition.	
(2) Material changes in results of operations, Rule 3–03(b) of Regulation S–X matters.	(2) Material changes in results of operations (i) Material changes in results of operations (year-to-date). (ii) Material changes in results of operations (quarter comparisons).	
Instruction 1 to Item 303(b)	Instruction 1 to Item 303(c) (with amendments to reference Instructions 3, 6, 8, and 11 to proposed Item 303(b)).	II.C.9.
Instruction 2 to Item 303(b)	Eliminate	II.C.9.
Instruction 3 to Item 303(b)	Eliminate	II.C.9.
Instruction 4 to Item 303(b)	Instruction 2 to Item 303(c)	II.C.9.
Instruction 5 to Item 303(b)	Eliminate	II.C.9.
Instruction 6 to Item 303(b)	Eliminate	II.C.9.
Instruction 7 to Item 303(b)	Eliminate	II.C.9.
Instruction 8 to Item 303(b)	Instruction 11 to Item 303(b)	II.C.9.
Item 303(c), *Safe harbor*	Eliminate	II.C.10.
Item 303(d), *Smaller reporting companies*	Eliminate	II.C.11.

1. Restructuring and Streamlining (Item 303(a))

The first paragraph of current Item 303(a) instructs registrants to discuss their financial condition, changes in financial condition, and results of operations for full fiscal years.[89] The paragraph then sets forth the items that must be included in this discussion, including liquidity, capital resources, results of operations, off-balance sheet arrangements, contractual obligations, and any other information a registrant believes would be necessary to understand its financial condition, changes in financial condition, and results of operations. The paragraph also instructs that discussions of capital resources and liquidity may be combined when the topics are interrelated. Finally, the paragraph states that a registrant must provide a discussion of business segments and/or of subdivisions when, in the registrant's judgment, such a discussion would be appropriate for understanding its business. This discussion must focus on each relevant, reportable segment and/or other subdivision of the business and on the registrant as a whole. In addition to the text, there are fourteen instructions to Item 303(a).

We are proposing multiple changes that are intended to streamline and clarify the purposes of Item 303.[90] First, we propose adding a new Item 303(a) to succinctly state the purposes of MD&A by incorporating a portion of the substance of Instruction 1, and much of the substance of Instructions 2 and 3 into the item. Specifically, we propose to incorporate each of the following portions of current Instructions 1, 2, and 3 to describe the objectives of MD&A, which is for companies to provide disclosure regarding:

- Material information relevant to an assessment of the financial condition and results of operations of the registrant, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources.
- The material financial and statistical data that the registrant believes will enhance a reader's understanding of the registrant's financial condition, changes in financial condition, and results of operations.[91]
- Material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include descriptions and amounts of matters that: (i) Would have a material impact on future operations and have not had an impact in the past, and (ii) have had a material impact on reported operations and are not expected to have an impact on future operations.

We are also proposing to codify Commission guidance that states that a registrant should provide a narrative explanation of its financial statements that enables investors to see a registrant ''through the eyes of management'' [92] into the description of MD&A objectives. We believe that emphasizing the purpose of MD&A at the outset of the Item will provide clarity and focus to registrants as they consider what information to discuss and analyze. Our intent is to facilitate a thoughtful discussion and analysis, and encourage management to disclose factors specific to the registrant's business, which management is in the best position to know, and underscore materiality as the overarching principle of MD&A.[93] Our proposal is intended to serve as a reminder to registrants as they prepare their MD&A that the general purpose of the disclosure is to provide both a historical and prospective analysis of the registrant's financial condition and

[89] Item 303(a) of Regulation S–K [17 CFR 229.303(a)].

[90] These proposed changes, along with the other proposed amendments and eliminations discussed elsewhere in this release, would result in some changes in the subsection labeling and headings.

[91] The remainder of the instruction also specifies periods that the discussion must cover, which our proposed amendments would retain.

[92] *See* 2003 MD&A Interpretative Release, at 75056. *See also* 1989 Interpretative Release, at 22428.

[93] *See, e.g.,* FAST Act Adopting Release, at 12679 (emphasizing that ''[m]ateriality remains, as always, the primary consideration'' of MD&A) and the 2003 MD&A Interpretative Guidance, at 75060 (noting that ''it is increasingly important for companies to focus their MD&A on material information. In preparing MD&A, companies should evaluate issues presented in previous periods and consider reducing or omitting discussion of those that may no longer be material or helpful, or revise discussions where a revision would make the continuing relevance of an issue more apparent.'').

results of operations, with particular emphasis on the registrant's prospects for the future.[94] This principles-based approach is also well-suited to elicit disclosure about complex and often rapidly evolving areas, without the need to continuously amend the text of the rule to impose bright-line or prescriptive requirements.[95]

In light of our proposal to add new Item 303(a), we propose to re-caption current Item 303(a) as Item 303(b), which will continue to apply to all MD&A disclosures.[96] As proposed, the introductory paragraph would retain the current language that outlines what is to be covered in the discussion of a registrant's financial condition, changes in financial condition, and results of operations.[97] Additionally, we propose to add product lines as an example of other subdivisions of a registrant's business that should be discussed where, in the registrant's judgment, such a discussion would be necessary to an understanding of the registrant's business.[98] We believe that this added example would provide registrants with additional clarity on the types of subdivisions that may require separate disclosure, though it is not intended to complete the list.

We also propose to move to proposed Item 303(b) the portion of current Instruction 4 to Item 303(a) that requires a description of the causes of material changes from year-to-year in line items of the financial statements to the extent necessary to an understanding of the registrant's business as a whole.[99] In response to general requests for comment on Item 303 in the Concept Release, a few commenters provided recommendations on how to revise Item 303(a) to facilitate a more meaningful analysis.[100] One commenter suggested amending Item 303 to require a description of material factors that contributed to any material change in results, and that quantitative and qualitative factors could be listed as examples of the types of factors that could be discussed in MD&A.[101]

Similarly, another commenter recommended revising Item 303(a)(3) to require a description of the major factors that caused changes in line items (*e.g.,* economic trends, industry conditions and sales and costs related to key products and services).[102] Yet another commenter stated that Item 303(a) and Instruction 4 should be revised to ''clearly instruct'' registrants that discussions about material changes should address quantitative and qualitative factors underlying the changes.[103] One commenter also noted that it would be preferable for the requirements to indicate that registrants cannot present line item changes without providing ''meaningful explanations.'' [104] Finally, another commenter recommended revising Instruction 4 to Item 303(a) to allow registrants to omit financial statement line item changes to the extent such an omission would not materially impair an investor's understanding of a registrant's results of operations.[105] This revision, the commenter stated, would allow registrants and investors to focus on line items that had the most impact on its results of operations.

We propose to amend the language of Instruction 4 to Item 303(a),[106] which would be moved to proposed Item 303(b), to clarify that MD&A requires a narrative discussion of the ''underlying reasons'' for material changes from period-to-period in one or more line items in quantitative and qualitative terms, rather than only the ''cause'' for material changes. We are also proposing to amend the language to clarify that registrants should discuss material changes within a line item even when such material changes offset each other.[107] We believe our proposals would enhance analysis in MD&A, and accordingly, would be responsive to concerns raised by commenters. We also believe the proposals would clarify MD&A's requirements by codifying some of the Commission's prior guidance on the importance of analysis in MD&A. The Commission has previously emphasized the importance of providing an analysis in MD&A and stated that a thorough analysis often will involve discussing both the intermediate effects of known material trends, events, demands, commitments, and uncertainties and the reasons underlying those intermediate effects.[108] Commission guidance has also stated that MD&A should include both qualitative and quantitative analysis.[109] We believe the proposed amendments would encourage registrants to provide a more nuanced discussion of the underlying reasons that may be contributing to material changes in line items.

We also are proposing several amendments to further streamline the text of Item 303:

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[94] *See* 1989 MD&A Interpretive Release (''In preparing MD&A disclosure, registrants should be guided by the general purpose of the MD&A requirements: To give investors an opportunity to look at the registrant through the eyes of management by providing a historical and prospective analysis of the registrant's financial condition and results of operations, with particular emphasis on the registrant's prospects for the future.'').

[95] *See, e.g.,* Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33–9106 (Feb. 2, 2010) [75 FR 6290 (Feb. 8, 2010)] and Commission Statement and Guidance on Public Company Cybersecurity Disclosures (Feb. 21, 2018) [83 FR 8166 (Feb. 26, 2018)]. Commission staff has also provided its views on the application of our principles-based disclosure requirements to emerging issues. *See, e.g.,* Staff Statement on LIBOR Transition (July 12, 2019), available at *https://www.sec.gov/news/public-statement/libor-transition.*

[96] For interim periods, current Item 303(b) of Regulation S–K requires a ''discussion of material changes in those items specifically listed in [Item 303(a)], except that the impact of inflation and changing prices on operations for interim periods need not be addressed.'' *See* 1989 MD&A Interpretive Release at n. 38 and 39 and corresponding text (''The second sentence of Item 303(b) states that MD&A relating to interim period financial statements 'shall include a discussion of material changes in those items specifically listed in paragraph (a) of this Item, except that the impact of inflation and changing prices on operations for interim periods need not be addressed.' As this sentence indicates, material changes to each and every specific disclosure requirement contained in paragraph (a), with the noted exception, should be discussed.''); 2003 MD&A Interpretive Release (''Disclosure in MD&A in quarterly reports is complementary to that made in the most recent annual report and in any intervening quarterly reports.'').

[97] *See* Item 303(a).

[98] The current relevant Item 303(a) language states that where, in the registrant's judgment, a discussion of segment information and/or of other subdivisions (*e.g.,* geographic areas) of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant segment and/or other subdivision of the business and on the registrant as a whole.

[99] Instruction 4 to Item 303(a) of Regulation S–K [17 CFR 229.303(a)].

[100] *See, e.g.,* letters from Fenwick, Maryland State Bar Association (July 21, 2016) (''Maryland Bar Securities Committee''), S. Percoco, and NYSSCPA.

[101] *See* letter from Fenwick.

[102] *See* letter from S. Percoco.

[103] *See* letter from Maryland Bar Securities Committee.

[104] *See* letter from NYSSCPA. This commenter also expressed its belief that a significant number of registrants were providing narratives that did not allow an investor to view performance ''through the eyes of management.'' According to this commenter, such discussions ''generally [become] an exercise where management provides a quantitative analysis, which most investors can recompute—if they chose to—from the financial statements.''

[105] *See* letter from Davis Polk.

[106] Proposed to be renumbered as Instruction 3 to Item 303(b).

[107] *See, e.g.,* 1989 MD&A Interpretive Release (providing an example of material changes in revenue and in so doing, describing the effects of offsetting developments: ''Revenue from sales of single-family homes for 1987 increased 6 percent from 1986. The increase resulted from a 14 percent increase in the average sales price per home, partially offset by a 6 percent decrease in the number of homes delivered. Revenues from sales of single-family homes for 1986 increased 2 percent from 1985. The average sales price per home in 1986 increased 6 percent, which was offset by a 4 percent decrease in the number of homes delivered.'').

[108] *See, e.g.,* 2003 MD&A Interpretive Release.

[109] *See, e.g.,* 2003 MD&A Interpretive Release and 1989 MD&A Interpretive Release.

• We propose to move the text in current Item 303(a) stating that registrants may combine their discussions of liquidity and capital resources when the topics are interrelated to an instruction to the item.[110] We believe this language is an instruction given that it is not a substantive requirement or accommodation, but rather a clarification of how registrants may structure their disclosures.

• Instruction 8 to current Item 303(b) indicates that the term ''statement of comprehensive income'' is defined by Rule 1–02 of Regulation S–X.[111] We are proposing to move this language to proposed Instruction 11 to proposed Item 303(b) to clarify that the instruction applies to both full fiscal year and interim period MD&A disclosure.

• We also propose to eliminate current Instructions 13 and 14 to Item 303(a) as simplifying amendments. These instructions call the attention of bank holding companies and property-casualty insurance companies to Guide 3 [112] and Guide 6,[113] respectively. Registrants should still consider the Guides in preparing their disclosures generally, but we do not believe the cross-reference is necessary to an understanding of the requirements of Item 303.

Request for Comment

18. Should we adopt proposed Item 303(a)? Would proposed Item 303(a) clarify the purpose of MD&A disclosures for registrants and others? Would the proposed amendments aid registrants in determining what to disclose in their MD&A?

19. Should we incorporate the language from current Instruction 4 to Item 303(a) into proposed Item 303(b), as proposed? Should we amend this language to require disclosure of the underlying reasons for material changes in quantitative and qualitative terms, including material changes within a line item, as proposed?

20. Are there any instructions that we are proposing to delete or move that we should retain or leave as is? Are there any other current instructions that we should revise or clarify?

21. Should we eliminate Instructions 13 and 14 to Item 303(a) that reference Guides 3 and 6, as proposed? Should we instead include additional instructions to reference the other industry guides?

2. Capital Resources (Item 303(a)(2))

Item 303(a)(2) requires a registrant to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, and to indicate the general purpose of such commitments and the anticipated sources of funds needed to fulfill such commitments.[114] A registrant also must discuss any known material trends, favorable or unfavorable, in its capital resources, and indicate any expected material changes in the mix and relative cost of such resources.[115] The discussion must consider changes between equity, debt, and any off-balance sheet financing arrangements.[116]

When adopting disclosure requirements for capital resources, the Commission recognized that the term ''capital resources'' lacked precision, but stated that ''additional specificity would decrease the flexibility needed by management for a meaningful discussion.'' [117] To that end, Item 303 does not define ''capital resources.'' [118] The current capital resources disclosure requirements in Item 303(a)(2) have remained largely the same since 1980.[119] Item 303(a)(2) specifies that registrants must disclose material commitments for capital expenditures, which generally relate to physical assets, such as buildings and equipment. Some registrants include disclosure beyond capital expenditures, which the Commission's guidance has encouraged.[120]

The Concept Release solicited comment on how the Commission could revise Item 303(a) to elicit a more meaningful analysis of a registrant's capital resources while maintaining flexibility.[121] The Concept Release also requested comment on how registrants interpret the term ''capital resources'' and whether defining the term would be helpful to registrants.[122]

Some commenters observed differences in how registrants apply the term ''capital resources.'' [123] One of these commenters stated that the Commission should adopt a definition of capital resources that is broader than currently implied by Item 303(a)(2)(i).[124] This commenter stated that registrants interpret ''capital resources'' as material commitments for capital expenditures and the source of funds related to such commitments. Another commenter stated that some registrants interpret ''capital resources'' to require ''disclosure of a registrant's sources of capital, while others interpret it to require disclosure of the sources of capital assets used in a registrant's business.'' [125]

Some commenters supported the Commission's current approach to the term ''capital resources.'' [126] One commenter urged the Commission not to depart from the existing policy of recognizing the term ''capital resources'' as a general term in a manner that might decrease the flexibility needed by management for a meaningful discussion.[127] Another commenter recommended that the Commission not further define the term ''capital resources'' beyond its current general use.[128]

We continue to believe that disclosure of capital resources is critical to an assessment of a registrant's prospects for the future and likelihood of its survival.[129] Therefore, we propose to

[110] Proposed Instruction 2 to Item 303(b).

[111] [17 CFR 210.1–02(cc)]. Rule 1–02 defines a ''statement of comprehensive income'' as follows: ''[t]he term statement(s) of comprehensive income means a financial statement that includes all changes in equity during a period except those resulting from investments by owners and distributions to owners. . . . A statement of operations or variations thereof may be used in place of a statement of comprehensive income if there was no other comprehensive income during the period.'' Thus, references to a statement of comprehensive income would include a statement of operations prepared by certain issuers, such as BDCs.

[112] [17 CFR 229.801(c) and 17 CFR 229.802(c)]. We recently proposed rules relating to Guide 3. *See Update of Statistical Disclosures for Bank and Savings and Loan Registrants,* Release No. 33–10688 (Sept. 17, 2019) [84 FR 52936 (Oct., 3, 2019)]. The proposed rules would update the disclosures that investors receive, codify certain Guide 3 disclosures and eliminate other Guide 3 disclosures that overlap with Commission rules, U.S. GAAP, or International Financial Reporting Standards (''IFRS''). In addition, the Commission proposed to relocate the codified disclosures to a new subpart of Regulation S–K and to rescind Guide 3.

[113] [17 CFR 229.801(f)].

[114] Item 303(a)(2)(i) of Regulation S–K [17 CFR 229.303(a)(2)(i)].

[115] Item 303(a)(2)(ii) [17 CFR 229.303(a)(2)(ii)].

[116] *Id.*

[117] 1980 Form 10–K Adopting Release, at 63636.

[118] Instruction 5 to Item 303(a) of Regulation S–K [17 CFR 229.303(a)]. *See also* 1980 Form 10–K Adopting Release, *supra* note 45, at 63636.

[119] *See* 1980 Form 10–K Adopting Release.

[120] *See* 2003 MD&A Interpretive Release, at 75062.

[121] *See* Concept Release, at 23947.

[122] *See id.*

[123] *See* letters from NYSSCPA and BDO.

[124] *See* letter from NYSSCPA.

[125] *See* letter from BDO.

[126] *See* letters from Davis Polk and FEI.

[127] *See* letter from Davis Polk.

[128] *See* letter from FEI (''As noted above, we believe it would be helpful to consolidate the guidance on MD&A into a single source. In doing so, we recommend that the SEC not expand prescriptive requirements with respect to liquidity and capital resources, including not further defining the terms ''liquidity'' and ''capital resources'' beyond their current general terms.'').

[129] *See* 2003 MD&A Interpretive Release at note 41 and corresponding text. Much of the Commission's prior guidance has focused on enhancing disclosure of liquidity and capital resources. *See, e.g.,* 1989 MD&A Interpretive Release and 2003 MD&A Interpretive Release.

amend current Item 303(a)(2) [130] to specify, consistent with the Commission's 2003 MD&A Interpretive Release, that a registrant should broadly disclose material cash commitments, including but not limited to capital expenditures. Specifically, our proposed amendment would require a registrant to describe its 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.[131]

This proposal is intended to require registrants to identify and disclose known material cash requirements. Depending on the registrant, this could include items such as: Funds necessary to maintain current operations, complete projects underway, and achieve stated objectives or plans; or commitments for capital or other expenditures.[132] This proposal is also intended to modernize Item 303(a)(2) by specifically requiring disclosure of material cash requirements in addition to capital expenditures. While capital expenditures remain important in many industries, we recognize that certain expenditures and cash commitments that are not necessarily capital investments in property, plant, and equipment may be increasingly important to companies, especially those for which human capital or intellectual property are key resources. Our proposals are intended to encompass these and other material cash requirements.

These proposals, alongside the current requirement for registrants to discuss their ability to generate cash,[133] are intended to enhance disclosure and provide investors with a clear picture of a registrant's ability to meet its material cash requirements. We acknowledge the commenters who suggested that we define ''capital resources.'' We have decided, however, not to propose a definition of the term to allow for continued flexibility and business-specific discussions of the topic.[134] Lastly, and as discussed in Section II.C.7, our proposal to enhance discussion of capital resources is also intended to complement our proposed deletion of the contractual obligations table.

Request for Comment

22. Should we amend Item 303(a)(2), as proposed? Would the proposed amendments continue to allow management flexibility to provide a meaningful discussion of capital resources?

23. Are there other aspects of Item 303(a)(2) we should revise? If so, which aspects?

3. Results of Operations—Known Trends or Uncertainties (Item 303(a)(3)(ii))

Item 303(a)(3)(ii) requires a registrant to describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations.[135] In addition, if the registrant knows of events that will cause a material change in the relationship between costs and revenues, the change in the relationship must be disclosed.[136]

We propose to amend Item 303(a)(3)(ii) [137] to provide that when a registrant knows of events that are *reasonably likely* to cause (as opposed to *will* 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 reasonably likely change must be disclosed. This proposed amendment would conform the language in this paragraph to other Item 303 disclosure requirements for known trends,[138] and align Item 303(a)(3)(ii) with the Commission's guidance on forward-looking disclosure.[139]

Request for Comment

24. Should we amend Item 303(a)(3)(ii) to provide that registrants must disclose events reasonably likely to cause a material change in the relationship between costs and revenue, as proposed? Are there other areas in Item 303 where we should provide a similar requirement?

4. Results of Operations—Net Sales and Revenues (Item 303(a)(3)(iii))

Item 303(a)(3)(iii) specifies that, to the extent financial statements disclose material increases in net sales or revenues, a registrant must provide a narrative discussion of the extent to which such increases are attributable to increases in prices, or to increases in the volume or amount of goods or services being sold, or to the introduction of new products or services.[140] The Commission previously clarified that a results of operations discussion should describe not only increases but also decreases in net sales or revenues.[141] Accordingly, we propose to amend Item 303(a)(3)(iii) to codify this guidance and clarify the requirement by tying the required disclosure to ''material changes'' in net sales or revenues, rather than solely to ''material increases'' in these line items.

Request for Comment

25. Should we revise Item 303(a)(3)(iii), as proposed?

26. Are there reasons other than changes in prices, or changes in volume or amount of goods or services being sold, or the introduction of new products or services that can contribute to changes in revenue or net sales, or other line items? If so, what are they? Would enumerating other reasons aid registrants in determining what information may be necessary to understand material changes in line items, or would this result in a *de facto* prescriptive or minimum disclosure standard?

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[130] Proposed to be renumbered as Item 303(b)(2).

[131] *See* 2003 MD&A Interpretive Release, at 75063.

[132] *See id.*

[133] *See* Item 303(a)(1) and Instruction 5 of Item 303(a). *See also* 2003 MD&A Interpretive Release, at 75062–75064.

[134] *See* 1980 Form 10–K Adopting Release.

[135] Item 303(a)(3)(ii) of Regulation S–K [17 CFR 229.303(a)(3)(ii)].

[136] Examples given include known future increases in costs of labor or materials or price increases or inventory adjustments. *See id.*

[137] To be renumbered as Item 303(b)(3)(ii).

[138] *See, e.g.,* Item 303(a)(1), which requires registrants to ''[i]dentify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way.'' Item 303(a)(1) to Regulation S–K [17 CFR 229.303(a)(1)].

[139] *See* 1989 MD&A Interpretive Release, at 22430, where the Commission articulated a two-step test for assessing when forward-looking disclosure is required in MD&A:

''Where a trend, demand, commitment, event or uncertainty is known, management must make two assessments:

(1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.

(2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur.''

[140] Item 303(a)(3)(iii) of Regulation S–K [17 CFR 229.303(a)(3)(iii)].

[141] *See* 1989 MD&A Interpretative Release, at n. 36 (''Although Item 303(a)(3)(iii) speaks only to material increases, not decreases, in net sales or revenues, the Commission interprets Item 303(a)(3)(i) and Instruction 4 as seeking similar disclosure for material decreases in net sales or revenues.'').

5. Results of Operations—Inflation and Price Changes (Item 303(a)(3)(iv), and Instructions 8 and 9 to Item 303(a))

Item 303(a)(3)(iv)[142] generally requires registrants, for the three most recent fiscal years, or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, to discuss the impact of inflation and price changes on their net sales, revenue, and income from continuing operations. Instruction 8 to Item 303(a) clarifies that a registrant must provide a discussion of the effects of inflation and other changes in prices only to the extent it is material. The instruction further states that the discussion may be made in whatever manner appears appropriate under the circumstances and that no specific numerical financial data is required, except as required by Rule 3–20(c) of Regulation S–X,[143] which applies to FPIs. Instruction 9 to Item 303(a) states that registrants that elect to disclose supplementary information on the effects of changing prices may combine such disclosures with the Item 303(a) discussion and analysis or provide it separately (with an appropriate cross-reference).[144]

The precursors to Item 303(a)(3)(iv) and Instructions 8 and 9 were adopted in 1980,[145] during a period of rapid domestic inflation.[146] At that time, the Commission was concerned with the adequacy of disclosures about the effect of inflation and changing prices on registrants.[147] Several years later, the Commission amended the instructions to, among other things, clarify that disclosure of inflation is only required if material.[148]

Although Instruction 8 to Item 303(a) specifies that a discussion of inflation and other changes in prices is required only when such matters are considered material, we believe that the reference to inflation and changing prices may give undue attention to the topic, even when such information is not necessary to an understanding of a registrant's financial condition or results of operations. In order to encourage registrants to focus their MD&A on material information that is tailored to their respective facts and circumstances, we propose to eliminate Item 303(a)(3)(iv) and current Instruction 8 and Instruction 9 to Item 303(a).

We do not believe that these proposed changes would result in a loss of material information. Despite these proposed deletions, registrants would still be expected to discuss the impact of inflation or changing prices if they are part of a known trend or uncertainty that has had, or the registrant reasonably expects to have, a material favorable or unfavorable impact on net sales, or revenue, or income from continuing operations.[149] The Commission has also specifically encouraged registrants to consider disclosure of economic or industry-wide factors where relevant.[150]

In addition, the proposed amendments to current Item 303(a)(3)(iii)[151] would require registrants to provide the reasons underlying material changes from period-to-period in one or more line items in the statement of comprehensive income.[152] Similarly, our proposed amendment to Instruction 4 to Item 303(a) would require that, where the financial statements reveal material changes in one or more line items, registrants would be required to disclose the underlying reasons for material changes in quantitative and qualitative terms. If there are material changes from inflation or changing prices, registrants would be required to discuss those reasons under both current Item 303 and amended Item 303, as proposed.

Request for Comment

27. Should we eliminate the references to inflation disclosure by eliminating Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a), as proposed? Would there be a loss of material information if we eliminate these provisions?

6. Off-Balance Sheet Arrangements (Item 303(a)(4))

Item 303(a)(4)[153] requires, in a separately-captioned section, a discussion of a registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures, or capital resources that is material to investors.[154] Generally, Item 303(a)(4)(ii) defines off-balance sheet arrangements as certain guarantees, retained or contingent interests in assets transferred to an unconsolidated entity, obligations under certain derivative instruments,[155] and variable interests in any unconsolidated entity. To the extent necessary to an understanding of such arrangements and effect, registrants must disclose the following items and such other information that the registrant believes is necessary for such an understanding:

- The nature and business purpose of such off-balance sheet arrangements;[156]
- The importance to the registrant of such off-balance sheet arrangements in respect of its liquidity, capital resources, market risk support, credit risk support, or other benefits;[157]
- The amounts of revenues, expenses, and cash flows arising from such arrangements; the nature and amounts of any interests retained, securities

[142] Item 303(a)(3)(iv) of Regulation S–K [17 CFR 229.303(a)(3)(iv)].

