

## SEC PROPOSES SIMPLIFIED MD&A DISCLOSURE REQUIREMENTS

February 14, 2020

### I. Executive Summary

On January 30, 2020, the U.S. Securities and Exchange Commission (“SEC”) continued its disclosure regime harmonization and simplification initiative with new proposed amendments to Regulation S-K, the integrated disclosure regime, this time directed towards one of its most critical disclosure elements, Item 303, the Management Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”). We reported last year on the SEC’s May 2, 2019 adoption of amendments to modernize and simplify Regulation S-K’s disclosure rules for reporting companies, investment advisors, and investment companies. The Regulation S-K amendments are expected to benefit investors by eliminating outdated and redundant disclosure and facilitating investor access to material information and ability to analyze it, and also benefit reporting companies, investment advisors and investment companies themselves by relieving them of filing obligations that provide little benefit to investors.

Both the 2019 and current Regulation S-K amendments are part of an ongoing SEC initiative to simplify and harmonize the patchwork of disclosure requirements across the entire securities regulatory regime for both registered and exempt securities offerings. *See, SEC Proposes Accredited Investor and Qualified Institutional Buyer Amendments Critical to Exempt Private Placements and Resales, December 26, 2019; SEC Seeks Public Comment on Revising and Harmonizing Securities Exempt Offering Regime, July 8, 2019; SEC Adopts Simplified Disclosure Requirements, April 30, 2019*, all available on our website at <https://kurtinlaw.com/articles-whitepapers/>.

### II. The January 30 Regulation S-K Proposed Amendments will:

- Eliminate Items 301 (Selected Financial Data) and 302 (Supplementary Financial Data). Both Items were identified by the SEC as requiring duplicative and non-material disclosure and undue compliance difficulty.
- Add a new Item 303(a), *Objective*, which will require an opening statement of the principle objectives of MD&A disclosure.

- Replace Item 303(a)(4), *Off-balance Sheet Arrangements*, with “principles-based” instruction to prompt registrants to discuss off-balance sheet results in the overall context of MD&A disclosure. Off-balance sheet arrangements, a staple of financial engineering and off-shore activity, have been on the SEC’s radar screen for some time. *See, Special Purpose Vehicles, Uses and Abuses, January 2020*, also available on our website.
- Eliminate Item 303(a)(5), *Tabular Disclosure of Contractual Obligations*, as overlapping with and redundant of information disclosed in financial statements and in promotion of the new, principles-based approach to MD&A.
- Add a new Item 303 requirement, *Critical Accounting Estimates*, to clarify and codify existing SEC guidance.
- Revise Item 303(b)’s interim MD&A requirement to allow flexibility in reporting by allowing reporting companies to compare their most recently completed quarter to either the prior year’s corresponding quarter (the current requirement) *or* to the immediately preceding quarter. Last year’s Regulation S-K amendments had amended Item 303 to permit a reporting company (other than in an initial public offering) to omit discussion of the earliest of the three fiscal years generally included in year-to-year comparison discussions if the company was required to provide that discussion in a prior filing. The 2019 Regulation S-K amendments also encouraged companies to use any presentation, including narrative format, that facilitated reader comprehension. The amendment included the proviso that a company omitting the earliest year discussion must identify where in the prior filing the discussion was made.
- The proposed Regulation S-K amendments, like those of 2019, also provide for corresponding amendment to Forms 20-F and 40-F.

### III. Implied Effect on Private Placement and Non-Reporting Company Activity

Although the proposed amendments are to Regulation S-K only, it is important to keep in mind the nature of the SEC’s effort to harmonize and simplify disclosure requirements across different regulatory regimes. Therefore, these changes to MD&A and Regulation S-K generally, like last year’s, may be expected to be reflected in amended regulation and practice for private placements and non-reporting company activity. For example, SEC Form 1-A, used for disclosure in offering circulars or private

placement memoranda under Regulation D (pursuant to its Rule 502(b)(2)) and Regulation A for offers and sales of securities exempt from Securities Act of 1933 section 5 registration, provides for an MD&A in its Item 9. We may expect to see Regulation D and A private placement MD&A offering circular/private placement memorandum disclosure influenced by and harmonized with these Regulation S-K amendments. *See, Raising Capital through Private Placements: Deal Points, January 2020*, also available on our website.

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