

# Key Considerations for the 2022 Annual Reporting and Proxy Season

## Part I: Form 10-K Considerations

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This is Part I of a two-part series outlining key considerations from White & Case's Public Company Advisory Group for US public companies during the 2022 annual reporting and proxy season.

Part I of this memo describes our key considerations for Annual Reports on Form 10-K in two parts:

- (1) Five Housekeeping Considerations for Form 10-K in 2022; and
- (2) Eight Disclosure Considerations for Form 10-K in 2022.

Part II of the series will describe key considerations for annual meeting proxy statements.

## Form 10-K: Key Housekeeping and Disclosure Considerations in 2022

### I. Five Housekeeping Considerations

The following five housekeeping items are reminders for Form 10-Ks:

- (1) Confirm Your Filing Status:** First, confirm your filing status in order to appropriately complete your Form 10-K cover page. The determination of your filing status is crucial for determining the deadline for filing periodic reports for the fiscal year. For example, this year's [Form 10-K](#) is due on March 1, 2022 for large accelerated filers, March 16, 2022 for accelerated filers, and March 31, 2022 for non-accelerated filers. See the SEC's helpful [compliance guide](#) and [information on filing deadlines](#).<sup>1</sup>
- (2) Update Part II, Item 6 of Form 10-K:** The requirement under Item 301 of Regulation S-K to provide five years of selected financial data has been removed. Remember to update Item 6 in Part II to state "[Item 6. \[Reserved\]](#)" instead of "Item 6. Selected Financial Data" as was included in the prior version of the Form 10-K. For more information, see "[Considerations for the Form 10-K in 2022: Mandatory Compliance with SEC's Rule Amendments to Items 301, 302 and 303](#)" below.

<sup>1</sup> For additional information, see our prior alert "[Key Considerations for the 2021 Annual Reporting and Proxy Season Part I: Form 10-K Considerations](#)."

- (3) **Check Exhibit Index:** Carefully review your exhibit list and add any required exhibits, including exhibits that were filed since last year's Form 10-K on Forms 8-K and 10-Q, as well as the recently added registered debt exhibit, if applicable, and the description of securities for each class of securities registered under Section 12 of the Securities Exchange Act of 1934 exhibit. Additionally, remove outdated exhibits no longer required to be filed, such as material contracts that have been fully performed.

With respect to confidential treatment orders, keep in mind that the SEC updated the standard for redacting confidential information in exhibit filings under Item 601(b)(2) and 601(b)(10), removing the "competitive harm" standard. Information may now be redacted if it is not material and is the type that the company both "customarily and actually treats as private or confidential."

See our [2021 Housekeeping Items](#) for an explanation of recent rules on these items.

- (4) **Electronic Signatures.** As part of amendments adopted in 2020, individuals have the option to sign a signature page or other authentication document with an electronic signature, instead of a manual, wet-ink signature.<sup>2</sup> However, in order to use electronic signatures, companies must first take certain steps and meet the requirements explained in the "Electronic Signatures" section of our [prior memo](#), which include signatories manually signing an attestation agreeing to the use of the electronic signature and a sample attestation found [here](#).
- (5) **D&O Questionnaires.** Ahead of your Form 10-K filing, review and update your D&O questionnaires, which provide back-up and support for the disclosure to be included in your Form 10-K and proxy statement. In particular, if you are a Nasdaq-listed company subject to the board diversity requirements or otherwise plan to voluntarily disclose the diversity of your directors, be sure to add in a question to elicit information on your directors' diversity characteristics and obtain their consent to disclose this information in the company's SEC filings. See [Appendix A](#) for a sample question to add to your D&O Questionnaires, and [Appendix B](#) for a summary of the Nasdaq diversity disclosure requirement and other key investor and proxy advisory firm policies on board diversity.

## Eight Disclosure Considerations for the Form 10-K in 2022

Below are our eight disclosure considerations when preparing your upcoming Form 10-K in 2022.

- (1) **Confirm Effects of SAB No. 120 for Equity Awards:** In December 2021, the SEC announced the adoption of [Staff Accounting Bulletin \("SAB"\) No. 120](#) to provide guidance on how companies should recognize the cost of "spring-loaded" compensatory awards. "Spring-loaded" awards refer to stock options and other share based awards (including restricted stock units) granted shortly before a company announces market-moving information. As your company's accountants close the books for 2021, confirm if and how they may need to consider SAB No. 120 to appropriately account for and disclose the terms of any equity awards granted in 2021. If any "spring-loaded" compensatory awards were granted during fiscal 2021, additional disclosures may be required in the Form 10-K to comply with SAB No. 120, including in the footnotes to the financial statements and Management's Discussion and Analysis ("MD&A") discussion of critical accounting estimates.
- (2) **Carefully Consider Climate Change, Human Capital Management and Other ESG Disclosures:** With increased focus from the SEC and investors on climate-related and other environmental, social and governance ("ESG") disclosures, companies should proactively consider discussion of these topics in their Form 10-Ks. For the first time in late 2020, the SEC required public companies to provide human capital management ("HCM") disclosures in Form 10-Ks. The SEC is expected to propose mandatory climate-related disclosure requirements in 2022.

<sup>2</sup> See the SEC's final rule amendment on electronic signatures [here](#) and the press release [here](#).

## Climate Disclosures

In recent months, the SEC has significantly increased its focus on climate-related disclosures.<sup>3</sup> While proposed SEC rulemaking is still in the works, any material information related to how climate change might impact a company's business should be included in its Form 10-K. Companies should consider their existing climate-related disclosure in light of the SEC's [2010 climate change disclosure guidance](#), as well as recent Corp Fin comment letters on companies' climate disclosure. For a summary of recent SEC comments, see our prior client alert, "[SEC Issues Sample Comment Letter as it Ramps Up Scrutiny of Climate Disclosures](#)." In light of this increased focus, companies should proactively confirm whether additional information regarding climate change is material for their business and should consider their risk factors, business description, legal proceedings and MD&A when assessing their climate disclosures. See "Environmental" discussion in "[Risk Factors: What to Include](#)", below.

## Human Capital Management ("HCM") Disclosures<sup>4</sup>

The fiscal year 2021 Form 10-K is the second annual report in which US public companies must comply with amended Item 101 of Regulation S-K, including a description of human capital resources and human capital measures or objectives that the company focuses on in managing its business, to the extent material to the company as whole.<sup>5</sup> The amended rule retains the requirement to provide the total number of persons employed and provides that measures or objectives that address the attraction, development and retention of personnel are non-exclusive examples of items that may be material, depending on the nature of the company's business and workforce.<sup>6</sup>

Now that companies have had more time to assess this disclosure, they should consider what, if any information, should be added to the previous year's disclosure, taking the following steps:

- *Update HCM Disclosure to Reflect Developments Within the Company:* Companies should consider which human capital measures or objectives the board and senior management has focused on during fiscal 2021, and how these should be discussed in the company's disclosure.<sup>7</sup> Companies should also consider whether recent developments in their operations and industry, including those related to COVID-19, warrant updates to their HCM disclosures. For example, the negative impact from the COVID-19 pandemic has, in many cases, contributed to heightened levels of employee attrition and difficulties retaining employees and talent, which could have a material impact on the company's HCM strategies.
- *Keep in Mind Disclosure Trends in the Market:* Companies should consider recent market trends in HCM disclosure, which reflect investors' heightened focus on diversity disclosures. For example, a review of the 2021 Form 10-Ks of Fortune 50 companies found that over half of the Form 10-Ks included quantitative human capital metrics, such as information on (i) the percentage of employees

<sup>3</sup> SEC Chairman Gary Gensler recently asked the staff to make recommendations about how companies might disclose their Scope 1 and Scope 2 emissions, along with whether, and if so, how and under what circumstances, to disclose Scope 3 emissions. It also appears the SEC is considering requiring companies that are making net zero commitments to disclose their Scopes 1, 2, and 3 emissions to support their net-zero statements. See our prior alert, "[SEC Focuses on ESG and Climate Disclosure](#)."

<sup>4</sup> For more information, see our alert, "[SEC Adopts Amendments to Modernize Disclosures and Adds Human Capital Resources as a Disclosure Topic: Key Action Items and Considerations for US Public Companies](#)."

