

# Publications

## Evolving Disclosures in 2021

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Even in the midst of the coronavirus (COVID-19) pandemic, the Securities and Exchange Commission (SEC) staff continued to update and streamline disclosure requirements applicable to public reporting companies. Due to the unique challenges experienced by public reporting companies during the COVID-19 pandemic, the SEC has taken additional steps in response to the pandemic, including issuing guidance regarding its expectations for disclosures addressing the business and market disruptions caused by the pandemic and adopting unanticipated amendments to permit electronic signatures for electronic filings on EDGAR.

In its flurry of rulemaking activity, the SEC issued several amendments that will impact the disclosures contained in public reporting companies' annual and/or quarterly reports and registration statements filed or becoming effective in 2021. Public reporting companies will need to take note of the amended disclosure requirements and begin planning when and how they will address the new and modified disclosures in upcoming periodic reports and registration statements. Because this article only contains summaries of the disclosure requirements, readers should refer to the full text of the SEC's releases and related guidance in preparing their disclosures.

## CURRENTLY EFFECTIVE AMENDMENTS

### Items 101 (Business), 103 (Legal Proceedings) and 105 (Risk Factors) of Regulation S-K

The SEC adopted amendments to Items 101, 103 and 105 of Regulation S-K to (1) implement a principles-based approach with respect to registrants' business disclosures, (2) introduce additional disclosure items that had been championed by investors over several years and (3) streamline unnecessarily duplicative disclosures.<sup>1</sup> These amendments were effective on November 9, 2020 and apply to registration statements and periodic reports requiring disclosure under these Items that are filed or made effective, as applicable, after that date.<sup>2</sup>

**Business (Item 101 of Regulation S-K)**

The amendments to Item 101 move to a more “principles-based” approach and provide registrants with flexibility to tailor disclosures to their unique circumstances. Most notably, these amendments introduce the following changes:

- replace the five-year timeframe under Item 101(a) (or, in the case of smaller reporting companies, the three-year timeframe under Item 101(h)) applicable to the description of the general development of the registrant’s business with a materiality standard for the disclosure;<sup>3</sup>
- permit the registrant to provide only an update of the general development of its business with a focus on any material developments that have occurred since the most recent full discussion of the general development of its business disclosed in a single previously filed registration statement or periodic report through incorporating by reference the most recent full discussion using an active hyperlink;<sup>4</sup>
- amend the prescribed disclosure topics for the registrant’s discussion of the general development of its business to include a non-exclusive list of the types of information that a registrant may need to disclose to the extent such information is material to an understanding of the general development of the registrant’s business, including a new topic of any material changes to a registrant’s previously disclosed business strategy;<sup>5</sup>
- amend the requirement for a narrative description of the business conducted and intended to be conducted by the registrant and its subsidiaries by replacing the current list of specific disclosure items with a non-exclusive list of disclosure topic examples to be addressed only to the extent material to an understanding of the registrant’s business, including the following new or expanded topics:
  - revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers;
  - status of development efforts for new or enhanced products, trends in market demand and competitive conditions;
  - resources material to a registrant’s business (such as sources and availability of raw materials and the duration and effect of all patents, trademarks, licenses, franchises and concessions held); and
  - any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the government;<sup>6</sup>
- expand the disclosure requirement under Item 101(c) with respect to compliance with environmental laws to instead require disclosure, to the extent material to an understanding of the registrant’s business taken as a whole, of the material effects that compliance with governmental regulations (including environmental regulations) may have upon the capital expenditures, earnings and the competitive position of the registrant and its subsidiaries, including estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period; and
- add a new requirement under Item 101(c) to discuss with respect to, and to the extent material to an understanding of, the registrant’s business taken as a whole (identifying any particular segment to which such information is material), the registrant’s human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant’s business and workforce, measures or objectives that address the development, attraction and retention of personnel).

### Legal Proceedings (Item 103 of Regulation S-K)

The amendments to Item 103 permit the use of hyperlinks and cross-references to legal proceedings disclosure located elsewhere in the registration statement or report, such as in the Management's Discussion and Analysis (MD&A), Risk Factors or a note to the financial statements. This amendment allows registrants to avoid duplicative disclosures to the extent that the information meeting the requirements of Item 103 is located elsewhere in the registration statement or report.

