

SEC Issues Guidance on Revised MD&A Rules

January 27, 2020

Last week the SEC issued three new Compliance & Disclosure Interpretations (C&DIs) intended to give clarity to last spring's rule changes that allowed companies to omit discussion of the earliest of the three years in the MD&A under certain circumstances.

Among other things, the rule changes adopted by the SEC last year pursuant to the FAST Act (and discussed in our March 2019 [memo](#)) allow a company to omit discussion of the earliest of the three years in the MD&A if the company's prior filings with the SEC already contained such discussion and it is not necessary to understand the company's financial condition, changes in condition, and results of operations.

The new C&DIs clarify that when a company has omitted a discussion of the earliest of the three years in a filing, the required statement identifying the location of a discussion in a prior filing would not result in the prior discussion being incorporated by reference into the filing. Likewise, when a company updates an effective registration statement by filing a Form 10-K which omits the discussion of the earliest of the three years and includes a statement identifying the location of the prior discussion, the prior discussion would not be considered to be incorporated by reference into the registration statement. The new C&DIs also make clear that where a company believes a discussion of its earliest of three years is necessary to understand its financial condition, changes in condition, and results of operations, it may not omit the discussion pursuant to the new rules.

The new **C&DIs** are:

- **Question 110.02:** A registrant providing financial statements covering three years in a filing relies on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years and includes the required statement that identifies the location of such discussion in a prior filing. Does the statement identifying the disclosure in a prior filing incorporate such disclosure by reference into the current filing?

Answer: No. A statement merely identifying the location in a prior filing where the omitted discussion can be found does not incorporate such disclosure into the filing unless the registrant expressly states that the information is incorporated by reference. See Securities Act Rule 411(e) and Exchange Act Rule 12b-23(e).

- **Question 110.03:** May a registrant rely on Instruction 1 to Item 303(a) to omit a discussion of the earliest of three years from its current MD&A if it believes a discussion of that year is necessary?

Answer: No. Item 303(a) requires that the registrant provide such information that it believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. A registrant must assess its information about the earliest of three years and, if it is required by Item 303(a), include it in the current disclosure or expressly incorporate by reference its discussion from a previous filing.

- **Question 110.04:** A registrant has an effective registration statement that incorporates by reference its Form 10-K for the fiscal year ended December 31, 2018. In its Form 10-K for the fiscal year ended December 31, 2019, the registrant will omit the discussion of its results for the fiscal year ended December 31, 2017 pursuant to Instruction 1 to Item 303(a) and include a statement identifying the location of the discussion presented in its Form 10-K for the fiscal year ended December 31, 2018. The filing of the Form 10-K for the fiscal year ended December 31,

2019 will operate as the Section 10(a)(3) update to the registration statement. After the company files the Form 10-K for the fiscal year ended December 31, 2019, will the company's discussion of its results for the fiscal year ended December 31, 2017 be incorporated by reference in the registration statement?

Answer: No. The filing of the Form 10-K for the fiscal year ended December 31, 2019 establishes a new effective date for the registration statement. As of the new effective date, the registration statement incorporates by reference only the Form 10-K for the fiscal year ended December 31, 2019, which does not contain the company's discussion of results for the fiscal year ended December 31, 2017 unless, as indicated in Question 110.02, the information is expressly incorporated by reference.

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