<sup>5</sup> Smaller reporting companies are not technically required to provide human capital management disclosures, but some may do so for investor relations purposes.

<sup>6</sup> Over the past year, the SEC issued comment letters to several companies that did not comply with the baseline requirements for human capital management disclosures and disclosed only the number and location of their employees, a brief description of their relationships with employees and/or general employee diversity data. While companies that included fulsome HCM disclosures in their Form 10-Ks do not appear to be the target of these SEC comments, the comments signal that the SEC is paying attention to this area and that companies should continue to assess their disclosures in 2022 to ensure they are rule compliant.

<sup>7</sup> For information on the human capital measures companies were disclosing in their Form 10-Ks prior to the effectiveness of the rule change, see our prior alert "[ESG Disclosure Trends in SEC Filings](#)."

who are women or people of color, (ii) corporate investments to improve gender and ethnic/racial diversity in their workforce, and (iii) employee turnover and retention rates.

Similarly, a 2021 survey of HCM disclosures made in the Form 10-Ks of S&P 500 companies found the following were common new human capital metrics disclosed: geographical distribution of employees; breakdown of types of employees (e.g., full-time, part-time, seasonal); steps taken to identify, recruit, and retain new and existing employees; diversity statistics and commitments to diversity and inclusion; employee incentives and benefits (e.g., insurance packages, stock-based compensation awards, cash-based performance bonus awards); employee learning/development/training programs; core values (e.g., learning, development, inclusion, diversity, teamwork); social impact and social justice initiatives; impact of and response to the COVID-19 pandemic; employee safety measures and employee engagement surveys.

### ESG Disclosure Considerations Generally

The following considerations apply to all ESG-related disclosures, including those on climate and HCM.

- *Assess Disclosure in Sustainability Reports, on Company Websites and in Investor Presentations:* Companies should assess the climate-related and other ESG information contained in their sustainability reports to determine whether any such information is material and therefore required to be included in their Form 10-K. In its above-noted [sample comment letter](#) on climate disclosures, the SEC included a comment warning companies that it may ask *why* disclosures that are made voluntarily in sustainability reports are not also included in the company's Form 10-K.

In addition to publishing sustainability reports, companies are also increasingly disclosing emissions performance metrics, climate commitments and other ESG information on their websites and in presentations to investors, including in roadshow presentations in connection with securities offerings. Any material ESG information a company publishes or discloses outside of its SEC filings should be considered for inclusion in the Form 10-K.<sup>8</sup> Companies should also take cautionary steps to ensure that there are no significant inconsistencies across all of their ESG disclosures.

- *Confirm Accuracy of ESG Disclosures Through Robust Disclosure Controls:* Companies should take steps to ensure that ESG disclosure is subject to the same robust, traditional disclosure controls covering other information in the Form 10-K. These controls may include designating information "owners" responsible for vetting this information, confirming its accuracy and consistency across all public disclosure and having such "owners" sign sub-certifications regarding this disclosure. To the extent the company has a disclosure committee, it should consider presenting compiled ESG information to such committee and ensuring that senior management in charge of ESG matters participate in committee meetings. Informative climate and other ESG reporting can require a complex interaction of many different functions in a company, such as supply chain, production and other operations, investor relations, human resources, finance/accounting, and legal, as well as the incorporation of complex assumptions about the effect of changing climate on the business. As always, legal departments should also review drafts of ESG disclosures in the Form 10-K for litigation risks and other issues, such as potentially inaccurate and inconsistent statements or overly broad and optimistic statements that could raise liability concerns.
- *Board Oversight: Update Your Audit Committee and/or Other Board Committees:* In light of heightened SEC and investor scrutiny of climate and other ESG disclosures, companies should consider providing updates to their audit committees and other board committees responsible for ESG oversight, such as a public policy or sustainability committee, on recent developments related to climate and their company's current and planned climate disclosures, as well as how assumptions about future climate change should be reflected in their financial statements and risk assessments. In

<sup>8</sup> Companies may also find that certain material social and/or governance information from their sustainability reports, company websites and/or investor presentations, such as on board diversity, is better suited for their proxy statement (which incorporates by reference Part III information in the Form 10-K).

addition, companies should consider presenting HCM information and disclosures to their compensation committees prior to publication of their Form 10-K.

- *Consider Institutional Investor Positions Relevant to Your Shareholder Base:* Companies should carefully consider their institutional investors' positions on climate disclosure, including their preferred disclosure frameworks, and how best to meet such demands for information. While not dispositive on the materiality of such information for a particular company, investor mandates and expectations related to climate-related and other ESG disclosures are expected to increase. For example, in his [2021 letter to CEOs](#), BlackRock CEO Larry Fink asked companies to disclose a “plan for how their business model will be compatible with a net zero economy” and how transition and physical climate risks, as well as risk mitigation, affect a company's business.<sup>9</sup> Items to consider for disclosure include risks related to sea level rise and extreme weather events, national emissions goals, carbon taxes, regulations and investment in alternative energy.<sup>10</sup>

**(3) Mandatory Compliance with SEC's Amendments to Items 301, 302 and 303:** The SEC's comprehensive changes to Items 301, 302 and 303 of Regulation S-K became mandatory for Form 10-Ks filed for fiscal years ending on or after August 9, 2021. Therefore, this will be the first Form 10-K in which calendar-year companies are required to comply with these rule changes, which are shown in [Appendix C](#).<sup>11</sup>

- *Selected Financial Data Disclosure (Item 301).* Item 301 of Regulation S-K previously required companies to furnish selected financial data in comparative tabular form for each of the last five fiscal years.<sup>12</sup> The SEC's rule amendments eliminated this disclosure requirement (for more information, see [“Housekeeping Items for Form 10-K in 2022: Update Part II, Item 6 of Form 10-K”](#)). However, in making this rule change, the SEC still encouraged companies to consider whether trend information for periods earlier than those in the financial statements may be necessary as part of MD&A's objective to “provide material information [regarding] the financial condition and results of operations.” In addition, the SEC encouraged companies to consider whether a “tabular presentation of relevant financial or other information, as part of an introductory section or overview” may help a reader's understanding of trends in MD&A.<sup>13</sup> Therefore, companies should consider whether any of this additional trend information previously disclosed under Item 301 is material and should be added to their MD&As this year.
- *Selected Quarterly Financial Data (Item 302).* Item 302(a) of Regulation S-K previously required disclosure of selected quarterly financial data of specified operational results and changes in these results from amounts previously reported on the company's Form 10-Q. The rule amendments significantly reduced the scope of Item 302 such that the disclosure will not be required for most companies. Item 302 disclosure is now mandated “**only when** there are one or more retrospective changes that pertain to the statements of comprehensive income for any of the quarters within the two most recent fiscal years and any subsequent interim period for which financial statements are included or required to be included...and that, individually or in the aggregate, are material.”<sup>14</sup> As

<sup>9</sup> Larry Fink's letter is further discussed in our alerts, [“SEC Focuses on ESG and Climate Disclosure”](#) and [“A Survey and In-Depth Review of Sustainability Disclosures by Small- and Mid-Cap Companies.”](#)

<sup>10</sup> See our alert, [“A Survey and In-Depth Review of Sustainability Disclosures by Small- and Mid-Cap Companies.”](#)

<sup>11</sup> For a table summarizing the amendments, please see page 8 of the adopting release, available [here](#).

<sup>12</sup> Smaller reporting companies (“SRCs”) are not required to provide Item 301 information and emerging growth companies need not present selected financial data for any period prior to the earliest audited financial statements presented.

<sup>13</sup> See adopting release [here](#).

<sup>14</sup> The SEC provided the following non-exhaustive list of examples of the type of “retrospective change” that may trigger Item 302(a) disclosure, if material: a correction of an error, the disposition of a business that is accounted for as discontinued operations, a reorganization of entities under common control, or a change in an accounting principle. Companies should therefore consider ahead of this Form 10-K filing whether a “retrospective change” has occurred that triggers the Item 302 requirements. If triggered, the amendments require registrants to: (i) provide an explanation of the reasons for any such material retrospective changes and (ii) disclose, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the statements of comprehensive income and earnings per share reflecting such changes.

examples of the type of “retrospective change” that may trigger Item 302(a) disclosure, the SEC noted the following: a correction of an error, the disposition of a business that is accounted for as discontinued operations, a reorganization of entities under common control, or a change in an accounting principle. The SEC cautioned, however, that these examples are not intended to be an exhaustive list and noted that such changes may not always be material such that disclosure would be required under amended Item 302(a). Therefore, companies should confirm whether any such retrospective changes exist and require disclosure under Item 302(a) in their upcoming Form 10-Ks.