These amendments also revise the threshold previously addressed in Instruction 5.C to Item 103 for disclosure of pending proceedings under environmental laws to which a governmental authority is a party and that involve monetary sanctions to adjust for inflation and provide additional flexibility to registrants in determining whether disclosure of such environmental proceedings is material. This amended threshold, which is now contained in Item 103(c)(3), requires disclosure of any such environmental proceeding if the registrant reasonably believes that such proceeding may result in monetary sanctions, exclusive of interest and costs, equal to or exceeding (i) \$300,000 or (ii) such other threshold amount elected by the registrant that (a) the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to the business or financial condition is disclosed, (b) the registrant discloses (including any change thereto) in each annual and quarterly report, and (c) does not exceed the lesser of \$1 million or one percent of the current consolidated assets of the registrant and its subsidiaries. However, under this amended disclosure requirement, any environmental proceedings required to be disclosed that are similar in nature may be grouped and described generically.

### Risk Factors (Item 105 of Regulation S-K)

To address the lengthy and generic nature of the risk factor disclosure presented by many registrants, the SEC adopted amendments to Item 105 to require a summary risk factor disclosure in the forepart of the registration statement or report if the registrant's risk factor disclosure exceeds 15 pages, to replace the requirement to disclose the "most significant" risk factors with "material" risks and to organize the registrant's risk factor disclosure under relevant headings, in addition to the subcaptions that are currently required. In adopting these amendments, the SEC expressed the belief that these changes would help registrants avoid including generic, boilerplate risk factors and improve the readability and usefulness of this disclosure.

### Electronic Signatures (Rule 302 of Regulation S-T and EDGAR Filer Manual)

The recently adopted amendments to Rule 302 of Regulation S-T and the EDGAR Filer Manual, as well as the corresponding revisions to forms under the Securities Act of 1933 (the Securities Act), the Securities Exchange Act of 1934 (the Exchange Act) and the Investment Company Act of 1940, permit the use of electronic signatures in signature authentication documents required under Regulation S-T in connection with electronic filings on EDGAR that are required to be signed.<sup>7</sup> Electronic authentication of these documents must meet certain requirements set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing" (Version 55) (November 2020).

In particular, when a signatory signs an authentication document using an electronic signature, the signing process must: (i) require the signatory to present a physical, logical or digital credential that authenticates his or her individual identity; (ii) reasonably provide for the signature's non-repudiation

(meaning assurance that the signatory cannot falsely deny having given his or her signature); (iii) provide that the signature be attached, affixed or logically associated with the signature page or document being signed; and (iv) include a timestamp to record the date and time of the signature. In addition, under new Rule 302(b)(2), a signatory may only sign by electronic signature if the signatory has previously manually signed a document (*i.e.*, a “wet ink” signature) attesting that the signatory agrees that the use of an electronic signature in any authentication document constitutes the legal equivalent of such individual’s manual signature for purposes of authenticating the signature to any filing for which it is provided. This manually signed “initial electronic signature authentication document” must be retained for as long as the signatory may use an electronic signature to sign an authentication document and for a minimum of seven years after the date of the most recent electronically signed authentication document. The SEC has not changed the requirement that filers retain the authentication document for a period of five years and furnish a copy of such document to the SEC or its staff upon request.

These amendments were effective on December 4, 2020, after which filers are permitted to use electronic signatures for any documents electronically filed on EDGAR, including Forms 10-K, 10-Q and 8-K, and registration statements. Electronic signatures may also be used for CEO and CFO certifications required to be filed with Forms 10-K and 10-Q.

