

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 211, 231, and 241

[Release Nos. 33-10751; 34-88094; FR-87]

Commission Guidance on Management’s Discussion and Analysis of Financial Condition and Results of Operations

AGENCY: Securities and Exchange Commission.

ACTION: Guidance.

SUMMARY: We are providing guidance on key performance indicators and metrics in Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”).

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Questions about specific filings should be directed to staff members responsible for reviewing the documents the company files with the Commission. For general questions about this release, contact Angie Kim, Special Counsel, at (202) 551-3430, Office of Rulemaking, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Guidance on Key Performance Indicators and Metrics

We are providing guidance on disclosure of key performance indicators and metrics in MD&A (the “Guidance”).¹ Item 303(a) of Regulation S-K requires disclosure of information not

¹ MD&A is required by Item 303 of Regulation S-K (Management's Discussion & Analysis of Financial Condition and Results of Operations) [17 CFR 229.303], Item 5 of Form 20-F (Operating and Financial Review and Prospects) [17 CFR 249.220f], and Item 9 of Form 1-A [17 CFR 239.90].

While this release refers primarily to Item 303 of Regulation S-K, it also is intended to apply to MD&A drafted pursuant to Item 5 of Form 20-F and Item 9 of Form 1-A. The disclosure requirements for Item 5 of Form 20-F (Operating and Financial Review and Prospects) are substantively comparable to the MD&A requirements under Item 303 of Regulation S-K. *See* International Disclosure Standards, Release No. 33-7745 (Sept. 28, 1999) [64 FR

specifically referenced in the item that the company believes is necessary to an understanding of its financial condition, changes in financial condition and results of operations.² The item also requires discussion and analysis of other statistical data that in the company’s judgment enhances a reader’s understanding of MD&A.³

When proposing the current MD&A framework, the Commission noted that “[f]or each business, there is a limited set of critical variables which presents the pulse of the business.”⁴ The Commission previously has emphasized that, when preparing MD&A, “companies should consider whether disclosure of all key variables and other factors that management uses to manage the business would be material to investors, and therefore required.”⁵ The Commission also previously stated that companies should identify and address those key variables and other qualitative and quantitative factors that are peculiar to and necessary for an understanding and

53900 (Oct. 5, 1999)], at 53904. The disclosure requirements for Item 9 of Form 1-A are also similar to the MD&A requirements under Item 303. *See* Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Release No. 33-9741 (Mar. 25, 2015) [80 FR 21805 (Apr. 20, 2015)], at 21830. Companies, including foreign private issuers, smaller reporting companies, and issuers relying on Regulation A, should consider this guidance based on their particular facts and circumstances.

² Item 303(a) of Regulation S-K [17 CFR 229.303(a)]. Concurrent with this Guidance we are proposing changes to Item 303. *See* Management’s Discussion & Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10750 (Jan. 30, 2020) (the “Companion Proposing Release”). In the Companion Proposing Release, we propose adding a new Item 303(a) to state the purposes of MD&A. Current Item 303(a) is proposed to be Item 303(b).

³ *See, e.g.*, Instruction 1 to Item 303(a) of Regulation S-K [17 CFR 229.303(a)]. In the Companion Proposing Release, we propose incorporating a portion of the substance of Instruction 1 into proposed Item 303(a).

⁴ *See* Proposed Amendments to Annual Report Form; Integration of Securities Act Disclosure Systems, Release No. 33-6176, (Jan. 15, 1980) [45 FR 5972 (Jan. 24, 1980)], at 5979-5980.

⁵ *See* Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operation, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056 (Dec. 29, 2003)], at 75060. Information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision. *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (“TSC Industries”) at 449 (further explaining that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information available). The definitions of “material” in Rule 12b-2 of the Exchange Act and Rule 405 of the Securities Act, are consistent with TSC Industries.

evaluation of the individual company.⁶ Such information could constitute key performance indicators and other metrics.

Some companies also disclose non-financial and financial metrics when describing the performance or the status of their business. Those metrics can vary significantly from company to company and industry to industry, depending on various facts and circumstances. For example, some of these metrics relate to external or macro-economic matters, some are company or industry specific, and some are a combination of external and internal information. Some companies voluntarily disclose specialized, company-specific sales metrics, such as same store sales or revenue per subscriber. Some companies also voluntarily disclose environmental metrics, including metrics regarding the observed effect of prior events on their operations.

We remind companies that, when including metrics in their disclosure, they should consider existing MD&A requirements⁷ and the need to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading.⁸ In this regard, a company should first consider the extent to which an existing regulatory disclosure framework applies, such as Generally Accepted Accounting Standards (“GAAP”)⁹ or, for “non-GAAP measures,”

⁶ *Id.* (quoting Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Release No. 33-6835 (May 18, 1989) [54 FR 22427 (May 24, 1989)], which quotes Management’s Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-6349 (Sept. 28, 1981) [*not published in the Federal Register*]).

⁷ See footnotes 2 and 3 above and corresponding text. The company should provide a narrative that enables investors to see a company “through the eyes of management,” so these metrics should not deviate materially from metrics used to manage operations or make strategic decisions.

⁸ See Rule 408(a) [17 CFR 230.408(a)] and Rule 12b-20 [17 CFR 240.12b-20].

⁹ This would include subsets of line items presented on the face or in the footnotes to the financial statements and ratios or statistical measures calculated using exclusively measures calculated or disclosed pursuant to GAAP. Here, we use the term GAAP to refer to the *FASB Accounting Standards Codification* or other comprehensive bases of accounting used in primary financial statements filed with the Commission.