- *Streamlined MD&A (Item 303)*: The SEC made substantial changes to the MD&A requirements under Item 303 of Regulation S-K. While some companies complied early, this will be the first year for many companies to comply with the amended requirements, which include both active changes and more general implications, including reinforcements of traditional MD&A best practices:
  - *Contractual Obligations Table No Longer Technically Required*: The amended rules eliminate the requirement for the formulaic contractual obligations table in Item 303(a)(5), and replace it with a more general requirement in [Item 303\(b\)\(1\)](#) to provide, in the discussion of liquidity and capital resources, an analysis of “*material cash requirements from known contractual and other obligations.*” This analysis should specify the type of obligation and the relevant time period for the related cash requirements, to the extent material to liquidity and capital resources.
    - As a result, companies can remove the contractual obligations table in MD&A. However, companies must confirm that their MD&A otherwise adequately addresses all known material cash requirements (i.e., capital investments, human capital, contractual obligations, and any off-balance sheet arrangements) and material trends, commitments or uncertainties reasonably likely to affect liquidity and capital resources.
  - *Critical Accounting Policies Expressly Required*: The SEC has clarified the requirements in [Item 303\(b\)\(3\)](#) to disclose critical accounting estimates, codifying a long-standing practice of many companies in their MD&As. The disclosure should contain “qualitative and quantitative information necessary to understand” estimation uncertainty, and explain “the impact the critical accounting estimate has had or is reasonably likely to have on financial condition,” “why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period.”
    - Thus, companies should ensure they address critical accounting estimates in MD&A, why such estimates are subject to uncertainty, and the assumptions and estimates underlying the critical accounting estimate’s calculation. Moreover, as noted in the adopting release, this disclosure “must supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.”
  - *Off-Balance Sheet Caption No Longer Required*: The SEC eliminated the requirement to present a separately captioned section discussing off-balance sheet arrangements and instead added a principles-based [Instruction 8](#) regarding commitments and obligations that constitute off-balance sheet arrangements. As a result, companies should remove the separately captioned off-balance sheet arrangements section, but consider whether additional disclosure is required in liquidity and capital resources.
  - *Known Events, Uncertainties and Trends Disclosure*: The SEC added new paragraph (a) to Item 303 to clarify the objective of MD&A disclosure, including to “focus specifically on material events and uncertainties *known to management* that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition.” This includes both “descriptions and amounts of matters that *have had a material impact* on reported operations,” and “matters that are *reasonably likely* based on management’s assessment *to have a material impact on future operations.*”

The SEC also revised the results of operations section to require disclosure under [Item 303\(b\)\(2\)\(ii\)](#) of known events that are “reasonably likely” to (as opposed to the prior standard that a company “reasonably expects 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.”

- Companies should confirm that they assess past and ongoing known trends, events and uncertainties and disclose those which are “*reasonably likely*” to impact financial results, including results of operations and liquidity and capital resources. Moreover, companies should carefully consider whether any significant trend or uncertainty that management is closely monitoring and/or has discussed with the board is appropriate for MD&A disclosure.
- *Discussion of Drivers in Period-to-Period Changes:* The SEC clarified in amended Item 303(b) that where there are period-to-period material changes in a line item of a company’s financial statements (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. Additionally, Item 303(b)(2)(iii) now requires disclosure of the extent to which any period-to-period “material *changes*” (as opposed to the prior reference to “material *increases*”) in net sales or revenues stemmed from “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.” As a result, companies should confirm that they have provided disclosure of the underlying reasons of material changes *both in quantitative and qualitative terms*, including material changes in net sales or revenues.

**(4) Confirm Compliance with Previously Amended Requirements:**<sup>15</sup> In addition to the rule changes impacting MD&A described above, companies are reminded of the 2020 rule changes to the business and legal proceedings sections, which took effect in November 2020, and thus were already required in companies’ most recent Form 10-Ks.

- *Include Required Discussion of Material Changes to a Previously Disclosed Business Strategy:* Companies are now specifically required under Item 101(a) of Regulation S-K to disclose “material changes to a registrant’s *previously disclosed* business strategy.” This is particularly relevant for a company that recently went public and provided a lengthy discussion of its business strategy in the business section of its IPO registration statement. The SEC’s adopting release emphasized the principles-based approach of the amendments and the ability of companies to determine the appropriate level of detail for these disclosures.
- *Consider Streamlining Business Disclosure No Longer Required:* Under the SEC’s principles based approach, certain information that was previously required under Item 101 of Regulation S-K in the Business section may now be removed if not material for a company.<sup>16</sup> However, companies must still provide disclosure on Business section topics (even those eliminated from Item 101(c)’s previous prescriptive disclosure list, as detailed in the chart in Part II of [our prior memo](#)) if material to an understanding of the business.
- *Confirm Your Business Section Includes a Discussion of Compliance with Material Government (Not Just Environmental) Regulations:* Codifying common practice among reporting companies, amended Item 101(c) of Regulation S-K specifically requires, to the extent material to an understanding of the business taken as a whole, disclosure of the material effects on capital expenditures, earnings and competitive position of compliance with *government regulations generally*, not just environmental

<sup>15</sup> The adopting release related to these amended requirements is available [here](#).

<sup>16</sup> For example, to the extent not material for a company, it may remove from its Form 10-K Business section: “the year in which the registrant was organized and its form of organization” and “the dollar amount of backlog orders”. For more information, see our prior alert “[SEC Adopts Amendments to Modernize Disclosures and Adds Human Capital Resources as a Disclosure Topic: Key Action Items and Considerations for US Public Companies.](#)”

regulations. Companies should ensure that regulatory disclosure in their Form 10-Ks adequately addresses all areas of government regulations generally that are responsive to this principles-based materiality standard, which may be accomplished through cross-references to other sections of the Form 10-K, such as risk factors.

- *Assess Your Environmental Legal Proceedings Disclosure.* The amended requirements for environmental legal proceedings under Item 103 of Regulation S-K added two points of flexibility to existing disclosure requirements. Specifically, the amendments: (i) *increased* the existing quantitative threshold for such environmental proceedings disclosure from \$100,000 to \$300,000; and (ii) allow a company to opt for a different threshold of the lesser of \$1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis. A company may only opt for a different threshold if it determines such alternative threshold is “reasonably designed to result in disclosure of any such proceeding that is material to the business or financial condition” and discloses the threshold in each annual and quarterly report (including any change thereto). Companies facing environmental proceedings in fiscal 2021 should therefore consider the nature and anticipated short- and long-term impacts of past and current environmental proceedings and determine the appropriate monetary threshold for their company under the amended rule. In the end, companies will need to weigh the appropriateness and desire for a higher threshold against the requirement to publicly disclose, in each annual and quarterly report, their materiality threshold for disclosing such proceedings.

**(5) Pay Attention to Non-GAAP Compliance:** Non-GAAP financial measures remained the most frequent topic in SEC staff comment letters in 2021, so it is important to pay careful attention to the use and disclosure of such measures each fiscal quarter. In addition, companies should carefully review non-GAAP adjustments relating to the COVID-19 pandemic to ensure compliance with applicable SEC rules. SEC guidance has emphasized the following:

- Ensure that when a non-GAAP measure is used, the comparable GAAP measure is disclosed with equal or greater prominence, and a reconciliation of the two measures is provided. The staff’s 2021 comments on non-GAAP disclosures in several instances focused on “equal or greater prominence” issues, including where the staff asked companies to re-order the presentation of sections of their periodic reports in order to give greater prominence to GAAP information<sup>17</sup>;
- Maintain consistent treatment of items between periods, or otherwise provide adequate disclosure about the reason for any change in treatment. For example, if there is a COVID-19-related adjustment for an item during the current reporting period, and that adjustment was **not** made during the prior period, the company should provide sufficient disclosure regarding the change, including (i) the differences in the way the metric is calculated, (ii) the reasons for such changes, and (iii) the effects of any such change on the amounts or other information being disclosed<sup>18</sup>; and
- To the extent a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, it should highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company’s financial position and results of operations.