[143] Rules 3–20(c) and 3–20(d) of Regulation S–X provide the situations when a registrant must discuss hyperinflation. Rule 3–20(d) generally describes a hyperinflationary environment as one that has cumulative inflation of approximately 100 percent or more over the most recent three-year period.

[144] Instruction 9 to Item 303(a).

[145] 1980 Form 10–K Adopting Release.

[146] *See* One Hundred Years of Price Change: The Consumer Price Index and the American Inflation Experience (Apr. 2014) available at *https://www.bls.gov/opub/mlr/2014/article/one-hundred-years-of-price-change-the-consumer-price-index-and-the-american-inflation-experience.htm* (stating ''the period from 1968 to 1983 stands out as the definitive era of sustained inflation in the 20th-century United States'' and that during this time period, the largest 12-month increase in inflation of 14.8 percent occurred between March 1979 to March 1980).

[147] *See* 1980 Form 10–K Adopting Release (''[T]he Commission believes that Management's Discussion and Analysis should contain information which changes the potentially confusing situation involving inflation impact disclosure into a meaningful discussion of the effects of changing prices on the registrant's business.'').

[148] At that time, the Commission amended Instructions 8 and 9 to conform the requirement to the then-recently adopted SFAS No. 89 (Financial Reporting and Changing Prices) and stated ''Item 303(a) does not require registrants to discuss the impact of inflation when such impact does not materially affect the financial statements.'' *See Disclosure of the Effects of Inflation and Changes in Prices,* Release No. 33–6681 (Dec. 18, 1986), [51 FR 47026 (Dec. 30, 1986)), adopted in Release No. 33–6728 (Aug. 7, 1987), [52 FR 30917 (Aug. 18, 1987)].

[149] *See* Item 303(a)(3)(ii) [CFR 229.303(a)(3)(ii)] and proposed Item 303(b)(3)(ii).

[150] *See* 2003 MD&A Interpretive Release, at 75059.

[151] Proposed to be renumbered as Item 303(b)(3)(iii).

[152] *See supra* Section II.C.4.

[153] Item 5.E. of Form 20–F and General Instruction B.(11) of Form 40–F contain requirements for issuers that use those forms that are virtually identical to the requirements of Item 303(a)(4).

[154] Item 303(a)(4) of Regulation S–K [17 CFR 229.303(a)(4)].

[155] For registrants whose financial statements are prepared in accordance with U.S. GAAP, the definition includes a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in the registrant's statement of stockholders' equity. *See* ASC 815–10–15–74. For other registrants, the definition includes derivative instruments that are both indexed to the registrant's own stock and classified in stockholders' equity, or not reflected, in the registrant's statement of financial position. *See* Item 5.E.2.(c) of Form 20–F.

[156] Item 303(a)(4)(i)(A) of Regulation S–K [17 CFR 229.303(a)(4)(i)(A)].

[157] Item 303(a)(4)(i)(B) of Regulation S–K [17 CFR 229.303(a)(4)(i)(B)].

issued, and other indebtedness incurred in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the registrant arising from such arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; [158] and

• Any known event, demand, commitment, trend, or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability, of a registrant's off-balance sheet arrangements that provide material benefits, and the course of action that the registrant has taken or proposes to take in response to any such circumstances.[159]

In 2002, the Commission issued a statement that the quality of disclosure of off-balance sheet arrangements in MD&A should be improved.[160] The Commission also noted that off-balance sheet arrangements often are integral to both liquidity and capital resources and that registrants should ''consider all of these items together, as well as individually,'' when drafting MD&A disclosure.[161] The Commission further noted that off-balance sheet arrangements and transactions with unconsolidated, limited purpose entities should be discussed pursuant to Item 303(a) when they are ''reasonably likely to affect materially liquidity or the availability of or requirements for capital resources.'' [162]

The 2002 Commission Statement was consistent with Commission rules and guidance at the time. For example, Item 303(a)(2)(ii) specifically requires registrants to disclose off-balance sheet financing arrangements in their discussion of capital resources.[163] Similarly, the 1989 MD&A Interpretive Release indicated that a registrant's discussion of long-term liquidity and long-term capital resources must address demands or commitments, including any off-balance sheet items.[164]

Several months after the 2002 Commission Statement, the Sarbanes-Oxley Act [165] was enacted and added Section 13(j) to the Exchange Act, which required the Commission to adopt rules providing that each annual and quarterly financial report required to be filed with the Commission disclose all material off-balance sheet arrangements.[166] To implement Section 13(j), in 2003 the Commission adopted specific disclosure requirements for off-balance sheet arrangements in current Item 303(a)(4).[167] When adopting Item 303(a)(4), the Commission reiterated that, while at that time only one item in Item 303 specifically identified off-balance sheet arrangements,[168] other requirements ''clearly require[d] disclosure of off-balance sheet arrangements if necessary to an understanding of a registrant's financial condition, changes in financial condition or results of operations.'' [169] The 2003 amendments supplemented and clarified the disclosures that registrants must make about off-balance sheet arrangements and required registrants to provide those disclosures in a separately designated section of MD&A.[170]

In the release proposing Item 303(a)(4), the Commission recognized that parts of the proposed off-balance sheet disclosure requirements might overlap with disclosure presented in the footnotes to the financial statements.[171] The Commission stated, however, that the proposed rules were designed to provide more comprehensive information and analysis in MD&A than the disclosure that U.S. GAAP required in footnotes to financial statements.[172]

Since the adoption of Item 303(a)(4), the FASB has issued additional requirements that have caused U.S. GAAP to further overlap with the item.[173] For example, U.S. GAAP now requires disclosure in the notes to the financial statements of the nature and amount of a guarantee,[174] retained or contingent interests in assets transferred to unconsolidated entities,[175] pertinent information of derivative instruments that are classified as stockholders' equity under U.S. GAAP,[176] and obligations under variable interests in unconsolidated entities.[177] In the Commission staff's experience, this overlap often leads to registrants providing cross-references to the relevant notes to their financial statements or providing disclosure that is duplicative of information in the notes in response to Item 303(a)(4). Nevertheless, while many of the requirements in Item 303(a)(4) overlap with U.S. GAAP, some of the requirements related to the location, presentation, and nature of the disclosure are not the same. Additionally, Item 303(a)(4) disclosure is not audited. Below we discuss these differences in greater detail.

Location of Disclosure. Item 303(a)(4)(i) specifies that off-balance sheet arrangements should be discussed in a separately-captioned section. The instructions to Item 303(a)(4) permit that discussion to cross-reference information in the footnotes to the financial statements, rather than repeat it, provided that the MD&A disclosure

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[158] Item 303(a)(4)(i)(C) of Regulation S–K [17 CFR 229.303(a)(4)(i)(C)].

[159] Item 303(a)(4)(i)(D) of Regulation S–K [17 CFR 229.303(a)(4)(i)(D)].

[160] *See Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations,* Release No. 33–8056 (Jan. 22, 2002) [67 FR 3746 (Jan. 25, 2002)] (''2002 Commission Statement'').

[161] *See id.* at 3748.

[162] *See id.*

[163] Item 303(a)(2)(ii) of Regulation S–K [17 CFR 229.303(a)(2)(ii)]. The item specifies that the discussion shall consider changes between equity, debt, and any off-balance sheet financing arrangements.

[164] *See* 1998 MD&A Interpretive Release at 22431 (''The discussion of long-term liquidity and long-term capital resources must address material capital expenditures, significant balloon payments or other payments due on long-term obligations, and other demands or commitments, including any off-balance sheet items, to be incurred beyond the next 12 months, as well as the proposed sources of funding required to satisfy such obligations.'').

[165] Sarbanes-Oxley Act of 2002, Public Law 107–204, 116 Stat 745 (Jul. 2002) (''Sarbanes-Oxley Act'').

[166] Section 401(a) of the Sarbanes-Oxley Act added Section 13(j) to the Exchange Act [15 U.S.C. 78m(j)], which directed the Commission to adopt rules requiring each annual and quarterly financial report filed with the Commission to disclose ''all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.''

[167] *See Disclosure in Management's Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations,* Release No. 33–8182 (Jan. 28, 2003), [68 FR 5981(Feb. 5, 2003)] (''Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release''), at 5983.

[168] Item 303(a)(2)(ii) of Regulation S–K [17 CFR 229.303(a)(2)(ii)].

[169] *See* Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release, at 5983.

[170] *See id.*

[171] *See Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments,* Release No. 33–8144 (Nov. 4, 2002) 67 FR 68054 (Nov. 8, 2002), at n.72.

[172] *See id.*

[173] In June 2009, the FASB Issued SFAS No. 166, *Accounting for Transfers of Financial Assets an amendment of FASB Statement No. 140,* which requires enhanced disclosures about transfers of financial assets and a transferor's continuing involvement with transfers of financial assets accounted for as sales. Also in June 2009, the FASB issued SFAS No. 167, *Amendments to FASB Interpretation No. 46(R),* which requires enhanced disclosures about an enterprise's involvement in a variable interest entity, including unconsolidated entities. SFAS No. 166 and 167 have been codified as ASC Topics 860 (Transfers and Servicing) and 810 (Consolidation), respectively. *See also* Section II.D.1.b and note 315 below for a discussion of IFRS requirements that overlap with Item 5.E of Form 20–F.

[174] *See* ASC 460–10–50.

[175] *See* ASC 860–10–50–3, ASC 860–20–50.

[176] *See* ASC 815–40–50–5, ASC 505–10–50.

[177] *See* ASC 810–10–50–4.

integrates the substance of the footnotes in a manner designed to inform readers of the significance of the information that is cross-referenced.[178] By contrast, U.S. GAAP does not prescribe the location of these disclosures, which may be dispersed throughout the notes to the financial statements. However, the submission of this information in interactive data format, which is required in periodic reports on Forms 10–K, 10–Q, 20–F, 40–F and reports on Forms 8–K and 6–K that contain revised or updated financial statements, allows investors to isolate disclosures about off-balance sheet arrangements even when it is dispersed throughout the notes to the financial statements.

Presentation of Disclosure. Item 303(a)(4) requires disclosure for the most recent period and a discussion of changes from the previous year where necessary to an understanding of the disclosure.[179] U.S. GAAP does not require discussion of changes from the previous year.

Nature of Disclosures. While Item 303(a)(4) and U.S. GAAP both require disclosure of the nature and amounts associated with off-balance sheet arrangements, Item 303(a)(4)(i)(A) requires additional disclosure about the business purpose of the off-balance sheet arrangement and the importance of the off-balance sheet arrangement to the registrant's liquidity and capital resources. Item 303(a)(4) also requires disclosure of any known event, demand, commitment, trend, or uncertainty that will result in or is reasonably likely to result in the termination or material reduction in the availability of material off-balance sheet arrangements to the registrant and the course of action the registrant has taken or proposes to take to address such circumstances. U.S. GAAP does not require this disclosure.

In the Concept Release, the Commission solicited comment on the importance of disclosure elicited by Item 303(a)(4) and whether and how we should amend the requirements. Some commenters supported retaining the requirements.[180] One of these commenters stated that without this disclosure requirement, ''a registrant could create significant off-balance sheet liabilities that have the potential to impair its financial condition without investors knowing of it.'' [181] Another commenter stated that off-balance sheet arrangements disclosure requirements should be retained and expanded, and stated that it was comfortable with duplications between the financial statements and MD&A disclosures.[182] This commenter indicated that an executive overview analyzing the risks associated with off-balance sheet arrangements would be beneficial.

Several commenters encouraged the Commission to eliminate or amend Item 303(a)(4), stating that the requirements substantially overlap with U.S. GAAP.[183] Some commenters suggested that the Commission apply the principles-based disclosure framework in MD&A to off-balance sheet arrangements.[184] Other commenters recommended that the Commission make clear that no disclosure is required related to off-balance sheet arrangements that are not material.[185]

In light of the updates made to U.S. GAAP that result in substantial overlap between U.S. GAAP and Item 303(a)(4) of Regulation S–K, and consistent with our other proposed amendments intended to promote the principles-based nature of MD&A, we believe that the current more prescriptive off-balance sheet arrangement definition and related disclosure requirement in Item 303(a)(4) should be replaced with a principles-based instruction. Specifically, we propose to replace current Item 303(a)(4) with a new Instruction to Item 303(b) that would require registrants 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources.[186] This proposed instruction would build on the current requirement in Item 303(a)(2) that specifically requires consideration of off-balance sheet financing arrangements as part of the capital resources discussion.[187]

The proposed amendment should result in greater integration of material off-balance sheet arrangements disclosure within the context of broader MD&A disclosures as those arrangements enumerated in Item 303(a)(4) may be discussed more cohesively with other off-balance sheet arrangements that are not enumerated in Item 303(a)(4). We believe this could result in more effective discussion of the impact of these arrangements. Commission staff and commenters have observed that the current requirements often result in boilerplate disclosure or a duplication of disclosures in the financial statements. Further, Item 303(a)(4)'s requirement for disclosure in a separately captioned section often results in a disjointed presentation of off-balance sheet arrangements that may lack the necessary context of how these obligations should be considered in light of a registrant's overall financial condition. We believe that the proposed amendment would result in disclosure that would be more useful to understanding the impact of off-balance sheet arrangements, and may help avoid boilerplate or disjointed disclosure.

We acknowledge that, as discussed above, certain Item 303(a)(4) requirements related to the location, presentation, and nature of the disclosure do not overlap with U.S. GAAP. However, we believe that proposed Instruction 8 would mitigate any potential loss of information by requiring a discussion of material matters of liquidity, capital resources, and financial condition as they relate to off-balance sheet arrangements. Below, we seek comment on what material information, if any, may be lost if we adopt the proposed amendments.

Unlike Item 303(a)(4), the proposed instruction would not define ''off-balance sheet arrangements.'' Rather, it states that discussion of commitments or obligations, including contingent obligations, of the registrant arising from arrangements with unconsolidated entities or persons that have or are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources shall be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. The instruction provides examples of such arrangements that are substantially the same as those included in the current definition of off-balance sheet arrangements in Item 303(a)(4), including: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity, or market risk for assets transferred; obligations that arise or could arise from variable interests held in an

[178] Instruction 5 to Item 303(a)(4) of Regulation S–K [17 CFR 229.303(a)(4)].

[179] Instruction 4 to Item 303(a)(4) of Regulation S–K [17 CFR 229.303(a)(4)].

[180] *See, e.g.,* letters from CFA, CalPERS, and S. Percoco.

[181] *See* letter from CFA.

[182] *See* letter from CalPERS.

[183] *See. e.g.,* letters from Chamber, CGCIV, Davis Polk, E&Y, KPMG LLP (July 21, 2016) (''KPMG''), Arthur J. Radin, Janover LLC (''A. Radin''), and SIFMA.

[184] *See, e.g.,* letters from CGCIV, Chamber, and PWC.

[185] *See* letters from Davis Polk and Fenwick.

[186] *See* proposed Instruction 8 to Item 303(b).

[187] *See* Item 303(a)(2)(ii) of Regulation S–K [17 CFR 302(a)(2)(ii)].

unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity under U. S. GAAP and are therefore not presented as liabilities on a registrant's balance sheet.

While the examples in the proposed instruction are substantially the same as those in the current off-balance sheet arrangements definition in Item 303(a)(4), the examples do not include references to specific paragraphs in U.S. GAAP. Despite the elimination of these cross-references, the amendments are not intended to broaden the types of arrangements for which MD&A disclosure would be required. In this regard, under existing MD&A requirements, registrants are required to discuss in MD&A any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity decreasing in any material way, even if the known demand did not meet the definition of an off-balance sheet arrangement in Item 303(a)(4). Under the proposed amendments, those same arrangements would continue to be required to be discussed in MD&A. For the same reason, the proposed amendments also would not narrow the scope of what would be required to be disclosed in MD&A. The primary difference from what is currently required, and would be required under the proposed amendments, is that the discussion would no longer occur in a separately-captioned section; but rather, it would be made in the context of a more holistic, principles-based analysis.

We considered whether our proposal is consistent with Section 13(j) of the Exchange Act, as added by Section 401(a) of the Sarbanes-Oxley Act, which required the Commission to adopt rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet arrangements. We believe that Section 13(j) remains satisfied because, under proposed Instruction 8 to Item 303(b), disclosure of all material off-balance sheet arrangements would continue to be required in annual and quarterly reports. As discussed above, although a discussion of off-balance sheet arrangements would no longer be required to be provided in a separately captioned section, registrants would still be required to discuss such arrangements in the broader context of their MD&A disclosures.

We also propose to amend Items 2.03 and 2.04 of Form 8–K to include the definition of ''off-balance sheet arrangements'' that is currently in Item 303(a)(4). Currently, Form 8–K defines off-balance sheet arrangements by cross reference to Item 303(a)(4)(ii).[188] This proposed amendment would not result in any changes in reporting obligations under Item 2.03 and Item 2.04 of Form 8–K.[189]

Request for Comment

28. Should we amend the off-balance sheet arrangements disclosure requirement by replacing Item 303(a)(4) with Instruction 8 to Item 303(b), as proposed? Is the proposed instruction a sufficient replacement for the current requirement for a separately-captioned presentation of off-balance sheet arrangements?

29. Are there alternative approaches we should consider to address the potential for boilerplate or duplicative disclosure?

30. Would the proposed amendments result in the loss of material information to investors that would not be disclosed elsewhere? If so, what information would be lost? Are the proposed amendments sufficiently tailored to avoid discussion of immaterial off-balance sheet arrangements?

31. Would the proposed amendments result in more meaningful MD&A disclosures about off-balance sheet arrangements? Are the proposed amendments likely to reduce boilerplate or duplicative disclosure?

32. Should we amend Items 2.03 and 2.04 of Form 8–K to incorporate the definition of ''off-balance sheet arrangements'' that is currently in Item 303(a)(4), as proposed? Would the proposed amendments create any confusion as to when a reporting obligation under Item 2.03 or Item 2.04 of Form 8–K would be triggered?

[188] *See* Item 2.03(d) and Item 2.04(d) of Form 8–K. In 2004, as part of a broader effort to expand the events that registrants must report on a current basis, the Commission adopted additional requirements for disclosing off-balance sheet arrangements on Form 8–K. These provisions require registrants to file a Form 8–K upon the creation of a direct financial obligation or an obligation under an off-balance sheet arrangement (Item 2.03) and to file a Form 8–K if a triggering event occurs that causes the increase or acceleration of such an obligation and the consequences of the event are material to the registrant (Item 2.04). While the Form 8–K requirements rely on the definition of ''off-balance sheet arrangement'' in Item 303(a)(4)(ii), the purpose of the disclosure is different. Unlike Item 303(a)(4), Form 8–K does not require registrants to provide an analysis of off-balance sheet arrangements or their importance to the registrant.

[189] We believe it is appropriate to retain the current, prescriptive definition of ''off-balance sheet arrangements'' in Form 8–K in light of its four business day filing requirement. *See* Instruction B.1 and Instructions to Item 2.03 of Form 8–K. Our intent is that a prescriptive definition will provide registrants with greater certainty when filing a Form 8–K.

7. Contractual Obligations Table (Item 303(a)(5))

Under Item 303(a)(5),[190] registrants other than SRCs must disclose in tabular format their known contractual obligations. The item requires a registrant to arrange its table to disclose contracts by type of obligations,[191] the overall payments due, and by four prescribed periods.[192] A registrant may disaggregate the categories of obligations, but it must disclose all obligations falling within the prescribed five categories and for the prescribed time periods. A registrant may provide footnotes to the table to the extent such information is necessary to understand the disclosures in the contractual obligations table. There is no materiality threshold for this item, meaning registrants must disclose all contractual obligations falling within the prescribed four categories.

When the Commission implemented this disclosure requirement, its purpose was to ensure that aggregated information about contractual obligations was presented in one place.[193] This was intended to aid investors in determining the effect such obligations would have in the context of off-balance sheet arrangements.[194] Commission guidance that followed the implementation of this requirement encouraged registrants to include narratives to the table to provide more context and analysis for the numbers presented.[195]

In the Concept Release, the Commission solicited comment on the meaningfulness of disclosure elicited by Item 303(a)(5). Several commenters recommended retaining and enhancing this item requirement,[196] with two of these commenters supporting an additional requirement to include pension obligations.[197] Another

[190] Item 303(a)(5) of Regulation S–K [17 CFR 229.303(a)(5)].

[191] The types of obligations include long-term debt obligations, capital lease obligations, operating lease obligations, purchase obligations, and other long-term liabilities reflected on the registrant's balance sheet under GAAP.

[192] The payment obligations must be disclosed for the following timeframes: Less than one year; one to three years; three to five years; and more than five years.

[193] *See* Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release at 5990.

[194] *See id.*

[195] *See Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis,* Release No. 33–9144 (Sept. 17, 2010) [75 FR 59894 (Sept. 28, 2010)] (''2010 MD&A Interpretive Release''), at 59896.

[196] *See, e.g.,* letters from RGA, Bloomberg, Better Markets, Inc. (Jul. 21, 2016) (''Better Markets''), S. Percoco, and CFA Institute.

[197] *See* letters from Bloomberg and S. Percoco.

commenter recommended enhancing this disclosure by requiring XBRL tagging and disclosure of single, discrete years (as opposed to grouped years).[198] Some of these commenters recommended requiring, or at least encouraging, registrants to provide a narrative to the contractual obligations table.[199]

Many commenters, however, recommended that we simplify or eliminate Item 303(a)(5).[200] Some commenters encouraged the Commission to consider whether the contractual obligations table is necessary given the overlap with the disclosure requirements of U.S. GAAP.[201] One commenter also noted that ''to the degree that elimination of duplicative topics is unavoidable, registrants should be able to cross-reference within a filing.'' [202] Another commenter broadly supported the idea of making MD&A contractual obligations disclosure more principles-based ''to highlight material issues regarding [a registrant's] liquidity'' and allowing the relevant factual information to be provided in the financial statements.[203] One commenter questioned whether the contractual obligations table, as currently structured, provides a complete picture of a registrant's obligations and liquidity concerns.[204]

Several commenters recommended the Commission eliminate Item 303(a)(5), stating that the disclosure requirement is largely redundant with what is required in the financial statements.[205] One of these commenters indicated that the Commission should eliminate disclosure requirements that are redundant with U.S. GAAP or IFRS, as applicable.[206] This commenter stated that ''[i]dentical, or even similar disclosures, to GAAP appear unnecessary considering that accounting standards undergo a high level of scrutiny in the standards-setting process and are subjected to ongoing FASB monitoring for needed revisions.'' [207] Another commenter stated that the information provided in response to Item 303(a)(5) is largely the same as that provided in a registrant's financial statements and questioned its utility.[208] The commenter went on to state that the information in the Item 303(a)(5) contractual obligations table did not provide insight as to whether a registrant could pay the obligations as they became due.

In the FAST Act Report, Commission staff recommended eliminating the contractual obligations table while enhancing the liquidity discussion requirements.[209] Under this recommendation, registrants would no longer be required to present contractual obligations in a table, but registrants would have to provide a hyperlink to the relevant information in the financial statements. One commenter on the FAST Act Report stated that eliminating the contractual obligations table would be a ''step backwards.'' [210] The commenter wrote that ''[t]he table as it exists is a user-friendly, central location for the complete display of all a firm's future cash obligations.''

Although the Commission did not propose to eliminate Item 303(a)(5) in the FAST Act Proposing Release,[211] we now propose to eliminate Item 303(a)(5), consistent with our objective to promote the principles-based nature of MD&A and streamline disclosures by reducing redundancy.[212] We do not believe that eliminating the requirement would result in a loss of material information to investors given the overlap with information required in the financial statements and our proposed expansion of the capital resources requirement, discussed above in Section II.C.2.

As many commenters pointed out,[213] much of the information presented in response to this requirement overlaps with U.S. GAAP and is therefore included in the notes to the financial statements.[214] As commenters also observed, the current table does not provide insight into the registrant's ability to pay its obligations as they become due [215] and may not provide a complete picture of the registrant's expected uses of cash.[216] Our proposals to enhance the liquidity and capital resources discussion are intended to address some of these commenter concerns. We recognize that some of the information in the contractual obligations table is not specifically called for under U.S. GAAP.[217] However, under our capital resources proposals, described above in Section II.C.2, registrants would be required to discuss material cash requirements, which would include material contractual obligations.

Request for Comment

33. Should we eliminate the contractual obligations disclosure requirement, as proposed?

34. Would investors be deprived of material information under the proposal?

35. Is the disclosure of information related to contractual obligations in the notes to the financial statements an adequate substitute for its separate tabular presentation in Item 303(a)(5)? Would there be any costs or challenges to investors of compiling information required in Item 303(a)(5) from other sources and, if so, what would the costs or challenges be? Do current XBRL-tagging requirements facilitate compilation and comparison of such information?

36. How do market participants use the ''payments due by period'' information in the contractual obligations table and is the disclosure material to an investor's investment decision? If we eliminate Item 303(a)(5), should we require registrants to disclose information regarding the time periods in which material contractual obligations will become due?

37. If we eliminate the required table of contractual obligations, as proposed,

[198] *See* letter from RGA.

[199] *See, e.g.,* letters from Better Markets, S. Percoco, and CFA Institute.

[200] *See, e.g.,* letters from E&Y, SIFMA, BDO, EEI and AGA, Davis Polk, General Motors, FEI, A. Radin, Deloitte, Chamber, FedEx, CGCIV, CAQ, KPMG, PWC, Chevron, Fenwick, and Grant Thornton.

[201] *See* letters from General Motors, PWC, Grant Thornton, CAQ, and Deloitte.

[202] *See* letter from General Motors.

[203] *See* letter from SIFMA.

[204] As an example, the commenter noted that a registrant can have a large or small amount of contractual obligations, but the disclosure of such amount does not necessarily provide investors with information about the registrant's ability to generate liquidity, its contractual obligations at any other point in time, or a complete picture of its expected uses of cash. *See* letter from E&Y.

[205] *See, e.g.,* letters from A. Radin, Deloitte, Chamber, FedEx, CGCIV, CAQ, KPMG, PWC, Chevron, Fenwick, E&Y, and Grant Thornton.

[206] *See* letter from KPMG.

[207] The commenter then also included a chart that, among other things, noted the items that overlap between Item 303(a)(5) and U.S. GAAP requirements.

[208] *See* letter from Grant Thornton.