## AMENDMENTS BECOMING EFFECTIVE IN 2021

### Items 301 (Selected Financial Data), 302 (Supplementary Financial Information) and 303 (Management’s Discussion and Analysis of Financial Condition and Results of Operations) of Regulation S-K

The SEC adopted amendments to Items 301, 302 and 303 of Regulation S-K to reduce disclosures duplicating information already contained in registrants’ financial statements and/or readily available from such financial statements and to streamline and modernize the disclosure items applicable to registrants’ MD&As, including introducing a new subsection outlining the objectives of the MD&A.<sup>8</sup> These amendments will be effective 30 days following publication of the final rules in the Federal Register. Registrants will be required to apply the amended rules for their first fiscal year ending on or after the date that is 210 days after publication of these amended rules in the Federal Register, including in any registration statement or prospectus that on its initial filing date contains financial statements for a period on or after the mandatory compliance date for which compliance with these amended rules is required.

Registrants may voluntarily comply with amended rules at any time after the effective date as long as they provide disclosure responsive to an amended item in its entirety (for this purpose, Item 303 must be viewed as a single item with disclosure provided pursuant to each provision of amended Item 303 in its entirety). Registrants need not comply with all items amended by Release No. 33-10890 in order to voluntarily comply with one of the amended items.

#### Selected Financial Data (Item 301 of Regulation S-K)

The SEC’s amendments to Item 301 will eliminate the requirement for registrants to provide five years of selected financial data. In adopting these amendments, the SEC explained that technological advances allow for easy access to the information required by this Item on EDGAR and the original intention of this

Item (to elicit disclosure of material trends) was duplicative of the requirement to discuss and analyze trends under the MD&A. Despite the elimination of Item 301, the SEC encouraged registrants to consider whether trend information for periods earlier than those presented in the financial statements may be necessary as part of the MD&A and whether a tabular presentation of relevant financial or other information in an introductory section or overview may help a reader's understanding of the MD&A.

#### **Supplementary Financial Information (Item 302 of Regulation S-K)**

Item 302(a) currently requires disclosure of specified financial information for each full quarter within the two most recent fiscal years and any subsequent interim period for which financial statements were included or required to be included by Article 3 of Regulation S-X. The SEC's amendments to Item 302(a) will streamline this requirement so that registrants are only required to provide disclosure under this Item when there has been one or more retrospective changes to the statements of comprehensive income for any of the quarters within the two most recent fiscal years or any subsequent interim period for which financial statements are required to be included under Article 3 of Regulation S-X that, individually or in the aggregate, are material.<sup>9</sup> Registrants will be required to provide an explanation of the reasons for such material changes and to 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. Additional amendments to Rule 1-02(bb) will clarify that the disclosure of summary financial information may vary, as appropriate, to conform to the nature of the registrant's business and, therefore, will provide registrants flexibility in determining the line items presented pursuant to amended Item 302(a). By eliminating duplication of quarterly financial information provided elsewhere or information that can be derived from annual results disclosed by registrants, these amendments aim to better highlight material retrospective changes and the related quantitative effect on quarterly periods.

#### **Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303 of Regulation S-K)**

The SEC introduced a number of changes to Item 303 intended to modernize, simplify and enhance the disclosures in the MD&A for investors. In summary, these amendments will introduce the following changes:

- add a new Item 303(a) to state the objectives of the MD&A (including by incorporating Instruction 1 and portions of Instructions 2 and 3 into this new Item 303(a)), which include disclosing (i) material information relevant to an assessment of the registrant's financial condition and results of operations, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources; (ii) material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of the registrant's future operating results or future financial condition, including 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; and (iii) material financial and 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;
- incorporate into Item 303(a) current guidance that the MD&A is expected to better allow investors to view the registrant from "management's perspective";