Moreover, the Staff has reminded companies that it is **not** appropriate for a company to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company. Rather, the acceptable purpose of non-GAAP measures is to share with

<sup>17</sup> For example, Bill.com Holdings included a subsection in the forepart of the MD&A section of its 2020 10-K captioned “Non-GAAP Financial Measures.” The Staff’s [comment letter](#) asked the company to revise the table to disclose the comparable GAAP measures with greater prominence and, to avoid giving undue prominence to its non-GAAP financial measures, to move this section so that it followed the results of operations section.

<sup>18</sup> For more information, see our prior alert, “[SEC Releases New Guidance on KPIs.](#)”

investors "how management and the Board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results."

**(6) Confirm Risk Factor Format Continues to Meet the SEC's Previously Amended Requirements:**<sup>19</sup>

Companies should ensure that their risk factor section continues to comply with the SEC's amended rules, which took effect in November 2020 and thus were already required in companies' most recent Form 10-Ks:

- If Risk Factor Section is More Than 15 Pages, Add Summary Risk Factor Disclosure:* If a company's risk factor section exceeds 15 pages, it must *add* a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal risk factors and place this summary at the beginning of the Form 10-K. Many companies have chosen to combine this disclosure with their forward-looking statement legends in order to avoid repetition, and companies may consider this approach so long as the legend is titled to reflect its dual purposes (i.e., "Cautionary Note Regarding Forward-Looking Statements and Risk Factor Summary").
- Tailor Generic Risks or Add a General Risk Factor Section:* For any risk factors that apply generically to any registrant or offering, the company must either (i) tailor these risk factors to emphasize the specific relationship of the risk to the company, or (ii) disclose the generic risk factors at the end of the risk factor section under the caption "General Risk Factors".
- Organize Risk Factors Under Relevant Headings:* Companies must now organize risk factors into groups of related risk factors under "relevant headings", in addition to the sub-caption previously required for each risk factor.

**(7) Risk Factors: What to Include:** For upcoming Form 10-Ks, a number of recent trends and events may impact risk factor disclosures, as well as disclosures in other sections of the report. Although each company will need to assess its own material risks and tailor its risk factors to its unique circumstances, below is a list highlighting certain areas of SEC focus and key trends that a company should consider when assessing its risk factors.

*Beware of Hypothetical Language:* Companies should be mindful of providing thoughtful, accurate and thorough risk factor disclosure, as recent SEC enforcement actions indicate the SEC is focused on misrepresentations or omissions in connection with risk factors. In particular, the SEC has alleged that statements in a company's risk factors were materially misleading because a company stated that an event only "may" or "could" occur, when the event was no longer hypothetical at the time of the disclosure. Accordingly, a company should ensure that its risk factors accurately and fully describe the risks it faces, including risks that have already had an impact on the company, rather than describing these risks as merely hypothetical.<sup>20</sup> Moreover, risk factor disclosure should clarify whether a potential material risk has in fact occurred to some degree (whether or not the degree of occurrence is material on its own).<sup>21</sup>

- Human Capital Resources:* In light of the rule changes requiring HCM disclosure (discussed above), companies should assess what, if any, material issues their company faces with respect to human capital resources. This could include risks related to the ability to attract and retain skilled employees, employee health and safety issues, increases in labor costs and increased employee turnover, particularly in light of the COVID-19 pandemic.

<sup>19</sup> The adopting release related to these amended requirements is available [here](#).

<sup>20</sup> For example, in September 2019, a major pharmaceutical company agreed to pay a \$30 million penalty to the SEC for using hypothetical language. After a government agency informed the company that it had misclassified its most profitable product as a generic drug, the company's risk factor disclosures in its annual reports continued to state that a government entity "may" take a position that is contrary to that classification. The SEC concluded that using the term "may" was materially misleading because the company knew at the time that a government agency had in fact taken a contrary position. For more information, see "Press Release 2019-194, Mylan to Pay \$30 Million for Disclosure and Accounting Failure Relating to EpiPen" (Sept. 27, 2019), [available here](#).

<sup>21</sup> For more information, see our prior alert, "[Time to Revisit Risk Factors in Periodic Reports.](#)"

- *Environmental:* Environmental issues such as climate change have been receiving increased attention, and many companies are including new risk factors on environmental topics or expanding upon existing risk factors that discuss the potential impact of climate change on their businesses. Risk factor disclosure related to environmental issues should be tailored to the company's specific circumstances and can address a number of topics, including applicable environmental regulations and the impact of climate change on a company's business, such as risks of increased costs or reduced demand for products, carbon asset risk, risks due to severe weather events and management of greenhouse gas emissions. Environmental risk factors should also address risks to companies from anticipated changes to regulations affecting their businesses. Companies should consider whether these factors present material risks for their businesses. See also "[Carefully Consider and Review Climate Change, Human Capital Management and Other ESG Disclosures: Climate Disclosures](#)" above.
- *Cybersecurity:* As cybersecurity incidents and data misuse continue to proliferate, the SEC staff has been focusing on, and providing comments regarding, cybersecurity and privacy disclosures. The SEC is expected to be more aggressive in reviewing public company disclosure of cybersecurity incidents, and recently the [Ninth Circuit found](#) that plaintiffs adequately alleged that a company intentionally made statements in its Forms 10-Q that omitted material facts regarding cybersecurity risks. In addition, the SEC has recently filed enforcement actions against public companies related to the timing and content of cybersecurity incident disclosures.<sup>22</sup> These follow other high-profile enforcement actions for alleged inadequate or misleading disclosures,<sup>23</sup> all of which signal the SEC's continued focus on how public companies respond to and disclose material cybersecurity incidents and risks.
- *IP and Technology Risks:* In December 2019, the SEC staff released [guidance](#) specifically calling on companies to assess risks related to the potential theft or compromise of their technology, data or intellectual property ("IP") in connection with their international operations and disclose them where material. The guidance encourages companies to consider a range of questions when assessing these risks, including whether they are operating in foreign jurisdictions where the ability to enforce rights over IP is limited as a statutory or practical matter, and whether they have controls and procedures in place to adequately protect technology and IP. The Staff also emphasized that disclosure of material risks should be specifically tailored, and that where a company's technology, data or IP is being (or previously was) materially compromised, hypothetical disclosure of potential

<sup>22</sup> In August 2021, the SEC settled with an educational publishing and services company over its failure to adequately disclose a material cybersecurity breach and for making misleading statements in its SEC filings. Specifically the SEC found that: (i) several months after the breach, the company issued a Form 6-K that referenced a general risk of data breach/cybersecurity incident, but did not specifically reference the breach that had occurred; and (ii) the company's press statement referred only to "unauthorized access" and "expos[ure of] data" which "may [have] include[d]" birthdates and emails, even though the company knew that significant personal data had been downloaded, and made no mention of the volume of breached data nor of the other critical vulnerabilities in the system.

In June 2021, the SEC settled with a real estate settlement services company for its alleged failure to adequately disclose a security *vulnerability* that *could be* used to compromise the company's computer systems. In May 2019, the company was notified of a software vulnerability that exposed personal and financial data, after which it issued a statement and furnished a Form 8-K, stating it had taken "immediate action" to terminate external access to the data. However, the executives responsible for the statement and Form 8-K were not informed that the company's information security personnel had been aware of the vulnerability since January 2019 or that the company had failed to timely remediate that vulnerability in accordance with its policies. According to the SEC, the January 2019 findings "would have been relevant to management's assessment of the company's disclosure response...and the magnitude of the resulting risk" and the company failed to maintain disclosure controls and procedures to ensure that management had all available relevant information prior to making its disclosures.

<sup>23</sup> With respect to cybersecurity, the SEC found that Yahoo's risk factor disclosures in its annual and quarterly reports were materially misleading in that they claimed the company only faced the "risk of potential future data breaches" that might expose the company to loss and liability "without disclosing that a massive data breach had in fact already occurred." The SEC's action is available [here](#). For more information, see our prior alert, "[SEC Fines Yahoo \\$35 Million for Failure to Timely Disclose a Cyber Breach.](#)"

risks is not sufficient to satisfy a company's reporting obligations. Accordingly, companies should continue to consider this evolving area of risk and evaluate its materiality on an ongoing basis.

