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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, 232, 239, 240, 249, 270, 274 and 275

[Release No. 33-10425; 34-81851; IA-4791; IC-32858; File No. S7-08-17]

RIN 3235-AM02

FAST Act Modernization and Simplification of Regulation S-K

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments based on the recommendations made in the staff's Report on Modernization and Simplification of Regulation S-K, as required by Section 72003 of the Fixing America's Surface Transportation Act. The proposed amendments are intended to modernize and simplify certain disclosure requirements in Regulation S-K, and related rules and forms, in a manner that reduces the costs and burdens on registrants while continuing to provide all material information to investors. The amendments are also intended to improve the readability and navigability of disclosure documents and discourage repetition and disclosure of immaterial information. To provide for a consistent set of rules to govern incorporation by reference and hyperlinking, we are also proposing parallel amendments to several rules and forms applicable to investment companies and investment advisers, including proposed amendments that would require certain investment company filings to be submitted in HyperText Markup Language ("HTML") format.

DATES: Comments should be received by [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment forms (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-08-17 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-08-17. This file number should be included in the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Shehzad Niazi, Daniel Morris, or Angie Kim, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430; Michael C. Pawluk or J. Matthew DeLesDernier, Investment Company Rulemaking Office, Division of Investment Management, at (202) 551-6792; U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing to amend Items 10, 102, 202, 303, 401, 405, 407, 501, 503, 512, 601, and 1100 of Regulation S-K under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"); Rules 405, 411, and 491 of Regulation C under the Securities Act; Rules 11, 102, 105, 303, and 406 of Regulation S-T under the Securities Act and Exchange Act; Forms S-1, S-3, S-6, S-11, N-14, S-4, F-1, F-3, F-4, F-7, F-8, F-10, F-80, SF-1, and SF-3 under the Securities Act; Rules 12b-13, 12b-23, 14a-101 (Schedule 14A), and 16a-3 under the Exchange Act; Forms 3, 4, 5, 8-A, 10, 20-F, 40-F, 8-K, 10-Q, 10-K, and 10-D under the Exchange Act; Rule 0-4 under the Investment Company Act of 1940 (the "Investment Company Act"); Forms N-1A, N-2, N-3, N-4, N-5, and N-6 under the Investment Company Act and Securities Act; Form N-CSR under the Investment Company Act and Exchange Act; and Rule 0-6 under the Investment Advisers Act of 1940 ("Investment Advisers Act"). The Commission is also

proposing to add new Item 105 to Regulation S-K and to remove Rule 12b-32 under the Exchange Act and Rules 8b-23, 8b-24, and 8b-32 under the Investment Company Act.

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I. INTRODUCTION

A. Background

We are proposing amendments to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms to implement Section 72003 of the Fixing America's Surface Transportation Act (the "FAST Act").[1] As required by Section 72003(c) of the FAST Act, the staff published its Report on Modernization and Simplification of Regulation S-K (the "FAST Act Report") on November 23, 2016.[2] Consistent with Section 72003, the FAST Act Report provided "specific and detailed recommendations on modernizing and simplifying the requirements in Regulation S-K in a manner that reduces the costs and burdens on companies while still providing all material information" and "[recommendations] on ways to improve the readability and navigability of disclosure and to discourage repetition and the disclosure of immaterial information."[3] Also consistent with Section 72003, the FAST Act Report reflected consultations with the Investor Advisory Committee ("IAC") and the Advisory Committee on Small and Emerging Companies.

This release proposes amendments based on the recommendations in the FAST Act Report. The proposed amendments largely implement these recommendations, as required by Section 72003(d) of the FAST Act. However, in some cases, and as discussed in more detail

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[1] Pub. L. No. 114-94, Sec. 72003, 129 Stat. 1312 (2015).

[2] *Report on Modernization and Simplification of Regulation S-K* (Nov. 23, 2016), *available at* https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf.

[3] *See* FAST Act § 72003(c).

below, we have chosen to alter or supplement the staff's previously recommended approach based on our consideration of the issues and the statutory mandate.[4] This release reflects perspectives developed during the staff's broader review of the Commission's disclosure regime. As part of that effort, the staff requested public input on how the disclosure system could be improved,[5] and the Commission issued a concept release on the business and financial disclosure requirements in Regulation S-K (the "Concept Release").[6]

In developing the proposed amendments, we considered the comment letters we received on the Concept Release;[7] the prior staff study of Regulation S-K (the "S-K Study") mandated by the Jumpstart Our Business Startups Act (the "JOBS Act");[8] the Commission's request for comment on the requirements relating to management, security holders, and corporate governance matters in Subpart 400 of Regulation S-K (the "Regulation S-K Subpart 400

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[4] The FAST Act Report presented recommendations for the Commission's consideration. The FAST Act Report also noted that many of the recommendations in the report were necessarily preliminary in nature and that ongoing outreach and study would be necessary in connection with any rulemaking to implement the recommendations. *See* FAST Act Report, *supra* note 2, at n.15.

[5] Comment letters related to this request are available at https://www.sec.gov/spotlight/disclosure-effectiveness.shtml. We refer to these letters throughout as "Disclosure Effectiveness" letters.

[6] *See Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)].

[7] Comment letters related to this request are available at https://www.sec.gov/comments/s7-06-16/s70616.htm.

[8] Pub. L. No. 112-106, Sec. 108, 126 Stat. 306 (2012). *See also* Rule 12b-2 under the Exchange Act [17 CFR 240.12b-2] and Rule 405 under the Securities Act [17 CFR 230.405]. Section 108 of the JOBS Act required the Commission to comprehensively evaluate its disclosure requirements to determine how they could be updated to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements for emerging growth companies ("EGCs"). The resulting recommendations are in the staff's Report on Review of Disclosure Requirements in Regulation S-K, *available at* https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

In connection with the S-K Study, we received public comments on regulatory initiatives to be undertaken in response to the JOBS Act. *See Comments on SEC Regulatory Initiatives Under the JOBS Act: Title I – Review of Regulation S-K, available at* http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk.shtml.

Release”);[9] and the FAST Act Report.[10] Throughout this release, we discuss these comments as further context for the proposed amendments.[11] The proposed amendments also reflect the Commission’s experience with Regulation S-K arising from the Division of Corporation Finance’s disclosure review program.

In this release, we focus on amendments to implement Section 72003(d) of the FAST Act. Accordingly, we are not at this time proposing amendments that extend substantially beyond the staff’s recommendations in the FAST Act Report.[12] We are continuing to consider potential additional changes to our disclosure regime in connection with recent proposing releases and requests for comment.[13] In addition, we are proposing parallel amendments to

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[9] *Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters*, Release No. 33-10198 (Aug. 25, 2016) [81 FR 59927 (Aug. 31, 2016)]. Comment letters related to this request are available at https://www.sec.gov/comments/s7-18-16/s71816.htm. We refer to these letters throughout as “Subpart 400” letters.

[10] Comment letters related to the FAST Act Report are available at https://www.sec.gov/comments/fast/fast.htm.

After the FAST Act Report was published, the staff updated the IAC on the recommendations included in the report at its December 8, 2016 meeting. *See Minutes of the IAC Meeting on December 8, 2016* available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac120816-minutes.htm. The staff did not discuss with the IAC or the ACSEC potential modifications to those recommendations as reflected in this release.

[11] Unless otherwise indicated, comment letters cited in this release are to the Concept Release.

[12] As discussed in relevant sections below, some of the proposed amendments in this release would apply to Form 20-F or Form 40-F. Form 20-F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. Form 40-F is the registration statement and annual report used by eligible Canadian issuers under the Multijurisdictional Disclosure System. While Section 72003 of the FAST Act is focused on Regulation S-K, we are proposing to make corresponding changes to the disclosure requirements applicable to foreign private issuers where Forms 20-F and 40-F include provisions that are substantially similar to those found in Regulation S-K.

[13] *See Request for Comment on Possible Changes to Industry Guide 3 (Statistical Disclosure by Bank Holding Companies)*, Release No. 33-10321 (Mar. 1, 2017) [82 FR 12757 (Mar. 7, 2017)]; Concept Release, *supra* note 6; Regulation S-K Subpart 400 Release, *supra* note 9; *Disclosure Update and Simplification*, Release No. 33-

several rules and forms applicable to investment companies and investment advisers to provide for a consistent set of rules governing incorporation by reference and hyperlinking, including proposed amendments that would require certain investment company filings to be submitted in HTML format.[14]

B. Overview of the Proposed Amendments

We are proposing amendments to several individual rules that would update, streamline, or otherwise improve our well-established and robust disclosure framework. These include proposed changes to:

- Description of Property (Item 102);
- Management's Discussion and Analysis (Item 303);
- Directors, Executive Officers, Promoters, and Control Persons (Item 401);
- Compliance with Section 16(a) of the Exchange Act[15] (Item 405);
- Outside Front Cover Page of the Prospectus (Item 501(b));[16]

10110 (Jul. 13, 2016) [81 FR 51607 (Aug. 4, 2016)] (the "Disclosure Update and Simplification Proposing Release"); *Amendments to Smaller Reporting Company Definition*, Release No. 33-10107 (Jun. 27, 2016) [81 FR 43130 (Jul. 1, 2016)]; and *Modernization of Property Disclosures for Mining Registrants*, Release No. 33-10098 (Jun. 16, 2016) [81 FR 41651 (Jun. 27, 2016)] (the "Modernization for Mining Registrants Proposing Release").

[14] The Commission has adopted requirements for exhibit hyperlinks and HTML format for operating companies. *See Exhibit Hyperlinks and HTML Format*, Release No. 33-10322 (Mar. 1, 2017) [82 FR 14130 (Mar. 17, 2017)] ("Exhibit Hyperlinks Adopting Release") (adopting amendments to require registrants to hyperlink to each exhibit listed in the exhibit index and, to enable the inclusion of hyperlinks, requiring registrants to submit all such filings in HTML format). Non-accelerated filers and smaller reporting companies ("SRCs") may continue to file in American Standard Code for Information Interchange ("ASCII") until September 1, 2018 and are therefore not required to include exhibit hyperlinks until that date.

[15] 15 U.S.C. 78a *et seq*.

[16] *See* proposed amendments to Item 501(b)(1), (b)(3) and (b)(4).

- Risk Factors (Item 503(c));
- Plan of Distribution (Item 508);[17]
- Material Contracts (Item 601(b)(10)); and
- Various rules related to incorporation by reference.

Other proposed amendments would update some of our rules to account for developments since their adoption or last amendment. These include proposed changes to Corporate Governance (Item 407), Outside Front Cover Page of the Prospectus (Item 501(b)(10)), and Undertakings (Item 512). Some of the proposed amendments would simplify disclosure or the disclosure process. These include proposed changes to Management's Discussion and Analysis (Item 303(a)) that would allow for flexibility in discussing historical periods and the addition of new subparagraphs to Exhibits (Item 601) to permit omission of portions of exhibits that do not contain material information.

Some of our proposed amendments would require additional disclosure or incorporation of new technology. These include proposed changes to:

- Outside Front Cover Page of the Prospectus (Item 501(b)(4));
- Description of Registrant's Securities (Item 601(b)(4));
- Subsidiaries of the Registrant (Item 601(b)(21)(i)); and
- Various regulations and forms to require all of the information on the cover pages of some Exchange Act forms to be tagged in Inline XBRL format.

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[17] Our proposals would amend Rule 405 and Rule 491.

We discuss the proposed amendments generally in the order that each Item appears in Regulation S-K; however, we have consolidated the discussion of the rules and item requirements related to incorporation by reference. We have also consolidated our discussion of rules requiring the incorporation of new technology.

II. PROPOSED AMENDMENTS

A. Description of Property (Item 102)

Item 102 requires disclosure of the location and general character of the principal plants, mines, and other materially important physical properties of the registrant and its subsidiaries.[18] Instruction 1 to Item 102 states that registrants must disclose such information as reasonably will inform investors as to the suitability, adequacy, productive capacity, and extent of utilization of the facilities by the registrant.[19] Instruction 2 provides that, in determining whether properties are material to an understanding of the registrant's business taken as a whole, registrants should take into account both quantitative and qualitative factors.[20]

Currently, Item 102 specifies disclosure of "principal" plants, mines, and other "materially important" physical properties. The staff has observed, however, that the item may

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[18] Item 102 of Regulation S-K [17 CFR 229.102].

[19] Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required. *See* Instruction 1 to Item 102 of Regulation S-K.