- incorporate Instruction 4 into new Item 303(b) (previous Item 303(a)) to clarify that, where the consolidated financial statements reveal material changes from year to year in one or more line items, the MD&A should address the underlying reasons for these material changes in quantitative and qualitative terms;
- expand the potential subdivisions of the registrants' business for which disclosure must be provided by revising Item 303(b) (previous Item 303(a)) to state that, where in the registrant's judgment a discussion of segment information and/or of other subdivisions (e.g., geographic areas, product lines) of the registrant's business would be necessary to an understanding of such business, the discussion must focus on each relevant reportable segment and/or other subdivision of the business as well as on the registrant as a whole;
- add a combined liquidity and capital resources disclosure requirement under Item 303(b)(1) for a description of 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.*, up to 12 months) and the long-term (*i.e.*, beyond 12 months);
- add a new component of the specific capital resources disclosure required by Item 303(b)(1)(ii) to discuss any material cash requirements, *including* commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements and the general purpose of such requirements;<sup>10</sup>
- enhance the discussion of known trends and uncertainties under the registrant's discussion of its results of operations to require under amended Item 303(b)(2)(ii) that when a registrant knows of events that are reasonably likely to cause a material change in the relationship between costs and revenues (such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship must be disclosed;
- incorporate previous guidance from the SEC into Item 303(a)(3)(iii) to clarify that a discussion of material *changes* in net sales or revenue is required rather than only material *increases*;
- eliminate the separate off-balance sheet disclosure requirement under Item 303(a)(4) and insert a new instruction to Item 303(b) to discuss off-balance sheet arrangements in the broader context of the MD&A to the extent that they have or are reasonably likely to have a material current or future effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources;<sup>11</sup>
- eliminate the tabular disclosure of contractual obligations under Item 303(a)(5) to reflect the incorporation of the discussion of material cash requirements from known contractual or other obligations into the liquidity and capital resources discussion of the MD&A;
- introduce a new discussion of critical accounting estimates<sup>12</sup> under Item 303(b)(3);<sup>13</sup> and
- add more flexibility for the interim disclosure requirements under new Item 303(c) to allow registrants to compare their most recently completed quarter to either the corresponding quarter of the prior year or the immediately preceding quarter,<sup>14</sup> requiring registrants that change the comparison from the comparison presented in the immediately prior Form 10-Q to explain the reason for the change and present both comparisons in the filing where the change is announced.

## Rules 3-10 and 3-16 and New Article 13 of Regulation S-X

The SEC adopted amendments to the financial disclosure requirements under Rules 3-10 and 3-16 of Regulation S-X for issuers and guarantors of registered securities and affiliates whose securities provide a substantial portion of the collateral for registered securities.<sup>15</sup> These amendments, which impact disclosures made in connection with registered debt offerings and subsequent periodic reporting, are intended to simplify and streamline the required disclosures to reduce costs and burdens to registrants in conducting registered debt offerings. Although the amendments were effective as of January 4, 2021, the SEC provided a phase-in period for the new disclosure requirements, requiring that any registration statement first filed on or after January 4, 2021 and any periodic report (*i.e.*, a Form 10-K or Form 10-Q) for a period ending after January 4, 2021 or a period ending after a registration statement that was required to comply with the new amendments became effective must comply with the new amendments. Registrants have the option of voluntarily complying with the new amendments prior to such time but, after such voluntary compliance, must comply with the new amendments for each later applicable filing.

Rule 3-10 requires every issuer and guarantor of a registered security that is guaranteed to file the financial statements required of a registrant under Regulation S-X and provides exceptions from such requirements if certain alternative disclosures are provided by the parent company. Rule 3-16 requires a registrant to provide separate financial statements for each affiliate whose securities constitute a substantial portion of the collateral for any class of registered securities as if the affiliate were a separate registrant.

### Rule 3-10 and new Rule 13-01 of Regulation S-X

The amendments to Rule 3-10 modify the conditions under which separate financial statements of subsidiary issuers and guarantors of registered securities may be omitted to provide for a single set of eligibility criteria that applies to all issuer and guarantor structures, including, most notably, the following changes:

- replacing the condition that the subsidiary issuer or guarantor be 100 percent owned by the parent company with a condition that it be consolidated in the parent company's consolidated financial statements;
- modifying the alternative financial and non-financial disclosures that must be provided by the parent company, including replacing the requirement to provide condensed consolidating financial information with summarized financial information (as defined in 17 CFR 210.1-02(bb)(1)) of the issuers and guarantors, which may be presented on a combined basis, and reducing the number of periods presented;
- expanding the qualitative disclosures about the guarantees and the issuers and guarantors;
- eliminating quantitative thresholds for disclosure and requiring disclosure of additional information about each guarantor that would be material for investors to evaluate the sufficiency of the guarantee consistent with existing Rule 3-10;
- permitting the alternative disclosures to be provided outside of the notes to the parent company's consolidated financial statements in all cases;
- eliminating the requirement to provide pre-acquisition financial statements of recently acquired subsidiary issuers and guarantors but requiring, in certain instances, pre-acquisition summarized

financial information (as defined in 17 CFR 210.1-02(bb)(1)) about significant recently acquired subsidiary issuers and guarantors;