- *Labor Shortages/Supply Chain Disruptions*: Shortages of supplies or labor or shipping delays may need to be disclosed as a risk, particularly as these have become more common due to COVID-19-related impacts. Companies should assess whether they have, or may experience in the future, issues related to labor shortages or supply chain disruptions that should be disclosed as a risk factor. In addition, depending on the severity of the impact of these factors on the company's business, companies may need to consider whether such issues should also be included in their MD&A disclosures.
  - *LIBOR*: In light of the discontinuation of LIBOR after 2021,<sup>24</sup> the SEC staff issued [guidance](#) in December 2021 urging companies to provide *detailed* and *specific* disclosure about their progress toward LIBOR risk identification and mitigation and the anticipated impact on the company, if material, such as: (i) *quantitative* disclosures to provide context for the status of the company's transition efforts and the related risks<sup>25</sup>; (ii) for companies with material risk related to outstanding debt with inadequate fallback provisions (*i.e.* those that do not provide a process for replacing LIBOR with an alternative reference rate, or do not otherwise address a permanent cessation of LIBOR), how much debt will be outstanding after the relevant cessation date and the steps the company is taking to address this, such as renegotiating contracts or refinancing the obligations; and (iii) to the extent that a company has or is taking steps to identify and assess LIBOR exposure and mitigate material risks or potential impacts of the transition, insight into what the company has done, what steps remain, and the timeline for further efforts. Companies typically include disclosures about the LIBOR transition as part of risk factors, MD&A and/or quantitative and qualitative disclosures about market risk. To the extent a company provides LIBOR transition disclosure in response to more than one disclosure requirement within a filing, it should consider providing a cross-reference or otherwise tying the information together to provide investors with a complete picture. For further guidance on disclosure considerations, companies should continue to refer to the SEC's 2019 [guidance](#).
  - *Regulatory*: Changes and potential changes in law, regulation, policy and/or political leadership, including the regulatory agenda of the Biden administration, may necessitate modifications to risk factor disclosure for certain companies. Some examples include: current and potential changes to immigration policies, minimum wage, tariffs, taxes, environmental policies, health care and other political developments in the US.
- (8) COVID-19 Disclosure in Form 10-K**: Now that we are nearly two years into the COVID-19 pandemic, disclosure regarding the impact of the pandemic on your company should be concrete and provide investors with clear information on such impact to date.<sup>26</sup> For many companies, this may be reflected in the various waves of the pandemic, including effects from the most recent Omicron variant. Key impacts should be identified, assessed and described, including, but not limited to: information on liquidity, operational adjustments, health and safety of employees, any material changes in the company's debt, loans and credit, any material changes to equity investments, impairment of assets, rent concessions and government assistance related to COVID-19. Companies should also carefully consider whether any significant trend or uncertainty that management is closely monitoring and/or has discussed with the board is appropriate for MD&A disclosure.

<sup>24</sup> LIBOR is an indicative measure of the average interest rate at which major global banks could borrow from one another and is quoted for multiple currencies and time frames. It is used extensively in the US and globally as a "benchmark" or "reference rate" for various commercial and financial contracts. See SEC guidance available [here](#).

<sup>25</sup> Such as the notional value of contracts referencing LIBOR and extending past December 31, 2021 or June 30, 2023, as applicable.

<sup>26</sup> For more information, see our prior alerts, "[COVID-19 Legal Issues and Considerations](#)", "[SEC Takes Additional Actions Helping Public Companies Address Impact of COVID-19](#)", "[Practical Tips for Preparing Upcoming Quarterly Disclosures](#)" and "[SEC Emphasizes Importance of Robust Forward-Looking Disclosure for Q1 to Address COVID-19](#)."

Companies should also ensure their risk factor disclosure related to COVID-19 is appropriately robust and specific. COVID-19 is no longer a novel consideration from a disclosure perspective and it is therefore important for companies to discuss company-specific risks rather than general economic or societal impacts.

In addition, companies should consider the potential impacts of vaccine-mandates, and what material impacts might need to be disclosed. In September 2021, President Biden signed an executive order to require all federal contractors to ensure their US-based employees and contractors are fully vaccinated and in November 2021, the Department of Labor's Occupational Safety and Health Administration ("OSHA") implemented a rule requiring all employers with at least 100 employees to confirm that their employees are fully vaccinated or require that all unvaccinated workers to produce a negative COVID-19 test on a weekly basis.<sup>27</sup> The rule has been challenged but remains in effect while it is being considered by the US Supreme Court. This mandate could have material impacts on a company that are appropriate to disclose in its MD&A, forward-looking statements, risk factors or other sections of the Form 10-K.<sup>28</sup>

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<sup>27</sup> See [COVID-19 Vaccination and Testing ETS | Occupational Safety and Health Administration](#).

<sup>28</sup> COVID-19 disclosures have also led to several shareholder derivative suits. According to the Stanford Law School Securities Class Action Clearinghouse, available [here](#), as of January 20, 2021, 21 securities class action lawsuits had been filed by shareholders accusing companies of failing to disclose or downplaying the risks related to the COVID-19 pandemic, failing to disclose or misrepresenting the extent to which it has affected the company's operations or financial results, or making false statements about or products related to COVID-19. In addition, there has been at least one high-profile SEC administrative action against a company under Section 13(a) of the Exchange Act in which the SEC found that the company's filings were misleading when the company disclosed that it was "operating sustainably", while the company's own internal documents at the time showed that the company was losing significant cash each week and that the company only had four months of cash remaining. See the SEC's order against The Cheesecake Factory, available [here](#). See the SEC's press release, available [here](#). Former SEC Chairman Jay Clayton noted that "it is important that issuers continue their proactive, principles-based approach to disclosure, tailoring these disclosures to the company and industry-specific effects of the pandemic on their business and operations."

## Appendix A

## Sample Question: Director Self-Identified Diversity Characteristics

Institutional investors and proxy advisers are increasingly expecting that director diversity characteristics be disclosed, and The Nasdaq Stock Market LLC recently adopted rules requiring the disclosure of director diversity characteristics (subject to certain phase-in periods). At the Company, diversity and inclusion are also part of our values. To that end, the Company may determine that it needs to disclose director diversity information for various purposes, including for stock exchange rules or investor expectations. Answering this question is optional, but participation helps us to understand the breadth of diverse backgrounds that our directors bring to the Company. **If you agree to inclusion of the information, please answer the following questions.** Please note that if you choose to provide this information, you consent to our possible public disclosure of the information in other public media, including on our website and our corporate responsibility report and in response to inquiries from surveys, analysts, shareholders or journalists.

- i. Please specify your gender:
  - (A) Male
  - (B) Female
  - (C) Non-Binary
  - (D) Prefer Not to Answer
  
- ii. Please specify your ethnicity or race (you may check one or more):
  - (A) African American or Black
  - (B) Alaskan Native or Native American
  - (C) Asian
  - (D) Hispanic or Latinx
  - (E) Native Hawaiian or Pacific Islander
  - (F) White
  - (G) Indian or Other South Asian
  - (H) Middle Eastern or North African
  - (I) Two or More Races or Ethnicities
  - (J) Prefer Not to Answer
  
- iii. Are there other diversity characteristics that you wish to identify not covered by questions (i) to (iii) above (e.g., religion, nationality, disability, sexual orientation, gender expression, military service or socio-economic or demographic characteristics)? If so, please specify:  

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## Appendix B

### Board Diversity Policies

#### Gender Diversity Policies of Proxy Advisory Firms:

- **ISS:** Currently (through meetings held up to January 31, 2023), for companies in the Russell 3000 or S&P 1500 indices, ISS will generally recommend voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the company's board. An exception will be made if there was a woman on the board at the preceding annual meeting and the board makes a firm commitment to return to a gender-diverse status within a year. Effective for meetings on or after February 1, 2023, the current U.S. board gender diversity policy will be extended to all companies covered under U.S. policy with effect from 2023.
- **Glass Lewis:** Beginning January 1, 2022, Glass Lewis will generally recommend against the nominating chair if the board has fewer than two gender diverse directors, or the entire nominating committee of a board with no gender diverse directors. For companies outside of the Russell 3000 index, and all boards with six or fewer total directors, one gender diverse director will be required. Starting January 1, 2023, for companies in the Russell 3000 index, will generally recommend against the nominating chair if a board is less than 30% gender diverse.