[20] Disclosure specific to the mining, oil and gas, and real estate industries is outside the scope of this release. Instructions 3, 5, and 7 apply to the mining industry. The Commission has separately proposed revisions to the property disclosure requirements for mining registrants. *See Modernization for Mining Registrants Proposing Release*, *supra* note 13. Instructions 4, 6, and 8 apply to the oil and gas industry. The Commission considered disclosure specific to the oil and gas industry in 2008. *See Modernization of Oil and Gas Reporting*, Release No. 33-8995 (Dec. 31, 2008) [74 FR 2158 (Jan. 14, 2009)]. Instruction 9 applies to the real estate industry.

elicit disclosure that is not material.[21] For example, some registrants—such as those in the services or information technology industry—may not have material physical properties, and accordingly, these registrants tend to disclose information about their corporate headquarters, office space, and other facilities in response to this item. To address this concern, in the FAST Act Report, the staff recommended that the Commission consider revising Item 102 to require a description of property only to the extent that physical properties are material to the registrant's business.[22]

Similarly, several commenters stated that Item 102 is not relevant to all registrants or can result in immaterial disclosure.[23] Two of these commenters noted that, if material to a registrant's business, Item 303, Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"),[24] would require a discussion of the importance of a property or facility and, in these instances, Item 102 may result in duplicative disclosure.[25]

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[21] *See* FAST Act Report, *supra* note 2, at Recommendation B.1. *See also* Concept Release, *supra* note 6, at Section IV.A.6.b and SEC Staff's *Report of the Task Force on Disclosure Simplification* (Mar. 5, 1996) *available at* https://www.sec.gov/news/studies/smpl.htm.

[22] FAST Act Report, *supra* note 2, at Recommendation B.1.

[23] *See, e.g.*, Letters from Ernst & Young (Sept. 11, 2012) [S-K Study letter] ("Ernst & Young 1"); U.S. Chamber of Commerce (July 29, 2014) [Disclosure Effectiveness letter] ("Chamber 1"); Society of Corporate Secretaries and Governance Professionals (Sept.10, 2014) [Disclosure Effectiveness letter]("Society of Corporate Secretaries"); Shearman & Sterling LLP (Nov. 26, 2014) [Disclosure Effectiveness letter] ("Shearman 1") (stating that disclosure of physical properties does not, in most cases, provide investors meaningful information, particularly for registrants not engaged in manufacturing); Allstate Insurance Company (July 1, 2016) ("Allstate"); Fenwick West LLP (Aug. 1, 2016) ("Fenwick"); U.S. Chamber of Commerce (July 20, 2016) ("Chamber 2"); Corporate Governance Coalition for Investor Value (July 20, 2016) ("CGCIV"); Securities Industry and Financial Markets Association (July 21, 2016) ("SIFMA"); Ernst & Young (July 21, 2016) ("Ernst &Young 3"); and Davis Polk & Wardwell LLP (July 22, 2016) ("Davis Polk 1").

[24] 17 CFR 229.303.

[25] *See* Letters from Chamber 1 and Society of Corporate Secretaries.

A number of commenters also supported revising Item 102 to be more principles-based or require disclosure only when property is material.[26] One of these commenters asserted that the lack of a materiality overlay in Instruction 2 to Item 102 results in immaterial disclosure.[27] Another commenter noted different triggers for disclosure in Item 102, such as the item's reference to "materially important" physical properties and "major" encumbrance.[28] This commenter suggested harmonizing these and similarly varied formulations to lessen ambiguity in their application.[29]

A few commenters, however, suggested retaining this item in its current form,[30] with one commenter noting the importance of this disclosure for mining companies.[31] Additionally, two commenters recommended expanding the item to include additional disclosure.[32] One of these commenters recommended disclosure of risks resulting from the potential lack of availability and

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[26] *See, e.g.*, Letters from Allstate; National Association of Real Estate Investment Trusts (July 21, 2016); Fenwick; Davis Polk 1; FedEx Corporation (July 21, 2016) ("FedEx"); Chamber 2; and CGCIV (both the Chamber 2 and CGCIV letters recommended eliminating this disclosure requirement except to the extent property disclosure is material or is necessary to make other disclosures not misleading and stated that, if this disclosure requirement is retained, it should not be expanded and the Commission should clarify that for registrants who do not have material physical properties, disclosure about their corporate headquarters, office space, and other facilities is optional, not required).

[27] *See* Letter from Fenwick.

[28] *See* Letter from American Bar Association (Mar. 6, 2015) [Disclosure Effectiveness letter] ("ABA").

[29] *Id.*

[30] *See, e.g.*, Letters from US SIF: The Forum for Sustainable and Responsible Investment (Sept., 18, 2014) [Disclosure Effectiveness letter] ("US SIF 1"); US SIF: The Forum for Sustainable and Responsible Investment (July, 14, 2016) ("US SIF 2"); Elise J. Bean (July 6, 2016) ("E. Bean"); and CFA Institute (Oct. 6, 2016) ("CFA Institute").

[31] *See* Letter from US SIF 2.

[32] *See* Letters from Stephen P. Percoco (July 24, 2016) ("S. Percoco") and Sen. Feinstein, et al (Feb. 27, 2017) ("Sen. Feinstein, et al").

rising cost of properties.[33] The other commenter recommended property disclosure specific to the manufacturing industry, including manufacturing locations that promote and retain jobs within the United States. This commenter stated that enhanced disclosures would inform investors about the benefits of manufacturing in the United States.[34]

Consistent with several commenters' suggestions and the staff's recommendation in the FAST Act report, we are proposing to revise Item 102 to emphasize materiality. While the FAST Act Report recommended amending Item 102 to require disclosure only to the extent physical properties are material to the registrant's business, our proposals would require this disclosure to the extent material to the registrant. Our proposal is intended to encompass properties that are material to the registrant, which would include those properties that are material to the registrant's business.[35] We are also proposing to clarify that the disclosure required under Item 102 should focus on physical properties that are material to the registrant and may be provided on a collective basis, if appropriate.

As suggested by one commenter, we are also proposing to harmonize the various non-industry-specific triggers for disclosure in Item 102.[36] For example, we are proposing to replace the references to "major" encumbrances and "materially important" physical properties in Item 102 with references to a materiality threshold. By using a consistent materiality threshold, we

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[33] *See* Letter from S. Percoco.

[34] *See* Letter from Sen. Feinstein, et al.

[35] We believe this approach is clearer and does not inadvertently omit disclosures that would be material to the registrant, but not its ongoing business, for example properties that had value that was material to the registrant but that were no longer important to its operations.

[36] *See* Letter from ABA.

intend to facilitate application of the proposed amendments. In light of the particular significance of this disclosure for registrants in the mining, real estate, and oil and gas industries, we are not proposing to modify any of the instructions of Item 102 specific to those industries in this release.[37]

In the FAST Act Report, the staff also recommended that the Commission consider combining the description of material physical properties with the description of business in Item 101(c) of Regulation S-K.[38] A number of commenters on the Concept Release also recommended incorporating Item 102 into the broader description of business disclosure requirements in Item 101.[39] Several of these commenters recommended revising Item 101 to require broad disclosure of a registrant's resources or assets, whether physical or otherwise, that are critical to a registrant's business.[40] One of these commenters stated that the specific requirements of Item 102 are obsolete, but that a description of physical properties in Item 101 would remain relevant to certain types of registrants.[41]

We have considered the recommendations of the staff and commenters but are not proposing to combine Item 102 and Item 101. We believe that any effort to combine these items

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[37] For example, Instruction 3 of Item 102 refers to "major significance" and is specific to the mining industry. The Modernization for Mining Registrants Proposing Release proposes to eliminate this instruction. *See supra* note 13.

[38] Item 101(c) of Regulation S-K [17 CFR 229.101(c)]. *See* FAST Act Report, *supra* note 2, at Recommendation B.1.

[39] *See*, *e.g.*, Letters from Ernst & Young 3; SIFMA; New York State Society of Certified Public Accountants (July 19, 2016) ("NYSSCPA"); Davis Polk 1; General Motors Company (Sept. 30, 2016) ("General Motors"); and Financial Executives International (Oct. 3, 2016) ("Financial Executives International").

[40] *See* Letters from Ernst & Young 3; Davis Polk 1; General Motors; and Financial Executives International.

[41] *See* Letter from Davis Polk 1.

should follow a broader evaluation of how the disclosure should address material core assets, whether physical or otherwise, including material resources such as human capital or intellectual property. Such a broader inquiry was not included in the FAST Act Report and is therefore outside the scope of this release.

Request for Comment

1. Should we revise Item 102 to clarify that a description of property is required only to the extent that physical properties are material to the registrant and may be provided on a collective basis, if appropriate, as proposed? Under what circumstances is the flexibility to provide property disclosure on a collective basis useful (*e.g.*, information about the percentage of material properties within and outside the United States)?
2. Should we harmonize non-industry-specific disclosure thresholds by replacing them with a materiality threshold as proposed?
3. The S-K Study recommended that, for businesses that have material properties, disclosure requirements could be refocused on material facts about those properties that would inform investors about the significance of the property to the business, including uncertainties in connection with these properties.[42] Should Item 102 require additional

[42] *See* S-K Study at pp. 99 – 100 (recommending that "[f]or businesses that do have properties that are material, disclosure requirements could be refocused on material facts about those properties that would inform investors about the significance of the property to the business and any trends or uncertainties in connection with that property, rather than requiring a list of locations, capacity and ownership. Changes in the way that businesses operate may also make other disclosures relevant that are not expressly addressed under current requirements. For example, requirements could be more specific as to additional disclosure that would be necessary where a business relies heavily on intellectual property owned by a third party or relies on service agreements with third parties to perform necessary business functions.").

disclosure about material properties, including uncertainties such as information about properties that are located near designated areas where natural disasters are more likely to occur? If so, what should be required and why? Would this elicit more meaningful disclosure or would this duplicate disclosure in MD&A?

B. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)[43]

1. Year-to-Year Comparisons (Instruction 1 to Item 303(a))

Item 303(a) requires registrants to discuss their financial condition, changes in financial condition, and results of operations.[44] Instruction 1 to Item 303(a) states that the discussion and analysis shall be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition, and results of operations. This instruction also provides that, generally, the discussion shall cover the three-year period covered by the financial statements and either use year-to-year comparisons or any other formats that in the registrant's judgment would enhance a reader's understanding. The instruction states that reference to the five-year selected financial data may be necessary where trend information is relevant.

In the FAST Act Report, the staff recommended that we consider revising Item 303(a) to clarify that a registrant need only provide a period-to-period comparison for the two most recent

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[43] After consideration of the staff's recommendation C.2. in the FAST Act Report, we are not, proposing to eliminate or revise the table of contractual obligations. *See* FAST Act Report, *supra* note 2, at n.15. *See also* letter from Jack Ciesielski (Dec. 12, 2016) [FAST Act Letter] (opposing the staff's recommendation to delete or revise the table of contractual obligations).

[44] Item 303(a) of Regulation S-K [17 CFR 229.303(a)].

fiscal years covered by the financial statements and may hyperlink to the prior year's annual report for the earlier of the year-to-year comparisons.[45] Many commenters on the Concept Release recommended modifying Item 303 to reduce duplicative disclosure, although these commenters recommended simply eliminating the earlier of the year-to-year comparisons.[46] A number of these commenters stated that this discussion is readily available in a registrant's prior year annual report on EDGAR.[47] Two of these commenters stated that repetition of the earlier of the year-to-year comparisons could distract investors from new, material information and result in confusion.[48] A few of these commenters recommended requiring the earlier of the year-to-year comparisons only if there is a significant trend that is discernible through a multiple year-to-year comparison[49] or if prior results have been restated.[50]

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[45] *See* FAST Act Report, *supra* note 2, at Recommendation C.1.

[46] *See, e.g.*, Letters from Ernst & Young 1 (stating that the existing requirements in Item 303 should be sufficient to result in a comprehensive discussion of a three-year trend without a year-to-year comparison); Chamber 1; Society of Corporate Secretaries (also stating that the existing requirements in Item 303 are sufficient to elicit a discussion of trends over the relevant three-year period, if such a trend exists and is material); IBM Corporation (Aug. 7, 2014) [Disclosure Effectiveness letter]; Arthur J. Radin (May 29, 2015) [Disclosure Effectiveness letter] ("A. Radin 1"); Arthur J. Radin (July 5, 2016) ("A. Radin 2"); UnitedHealth Group Inc. (July 21, 2016) ("United Health"); SIFMA; Ernst & Young (Nov. 20, 2015) [Disclosure Effectiveness letter] ("Ernst &Young 2"); Ernst & Young 3; PNC Financial Services Group (July 21, 2016) ("PNC"); Investment Program Association (July 21, 2016) ("Investment Program Association"); Prologis Inc. (July 21, 2016) ("Prologis"); Allstate; Davis Polk 1; S. Percoco; Fenwick; NYSSCPA; Institute of Management Accountants; Chamber 2; FedEx; CGCIV; Northrop Grumman Corporation (Sept. 27, 2016); General Motors; and Financial Executives International.