Regulation G or Item 10 of Regulation S-K.¹⁰ In addition, the company should consider what additional information may be necessary to provide adequate context for an investor to understand the metric presented.¹¹ We would generally expect, based on the facts and circumstances, the following disclosures to accompany the metric:

- A clear definition of the metric and how it is calculated;
- A statement indicating the reasons why the metric provides useful information to investors; and
- A statement indicating how management uses the metric in managing or monitoring the performance of the business.

The company should also consider whether there are estimates or assumptions underlying the metric or its calculation, and whether disclosure of such items is necessary for the metric not to be materially misleading.

If a company changes the method by which it calculates or presents the metric from one period to another or otherwise, the company should consider the need to disclose, to the extent material: (1) the differences in the way the metric is calculated or presented compared to prior periods, (2) the reasons for such changes, (3) the effects of any such change on the amounts or

¹⁰ See Regulation G [17 CFR 244.100-244.102]. See also Item 10(e) of Regulation S-K. [17 CFR 229.10(e)]. Item 10(e)(4) of Regulation S-K states that, for purposes of Item 10(e), non-GAAP financial measures exclude operating and other statistical measures; and ratios or statistical measures calculated using exclusively one or both of (i) financial measures calculated in accordance with GAAP, and (ii) operating measures or other measures that are not non-GAAP financial measures. The Commission has stated that operating and other statistical measures such as unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers are not non-GAAP financial measures. See Conditions for Use of Non-GAAP Financial Measures, Release No. 33-8176 (Jan. 22, 2003) [68 FR 4819 (Jan. 30, 2003)].

¹¹ Examples of metrics to which this Guidance is intended to apply include, but are not limited to: operating margin; same store sales; sales per square foot; total customers/subscribers; average revenue per user; daily/monthly active users/usage; active customers; net customer additions; total impressions; number of memberships; traffic growth; comparable customer transactions increase; voluntary and/or involuntary employee turnover rate; percentage breakdown of workforce (e.g., active workforce covered under collective bargaining agreements); total energy consumed; and data security measures (e.g., number of data breaches or number of account holders affected by data breaches).

other information being disclosed and on amounts or other information previously reported, and (4) such other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects. Depending on the significance of the change(s) in methodology and results, the company should consider whether it is necessary to recast prior metrics to conform to the current presentation and place the current disclosure in an appropriate context.

Additionally, we remind companies of the requirement to maintain effective disclosure controls and procedures.¹² Effective controls and procedures are important when disclosing material key performance indicators or metrics that are derived from the company's own information. When key performance indicators and metrics are material to an investment or voting decision, the company should consider whether it has effective controls and procedures in place to process information related to the disclosure of such items to ensure consistency as well as accuracy.¹³

II. Codification Update

The "Codification of Financial Reporting Policies" announced in Financial Reporting Release 1 (April 15, 1982) [47 FR 21028] is updated by adding new Section 501.16, captioned

¹² See Rule 13a-15 and Rule 15d-15 [17 CFR 240.13a-15 and 17 CFR 240.15d-15]. Pursuant to Exchange Act Rules 13a-15 and 15d-15, a company's principal executive officer and principal financial officer must make certifications regarding the maintenance and effectiveness of disclosure controls and procedures. These rules define "disclosure controls and procedures" as those controls and procedures designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is (1) "recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms," and (2) "accumulated and communicated to the company's management ... as appropriate to allow timely decisions regarding required disclosure."

¹³ See *id.* As we have stated before, a company's disclosure controls and procedures should not be limited to disclosure specifically required, but should also ensure timely collection and evaluation of "information potentially subject to [required] disclosure," "information that is relevant to an assessment of the need to disclose developments and risks that pertain to the [company's] businesses," and "information that must be evaluated in the context of the disclosure requirement of Exchange Act Rule 12b-20." Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 33-8124 (Aug. 28, 2002) [67 FR 57275 (Sept. 9, 2002)].

“Additional Guidance on Key Performance Indicators and Metrics” to the Financial Reporting Codification and under that caption including the text in Section I of this release.

The Codification is a separate publication of the Commission. It will not be published in the Federal Register or Code of Federal Regulations.

III. Other Matters

Pursuant to the Congressional Review Act,¹⁴ the Office of Information and Regulatory Affairs has designated this guidance as not a “major rule,” as defined by 5 U.S.C. § 804(2).

List of Subjects in

17 CFR Parts 211, 231, and 241

Securities.

Amendments to the Code of Federal Regulations.

For the reasons set forth above, the Commission is amending title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 211 — INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

1. The authority citation for part 211 continues to read as follows:

Authority: 15 U.S.C. 77g, 15 U.S.C. 77s(a), 15 U.S.C. 77aa(25) and (26), 15 U.S.C. 78c(b), 17 CFR 78l(b) and 13(b), 17 CFR 78m(b) and 15 U.S.C. 80a-8, 30(e) 15 U.S.C. 80a-29(e), 15 U.S.C. 80a-30, and 15 U.S.C. 80a-37(a).

2. Part 211, Subpart A, is amended by adding Release No. FR-87 and the release date of January 30, 2020 to the list of interpretive releases.

¹⁴ 5 U.S.C. § 801 *et seq.*

PART 231 — INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

3. The authority citation for part 231 is added to read as follows:

Authority: 15 U.S.C. 77a *et seq.*

4. Part 231 is amended by adding Release No. 33-10751 and the release date of January 30, 2020 to the list of interpretive releases.

PART 241 — INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

5. The authority citation for part 241 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.*

6. Part 241 is amended by adding Release No. 34-88094 and the release date of January 30, 2020 to the list of interpretive releases.

By the Commission.

Dated: January 30, 2020.

Eduardo A. Aleman

Deputy Secretary