



NASAA

April 28, 2020

By email to: rule-comments@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

**RE: File No. S7-01-20: Management's Discussion and Analysis,
Selected Financial Data, and Supplementary Financial Information**

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA"),¹ I am writing in response to U.S. Securities and Exchange Commission ("SEC" or the "Commission") Release No. 33-10750, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information* (the "Proposal"),² under which the Commission proposes to eliminate or change certain Regulation S-K disclosure requirements. NASAA opposes the elimination of Items 301 and 302 because the ability of investors to easily discern a five year trend in an issuer's performance, and to see an issuer's fourth quarter results, provide clear benefits that outweigh the undefined cost savings to issuers.

I. Items 301 and 302 Should Not Be Eliminated Because They Provide Important Financial Information in Easily Understandable Formats.

The Commission should not eliminate Item 301 or 302 because the manner in which information is presented under these requirements helps investors. Item 301³ requires issuers to disclose certain key financial data in an easily understood tabular format for the last five fiscal years (or longer if necessary to make the information not misleading). The required disclosures

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.sec.gov/rules/proposed/2020/33-10750.pdf>.

³ 17 CFR § 229.301.

include: net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock; and cash dividends declared per common share.⁴ Issuers also have the flexibility to include other metrics if doing so could enhance an investor’s understanding of the issuer’s business or financial condition.⁵ The SEC’s 2016 Concept Release on Regulation S-K explained how Item 301 is useful to investors and not duplicative of financial information required to be disclosed elsewhere.⁶ Item 302⁷ requires disclosure by most exchange-listed issuers⁸ of selected quarterly financial data for the past two years, including identification of any variances in this data from amounts previously reported. Item 302 information includes: net sales; gross profit; income (loss) from continuing operations, including on a per share basis; net income (loss); and net income (loss) on a per share basis and as attributable to the issuer.⁹

The Commission proposes to eliminate Items 301 and 302 in part because the underlying data is available elsewhere on EDGAR.¹⁰ The Proposal also states that the “incremental utility of having a full five years of selected financial information is not justified by the cost to prepare such disclosures.”¹¹ We respectfully disagree.

The Proposal assumes that all investors have the skills to navigate EDGAR effectively, and the time to search through years of disclosures and financial statements to compile the information currently provided under Items 301 and 302. They do not. Of particular concern is the adverse impact on retail investors, including those who continue to receive and review filings on paper. The Proposal would eliminate simple and convenient disclosures for investors in order to make

⁴ See Proposal at 14.

⁵ See Instruction No. 2 to Item 301.

⁶ See Concept Release: Business and Financial Disclosure Required by Regulation S-K, SEC Release No. 33-10064 (Apr. 13, 2016), available at <https://www.sec.gov/rules/concept/2016/33-10064.pdf>, at 87 (“Despite some overlap with current and prior financial statements, Item 301 disclosure can provide information that might not be available to investors for all five years. Specifically, retrospective changes to the annual financial statements would typically be reflected in the selected financial data table across all five years instead of the three years covered in the financial statements. For example, a registrant that retrospectively revises its annual financial statements to reflect discontinued operations typically may need to consider whether it should adjust years four and five in its selected financial data table in addition to the three most recent years covered in the annual audited financial statements. Item 301 disclosure reflecting the discontinued operations for these earlier two years would not be available in either the current or prior financial statements.”).

⁷ 17 C.F.R. § 229.302.

⁸ See Item 302(a)(5) (stating that it applies to certain issuers with securities registered pursuant to Sections 12(b) or 12(g) of the Securities Exchange Act of 1934 (the “Exchange Act”).

⁹ See Proposal at 22, nn. 51-52.

¹⁰ See *id.* at 18 (“We propose to eliminate Item 301 ... [because] the information required by Item 301 can be readily accessed and compiled through prior filings on EDGAR.”); and 26 (“We propose to eliminate Item 302(a) ... [because] most of the financial data required by Item 302(a) can be found in prior quarterly reports, which are readily available on EDGAR.”).