[209] *See Report on Modernization and Simplification of Regulation S–K* (Nov. 23, 2016), available at *https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf.*

[210] *See* letter to the FAST Act Report from Jack T. Ciesielski, R.G. Associates, Inc. (Dec. 12, 20016), available at *https://www.sec.gov/comments/fast/fast.htm.*

[211] *See* FAST Act Proposing Release.

[212] Item 2.03 of Form 8–K defines ''direct financial obligation'' by cross references to Item 303(a)(5)(ii)—*Definitions.* Accordingly, we are proposing to replace these cross references in Form 8–K with the definitions from Item 303(a)(5)(ii).

[213] *See, supra* note 201.

[214] For example, the following ASC requirements overlap with Item 303(a)(5): ASC 470–10–50 (debt); ASC 840–10–50 (leases); ASC 842 (leases); ASC 440–10–50 (purchase commitments); and ASC 410, 420, 450, and 710 (other long-term obligations).

[215] *See, e.g.,* letters from Grant Thornton, General Motors, CAQ, and E&Y.

[216] *See, e.g.,* letters from CAQ and E&Y.

[217] *See* Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release, at 5986 (''The preparation of financial statements in accordance with GAAP already requires registrants to assess payments under all of the above categories of contractual obligations, except for purchase obligations.'').

what information about contractual obligations are registrants likely to provide in their MD&A?

38. Should we retain the contractual obligations disclosure requirement in a modified form (*e.g.,* with a materiality threshold, but not require a tabular presentation, etc.)? If so, what modifications should we make to the requirement?

39. If we retain the current contractual obligations disclosure requirement, should we revise it to enhance the information provided to investors (*e.g.,* should we expressly require a narrative to the contractual obligations table)?

8. Critical Accounting Estimates

While not specified in Item 303, the Commission in prior guidance has stated that, while preparing MD&A, registrants should consider whether accounting estimates and judgments could materially affect reported financial information.

Specifically, in 2001, the Commission reminded registrants that, under the existing MD&A disclosure requirements, a registrant should address material implications of uncertainties associated with the methods, assumptions, and estimates underlying the registrant's critical accounting measurements.[218] The Commission also encouraged companies to explain the effects of the critical accounting policies applied and the judgments made in their application.[219] In 2002, the Commission proposed rules to require disclosure of critical accounting estimates, but it never adopted this proposal.[220]

In the 2003 MD&A Interpretive Release, the Commission addressed critical accounting estimates.[221] The Commission stated that when preparing MD&A disclosure, companies should consider whether they have made accounting estimates or assumptions where the nature of the estimates or assumptions is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change; and the impact of the estimates and assumptions on financial condition or operating performance is material.[222] This guidance further stated that if critical accounting estimates or assumptions are identified, a registrant should analyze, to the extent material, factors such as how it arrived at the estimate, how accurate the estimate/assumption has been in the past, how much the estimate/assumption has changed in the past, and whether the estimate/assumption is reasonably likely to change in the future. This guidance also stated that a registrant should analyze its specific sensitivity to change based on other outcomes that are reasonably likely to occur. Any disclosure should supplement, not duplicate, the description of accounting policies that are already disclosed in the notes to the financial statements, and provide greater insight into the quality and variability of information regarding financial condition and operating performance.[223]

U.S. GAAP does not require a similar disclosure of estimates and assumptions in the notes to financial statements except in a limited number of circumstances.[224] Instead, U.S. GAAP requires disclosure of the accounting principles followed and the methods of applying those principles that materially affect the determination of financial position, cash flows, or results of operations.[225] Unlike U.S. GAAP, any discussion in MD&A should present a registrant's analysis of the uncertainties involved in applying the principles.[226] IFRS requires disclosures regarding sources of estimation uncertainty and judgments made in the process of applying accounting policies that have the most significant effect on the amounts recognized in the financial statements.[227]

In the Concept Release, the Commission noted that, despite its guidance, many registrants repeat the discussion of significant accounting policies from the notes to the financial statements in MD&A and provide limited additional discussion of the critical accounting estimates.[228] The Commission solicited comment on how to improve the discussion of critical accounting estimates in MD&A.

The Commission received a range of comments on critical accounting estimates. Many commenters acknowledged that registrants typically provide disclosure that is duplicative of their accounting policies or does not otherwise provide meaningful analysis of the estimates and assumptions involved.[229] Several commenters recommended revising Item 303 to include a critical accounting estimate requirement,[230] with some of these commenters suggesting this may improve the resulting disclosure.[231] While some of the commenters that recommended revising Item 303 supported a prescriptive rule for critical accounting estimates,[232] others suggested revising the item to provide a principles-based framework for critical accounting estimates.[233] One commenter stated that a critical accounting estimate requirement in Item 303 should specifically state that the disclosure is meant to supplement, and not duplicate, the description of accounting policies in the footnotes to the financial statements.[234] This same commenter also recommended that Item 303 require a discussion about the judgments and assumptions that management must make in order to prepare its financial statements and that have the most significant impact on such financial statements.

Some commenters suggested that, if Item 303 is revised to address critical accounting estimates specifically, the Commission should not codify the Commission's guidance on disclosure of critical accounting estimates and related disclosure requirements as set forth in the 2003 MD&A Interpretive Release.[235] One commenter suggested that disclosure of critical accounting estimates should be required when: (i) It is at least reasonably possible that the estimate of the effect on the financial statements of a condition, situation, or set of circumstances that existed at the date of the financial statements will change in the near term due to one or more future confirming events; and (ii) the effect of the change would be material to the financial statements.[236] Two commenters stated that the

[218] *See Cautionary Advice Regarding Disclosure,* Release No. 33–8040 (Dec. 12, 2001) [66 FR 65013 (Dec. 17, 2001)] (''Cautionary Advice Release'').

[219] *See id.*

[220] *See Disclosure in Management's Discussion and Analysis about the Application of Critical Accounting Policies,* Release No. 33–8098 (May 10, 2002) [67 FR 35620 (May 20, 2002)] (''2002 Critical Accounting Policies Proposal''). *See also,* Concept Release, at 239452, for a summary of the 2002 Critical Accounting Policies Proposal.

[221] *See* 2003 MD&A Interpretive Release.

[222] *See id.*

[223] *See id.*

[224] For example, ASC 820–10–50–1C requires similar disclosure related to fair value measurements.

[225] *See* ASC 235–10–50–3.

[226] *See* 2003 MD&A Interpretive Release, at 75064.

[227] International Accounting Standard (''IAS'') 1, paragraphs 122 to 133.

[228] *See* Concept Release, at 23953.

[229] *See, e.g.,* letters from A. Radin, NYSSCPA, Deloitte, PWC, Investment Program Association (Jul. 21, 2016), Davis Polk, Fenwick, CalPERS, NAREIT and American Bar Association (Dec. 15, 2017) (''ABA'').

[230] *See, e.g.,* letters from Deloitte, NYSSCPA, BDO, CAQ, Grant Thornton, PWC, CalPERS, S. Percoco, and ABA.

[231] *See, e.g.,* letters from Deloitte, BDO, and Grant Thornton.

[232] *See, e.g.,* letters from NYSSCPA and CalPERS.

[233] *See* letters from Deloitte, Grant Thornton, BDO, PWC, and CAQ.

[234] *See* letter from ABA.

[235] *See, e.g.,* letters from A. Radin, CalPERS, NAREIT, and S. Percoco.

[236] *See* letter from KPMG (citing KPMG, LLP letter (Dec. 9, 2002) to the 2002 Critical Accounting Policies Proposal).

disclosures should describe the process employed in creating the estimate.[237]

Other commenters suggested that the Commission coordinate with the FASB to enhance U.S. GAAP so that it requires these disclosures.[238] Yet others suggested that the Commission eliminate guidance related to critical accounting estimates because they believe the disclosures are not useful and the dynamic nature of uncertainties makes it overly challenging to quantify the reasonably likely range of outcomes with a solid basis for investor reliance.[239] A few commenters stated that current Commission guidance is sufficient but recommended that the Commission provide additional illustrative guidance.[240] Two of these commenters opposed revising Item 303 to require disclosure of critical accounting estimates and opposed adopting a ''strict definition'' of critical accounting estimates; these commenters stated that any clarification in this area should be done through a revised interpretive release.[241]

We propose to amend Item 303(a)[242] to explicitly require disclosure of critical accounting estimates.[243] We are persuaded by commenters who stated that a requirement in Item 303 would facilitate compliance and may improve the resulting disclosure.[244] As stated by many commenters, registrants often repeat the information in the financial statement footnotes about significant accounting policies. By proposing to codify this requirement, our intent is to eliminate disclosure that duplicates the financial statement discussion of significant accounting policies and, instead, promote enhanced analysis of measurement uncertainties.

Our proposed amendments are also intended to clarify for registrants the required disclosures related to critical accounting estimates. To this end, our proposals define a critical accounting estimate as an estimate made in accordance with generally accepted accounting principles that involves a significant level of estimation uncertainty and has had or is reasonably likely to have a material impact on the registrant's financial condition or results of operations. By focusing the definition on estimation uncertainties, we intend to avoid any unnecessary repetition of significant accounting policy footnotes. For each critical accounting estimate, the proposed amendments would require registrants to disclose, to the extent material, why the estimate is subject to uncertainty, how much each estimate has changed during the reporting period, the sensitivity of the reported amounts to the material methods, assumptions, and estimates underlying the estimate's calculation.[245]

We believe the proposed amendments would clarify for registrants the disclosures required to address any critical accounting estimates, help avoid boilerplate or duplicative disclosures, and provide investors with material information regarding critical accounting estimates. We also believe that the disclosure elicited by the proposed amendments would facilitate further understanding of an analysis of amounts reported in the financial statements by providing greater insight on the uncertainties involved in creating and applying an accounting policy and how significant accounting policies of registrants faced with similar facts and circumstances may differ.

We recognize that some of the disclosure that would be required under our proposals may be provided already under U.S. GAAP[246] or IFRS.[247] To discourage duplicative disclosures, we are proposing, as suggested by one commenter, to also include an instruction specifying that the disclosure of critical accounting estimates shall supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.[248]

We considered the potential for overlap with auditor communications of critical audit matters.[249] A critical audit matter is defined as ''any matter arising from the audit of the financial statements that was communicated or required to be communicated to the audit committee and that: (1) Relates to accounts or disclosures that are material to the financial statements; and (2) involved especially challenging, subjective, or complex auditor judgment.''[250] Beginning with audits of fiscal years ending on or after June 30, 2019,[251] audit reports are required, among other things, to include a description of ''the principal considerations that led the auditor to determine that the matter is a critical audit matter.''[252] The communications auditors are expected to provide on critical audit matters in an audit report have a different objective than disclosures related to critical accounting estimates. In this regard, critical audit matters provide insight into matters that are especially challenging, subjective, and complex to audit from the perspective of the auditor. On the other hand, critical accounting estimates disclosure should provide management's insights into estimation uncertainties that have had or are reasonably likely to have a material impact on reported financial statements. A critical accounting estimate may not be a critical audit matter because it may not involve especially challenging, subjective, or complex auditor judgment, but it would still require analysis in MD&A. Likewise, a critical audit matter that would require reporting in the audit report may not necessarily be a critical accounting estimate, as proposed, because it may not involve estimation uncertainty that can materially affect reported amounts.[253] For these reasons, we do

[237] *See* letters from CAQ and CalPERS.

[238] *See, e.g.,* letters from E&Y, Northrop Grumman, and KPMG.

[239] *See* letters from A. Radin, Davis Polk, and Fenwick.

[240] *See, e.g.,* letters from Chevron, CGCIV, and Chamber.

[241] *See* letter from Chamber and CGCIV.

[242] Proposed to be renumbered as Item 303(b).

[243] *See* proposed Item 303(b)(6).

[244] *See, e.g.,* letters from Deloitte, BDO and Grant Thornton.

[245] These disclosure requirements are similar to those found in IFRS. *See* IAS 1, paragraph 129.

[246] For example, with respect to recurring fair value measurements categorized with Level 3 of the fair value, ASC 820–10–50–2 requires a narrative description of the sensitivity of the fair value measurement to changes in unobservable inputs if a change in those inputs to a different amount might result in a significantly higher or lower fair value measurement. We are not proposing to eliminate any requirement that this information be provided.

[247] *See* IAS 1, paragraphs 125 to 133.

[248] *See* letter from ABA.

[249] *See* PCAOB Standard AS 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion* (''AS 3101''). *See also* letter from Grant Thornton (stating that ''[w]hile the two concepts have different meanings, there may be some confusion amongst stakeholders as to the relationship between the two.'').

[250] *See* AS 3101.

[251] The requirements related to critical audit matters in AS 3101 apply to reports of independent registered public accounting firms that are included in certain registrant filings. These requirements are effective for audits of fiscal years ending on or after June 30, 2019 for large accelerated filers; and for fiscal years ending on or after December 15, 2020, for all other companies to which the requirements apply. *See Public Company Accounting Oversight Board; Order Granting Approval of Proposed Rules on the Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, and Departures from Unqualified Opinions and Other Reporting Circumstances, and Related Amendments to Auditing Standards,* Release No. 33–81916 (Oct. 23, 2017) [82 FR 49886 (Oct. 27, 2017)].

[252] *See* paragraph 14 of AS 3101.

[253] *See e.g.,* ''Implementation of Critical Audit Matters: A Deeper Dive on the Determination of CAMS'' (Mar. 18, 2019), at 6 available at *https://pcaobus.org/Standards/Documents/Implementation-of-Critical-Audit-Matters-Deeper-Dive.pdf.*

Additionally, our proposal to require critical accounting estimates would apply to EGCs. In contrast, disclosure of critical audit matters is not required for audits of EGCs. *See* paragraph 5 of AS 3101.

not believe that proposed Item 303(a)(4) would necessarily result in duplicative disclosure.

Request for Comment

40. Should we amend Item 303 to require disclosure of critical accounting estimates, as proposed?

41. Is the proposed definition of critical accounting estimates sufficiently clear? Are there alternative definitions that we should consider?

42. Should any registrants, such as SRCs, EGCs, or IPO issuers, be exempted from this proposed requirement? If so, which registrants, and should there be a time limitation on such an accommodation?

43. Would the proposed amendments result in disclosures that are duplicative of U.S. GAAP or IFRS, as applicable? If so, how? Are there alternatives we should consider to encourage registrants to provide disclosures that will supplement, rather than duplicate, disclosures that appear in the financial statements?

44. Would the proposed amendments provide clarity to registrants on disclosures regarding critical accounting estimates? Would the proposed amendments provide investors with material information regarding critical accounting estimates?

45. Some commenters suggested we issue a revised interpretive release addressing critical accounting estimates [254] and others suggested we provide illustrative examples to facilitate this disclosure.[255] Instead of amending Item 303, should we issue revised guidance addressing critical accounting estimates? Should we provide illustrative examples?

46. The Commission has previously encouraged registrants to include, in their MD&A, explanations of the judgments and uncertainties affecting application of their accounting policies.[256] For example, critical accounting judgments may include whether financial assets are held-to-maturity investments, whether an instrument is classified as debt or equity, or judgments made about the appropriate scope for a transaction. Should the Commission be more prescriptive in this area and, for example, adopt a requirement for registrants to disclose critical accounting judgments? Would such a requirement elicit material information that would not otherwise be provided, including as a result of the proposed critical accounting estimates requirement? As an alternative to a new requirement, should we refer the matter to the FASB for potential incorporation into U.S. GAAP?

9. Interim Period Discussion (Item 303(b))

Item 303(b) requires registrants to provide MD&A disclosure for interim periods that enables market participants to assess material changes in financial condition and results of operations between certain specified periods.[257] Item 303(b)(1) requires registrants to discuss any material change in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet.[258] Item 303(b)(2) requires registrants to discuss any material changes in their results of operations for the most recent fiscal year-to-date period presented in their income statement, along with a similar discussion of the corresponding year-to-date period of the preceding fiscal year. If a registrant 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.[259] Item 303(b)(2) also states that registrants subject to Rule 3–03(b) of Regulation S–X [260] 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.

The Commission adopted the precursor to current Item 303(b) as part of its effort to integrate and simplify its disclosure system.[261] The Commission stated at the time that the amendments it was adopting formed ''an integral part of the Commission's program to integrate the disclosure requirements of the Exchange Act with those of the Securities Act, and to encourage and facilitate the integration of corporate reporting on formal Commission filings with informal corporate communications with shareholders.'' [262] The Commission also noted that the amendments were complements to the annual report amendments adopted around the same time.[263]

The Commission recently solicited comment on the current quarterly reporting process and how the Commission can reduce the administrative burdens on reporting companies associated with this process while enhancing the investor protections associated with periodic reporting under the Exchange Act.[264] The Commission also sought input on the benefits, costs, and burdens of the current quarterly reporting system, and possible approaches to simplifying the process through which investors access, process, and evaluate information.[265]

Multiple commenters responding to the Request for Comment recommended that the Commission consider allowing more flexibility in interim period MD&A, or otherwise streamline or eliminate certain discussion requirements.[266] One commenter recommended that the Commission

[254] *See, e.g.,* letters from Chamber and CGCIV.

[255] *See, e.g.,* letters from PWC, KPMG, and Chevron.

[256] *See* Cautionary Advice Release, at 65013.

[257] Item 303(b) of Regulation S–K [17 CFR 229.303(b)].

[258] If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding year, the registrant must also discuss any material changes in financial condition from that date to the date of the most recent interim balance sheet provided. At their discretion, registrants may combine discussions of changes from both the end and the corresponding interim date of the preceding fiscal year when such discussions are required. *See* Item 303(b)(1).

[259] In addition, if the registrant elects to provide a statement of comprehensive income for the twelve-month period ended as of the date of the most recent interim balance sheet provided, the registrant must also discuss material changes with respect to that twelve-month period and the twelve-month period ended as of the corresponding interim balance sheet date of the preceding fiscal year. *See* Item 303(b)(2).

[260] These registrants include those primarily engaged in: The generation, transmission, or distribution of electricity; the manufacture, mixing transmission, or distribution of gas; the supplying or distribution of water; or the furnishing of telephone or telegraph services; or in holding securities of companies engaged in such business.

[261] *See New Interim Financial Information Provisions and Revisions of Form 10–Q for Quarterly Reporting,* Release No. 33–6288 (Feb. 9, 1981), 46 FR 12480 (Feb. 17, 1981) (adopting current Item 303(b) of Regulation S–K as then Item 11(b) of Regulation S–K) (''Item 303(b) Adopting Release''). *See also* 1982 Integrated Disclosure Adopting Release (reorganizing Regulation S–K to, among other things, move the substance of Item 11(b) of Regulation S–K to Item 303(b) of Regulation S–K).

[262] *See* Item 303(b) Adopting Release, at 12481.

[263] *Id.*

[264] *Request for Comment on Earnings Releases and Quarterly Reports,* Release No. 33–10588 (Dec. 18, 2018) [83 FR 65601 (Dec. 21, 2018)] (the ''Request for Comment''). Comment letters in response to the Request for Comment are available at *https://www.sec.gov/comments/s7-26-18/s72618.htm.* References to comment letters in this Section II.C.9 are to those letters received in response to the Request for Comment.

[265] The request for comment also addressed other items relating to (1) the use of earnings releases to satisfy the core disclosure requirements of Form 10–Q, (2) the frequency of interim reporting, and (3) earnings guidance.

[266] *See, e.g.,* letters in response to the Request for Comment from Bank of America (Mar. 21, 2019) (''BoA''), BDO USA, LLP (Mar. 21, 2019) (''BDO 2''), Center for Audit Quality (Mar. 20, 2019) (''CAQ 2''), Financial Executives International (''FEI 2''), Cleary Gottlieb Steen & Hamilton LLP (Mar. 27, 2019) (''Cleary Gottlieb''), and Institute of Management Accountants (Mar. 21, 2019).

evaluate whether registrants should *only* be required to discuss year-to-date results of operations in their MD&A (and not be required to provide a separate discussion of the results of operations of individual quarters).[267] Other commenters, however, recommended that the Commission assess whether registrants should be required to discuss year-to-date results and condition (*i.e.,* evaluate whether registrants should be permitted to exclude year-to-date discussions).[268] One of these commenters recommended that the Commission permit flexibility in how registrants present their MD&A by allowing registrants to choose the presentation that is most consistent with how they manage their respective businesses (*e.g.,* quarter over quarter vs. year over year).[269] Another commenter recommended the Commission consider allowing management to exercise judgment in omitting certain year-to-date and/or quarterly information from interim period MD&A if the omitted information is consistent with prior trends or repeats information provided elsewhere in a quarterly report.[270]

Other commenters noted that Form 10–Q's prescribed disclosures ensure uniformity among registrants.[271] One of these commenters stated that the structured format of quarterly reports allows certain market participants to analyze results and to produce tools that ''aid investors to make more informed investment decisions.'' [272] Another commenter stated that there should be some element of uniformity in required disclosures so that there is consistency among registrants.[273]

Several commenters encouraged the Commission to conduct further outreach with investors and companies.[274] On July 18, 2019, the Commission held a roundtable discussion on whether the quarterly reporting system should be modified to address the impact of short-termism on our capital markets.[275] During the roundtable discussion, multiple panelists discussed the need for streamlined MD&A disclosures, including interim period MD&A.[276] One panelist suggested that the Commission allow registrants to make MD&A comparisons to the preceding interim period or to discuss only year-to-date changes.[277] Another panelist noted that ''companies will want to talk about discrete quarters'' because ''that's how they do their earnings releases.'' [278]

We propose to amend Item 303(b) (to be renumbered as proposed Item 303(c)) to allow for flexibility in comparisons of interim periods and to simplify the item.[279] Specifically, we propose to permit registrants to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) *or* to the immediately preceding quarter. Under the proposal, if a registrant elects to discuss changes from the immediately preceding sequential 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. In addition, under the proposed amendment, if a registrant changes the comparison from the prior interim period comparison, the registrant would be required to explain the reason for the change and present both comparisons in the filing where the change is announced. For example, if a registrant in its third quarter Form 10–Q decides to compare its results to the preceding quarter after the registrant had compared such quarter to the corresponding quarter of the previous year in its earlier report, the registrant would be required to present both comparisons in that third quarter Form 10–Q and explain the reasons for the change in comparison.

We believe that these changes would allow registrants additional flexibility to provide an analysis that they believe is most relevant to an understanding of the frequency and amplitude of past business cycles while also ensuring that investors have appropriate information to assess the comparisons being presented. We recognize that not all businesses are seasonal and a comparison to the corresponding quarter of the preceding year may not be as meaningful as a comparison to the preceding quarter. We also believe that this proposal would respond to commenters' concern about the need for flexibility in MD&A.[280] These changes are intended to provide market participants with the most relevant information about a registrant while reducing comparisons that may obscure the most material trends. We believe that requiring registrants to provide both comparisons and explain the reasons for a change in comparison from prior periods would ensure that investors and other market participants have sufficient information to understand and adjust to any period over period change.

We are also proposing amendments to simplify Item 303(b) (to be renumbered as proposed Item 303(c)) that would:

- Eliminate the text that states that registrants need not provide a discussion of the impact of inflation and changing prices, consistent with the proposed amendments described above; [281] and
- Amend Item 303(b)(2) (proposed Item 303(c)(2)) material changes in results of operations—to break the requirements into two subsections:
  - Proposed Item 303(c)(2)(i) would continue to require registrants to discuss any material changes in their 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; and
  - Proposed Item 303(c)(ii) would, as discussed above, require registrants to compare their most recently completed quarter to either of the corresponding quarter of the prior year (as is currently required) *or* to the immediately preceding quarter.[282]

We are also proposing to eliminate language requiring registrants subject to Rule 3–03(b) of Regulation S–X [283] that

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[267] *See* letter from Ernst & Young (Mar. 21, 2019) (''Ernst'').

[268] *See* letters from BoA, BDO 2, CAQ 2, CCR, Cleary Gottlieb, FEI 2, and IMA.

[269] *See* letter from BDO.

[270] *See* letter from CAQ 2.

[271] *See, e.g.,* letters from AFL–CIO (Mar. 21, 2019), BDO 2, Better Markets (Mar. 21, 2019), CAQ 2, CIT Group Inc. (Mar. 21, 2019) (''CIT''), Edison Electric Institute and American Gas Association (Mar. 21, 2019), Gallagher Co. (Mar. 14, 2019), Investment Company Institute (Mar. 21, 2019), KPMG LLP (Mar. 21, 2019), Marcum LLP (Mar. 21, 2019), Mazars USA LLP (Mar. 21, 2019), New York City Bar Association (Apr. 10, 2019), RSM US LLP (Mar. 20, 2019) (''RSM''), T. Rowe Price (Mar. 20, 2019), Think Computer Foundation (Mar. 20, 2019), and XBRL US (Mar. 21, 2019).

[272] *See* letter from Better Markets.

[273] *See* letter from CIT.

[274] *See, e.g,* letters from CAQ 2, FEI 2, Ernst, Grant Thornton, RSM, and Tapestry Networks.

[275] *Roundtable on Short-term/Long-term Management of Public Companies, our Periodic Reporting System and Regulatory Requirements* (July 18, 2019), archived at *https://www.sec.gov/video/webcast-archive-player.shtml?document_id=roundtable-short-long-term-071819.*

[276] *See id.* at 2:40:56, Statement of Steven Jacobs. *See also id.* at 3:22:20, Statement of Nicolas Grabar.

[277] *See supra* note 275 at 2:48:36, Statement of Nicolas Grabar.

[278] *See supra* note 275 at 2:40:56, Statement of Steven Jacobs.

[279] The proposed changes to Item 303(a) would flow through to Item 303(b) because Item 303(b) currently provides that the interim discussion and analysis must include a discussion of the material changes in items specified in Item 303(a) (with the exception of inflation and changing prices, which we propose to eliminate).

[280] *See supra* note 266.

[281] *See* discussion, *supra* at Section II.C.5.

[282] As described above, if a registrant changes the comparison from the prior interim period comparison, the registrant would be required to explain the reason for the change.

[283] *See supra* note 260.

elect to provide a statement of comprehensive income for the twelve-month period ended as of the date of the most recent interim balance sheet to discuss material changes in that twelve-month period with respect to the preceding fiscal year, rather than the corresponding preceding period. We propose giving these registrants the same flexibility as other registrants to make the most meaningful comparisons in their interim period MD&A. In addition to simplifying Item 303, this change is meant to modernize the current Item 303 requirement. We have not observed any registrants in recent history that provided the statements of comprehensive income in registration statements permitted by Rule 3–03(b) of Regulation S–X. Accordingly, we do not believe the elimination of the provisions in Item 303(b) would cause any impact. We also believe that the additional flexibility we are proposing for all registrants would allow registrants subject to Rule 3–03(b) of Regulation S–X [284] to make the most meaningful comparisons in their MD&A.