[47] *See, e.g.*, Letters from A. Radin 1 and A. Radin 2; Ernst &Young 3; PNC; Prologis; Allstate; Fenwick; NYSSCPA; Chamber 2; FedEx; CGCIV; Investment Program Association; General Motors; and Financial Executives International.

[48] *See* Letters from Chamber 1; Chamber 2; and CGCIV.

[49] *See* Letters from SIFMA and PNC.

[50] *See* Letter from S. Percoco.

Some of the commenters who suggested eliminating the earlier of the year-to-year comparisons recommended allowing registrants to hyperlink to the filing with the earlier of the year-to-year comparisons.[51] One commenter opposed a requirement to hyperlink to the prior filing, stating that EDGAR is sufficiently user-friendly for investors to readily obtain the relevant report.[52] Another commenter, however, disagreed with eliminating the requirement to include the earlier of the year-to-year comparisons stating that this would require investors to look for the information elsewhere.[53]

We are proposing to amend Item 303 to eliminate discussion of the earliest year in some situations.[54] Under the amendments we propose today, when financial statements included in a filing cover three years, discussion about the earliest year would not be required if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations, and (ii) the registrant has filed its prior year Form 10-K[55] on EDGAR containing MD&A of the earliest of the three years included in the financial statements of the current filing. By allowing registrants to eliminate MD&A disclosure about the

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[51] *See, e.g.*, Letters from United Health; Investment Program Association; Allstate; and General Motors.

[52] *See* Letter from Fenwick.

[53] *See* Letters from CFA Institute (Nov. 12, 2014 [Disclosure Effectiveness letter] and Oct. 6, 2016).

[54] Our proposed amendments to Item 303(a)(3) would not affect SRCs, as SRCs may limit their disclosure to the two-year period covered by their financial statements. *See* Instruction 1 to Item 303(a) of Regulation S-K. *See also* Rule 12b-2 under the Exchange Act and Rule 405 under the Securities Act.

Similarly, our proposed amendments would not affect EGCs that provide two years of audited financial statements. EGCs are only required to provide two years of audited financial statements in an initial public offering of common equity securities and may limit their MD&A to only those audited periods presented in the financial statements. Pub. L. No. 112-106, Sec. 102(b)-(c), 126 Stat. 306 (2012). *See also* Instruction 1 to Item 303(a) of Regulation S-K.

[55] 17 CFR 249.310.

earliest year in these situations, our proposals are intended to discourage repetition of disclosure that is no longer material, which we believe would further our mandate under the FAST Act to modernize and simplify Regulation S-K in a manner that reduces costs and burdens on companies while still providing all material information.

Our proposed amendments to Item 303(a) are consistent with our existing interpretive guidance on MD&A. In the 2003 MD&A Interpretive Release, the Commission stated that, in preparing MD&A, companies should evaluate issues presented in previous periods and consider reducing or omitting discussion of those that may no longer be material or helpful, or revise discussions where a revision would make the continuing relevance of an issue more apparent.[56] The Commission also encouraged companies and management to take a "fresh look" at MD&A with a view to enhancing its quality.[57] The Commission observed that the effectiveness of MD&A decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information.[58] In furtherance of this prior interpretive guidance, our proposals are intended to encourage companies to re-evaluate disclosures in their prior year MD&A and take a "fresh look" to determine whether such disclosure remains material.

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[56] *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)] ("2003 MD&A Interpretive Release").

[57] *Id.*

[58] *Id. See also Basic, Inc., v. Levinson*, 485 U.S. 224 (1998) at 231 quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) at 448-449.

To this end, we are not proposing the staff's recommendation in the FAST Act Report to hyperlink to the prior year's annual report for the earlier of the year-to-year comparison. We believe that encouraging companies to take a "fresh look" at their prior year MD&A to determine whether it remains material and eliminating disclosure of the earliest of the three years when specified conditions are met, rather than hyperlinking to disclosure that may no longer be material, would more effectively achieve our FAST Act mandate to reduce the costs and burdens on companies while continuing to provide all material information.[59]

Our proposals would also eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a). Instruction 1 provides that, where trend information is relevant, reference to the five-year selected financial data in Item 301 may be necessary. Because disclosure requirements for liquidity, capital resources, and results of operations already require trend disclosure,[60] we are proposing to simplify Instruction 1 by eliminating the reference to trend information. This proposed amendment is intended to eliminate duplication and is not intended to discourage registrants from providing trend disclosure in MD&A.

We are also proposing to simplify Instruction 1 to Item 303(a) to emphasize that registrants may use any presentation that, in the registrant's judgment, would enhance a reader's understanding. Instruction 1 currently specifies that the discussion cover the three-year period

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[59] We also are mindful that a number of registrants with segments or different lines of business may present their MD&A by segment or line of business. In these instances, numerous hyperlinks in MD&A may fragment readability.

[60] *See* Item 303(a)(1), 303(a)(2)(ii) and 303(a)(3)(ii) of Regulation S-K [17 CFR 229.303(a)(1), (a)(2)(ii), (a)(3)(ii)].

covered by the financial statements and use year-to-year comparisons or any other format that, in the registrant's judgment, would enhance a reader's understanding. Although the staff has observed that almost all registrants provide year-to-year comparisons,[61] we believe that registrants may, in some cases, determine that a narrative discussion for some or all of the years in the three-year period is a more appropriate format. For instance, in a situation where some information about the earliest year in a three-year period is needed because it remains material to an understanding of the registrant's financial condition, a registrant may decide that narrative disclosure about the earliest year and a year-to-year comparison for the two most recent years in the three-year period is appropriate. The proposed amendments underscore our intent to allow registrants to tailor the presentation of their disclosure to reflect their varying circumstances, provided that registrants continue to disclose the information required by Item 303.[62]

Request for Comment

4. Should we revise Item 303 as proposed?
5. Should we expand the proposal, with similar conditions, to other forms such as Form S-1[63] or Form 8-K?[64]
6. Instead of allowing registrants to eliminate the earliest of the three years of MD&A in some situations, should we retain the earliest year requirement and instead amend

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[61] *See* Concept Release, *supra* note 6, at n.350 and accompanying text.

[62] *See* 2003 *MD&A Interpretive Release*, *supra* note 53.

[63] 17 CFR 239.11.

[64] 17 CFR 249.308.

Item 303 to allow registrants to hyperlink to the prior year's annual report for that disclosure in lieu of repeating the disclosure in the current year's report?

7. Should we include additional conditions on allowing registrants to exclude the earliest of the three years or provide guidance on when a discussion of the earliest of the three years would be material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations? For example, should we not allow registrants to exclude discussion of the earliest year if there has been a material change to either of the two earlier years due to a restatement or a retrospective adoption of a new accounting principle?
8. Should we revise Instruction 1 to Item 303(a) as proposed to eliminate the reference to year-to-year comparisons? Would eliminating that reference encourage registrants to use a different presentation? Alternatively, should we retain the references to year-to-year comparisons and revise the instruction to identify specific alternatives to year-to-year comparisons? If so, what alternatives should we include?
9. Should we eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a) as proposed? Would there be a significant impact on the total mix of information available? Would eliminating this reference discourage registrants from providing trend disclosure in their MD&A?

2. Application to Foreign Private Issuers

The disclosure requirements for Item 5 of Form 20-F[65] (Operating and Financial Review and Prospects) are substantively comparable to the MD&A requirements under Item 303 of Regulation S-K.[66] To maintain a consistent approach to MD&A for domestic registrants and foreign private issuers, we are proposing changes to Form 20-F that conform to our proposed amendments to Instruction 1 to Item 303(a). Accordingly, our proposals would amend the instructions to Item 5 of Form 20-F to provide that, when financial statements included in a filing cover three years, discussion about the earliest year would not be required if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations and (ii) the registrant has filed its prior year Form 20-F on EDGAR containing Item 5 disclosure of the earliest of the three years included in the financial statements of the current filing. Similar to our proposals for Item 303, we are proposing to amend the instructions to Item 5 of Form 20-F to emphasize that registrants may use any presentation that, in the registrant's judgment, would enhance a reader's understanding.

We are not proposing similar changes to Form 40-F.[67] Form 40-F generally permits Canadian issuers to use Canadian disclosure documents to satisfy the Commission's registration

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[65] 17 CFR 249.220f.

[66] When the Commission revised the wording of Item 5 of Form 20-F in 1999, the adopting release noted that the requirements correspond with Item 303 of Regulation S-K. *See International Disclosure Standards*, Release No. 33-7745 (Sept. 28, 1999) [64 FR 53900 (Oct. 5, 1999)], at 53904.

[67] 17 CFR 249.240f.

and disclosure requirements. As a result, the MD&A contained in Form 40-F is largely prepared in accordance with Canadian disclosure standards.

Request for Comment

10. Should we make corresponding changes to the instructions to Item 5 in Form 20-F as proposed? Why or why not? Are there any unique considerations with respect to foreign private issuers in this context?
11. Should we include additional conditions on allowing registrants to exclude the earliest of the three years or provide guidance on when a discussion of the earliest of the three years would be material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations when providing Item 5 disclosure on Form 20-F? For example, should we not allow registrants to exclude discussion of the earliest year if there has been a material change to either of the two earlier years due to a restatement or a retrospective adoption of a new accounting principle?
12. Should we make corresponding changes to Form 40-F? Why or why not?
13. Would the proposed amendments conflict with home-country requirements in some jurisdictions? If so, please explain.

C. Management, Security Holders and Corporate Governance

1. Directors, Executive Officers, Promoters, and Control Persons (Item 401)

Item 401[68] requires disclosure of identifying and background information about a registrant's directors, executive officers, and significant employees.[69] The information required by Item 401 must be included in several of the Commission's disclosure forms, including Part III of an annual report on Form 10-K. General Instruction G of Form 10-K allows Part III disclosure to be incorporated into the Form 10-K by reference to the registrant's definitive proxy or information statement.[70]

As an alternative to incorporating all of the Part III disclosure by reference to a definitive proxy or information statement, Instruction 3 to Item 401(b) allows disclosure of information about executive officers required under Item 401 to be included in Part I of Form 10-K. If a registrant elects to follow this instruction, it is not required to repeat that information in its definitive proxy or information statement.

This instruction was introduced in 1978, when the executive officer and director disclosure requirements were moved from separate parts of Form 10-K into what was then

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[68] 17 CFR 229.401.

[69] Item 401 of Regulation S-K [17 CFR 229.401] was adopted in 1982 as part of the Commission's integrated disclosure initiative, although similar requirements can be traced back to Schedule A of the Securities Act. *See Adoption of Integrated Disclosure System*, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380 (Mar. 16, 1982)] (the "Integrated Disclosure System Adopting Release"). *See also* Securities Act, Schedule A, Paragraph 4 [15 U.S.C. 77aa(4)].

[70] General Instruction G.3 allows the information required by Item 401, along with other items required by Part III of Form 10-K, to be incorporated by reference from the registrant's proxy statement if it is filed with the Commission within 120 days after the end of the fiscal year covered by the Form 10-K.

Item 3 of Regulation S-K.[71] The instruction was intended to allow registrants to continue the practice of disclosing information about their executives in Form 10-K while incorporating disclosure about directors and other matters by reference to their definitive proxy or information statement.[72]

As the staff observed in the FAST Act Report, the instruction's location may cause confusion because it is included under paragraph (b), despite the fact that other paragraphs of Item 401 also require disclosure about executive officers.[73] Although Instruction 3 refers to "this Item" (rather than to paragraph (b) narrowly), the staff issued interpretive guidance stating that disclosure of the business experience of executive officers pursuant to Item 401(e) need not be duplicated in proxy statements if it is already presented in Part I of Form 10-K.[74]

To eliminate any confusion arising from the current location of the instruction, we are proposing to clarify the instruction by moving it from Item 401(b) and making it a general instruction to Item 401. The amended instruction is intended to clarify its application to any disclosure about executive officers required by Item 401. We are also proposing to revise the required caption for the disclosure if it is included in Part I of Form 10-K to reflect a "plain

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[71] *See Uniform and Integrated Reporting Requirements*, Release No. 33-5949 (July 28, 1978) [43 FR 34402 (Aug. 3, 1978)].

[72] *Id.* At the time, Part I of Form 10-K required disclosure regarding executive officers of the registrant and Part II required disclosure about directors. Registrants could exclude the Part II information if it would be included in the registrant's proxy statement.