#### Racial/Ethnic Diversity Policies:

- **ISS:** Effective for meetings on or after February 1, 2022, for companies in the Russell 3000 or S&P 1500 indices, will generally recommend voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members. An exception will be made if there was racial and/or ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to appoint at least one racially and/or ethnically diverse member within a year.
- **Glass Lewis:** Beginning in 2022, for companies in the S&P 500 index with "particularly poor disclosure" on racial/ethnic diversity, Glass Lewis may recommend voting against the chair of the nominating and/or governance committee. "Particularly poor disclosure" means a failure to provide any disclosure on each of the following:
  - the board's current percentage of racial/ethnic diversity;
  - whether the board defines diversity explicitly to include gender and/or race/ethnicity;
  - whether the board has adopted a "Rooney Rule" policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees; and
  - board skills disclosure.
- **BlackRock:** Boards should aspire to 30% diversity of membership; companies are encouraged to have at least two directors on their board who identify as female and at least one who identifies as a member of an underrepresented group.
- **State Street:** Expects boards of Russell 3000 and TSX listed companies to have at least one female director, or may vote against the chair of the nominating committee or board leader in the absence of a nominating committee. For S&P 500 companies, will vote against the chair of the nominating/governance committee if the company does not disclose the board's gender, racial and ethnic composition. Starting in 2022, for S&P 500 companies, will vote against the compensation committee chair if the company does not disclose its EEO-1 survey responses and against the nominating/governance committee chair if there are no directors from an underrepresented community.

- **Nasdaq's Diversity Disclosure Rule:** Nasdaq's new listing rule requires most Nasdaq-listed companies starting in 2023 to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority or LGBTQ+. In addition, the new listing rules require all Nasdaq-listed companies to publicly disclose, starting in 2022, "consistent, transparent diversity statistics regarding their board of directors" using a standardized disclosure matrix template either in their annual meeting proxy statements or on their websites.<sup>29</sup>

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<sup>29</sup> See Nasdaq listing rules 5605(f) and 5606, available [here](#).

## Appendix C

## Regulation S-K Items 301-303

as amended by

*Management's Discussion and Analysts, Selected Financial Data, and Supplementary Financial Information (Release No. 33-10890, November 19, 2020)*

~~§229.301 (Item 301) Selected financial data. [Removed and reserved].~~

~~Furnish in comparative columnar form the selected financial data for the registrant referred to below, for~~

~~(a) Each of the last five fiscal years of the registrant (or for the life of the registrant and its predecessors, if less); and~~

~~(b) Any additional fiscal years necessary to keep the information from being misleading.~~

~~(c) *Smaller reporting companies.* A registrant that qualifies as a smaller reporting company, as defined by §229.10(f)(1), is not required to provide the information required by this Item.~~

~~(d) *Emerging growth company.* An emerging growth company, as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter), that is providing the information called for by this Item in:~~

~~(1) 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 registrant's initial public offering of its common equity securities; or~~

~~(2) A registration periodic report, or other report filed under to Exchange Act need not present selected financial data for any period prior to earliest audited financial statements presented in connection with the first registration statement that became effect under to Exchange Act or the Securities Act.~~

~~*Instructions to Item 301:* 1. The purpose of the selected financial data shall be to supply in a convenient and readable format selected financial data which highlight certain significant trends in the registrant's financial condition and results of operations.~~

~~2. Subject to appropriate variation to conform to the nature of the registrant's business, to following items shall be included in to table of financial data: net sales or operating revenues; income (loss) from continuing operate<sup>TM</sup>; income (loss) from confinnng opemtens per common share; total assets; long-term obi gabons and redeanab e preferred stock (including ong term debt, capital leases, and redeemable preferred stock us defined n §210.5 02.27(a) of Regulabon SX[17 CFR 210]; and each dividends declared per common share. Regiabitmo may include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations.~~

~~Briefly describe, or cross-reference to a discussion thereof, factors such as accounting changes, business combinations or dispositions of business operations, that materially affect the comparability of the information reflected in selected financial data. Discussion of, or reference to, any material uncertainty should also be included where such matter, might ouage the data reflected herein not to be mdreatve of the regrstrant's future finance! condition or results of operations.~~

~~3. All references to the registrant in the table of selected financial data and in this Item shall mean the registrant and its subsidiaries consolidated.~~

~~4. If interim period financial statements are included, or are required to be included, by Article 3 of Regulation S-X, registrants should consider whether any or all of the selected financial data need to be updated for such interim periods to reflect a material change in the trends indicated; where such updating information is necessary, registrants shall provide the information on a comparative basis unless not necessary to an understanding of such updating information.~~

~~5. A foreign private issuer shall disclose also the following information in all filing. Containing financial statements:~~

~~A. In the forepart of the document and as of the latest practicable date, the exchange rate into U S currency of the foreign currency in which the financial statements are denominated;~~

~~B. A history of exchange rates for the five most recent years and any subsequent interim period for which financial statements are presented setting forth the rates for period end, the average rates, and the range of high and low rates for each year; and~~

~~C. If equity securities are being registered, a five year summary of dividends per share stated in both the currency in which the financial statements are denominated and United States currency based on the exchange rates at each respective payment date.~~

~~6. A foreign private issuer shall present the selected financial data in the same currency as its financial statements. The issuer may present the selected financial data on the basis of the accounting principles used in its primary financial statements but in such case shall present this data also on the basis of any reconciliations of such data to United States generally accepted accounting principles and Regulation S-X made pursuant to Rule 4-01 of Regulation S-X (§210.4-01 of this chapter).~~

~~7. For purposes of this rule, the rate of exchange means the noon buying rate in New York City for enable transfers in foreign currencies as certified for customs purposes by the Federal Reserve Bank of New York. The average rate means the average of the exchange rates on the last day of each month during a year.~~

§229.302 (Item 302) Supplementary financial information.

~~(a) Selected quarterly financial data. Registrants specified in paragraph (a)(5) of this Item shall provide the information specified below.~~

(a) Disclosure ~~shall be made 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), per share data based upon net income (loss) and net income (loss) attributable to the registrant, for each full quarter~~ of material quarterly changes. When there are one or more retrospective changes to the statements of comprehensive income for any of the quarters within the two most recent fiscal years and/or any subsequent interim period for which financial statements are included or are required to be included by 47 CFR § 210.3-01 through 210.3-20 (Article 3 of Regulation S-X) that individually or in the aggregate are material, provide an explanation of the reasons for such material changes and disclose, for each affected quarterly period and the fourth quarter in the affected year, summarized financial information related to the statements of comprehensive income as specified in Rule 1-02(bb)(ii) of Regulation S-X and earnings per share reflecting such changes.

~~(2) When the data supplied pursuant to paragraph (a) of this section vary from the amounts previously reported on the Form 10-Q (§249.308a of this chapter) filed for any quarter, such as would be the case when a combination between entities under common control occurs or where an error is corrected, reconcile the amounts given with those previously reported and describe the reason for the difference.~~

~~(3) Describe the effect of any discontinued operations and unusual or infrequently occurring items recognized in each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements are included or are required to be included by 17 CFR 210.3-01 through 210.3-20 (Article 3 of Regulation S-X), as well as the aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter.~~

(1) If the financial statements to which this information relates have been reported on by an accountant, appropriate professional standards and procedures as enumerated in the Auditing Standards issued by the ~~Auditing Standards Board of the American Institute of Certified Public Accountants~~ Public Company Accounting Oversight Board ("PCAOB"), shall be followed by the reporting accountant with regard to the disclosure required by this paragraph (a).

(2) This paragraph (a) applies to any registrant, except a foreign private issuer, that has securities registered pursuant to sections 2(b) (15 U.S.C. §781(b)) other than mutual life insurance companies) or 12(g) of the Exchange Act (15 U.S.C. §781(g)) after the registrant's initial registration of securities under these sections.