Finally, we are proposing to delete Instructions 2, 3, 5, 6, 7, and 8 to current paragraph (b).[285] We are proposing to eliminate Instruction 2 because we no longer believe it necessary that an instruction make explicit the presumption that readers have read or have access to the MD&A for the preceding fiscal year. We also propose to eliminate Instructions 3 and 6 because they duplicate current Instructions 4 [286] and 7 to Item 303(a), respectively.[287] Instead, we propose a new Instruction 1 to proposed Item 303(c) that would cross-reference the applicable instructions in proposed Item 303(b). We propose to eliminate Instruction 7 to Item 303(b) in light of our proposal to eliminate Item 303(a)(5), the subsection that requires disclosure of contractual obligations. We also propose to eliminate Instruction 5, which is currently reserved. Finally, we propose to move Instruction 8 to current Item 303(b) to Instruction 10 of proposed Item 303(b). The following table outlines the current and proposed structure of Item 303(b) (proposed Item 303(c)): [288]

Current structure	Proposed structure
Item 303(b), *Interim periods*	Item 303(c), *Interim periods*.
(1) Material changes in financial condition	(1) Material changes in financial condition.
(2) Material changes in results of operations, Rule 3–03(b) of Regulation S–X matters.	(2) Material changes in results of operations. (i) Material changes in results of operations (year-to-date). (ii) Material changes in results of operations (quarter comparisons).
Instruction 1 to Item 303(b)	Instruction 1 to Item 303(c) (with amendments to reference Instructions 2, 5, 9, and 10 to proposed Item 303(b)).
Instruction 2 to Item 303(b)	Eliminate.
Instruction 3 to Item 303(b)	Eliminate.
Instruction 4 to Item 303(b)	Instruction 2 to Item 303(c).
Instruction 5 to Item 303(b)	Eliminate.
Instruction 6 to Item 303(b)	Eliminate.
Instruction 7 to Item 303(b)	Eliminate.
Instruction 8 to Item 303(b)	Instruction 10 to proposed Item 303(b).

Request for Comment

47. Should we amend the interim period disclosure requirements in Item 303(b), as proposed? Alternatively, in order to permit registrants flexibility to choose their presentation in the manner that is most consistent with how their business is managed, should we allow registrants to include a discussion of material changes in the results of operations with respect to either the most recent fiscal year-to-date period or the most recent fiscal quarter? Are there other approaches we should consider?

48. What would the benefits and/or drawbacks be of allowing registrants more flexibility regarding the interim period comparisons they discuss in MD&A?

49. Would the ability to compare interim period information across registrants be significantly affected by allowing flexibility for interim period comparisons, as proposed?

50. How do market participants use Item 303(b) disclosures? What are the benefits and drawbacks of the current period-to-period comparisons requirements?

51. How would our proposed amendments affect registrants subject to Rule 3–03(b) of Regulation S–X? We are not proposing to eliminate Rule 3–03(b). If adopted, would the Commission's disclosure rules and guidance be sufficiently clear about disclosure these registrants must provide? What would the consequences of these proposed changes be for market participants?

10. Safe Harbor for Forward-Looking Information (Item 303(c))

Item 303(c) [289] states that the safe harbors provided in Section 27A of the Securities Act and 21E of the Exchange Act (together, ''statutory safe harbors'') apply to all forward-looking information provided in response to Item 303(a)(4) (off-balance sheet arrangements) and Item 303(a)(5) (contractual obligations), provided such disclosure is made by certain enumerated persons.[290] Item 303(c) confirms application of the statutory safe harbors to Item 303(a)(4) and Item 303(a)(5), and states that all of the required disclosures under these two items are deemed to be ''forward-looking statements'' as that term is defined in the statutory safe harbors,

[284] *See d.*

[285] Instruction 5 to Item 303(b) is currently reserved.

[286] As discussed in Section II.C.4, we are proposing to revise current Instruction 4 to Item 303(a) to clarify that registrants must discuss the ''underlying reasons'' for material changes in ''quantitative and qualitative terms.'' We are also proposing to clarify that registrants must discuss material changes within a line item.

[287] We also propose to move the text of Instruction 8 to a new Instruction 11 to Item 303(a) (proposed Item 303(b)), and reference it in proposed Instruction 1 to Item 303(c).

[288] The information in this table is not comprehensive and is intended only to highlight the general structure of the current rules and proposed amendments. It does not reflect all of the substance of the proposed amendments or all of the rules and forms that are proposed to be affected. All changes are discussed in their entirety throughout this release. As such, this table should be read together with this Section II.C.9.

[289] Item 303(c) of Regulation S–K [17 CFR 229.303(c)].

[290] Such persons are the issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

except for historical facts.[291] With respect to Item 303(a)(4), Item 303(c) further states that the ''meaningful cautionary statements'' element of the statutory safe harbors is satisfied if a registrant satisfies all of Item 303(a)(4) requirements.[292]

The Commission added Item 303(c) in 2003 when it adopted Items 303(a)(4) and (5).[293] Item 303(c) was intended to remove possible ambiguity about the application of the statutory safe harbors to these items.[294] Since we propose to eliminate both Items 303(a)(4) and (5), we are also proposing to eliminate Item 303(c), which specifically and exclusively refers to those disclosure requirements.

Nevertheless, forward-looking information included in off-balance sheet arrangement disclosures provided in response to proposed Instruction 8 to Item 303(b), along with disclosures regarding contractual obligations, would continue to be covered by existing safe harbors. The proposed amendments are intended to be conforming changes and would not alter the availability of the regulatory safe harbors in Securities Act Rule 175 [295] and Exchange Act Rule 3b–6,[296] which expressly apply to forward-looking information in MD&A disclosure.[297] These rules establish a safe harbor for ''forward-looking statements'' and define such statements to include statements of ''future economic performance contained in management's discussion and analysis.'' [298] These rules were adopted with the express purpose of encouraging forward-looking information and in response to commenters' recommendations stating that the absence of a safe harbor could discourage forward-looking information.[299]

Our proposed amendments are also not intended to alter the application of the statutory safe harbor provisions of the Private Securities Litigation Reform Act.[300] While these provisions apply more broadly, they also protect eligible forward-looking statements [301] in MD&A against private legal actions that are based on allegations of a material misstatement or omission. We continue to believe that the safe harbors for eligible forward-looking statements and the safe harbor provisions of the Private Securities Litigation Reform Act have encouraged greater disclosure of forward-looking information that has benefited investors and our markets.

Request for Comment

52. Should we eliminate Item 303(c), as proposed?

53. If we eliminate Item 303(c), is it necessary or helpful to provide a specific instruction referring to the statutory safe harbors for forward-looking statements that may apply to the proposed off-balance sheet arrangement disclosures? Should we instead retain Item 303(c) and acknowledge that the statutory safe harbors would apply to all of Item 303?

11. Smaller Reporting Companies (Item 303(d))

Item 303(d) [302] states that an SRC may provide Item 303(a)(3)(iv) information for the most recent two fiscal years if it provides financial information on net sales and 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 chart specified in Item 303(a)(5). In light of our proposals to eliminate Item 303(a)(3)(iv) and (a)(5), we are also proposing to eliminate Item 303(d), which specifically and exclusively references these two disclosure requirements. SRCs may continue to rely on Instruction 1 to Item 303(a),[303] which states that an SRC's discussion shall cover the two-year period required in Article 8 of Regulation S–X.

Request for Comment

54. Should we eliminate Item 303(d), as proposed?

55. Are there any proposed amendments to Item 303 where we should consider providing further accommodations to SRCs?

General Requests for Comment for Item 303

56. Are there any other changes we should consider to Item 303 to streamline, update, or modernize MD&A disclosure requirements?

57. Should we require MD&A to be structured in Inline eXtensible Business Reporting Language (''Inline XBRL'') format? [304] If so, should MD&A be structured using block tags, detail tags, or some combination of the two? How would investors and other market participants benefit from such a requirement, and what would be the costs and burdens to registrants? Would the costs and burdens be disproportionately high for any group of issuers?

58. Should we amend Item 9 of Form 1–A to reflect any of the proposals in this release?

D. Application to Foreign Private Issuers

We are proposing corresponding amendments that would apply to FPIs providing disclosure required by Form 20–F or Form 40–F.[305] We are also proposing amendments to current Instruction 11 to Item 303, which specifically applies to FPIs that choose to file on domestic forms. Similar to our discussions above and for the reasons discussed in greater detail below, our proposals to these forms are intended to

[291] Item 303(c)(2)(i) of Regulation S–K [17 CFR 229.303(c)(2)(i)].

[292] Item 303(c)(2)(ii) of Regulation S–K [17 CFR 229.303(c)(2)(ii)].

[293] *See* Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release at 5992 (''To encourage the type of information and analysis necessary for investors to understand the impact of off-balance sheet arrangements and to reduce the burden of estimating the payments due under contractual obligations, the amendments include a safe harbor for forward-looking information.'').

[294] *See id.*

[295] [17 CFR 230.175].

[296] [17 CFR 240.3b–6].

[297] Instruction 7 to Item 303(a) of Regulation S–K [17 CFR 229.303(a)], Securities Act Rule 175 [17 CFR 230.175], and Exchange Act Rule 3b–6 [17 CFR 240.3b–6].

[298] *See* Rule 175(c)(3) and Rule 3b–6(c)(3) [17 CFR 230.175(c)(3) and 17 CFR 240.3b–6(b)(3)].

[299] *See Safe Harbor Rule for Projections,* Release No. 33–6084 (June 25, 1979) [44 FR 38810 (July 2, 1979)].

[300] *See* Sections 27A of the Securities Act and 21E of the Exchange Act.

[301] The statutory safe harbors by their terms do not apply to forward-looking statements included in financial statements prepared in accordance with generally accepted accounting principles. Notably, the statutory safe harbors also would not apply to MD&A disclosure if the MD&A forward-looking statements were made in connection with: An initial public offering; a tender offer; an offering by a partnership, limited liability company, or a direct participation investment program, or the forward-looking statement is made by an issuer of penny stock or is made by an issuer in connection with an offering of securities by a blank check company, or is made in connection with a roll-up transaction or a going private transaction. *See* Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act. Also, the statutory safe harbors do not, absent a rule, regulation, or Commission order, apply to forward-looking statements by issuers covered by Section 27A(b)(1)(A) of the Securities Act and Section 21E(b)(1)(A) of the Exchange Act. Because the statutory safe harbors only apply to forward-looking statements made by or on behalf of an issuer that is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, they would not apply to forward-looking statements made in connection with an offering under Regulation A unless the issuer is a reporting company and no other exclusions from the safe harbor apply.

[302] Item 303(d) of Regulation S–K [17 CFR 229.303(d)].

[303] Proposed renumbered Item 303(b).

[304] Registrants subject to the financial disclosure requirements of Regulation S–K are either currently required or will be required to file their financial statements and filing cover page disclosures in the Inline XBRL format. *See* [17 CFR 229.601(b)(101)]. *See also* Inline XBRL Filing of Tagged Data, Securities Act Release No. 10514 (June 28, 2018) [83 FR 40846 (Aug. 16, 2018), at 40851] (''Inline XBRL Adopting Release'').

[305] These proposals would also apply to those forms calling for information in Forms 20–F, such as Form F–1.

modernize, clarify, and streamline these disclosure requirements.

1. Form 20–F

a. Selected Financial Data (Item 3.A of Form 20–F)

Similar to Item 301, Item 3.A of Form 20–F requires FPIs to provide selected historical financial data for the most recent five financial years (or such shorter period that the company has been in operation). Also similar to Item 301, Item 3.A specifies the information that must be included in the selected financial data and provides that EGCs are not required to present selected financial data for any period prior to the earliest audited financial statements presented in connection with the registrant's initial public offering of its common equity securities. In a registration statement, periodic report, or other report filed under the Exchange Act, an EGC need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with the EGC's first registration statement that became effective under the Exchange Act or the Securities Act.[306] However, unlike Item 301, Item 3.A also permits a FPI to omit either or both of the earliest two years of data if it represents that it cannot provide the information, or cannot provide the information on a restated basis, without unreasonable effort or expense.

Given the similarities between Item 3.A and Item 301, we propose to delete Item 3.A and the related instructions. As with Item 301, trend disclosure elicited by Item 3.A typically would be discussed in disclosure provided in response to Item 5 of Form 20–F, which requires MD&A disclosure similar to Item 303. FPIs may, however, continue to include a tabular presentation of the line items discussed in the MD&A, to the extent they believe that such a presentation would be useful to an understanding of the disclosure.[307]

Request for Comment

59. Should we eliminate Item 3.A of Form 20–F, as proposed? Would the proposed elimination of Item 3.A result in the loss of material information that is otherwise not available to investors? If so, what information would be lost, and are there alternatives we should consider that would elicit this information?

60. The Commission revised Form 20–F in 1999 to conform in large part to the international disclosure standards endorsed by the International Organization of Securities Commissions (''IOSCO'') for the non-financial statement portions of a disclosure document, which have served as the basis for the disclosure requirements in several foreign jurisdictions.[308] One of the objectives of the IOSCO standards was to facilitate the cross-border flow of securities and capital by promoting the use of a single disclosure document that would be accepted in multiple jurisdictions. If we revise Item 3.A of Form 20–F as proposed, would such revision reduce the ability of FPIs to use a single document in multiple jurisdictions?

61. Would the proposed amendments conflict with home-country requirements in some jurisdictions if the FPI were engaging in a cross-border offering or listing? If so, please explain.

62. Unlike Item 301, Item 3.A provides an accommodation to FPIs for either or both of the earliest two years of data. Given this accommodation, should we retain this item? Does Item 3.A require disclosure that is duplicative of the financial statements?

63. Are there any unique considerations with respect to FPIs in this context?

64. Are the requirements of Item 5 of Form 20–F sufficient to provide investors with necessary disclosure of trends in a registrant's results of operations and financial condition? If we eliminate Item 3.A as proposed, should we amend Item 5 of Form 20–F to explicitly require a tabular presentation of line items discussed in the disclosure?

65. What are the costs to FPIs of providing required selected financial data?

66. How do market participants use the selected financial data disclosures provided by FPIs? Do market participants rely on any time segment of data more than others (*e.g.,* the most recent two or three years)?

b. Operating and Financial Review and Prospects (Item 5 of Form 20–F)

The disclosure requirements for Item 5 of Form 20–F (Operating and Financial Review and Prospects) are substantively comparable to the MD&A requirements under Item 303 of Regulation S–K.[309] To maintain a consistent approach to MD&A for domestic registrants and FPIs, our proposed amendments to Form 20–F generally conform to our proposed amendments to Item 303.

Some of our proposals would amend Item 5 of Form 20–F to incorporate portions of both current and proposed Item 303. Specifically, we are proposing to incorporate portions of current Instructions 1 and 3 to Item 303(a) that specify the purpose of MD&A, into the forepart of Item 5 of Form 20–F to highlight the item's objective. Our proposals would revise Item 5 to state that the discussion must:

- Include other statistical data that will enhance a reader's understanding of the company's financial condition, changes in financial condition, and results of operations; and
- Focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or future financial condition.

We are also proposing to codify into the forepart of Item 5 Commission guidance that states that a registrant should provide a narrative explanation of its financial statements that enables investors to see a registrant ''through the eyes of management.'' [310] Consistent with our rationale for proposing analogous changes to Item 303,[311] we believe that emphasizing the purpose of MD&A at the outset of the Item will provide clarity and focus to registrants as they consider what information to discuss and analyze. We are also proposing to revise the forefront of Item 5 to state that, in addition to providing information relating to all separate segments, FPIs must also provide information relating to other subdivisions, such as geographic areas or product lines. This proposed revision is intended to conform Form 20–F to both current Item 303, by referencing other subdivisions and including geographic areas as an example, and proposed Item 303, by adding product lines as an example.[312]

[306] *See* Instruction 3 to Item 3.A.

[307] *See* 2003 MD&A Interpretive Release (''Companies should consider whether a tabular presentation of relevant financial or other information may help a reader's understanding of MD&A.''). *See also* footnote 1 of 2003 MD&A Interpretive Release which states that the guidance in that release is intended to apply to FPIs.

[308] *See* International Disclosure Standards, Release No. 33–7745 (Sept. 28, 1999) [64 FR 53900 (Oct. 5, 1999)].

[309] When the Commission revised the wording of Item 5 of Form 20–F in 1999, the adopting release noted that the requirements correspond with Item 303 of Regulation S–K. *See International Disclosure Standards,* Release No. 33–7745 (Sept. 28, 1999) [64 FR 53900 (Oct. 5, 1999)], at 53904 (''International Disclosure Standards Release'').

[310] *See* 2003 MD&A Interpretative Release, at 75056. *See also* 1989 Interpretative Release, at 22428.

[311] *See* Section II.C.1 above.

[312] *See* footnote 98 above and corresponding sentence.

For the reasons discussed above, we are proposing to:

- Revise Item 5 to specify that the discussion must include a quantitative and qualitative description of the reasons underlying material changes, including where material changes within a line item offset one another; [313]
- Revise the liquidity and capital resources requirement in Item 5.B to specify that a registrant must broadly disclose material cash commitments, including but not limited to capital expenditures; [314]
- Replace Item 5.E, which covers off-balance sheet arrangements, with a principles-based instruction; [315]
- Eliminate Item 5.F., which covers tabular disclosure of contractual obligations; [316] and
- Eliminate Item 5.G, which acknowledges application of the statutory safe harbor and specifically and exclusively applies to Item 5.E and Item 5.F.[317]

Consistent with our proposal to amend Item 303 above, we are also proposing to revise Item 5 to explicitly require disclosure of critical accounting estimates.[318]

We are also proposing a change to the requirement in Form 20–F that requires disclosure of inflation for FPIs.[319] Item 5.A.2 requires disclosure of the impact of inflation, if material, and hyperinflation, if the currency in which the financial statements are presented is of a country that has experienced hyperinflation.[320] Instruction 1 to Item 5.A states that disclosure of hyperinflation must be provided if hyperinflation has occurred in any of the periods for which an FPI is required to provide audited financial statements or unaudited interim financial statements. We believe that for FPIs in a hyperinflationary economy, hyperinflation is a salient issue such that it merits specific mention. As it relates to hyperinflation, we are therefore not proposing to amend Item 5.A.2 or the related instruction. However, and consistent with our change to Item 303,[321] we are proposing to amend the portion of Item 5.A.2 calling for disclosure of the impact of inflation, if material. Some of our proposals to amend Form 20–F are unique to this form but are consistent with MD&A's focus on materiality. Specifically, we are proposing to:

- Amend Item 5.D of Form 20–F, which requires FPIs to identify ''the most significant recent trends,'' to instead, require disclosure of ''material trends,'' consistent with Item 303 and MD&A's focus on materiality; [322] and
- Amend Instruction 1 to Item 5, which currently references only the 1989 MD&A Interpretive Release, to add the 2002 Commission Statement, 2003 MD&A Interpretive Release, 2010 MD&A Interpretive Release [323] and the Companion Guidance, to direct FPIs to the Commission's guidance.

These and all of our proposals to Item 5 of Form 20–F are consistent with our policy of having the existing MD&A requirements for FPIs mirror the substantive MD&A requirements in Item 303.[324]

Request for Comment

67. Should we amend Item 5 of Form 20–F as proposed?

68. Would the proposed deletions in Item 5 result in the loss of material information that is otherwise not available to investors? If so, what information would be lost, and are there alternatives we should consider that would elicit this information?

69. Would the proposed additions to Item 5 create burdens for companies?

70. If we revise Item 5 of Form 20–F as proposed, would such revision reduce the ability of FPIs to use a single document in multiple jurisdictions?

71. Would the proposed amendments conflict with home-country requirements in some jurisdictions? If so, please explain.

72. Are there any unique considerations with respect to FPIs in the context of MD&A and Item 5 disclosures?

2. Form 40–F

Form 40–F generally permits eligible Canadian FPIs to use Canadian disclosure documents to satisfy the Commission's registration and disclosure requirements. As a result, the MD&A contained in Form 40–F is largely prepared in accordance with Canadian disclosure standards. General Instructions B.(11) and B.(12), however, were added when the Commission adopted the off-balance sheet arrangements and contractual obligations disclosure requirements.[325] For the reasons discussed above, we are proposing to eliminate the contractual obligations disclosure requirement in B.(12) of Form 40–F.[326] In addition, we are also proposing to make parallel changes (as discussed above) to the off-balance sheet disclosure requirement in Form 40–F by replacing General Instruction B.(11) with a principles-based instruction.[327] As noted above, unlike Item 303 and Form 20–F, the MD&A required under Form 40–F is defined as required by Canadian law.[328] Accordingly, our proposal to amend Item 40–F would only require

[313] *See* Section II.C.4 above.

[314] *See* Sections II.C.2 and II.C.7 above.

[315] *See* proposed Instruction 7 to Item 5 of Form 20–F. For FPIs filing on Forms 20–F and 40–F that apply IFRS, the overlap between the requirements of those Forms and IFRS are similar to the overlap between Item 303(a)(4) and U.S. GAAP, as described in Section II.C.6 above.

IFRS now requires the following disclosures that substantially overlap with the requirements of Item 5.E. of Form 20–F: The nature and amount of a guarantee (*see* Paragraph 35M of IFRS 7, Financial Instruments: Disclosures (''IFRS 7'')); retained or contingent interests in assets transferred to unconsolidated entities (*see* Paragraphs 42B and 42E of IFRS 7); the significance of financial instruments for the entity's financial position and performance; and the nature and extent of risks arising from financial instruments to which the entity is exposed and how the entity manages those risks (*see* Paragraphs 1 of IFRS 7); and obligations under interests in unconsolidated entities (*see* Paragraphs 1 and 24 to 31 of IFRS 12, Disclosure of Interests in Other Entities).

We believe our proposed amendments to Item 5.E of Form 20–F are consistent with the statutory mandate in Section 13(j) of the Exchange Act for the same reasons discussed above in Section II.C.6.

[316] *See* Sections II.C.6 and II.C.7 above. Similar to our discussion above, current IFRS requirements overlap with the contractual obligations table. For example, IFRS 7.39(a), requires disclosure of a maturity analysis for long-term debt obligations; IFRS 16.58 requires disclosure of a maturity analysis of lease obligations; and IAS 37.85 requires disclosure of the expected timing of outflows of economic benefits related to each class of provision. IFRS does not have a specific requirement to disclose the timing of purchase obligations.

We are also proposing to delete the Instructions to Item 5.E and 5.F.

[317] *See* Section II.C.10 above. Similar to this discussion above, we remind FPIs of the existing regulatory and statutory safe harbors. Additionally, Form 20–F reminds companies that forward-looking information is expressly covered by statutory safe harbor provisions. *See* Instruction 3 to Item 5 of Form 20–F.

[318] *See* Section II.C.8 above. As discussed in this section, the 2003 MD&A Interpretive Release addressed critical accounting estimates. The guidance in the 2003 MD&A Interpretive Release applies to MD&A drafted pursuant to Item 5 of Form 20–F. *See* footnote 1 of the 2003 MD&A Interpretive Release.

[319] *See* Section II.C.5 above.

[320] Rules 3–20(c) and 3–20(d) of Regulation S–X provide the situations when a registrant must discuss hyperinflation in a company's financial statements. Rule 3–20(d) generally describes a hyperinflationary environment as one that has cumulative inflation of approximately 100 percent or more over the most recent three-year period.

[321] *See* Section II.C.5 above.

[322] *See, e.g.,* 2003 MD&A Interpretive Release, at 75060.

[323] *See* 2010 MD&A Interpretive Release.

[324] *See* International Disclosure Standards Release. *See also* Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release.

[325] *See Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release.*

[326] *See* Section II.C.7 and footnote 316 above.

[327] See Section II.C.6 and footnote 153 above. We believe our proposed amendments to General Instruction B.(11) of Form 40–F is consistent with the statutory mandate in Section 13(j) of the Exchange Act for the same reasons discussed above in Section II.C.6.

[328] *See* General Instruction B.(3) of Form 40–F.

disclosure of off-balance sheet arrangements to the extent it is not already provided under the MD&A required by Canadian law. Lastly, and consistent with our proposals above, we are proposing to eliminate General Instruction B.(13), which acknowledges application of the statutory safe harbor and specifically and exclusively applies to General Instructions B.(11) and B.(12).[329]

Request for Comment

73. Should we amend Form 40–F, as proposed?

74. Would replacing General Instruction B.(11) of Form 40–F with a more principles-based instruction result in the loss of material information that is otherwise not available to investors? If so, what information would be lost, and are there alternatives we should consider that would elicit this information?

75. Would the proposed deletion of General Instruction B.(12) of Form 40–F result in the loss of material information that is otherwise not available to investors? If so, what information would be lost, and are there alternatives we should consider that would elicit this information?

76. If we eliminate General Instruction B.(13) of Form 40–F, is it necessary or helpful to provide a specific instruction referring to the statutory safe harbors for forward-looking statements that may apply to the proposed off-balance sheet arrangement disclosures? Should we instead retain General Instruction B.(13) of Form 40–F and acknowledge that the statutory safe harbors would apply?

77. Are there any unique considerations with respect to eligible Canadian FPIs in this context?

3. Item 303 of Regulation S–K

FPIs may voluntarily choose to file on forms that would require disclosure under Item 303. Current Instruction 11 to Item 303 requires ''foreign private registrants'' to discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by United States nationals.[330]

For consistency with the requirements of Form 20–F,[331] we are proposing to amend this FPI instruction to incorporate the requirement for FPIs to discuss hyperinflation in a hyperinflationary economy.[332] Proposed Instruction 9 would also replace ''foreign private registrants'' with the defined term ''foreign private issuer.'' [333]

Request for Comment

78. Should we retain and amend the FPI instruction to Item 303, as proposed?

E. Additional Conforming Amendments

We propose additional conforming amendments that are consistent with the proposed amendments described above.[334]

1. Roll-Up Transactions—Item 914 of Regulation S–K

We propose to delete references to Items 301 and 302 in Item 914(a) of Regulation S–K. This item applies to roll-up transactions, which generally involve the combination or reorganization of one or more partnerships, directly or indirectly, where some or all of the investors in any such partnerships will receive new securities, or securities in another entity.[335] Item 914(a) provides that, for each partnership to be included in a roll-up transaction, certain financial information, including disclosure under Item 301 and Item 302, must be provided.