- requiring that the alternative disclosures under amended Rule 13-01 be provided for as long as the issuers and guarantors have reporting obligations under the Exchange Act with respect to the guaranteed securities rather than for so long as the guaranteed securities are outstanding; and
- allowing the parent company to locate the alternative disclosures under amended Rule 13-01 in the MD&A rather than a footnote to its consolidated financial statements and, with respect to any registration statement, in its prospectus immediately following “Risk Factors” or otherwise immediately following pricing information described in Item 105 of Regulation S-K.

The amended conditions in Rule 3-10 to omit separate financial statements of subsidiary issuers and guarantors of guaranteed securities require that:

- the consolidated financial statements of the parent company have been filed;
- the subsidiary issuer or guarantor is a consolidated subsidiary of the parent company;
- the guaranteed security is “debt or debt-like;”
- the issuer and guarantor structure is one of the following:
  - the parent company issues the security or co-issues the security, jointly and severally, with one or more of its consolidated subsidiaries; or
  - a consolidated subsidiary issues the security or co-issues the security with one or more other consolidated subsidiaries of the parent company, and the security is guaranteed fully and unconditionally by the parent company.

If the above conditions are met, the parent company may omit financial statements of the subsidiary issuers and guarantors of the guaranteed securities by providing the amended alternative financial and non-financial disclosures, which have been relocated to Rule 13-01, rather than spread among the provisions of Rule 3-10.

#### **Rule 3-16 and new Rule 13-02 of Regulation S-X**

The amendments to Rule 3-16 replace the existing requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with a requirement that the registrant provide financial and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement to the registrant’s consolidated financial statements in accordance with new Rule 13-02. Similar to the amendments to Rule 3-10, these amendments give a registrant the flexibility to locate the alternative disclosures required under Rule 13-02 in a footnote to the registrant’s consolidated financial statements or alternatively, in the MD&A or, with respect to any registration statement, in its prospectus immediately following “Risk Factors” or otherwise immediately following pricing information described in Item 105 of Regulation S-K. In addition, the new disclosure requirements provide as follows:

- the specified disclosures with respect to affiliate(s) whose securities collateralize the registered securities must be provided in all cases unless such disclosures are not material to the holders of the collateralized securities;

- registrants are now required to provide any additional information about the collateral arrangement and each affiliate whose securities are pledged as collateral that would be material to making an investment decision with respect to the collateralized security;
- registrants must provide summarized financial information (as defined in 17 CFR 210.1-02(bb)(1)) for each affiliate whose securities are pledged as collateral, which summarized financial information may be presented on a combined rather than individual basis;
- when information provided in response to Rule 13-02 is applicable to one or more, but not all, affiliates, separate disclosure of summarized financial information for the affiliates to which the information applies is required, except that, in certain limited circumstances, narrative disclosure may be provided in lieu of the summarized financial information of the affected affiliates (e.g., when such separate financial information applicable to the affected affiliates can be easily explained and understood);
- the summarized financial information must be provided for such affiliates as of and for the most recently ended fiscal year and year-to-date interim period included in the registrant's consolidated financial statements; and
- certain non-financial disclosures must be provided regarding the securities pledged as collateral, each affiliate whose securities are pledged, the terms and conditions of the collateral arrangement and whether a trading marketing exists for the pledged securities.

The SEC has also added corresponding references to Form 20-F, Rule 8-03 and Form 1-SA to require compliance with new Rule 13-02 by foreign private issuers, smaller reporting companies and Regulation A issuers, respectively, under applicable circumstances.