~~(b) Information about oil and gas producing activities. Registrants engaged in oil and gas producing activities shall present the information about oil and gas producing activities (as those activities are defined in Regulation S-X, §210.4-10(a)) specified in FASB ASC Topic 932, Extractive Activities—Oil and Gas, if such oil and gas producing activities are regarded as significant under one or more of the tests set forth in FASB ASC Subtopic 932-235, Extractive Activities—Oil and Gas—Notes to Financial Statements, for 'Significant Activities.'~~

~~Inaction 1 to paragraph (b). (a) FASB ASC Subtopic 932-235 disclosures that relate to annual periods shall be presented for each annual period for which a statement of comprehensive income (as defined in §210.1-02 of Regulation S-X) is required, (b) FASB ASC Subtopic 932-235 disclosures required as of the end of an annual period shall be presented as of the date of each audited balance sheet required, and (c) FASB ASC Subtopic 932-235 disclosures required as of the beginning of an annual period shall be presented as of the beginning of each annual period for which a statement of comprehensive income (as defined in §210.1-02 of Regulation S-X) is required.~~

~~Instruction 2 to paragraph (b). This paragraph, together with §210.4-10 of Regulation S-X, prescribes financial reporting standards for the preparation of accounts by persons engaged in whole or in part in the production of crude oil or natural gas in the United States, pursuant to Section 503 of the Energy Policy and Conservation Act of 1975 (12 U.S.C. 8383) ("EPCA") and section 116 of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796) ("ESECA") as amended by Section 506 of EPCA. The application of the paragraph to these oil and gas producing operations of companies regulated for ratemaking purposes on an individual company cost-of-service basis may, however, give appropriate recognition to differences arising because of the effect of the ratemaking process.~~

~~Instruction 3 to paragraph (b). Any person exempted by the Department of Energy from any record-keeping or reporting requirements pursuant to Section 11(c) of ESECA, as amended, is similarly exempted from the related provisions of this paragraph in the preparation of accounts pursuant to EPCA. This exemption does not affect the applicability of this paragraph to filings pursuant to the federal securities laws.~~

(3) ~~Smaller reporting companies.~~ A registrant that qualifies as a smaller reporting company, as defined by §229.10f(l), is not required to provide the information required by this Item.

§ 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. The discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to 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 have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations. 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, cash flows and other changes in financial condition and results of operations. A discussion and analysis that meets these requirements is expected to better allow investors to view the registrant from the management's perspective to view the registrant from management's perspective.

(b) Full fiscal years. ~~Discuss registrant's.~~ The discussion of financial condition, changes in financial condition and results of operations ~~The discussion shall~~ must provide information as specified in paragraphs (b)(1) through (3) of this ~~Item section~~ and also shall provide 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. ~~Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. 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.~~ 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 ~~shall~~[must](#) focus on each relevant reportable segment and/or other subdivisions of the business and on the registrant as a whole.

(1) **Liquidity and Capital Resources.** Analyze the registrant's ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in the short-term (i.e., the next 12 months from the most recent fiscal period end required to be presented) and separately in the long-term (i.e., beyond the next 12 months). The discussion should analyze material cash requirements from known contractual and other obligations. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. As part of this analysis, provide (i) through (ii) below.

(i) **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.

(ii) **Capital resources.** ~~(i) Describe~~ the registrant's material [cash requirement, including](#) commitments for capital expenditures, as of the end of the latest fiscal period, ~~and indicate the general purpose of such commitments and the~~ anticipated source of funds needed to ~~such commitments~~ [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~~ [reasonably likely](#) material changes in the mix and relative cost of such resources. The discussion ~~shall~~[must](#) consider changes ~~between~~ [among](#) equity, debt and any off-balance sheet financing arrangements.

(2) **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, ~~should be described in order to understand~~ [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 are~~ reasonably ~~expects will~~ [likely to](#) 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~~ [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 change in the relationship ~~shall~~ [must](#) be disclosed.

(iii) ~~If~~ the statement of comprehensive income presents ~~extent that the financial statement discloses~~ ~~statement of comprehensive income presents~~ material ~~increase~~ [changes from period to period](#) in net sales or ~~revenue~~; ~~provide a narrative discussion of revenue, if applicable, describe~~ the extent to which such ~~increases~~ [changes](#) are attributable to ~~increases~~ [changes](#) in prices or to ~~increases~~ [changes](#) in the volume or amount of goods or services being sold or to the introduction of new products or services.

(3) **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 the financial condition or results of operations of the registrant. Provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations to the extent the information is material and reasonably available. This information should include why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period, and the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation.~~

~~(iv) For the three most recent fiscal years of the registrant or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, discuss the impact of inflation and changing prices on the registrant's net sales and revenues and on income from continuing operations.~~

~~(4) *Off-balance sheet*. (i) In a separately captioned section, discuss the registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the 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. The disclosure shall include the items specified in paragraphs (a)(4)(i)(A), (B), (C) and (D) of this Item to the extent necessary to an understanding of such arrangements and effect and shall also include such other information that the registrant believes is necessary for such an understanding.~~

~~(A) The nature and business purpose to the registrant of such off-balance sheet arrangements;~~

~~(B) 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;~~

~~(C) The amounts of revenues, expenses and cash flows of the registrant arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the registrant 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; and~~

~~(D) 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 to the registrant, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the registrant has taken or proposes to take in response to any such circumstances.~~

~~(ii) As used in this paragraph (a)(1) the term *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:~~

~~(A) 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.~~

~~(B) 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;~~

~~(C) 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~~

~~(D) 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.~~

~~(5) *Tabular disclosure of contractual obligations*. (i) In a tabular format provide the information specified in this paragraph (a)(5) as of the latest fiscal year end balance sheet date with respect to the registrant's known contractual obligations specified in the table that follows this paragraph (a)(5)(i) The registrant shall provide amounts, aggregated by type of contractual obligation. The registrant may disaggregate the specified categories of contractual obligation using other categories suitable to its business, but the presentation must include all of the obligation of the registrant that fall within the specified categories. A presentation covering at least the periods specified shall be included. The tabular presentation may be accompanied by footnotes to describe provisions that create, increase or accelerate obligations, or other pertinent data to the extent necessary for an understanding of the timing and amount of the registrant's specified contractual obligations.~~

Contractual obligations	Payments due by period	3-5 years	More than 5 years
-------------------------	------------------------	-----------	-------------------

	Total	Less than 1 year	1-3 years		
<del>[Long Term Debt Obligation]</del>					
<del>[Capital Lease Obligations]</del>					
<del>[Opening Lease Obligations]</del>					
<del>[Purchase Obligations]</del>					
<del>[Other Long Term Liabilities Reflected on the Registrant's Balance sheet under GAAP]</del>					
<del>Total</del>					

~~(ii) Definition: The following definition apply to this paragraph (a)(5):~~

~~(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.~~

~~(B) 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.~~

~~(C) 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.~~

~~(D) Purchase obligation means an agreement to purchase goods or services that is enforceable and legally binding on the registrant that specifies all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the approximate timing of the transactions.~~

Instruction to paragraph 303([ab](#)).

1. ~~The registrant's discussion and analysis, shall be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition, and results of operations.~~ Generally, the discussion shall 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 shall 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 ([ab](#)) of this ~~Item~~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. The purpose of the discussion and analysis shall be to provide to investors and other users information relevant to an assessment of the financial condition and results of operations of the registrant as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources.~~

~~3. The discussion and analysis shall 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 would include descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported operations and are not expected to have an impact upon future operations.~~

2. ~~Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described to the extent necessary to an understanding of the registrant's businesses as a whole; Provided, however, That if the causes for all 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~~neither required ~~or~~nor generally appropriate. Registrants need not recite the amounts of changes from ~~year to year~~ which period to period if they are readily computable from the financial statements. The discussion ~~shall~~must not merely repeat numerical data contained in the ~~consolidated~~ financial statements.~~

~~5. 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 for cash. Except where it is otherwise clear from the discussion, the registrant shall indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition. Liquidity generally shall be discussed on both a long-term and short-term basis. The issue of liquidity shall 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.~~

3. Provide the analysis in a format that facilitates easy understanding and that supplements, and does not duplicate, disclosure already provided in the filing. For critical accounting estimates, this disclosure must supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

4. For the Liquidity and Capital Resources disclosure, discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet. Except where it is otherwise clear from the discussion, the registrant must discuss those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition.