In the context of Item 914(a), disclosure provided under Items 301 and 302 would not be duplicative of the financial statements and would otherwise be unavailable. However, Item 914(a) specifies disclosure of other financial information [336] and states that additional or other information should be provided if material to an understanding of each partnership proposed to be included in a roll-up transaction. In light of these other requirements, we believe deleting references to Items 301 and 302 in Item 914(a) would not result in a loss of material information.

Request for Comment

79. If we eliminate Items 301 and 302 should we also delete these references in Item 914(a) and not specify additional disclosure requirements, as proposed? Are there any unique considerations for roll-up transactions that would necessitate some or all of the information required by Items 301 and 302?

2. Regulation AB—Items 1112, 1114, and 1115

Item 1112 of Regulation AB requires disclosure of financial information required by Item 301 or Item 3.A of Form 20–F about significant obligors of pool assets if the pool assets relating to the significant obligor represent 10% or more, but less than 20%, of the asset pool in an asset-backed securities (''ABS'') transaction. Similarly, Items 1114 and 1115 of Regulation AB require disclosure of financial information required by Item 301 or Item 3.A of Form 20–F about credit enhancement providers and derivatives counterparties, respectively, whose support represents a similar level of concentration in an ABS transaction. With our proposal to eliminate Item 301 and Item 3.A of Form 20–F for corporate issuers, financial information about these third parties to an ABS transaction, including any trend information comparable to information required by Item 303 or Item 5 of Form 20–F, may not otherwise be available. Therefore, we propose to replace in Regulation AB those requirements to disclose selected financial data under Item 301 or Item 3.A of Form 20–F with requirements to disclose summarized financial information, as defined by Rule 1–02(bb) of Regulation S–X,[337] for

[329] *See* Section II.C.10 and footnote 317.

[330] *See* Instruction 11 to Item 303(a) of Regulation S–K.

[331] *See* Section II.D.1.b above.

[332] *See* proposed Instruction 9.

[333] *See* Rule 405 and Rule 3b–4(c).

[334] If the proposed amendments are adopted, the Commission will also amend certain rules and forms to update references to the items we are proposing to amend. Specifically, if adopted as proposed, conforming amendments will be made to: Remove references to Item 301 or Item 3.A of Form 20–F (Item 10 of Regulation S–K [17 CFR 229.10]; Forms S–1 [17 CFR 239.11], N–2 [17 CFR 274.11a–1], S–11 [17 CFR 239.18], S–4 [17 CFR 239.25], F–1 [17 CFR 239.31], F–4 [17 CFR 239.34], 1–A [17 CFR 239.90], 10 [17 CFR 249.208c], and 10–K [17 CFR 249.310]; Schedule 14A [17 CFR 240.14a–101]; and Exchange Act Rule 14a–3 [17 CFR 240.14a–3]); remove references to Item 302 (Items 10 [17 CFR 229.10; Forms S–1 [17 CFR 239.11], N–2 [17 CFR 274.11a–1], S–11 [17 CFR 239.18], S–4 [17 CFR 239.25], 1–A [17 CFR 239.90], 10 [17 CFR 249.208c], and 10–K [17 CFR 249.310]; Schedule 14A [17 CFR 240.14a–101]; Securities Act Rule 175 [17 CFR 230.175]; Exchange Act Rules 3b–6 [17 CFR 240.3b–6] and 14a–3 [17 CFR 240.14a–3]; and Trust Indenture Act of 1939 Rule 0–11 [17 CFR 260.0–11].); and update references to subparagraphs of Item 303 (Securities Act Rule 419 [17 CFR 230.419]).

[335] *See* Rule 901 of Regulation S–K [17 CFR 229.901].

[336] In addition to disclosure under Items 301 and 302, Item 914(a) calls for the following financial disclosures: Ratio of earnings to fixed charges, cash and cash equivalents, total assets at book value, total assets at the value assigned for purposes of the roll-up transaction (if applicable), total liabilities, general and limited partners' equity, net increase (decrease) in cash and cash equivalents, net cash provided by operating activities, distributions; and per unit data for net income (loss), book value, value assigned for purposes of the roll-up transaction (if applicable), and distributions (separately identifying distributions that represent a return of capital).

[337] [17 CFR 210.1–02(bb)]. We are also proposing amendments to Rule 1–02(bb) of Regulation S–X, which calls for disclosure of summary financial information. To eliminate any implication that a

each of the last three fiscal years (or the life of the relevant entity or group of entities, if less). We believe the information required under Rule 1–02(bb) is similar to the information currently required, and is consistent with other types of financial statement disclosures that are required to be disclosed when certain significance thresholds have been met.[338] As proposed, these requirements span the same periods as the historical data that the ABS registrant is required to provide for the pool assets under Item 1111 of Regulation AB.[339] While this proposal would generally result in fewer periods being presented under these items, we do not believe requiring disclosure beyond three years is necessary. Such disclosure would cover periods beyond those presented for the underlying pool assets to which the third-party financial information would relate.

Request for Comment

80. If we eliminate Item 301 and Item 3.A of Form 20–F, should we replace these references in Items 1112, 1114, and 1115 of Regulation AB with a reference to Rule 1–02(bb) of Regulation S–X, as proposed? Would the potential fewer earlier periods being presented under these items result in the loss of material information? Are there alternatives that we should consider? Should we explicitly require a tabular presentation of the summarized financial information for ABS?

3. Summary Prospectus in Forms S–1 and F–1

We are proposing to replace references to Item 301 and Item 3.A of Form 20–F in Form S–1 and Form F–1, respectively, with Rule 1–02(bb) of Regulation S–X, where these forms provide for use of a summary prospectus under Rule 431.[340] A summary prospectus is intended to provide prospective investors with a condensed statement of the more important information in the registration statement.[341] Consistent with this purpose, the Instructions as to Summary Prospectuses in Forms S–1 and F–1 call for disclosure of selected financial data under Item 301 or Item 3.A of Form 20–F, respectively. These instructions also state that, with the exception of these items, the summary prospectus shall not contain any other financial information.[342] To preserve disclosure of financial information in summary prospectuses, we propose to replace the requirement for selected financial data in Forms S–1 and F–1 with summarized financial information under Item 1–02(bb) of Regulation S–X. We believe the information required under Rule 1–02(bb) is similar to the information currently required and is consistent with other types of financial statement disclosures that should be included when certain significance thresholds have been met.

Request for Comment

81. If we eliminate Item 301 and Item 3.A of Form 20–F, as proposed, should we replace these references in the Instructions as to Summary Prospectuses of Forms S–1 and F–1 with Item 1–02(bb) of Regulation S–X, as proposed?

4. Business Combinations—Form S–4, Form F–4 and Schedule 14A

We are proposing to eliminate references to Items 301 and 302 in Form S–4, Form F–4, and Schedule 14A. Where these forms are used in conjunction with a business combination, pro forma financial statements for the most recent fiscal year and interim period under Article 11 of Regulation S–X are required.[343] Additionally, Item 3(e) and (f) in both Forms S–4 and F–4 require Item 301 or Item 3.A of Form 20–F information, respectively, on a pro forma basis. Item 14(b)(9) and (10) of Schedule 14A generally call for similar pro forma information in the context of a business combination. A related instruction stipulates that, for a business combination accounted for as a purchase, financial information is required for the same periods required by Article 11 of Regulation S–X. Because these pro forma requirements are effectively duplicative of the pro forma financial statements required elsewhere by the form, we propose to delete them.[344]

Similarly, we are proposing to eliminate references to Item 301 and Item 3.A of Form 20–F in Item 17(b)(3) of both Form S–4 and Form F–4. We are also proposing to delete the reference to Item 302 in Item 17(b)(4) of Form S–4. Because Item 17(b) of Forms S–4 and F–4 applies to non-reporting target companies in a business combination, this disclosure may not be available elsewhere. We believe, however, consistent with the discussion above,[345] that the requirement for discussion and analysis of trends in Item 303 would also be sufficient to address material information related to a target company in a business combination context.

Request for Comment

82. If we eliminate Item 301 and Item 3.A of Form 20–F as proposed, should we also eliminate references to these items in Form S–4 and F–4 and Schedule 14A, as proposed? Are there any unique considerations in the context of a business combination?

83. In Forms S–4 and F–4, pro forma information of selected financial data is required as part of the prospectus summary. Are there any unique considerations in the context of a business combination such that Item 301 and Item 3.A of Form 20–F pro forma information should be required as part of the prospectus summary?

84. Should we eliminate the requirement to provide Item 301, Item 3.A of Form 20–F, and Item 302 disclosure in Forms S–4 and F–4 for non-reporting target companies, as proposed?

5. Form S–20

We are proposing a conforming change to Form S–20 to remove references to Item 302 of Regulation S–K.[346] Form S–20 is used to register standardized options under the Securities Act and requires limited information about the clearing agency registrant and the options being registered. Since the adoption of Rule 238 in 2002, which exempts from Securities Act Section 5 the registration of offerings of standardized options that are issued by a registered clearing agency and traded on a national

registrant would need to prepare disclosure that is not consistent with the disclosure in the entity's financial statements, the proposed amendments would clarify that the disclosure of summary financial information may vary, as appropriate, to conform to the nature of the entity's business.

[338] For example, Rule 4–08(g) of Regulation S–X [17 CFR 210.4–08(g)] requires disclosure of summarized financial information for equity method investees when significance thresholds are met.

[339] While ABS registrants are generally not required to provide financial statements, under Item 1111 of Regulation AB, ABS registrants must provide historical data on the pool assets as appropriate (*e.g.,* the lesser of three years or the time such assets have existed) to allow material evaluation of the pool data. *See* 17 CFR 229.1111.

[340] *See* 17 CFR 230.431. *See also* Instruction 1(f) under Instructions as to Summary Prospectuses in Form S–1 and Instruction 1(c)(v) under Instructions as to Summary Prospectuses in Form F–1.

[341] *See* Adoption of Summary Prospectus Rule and Amendments to Form S–1 and S–9, Release No. 33–3722 (Nov. 26, 1956) [21 FR 9642 (Dec. 6, 1956)].

[342] *See* Instruction 2 under Instructions as to Summary Prospectuses for Form S–1 and Form F–1.

[343] *See* Item 5 under Part 1 of Forms F–4 and S–4.

[344] We are also proposing to delete the related instruction to these items.

[345] *See* Section II.A above.

[346] 17 CFR 239.20. Current references in Form S–20 to Item 302 are references to the item's predecessor, Item 12.

securities exchange, Form S–20 is rarely used.[347]

Request for Comment

85. If we eliminate Item 302, should we also eliminate reference to this item in Form S–20? Are there any unique considerations in the context of Form S–20?

F. Compliance Date

We propose to provide a transition period after the publication of a final rule in the **Federal Register** to provide registrants with adequate time to adjust their disclosures in light of the proposed amendments. Though companies would be able to begin voluntarily complying with the proposed amendments upon effectiveness, we propose a compliance date of 180 days after effectiveness of any final rule, if adopted. The Commission believes that this transition period would allow sufficient time to prepare for and come into compliance with the amended reporting requirements, but we request comment on whether this time period is appropriate.

Request for Comment

86. Is the proposed transition period necessary and appropriate? If not, what time period would be necessary for registrants to comply with the proposed amendments?

87. Would certain proposed amendments (*e.g.,* critical accounting estimates) require more time to prepare for than other requirements?

III. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the proposed amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. Economic Analysis

A. Introduction

As discussed above, we are proposing amendments to modernize, simplify, and enhance certain financial disclosure requirements in Regulation S–K. Specifically, we are proposing (1) to eliminate Item 301 of Regulation S–K, Selected Financial Data, and Item 302 of Regulation S–K, Supplementary Financial Information; and (2) to amend Item 303 of Regulation S–K, Management's Discussion & Analysis of Financial Condition and Results of Operations. The proposed amendments are intended to eliminate duplicative disclosures and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants.

Overall, investors and registrants may benefit from the proposed amendments if they would help avoid duplicative disclosure and if emphasizing the current principles-based approach to MD&A results in more tailored disclosures that allow investors to better understand the registrant's business through the eyes of management. We acknowledge the risk that emphasizing the current principles-based approach may result in certain loss of information to investors. However, we believe that any loss of information would be limited because the proposed eliminations are mostly duplicative. Additionally, under the proposed principles-based approach, registrants would still be required to provide disclosure about these topics if they are material to an investment decision, further mitigating the potential loss of information.

We are mindful of the costs and benefits of the proposed amendments. The discussion below addresses the potential economic effects of the proposed amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation.[348] At the outset, we note that, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the proposed amendments. In many cases, however, we are unable to quantify the potential economic effects because we lack information necessary to provide a reasonable estimate. For example, we are unable to quantify, with precision, the costs to investors of accessing alternative information sources (*e.g.,* footnotes to financial statements or earnings announcements) under each disclosure item. We are also unable to quantify the potential information processing cost savings that may arise from the elimination of disclosures that are duplicative or not material to an investment decision. Where we are unable to quantify the economic effects of the proposed amendments, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs, and the potential impacts of the proposed amendments on efficiency, competition, and capital formation.

B. Baseline and Affected Parties

The current disclosure requirements under Items 301, 302, and 303 of Regulation S–K, and the related requirements under Items 3.A and 5 of Form 20–F, and General Instructions B.(11), (12), and (13) of Form 40–F, together with the current disclosure practices registrants have adopted to comply with these requirements, form the baseline from which we estimate the likely economic effects of the proposed amendments.[349] The disclosure requirements apply to various filings, including registration statements, periodic reports, and certain proxy statements filed with the Commission. Thus, the parties that are likely to be affected by the proposed amendments include investors and other market participants that use the information in these filings (such as financial analysts, investment advisors, and portfolio managers), as well as registrants subject to the relevant disclosure requirements discussed above.

The proposed amendments may affect both domestic registrants and FPIs.[350]

[347] *See Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934,* Release No. 33–8171 (Dec. 23, 2002) [68 FR 188 (Jan. 2, 2003)] (''New Securities Act Rule 238 does not make Form S–20 obsolete. We are retaining Form S–20 for use by an issuer of standardized options that is not a clearing agency registered under Section 17A of the Exchange Act, such as a foreign clearing agency, or for use by issuers of standardized options that do not trade on a registered national securities exchange or on a registered national securities association.''). Since the effective date of Rule 238 in 2003, we estimate that approximately one entity has used Form S–20.

[348] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

[349] *See supra* Section I.

[350] The number of domestic registrants and FPIs affected by the proposed amendments is estimated as the number of unique companies, identified by Central Index Key (CIK), that filed a Form 10–K, Form 10–Q, Form 20–F, and Form 40–F or an amendment thereto with the Commission during calendar year 2018. The estimates for the percentages of SRCs, are based on information from Form 10–K, Form 20–F, and Form 40–F. For purposes of this economic analysis, these estimates do not include issuers that filed only initial Securities Act registration statements during calendar year 2018, and no Exchange Act reports,

We estimate that during calendar year 2018 there were approximately 6,919 registrants that filed on domestic forms [351] and 806 FPIs that filed on F-forms, other than registered investment companies. Among the registrants that filed on domestic forms, approximately 29 percent were large accelerated filers, 19 percent were accelerated filers, and 52 percent were non-accelerated filers. In addition, we estimate that approximately 33 percent of these domestic issuers were SRCs [352] and 21.3 percent were EGCs. The proposed amendments would also affect ABS issuers. ABS issuers are required to file on Forms SF–1 and SF–3 and, as a result, may be subject to the proposed changes to Regulation AB requirements in this release. We estimate that during calendar year 2018, there were 36 unique depositors filing at least one Form SF–1 or Form SF–3.

C. Potential Benefits and Costs of the Proposed Amendments

In this section, we discuss the anticipated economic benefits and costs of the proposed amendments. We first analyze the overall economic effects of the proposed amendments. We then discuss the potential benefits and costs of specific proposed amendments.

1. Overall Potential Benefits and Costs

We anticipate the proposed amendments [353] would benefit registrants in several ways. First, by eliminating certain duplicative disclosure requirements, the proposed amendments could reduce registrants' disclosure burden and associated compliance costs. Second, by modernizing and simplifying Item 303 disclosure requirements, the proposal may benefit registrants by reducing disclosure burdens and associated compliance costs. In addition, to the extent the proposed amendments result in more tailored and informative disclosure, they could potentially reduce information asymmetry between registrants and investors, improve firms' liquidity, and decrease the cost of capital. Finally, certain of the proposed amendments emphasize a more principles-based approach to MD&A, which we believe would benefit registrants by underscoring the flexibility available in presenting financial results that are more indicative of their business.[354] A more principles-based approach, however, could lead to registrants incurring increased costs associated with assessing materiality.

We believe investors could also benefit from the proposed amendments. First, proposed amendments that clarify and codify existing guidance, such as the proposed amendments related to critical accounting estimates and capital resources, could enhance MD&A disclosure. More robust and informative disclosure on these topics could facilitate investors' decision making and enhance investor protection. Second, if the proposed amendments result in more enhanced and principles-based disclosure, they could allow investors to more efficiently process the disclosure and make better-informed investment decisions. In particular, investors may benefit from more tailored disclosures that allow them to better understand the registrant's business through the eyes of management. Investors also could benefit from the reduction of duplicative disclosure, because reducing such duplication may improve the readability and conciseness of the information provided, help investors focus on material information, and facilitate more efficient information processing.[355]

However, investors could incur certain costs under the proposed amendments. For example, investors who are used to the current disclosure format might experience costs when adjusting to the new format. However, this cost should decrease over time. Investors could also incur monetary costs such as database subscriptions, or opportunity costs such as time spent, if they need to obtain or reconstruct information through alternative sources. However, we do not expect such costs to be significant since registrants would still need to disclose material information. There could be certain additional costs associated with the proposed amendments to the extent that they result in the elimination of disclosure material to an investment decision if registrants misjudge what information is material, or if disclosure becomes less comparable across firms.[356] The risk of misjudgment may

in order to avoid including entities, such as certain co-registrants of debt securities, which may not have independent reporting obligations and therefore would not be affected by the proposed amendments. Nevertheless, the proposed amendments would affect any registrant that files a Securities Act or Exchange Act registration statement or is subject to Exchange Act reporting obligations. We believe that most registrants that have filed a Securities Act or Exchange Act registration statement, other than the co-registrants described above, would be captured by this estimate through their annual or quarterly filings. The estimates for the percentages of SRCs, EGCs, accelerated filers, large accelerated filers, and non-accelerated filers are based on data obtained by Commission staff using a computer program that analyzes SEC filings, with supplemental data from Ives Group Audit Analytics.

[351] This number includes fewer than 25 FPIs that filed on domestic forms in 2018 and approximately 100 BDCs.

[352] This estimate is based on the definition of SRCs prior to the September 2018 effective date of recent amendments to this definition. *See* Amendments to the Smaller Reporting Company Definition, Release No. 33–10513 (June 28, 2018) [83 FR 31992 (July 10, 2018)]. As these amendments increased the number of registrants who are eligible to be SRCs, it is likely that the percentage of registrants that are SRCs is now higher than 33 percent.

[353] *See supra* Sections II.A. through II.E.

[354] A number of academic studies have explored the use of prescriptive thresholds and materiality criteria. Many of these papers highlight a preference for principles-based materiality criteria. *See, e.g.,* Eugene A. Imhoff Jr. and Jacob K. Thomas, *Economic consequences of accounting standards: The lease disclosure rule change,* 10.4 J. Acct. & Econ. 277–310 (1988) (providing evidence that management modifies existing lease agreements to avoid crossing rules-based criteria for lease capitalization); Cheri L. Reither, *What are the best and the worst accounting standards?,* 12.3 Acct. Horizons 283 (1998) (documenting that due to the widespread abuse of bright-lines in rules for lease capitalization, SFAS No. 13 was voted the least favorite FASB standard by a group of accounting academics, regulators, and practitioners); Christopher P. Agoglia, Timothy S. Doupnik, and George T. Tsakumis. *Principles-based versus rules-based accounting standards: The influence of standard precision and audit committee strength on financial reporting decisions,* 86.3 The Acct. Rev. 747–767 (2011) (conducting experiments in which experienced financial statement preparers are placed in a lease classification decision context and finding that preparers applying principles-based accounting are less likely to make aggressive reporting decisions than preparers applying a more precise rules-based standard and supporting the notion that a move toward principles-based accounting could result in better financial reporting); Usha Rodrigues and Mike Stegemoller, *An inconsistency in SEC disclosure requirements? The case of the ''insignificant'' private target,* 13.2–3 J. Corp. Fin. 251–269 (2007) (providing evidence, in the context of mergers and acquisitions, where rule-based [disclosure] thresholds deviate from investor preferences). Papers that highlight a preference for rules-based materiality criteria are cited below.

[355] *See* A. Lawrence, *Individual Investors and Financial Disclosure,* 56 J. Acct. & Econ., 130–147 (2013). Using data on trades and portfolio positions of 78,000 households, this article shows that individuals invest more in firms with clear and concise financial disclosures. This relation is reduced for high frequency trading, financially literate investors, and speculative individual investors. The article also shows that individuals' returns increase with clearer and more concise disclosures, implying such disclosures reduce individuals' relative information disadvantage. A one standard deviation increase in disclosure readability and conciseness corresponds to return increases of 91 and 58 basis points, respectively. The article acknowledges that, given the changes in financial disclosure standards and the possible advances in individual investor sophistication, the extent to which these findings, which are based on historical data from the 1990s, would differ from those today is unknown. Recent advances in information processing technology, such as machine learning for textual analysis, may also affect the generalizability of these findings.

[356] *See* Mark W. Nelson, *Behavioral evidence on the effects of principles- and rules-based standards,* 17.1 Accounting Horizons 91–104 (2003); and Katherine Schipper, *Principles-based accounting standards,* 17.1 Accounting Horizons 61–72 (2003) (noting potential advantages of rules-based accounting standards, including: Increased comparability among firms, increased verifiability

Continued

be mitigated by factors including accounting, financial reporting, and disclosure controls or procedures,[357] as well as the antifraud provisions of the securities laws. In terms of the potential loss of comparability, the cost related to it should be minimal since investors can pull data from the financial statements via XBRL.

Some of the costs of the proposed amendments could be mitigated by external disciplining mechanisms, such as the Commission staff's filing review program. In general, registrants would remain subject to the antifraud provisions of the securities laws.[358] There also may be incentives for registrants to voluntarily disclose additional information if the benefits of reduced information asymmetry exceed the disclosure costs.

The proposed amendments likely would affect registrants and investors differently. For example, any compliance cost reduction might be more beneficial to smaller registrants that are financially constrained. Similarly, although eliminating information that is not material should benefit all investors, retail investors could benefit more as they are less likely to have the time and resources to devote to reviewing and evaluating disclosure. On the other hand, retail investors could also incur additional costs as a result of the proposed amendments because they may need to obtain information from alternative sources, which could involve monetary costs, such as database subscriptions, or opportunity costs, such as time spent searching for alternative sources. These costs may be higher for retail investors than for institutional investors.

for auditors, and reduced litigation for firms). *See also* Randall Rentfro and Karen Hooks, *The effect of professional judgment on financial reporting comparability,* 1 Journal of Accounting and Finance Research 87–98 (2004) (finding that comparability in financial reporting may be reduced under principles-based standards, which rely more heavily on the exercise of professional judgment, but comparability may improve as financial statement preparers become more experienced and hold higher organizational rank); Andrew A. Acito, Jeffrey J. Burks, and W. Bruce Johnson, *The Materiality of Accounting Errors: Evidence from SEC Comment Letters,* 36.2 Contemp. Acct. Res. 839, 862 (2019) (studying managers' responses to SEC inquiries about the materiality of accounting errors and finding that managers are inconsistent in their application of certain qualitative considerations and may omit certain qualitative considerations from their analysis that weigh in favor of an error's materiality).

[357] *See, e.g.,* Exchange Act Rules 13b–2b [17 CFR 240.13b–2b], 13a–15e [17 CFR 240.13a–15e], and 13a–15f [17 CFR 240.13a–15f].

[358] *See, e.g.,* Exchange Act Rule 10b–5(b) [17 CFR 240.10b–5(b)].

2. Benefits and Costs of Specific Proposed Amendments

We expect the proposed amendments would result in costs and benefits to registrants and investors, and we discuss those costs and benefits item by item in this section. The proposed changes to each item would impact the compliance burden for registrants in filing forms that require disclosures that are responsive to such items. Overall, we expect the net effect of the proposed amendments on a registrant's compliance burden to be limited. As explained in this section, we expect certain aspects of the proposed amendments to increase compliance burdens, and others to decrease the burdens. The quantitative estimates of changes in those burdens for purposes of the Paperwork Reduction Act of 1995 (''PRA'') [359] are further discussed in Section V below. For purposes of the PRA, we estimate that the effect of the proposed amendments would vary for different forms. However, taken together, the amendments are likely to result in a net decrease in burden hours for all forms, ranging from 0.1 to 6.5 burden hours per form.[360]

a. Selected Financial Data (Item 301)

Item 301 requires certain registrants [361] to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading.[362] The purpose of this disclosure is to supply in a convenient and readable format selected financial data that highlights certain significant trends in the registrant's financial conditions and results of operations. For certain registrants, information disclosed under Item 301 has also been disclosed in historical financial data and related XBRL data submissions that can be accessed through prior filings on EDGAR.

The current disclosure requirement under Item 301 could result in duplicative disclosure, and it can be costly for registrants to provide such disclosures under certain circumstances. For example, as discussed above, providing disclosure of the earliest two years often creates challenges for registrants when such information has not been previously provided.[363] Therefore, eliminating this requirement may facilitate capital raising activity and increase efficiency for non-EGC issuers contemplating an IPO. Overall, we expect the proposed elimination of Item 301 would benefit registrants by eliminating duplicative disclosures and reducing compliance costs. We also note that the benefit associated with eliminating the costs of providing Item 301 disclosure may be offset by the costs associated with making materiality determinations under a principles-based disclosure framework. In general, we do not expect the proposed elimination of Item 301 would affect the cost of capital given that the eliminated disclosures are largely duplicative. To the extent that there is information loss under certain circumstances, such as in the case of non-EGC IPOs, these registrants could potentially experience an increase in the cost of capital as a result of reduced disclosure. However, in these circumstances registrants would likely voluntarily provide the disclosures to the extent the increase in cost of capital would be significant.