### **Item 601(a) and new Item 601(b)(22) of Regulation S-K**

In connection with the above amendments to Regulation S-X, the SEC also adopted amendments Item 601 of Regulation S-K to add a new exhibit requirement, which will require a list of each of the registrant's subsidiaries that is a guarantor, issuer or co-issuer of the guaranteed security subject to Section 13(a) or 15 (d) of the Exchange Act, or the offer and sale of which is being registered under the Securities Act, as well as each of the registrant's affiliates whose securities are pledged as collateral for the registrant's security subject to Section 13(a) or Section 15(d) of the Exchange Act, or the offer and sale of which is being registered under the Securities Act, including for each affiliate, identification of the securities pledged as collateral. This information should be listed in the exhibit under an appropriately captioned heading that identifies the associated securities. Also, the amendments provide that an entity need not be listed more than once if it serves in multiple roles, so long as those roles are clearly identified in the exhibit. This new exhibit must be filed with registration statements on Forms S-1, S-3 and S-4, periodic reports on Forms 10-Q and 10-K and current reports on Form 8-K (but only if the Form 8-K reports subject matter relevant to the exhibit).

## **ADDITIONAL GUIDANCE**

### **COVID-19**

In preparing disclosures for periodic reports to be filed in 2021, public reporting companies will also want to continue following the guidance issued by the SEC's Division of Corporation Finance addressing its views regarding operations, liquidity and capital resources disclosures to be considered with respect to business

and market disruptions caused by, and risks related to, the COVID-19 pandemic and its evolving impact.<sup>16</sup> In light of the recent amendments to key disclosure requirements described above, public reporting companies should consider how the impact of the COVID-19 pandemic and the steps taken to manage its impact should be reflected in these new or modified disclosures for 2021.

### Bank Holding Companies and Savings and Loan Holding Companies

Those public reporting companies that are registered bank holding companies or otherwise engaged in material lending and deposit-taking activities (including savings and loan holding companies) should also take note of the recent amendments adopted by the SEC to rescind Guide 3, effective January 1, 2023, and replace Guide 3 with a new set of rules to be codified as a new subpart 1400 of Regulation S-K.<sup>17</sup> Although the rescission of Guide 3 will not be effective until January 1, 2023, compliance with the new rules under subpart 1400 of Regulation S-K must begin for fiscal years ending on or after December 15, 2021. Registrants are permitted to begin complying with the rules in new subpart 1400 prior to such date. The new and amended disclosure requirements will impact, most notably, registrants' disclosures relating to distribution of assets, liabilities and stockholders' equity; interest rates and interest differential (average balance, interest and yield/rate analysis and rate/volume analysis); investment portfolio; loan portfolio; allowance for credit losses; and deposits. The existing Guide 3 disclosure requirements with respect to return on equity and assets (including the specific ratios for return on assets, return on equity, dividend payout and equity to assets for the "reported periods") and short-term borrowings are not codified as part of new subpart 1400.

Please contact any of the authors or your regular Vorys attorney with any questions or for additional information related to these amendments.

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<sup>1</sup> Release Nos. 33-10825; 34-89670, *Modernization of Regulation S-K Items 101, 103 and 105* (Aug. 26, 2020), available at <https://www.sec.gov/rules/final/2020/33-10825.pdf> ("Release No. 33-10825").

<sup>2</sup> For any Form S-3 that became effective before November 9, 2020, the SEC's Division of Corporation Finance in its *Transitional FAQs Regarding Amended Regulation S-K Items 101, 103 and 105* (available at <https://www.sec.gov/corpfin/transitional-faqs-amended-regulation-s-k-items-101-103-105>) (the "Transitional FAQs for Items 101, 103 and 105") confirmed that a registrant would not be required, upon filing a prospectus supplement to such Form S-3 on or after November 9, 2020, to amend the Form 10-K incorporated by reference into its Form S-3 pursuant to Item 12(a)(1) of Form S-3 to comply with the new Items 101 and 103 (which are not expressly required by Form S-3). In addition, the Division stated that, despite the fact that Form S-3 expressly requires disclosure under Item 105, the SEC staff would not object if a subsequently filed prospectus supplement to a registrant's Form S-3 complied with the old Item 105 until the next update to this Form S-3 for Section 10(a)(3) purposes.