¹¹ *Id.* at 20.

filing burdens fractionally easier for certain issuers.¹² The balance of equities favors retaining this information for the benefit of investors.

The five-year tabular summary required by Item 301 is extremely useful. Other disclosures required by Regulation S-K require only three years of financial information. The additional two years of data required by Item 301 is particularly significant when a corporation changes its accounting standards or otherwise materially restates prior period financial results. Without Item 301, the impact of significant accounting changes or restatements could be obscured.

A five-year compilation of results also helps long-term value investors discern trends in an issuer's business, management performance, and financial health which can compel narrative disclosures. If a five-year summary shows a trend of weakening results, the issuer will face pressure to explain and address it. This pressure motivates management to explain and address performance trends and inures to the benefit of all investors. On the other hand, removing this information eases the pressure on issuers to explain results, and therefore weakens the management discipline created by strong disclosures.

Item 302 is similarly useful. Presenting eight quarters' worth of key financial metrics like net sales and gain (loss) from continuing operations affords investors a detailed look into the issuer's operations. Item 302 also fills a gap in the SEC disclosure regime, which does not otherwise require a separate report for an issuer's fourth quarter. Many investors find it very useful to see fourth quarter results disclosed clearly (rather than being forced to calculate these results by backing the first three quarters out of annual results). Indeed, the SEC admits that the inability to derive fourth quarter information accurately, especially in the case of a restatement, could negatively affect the decision making of even sophisticated investors.¹³ Yet, the SEC dismisses this known risk by theorizing, without support, that "the potential information loss from the elimination of Item 302(a) *might be mitigated* under MD&A's principles-based framework."¹⁴

II. The Proposal Does Not Offer Strong Reasons to Eliminate Items 301 and 302.

Against these clear investor benefits and risks, the reasons offered to eliminate Items 301 and 302 are not persuasive. The Proposal accepts claims from certain issuers, counsel and auditors that complying with Items 301 and 302 is overly burdensome.¹⁵ These arguments lack force because, with limited exceptions, Items 301 and 302 merely require issuers to arrange and present data they must already gather to prepare their financial results. Issuers have complied with these obligations for decades, and they have (or should have) robust procedures to calculate and verify financial data. Further, the Commission's recognition that financial data is now structured to meet

¹² As the Commission notes: Items 301 and 302(a) do not apply to smaller reporting companies; the requirements of Item 301 are limited for emerging growth companies; Item 302(a) does not apply to foreign private issuers; and Item 302(a) only applies to issuers who already have a class of securities registered under Section 12 of the Exchange Act. *See id.* at 14-15, 22-23.

¹³ *See id.* at 127.

¹⁴ *Id.* (emphasis added).

¹⁵ *See id.* at 15-17, nn. 23-34.

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eXtensible Business Reporting Language requirements¹⁶ makes clear that, in most cases, issuers must do all of the work necessary to identify and tag such data regardless of the requirements of Items 301 and 302. Against this, the Commission offers no estimate of anticipated cost savings. Given the lack of support for the Proposal's assumptions of cost savings, the most apparent benefit to issuers is not a reduction in disclosure burdens, but a reduction in the ability of investors to scrutinize issuers' results. Items 301 and 302 should not be eliminated because the only clear result is that the ability of investors to understand issuer financial disclosures will be diminished.

III. Conclusion.

For the reasons explained above, we encourage the Commission to retain Regulation S-K Items 301 and 302. The ability of investors to easily discern a five year trend in an issuer's performance, and to see an issuer's fourth quarter results, provide clear benefits that outweigh the undefined cost savings to issuers.

Thank you for considering these views. We look forward to continuing to work with the SEC on our shared mission of protecting investors. Should you have questions, please contact either the undersigned or NASAA's Executive Director, Joseph Brady, at (202) 737-0900.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Gerold', written over a horizontal line.

Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities

¹⁶

See id. at 18.