To the extent the proposed amendments result in the elimination of disclosure that is not material, investors may benefit. In particular, if the readability and conciseness of the information provided improves,[364] investors may be able to process information more effectively by focusing on the material information. Also, a principles-based approach may permit or encourage registrants to present more tailored information, which also may benefit investors by allowing them to better understand the registrant's business.

Investors may incur costs to the extent the proposed amendments result in a loss of information. While we do not anticipate significant information loss from the elimination of Item 301, we recognize that selected financial information for the two earliest years would no longer be disclosed in non-EGC IPOs. However, the purpose of the item is to highlight certain significant

[359] Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (codified at 44 U.S.C. 3501 *et seq.*).

[360] *See infra* Section V.B.

[361] As discussed above in Section II.A, SRCs are not required to provide Item 301 information and EGCs that are providing the information called for by Item 301 in a Securities Act registration statement need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with the EGC's IPO of its common equity securities. In addition, an EGC that is providing the information called for by Item 301 in a registration statement, periodic report, or other report filed under the Exchange Act need not present selected financial data for any period prior to the earliest audited financial statements presented in connection with its first registration statement that became effective under the Exchange Act or Securities Act. *See* Item 301(c) of Regulation S–K; Item 301(d)(1) of Regulation S–K.

[362] *See supra* Section II.A.

[363] *See supra* Section II.A.

[364] *See supra* note 355.

trends in the registrant's financial condition and results of operations and we expect that any material trend information that would have been disclosed pursuant to Item 301 would be disclosed under Item 303. We also recognize investors may incur certain other costs. In particular, investors would incur search costs if they have to spend more time to retrieve the information from prior filings. Additionally, to the extent investors are used to the current format and rely on the compiled comparable data, they may incur costs to adjust to new disclosure formats.

Elimination of Item 301 would affect the financial information disclosure by ABS issuers. As discussed above, the currently available financial information set forth in Item 301 or Item 3.A of Form 20–F about significant obligors of pool assets, credit enhancement providers, and derivatives counterparties as required by Item 1112, Items 1114, and 1115 of Regulation AB may not otherwise be available. To mitigate this potential information loss, we propose to replace in Regulation AB those requirements to disclose selected financial data under Item 301 or Item 3.A of Form 20–F with requirements to disclose summarized financial information, as defined by Rule 1–02(bb) of Regulation S–X, for each of the last three fiscal years (or the life of the relevant entity or group of entities, if less).

Since the proposed changes related to ABS issuers are intended to conform to the other changes related to selected financial data and MD&A, our analysis of the costs and benefits for registrants and their investors under the proposed amendments to Item 301 and Item 3.A of Form 20–F can be carried over to ABS issuers. While this proposal would generally result in fewer periods being presented, we do not expect it to have a significant effect on ABS issuers and their investors, because the disclosure of the earlier years would cover periods beyond those presented for the underlying pool assets to which the third-party financial information would relate.

b. Supplementary Financial Information (Item 302)

Under Item 302(a), certain registrants are required to disclose quarterly financial data of specified operating results and variances in these results from amounts previously reported on a Form 10–Q.[365] Registrants must provide quarterly information for each full quarter within the two most recent fiscal years and any subsequent period for which financial statements are included or required by Article 3 of Regulation S–X. Item 302(a) also requires disclosure related to effects of any discontinued operations and unusual or infrequently occurring items.

Since the financial data required under this item (including disclosure related to the effect of any discontinued operations and unusual or infrequently occurring items), other than fourth-quarter data, typically can be found in prior quarterly filings through EDGAR, the prescriptive disclosure requirements under existing Item 302(a) result in duplicative disclosures. By eliminating the duplicative disclosure and associated compliance costs, the proposed amendments would benefit registrants. We do not expect the proposed elimination of Item 302(a) to affect registrants negatively. While a decrease in disclosure could potentially increase the company's cost of capital in general, registrants can always choose to disclose the quarterly financial information through other channels, such as an earnings release.

Investors could benefit to the extent that the proposed amendments result in less duplicative disclosure and less disclosure of immaterial information. The proposed amendments may result in improved readability and conciseness of the information provided, help investors focus on material information, and facilitate more efficient information processing by investors. The proposed amendments would also allow registrants to present financial information that is more reflective of their own industry and firm operating cycles, which could allow investors to better understand their business.

We anticipate information loss from the proposed elimination of fourth quarter financial information currently required under Item 302(a), which is otherwise not explicitly required to be disclosed. Though fourth quarter financial data could be calculated from annual report and cumulative third quarter data, it may be costly for investors to calculate or obtain. While such costs might be minimal for institutional investors, which have both resources and sophistication to obtain the needed financial information, for retail investors, the search costs might be substantially larger, which could involve monetary costs such as database subscriptions, or opportunity costs such as time spent searching for alternative sources and cross-referencing. Additionally, investors could make mistakes in deriving the fourth quarter financial information. Finally, in the case of a restatement, investors, including more sophisticated institutional investors, might not be able to accurately back out the fourth quarter information. To the extent that there is lack of accurate fourth quarter information which cannot be obtained through alternative means, investors' decision making could be affected.

However, the potential information loss from the elimination of Item 302(a) might be mitigated under MD&A's principles-based framework. We believe that fourth quarter data may not be material to all registrants or in every fiscal year. For example, for investors in companies with long operating cycles, fourth quarter data might not be as incrementally important as annual data. However, to the extent that there are material trends or events in the fourth quarter or throughout the fiscal year, registrants would be required to address those matters in their MD&A.

Item 302(b) requires issuers engaged in oil and gas producing activities, other than SRCs, to disclose information about those activities that is required by U.S. GAAP for each period presented. The FASB has recently proposed to amend U.S. GAAP to require the incremental disclosure called for by Item 302(b). Thus, because the disclosure required by Item 302(b) would be included in the notes to the registrant's financial statements, the proposed elimination of Item 302(b) would remove duplicative disclosure on this topic, benefiting both registrants and investors. Registrants could benefit from the reduced compliance burden. Investors should not face information loss from this aspect of the proposed amendments, as this requirement completely overlaps with the proposed amendments to U.S. GAAP. However, investors may incur costs to adjust to the new disclosure format. Such costs are likely to be one-time costs or to decrease over time.

c. Item 303(a) Restructuring and Streamlining

The proposal includes multiple changes that are intended to clarify and streamline the requirements of Item 303. For example, we are proposing a new Item 303(a) to provide a succinct and clear description of the purpose of MD&A. As discussed above, emphasizing the purpose of MD&A at the outset of the item is intended to provide clarity and focus to registrants as they consider what information to discuss and analyze, which could

[365] As discussed in Section II.B.1, SRCs, FPIs, issuers conducting an IPO, and registrants that have a class of securities registered under Section 15(d) of the Exchange Act are not subject to Item 302(a).

encourage management to disclose those factors that are most specific and relevant to a registrant's business. Other changes include restructuring and streamlining language in Item 303 and the related instructions.

We anticipate that the proposed amendments would provide registrants with more clarity on disclosure requirements. When there is confusion related to disclosure requirements, registrants may either over-disclose and incur additional compliance costs, or under-disclose and face increased litigation risk. To the extent that the proposed amendments reduce registrants' confusion, registrants could potentially benefit from reduced compliance costs and litigation risk. More informative disclosure could potentially benefit both registrants and investors by reducing information asymmetry in the market. Reduced information asymmetry could help investors make more informed investment decisions, which may benefit registrants in their capital raising. For registrants, reduced information asymmetry could also potentially improve firm liquidity and reduce cost of capital.

d. Capital Resources (Item 303(a)(2))

Item 303(a)(2), which requires a registrant to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, does not define the term ''capital resources.'' The lack of specificity was intended to provide management flexibility for a meaningful discussion when this disclosure requirement was adopted in 1980. Nonetheless, the Commission has previously provided guidance to clarify the nature of this requirement.[366] Further, while the required disclosure of material commitments of capital expenditures generally relates to physical assets, such as buildings and equipment, this requirement may not fully reflect market developments. While capital expenditures remain important in many industries, certain expenditures that are not necessarily capital investments may be increasingly important to companies. For example, expenditures for human resources or intellectual property may be essential for companies in certain industries. The proposed amendments to Item 303(a)(2) are intended to encompass these types of expenditures. The proposed amendments would also require, consistent with the Commission's 2003 MD&A Interpretive Release, that registrants broadly disclose material cash commitments, including but not limited to capital expenditures. We believe the proposed amendments would modernize the requirement and make the disclosure more reflective of current and future industry outlays.

We believe that the proposed amendments could benefit registrants by providing additional clarity on the term ''capital resources'' and reducing confusion, thereby eliciting appropriate disclosure from registrants and potentially decreasing litigation risk. Capital expenditures vary across industries. While firms in traditional industries rely more on physical assets, firms in other industries such as the technology sector may invest more heavily in intellectual property and human capital. Specifying only capital expenditures in the rule could lead to confusion about what information should be provided. As a result, registrants may over-disclose and incur additional compliance costs, or under-disclose and face increased litigation risk. Further, we expect that registrants would benefit from decreased compliance costs to the extent that the proposed amendments reduce the need to consult existing Commission guidance to process and understand the disclosure requirements.

The proposed amendments should also benefit investors through improved disclosure. As discussed above, lack of clarity might lead to under- or over-disclosure by registrants. For example, disclosure focusing only on capital expenditures rather than on material cash commitments more generally might lead to under-disclosure for less capital intensive industries. As a result, investors might not receive adequate or consistent information to make informed investment decisions. By providing clarity on the requirement, the proposed amendments may facilitate more informative disclosure.

The proposed amendments might increase the disclosure burden for some registrants because they may prompt disclosure of material investments in non-physical assets that registrants might not otherwise be disclosing. However, we do not anticipate a significant increase in compliance costs. As discussed above, some registrants already include disclosure beyond capital expenditures, which the Commission's MD&A guidance has encouraged.[367] Also, better disclosure should eventually benefit registrants, because it could reduce information asymmetry between management and investors, reduce the cost of capital, and thereby improve firms' liquidity and their access to capital markets.[368]

e. Results of Operations—Known Trends or Uncertainties (Item 303(a)(3)(ii))

Item 303(a)(3)(ii) requires a registrant to describe any known trends or uncertainties that have had or that the registrant expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations. The proposed amendments clarify that when a registrant knows of events that are reasonably likely 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, the reasonably likely change must be disclosed. This proposed amendment would conform the language in this paragraph to other Item 303 disclosure requirements for known trends and align Item 303(a)(3)(ii) with the Commission's guidance on forward-looking disclosure.[369]

As discussed above, the language in the existing Item 303(a)(3)(ii) differs from other Item 303 disclosure requirements for forward-looking information.[370] This differing language

[366] *See* 2003 MD&A Interpretive Release.

[367] *See supra* Section II.C.2 and footnote 129.

[368] *See* Douglas W. Diamond and Robert E. Verrecchia, Disclosure, Liquidity, and the Cost of Capital, 46 J. Fin. 1325 (1991) (finding that revealing public information to reduce information asymmetry can reduce a firm's cost of capital through increased liquidity). *See also* Christian Leuz and Robert E. Verrecchia, The Economic Consequences of Increased Disclosure, 38 J. Acct. Res. 91 (2000) (providing empirical evidence that increased disclosure leads to lower information asymmetry component of the cost of capital in a sample of German firms); Christian Leuz and Peter D. Wysocki, The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research, 54 J. Acct. Res. 525 (2016) (providing a comprehensive survey of the literature on the economic effect of disclosure). Studies that provide both theoretical and empirical evidence on the link between information asymmetry and cost of capital include Thomas E. Copeland and Dan Galai, Information Effects on the Bid-Ask Spread, 38 J. Fin. 1457 (1983) (proposing a theory of information effects on the bid-ask spread); David Easley and Maureen O'Hara, Price, Trade Size, and Information in Securities Markets, 19 J. Fin. Econ. 69 (1987) (using a model to provide explanation for the price effect of block trades); David Easley and Maureen O'Hara, Information and the Cost of Capital, 59 J. Fin. 1553 (2004) (showing that differences in the composition of information between public and private information affect the cost of capital, with investors demanding a higher return to hold stocks with greater private information); Yakov Amihud and Haim Mendelson, Asset Pricing and the Bid-Ask Spread, 17 J. Fin. 223 (1986) (predicting that market-observed expected return is an increasing and concave function of the spread, and providing empirical results that are consistent with the predictions of the model).

[369] *See supra* note 139.

[370] *See supra* Section II.C.3. *See also supra* note 138 and 139.

may have led to confusion and inconsistent practice regarding what events should be disclosed. While the Commission has sought to alleviate some of these concerns by clarifying the standard for forward-looking information in its MD&A guidance,[371] the proposed amendment could further benefit registrants by reducing any residual confusion, eliciting more consistent disclosure, and potentially decreasing compliance costs and litigation risk. In addition, more consistent disclosure may allow investors to make more meaningful comparisons across firms and make more informed investment decisions.

Some registrants may experience an increased cost of compliance under the proposed amendments to the extent that these registrants have been disclosing events that *will* cause a material change in the relationship between costs and revenues as opposed to events that are *reasonably likely* to cause the change. Also, some registrants might need to spend resources to evaluate the future likelihood that such events might occur. However, such registrants might be few in light of existing Commission guidance, and the increase in compliance costs could be offset by the potential decrease in cost of capital as a result of enhanced disclosure and reduced information asymmetry.[372]

f. Results of Operations—Net Sales, Revenues, and Line Item Changes (Item 303(a)(3)(iii) and Instruction 4)

Item 303(a)(3)(iii) currently requires management to discuss certain factors, such as changes in prices or volume, that led to certain material increases in net sales or revenues. The proposed amendments broaden the current requirement focusing on ''material increases in net sales or revenue'' in the ''financial statements'' to instead require disclosure of ''material changes from period to period in one more line items'' in the ''statement of comprehensive income.'' Additionally, the proposed amendments would amend Item 303(a)(3)(iii) to require disclosure specifying the *reasons underlying* these material changes. Instead of specifying disclosure of ''material increases'' in net sales or revenue, our proposed revisions would tie the required disclosure to ''material changes'' in net sales or revenues. The proposed amendments to Instruction 4 would similarly clarify that MD&A requires a narrative discussion of the underlying reasons for material changes in quantitative and qualitative terms.

The proposed amendments are intended to codify Commission guidance on results of operations disclosure. The Commission has previously stated that MD&A disclosure should include both qualitative and quantitative analysis and clarified that a results of operations discussion should describe increases or decreases in any line item, including net sales or revenues.[373] The need for registrants to consult both existing Item 303(a)(3)(iii) and the Commission's guidance to understand the requirement could lead to confusion and inconsistent disclosure practice in registrants. The additional clarity provided by the proposed amendments could benefit registrants by reducing any confusion, eliciting more consistent disclosure, and potentially decreasing compliance costs and litigation risk.

The proposed amendments could increase disclosure burdens for registrants, thus potentially increasing compliance costs. However, since many registrants may already be following relevant Commission guidance, the marginal increase in compliance costs is not expected to be significant. Additionally, to the extent that registrants do incur additional compliance costs, such costs could be offset by the potential decrease in cost of capital as a result of increased disclosure and reduced information asymmetry.[374]

The proposed amendments would require registrants to provide a nuanced discussion of the underlying reasons that may be contributing to material changes in line items, and therefore should enhance the disclosure. More consistent and informative disclosure would allow investors to make more meaningful comparisons across firms and make more informed investment decisions. However, any potential benefits to investors may be limited to the extent registrants already are following the relevant Commission guidance.

g. Results of Operations—Inflation and Price Changes (Item 303(a)(3)(iv), Instruction 8, and Instruction 9)

We propose to eliminate Item 303(a)(3)(iv) and related Instructions 8 and 9, which generally require that registrants specifically discuss the impact of inflation and price changes on their net sales, revenue, and income from operations for the three most recent fiscal years, to the extent material. The purpose of the proposed elimination is to streamline Item 303 by eliminating the specific reference to these topics, which may not be material to most registrants. This proposed change is consistent with the principles-based disclosure framework of Item 303.

We do not believe that these proposed changes would result in a loss of material information for market participants. Registrants would still be required to discuss in their MD&A the impact of inflation and changing prices, if material.

The proposed elimination of this item could benefit registrants by streamlining Item 303 and reducing compliance costs. Similar to what we have discussed above,[375] to the extent that the elimination encourages registrants that currently disclose inflation and changing prices even if not material to modify such disclosure,[376] investors could potentially benefit from a focus on material information, which would allow them to process information more effectively. Also, emphasizing a principles-based approach may encourage registrants to present more tailored information, which also may benefit investors.

h. Off-Balance Sheet Arrangements (Item 303(a)(4))

Current Item 303(a)(4) requires, in a separately-captioned section, disclosure of a registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures, or capital resources that is material to investors. We propose to replace Item 303(a)(4) with a new principles-based instruction that would require registrants 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements, or capital resources.

We do not believe the proposed amendments would lead to significant information loss, as we expect the proposed principles-based instruction would continue to elicit material information about off-balance sheet arrangements. As discussed above, we believe that the proposed amendments would encourage registrants to consider

[371] *See* 1989 MD&A Interpretive Release.

[372] *See supra* note 368.

[373] *See, e.g.,* 2003 MD&A Interpretative Release and 1989 MD&A Interpretative Release.

[374] *See supra* note 368.

[375] *See supra* Section III.B.2.i.

[376] *See supra* note 354.

and integrate disclosure of off-balance sheet arrangements in the context of their broader MD&A disclosures and may avoid boilerplate disclosure that either duplicates information in the financial statements, or cross-references the financial statements without additional disclosure to put such information into appropriate context.

The proposed amendments could benefit registrants by avoiding duplicative disclosure and reducing compliance costs. As discussed above, to the extent the proposed amendments improve the readability and conciseness of the information provided, they may help investors process information more effectively. Also, emphasizing a principles-based approach may encourage registrants to provide disclosure that is tailored and informative, which could be more beneficial to investors.

Investors might need to spend time searching for the information and adjusting to the new format and location of the disclosure as the proposal would no longer require the relevant disclosure in a separately captioned section. Such costs are likely to be one-time or decrease over time.

i. Tabular Disclosure of Contractual Obligations (Item 303(a)(5))

Under existing Item 303(a)(5), registrants other than SRCs must disclose in tabular format their known contractual obligations. There is no materiality threshold for this item. A registrant must arrange its chart to disclose the aggregate amount of contractual obligations by type and with subtotals by four prescribed periods. The Commission adopted this requirement so that aggregated information about contractual obligations was presented in one place.[377] However, as discussed above, most of the information presented in response to this requirement is already included in the notes to the financial statements. In order to promote the principles-based nature of MD&A and streamline disclosures by reducing overlapping requirements, we propose to eliminate Item 303(a)(5).

We believe the proposal could lead to reduced compliance costs by avoiding duplicative disclosure, therefore benefiting registrants. On the other hand, we also recognize that there might be increased costs associated with assessing the materiality of contractual obligations under the proposed principles-based approach. However we do not expect such costs to be significant given that the materiality standard is already used by registrants when preparing MD&A disclosures. As discussed above, to the extent the elimination of redundant or immaterial disclosure improves the readability and conciseness of the information provided, the proposed amendment could potentially benefit investors, because it may help them process information more effectively by focusing on material information. Also, since a principles-based approach allows registrants to present more tailored information, it could lead to more informative disclosure, which would benefit investors.

We recognize that there could be a loss of certain information due to the proposed elimination of the item. As discussed in Section II.C.7, some of the information in the contractual obligations table such as purchase obligations is not specifically called for under U.S. GAAP. Additionally, information related to the ''payments due by period'' currently required by the item may be difficult to ascertain from a registrant's financial statements. However, since the proposed amendments to capital resources disclosure would encompass material contractual obligations, we believe any loss of information would not be significant.

We expect investors could experience certain additional costs. A centralized location and tabular format make it convenient for investors to extract and analyze information. Under the proposed amendments, the absence of a centralized location and tabular format may cause investors to incur search costs to derive the data from the financial statements, or monetary costs to obtain the information through alternative channels, such as database subscriptions. Investors may also incur opportunity costs, such as time spent searching for alternative sources, and these costs may fall more heavily on retail investors than on other types of investors, such as institutional investors.

j. Critical Accounting Estimates

Item 303(a) does not currently include a subsection requiring registrants to disclose critical accounting estimates. U.S. GAAP also does not require similar disclosure of estimates and assumptions in the notes to financial statements, except in limited circumstances. However, IFRS requires disclosures regarding sources of estimation uncertainty and judgments made in the process of applying accounting policies that have the most significant effect on the amounts recognized in the financial statements.[378] Although the Commission has issued guidance on disclosure of critical accounting estimates, many registrants repeat the discussion of significant accounting policies from the notes to the financial statements in their MD&A and provide limited additional discussion of critical accounting estimates. We propose amending Item 303 to explicitly require such disclosure due to the importance of critical accounting estimates in providing meaningful insight into the uncertainties related to these estimates and reported financials and how accounting policies of registrants faced with similar facts and circumstances may differ.

As discussed above, commenters have suggested that there is confusion as to how and whether to disclose critical accounting estimates, resulting in inconsistent disclosure practice among registrants. As noted above, many registrants simply repeat the discussion of significant accounting policies from the notes to the financial statements in their MD&A, which is duplicative and may not be particularly informative to investors. Providing a clear disclosure framework could benefit registrants by reducing confusion and duplicative disclosure, thereby decreasing compliance costs.

Investors would also likely benefit from the proposed amendments. The proposed amendments could elicit more informative disclosure from registrants related to their estimates and assumptions, which would help investors better understand any potential risk or uncertainty related to these estimates and make more informed investment decisions. The proposed amendments could also promote more consistent disclosure practices among registrants by providing more clarity, allowing investors to make more meaningful comparisons across registrants and better informed investment decisions.

We recognize that the proposed disclosure requirement could introduce additional costs to market participants. While we do not anticipate that investors would incur any direct costs (other than information processing costs) associated with this proposal, compliance costs might increase for registrants because of the proposed more prescriptive disclosure compared to the existing more principles-based approach. However, the potential increase in compliance costs might decline over time as registrants become more accustomed to the new filing requirements. We also note that,

[377] *See* Off-Balance Sheet Arrangements and Contractual Obligations Adopting Release, at 5990.

[378] *See supra* note 227.

consistent with Commission guidance, some registrants may already provide disclosures related to critical accounting estimates that do not duplicate the financial statement disclosures, thus the increase in compliance costs might be minimal to those registrants. In addition, the increase in compliance costs could be offset by a potential decrease in registrants' cost of capital, because such disclosure could reduce information asymmetry between investors and firms.[379] Taken together, we expect any potential increase in registrants' disclosure-related costs to be small.

k. Interim Period Discussion (Item 303(b))

Item 303(b) requires registrants to provide MD&A disclosure for interim periods that enables market participants to assess material changes in financial condition and results of operations between certain specified periods. The proposal would amend current Item 303(b) to allow for flexibility in comparisons of interim periods and to streamline the item. Specifically, under the proposed Item 303(c), registrants would be allowed to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. The proposed amendments would also streamline the instructions to current Item 303(b), consistent with the proposed amendments to current Item 303(a) and the related instructions.

This more flexible approach is intended to allow registrants to provide analysis that is better tailored to their business cycles. This may result in more informative disclosure that could reduce information asymmetry and firms' cost of capital, benefiting registrants.[380] In addition, streamlining the item could avoid duplicative disclosure and reduce associated compliance costs.

Investors also may benefit from the proposed amendments. As noted above, the proposed amendments would provide registrants flexibility to choose the interim period presented, which could allow them to provide a more tailored analysis. This, in turn, could allow investors to make better informed investment decisions. On the other hand, more flexibility in disclosure could also decrease comparability across firms, potentially increasing the cost of investors' decision-making. However, we do not expect the flexibility in reporting to significantly reduce comparability, since registrants in the same industry may be likely to have similar business cycles and choose similar interim periods. Therefore, the concern about a reduction of comparability across firms in the same industry could be mitigated. Streamlining this item is potentially beneficial to investors, as the resultant reduction of duplicative disclosure might increase the effectiveness of information processing by investors, thus helping them make more informed decisions.

l. Safe Harbor for Forward-Looking Information (Item 303(c))

Item 303(c)[381] states that the safe harbors provided in Section 27A of the Securities Act and 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) (contractual obligations), provided such disclosure is made by certain enumerated persons.[382] We propose to eliminate this item to conform to the proposed elimination of Items 303(a)(4) and 303(a)(5). We do not believe this proposed change would have any economic effect by itself. Disclosure would continue to be protected by the existing safe harbors, and therefore, we do not expect changes in market behavior. To the extent that the elimination of the section may result in any confusion as to the application of the safe harbors, there could be a cost to registrants. However, we believe such cost should be de minimis.

m. Smaller Reporting Companies (Item 303(d))

Item 303(d)[383] states that an SRC may provide Item 303(a)(3)(iv) information for the most recent two fiscal years if it provides financial information on net sales and 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 chart specified in Item 303(a)(5). To conform to the proposals to eliminate Item 303(a)(3)(iv) and (a)(5), we propose to eliminate Item 303(d). SRCs may continue to rely on Instruction 1 to Item 303(a),[384] which states that an SRC's discussion shall cover the two-year period required in Article 8 of Regulation S–X. As we propose to eliminate this item as a conforming change, we do not believe this proposed change would have any economic effect by itself.

n. Foreign Private Issuers

The proposed changes related to Item 3.A and Item 5 of Form 20–F and General Instructions B.(11), (12), and (13) of Form 40–F for FPIs are intended to conform to the other changes related to selected financial data and MD&A. Therefore, our analysis of the costs and benefits for domestic issuers and their investors under the proposed amendments to Item 301 can be carried over to FPIs and their investors under the amended items. The proposed changes could benefit FPIs through a reduction in compliance costs, although the benefits are likely to be smaller given that current Item 3.A permits a FPI to omit either or both of the earliest two years of data under certain conditions and registrants that file on Form 40–F use Canadian disclosure documents to satisfy the Commission's registration and disclosure requirements. Since FPIs would have more flexibility to provide information that is better tailored to their industry or country, investors could benefit from more informative disclosure. However, investors might incur additional search costs when looking for information through alternative channels.