<sup>3</sup> The SEC did not adopt a corresponding amendment to Item 1 of Part I of Form 10-K, which allows registrants to include in the discussion of their businesses only those developments since the beginning of the fiscal year for which the Form 10-K is filed. The SEC's Division of Corporation Finance in its *Transitional FAQs for Items 101, 103 and 105* confirmed that the amendments to Item 101 did not change Item 1 of Part I of Form 10-K.

<sup>4</sup> In its Transitional FAQs for Items 101, 103 and 105, the SEC's Division of Corporation Finance reaffirmed that a registrant is not required to use this permitted updating method and noted its anticipation that the updating method will mainly be used in the context of registration statements.

<sup>5</sup> The amended list under Item 101(a) no longer includes a specific reference to the year the registrant was organized and its form of organization and any material changes in the mode of conducting the registrant's business.

<sup>6</sup> The amended list under Item 101(c) no longer includes a specific reference to working capital practices, new segments and dollar amount of backlog orders believed to be firm. However, the SEC in Release No. 33-10825 notes that disclosure for these items, and any other topics regarding a registrant's business, should still be provided if such items are material to an understanding of the registrant's business and not otherwise disclosed.

<sup>7</sup> Release Nos. 33-10889; 34-90441, *Electronic Signatures in Regulation S-T Rule 302* (Nov. 17, 2020), available at <https://www.sec.gov/rules/final/2020/33-10889.pdf>.

<sup>8</sup> Release Nos. 33-10890; 34-90459, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information* (Nov. 19, 2020), available at <https://www.sec.gov/rules/final/2020/33-10890.pdf> ("Release No. 33-10890").

<sup>9</sup> *Id.* at \*19-20. In addition to these changes, the amendments to Item 302(a) provide that this requirement will apply beginning with the first filing on Form 10-K after the registrant's initial registration of securities under Section 12(b) or 12(g) of the Exchange Act.

<sup>10</sup> The current disclosures with respect to the liquidity and capital resources under current Item 303(a)(1) and (2) have been retained under the new Item 303(b)(1) for the combined liquidity and capital resources disclosure requirement.

<sup>11</sup> Release No. 33-10890 clarifies that the removal of the specific off-balance sheet arrangement disclosure should not deter registrants from highlighting discussion of certain off-balance sheet arrangements separately or including a separately captioned section to facilitate an understanding of such disclosure. Release No. 33-10890, at \*58.

<sup>12</sup> Amended Item 303(c) defines "critical accounting estimates" as 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. Release No. 33-10890, at \*68, 165-66.

<sup>13</sup> New Item 303(b)(3) will require disclosure of qualitative and quantitative information necessary to understand the estimation uncertainty and the impact that the critical accounting estimate has had or is reasonably likely to have on the registrant's financial condition or results of operations to the extent the information is material and reasonably available, including 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. Release No. 33-10890, at \*166.

<sup>14</sup> New Item 303(c) requires that, if the registrant chooses to discuss material changes from the immediately preceding quarter, it must provide in summary form financial information for that immediately preceding quarter or identify the registrant's prior EDGAR filings that present such financial information. Release No. 33-10890, at \*79, 170.

<sup>15</sup> Release Nos. 33-10762; 34-88307, *Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities* (Mar. 2, 2020), available at <https://www.sec.gov/rules/final/2020/33-10762.pdf>.

<sup>16</sup> CF Disclosure Guidance: Topic No. 9 (Mar. 25, 2020), available at <https://www.sec.gov/corpfin/coronavirus-covid-19>; CF Disclosure Guidance: Topic No. 9A (June 23, 2020), available at <https://www.sec.gov/corpfin/covid-19-disclosure-considerations>.

<sup>17</sup> Release Nos. 33-10835; 34-89835, *Update of Statistical Disclosures for Bank and Savings and Loan Registrants* (Sept. 11, 2020), available at <https://www.sec.gov/rules/final/2020/33-10835.pdf>.