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~~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 ~~shall~~must include a discussion of the nature and extent of such restrictions and the impact such restriction have had ~~and~~or are ~~expected~~reasonably likely 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]<sup>s</sup> and Securities Act Release No. 6084 (June 25, 1979) (44 FR ~~38840~~33810).

~~8. Registrants are only required to discuss the effects of inflation and other changes in prices when considered material. This discussion may be made in whatever manner appears appropriate under the circumstances. All that is required is a brief textual presentation of management's views. No specific numerical financial data need be presented except as Rule 3-20(c) of Regulation S-X (§210.3-20(c) of this chapter) otherwise requires. However, registrants may elect to voluntarily disclose supplemental information on the effects of changing prices as provided for in FASB ASC Topic 255, Changing Price, or through other supplemental disclosure. The Commission encourages experimentation with these disclosures in order to provide the most meaningful presentation of the impact of price changes on the registrant's financial statement.~~

~~9. Registrants that elect to disclose supplementary information on die effects of changing prices as specified by FASB ASC Topic 255 may combine such explanations with the discussion and analysis required pursuant to this Item or may supply such information separately with appropriate cross reference.~~

7. All references to the registrant in the discussion and in this Item ~~shall~~ mean the registrant and its subsidiaries consolidated.
8. Discussion of commitments or obligation 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 US GAAP.
9. ~~Foreign~~ If the registrant is a foreign private ~~registrants also shall~~ issuer, briefly 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~~ its 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 ~~shall~~ must focus on the primary financial statements presented in the registration statement or report ~~There shall be a reference~~ The foreign private issuer must refer to the reconciliation to United States generally accepted accounting principles, ~~and a discussion of~~ 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~~ are necessary for an understanding of the financial statements as a whole, if applicable.
11. The term statement of comprehensive income is as defined in §210.1-02 of Regulation S-X.

~~13. The attention of bank holding companies is directed to the information called for in Guide 3 (§229.801(c) and § 229.802(c)~~

~~14.M. The attention of property-casualty insurance companies is directed to the information called for in Guide 3 (§229.801(f)~~

~~Instruction to paragraph 303(a)(4): 1. No obligation to make disclosure under paragraph (a)(4) of this Item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditionally binding or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.~~

~~2. Registrants should aggregate off-balance sheet arrangements in groups or categories that provide material information in an efficient and understandable manner and should avoid repetition and disclosure of immaterial information. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. Distinctions in arrangements and their effects must be discussed to the extent the information is material, but the discussion should avoid repetition and disclosure of immaterial information.~~

~~3. For purposes of paragraph (a)(4) of Ms Item only, contingent liabilities arising out of litigation, arbitration or regulatory actions are not considered to be off-balance sheet arrangements.~~

~~Generally, the disclosure required by paragraph (a)(4) shall cover the most recent fiscal year. However, the discussion should address changes from the previous year where such discussion is necessary to an understanding of the disclosure~~

~~5. In satisfying the requirements of paragraph (a)(4) of this Item, the discussion of off-balance sheet arrangements need not repeat information provided in the footnotes to the financial statements, provided that such discussion clearly cross-references to specific information in the relevant footnotes and integrates the substance of the fo~~

~~notes into such discussion in a manner designed to inform readers of the significance of the information that is not included within the body of such discussion.~~

(b~~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 ~~240~~ 210.3], a management's discussion and analysis of the financial condition and results of operations ~~shall~~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 (b~~c~~)~~(l)~~ and (2) of this ~~Item~~section. The discussion and analysis ~~shall~~must include a discussion of material changes in those items specifically listed in paragraph (a~~b~~) of this ~~Item~~, ~~except that the impact of inflation and changing prices on operations for interim periods need not be addressed~~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 ~~shall~~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 ~~(or statement of operations if comprehensive income is presented in two separate but consecutive financial statements or if no other comprehensive income)~~ is provided and the corresponding year-to-date period of the preceding fiscal year. ~~If the registrant is required to or has elected to provide a statement of comprehensive income.~~

~~(or statement of operations if comprehensive income is presented in two separate but consecutive financial statements or if no other comprehensive income) for the most recent fiscal quarter, such discussion also shall cover material changes with respect to that fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year. In addition, if the registrant has elected to provide (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 ~~(or statement of operations if comprehensive income is presented in two separate but consecutive financial statements or if no other comprehensive income) for the twelve-month period ended as of the date of the most recent interim balance sheet provided, the discussion also shall cover material changes with respect to that twelve-month period and the twelve-month period ended as of~~is provided and the corresponding interim balance sheet date ~~of quarter for~~ the preceding fiscal year. ~~Notwithstanding to above if for purposes of a registration statement a registrant subject to §210.3-03(b) of Regulation S-X of this chapter provides or, in the alternative, the most recent quarter for which~~ a statement of comprehensive income ~~(or statement of operations if comprehensive income is presented in two separate but consecutive financial statements or if no other comprehensive income) for the twelve-month period ended as of the date of the most recent interim balance sheet provided in lieu of the interim statements of comprehensive income (or statement of operations if comprehensive income is presented in two separate but consecutive financial statements or if no other comprehensive income) otherwise required, the discussion of material changes in that twelve-month period will be in respect to the preceding fiscal year rather than the corresponding preceding period,~~ 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):

*Instruction 1 to paragraph (b).* If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information ~~shall~~must be prepared pursuant to this paragraph (b~~c~~) and the discussion of the full fiscal year's information ~~shall~~must be prepared pursuant to paragraph (a~~b~~) of this ~~Item~~section. Such discussions may be combined. Instructions 2, 3, 4, 6, 8, and 11 to paragraph (b) of this section apply to this paragraph (c).

~~Instruction 2 to paragraph (b).~~ In preparing to discussion and analysis required by this paragraph (b), the registrant may presume that users of to interim financial information have read or have access to the discussion and analysis required by paragraph (a) for to preceding fiscal year.

~~Instruction 3 to paragraph (b)~~ The discussion and analysis required by this paragraph (b) is required to focus only on material changes. Where the interim financial statements reveal material changes from period to period in one or more significant line items, the causes for the changes shall be described if they have not already been disclosed. *Provided, however,* That if the causes for a change in one line item also relate to other line items, no repetition is required. Registrants need not recite the amounts of changes from period to period which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the financial statements. The information provided shall include that which is available to the registrant without undue effort or expense and which does not clearly appear in the registrant's condensed interim financial statements.

~~Instruction 4 to paragraph (b).~~<sup>2</sup> The registrant's discussion of material changes in results of operations shall 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.

~~Instruction 5 to paragraph (b).~~ [Reserved].

~~Instruction 6 to paragraph (b).~~ 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 249.3b-6] and Securities Act Release No. 6084 (June 25, 1979) (44 FR 38810).

~~Instruction 7 to paragraph (b).~~ The registrant is not required to include the table required by paragraph (a)(5) of this Item for interim periods. Instead, the registrant should disclose material changes outside the ordinary course of the registrant's business in the specified contractual obligations during the interim period.

~~Instruction 8 to paragraph (b)~~ The term *comprehensive income* shall mean a statement of comprehensive income as defined in §210.1-02 of Regulation S-X of this chapter.

~~Safe harbor.~~ (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z-2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u-5) ("statutory safe harbors") shall apply to forward looking information provided pursuant to paragraphs (a)(4) and (5) of this Item, provided that the disclosure is made by: 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.

~~(2) For purposes of paragraph (c) of this Item only:~~

~~(i) All information required by paragraphs (a)(4) and (5) of this Item is deemed to be a forward looking statement as that term is defined in the statutory safe harbors, except for historical facts.~~

~~(ii) With respect to paragraph (a)(4) of this Item, the meaningful cautionary statements element of the statutory safe harbors will be satisfied if a registrant satisfies all requirements of that same paragraph (a)(4) of this Item~~

~~(d) Smaller reporting companies.~~ A smaller reporting company, as defined by §229.10(f)(1), may provide the information required in paragraph (a)(3)(iv) of this Item for the last two most recent fiscal years of the registrant if it provides financial information on net sales and revenues and on income from continuing operations for only two years. A smaller reporting company is not required to provide the information required by paragraph (a)(5) of this Item.

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