[73] FAST Act Report, *supra* note 2, at Recommendation D.1.

[74] *See* Regulation S-K Compliance and Disclosure Interpretation 116.02, *available at* https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm (last updated July 26, 2016). General Instruction G to Form 10-K also refers generally to the "information regarding executive officers required by Item 401" when discussing the accommodation provided in Instruction 3 to Item 401(b).

English" approach. The required caption would be "Information about our Executive Officers" instead of "Executive officers of the registrant."

Request for Comment

14. Should we amend Instruction 3 to Item 401(b) as proposed?
15. The proposed instruction would apply to all of the disclosure about executive officers required by Item 401. Should we limit this instruction to only certain paragraphs of Item 401, such as paragraphs (b) and (e) but exclude paragraph (f)?[75]
16. Where a registrant relies on General Instruction G to forward incorporate by reference to its definitive proxy or information statement, is there other Part III disclosure about executive officers that we should specify need not be duplicated in the proxy or information statement if it is already presented in Part I of Form 10-K? For example, should we specify that disclosure about transactions with executive officers pursuant to Item 404 does not need to be duplicated in the proxy or information statement if it is already disclosed in Part I of Form 10-K?
17. Instead of clarifying how Instruction 3 to Item 401(b) applies, should we require disclosure about executive officers to be included in a registrant's Form 10-K filing, so that it is easier to locate?[76] Alternatively, should we require all Item 401 disclosure to be

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[75] Item 401(b) (Identification of executive officers); Item 401(e) (Business experience) and Item 401(f) (Involvement in certain legal proceedings).

[76] *See* Letter from Davis Polk (Oct. 31, 2016) [Subpart 400 letter] ("Davis Polk 2") (stating that requiring disclosure about executive officers in Form 10-K would make it easier to find and would be more appropriate because shareholders "are not generally asked to vote on matters related to a registrant's executive officers other than with respect to executive compensation, and that information is provided in the proxy statement").

included in a registrant's proxy or information statement instead of its Form 10-K if the registrant is required to file a proxy or information statement?[77]

2. Compliance with Section 16(a) of the Exchange Act (Item 405)

Section 16(a) of the Exchange Act requires officers, directors, and specified types of security holders to report their beneficial ownership of a registrant's equity securities using forms prescribed by the Commission.[78] Item 405[79] requires registrants to disclose each reporting person[80] who failed to file on a timely basis Section 16 reports during the most recent fiscal year or prior fiscal years.[81] The disclosure is required under the caption "Section 16(a) Beneficial Ownership Reporting Compliance." Rule 16a-3(e) requires reporting persons to furnish a duplicate of those Section 16 reports to the registrant.[82] Item 405(a) states that registrants shall

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[77] *See* Letter from Ernst & Young LLP (Nov. 30, 2016) [Subpart 400 letter] (recommending that all Item 401 disclosure be required in a registrant's proxy or information statement because splitting that disclosure is "not conducive to investors assessing the diversity and complementary mix of experience of the board in conjunction with that of executive officers").

[78] *See* Form 3, Form 4, and Form 5.

[79] 17 CFR 229.405.

[80] Item 405(a)(1) of Regulation S-K [17 CFR 229.405(a)(1)] defines a "reporting person" as "each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to Section 12 of the Exchange Act, or any other person subject to Section 16 of the Exchange Act with respect to the registrant because of the requirements of Section 30 of the Investment Company Act."

[81] Item 405 was initially proposed in 1988 in an attempt to reduce the high delinquency rate for Section 16 reports. *See Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Release No. 34-26333 (Dec. 2, 1988) [53 FR 49997 (Dec. 13, 1988)] and *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release No. 34-27148 (Aug. 18, 1989) [54 FR 35667 (Aug. 29, 1989)] (re-proposing Item 405 in response to comments on the 1988 proposing release).

[82] *See* 17 CFR 240.16a-3(e).

provide the required disclosure based solely on a review of such furnished reports and any written representation provided by such persons that no Form 5 is required.[83]

In the FAST Act Report, the staff recommended that we consider eliminating the delivery requirement in Rule 16a-3(e) and revising Item 405 to permit registrants to rely only on (i) a review of Section 16 reports submitted on EDGAR and (ii) any written representation that no Form 5 is required, when determining whether there are any Section 16 delinquencies that must be disclosed pursuant to Item 405.[84] Reporting persons have been required to file their Section 16 reports electronically on EDGAR since 2003.[85] The Commission has stated that "[b]y reviewing Section 16 reports posted on EDGAR, an issuer is readily able to evaluate their timeliness"[86] and "issuers also may consult EDGAR to obtain notice of new filings."[87]

Consistent with the staff's recommendations, we are proposing to amend Item 405 to focus on a review of Section 16 reports available on EDGAR rather than reports furnished to the registrant. We are also proposing to eliminate the requirement in Rule 16a-3(e) that reporting

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[83] *See* 17 CFR 229.405(a) and (b)(1).

[84] FAST Act Report, *supra* note 2, at Recommendation D.2.

[85] *See Mandated Electronic Filing and Web Site Posting for Forms 3, 4 and 5*, Release No. 33-8230 (May 7, 2003) [68 FR 25788 (May 13, 2003)] (the "Section 16 Mandatory Electronic Filing Release"). In addition, all registrants who maintain a corporate website are required to post any Section 16 reports relating to the equity securities of the registrant on such website pursuant to Rule 16a-3(k) of the Exchange Act [17 CFR 240.16a-3(k)], and many registrants satisfy this requirement by providing hyperlinks directly to the electronic filings once they are made on EDGAR. The Commission has noted that any concerns a registrant may have about obtaining an electronic copy of the filing from a Section 16 reporting person in order to satisfy the web posting requirement "would not arise for issuers that rely on a hyperlink (for example, to EDGAR) instead of, or in addition to, direct website posting." *Id.* at 25790.

[86] *See Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release 33-8600 (Aug. 3, 2005) [70 FR 46080 (Aug. 9, 2005)], at 46086.

[87] *Section 16 Mandatory Electronic Filing Release*, *supra* note 85, at 25790.

persons furnish Section 16 reports to the registrant. We believe that a shift to reliance on electronically filed Section 16 reports, while retaining the written representation in Item 405(b)(1), would modernize and simplify compliance with Item 405 while still providing all material information.

In the FAST Act Report, the staff recommended that the Commission consider adding an instruction that permits a registrant to rely on the information in the Section 16 reports submitted on EDGAR unless it knows, or has reason to believe, that the information is not complete or accurate or that a report or an amendment should have been filed but was not.[88] While there is a similar instruction in Item 403 of Regulation S-K with respect to the contents of Section 13(d) and 13(g) statements filed with the Commission,[89] we have concerns that, if implemented, this recommendation could lead to uncertainty about when a registrant has a reporting obligation because of the difficulty ascertaining when a registrant may have knowledge of delinquencies or a reason to believe that delinquencies have occurred. Therefore, at this time, we are not proposing to expand reporting under Item 405 in this manner.

We are, however, proposing to change the language of Item 405 to clarify that registrants may rely on Section 16 reports filed on EDGAR but are not required to limit their inquiry to those filings. Item 405 currently states that the registrant "shall" make its disclosure "based solely upon" the Section 16 reports that are furnished to it pursuant to Rule 16a-3(e) and any written representation from a reporting person that no Form 5 is required. This language could

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[88] FAST Act Report, *supra* note 2, at n.55.

[89] *See* Instruction 3 to Item 403 [17 CFR 229.403].

be read to suggest that registrants may not rely on information outside of the Section 16 reports furnished to the registrant pursuant to Rule 16a-3(e). As proposed, Item 405(b) would state that registrants "may" rely only on the Section 16 reports and the written representation. Therefore, if a registrant was aware that information in a Section 16 report submitted on EDGAR was not complete or accurate, or that a reporting person failed to file a required report, it could provide appropriate disclosure pursuant to Item 405. We are also soliciting comment on the benefits and challenges of the proposed approach and how it may affect compliance with Section 16(a) reporting obligations.

The staff's final recommendation for revising Item 405 was to eliminate the use of the "Section 16(a) Beneficial Ownership Reporting Compliance" heading when the registrant does not have Section 16(a) delinquencies to report.[90] The staff has observed that some registrants have included this heading to disclose that they have nothing to report pursuant to Item 405.[91] To reduce unnecessary disclosure and improve the ability to search a registrant's filings for disclosure of Section 16(a) reporting delinquencies, we are proposing to add an instruction to Item 405 that encourages registrants to exclude the heading if they have no delinquencies to report. We are also proposing to change the heading to "Delinquent Section 16(a) Reports" to more precisely describe the required disclosure and to further encourage registrants to exclude the heading if they do not have delinquencies to report.

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[90] *See* FAST Act Report, *supra* note 2, at Recommendation D.3.

[91] Rule 12b-13 [17 CFR 240.12b-13] states that, unless expressly provided otherwise, if any item is inapplicable or the answer thereto is negative, an appropriate statement to that effect shall be made. Item 405, however, only requires the use of this heading when responsive disclosure is included. *See* Item 405(a)(1).

We are also proposing to eliminate the checkbox on the cover page of Form 10-K relating to Item 405 disclosures and the related instruction in Item 10 of Form 10-K.[92] Currently, registrants are required to check a box on the cover page of Form 10-K to indicate that disclosure pursuant to Item 405 is not contained in the Form 10-K and will not be contained, to the best of the registrant's knowledge, in any definitive proxy or information statement that is incorporated by reference.[93] This checkbox was included in Form 10-K to assist the Commission and security holders in identifying registrants that were disclosing delinquent filings by insiders.[94] The related instruction in Item 10 of Form 10-K is also intended to facilitate the Form's processing and review.[95] We believe that the proposed amendments would lessen the need for this checkbox by reducing the unnecessary use of the heading and thereby facilitating document searches. Moreover, the checkbox may have limited use, because most registrants defer their Item 405 disclosure to their definitive proxy or information statement pursuant to General Instruction G of Form 10-K.[96]

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[92] 17 CFR 229.10.

[93] *See* 17 CFR 249.310.

[94] *See Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release No. 34-28869 [56 FR 7242 (Feb. 21, 1991)] ("Ownership Reports and Trading Release"), at Section VI.B.

[95] The Instruction to Item 10 specifies that checking the box on the cover page to indicate that Item 405 disclosure of delinquent Form 3, 4, or 5 filers is not contained is intended to facilitate Form processing and review. The instruction also states that failure to provide such indication will not create liability for violation of the federal securities laws and that the space should be checked only if there is no disclosure in the Form of reporting person delinquencies in response to Item 405 and if the registrant, at the time of filing the Form 10-K, has reviewed the information necessary to ascertain, and has determined that, Item 405 disclosure is not expected to be contained in Part III of the Form 10-K or incorporated by reference.

[96] *See Ownership Reports and Trading Release* at 7260 ("If at the time of filing the Form 10-K the registrant does not yet know whether such disclosure will be contained in the proxy or information statement or the Form 10-K amendment containing the Part III information, the box should not be checked. If the box is not checked, this

Request for Comment

18. Would allowing registrants to rely on Section 16 reports filed on EDGAR instead of reports furnished to them reduce the burden of complying with Item 405 while preserving their ability to disclose delinquencies? What effect, if any, would the proposed approach have on compliance with the Section 16(a) reporting requirements? Should we continue to require Section 16 reporting persons to furnish reports to registrants, or should we require them to provide notice to the registrant when the reporting person files a report on EDGAR?
19. Should we, instead of permitting, require a registrant to disclose delinquencies under Item 405 if it knows, or has reason to believe, that there is a delinquency that is not reflected on EDGAR? Why or why not?
20. Should we revise the "Section 16(a) Beneficial Ownership Reporting Compliance" heading as proposed? Is there an alternative heading that would be more appropriate?
21. Should we continue to include a checkbox on Form 10-K, or include a checkbox on Schedule 14A[97] or Schedule 14C, to indicate when the disclosure required by Item 405 is included in a filing? If so, what benefits would it provide compared to our proposed

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will not be taken as a statement that there will be Item 405 disclosure of delinquent filers, but rather that the registrant may not have the requisite knowledge at the time the Form 10-K is filed."). The proposed approach would also have the advantage of allowing for this disclosure to be located with a simple text search whether it is included in the registrant's annual report or its definitive proxy or information statement.

[97] 17 CFR 240.14a-101.

approach of encouraging registrants to exclude the proposed "Delinquent Section 16(a) Reports" heading if they do not have delinquencies to report?