To maintain a consistent approach to MD&A for domestic registrants and FPIs, we are proposing changes to Forms 20–F and 40–F that generally conform to our proposed amendments to Item 303. Therefore, our discussion of the costs and benefits for domestic issuers and their investors under the proposed amendments to Item 303 generally can be carried over to FPIs under the amended item. The proposal adds to Item 303 the current Form 20–F instruction that requires FPIs that are not subject to the multijurisdictional disclosure system to discuss hyperinflation in a hyperinflationary economy. This disclosure can be important to investors when analyzing FPIs, as hyperinflation in some FPIs' home countries might be an important risk factor for the firm's results of operations or financial health.

D. Anticipated Effects on Efficiency, Competition, and Capital Formation

We believe the proposed amendments could have positive effects on efficiency, competition, and capital formation. As discussed above, we expect the proposed amendments could reduce duplicative disclosure and elicit disclosure that is more focused on material information and tailored to a

[379] *See supra* note 368.

[380] *Id.*

[381] Item 303(c) of Regulation S–K.

[382] Such persons are: An issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

[383] Item 303(d) of Regulation S–K.

[384] Proposed renumbered Item 303(b).

registrant's business, making the disclosure more informative. We believe more informative disclosure could reduce information asymmetry between firms and investors, thereby improving firm liquidity and price efficiency.[385] We also believe the proposed amendments could promote competition in the capital markets and facilitate capital formation. This is because more informative disclosure could allow investors to make more meaningful comparisons across firms and make more informed investment decisions, and as a result, more value-enhancing projects may receive more capital allocation.

However, as discussed above, since registrants no longer need to present certain information (*e.g.,* five-year comparable data), investors could incur costs when searching for alternative channels to obtain or reconstruct the information. Since each investor would have to consider the need for alternative sources of information, it could result in inefficiency in the information distribution process. Additionally, if registrants misjudge what information is material, there could be an increase in information asymmetries between registrants and investors, negatively affecting efficiency, competition, and capital formation. However, we expect this risk to be offset by mitigating factors, including accounting controls and the antifraud provisions of the securities laws.

The proposed amendments, in particular by simplifying and codifying certain positions expressed in various Commission guidance, might reduce the compliance costs of private companies considering going public and this cost reduction may be more significant for SRCs. For companies considering an IPO, the benefit of easing the burdens associated with preparing these disclosures for the first time could decrease the costs of going public and thus leave more capital for future investment. This could lead to more efficient capital formation.

E. Alternatives

As an alternative to the proposed elimination of Item 301, which requires registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years, we considered amending the item to require only the same number of years of data as presented in the registrant's financial statements in that same filing. Similarly, another alternative we considered is expanding the current EGC accommodation to all initial registrants. The EGC accommodation generally provides that an EGC need not present selected financial data for any period prior to the earliest audited period presented in its initial filing.[386] This accommodation allows EGCs to build up to the full five years of selected financial data.

The benefit of these alternatives would be potential cost savings from a reduction in compliance burdens by not having to reproduce the earliest years of selected financial data. These alternatives might be sufficient for investors to make a quick comparison with the most recent financial data without cross-referencing to other sources. However, given the nature of electronic access to financial data through EDGAR, we think the potential benefits of these alternatives would be more limited than the proposed elimination of Item 301. We decided not to propose the alternative of requiring the same number of years of data as presented in the registrant's financial statements in that same filing because such disclosure would be largely duplicative and therefore, have limited utility. Regarding the alternative that we expand the current EGC accommodation to all initial registrants, while this approach could provide cost savings to non-EGC initial registrants at the beginning, in the long run, these registrants would still face the same duplicative disclosure problem that other registrants do currently. As a result, we decided not to propose this alternative.

As another alternative, we considered amending Item 301 to require the earliest years only in circumstances where the company can represent that the information cannot be provided without unreasonable effort and expense, as is currently allowed under Item 3.A of Form 20–F. For example, as a commenter noted, there are several situations where such disclosure can be costly.[387] Under this approach, registrants would experience reduced compliance costs under the exempted circumstances, albeit a smaller reduction compared to the proposed approach, because they would still need to disclose selected financial data for the earliest years when it is deemed not time consuming and costly. On the other hand, while investors would still incur search costs if they prefer to analyze five years' financial data, such costs would be smaller compared to the proposed approach. We decided not to propose this alternative because the lack of a consistent or objective standard to determine when additional financial disclosure is required could be time consuming or burdensome for registrants.

As an alternative to the proposed elimination of Item 302, which requires disclosure of quarterly financial data of selected operating results and variances in these results from amounts previously reported on a Form 10–Q, we considered requiring a registrant to separately disclose fourth quarter data elsewhere in its annual report, such as in MD&A. This approach could prevent or mitigate the potential loss of the fourth quarter financial data under the proposed approach. We decided not to propose this alternative because the fourth quarter information may not be material or significant to investors in all circumstances. Therefore, separate presentation of the fourth quarter information might not justify its cost.

We are proposing to amend current Item 303(a)(2) to specify that a registrant should broadly disclose material cash commitments, including but not limited to capital expenditures. We considered proposing a definition for the term ''capital resources.'' While defining the term could provide more clarity for registrants, it would also result in a disclosure requirement more prescriptive in nature, inconsistent with our current objective to promote the principles-based nature of MD&A. We therefore decided not to propose this alternative.

As an alternative to the proposed elimination of Item 303(a)(5), which requires registrants to disclose in tabular format contractual obligations by type of obligation, overall payments due and prescribed periods, we considered maintaining the contractual obligations disclosure requirement in a modified form. For example, we considered allowing this disclosure in a non-tabular format. While this approach could prevent any potential information loss, the non-tabular presentation of information may not be as clear as the tabular format. Also, this approach may not generate meaningful savings for registrants through reduced compliance costs. Another alternative we considered was to reduce the prescribed time periods that need to be disclosed. For example, we could require disclosures of only short-term or long-

[385] *See supra* note 368. *See also* David Hirshleifer and Siew Hong Teoh, *Limited attention, information disclosure, and financial reporting,* 36 J. Acct. & Econ. 337–386 (2003) (developing a theoretical model where investors have limited attention and processing power and showing that, with partially attentive investors, the means of presenting information may have an impact on stock price reactions, misvaluation, long-run abnormal returns, and corporate decisions).

[386] *See* Item 301(d) of Regulation S–K [17 CFR 229.301].

[387] *See supra* note 28 and 29 and corresponding text.

term obligations rather than requiring disclosure to be grouped in the four time periods currently specified in Item 303(a)(5). While this approach could be more beneficial to investors by reducing their search costs compared to the proposed approach, it would result in redundant disclosure and higher compliance costs to registrants.

As an alternative to proposed Item 303(b)(4), we considered issuing additional guidance on critical accounting estimates that enhances the guidance issued in the 2003 MD&A Release. While this alternative could save compliance costs for registrants because it would not create a new requirement, the savings might not necessarily be significant, given the existing Commission guidance on this topic. Further, we believe that by codifying existing guidance, proposed Item 303(b)(4) would provide investors with more enhanced disclosure and protection by ensuring that companies consistently provide such disclosure. Therefore, we decided not to propose this alternative.

Proposed Item 303(b) would allow flexibility for registrants to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. As an alternative, we considered an approach under which registrants would be required to compare the most recent quarter to both the corresponding quarter of the prior year and the immediately preceding quarter. While this alternative approach would provide investors with more disclosure, it might not be clear to investors which time period is more representative of the registrant's business, and registrants would incur more compliance costs. Also, this alternative is less consistent with the principles-based nature of MD&A. Therefore, we decided not to propose this alternative.

The proposed amendments do not require registrants to structure financial disclosures in a machine-readable format. An alternative suggested by some commenters [388] was to require registrants to structure MD&A in the Inline XBRL format. Requiring registrants to structure MD&A disclosures could create benefits for investors (either through direct use of the data or through reliance on the data as extracted and analyzed by intermediaries) as well as other market participants by enabling more efficient retrieval, aggregation, and analysis of disclosed information and facilitating comparisons across issuers and time periods.[389] However, as other commenters observed, filers would incur increased costs under this alternative, with a block text and detail tagging requirement imposing greater costs than a block text tagging-only requirement.[390] This increased cost effect may be mitigated by the fact that registrants are or will be required to structure financial statement and cover page disclosures in the Inline XBRL format,[391] and would therefore incur only the incremental cost associated with tagging the additional disclosures. Also, concerns as to filer cost might be partially alleviated by the overall decline in the costs of XBRL tagging over time, including for SRCs. [392] However, our proposed amendments emphasize MD&A's principles-based framework, which encourages registrants to provide meaningful disclosure that is tailored to their specific facts and circumstances. This may make MD&A less comparable across issuers, thereby reducing the benefits of this alternative. As a result, we did not propose this alternative, but solicit comment on the specific benefits and costs of such a tagging requirement.

Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation or have an impact on investor protection. In addition, we also seek comment on alternative approaches to the proposed amendments and the associated costs and benefits of these approaches. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates.

Specifically, we seek comment with respect to the following questions: Are there any costs and benefits to any entity that are not identified or misidentified in the above analysis? Are there any effects on efficiency, competition, and capital formation that are not identified or misidentified in the above analysis? Should we consider any of the alternative approaches outlined above instead of the proposed amendments? Which approach and why? Are there any other alternative approaches to improving MD&A disclosure that we should consider? If so, what are they and what would be the associated costs or benefits of these alternative approaches?

V. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules, schedules, and forms that would be affected by the proposed amendments contain ''collection of information'' requirements within the meaning of the PRA.[393] The Commission is submitting the proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[394] The hours and costs associated with preparing, filing, and sending the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the

[388] *See, e.g.,* letters from CalPERS, California State Teachers' Retirement System (July 21, 2016), CFA Institute, Deloitte, RGA, Data Coalition (July 21, 2016) (''Data Coalition''), Merrill Corporation (July 19, 2016) (''Merrill''), and XBRL US (July 21, 2016) (''XBRL US''). In addition, the Commission received several comments supporting an Inline XBRL structuring requirement for MD&A disclosure in connection with the Inline XBRL proposing release. *See, e.g.,* letters from CFA Institute (July 1, 2017) and XBRL US (July 1, 2017 and Feb. 1, 2018).

[389] *See* Inline XBRL Adopting Release, at 40851, footnote 71 and accompanying text, and 40862. *See also, e.g.,* Mohini Singh, ''Data and Technology: How Information is Consumed in the New Age,'' *CFA Institute* (July 3, 2018) (describing examples of analytical, benchmarking, and regulatory XBRL usage); Chunhui Liu, Tawei Wang, and Lee J. Yao (2014), ''XBRL's Impact on Analyst Forecast Behavior: An Empirical Study,'' *Journal of Accounting and Public Policy,* 33(1) (finding that XBRL adoption has significantly increased information quantity and quality, as measured by analyst following and forecast accuracy).

[390] *See, e.g.,* letters from Institute of Management Accountants (July 29, 2016); FEI I and II; Maryland Bar Securities Committee, Northrop Grumman, and CCMC.

[391] *See* Inline XBRL Adopting Release; FAST Act Adopting Release.

[392] Preliminary statistics from a pricing survey being conducted by the AICPA and XBRL US indicate that the cost of XBRL formatting has declined 41% since 2014 and that the average cost of XBRL preparation for SRCs in 2017 averaged $5,850 per year. *See* AICPA, ''Research shows XBRL filing costs are lower than expected,'' available at *https://www.aicpa.org/InterestAreas/FRC/AccountingFinancialReporting/XBRL/DownloadableDocuments/XBRL%20Costs%20for%20Small%20Companies.pdf. See also* Mohini Singh, ''The Cost of Structured Data: Myth vs. Reality,'' CFA Institute (August 2017), available at *https://www.cfainstitute.org/-/media/documents/survey/the-cost-of-structured-data-myth-vs-reality-august-2017.ashx.*

[393] 44 U.S.C. 3501 *et seq.*

[394] 44 U.S.C. 3507(d); 5 CFR 1320.11.

information disclosed. The titles for the collections of information are:

''Form 1–A'' (OMB Control No. 3235–0286);

''Form 10'' (OMB Control No. 3235–0064);

''Form 10–Q'' (OMB Control No. 3235–0070);

''Form 10–K'' (OMB Control No. 3235–0063);

''Schedule 14A'' (OMB Control No. 3235–0059);

''Form 20–F'' (OMB Control No. 3235–0288);

''Form 40–F'' (OMB Control No. 3235–0381);

''Form F–1'' (OMB Control No. 3235–0258);

''Form F–4'' (OMB Control No. 3235–0325);

''Form N–2'' (OMB Control No. 3235–0026);

''Form S–1'' (OMB Control No. 3235–0065);

''Form S–4'' (OMB Control No. 3235–0324);

''Form S–11'' (OMB Control No. 3235–0067);

We adopted all of the existing regulations, schedules, and forms pursuant to the Securities Act, the Exchange Act, and/or the Investment Company Act. The regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions.

A description of the proposed amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the proposed amendments can be found in Section IV above.

B. Summary of the Proposed Amendments' Effects on the Collections of Information

The following Table 1 summarizes the estimated effects of the proposed amendments on the paperwork burdens associated with the affected forms listed in Section V.A.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS

Proposed amendments and effects	Affected forms	Estimated net effect *
Item 301: Selected Financial Data		
• Elimination of Item 301 requirement to furnish selected financial data for each of the registrant's last five fiscal years because Item 303 already calls for disclosure of material trend information, which would decrease the paperwork burden by reducing repetitive information about a registrant's historical performance.	• Forms 10, 10–K, S–1, S–4, and S–11.	• 2 hour net decrease in compliance burden per form.
	• Schedule 14A **	• 0.2 hour net decrease in compliance burden per schedule.
• Replacing the reference to Item 301 with a reference to Rule 1–02(bb) of Regulation S–X in Items 1112, 1114, and 1115 of Regulation AB would generally result in similar disclosure being presented under these Items, and therefore not affect the burden estimate.	• Form N–2 ±	• 0.3 hour net decrease in compliance burden per form.
	• Forms SF–1 and SF–3	• No change in compliance burden per form.
Item 302(a): Supplementary Financial Information		
• Elimination of Item 302(a) requirement to disclose selected quarterly financial data of selected operating results because Item 302(a) information is largely available in Forms 10–Q, which would decrease the paperwork burden by reducing repetitive information about a registrant's quarterly performance.	• Forms 10, 10–K, S–1, S–4, and S–11.	• 3 hour net decrease in compliance burden per form.
	• Schedule 14A **	• 0.3 hour net decrease in compliance burden per schedule.
	• Form N–2 ±	• 0.5 hour net decrease in compliance burden per form.
Item 302(b): Information About Oil and Gas Producing Activities		
• Elimination of Item 302(b) disclosures required for registrants engaged in oil and gas producing activities would decrease the paperwork burden by reducing repetitive disclosure that, subject to the adoption of the FASB's Accounting Standards Update, will be duplicative of U.S. GAAP.	• Forms 10, 10–K, S–1, S–4, and S–11.	• 0.1 hour net decrease in compliance burden per form.
	• Schedule 14A **	• 0.1 hour net decrease in compliance burden per schedule.
Item 303(a): Full Fiscal Years		
Restructuring and Streamlining:		
• Establishing a new paragraph to emphasize the purpose of the MD&A section at the outset to clarify and focus registrants is expected to have a minimal impact on the paperwork burden, as the change would codify existing guidance. *Estimated burden increase: 0.1 hour per form and per schedule.*	• Forms 10, 10–K, 10–Q, S–1, S–4, and S–11.	• 2.6 hour net increase in compliance burden per form.
	• Form 1–A ^	• 0.3 hour net increase in compliance burden per form.
• Amendments to streamline the text of new Item 303 would have no effect on the paperwork burden because these amendments are clarifications of existing requirements.	• Schedule 14A**	• 0.3 hour net increase in compliance buren per schedule.
	• Form N–2 ±	• 0.4 hour net increase in compliance burden per form.
Capital Resources:		
• Expanding Item 303(a)(2) to also require a discussion of material cash requirements, in addition to commitments for capital expenditures, would increase the paperwork burden. *Estimated burden increase: 1 hour per form and 0.1 hour increase per schedule.*		
Results of Operations—Known Trends or Uncertainties:		

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS—Continued

Proposed amendments and effects	Affected forms	Estimated net effect *
• Amending Item 303(a)(3)(ii) to clarify that a registrant should disclose *reasonably likely* changes in the relationship between costs and revenues would increase the paperwork burden, although this effect is expected to be minimal because the amendment is consistent with existing guidance. *Estimated burden increase: 1.0 hour per form and 0.1 hour increase per schedule*.		
Results of Operations—Net Sales, Revenues, and Line Item Changes:		
• Amending Item 303(a), Item 303(a)(3)(iii) and Instruction 4 to Item 303(a) to clarify that a registrant should include in its MD&A a discussion of the reasons underlying material *changes* from period-to-period in one or more line items could marginally increase the paperwork burden by requiring a more nuanced discussion consistent with the overall objective of MD&A. *Estimated burden increase: 1.0 hour per form and 0.1 hour increase per schedule*.		
Results of Operations—Inflation and Price Changes:		
• Eliminating the specific reference to inflation within Item 303(a)(3)(iv) for issuers should marginally reduce the paperwork burden, although such decrease is expected to be minimal. *Estimated burden decrease: 0.5 hours per form and 0.1 hour decrease per schedule*.		
Off-Balance Sheet Arrangements:		
• Replacing Item 303(a)(4) with an instruction emphasizing a more principles-based approach with respect to off-balance sheet arrangement disclosures, would reduce duplicative disclosures and decrease the paperwork burden. *Estimated burden decrease: 1.0 hour per form and 0.1 hour decrease per schedule*.		
• Amending Items 2.03 and 2.04 of Form 8–K to retain the definition of ''off-balance sheet arrangements'' that is currently in Item 303(a)(4) would not result in any changes in reporting obligations under Item 2.03 and Item 2.04 of Form 8–K, and would therefore result in no change in paperwork burden for this form.		
Contractual Obligations Table:		
• Eliminating Item 303(a)(5), the requirement that registrants provide a tabular disclosure of contractual obligations, would reduce duplicative disclosures and decrease the paperwork burden. *Estimated burden decrease: 1.0 hour per form and 0.1 hour decrease per schedule*.		
Critical Accounting Estimates:		
• Amending Item 303 to explicitly require disclosure of critical accounting estimates would provide more clarity on the uncertainties involved in creating an accounting policy and how significant accounting policies of registrants may differ. This would increase the paperwork burden. *Estimated burden increase: 2.0 hours per form and 0.2 hour increase per schedule*.		
Item 303(b): Interim Periods		
• Amending Item 303(b) to allow for more flexibility in interim periods compared and eliminating certain instructions and providing cross-references to similar instructions in Item 303(a) would decrease the paperwork burden.	• Forms 10, 10–K, 10–Q, S–1, S–4, and S–11.	• 4.0 hour net decrease in compliance burden per form.
	• Form 1–A ^	• 0.4 hour net decrease in compliance burden per form.
	• Schedule 14A **	• 0.4 hour net decrease in compliance burden per schedule.
	• Form N–2 ±	• 0.7 hour net decrease in compliance burden per form.
Item 303(c): Safe Harbor for Forward-Looking Information		
• Eliminating Item 303(c) as a conforming change would have no effect on the paperwork burden.		
Item 303(d): Accommodations for SRCs		
• Eliminating Item 303(d) as a conforming change would have no effect on the paperwork burden.		
Effect on FPIs		
• Eliminating Item 3.A and generally conforming Item 5 of Form 20–F to the proposed amendments to Item 303 would reduce the paperwork burden.	• Form 20–F	• 2.0 hour net decrease in compliance burden per form.
• Eliminating the contractual obligations disclosure requirement and replacing the off-balance sheet disclosure requirements in Forms 20–F and 40–F with a principles-based instruction would reduce the paperwork burden.	• Form 40–F	• 2.0 hour net decrease in compliance burden per form.
• Amending current Instruction 11 to Item 303 to conform to the hyperinflation disclosure requirements of Form 20–F would not affect the paperwork burden.	• Forms F–1 and F–4	• 3.5 hour net decrease per form.
Total	• Form 1–A	• 0.1 hour net decrease per form.
	• Form 10–Q	• 1.4 hour net decrease per form.
	• Forms 10, 10–K, S–1, S–4, and S–11.	• 6.5 hour net decrease per form.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS—Continued

Proposed amendments and effects	Affected forms	Estimated net effect *
	• Schedule 14A	• 0.7 hour net decrease per form.
	• Forms F–1 and F–4	• 3.5 hour net decrease per form.
	• Form 20–F	• 2.0 hour net decrease per form.
	• Form 40–F	• 2.0 hour net decrease per form.
	• Form N–2	• 1.1 hour net decrease per form.

* Estimated effect expressed as increase or decrease of burden hours *on average* and derived from Commission staff review of samples of relevant sections of the affected forms.

** The lower estimated average incremental burden for Schedule 14A reflects the Commission staff estimates that no more than 10% of the Schedule 14As filed annually include Item 301–303 disclosures.

± Form N–2 states that disclosure under Items 301–303 of Regulation S–K is only required if ''the Registrant is regulated as a business development company under the 1940 Act.'' The estimated average incremental burden for Form N–2 reflects the fact that approximately 17% of registrants are BDCs. The estimated burden has been reduced to adjust for this percentage.

≠ The reduced estimated average incremental burden for the proposed elimination of Item 302(b) reflects the fact that approximately 3.5% of registrants engage in oil and gas producing activities. For purposes of this PRA analysis, BDCs have been deemed not to be engaged in oil and gas producing activities.

^ In the preparation of Part II of Form 1–A, Regulation A issuers have the option of disclosing either the information required by (i) the Offering Circular format or (ii) Part I of Forms S–1 or S–11 (except for the financial statements, selected financial data, and supplementary information called for by those forms). The burden associated with Form 1–A is affected only to the extent that an issuer chooses to use Part I of these forms. The Commission staff estimates that 10.6% of Form 1–A filings reflect this election.

C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

Below we estimate the incremental and aggregate reductions in paperwork burden as a result of the proposed amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the nature of their business. We do not believe that the proposed amendments would change the frequency of responses to the existing collections of information; rather, we estimate that the proposed amendments would change only the burden per response.

The burden reduction estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a registrant to prepare and review disclosure required under the proposed amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. Table 2 below sets forth the percentage estimates we typically use for the burden allocation for each form. We also estimate that the average cost of retaining outside professionals is $400 per hour.[395]

PRA TABLE 2—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED FORMS AND SCHEDULES

Form/schedule type	Internal (percent)	Outside professionals (percent)
Forms 1–A, 10–K, 10–Q, 8–K, Schedule 14A	75	25
Forms S–1, S–4, S–11, F–1, F–4, SF–1, SF–3, and 10	25	75
Forms 20–F and 40–F	25	75
Form N–2	25	75

Table 3 below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the proposed amendments.

[395] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

[396] The number of estimated affected responses is based on the number of responses in the Commission's current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average. We do not expect that the proposed amendments would materially change the number of responses in the current OMB PRA filing inventory.

[397] The estimated reductions in Columns (C), (D), and (E) are rounded to the nearest whole number.

PRA Table 3—Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting From the Proposed Amendments

Form	Number of estimated affected responses (A) [396]	Burden hour reduction per current affected response (B)	Reduction in burden hours for current affected responses (C) = (A) × (B) [397]	Reduction in company hours for current affected responses (D) = (C) × 0.25 or 0.75	Reduction in professional hours for current affected responses (E) = (C) − (D)	Reduction in professional costs for current affected responses (F) = (E) × $400
S–1	901	6.5	5,857	1,464	4,393	$1,757,200
S–4	551	6.5	3,582	896	2,687	1,074,800
S–11	64	6.5	416	104	312	124,800
F–1	63	4.5	284	71	213	85,200
F–4	39	4.5	176	44	132	52,800
N–2	166	1.1	183	46	137	54,800
1–A	179	0.1	18	14	5	2,000
10	216	6.5	1,404	351	1,053	421,200
10–K	8,137	6.5	52,891	39,668	13,223	5,289,200
10–Q	22,907	1.4	32,070	24,053	8,018	3,207,200
20–F	725	2.0	1,450	363	1,088	435,200
40–F	132	2.0	264	66	198	79,200
Sch. 14A	5,586	0.7	3,910	2,933	978	391,200
Total	39,666			70,073		12,974,800

The following Table 4 summarizes the requested paperwork burden, including the estimated total reporting burdens and costs, under the proposed amendments.

PRA Table 4—Requested Paperwork Burden Under the Proposed Amendments

Form	Current burden current annual responses (A)	Program change current burden hours (B)	Requested change in burden current cost burden (C)	Number of affected responses (D)	Reduction in company hours (E) [398]	Reduction in professional costs (F) [399]	Annual responses (G) = (A)	Burden hours (H) = (B) − (E)	Cost burden (I) = (C) − (F)
S–1	901	148,556	$182,048,700	901	1,464	$1,757,200	901	147,092	$180,291,500
S–4	551	563,216	678,291,204	551	896	1,074,800	551	562,320	677,216,404
S–11	64	12,290	15,016,968	64	104	124,800	64	12,186	14,892,168
F–1	63	26,815	32,445,300	63	71	85,200	63	26,744	32,360,100
F–4	39	14,076	17,106,000	39	44	52,800	39	14,032	17,053,200
N–2	166	73,250	4,668,396	166	46	54,800	166	73,204	4,613,596
1–A	179	98,396	13,111,912	179	14	2,000	179	98,382	13,109,912
10	216	12,072	14,356,888	216	351	421,200	216	11,721	13,935,688
10–K	8,137	14,220,652	1,896,891,869	8,137	39,058	5,207,600	8,137	14,181,594	1,891,684,269
10–Q	22,907	3,253,411	432,290,354	22,907	24,053	3,207,200	22,907	3,229,358	429,083,154
20–F	725	479,304	576,875,025	725	363	435,200	725	478,941	576,439,825
40–F	132	14,237	17,084,560	132	66	79,200	132	14,171	17,005,360
Sch. 14A	5,586	3,253,411	432,290,354	5,586	2,933	391,200	5,586	3,250,478	431,899,154
Total	39,666	22,169,686	4,312,477,530	39,666	70,073	12,974,800	39,666	22,099,613	4,299,502,730

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–01–20. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be

[398] From Column (D) in PRA Table 3.