3. Corporate Governance (Item 407)

Several disclosure requirements related to corporate governance are consolidated in Item 407.[98] In the FAST Act Report, the staff recommended updating a reference to an outdated auditing standard in Item 407(d)(3)(i)(B) and revising Item 407(e)(5) to clarify that EGCs are not required to provide a compensation committee report.[99] We are proposing amendments to implement both of these recommendations.

a. *Audit Committee Discussions with Independent Auditor (Item 407(d)(3)(i)(B))*

Under existing Item 407(d)(3)(i)(B), when a registrant files a proxy or information statement relating to an annual or special meeting of security holders at which directors are elected or written consents are provided in lieu of a meeting, a registrant's audit committee must state whether it has discussed with the independent auditor the matters required by AU section 380, *Communication with Audit Committees* ("AU sec. 380").[100] AU sec. 380 was part of the interim standards previously adopted by the Public Company Accounting Oversight Board

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[98] 17 CFR 229.407. Item 407 was adopted in 2006 to consolidate various corporate governance requirements under a single disclosure item. *See Executive Compensation and Related Person Disclosure*, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158 (Sept. 8, 2006)].

[99] *See* FAST Act Report, *supra* note 2, at Recommendations D.4 and D.5.

[100] *See* Instruction 3 to Item 407(d) of Regulation S-K.

("PCAOB") on April 16, 2003.[101] As noted in the Commission's concept release on audit committee disclosures (the "Audit Committee Concept Release"), the reference to AU sec. 380 is outdated, because it was superseded by PCAOB Auditing Standard No. 16, *Communications with Audit Committees* ("AS 16").[102] Furthermore, on March 31, 2015, the PCAOB formally reorganized its auditing standards resulting in the codification of AS 16 as Auditing Standard No. 1301, *Communications with Audit Committees* ("AS 1301").[103]

Commenters on the Audit Committee Concept Release that addressed this issue generally supported updating the AU sec. 380 reference.[104] Commenters differed on how best to update this reference, as AS 1301 is not the only requirement addressing communications between an auditor and the audit committee. Specifically, both the Commission and PCAOB have other rules and standards that require matters to be communicated to a company's audit committee.[105] Accordingly, several commenters suggested aligning the disclosure requirements with the

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[101] *See PCAOB Release No. 2003-006* (Apr. 16, 2003). AU sec. 380 required an auditor to discuss various matters related to the conduct of an audit with those who have responsibility for oversight of the financial reporting process.

[102] *See Possible Revisions to Audit Committee Disclosures*, Release No. 33-9862 (July 1, 2015) [80 FR 38995 (July 8, 2015)], at 39003.

[103] *See* PCAOB Release No. 2015-02 (Mar. 31, 2015). The PCAOB completed a reorganization of its auditing standards into a topical structure and a single, integrated numbering system (the "Reorganization"). The Commission approved the Reorganization on September 17, 2015. *See Order Granting Approval of Proposed Rules to Implement the Reorganization of PCAOB Auditing Standards and Related Changes to PCAOB Rules and Attestation, Quality Control, and Ethics and Independence Standards*, Release No. 34-75935 (Sept. 17, 2015) [80 FR 57263 (Sept. 22, 2015)].

[104] Comments on the Audit Committee Concept Release are available at https://www.sec.gov/comments/s7-13-15/s71315.shtml. We refer to these letters throughout as "Audit Committee" letters.

[105] *See, e.g.*, Appendix B to AS 1301; Section 10A(k) of the Exchange Act [15 U.S.C. §78j-1(k)]; Rule 2-07 of Regulation S-X [17 CFR 210.2-07]; and Rule 10A-3 [17 CFR 240.10A-3].

communication requirements specific to the standards and rules of the PCAOB,[106] while others suggested a more encompassing requirement that would refer to all audit committee communications with the independent auditors required by not only the PCAOB but also the Commission.[107]

After consideration of the comments we have received and the recommendation of the staff in the FAST Act Report, we are proposing to update the reference to AU sec. 380 by referring more broadly to the applicable requirements of the PCAOB and the Commission. We believe such an approach would accommodate future changes to audit committee communication requirements.

Request for Comment

22. Should we amend Item 407(d)(3)(i)(B) to refer to the "applicable requirements of the PCAOB and the Commission rules" as proposed? Is there a better reference or additional guidance that we should provide to facilitate audit committee compliance and investor understanding of this requirement?

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[106] *See, e.g.*, Letters from AngloGold Ashanti Limited (Sept. 7, 2015) [Audit Committee letter]; Deloitte & Touche LLP (Sept. 2, 2015) [Audit Committee letter]; National Association of State Boards of Accountancy (Sept. 3, 2015) [Audit Committee letter]; and James H. Edwards (Sept. 8, 2015) [Audit Committee letter].

[107] *See, e.g.*, Letters from AT&T Inc. (Sept. 8, 2015) [Audit Committee letter]; Federal Regulation of Securities, Law and Accounting, and Corporate Governance Committees of the American Bar Association (Feb. 9, 2016) [Audit Committee letter]; and The Home Depot, Inc. (Sept. 17, 2015) [Audit Committee letter]. One commenter on the Regulation S-K Subpart 400 Release also recommended updating Item 407(d) to refer to AS 16. *See* Letter from Davis Polk 2.

b. *Compensation Committee Report (Item 407(e)(5))*

Item 407(e)(5) requires a registrant's compensation committee to state whether it has reviewed and discussed the Compensation Discussion and Analysis ("CD&A") required by Item 402(b).[108] Based on this review and discussion, Item 407(e)(5) requires that the compensation committee state whether it recommended to the board of directors that the CD&A be included in the registrant's annual report, proxy statement or information statement. As recommended by the staff, we are proposing to amend Item 407 to explicitly exclude EGCs from the Item 407(e)(5) requirement, because they are not subject to a requirement to include a CD&A in their public disclosures.[109] Specifically, we are proposing to add a reference to EGCs in Item 407(g) instead of amending Item 407(e)(5). Item 407(g) currently excludes SRCs from Item 407(e)(5), among other provisions of Item 407.

Request for Comment

23. Instead of amending Item 407(g) as proposed, should we amend Item 407(e)(5)?

D. Registration Statement and Prospectus Provisions

1. Outside Front Cover Page of the Prospectus (Item 501(b))

Item 501[110] includes disclosure requirements related to the forepart of the registration statement and the outside front cover page of the prospectus. In the FAST Act Report, the staff made several recommendations to streamline the requirements and to provide registrants with

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[108] 17 CFR 229.402(b).

[109] *See* Item 402(l) of Regulation S-K.

[110] 17 CFR 229.501.

greater flexibility in designing a cover page tailored to their business and the particular offering.[111] The proposed amendments discussed below would implement these recommendations.

a. *Name (Item 501(b)(1))*

Item 501(b)(1) requires disclosure of a registrant's name, including an English translation of the name of foreign registrants. The instruction to Item 501(b)(1) states that if a registrant's name is the same as that of a "well known" company, or if the name leads to a misleading inference about the registrant's line of business, the registrant must include information to eliminate any possible confusion with the other company. If disclosure is insufficient to eliminate the confusion, the registrant may be required to change its name. An exception, however, is available when the registrant is an "established company," the character of the registrant's business has changed, and the "investing public is generally aware of the change and the character of [the registrant's] current business."

The policy reflected in Item 501(b)(1) with regards to misleading company names was first articulated in 1969 in response to an increase in the number of registrants using names that the staff considered to be misleading.[112] Although we continue to believe that a registrant's

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[111] FAST Act Report, *supra* note 2, at Recommendations E.1-5.

[112] At the time, the Commission noted that registrants were using words such as "nuclear," "missile," "space," "nucleonics," and "electronics" in their names when they were not engaged in activity normally associated with those words, or were engaged to a limited extent. *See Guide for Preparation and Filing of Registration Statements; Misleading Names of Registrants*, Release No. 33-4959 (Apr. 16, 1969) [34 FR 6575 (Apr. 17, 1969)]. This policy was contained in Guide 53 of the Commission's Guides for Preparation and Filing of Registration Statements before being moved into Item 501 in 1982. *See Integrated Disclosure System Adopting Release*, *supra* note 69; *Rescission of Guides and Redesignation of Industry Guides*, Release No. 33-6384 (Mar. 3, 1982) [47 FR 11476 (Mar. 16, 1982)].

name could mislead investors, the staff's experience administering this provision suggests that these situations can typically be addressed with clarifying disclosure. The Commission and the staff may be able to address situations in which the registrant's name is either confusingly similar or misleading in connection with any public interest finding necessary to declare the filing effective.[113] Accordingly, we are proposing to streamline the instruction to Item 501(b)(1) by eliminating the portion that discusses when a name change may be required and the exception to that requirement.

Request for Comment

24. Should we eliminate the language about a registrant's being required to change its name in the instruction to Item 501(b)(1) as proposed, or should we retain the current version of the instruction? Are there situations where disclosure would not be sufficient to eliminate misleading inferences about the company or its line of business?

b. *Offering Price of the Securities (Item 501(b)(3))*

Item 501(b)(3) requires disclosure of the price of the securities being offered, the underwriter's discounts and commissions, and the net proceeds that the registrant and any selling security holders will receive.[114] The disclosure must be provided on an aggregate and per share basis, but registrants may present the required information in any format that fits the design of the cover page and is clear, easily read, and not misleading.

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[113] 15 U.S.C. 77h.

[114] 17 CFR 229.501(b)(3). Item 501(b)(3) also includes specific disclosure requirements for offerings being made on a minimum/maximum basis.

Although in many cases the disclosure required by Item 501(b)(3) will be straightforward, Instruction 2 states that "[i]f it is impracticable to state the price to the public, explain the method by which the price is to be determined."[115] In the FAST Act Report, the staff recommended providing registrants with greater flexibility in explaining the method by which the price is to be determined when it is impracticable to state the price on the cover page.[116]

We are proposing to amend Instruction 2 to explicitly allow registrants to include a clear statement that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus. Under the proposed instruction, registrants would be required to accompany that statement with a cross-reference to the offering price method or formula disclosure, including a page number that is highlighted by prominent type or in another manner.[117]

Request for Comment

25. As proposed, Item 501(b)(3) would allow registrants to choose to include a cross-reference to the explanation of the method in which the offering price will be determined when it is impracticable to state the price method or formula to the public on the cover

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[115] The instruction also provides that if the securities are to be offered at the market price, or if the offering price is to be determined by a formula relating to the market price, indicate the market and market price of the securities as of the latest practicable date. We are not proposing any change to this portion of the instruction.

[116] *See* FAST Act Report, *supra* note 2, at Recommendation E.2.

[117] This cross-reference would be similar to the cross-reference that is required for risk factor disclosure pursuant to Item 501(b)(5) of Regulation S-K [17 CFR 229.501(b)(5)]. In the FAST Act Report, the staff recommended the Commission consider amending Instruction 2 to Item 501(b)(3) to require the cross-reference to the offering price method or formula to be accompanied by a hyperlink. Because the cross-reference to risk factors required under Item 501(b)(5) does not currently require a hyperlink, we are not proposing to require a hyperlink for the disclosure called for by Item 501(b)(3).

page. Should we instead retain the requirement to present the explanation on the prospectus cover page? Why or why not?

26. Should we amend Instruction 2 to Item 501(b)(3) to require the cross-reference to be accompanied by a hyperlink? Item 501(b)(5) currently requires on the prospectus cover page a cross-reference to the risk factors section. Should we similarly amend Item 501(b)(5) to also require a hyperlink?

c. *Market for the Securities (Item 501(b)(4))*

Item 501(b)(4) requires a registrant to name the national securities exchanges that list the securities being offered and to disclose the trading symbols for those securities. A "national securities exchange" is a securities exchange that has registered with the Commission under Section 6 of the Exchange Act.[118] Under Item 501(b)(4), registrants are not required to name markets that are not a "national securities exchange."

Consistent with the staff's recommendation in the FAST Act Report, [119] we believe that information about markets that are not a "national securities exchange" could be important to investors and should be disclosed on the prospectus cover page. Accordingly, we are proposing to amend Item 501(b)(4) to require disclosure of the principal United States market or markets for the securities being offered and the corresponding trading symbols.[120]

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[118] *See* Section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f].

[119] *See* FAST Act Report, *supra* note 2, at Recommendation E.3.

[120] Our proposed changes to Item 501(b)(4) align with our proposals to amend Item 201(a) [17 CFR 229.201(a)] in the Disclosure Update and Simplification Proposing Release. *See Disclosure Update and Simplification Proposing Release supra* note 13, at 51688.

Also consistent with the staff's recommendation,[121] we are limiting disclosure of markets that are not national securities exchanges to those principal United States markets where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation. We agree with the staff that a registrant cannot always control whether its securities are quoted on an over-the-counter market and should not be burdened with making that determination.

Request for Comment

27. Should we expand the disclosure required by Item 501(b)(4) to include markets other than national securities exchanges as proposed? Would expanding the disclosure requirement make it difficult for registrants to determine which United States markets to disclose?
28. Should we limit the disclosure requirement to those principal United States markets where the registrant has actively sought and achieved quotation through the engagement of a registered broker-dealer as proposed? Should there be any other limitations on the markets the registrant would be required to disclose?
29. Should a domestic or foreign registrant be required to identify principal foreign markets where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation for the class of security being offered?

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[121] *See* FAST Act Report, *supra* note 2, at Recommendation E.3.

30. If a registrant discloses another trading market elsewhere in its registration statement, should Item 501(b)(4) require disclosure of that market on the cover page, even if it is not a national securities exchange and even if the registrant did not actively seek quotation through the engagement of a registered broker-dealer? For example, Item 201(a) of Regulation S-K[122] requires disclosure of the principal United States market or markets in which each class of the registrant's common equity is traded.

31. Should we provide additional guidance on when a market other than a national securities exchange must be disclosed or when a registrant would be considered to have actively sought quotation through the engagement of a registered broker-dealer?

d. *Prospectus "Subject to Completion" Legend (Item 501(b)(10))*

Item 501(b)(10) requires a registrant that is using a preliminary prospectus to include a legend advising readers that the information will be amended or completed. The legend also must include a statement that the prospectus is not an offer to sell or a solicitation of an offer to buy securities in any state where the offer or sale is not permitted. The latter statement was introduced in 1958 to harmonize the legend with what was required by state securities administrators at the time.[123]

The legend requirement has remained mostly unchanged since 1958, even after the National Securities Markets Improvement Act ("NSMIA") allowed for preemption of state blue

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[122] Item 201(a) of Regulation S-K.

[123] *See Amendment of Rules 134 and 433*, Release No. 33-3885 (Jan. 7, 1958) [23 FR 184 (Jan. 10, 1958)]. This requirement was originally in Rule 433, a predecessor to the current requirement.

sky laws in many offerings.[124] Consistent with the staff's recommendations in the FAST Act Report,[125] we are proposing to amend Item 501(b)(10) to permit registrants to exclude from the prospectus the portion of the legend relating to state law for offerings that are not prohibited by state blue sky law. This change would allow for a more tailored prospectus cover page in recognition of the changes to securities law brought by NSMIA.

Also consistent with the staff's recommendations,[126] we are proposing to streamline Item 501(b) by combining paragraphs (b)(10) and (11) without substantive change. Thus, our proposed amendments to paragraph (b)(10) would also require the "subject to completion" legend to be included if a registrant relies on Rule 430A[127] to omit pricing information and the prospectus is used after the effectiveness of the registration statement but before the public offering price is determined. Correspondingly, we are proposing to delete paragraph (b)(11).

Request for Comment

32. Should we allow registrants the discretion to exclude the portion of the legend required by Item 501(b)(10) that relates to state law prohibitions on offers or sales when it would not apply, as proposed?

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[124] Pub. L. No. 104-290, 110 Stat. 3416 (1996).

[125] *See* FAST Act Report, *supra* note 2, at Recommendation E.4.

[126] *See id.*, at Recommendation E.5.

[127] 17 CFR 230.430A.

2. Risk Factors (Item 503(c))

Item 503(c) requires disclosure of the most significant factors that make the offering speculative or risky.[128] The item specifies that the discussion should be concise and organized logically. Although the requirement is principles-based, it includes the following specific examples as factors that may make an offering speculative or risky:

- a registrant's lack of an operating history,
- a registrant's lack of profitable operations in recent periods,
- a registrant's financial position,
- a registrant's business or proposed business, or
- the lack of a market for a registrant's common equity securities or securities convertible into or exercisable for common equity securities.[129]

The item directs registrants to explain how each risk affects the issuer or the securities being offered. Additionally, the item discourages disclosure of risks that could apply to any issuer or offering.

Risk factor disclosure was initially called for only in the offering context.[130] Accordingly, when Item 503(c) was adopted in 1982 as part of the integrated disclosure system,

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[128] 17 CFR 229.503(c).

[129] These factors were derived from previous stop order proceedings under Section 8(d) of the Securities Act where the Commission suspended the effectiveness of previously filed registration statements due, in part, to inadequate disclosure about speculative aspects of the registrant's business. *See Guides for Preparation and Filing of Registration Statements*, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617 (Dec. 17, 1968)] (citing In the Matter of Doman Helicopters, Inc., 41 S.E.C. 431 (Mar. 27, 1963); In the Matter of Universal Camera Corp., 19 S.E.C. 648 (June 28, 1945)).

it was included with other offering-related disclosure requirements in Subpart 500 of Regulation S-K.[131] In 2005, risk factor disclosure requirements were extended to periodic reports and registration statements on Form 10.[132]

As recommended by the staff in the FAST Act Report, we are proposing to relocate Item 503(c) from Subpart 500 to Subpart 100 to reflect the application of risk factor disclosure requirements to registration statements on Form 10[133] and periodic reports.[134] Subpart 100 covers a broad category of business information and is not limited to offering-related disclosure. Accordingly, our proposed amendments would move Item 503(c)'s requirement for risk factor disclosure to new Item 105.[135]

Additionally, our proposed amendments would eliminate the risk factor examples that are currently enumerated in Item 503(c). Although not addressed in the FAST Act Report, we

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130 *See Guides for Preparation and Filing of Registration Statements*, Release No. 33-4666 (Feb. 7, 1964) [29 FR 2490 (Feb. 15, 1964)] and *Guides for Preparation and Filing of Registration Statements*, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617 (Dec. 17, 1968)].

131 *See Integrated Disclosure System Adopting Release*, *supra* note 69.

132 *See Securities Offering Reform*, Release No. 33-8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] ("Securities Offering Reform Adopting Release").

133 17 CFR 249.210.

134 *See* FAST Act Report, *supra* note 2, at Recommendation E.6. Additionally, the proposed amendments would use the term "registrant" instead of "issuer." Use of and reference to "registrant" instead of "issuer" is intended to better reflect the application of risk factor disclosure outside of the offering context. The term "registrant" is defined under both the Exchange Act and Securities Act. *See* Rule 12b-2 [17 CFR 240.12b-2] and Rule 405 [17 CFR 230.405].

135 *See* proposed Item 105. Consistent with this change, we are also proposing amendments to several Commission forms that require risk factor disclosure and reference Item 503(c). These proposed amendments would revise references to Item 503 to specify new Item 105. A number of forms that require risk factor disclosure do not reference Item 503(c). Our proposed amendments do not include revisions to these forms. For example, Forms 10-Q and 20-F require risk factor disclosure but do not reference Item 503(c).

solicited comment in the Concept Release on whether we should retain or eliminate the examples and whether we should revise our requirements to include additional or different examples.

A number of commenters recommended retaining and revising the examples in Item 503(c).[136] Several of these commenters supported a revision to specify examples of risk factors that are generic and therefore should not be disclosed.[137] For example, one of these commenters recommended that the Commission prohibit disclosure of generalized risks that affect all registrants or all registrants in a particular industry, the risk of stock volatility, organizational structure risks, and summaries of applicable regulation.[138] Two commenters recommended revising the examples to include risk factors applicable to well-established Exchange Act registrants,[139] while another two supported expanding the list of examples.[140] One of the commenters that recommended expanding the list of examples pointed to guidelines produced by the investor community as a source of additional examples.[141]

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[136] *See, e.g.*, Letters from Center for Audit Quality (July 21, 2016) ("CAQ"); California Public Employees' Retirement System (July 21, 2016) ("CalPERS"); PricewaterhouseCoopers LLP (July 21, 2016) ("PWC"); Edison Electric Institute and American Gas Association (July 21, 2016) ("Edison Electric and AGA"); Investment Program Association; Davis Polk 1; National Investor Relations Institute (Aug. 4, 2016) ("NIRI"); Shearman & Sterling (Aug. 31, 2016) ("Shearman 2"); NYSSCPA.

[137] *See, e.g.*, Letters from Edison Electric and AGA; Investment Program Association; Davis Polk 1; NIRI; and Shearman 2.

[138] *See* Letter from Investment Program Association.

[139] *See* Letters from CAQ and PWC.

[140] *See* Letters from CalPERS and NYSSCPA.

[141] *See* Letter from CalPERS (referring to several sets of guidelines such as the Principles for Responsible Investment and those issued by the International Corporate Governance Network, among others).

A few commenters recommended eliminating the examples in Item 503(c).[142] One of these commenters supported eliminating the examples so as to emphasize the principles-based nature of the disclosure requirement and to focus registrants on their own risk identification process.[143] Another of these commenters expressed a view that the examples were outdated and only helpful when the requirement to disclose risk factors was first introduced.[144]

As part of our mandate under the FAST Act to modernize and simplify our disclosure requirements while still providing all material information, we are proposing to eliminate these examples. These examples may not apply to all registrants and may not correspond to the material risks of any particular registrant. In addition, the inclusion of these examples could suggest that a registrant must address each one in its risk factor disclosures, regardless of the significance to its business. Finally, several commenters suggested expanding the list of examples or revising them to specify examples of generic risks that should not be disclosed. We are concerned that inclusion of examples could anchor or skew the registrant's risk analysis in the direction of the examples.[145] We believe that eliminating the examples would encourage registrants to focus on their own risk identification processes.

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[142] *See* Letters from Chris Barnard (June 23, 2016) ("Barnard"); Fenwick; and SIFMA (stating that the five examples are not "cutting edge" and "could be eliminated," but that most registrants recognize that Item 503(c) is focused on principles-based disclosure of the most significant factors that make the offering speculative or risky).

[143] *See* Letter from Barnard.

[144] *See* Letter from Fenwick.

[145] *See infra* note 349 and accompanying text.

Request for Comment

33. Should we move the requirement to provide risk factor disclosure in Item 503(c) to a new Item 105 as proposed? Why or why not?
34. Should we relocate Item 503(c)'s requirements to another subsection of Regulation S-K? If so, which subsection and why?
35. Should we eliminate the risk factor examples as proposed, or do they provide useful guidance to registrants? Instead of eliminating the examples, should we provide different or additional examples that would be more helpful to registrants? If so, what examples would be most helpful?

3. Plan of Distribution (Item 508)

Item 508 requires disclosure about the plan of distribution for securities in an offering, including information about underwriters.[146] Paragraph (a) requires disclosure about the principal underwriters and underwriters that have a material relationship with the registrant, while paragraph (h) requires disclosure of the discounts and commissions to be allowed or paid to dealers. If a dealer is paid any additional discounts or commissions for acting as a "sub-underwriter," paragraph (h) allows the registrant to include a general statement to that effect without giving the additional amounts to be sold.

"Sub-underwriter" is not a defined term, and its application may be unclear. "Principal underwriter," however, is defined in Regulation C as "an underwriter in privity of contract with

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[146] 17 CFR 229.508.

the issuer of the securities as to which he is an underwriter."[147] Consistent with the staff's recommendation in the FAST Act Report,[148] and in light of the definition of "principal underwriter" and the disclosure required by Item 508(a), we are proposing to amend Rule 405[149] to define the term "sub-underwriter" as a dealer that is participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but is not itself in privity of contract with the issuer of the securities.[150]

Request for Comment

36. Should we amend Rule 405 to define "sub-underwriter" as proposed? Should we define the term differently? For example, is the concept of "privity of contract" sufficiently clear?

4. Undertakings (Item 512)

Item 512[151] provides undertakings that a registrant must include in Part II of its registration statement, depending on the type of offering. In the FAST Act Report, the staff recommended that the Commission consider eliminating undertakings that are duplicative of

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[147] 17 CFR 230.405.

[148] *See FAST Act Report*, *supra* note 2, at Recommendation E.7.

[149] 17 CFR 230.405.

[150] The only other use of the term "sub-underwriter" or "subunderwriter" in Regulation S-K, the Securities Act rules, or the Exchange Act rules is in Rule 491 [17 CFR 230.491]. We are proposing to amend Rule 491 to reference "sub-underwriter," consistent with our proposed amendments here. The proposed definition of sub-underwriter would not change the meaning of that term in Rule 491 and appears to be consistent with its use in that context.

[151] 17 CFR 229.512.

other rules or that have become unnecessary due to developments since their adoption. We are proposing the following amendments to implement the staff's recommendations.