[399] From Column (F) in PRA Table 3.

in writing, refer to File No. S7–01–20 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

VI. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[400] the Commission must advise OMB as to whether the proposed amendments constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a ''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act. In particular, we request comment on the potential effect on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment, or innovation.

Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Regulatory Flexibility Act Certification

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (''RFA'') [401] requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (''IRFA'') that will describe the impact of the proposed rule on small entities.[402] Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.[403]

The proposed amendments would have an impact on a substantial number of small entities.[404] However, the Commission expects that the impact on entities affected by the proposed rule would not be significant.[405] The primary effects of the proposed amendments would be to (1) modernize, simplify, and enhance the disclosure requirements for MD&A in Item 303, such as by codifying prior Commission interpretive guidance and eliminating duplicative disclosures; (2) simplify duplicative disclosure requirements by eliminating Item 301, Selected Financial Data, and Item 302, Supplementary Financial Information; and (3) generally make conforming changes that would apply to FPIs filing on Forms 20–F or 40–F. As a result, we expect that the impact of the proposed amendments would be a reduction in the paperwork burden of affected entities, including small entities, and that the overall impact of the paperwork burden reduction would be modest.[406] Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed amendments to Items 301, 302, and 303 of Regulation S–K and Forms 20–F and 40–F and the related conforming changes, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Request for Comment

We request comment on this certification. In particular, we solicit comment on the following: Do commenters agree with the certification? If not, please describe the nature of any impact of the proposed amendments on small entities and provide empirical data to illustrate the extent of the impact. Such comments will be considered in the preparation of the final rules (and in a Final Regulatory Flexibility Analysis if one is needed) and will be placed in the same public file as comments on the proposed rules themselves.

VIII. Statutory Authority and Text of Proposed Rule and Form Amendments

The amendments contained in this release are being proposed under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3(b), 12, 13, 14, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 8, 24, 30, and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and recordkeeping requirements, Securities, Utilities.

17 CFR Parts 229, 239, 240, and 249

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j–1, 78*l,* 78m, 78n, 78*o*(d), 78q, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012), unless otherwise noted.

■ 2. Amend § 210.1–02 by revising paragraph (bb)(1) introductory text and (bb)(2) to read as follows:

§ 210.1–02 Definitions of terms used in Regulation S–X (17 CFR part 210).

* * * * *

(bb) * * * (1) Except as provided in paragraph (bb)(2) of this section, summarized financial information referred to in this regulation shall mean the presentation of summarized information as to the assets, liabilities and results of operations of the entity for which the information is required. Summarized financial information shall include the following disclosures, which may be subject to appropriate variation to conform to the nature of the entity's business:

* * * * *

[400] 5 U.S.C. 801 *et seq.*

[401] 5 U.S.C. 601 *et seq.*

[402] 5 U.S.C. 603(a).

[403] 5 U.S.C. 605(b).

[404] We estimate that there are 1,171 issuers that file with the Commission, other than investment companies, that may be considered small entities and are potentially subject to the proposed amendments. This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10–K, 20–F, and 40–F, or amendments, filed during the calendar year of January 1, 2018, to December 31, 2018. Analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

[405] *See* Section IV.B above.

[406] We estimate that the proposed amendments are likely to result in a net decrease of between 0.1 and 6.5 burden hours per form for purposes of the PRA. *See* Section V.B above.

(2) Summarized financial information for unconsolidated subsidiaries and 50 percent or less owned persons referred to in and required by § 210.10–01(b) for interim periods shall include the information required by paragraph (bb)(1)(ii) of this section.

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 3. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j–3, 78*l,* 78m, 78n, 78n–1, 78o, 78u–5, 78w, 78*ll,* 78 mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; sec. 953(b), Pub. L. 111–203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012).

§ 229.301 [Removed and Reserved]

■ 4. Remove and reserve § 229.301.

§ 229.302 [Removed and Reserved]

■ 5. Remove and reserve § 229.302.

■ 6. Revise § 229.303 to read as follows:

§ 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

(a) *Objective.* The objective of the discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources. This discussion and analysis must provide a narrative explanation of the registrant's financial statements that allows investors to view the registrant from management's perspective. The discussion and analysis must focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This includes descriptions and amounts of matters that are reasonably expected to have a material impact on future operations and have not had a material impact on past operations, and matters that have had a material impact on reported operations and are not reasonably expected to have a material impact upon future operations. The discussion and analysis must be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of the registrant's financial condition, changes in financial condition and results of operations.

(b) *Full fiscal years.* The discussion of financial condition, changes in financial condition and results of operations must provide information as specified in paragraphs (b)(1) through (4) of this section and such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Where the financial statements reflect material changes from period-to-period in one or more line items, including where material changes within a line item offset one another, describe the underlying reasons for these material changes in quantitative and qualitative terms. The reasons for material changes must be described to the extent necessary to an understanding of the registrant's businesses as a whole. Where in the registrant's judgment a discussion of segment information and/or of other subdivisions (*e.g.,* geographic areas, product lines) of the registrant's business would be necessary to an understanding of such business, the discussion must focus on each relevant segment and/or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(2) *Capital resources.* (i) Describe the registrant's material cash requirements, including commitments for 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.

(ii) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any expected material changes in the mix and relative cost of such resources. The discussion must consider changes between equity, debt and any off-balance sheet financing arrangements.

(3) *Results of operations.* (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, would be material to an understanding of the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that are reasonably likely 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), the reasonably likely change in the relationship must be disclosed.

(iii) If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of goods or services being sold or to the introduction of new products or services.

(4) *Critical accounting estimates.* Critical accounting estimates are those 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. Discuss, to the extent material, why each critical accounting estimate is subject to uncertainty, how much each estimate has changed during the reporting period, and the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation. The discussion should provide quantitative as well as qualitative information when quantitative information is reasonably available and will provide material information to investors.

Instructions to paragraph 303(b):

1. Generally, the discussion must cover the periods covered by the financial statements included in the filing and the registrant may use any presentation that in the registrant's judgment enhances a reader's understanding. A smaller reporting company's discussion must cover the two-year period required in Article 8 of Regulation S–X and may use any presentation that in the registrant's

judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, discussion about the earliest of the three years may be omitted if such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with Item 303 of Regulation S–K, provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found. An emerging growth company, as defined in Rule 405 of the Securities Act (§ 230.405 of this chapter) or Rule 12b–2 of the Exchange Act (§ 240.12b–2 of this chapter), may provide the discussion required in paragraph (b) of this section for its two most recent fiscal years if, pursuant to Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)), it provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of the emerging growth company's common equity securities.

2. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated.

3. If the reasons underlying a material change in one line item in the financial statements also relate to other line items, no repetition of such reasons in the discussion is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Registrants need not recite the amounts of changes from period to period which are readily computable from the financial statements. The discussion must not merely repeat numerical data contained in the financial statements.

4. The term ''liquidity'' as used in this Item refers to the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs. Except where it is otherwise clear from the discussion, the registrant must indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition. Liquidity generally must be discussed on both a long-term and short-term basis. The issue of liquidity must be discussed in the context of the registrant's own business or businesses. For example, a discussion of working capital may be appropriate for certain manufacturing, industrial, or related operations but might be inappropriate for a bank or public utility.

5. Where financial statements presented or incorporated by reference in the registration statement are required by § 210.4–08(e)(3) of Regulation S–X [17 CFR part 210] to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity must include a discussion of the nature and extent of such restrictions and the impact such restrictions have had or are expected to have on the ability of the parent company to meet its cash obligations.

6. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act [17 CFR 230.175], Rule 3b–6 under the Exchange Act [17 CFR 240.3b–6], and Securities Act Release No. 6084 (June 25, 1979) (44 FR 33810).

7. All references to the registrant in the discussion and in this Item mean the registrant and its subsidiaries consolidated.

8. Discussion of 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity under U. S. GAAP.

9. If the registrant is a foreign private issuer, briefly discuss any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, their operations or investments by United States nationals. The discussion must also consider the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited interim financial statements are filed. See Rule 3–20(c) of Regulation S–X for a discussion of cumulative inflation rates that may trigger this requirement.

10. If the registrant is a foreign private issuer, the discussion must focus on the primary financial statements presented in the registration statement or report. The foreign private issuer must refer to the reconciliation to United States generally accepted accounting principles and discuss any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes is necessary for an understanding of the financial statements as a whole, if applicable.

11. The term statement of comprehensive income means a statement of comprehensive income as defined in § 210.1–02 of Regulation S–X.

Instruction to paragraph 303(b)(4): The disclosure of critical accounting estimates should supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

(c) *Interim periods.* If interim period financial statements are included or are required to be included by Article 3 of Regulation S–X [17 CFR 210.3], a management's discussion and analysis of the financial condition and results of operations must be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (c)(1) and (2) of this section. The discussion and analysis must include a discussion of material changes in those items specifically listed in paragraph (b) of this section.

(1) *Material changes in financial condition.* Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also must be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations.* (i) Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which a statement of comprehensive income is provided and the corresponding year-to-date period of the preceding fiscal year.

(ii) Discuss any material changes in the registrant's results of operations with respect to either the most recent quarter for which a statement of comprehensive income is provided and the corresponding quarter for the preceding fiscal year or, in the alternative, the most recent quarter for which a statement of comprehensive income is provided and the immediately preceding sequential quarter. If the latter immediately preceding sequential quarter is discussed, then provide in summary form the financial information for that immediately preceding sequential quarter that is subject of the discussion or identify the registrant's prior filings on EDGAR that present such information. If there is a change in the form of presentation from period to period that forms the basis of comparison from previous periods provided pursuant to this paragraph, the registrant must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

Instructions to paragraph 303(c):

1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information must be prepared pursuant to this paragraph (c) and the discussion of the full fiscal year's information must be prepared pursuant to paragraph (b) of this section. Such discussions may be combined. Instructions 3, 6, 8 and 11 to paragraph (b) of this section apply to this paragraph (c).

2. The registrant's discussion of material changes in results of operations must identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

■ 7. Amend § 229.914 by revising paragraph (a) to read as follows:

§ 229.914 (Item 914) Pro forma financial statements: Selected financial data.

(a) For each partnership proposed to be included in a roll-up transaction provide: Ratio of earnings to fixed charges, cash and cash equivalents, total assets at book value, total assets at the value assigned for purposes of the roll-up transaction (if applicable), total liabilities, general and limited partners' equity, net increase (decrease) in cash and cash equivalents, net cash provided by operating activities, distributions; and per unit data for net income (loss), book value, value assigned for purposes of the roll-up transaction (if applicable), and distributions (separately identifying distributions that represent a return of capital). This information must be provided for the previous two fiscal years. Additional or other information must be provided if material to an understanding of each partnership proposed to be included in a roll-up transaction.

* * * * *

■ 8. Amend § 229.1112 by revising paragraph (b)(1) and Instruction 3.a. to paragraph (b) to read as follows:

§ 229.1112 (Item 1112) Significant obligors of pool assets.

* * * * *

(b) *Financial information.* (1) If the pool assets relating to a significant obligor represent 10% or more, but less than 20%, of the asset pool, provide summarized financial information, as defined by Rule 1–02(bb) of Regulation S–X (§ 210.1–02(bb) of this chapter), for the significant obligor for each of the last three fiscal years (or the life of the significant obligor and its predecessors, if less), provided, however, that for a significant obligor under § 229.1101(k)(2) of this chapter (Item 1101(k)(2) of Regulation AB), only net operating income for the most recent fiscal year and interim period is required.

* * * * *

Instructions to Item 1112(b):

* * * * *

3. * * *

a. If the summarized financial information required by paragraph (b)(1) of this section is presented on a basis of accounting other than U.S. GAAP or IFRS as issued by the IASB, then present a reconciliation to U.S. GAAP and Regulation S–X, pursuant to Item 17 of Form 20–F. If a reconciliation is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the summarized financial information from those accepted in the U.S.

* * * * *

■ 9. Amend § 229.1114 by revising paragraph (b)(2)(i) and Instruction 4.a. to paragraph (b) to read as follows:

§ 229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.

* * * * *

(b) * * *

(2) *Financial information.* (i) If any entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 10% or more, but less than 20%, of the cash flow supporting any offered class of the asset-backed securities, provide summarized financial information, as defined by Rule 1–02(bb) of Regulation S–X (§ 210.1–02(bb) of this chapter), for each such entity or group of affiliated entities for each of the last three fiscal years (or the life of the entity or group of affiliated entities and any predecessors, if less).

* * * * *

Instruction 4 to Item 1114(b). * * *

a. If the summarized financial information required by paragraph (b)(1) of this section is presented on a basis of accounting other than U.S. GAAP or IFRS as issued by the IASB, then present a reconciliation to U.S. GAAP and Regulation S–X, pursuant to Item 17 of Form 20–F. If a reconciliation is unavailable or not obtainable without unreasonable cost or expense, at a minimum provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements used as a basis for the summarized financial information from those accepted in the U.S.

* * * * *

■ 10. Amend § 229.1115 by revising paragraph (b)(1) to read as follows:

§ 229.1115 (Item 1115) Certain derivatives instruments.

* * * * *

(b) *Financial information.* (1) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 10% or more, but less than 20%, provide summarized financial information, as defined by Rule 1–02(bb) of Regulation S–X (§ 210.1–02(bb) of this chapter), for such entity or group of affiliated entities for each of the last three fiscal years (or the life of the entity or group of affiliated entities and any predecessors, if less).

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 11. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78*o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Pub. L. 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

■ 12. Amend Form S–1 (referenced in § 239.11) by:
■ a. Revising paragraphs (f) and (g) of Instruction 1 under ''Instructions as to Summary Prospectus''; and
■ b. Adding paragraph (h) of Instruction 1 under ''Instructions as to Summary Prospectus'' to read as follows:

Note: The text of Form S–1 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM S–1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

INSTRUCTIONS AS TO SUMMARY PROSPECTUSES

1. * * *

(f) As to Item 11, a brief statement of the general character of the business done and intended to be done and a brief statement of the nature and present status of any material pending legal proceedings;

(g) A tabular presentation of notes payable, long term debt, deferred credits, minority interests, if material, and the equity section of the latest balance sheet filed, as may be appropriate; and

(h) Subject to appropriate variation to conform to the nature of the registrant's business, provide summarized financial information defined by Rule 1–02(bb)(1)(i) and (ii) of Regulation S–X (§ 210.1–02(bb) of this chapter) in comparative columnar form for the periods for which financial statements are required by Regulation S–X (17 CFR part 210).

* * * * *

■ 13. Amend Form S–20 (referenced in § 239.20) by revising Item 7 and paragraph (1) to Item 8 to read as follows:

Note: The text of Form S–20 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM S–20

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

PART II INFORMATION NOT REQUIRED IN PROSPECTUS

* * * * *

Item 7. Financial Statements

Include financial statements meeting the requirements of Regulation S–X [17 CFR 210].

Item 8. Undertakings

Furnish the following undertakings:

1. The undersigned registrant hereby undertakes to file a post-effective amendment, not later than 120 days after the end of each fiscal year subsequent to that covered by the financial statements presented herein, containing financial statements meeting the requirements of Regulation S–X [17 CFR 210].

* * * * *

■ 14. Amend Form S–4 (referenced in § 239.25) by:
■ a. Removing and reserving Item 3(d), (e), and (f) and removing the Instruction to Item 3(e) and (f) under Part I, Section A (''Information About the Transaction''); and
■ b. Removing and reserving Item 17(b)(3) and (4) under Part I, Section C (''Information with Respect to Companies Other Than S–3 Companies'').
■ 15. Amend Form F–1 (referenced in § 239.31) by:
■ a. Revising the paragraph 1(c)(v) under ''Instructions as to Summary Prospectuses''; and
■ b. Adding paragraph 1(c)(vi) to read as follows:

Note: The text of Form F–1 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM F–1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

INSTRUCTIONS AS TO SUMMARY PROSPECTUSES

1. * * *

(c) * * *

(v) As to Item 4, a brief statement of the general character of the business done and intended to be done and a brief statement of the nature and present status of any material pending legal proceedings;

(vi) Subject to appropriate variation to conform to the nature of the registrant's business, provide summarized financial information defined by Rule 1–02(bb)(1)(i) and (ii) of Regulation S–X (§ 210.1–02(bb) of this chapter) in comparative columnar form for the periods for which financial statements are required by Item 8.A. of Form 20–F. If interim period financial statements are included, the summarized financial information should be updated for that interim period, which may be unaudited, provided that fact is stated. If summarized financial data for interim periods is provided, comparative data from the same period in the prior financial year shall also be provided, except that the requirement for comparative balance sheet data is satisfied by presenting the year end balance sheet information.

* * * * *

■ 16. Amend Form F–4 (referenced in § 239.34) by:
■ a. Removing and reserving Item 3(d), (e), and (f) and removing the Instruction to Item 3(e) and (f) under Part I, Section A (''Information About the Transaction''); and
■ b. Removing and reserving Item 17(b)(3) under Part I, Section C (''Information with Respect to Foreign Companies Other Than F–3 Companies'').

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 17. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

§ 240.14a–101 [Amended]

■ 18. Amend § 240.14a–101 by removing and reserving (b)(8), (9), and (10) under Item 14 (''Mergers, consolidations, acquisitions and similar matters''):

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 19. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

■ 20. Amend Form 20–F (referenced in § 249.220f) by:

■ a. Removing and reserving General Instruction G(c);
■ b. Removing and reserving Item 3.A;
■ c. Removing Instructions to Item 3.A;
■ d. Amending Item 5; and
■ e. Revising Instruction 3 of Instructions to Item 8.A.2 to remove the final sentence, to read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 20–F

* * * * *

Item 5. Operating and Financial Review and Prospects

The purpose of this standard is to provide management's explanation of factors that have materially affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends which are anticipated to have a material effect on the company's financial condition and results of operations in future periods. This discussion and analysis must provide a narrative explanation of the registrant's financial statements that allows investors to view the registrant from management's perspective.

Discuss the company's financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required. The discussion must include a quantitative and qualitative description of the reasons underlying material changes, including where material changes within a line item offset one another, to the extent necessary for an understanding of the company's business as a whole. Information provided also must relate to all separate segments and/or other subdivisions (*e.g.,* geographic areas, product lines) of the company. The discussion must include other statistical data that the company believes will enhance a reader's understanding of the company's financial condition, changes in financial condition, and results of operations. The discussion and analysis must also focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. Provide the information specified below as well as such other information that is necessary for an investor's understanding of the company's financial condition, changes in financial condition and results of operations.

A. Operating results. Provide information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the company's income from operations, indicating the extent to which income was so affected. Describe any other significant component of revenue or expenses necessary to understand the company's results of operations.

1. If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of products or services being sold or to the introduction of new products or services.

2. If the currency in which financial statements are presented is of a country that has experienced hyperinflation, the existence of such inflation, a five year history of the annual rate of inflation and a discussion of the impact of hyperinflation on the company's business must be disclosed.

3. Provide information regarding the impact of foreign currency fluctuations on the company, if material, and the extent to which foreign currency net investments are hedged by currency borrowings and other hedging instruments.

4. Provide information regarding any governmental economic, fiscal, monetary or political policies or factors that have materially affected, or could materially affect, directly or indirectly, the company's operations or investments by host country shareholders.

B. Liquidity and capital resources. The following information must be provided:

1. Information regarding the company's liquidity (both short and long term), including:

(a) A description of the internal and external sources of liquidity and a brief discussion of any material unused sources of liquidity. Include a statement by the company that, in its opinion, the working capital is sufficient for the company's present requirements, or, if not, how it proposes to provide the additional working capital needed.

(b) an evaluation of the sources and amounts of the company's cash flows, including the nature and extent of any legal or economic restrictions on the ability of subsidiaries to transfer funds to the company in the form of cash dividends, loans or advances and the impact such restrictions have had or are expected to have on the ability of the company to meet its cash obligations.

2. Information regarding the type of financial instruments used, the maturity profile of debt, currency and interest rate structure. The discussion also must include funding and treasury policies and objectives in terms of the manner in which treasury activities are controlled, the currencies in which cash and cash equivalents are held, the extent to which borrowings are at fixed rates, and the use of financial instruments for hedging purposes.

3. Information regarding the company's material cash requirements, including commitments for capital expenditures, as of the end of the latest financial year and any subsequent interim period and an indication of the general purpose of such requirements and the anticipated sources of funds needed to satisfy such requirements.

C. Research and development, patents and licenses, etc. Provide a description of the company's research and development policies for the last three years.

D. Trend information. The company must identify material recent trends in production, sales and inventory, the state of the order book and costs and selling prices since the latest financial year. The company also must discuss, for at least the current financial year, any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the company's net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition.

E. Critical Accounting Estimates.

A registrant that does not apply in its primary financial statements IFRS as issued by the IASB must discuss information about its critical accounting estimates. This disclosure should supplement, not duplicate, the description of accounting policies in the notes to the financial statements.

Critical accounting estimates. Critical accounting estimates are those 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. Discuss, to the extent material, why each critical accounting estimate is subject to uncertainty, how much each estimate has changed during the reporting period, and the sensitivity of the reported amounts to the material

methods, assumptions and estimates underlying its calculation. The discussion should provide quantitative as well as qualitative information when quantitative information is reasonably available and will provide material information to investors.

Instructions to Item 5:

1. Refer to the Commission's interpretive releases (No. 33–6835) dated May 18, 1989, (No. 33–8056) dated January 22, 2002, (No. 33–8350) dated Dec. 19, 2003, (No. 33–9144) dated September 17, 2010, and (No. 33–10751) dated January 30, 2020 for guidance in preparing this discussion and analysis by management of the company's financial condition and results of operations.

2. The discussion must focus on the primary financial statements presented in the document. You should refer to the reconciliation to U.S. GAAP, if any, and discuss any aspects of the differences between foreign and U.S. GAAP, not otherwise discussed in the reconciliation, that you believe are necessary for an understanding of the financial statements as a whole.

3. We encourage you to supply forward-looking information, but that type of information is not required. Forward-looking information is covered expressly by the safe harbor provisions of Section 27A of the Securities Act and Section 21E of the Exchange Act. Forward-looking information is different than presently known data which will have an impact on future operating results, such as known future increases in costs of labor or materials. You are required to disclose this latter type of data if it is material.

4. To the extent the primary financial statements reflect the use of exceptions permitted or required by IFRS 1, the issuer must:

a. Provide detailed information as to the exceptions used, including:

i. An indication of the items or class of items to which the exception was applied; and

ii. A description of what accounting principle was used and how it was applied;

b. Include, where material, qualitative disclosure of the impact on financial condition, changes in financial condition and results of operations that the treatment specified by IFRS would have had absent the election to rely on the exception.

5. An issuer filing financial statements that comply with IFRS as issued by the IASB must, in providing information in response to paragraphs of this Item 5 that refer to pronouncements of the FASB, provide disclosure that satisfies the objective of the Item 5 disclosure requirements. In responding to this Item 5, an issuer need not repeat information contained in financial statements that comply with IFRS as issued by the IASB.

6. Generally, the discussion must cover the periods covered by the financial statements and the registrant may use any format that in the registrant's judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, a discussion of the earliest of the three years may be omitted if such discussion was already included in any other of the registrant's prior filings on EDGAR that required disclosure in compliance with Item 5 of Form 20–F, provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found.

7. Discussion of 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 a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity, or not reflected in the statement of financial position.

Instruction to Item 5.A:

1. You must provide the information required by Item 5.A.2 with respect to hyperinflation if hyperinflation has occurred in any of the periods for which you are required to provide audited financial statements or unaudited interim financial statements in the document. See Rule 3–20(c) of Regulation S–X for a discussion of cumulative inflation rates that trigger this requirement.

* * * * *

Item 8. Financial Information

* * * * *

Instructions to Item 8.A.2:

* * * * *

In initial registration statements, if the financial statements presented pursuant to Item 8.A.2 are prepared in accordance with U.S. generally accepted accounting principles, the earliest of the three years may be omitted if that information has not previously been included in a filing made under the Securities Act of 1933 or the Securities Exchange Act of 1934.

* * * * *

■ 21. Amend Form 40–F (referenced in § 249.240f) by:

■ a. Revising General Instruction B.(11) to read as follows;

■ b. Removing and reserving General Instructions B.(12) and (13); and

■ c. Removing the Instructions following General Instruction B.(13).

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 40–F

* * * * *

B. Information To Be Filed on This Form

* * * * *

(11) *Off-balance sheet arrangements.* To the extent not discussed in management's discussion and analysis that is provided pursuant to General Instruction B.(3) of this form, discuss the commitments or obligations, including continent obligations, arising from arrangements with unconsolidated entities or persons that have or are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity, or not reflected in the statement of financial position.

* * * * *

■ 22. Amend Form 8–K (referenced in § 249.308) by revising Item 2.03(c)(1)

through(3) and 2.03(d) to read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 8–K

* * * * *

INFORMATION TO BE INCLUDED IN THE REPORT

* * * * *

Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant.

* * * * *

(c) For purposes of this Item 2.03, *direct financial obligation* means any of the following:

(1) A *long-term debt obligation* means a payment obligation under long-term borrowings referenced in FASB ASC paragraph 470–10–50–1 (Debt Topic), as may be modified or supplemented);

(2) a *capital lease obligation* means a payment obligation under a lease classified as a capital lease pursuant to FASB ASC Topic 840, Leases, as may be modified or supplemented;

(3) an *operating lease obligation* means a payment obligation under a lease classified as an operating lease and disclosed pursuant to FASB ASC Topic 840, as may be modified or supplemented; or

(4) a short-term debt obligation that arises other than in the ordinary course of business.

(d) For purposes of this Item 2.03, *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant has:

(1) Any obligation under a guarantee contract that has any of the characteristics identified in FASB ASC paragraph 460–10–15–4 (Guarantees Topic), as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FASB ASC paragraphs 460–10–15–7, 460–10–25–1, and 460–10–30–1.

(2) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(3) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in stockholders' equity in the registrant's statement of financial position, and therefore excluded from the scope of FASB ASC Topic 815, *Derivatives and Hedging,* pursuant to FASB ASC subparagraph 815–10–15–74(a), as may be modified or supplemented; or

(4) Any obligation, including a contingent obligation, arising out of a variable interest (as defined in the FASB ASC Master Glossary), as may be modified or supplemented in an unconsolidated entity that is held by, and material to, the registrant, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the registrant.

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By the Commission.

Dated: January 30, 2020.

Eduardo A. Aleman,

Deputy Secretary.

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