Item 512(c) sets forth undertakings that a registrant must include if it registers a warrant or rights offering to existing security holders and the securities not purchased by those security holders will be reoffered to the public.[152] The undertaking requires a registrant, after the expiration of the subscription period, to supplement the prospectus to disclose the results of the subscription offer and the terms of any subsequent reoffer to the public. If any public reoffer is made on terms different from the offer to existing security holders, then the registrant must undertake to file a post-effective amendment to disclose the terms of that offering. We are proposing to eliminate this undertaking because it is no longer necessary. A registrant conducting the type of offering described in Item 512(c) would already have been required to register and disclose the offering to existing security holders as well as the reoffering to the public. Furthermore, Item 512(a)(1) requires registrants to undertake to file a post-effective amendment to disclose fundamental changes in the information set forth in the registration statement and material information with respect to the plan of distribution or changes in the plan of distribution.[153] Thus, disclosure of material changes in the terms of the reoffering would also

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[152] 17 CFR 229.512(c). The Item 512(c) undertaking was included in the Securities Act forms and guides, prior to the enactment of the integrated disclosure system in 1982. *See, e.g.*, *Notice of Proposed Revision of Form S-4*, Release No. 33-3667 (July 31, 1956) [21 FR 6025 (Aug. 11, 1956)] and *Notice of Proposed Form S-11 for Registration of Securities of Certain Real Estate Companies*, Release No. 33-4347 (Apr. 10, 1961) [26 FR 3280 (Apr. 18, 1961)].

[153] 17 CFR 229.512(a)(1).

be required as part of the Item 512(a)(1) undertaking, thus obviating the need for the Item 512(c) undertaking.

Consistent with the recommendations made in the FAST Act Report, we are also proposing to eliminate the Item 512(d), Item 512(e), and Item 512(f) undertakings, because they are obsolete.[154] Item 512(d) requires a registrant to include undertakings if the securities it registers are to be offered at competitive bidding.[155] The undertaking requires a registrant to use its best efforts to distribute a Section 10(a) prospectus to prospective bidders, underwriters, and dealers and to file a post-effective amendment reflecting the results of the bidding and any related terms. This undertaking arises from former Rule 50 under the Public Utility Holding Company Act of 1935 ("PUHCA"), which formerly required public utility company securities to be sold through competitive bids.[156] We propose eliminating this undertaking because the Commission rescinded Rule 50 in 1994,[157] and because Congress repealed PUHCA in 2005.[158] Furthermore, this undertaking was put into place prior to the adoption of Rule 430A, which permits the omission of pricing and underwriter related terms from the effective registration

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[154] *See* FAST Act Report, *supra* note 2, at Recommendation E.9.

[155] 17 CFR 229.512(d).

[156] *See Notice of Proposal to Adopt Rule 415 Relating to Competitive Bidding Registration Statements, to Amend Rules 424, 455, 471 and 472 and to Rescind Rule 460*, Release No. 33-3491-Z (Nov. 10, 1953) [18 FR 7300 (Nov. 18, 1953)]; *Adoption of Rule 415 Relating to Competitive Bidding Registration Statements, Amendment of Rules 424, 427, 455, 471 and 472 and Rescission of Rule 460*, Release No. 33-3494 (Jan. 13, 1954) [19 FR 399 (Jan. 22, 1954)]; and *Phase One Recommendations of Task Force on Disclosure Simplification*, Release No. 33-7300 (May 31, 1996) [61 FR 30397 (June 14, 1996)] ("1996 Disclosure Simplification Recommendations").

[157] *See 1996 Disclosure Simplification Recommendations* (citing *Public Utility Holding Company Act Rules*, Release No. 35-26031 (Apr. 20, 1994) [59 FR 21922 (Apr. 28, 1994)]).

[158] *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

statement if the issuer includes that information in a prospectus or post-effective amendment after the effective date.[159] To the extent that competitive bidding is still used, registrants may file prospectuses that contain the pricing and underwriter disclosure pursuant to Rule 430A and those documents will be subject to the liability imposed by that rule.[160]

Item 512(e) provides that, if a registrant's prospectus directly incorporates by reference the registrant's annual report to security holders meeting the requirements of Rule 14a-4[161] or Rule 14c-3,[162] the registrant must undertake to deliver the latest annual report with the prospectus.[163] If interim information is required but is not included in the prospectus, the registrant must undertake to deliver the latest quarterly report that is incorporated by reference in the prospectus. The purpose of this undertaking is to ensure that the registrant delivers incorporated annual and quarterly reports with the prospectus, as required by former Form S-2.[164] The disclosure and delivery requirements of former Form S-2 were intended to minimize duplicative reporting while still requiring delivery of incorporated information.[165] The

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[159] 17 CFR 230.430A.

[160] We understand that registration statements filed in connection with securities to be offered through competitive bidding are rarely used. *See* Louis Loss, Joel Seligman, & Troy Paredes, *Securities Regulation* (5th ed. 2016) ("Loss et al.") § 2.A.4. Competitive Bidding. According to Loss et al., competitive bidding is now used by "municipalities and public instrumentalities." Rule 430A provides that information omitted in reliance on that rule is deemed part of the registration statement as of the time it was declared effective, thus subjecting those disclosures to liability under Section 11 of the Securities Act.

[161] 17 CFR 240.14a-4.

[162] 17 CFR 240.14c-3.

[163] 17 CFR 229.512(e).

[164] *See Proposed Comprehensive Revision to System for Registration of Securities Offerings*, Release No. 33-6235 (Sept. 2, 1980) [45 FR 63693 (Sept. 25, 1980)].

[165] *See Securities Offering Reform Adopting Release*, *supra* note 132.

Commission rescinded Form S-2 as part of Securities Offering Reform, since its underlying purpose was outdated because of EDGAR, other technological developments, and the rapid dissemination of information in the market.[166] Similarly, we are now proposing to eliminate the related undertaking, since any material information in a registrant's annual or quarterly reports to security holders should be publicly available.

Finally, the undertaking in Item 512(f) applies to registrants that prior to the offering had no obligation to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act.[167] If such a registrant conducts an underwritten equity offering, it must undertake to provide the securities certificates required by the underwriter at closing to permit prompt delivery to each purchaser. The purpose of this undertaking is to ensure that the registrant delivers sufficient certificates to the underwriter at closing to permit aftermarket trading in new issues.[168] We are proposing to eliminate this undertaking because the need to deliver certificates to underwriters has decreased dramatically since this undertaking was adopted in the early 1970s. Today, equity securities trades in the United States are typically cleared and settled using the

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[166] *See id*.

[167] 17 CFR 229.512(f).

[168] *See Hot Issues*, Release No. 33-5274 (July 26, 1972) [37 FR 16005 (Aug. 9, 1972)] ("Hot Issues Release"); *Notice of Adoption of Amendments to Registration Forms S-1 and S-2 under the Securities Act of 1933 and to Forms 10, 10-K and 10-Q and Rules 13a-13 and 15d-13 under the Securities Exchange Act of 1934*, Release No. 33-5395 (June 1, 1973) [38 FR 17202 (June 29, 1973)]. In 1972, the Commission conducted public hearings on the matter of hot issues securities markets, which revealed that "one of the imperfections affecting aftermarket trading in new issues is the occasional failure of issuers to furnish securities in such denominations and registered in such manner as to permit adequate and prompt delivery to each purchaser. Accordingly, one of the proposals is that non-reporting registrants formally undertake in registration statements filed on Forms S-1 and S-2 that they will deliver the certificates to the underwriter at the closing for prompt delivery to customers." *See Hot Issues Release*, *supra* at 16007.

depository and book-entry services of the Depository Trust and Clearing Corporation's clearing agency subsidiaries.[169]

Request for Comment

37. Should we retain or modify any of the undertakings that we have proposed eliminating? If so, please explain why.
38. In what instances are physical securities certificates still delivered today? Should we retain the undertaking for those situations?
39. Are there other undertakings that we have not addressed in this release that are duplicative, no longer necessary or that should be eliminated for other reasons?
40. Are there undertakings we should consider requiring to modernize and address developments for novel securities offerings?

E. Exhibits

1. Description of Registrant's Securities (Item 601(b)(4))

Item 202 requires registrants to provide a brief description of their registered capital stock, debt securities, warrants, rights, American Depositary Receipts, and other securities.[170]

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[169] *See* Loss et al. § 7.E.2. Current Law ("Virtually all equities securities trades in the United States are cleared and settled through the National Securities Clearing Corporation (NSCC) and the Depository Trust Company (DTC), clearing agency subsidiaries of the Depository Trust and Clearing Corporation (DTCC)."); Depository Trust & Clearing Corporation, *FAQs: How Issuers Work With DTC available at* http://www.dtcc.com/matching-settlement-and-asset-services/issuer-services/how-issuers-work-with-dtc (last visited Feb. 22, 2017) ("DTC provides (i) settlement services for virtually all equity, corporate and municipal debt trades and Money Market Instruments in the U.S.").

[170] Items 202(a)-(d) and (f) [17 CFR 229.202(a)-(d) and (f)]. Item 202(e), "Market information for securities other than common equity," is outside the scope of this release; it requires that if securities other than common stock are to be registered and there is an established trading market for such securities, registrants are required to provide market information for such securities comparable to that required by Item 201(a) of Regulation S-K.

Registrants provide Item 202 disclosure about registered securities in their registration statements[171] but are not required to provide this disclosure in their Form 10-K or Form 10-Q.[172]

Consistent with the staff's recommendation in the FAST Act Report,[173] we are proposing to amend Item 601(b)(4)[174] to require registrants to provide the information required by Item 202(a)-(d) and (f) as an exhibit to Form 10-K, rather than limiting this disclosure to registration statements.[175] Proposed Item 601(b)(4)(vi) would require Item 202 disclosure only for securities that are registered under Section 12 of the Exchange Act.[176] Because Item 202(e) requires Item 201(a) market information for securities other than common equity where there is an established trading market for those securities, proposed Item 601(b)(4)(vi) does not include Item 202(e).

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[171] Item 202 disclosure is often incorporated by reference into a registration statement on Form 8-A from a prior registration statement on Form S-1. *See* Concept Release, *supra* note 6, at Section IV.D.2. Registrants are not currently required to include Item 202 disclosure as an exhibit to any filings with the Commission.

[172] 17 CFR 249.308a.

Registrants are required to file complete copies of their articles and bylaws as exhibits to Form 10-K, but they are not required to provide the descriptions called for by Item 202. *See* Item 601(b)(3) [17 CFR 229.601(b)(3). Also, under Accounting Standards Codification ("ASC") Topic 505-10-50-3, registrants are required to summarize the "pertinent rights and privileges of the various securities outstanding" in the notes to their financial statements. ASC Topic 470-10-50-5 requires the same information for debt securities. While the date of sale is not required, registrants usually include it in their discussions of the rights and privileges of securities sold.

[173] *See* FAST Act Report, *supra* note 2, at Recommendation F.1.

[174] 17 CFR 229.601(b)(4).

[175] To the extent that a registrant has previously filed an exhibit containing Item 202 disclosure, it could incorporate that exhibit by reference and hyperlink to the previously-filed exhibit in future Form 10-K filings, assuming that the information contained therein remains unchanged. *See Exhibit Hyperlinks Adopting Release supra* note 15.

[176] The proposed amendment includes an instruction requiring disclosure for those classes of a registrant's securities that have not been retired by the end of the period covered by the report. We are also proposing to amend Item 202 to specify that Section 305(a)(2) of the Trust Indenture Act of 1939, 15 U.S.C. 77aa *et seq.*, as amended, would not affect a registrant's disclosure obligations under proposed Item 601(b)(4)(vi).

The proposed requirement is intended to increase investors' ease of access to information about the rights and obligations of each class of securities registered.

The proposed amendments would not change existing disclosure obligations under Form 8-K and Schedule 14A, which currently require registrants to disclose certain modifications to the rights of their security holders and amendments to their articles of incorporation or bylaws.[177] As proposed, any modifications and amendments during a fiscal year would now also be reflected in the Item 202 disclosure provided in an exhibit to the registrant's next annual report.[178] The proposed amendments would be in addition to the current requirement to file a complete copy of the amended articles of incorporation or bylaws under Item 601(b)(3).[179]

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[177] Item 3.03 of Form 8-K requires disclosure of material modifications to rights of security holders while Item 5.03 requires disclosure of amendments to the articles of incorporation or bylaws for amendments not disclosed in a proxy or information statement. Item 5.03 of Form 8-K also requires disclosure of changes in fiscal year other than by means of a submission to a vote of security holders through the solicitation of proxies (or otherwise) or an amendment to the articles of incorporation or bylaws [17 CFR 249.308].

Item 12 of Schedule 14A requires disclosure if action is to be taken regarding the modification of any class of securities of the registrant, or the issuance or authorization for issuance of securities of the registrant in exchange for outstanding securities. Section (b) of Item 12 requires disclosure of any material differences between the outstanding securities and the modified or new securities in respect of any of the matters concerning which information would be required in the description of the securities in Item 202 of Regulation S-K. Item 19 of Schedule 14A requires disclosure of amendments to the registrant's charter, bylaws, or other documents.

[178] Over the course of a given fiscal year, it is possible that a registrant may make various non-material changes to the rights and privileges of its securities that do not require separate disclosure on Form 8-K. However, if any changes are made, whether material or non-material, the proposed amendments would require a registrant to update the description of securities in the exhibit filed with its Form 10-K.

[179] *See* Item 601(b)(3) of Regulation S-K [17 CFR 229.601(b)(3)]. The proposal would amend Item 601(b)(4) instead of Item 601(b)(3) because (b)(4) is consistent with Item 202's requirement to provide a description of capital stock that is registered while (b)(3) is specific to the articles of incorporation and bylaws.

We recognize that some commenters opposed requiring Item 202 disclosure in periodic reports, stating that this information can easily be found in registration statements,[180] while other commenters noted that the information overlaps with disclosure required under U.S. GAAP.[181] Requiring Item 202 disclosure as an exhibit to annual reports could improve the ability of investors to gain access to information about their rights as security holders. The proposed Item 601(b)(4)(vi) would allow investors to easily locate an updated description of their rights as security holders in the most recent annual report rather than require investors to search through prior filings to find this disclosure. Where a registrant has previously filed the Item 202 information as an exhibit, and so long as there has not been any change to the information called for by Item 202, the registrant may incorporate the information by reference and provide a hyperlink to the previously filed exhibit. Therefore, we believe that any additional compliance cost associated with the proposed amendment should not be unduly burdensome.

Request for Comment

41. Should the proposed amendments include a requirement to file Item 202 disclosure for each class of securities registered under Section 12 of the Exchange Act as an exhibit to the annual report? Why or why not? Should registrants also be required to include descriptions of securities that are not registered under Section 12 of the Exchange Act? For example, should issuers reporting only under Section 15(d) of the Exchange Act

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[180] *See, e.g.*, Letters from Fenwick; CGCIV; Chamber 2; and FedEx. *See also* Davis Polk 1.

[181] *See* Letters from CAQ and KPMG LLP (July 21, 2016) ("KPMG"). Both commenters referenced Item 202 in the context of broader recommendations to the Commission to work with the FASB and the PCAOB to eliminate redundancies.

(*e.g.*, asset-backed issuers) be required to file Item 202 disclosure as a Form 10-K exhibit?

42. Do the requirements for Item 202, and our proposal to require that the Item 202 information be provided as an exhibit to the annual report, provide sufficient disclosure about debt securities or other classes of stock with different or preferential voting rights?

43. Would the new requirements result in significantly higher compliance costs? Would the new requirements provide benefits to investors and facilitate informed investment decisions? Would the proposed amendments require disclosure that is adequately provided elsewhere in the annual report or on EDGAR?[182]

44. Would compliance with the proposed amendment be problematic for issuers with multiples classes of registered securities (*e.g.*, well-known seasoned issuers or asset-backed issuers)? If so, how should we revise the proposed amendments to avoid unnecessary burdens that may be imposed on these issuers?

2. Information Omitted From Exhibits (Item 601)

Item 601 of Regulation S-K generally requires registrants to file complete copies of exhibits.[183] Securities Act Rule 406[184] and Exchange Act Rule 24b-2[185] permit registrants to request confidential treatment of information included in an exhibit to a filing or any other document required to be filed under either the Securities Act or the Exchange Act.

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[182] *See supra* notes 172 and 181 and accompanying text.

[183] Item 601 of Regulation S-K [17 CFR 229.601].

[184] 17 CFR 230.406.

[185] 17 CFR 240.24b-2.

Item 601(b)(2) states that registrants shall not file schedules or similar attachments to material plans of acquisition, reorganization, arrangement, liquidation, or succession unless they contain information material to an investment decision and unless that information is not otherwise disclosed in the agreement or the disclosure document.[186] The Commission staff generally has not objected where a registrant omits personally identifiable information from exhibits without submitting a confidential treatment request.

To modernize and simplify the disclosure requirements under Item 601, we are proposing to add new paragraphs (a)(5) and (a)(6) to expand the existing accommodation in Item 601(b)(2) to include all exhibits filed under Item 601 and permit the omission of personally identifiable information. We also propose to add paragraph (b)(10)(iv) to Item 601 to reduce significantly the need for registrants to submit applications for confidential treatment of information in material contract exhibits required by that item.[187] The proposals to add paragraphs (a)(6) and (b)(10)(iv) are broader than the staff's recommendations in the FAST Act Report. As explained more fully below, we believe that they are consistent with our mandate under the FAST Act to

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[186] 17 CFR 229.601(b)(2).

[187] Certain domestic forms include their exhibits requirements in the form and/or do not separately reference Item 601 of Regulation S-K (*e.g.*, Schedule 13E-3 and Schedule 13D). As such, we are considering whether the rationale for the proposed amendments to Item 601 of Regulation S-K is also applicable to the exhibit requirements in these forms. For example, Schedule 13E-3 and Schedule 13D require registrants to file as exhibits certain material agreements that may be deemed analogous to the exhibits required under Item 601 of Regulation S-K. We are requesting further comment to assist in our evaluation of this issue.

modernize and simplify our disclosure requirements while still providing all material information.[188]

a. *Schedules and Attachments to Exhibits*

Proposed Item 601(a)(5) would permit registrants to omit entire schedules and similar attachments to exhibits unless they contain material information and unless that information is not otherwise disclosed in the exhibit or the disclosure document. This exception, which is similar to the existing accommodation in Item 601(b)(2) for plans of acquisition, reorganization, arrangement, liquidation, or succession, would be expanded to all exhibits under the proposed amendments. Similar to the current provisions in Item 601(b)(2), proposed Item 601(a)(5) would require registrants to provide with each exhibit a list briefly identifying the contents of any omitted schedules and attachments. In addition, registrants would be required to provide, on a supplemental basis, a copy of any omitted schedules or attachments to the Commission staff upon request.[189]

The Commission requested comment in the Concept Release on whether to allow registrants to omit schedules and attachments to all exhibits, provided that the omitted schedules

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[188] *See* FAST Act Report, *supra* note 2, at Recommendation F.2 (recommending only that the Commission permit registrants to omit attachments and schedules filed with exhibits unless they contain information that is material to an investment decision that has not been otherwise disclosed).

[189] *See* proposed Item 601(a)(5) of Regulation S-K. Securities Act Rule 418 [17 CFR 230.418] states that the Commission or its staff may, where it is deemed appropriate, request supplemental information concerning the registrant or a registration statement, among other things. Exchange Act Rule 12b-4 [17 CFR 240.12b-4] similarly indicates that the Commission or its staff may, where it is deemed appropriate, request supplemental information concerning the registrant, a registration statement, and a periodic or other report filed under the Exchange Act. Unlike the current version of Item 601(b)(2), registrants would not be required to include with its list identifying the contents of all omitted schedules an agreement to furnish a supplemental copy of any omitted schedule to the Commission upon request. Instead, proposed Item 601(a)(5) would require registrants to provide a copy of any omitted schedule to the Commission staff upon request.

and attachments do not include material information that is not otherwise included in the exhibit or the disclosure document. Commenters uniformly supported expanding the exception under Item 601(b)(2).[190] Some noted that the current requirement to file complete exhibits is unnecessarily cumbersome and expensive where the schedules do not contain material information.[191] Commenters also stated that these burdens are exacerbated where those schedules contain, as is frequently the case, confidential information that would require registrants to file confidential treatment requests.[192] A few commenters that supported allowing registrants to omit schedules opposed requiring registrants to provide a list of their omitted schedules.[193] Another commenter supported a requirement to include a list, but stated that requiring registrants to provide a materiality analysis supporting the decision to omit the schedules was unnecessary.[194] We believe that a list of omitted schedules, similar to current Item 601(b)(2), would be informative for investors.

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[190] *See, e.g.*, Letters from Committee on Securities Law of the Business Law Section of the Maryland State Bar Association ("Maryland Bar Securities Committee") (July 21, 2016); ABA; NYSSCPA; FedEx; Fenwick; and Davis Polk 1. *See also* Letter from CGCIV (supporting exemption from filing immaterial attachments to material agreements for smaller reporting companies).

[191] *See, e.g.*, Letters from Fenwick and Davis Polk 1.

[192] *See, e.g.*, Letters from Fenwick; Fenwick and West LLP, Cooley LLP and Wilson Sonsini Goodrich & Rosati, PC (June 19, 2012) [S-K Study Letter] ("Silicon Valley"); and Mike Liles (Apr. 10, 2013) [S-K Study Letter] (endorsing the comments expressed in the Silicon Valley Letter).

[193] *See* Letter from Fenwick (stating that it does not believe "the burden of completing such a list of omitted schedules is offset by any meaningful advantage to investors"); *see also* letters from NYSSCPA and FEI.

[194] *See* Letter from Maryland Bar Securities Committee.

Request for Comment

45. Should the proposed amendments permit registrants to omit entire schedules and attachments to exhibits unless the schedules or attachments contain material information and unless that information is not otherwise disclosed in the exhibit or the disclosure document? Similarly, should we amend our investment company rules or forms to permit investment companies to omit entire schedules and attachments?
46. Should Item 601(a)(5) require registrants to provide a list of the contents of the omitted schedules and attachments as proposed? Would a list of the titles of the schedules and attachments be sufficient to identify the contents of the omitted schedules and attachments? Should we provide guidance on the registrant's description of any omitted schedule or attachment?
47. As proposed, Item 601(a)(5) would expand the existing Item 601(b)(2) accommodation to all exhibits. Should we require exhibits filed pursuant to certain subsections of Item 601(b) to include all schedules and attachments even if they are not material? If so, which exhibits and subsections?

b. *Personally Identifiable Information*

The Commission generally does not publish or make available information that "would constitute a clearly unwarranted invasion of personal privacy."[195] This information includes personally identifiable information ("PII"). Exhibits filed pursuant to Item 601 may include PII

[195] 17 CFR 200.80(b)(6) (exempting personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy).

such as bank account numbers, social security numbers, home addresses and similar information. The staff generally does not object where a registrant omits PII from exhibits without submitting a confidential treatment request.

In the Concept Release, the Commission requested comment about whether to continue or modify the current accommodation on PII. Numerous commenters recommended codifying the current staff practice of permitting registrants to omit PII from exhibits without making a formal confidential treatment request.[196]

Consistent with our mandate under the FAST Act to modernize and simplify our disclosure requirements while still providing all material information, Item 601(a)(6), as proposed, would permit registrants to omit PII without submitting a confidential treatment request under Rule 406 or Rule 24b-2. Allowing registrants to omit PII without submitting a confidential treatment request is also intended to better safeguard PII by limiting its dissemination. Under the proposed amendment, registrants also would not be required to provide an analysis to redact PII from exhibits.

Request for Comment

48. Should we codify the current staff practice of permitting registrants to omit PII without making a formal confidential treatment request as proposed? Similarly, should we amend our investment company rules or forms to similarly permit investment companies to omit PII?

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[196] *See, e.g.*, Letters from NYSSCPA; Chamber 2; FedEx; CGCIV; Maryland Bar Securities Committee; General Motors; and Financial Executives International.

c. *Redaction of Confidential Information in Material Contract Exhibits*

The proposed revisions to Item 601(b)(10) would permit registrants to omit confidential information from material contracts filed pursuant to that item where such information is both (i) not material and (ii) competitively harmful if publicly disclosed, even where the registrant has not submitted a confidential treatment request to the Commission. Instead, registrants would be required to mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of each redacted exhibit that information in the marked sections of the exhibit has been omitted from the filed version of the exhibit. Registrants would also be required to indicate with brackets where the information has been omitted from the filed version of the exhibit.[197]

Although registrants would not be required to file a confidential treatment request in accordance with Rule 406 or Rule 24b-2 in connection with the redacted exhibit, the responsibility of a registrant to determine whether all material information has been disclosed and whether they may redact the information under the proposed rules would remain unchanged.[198] The Commission staff would continue its selective review of registrant filings and would selectively assess whether redactions from exhibits appear to be limited to information that is not material and that would subject the registrant to competitive harm if publicly disclosed. As is currently the case, the redacted information should include no more text than

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[197] These proposals are consistent with the marking requirements for confidential treatment requests under Rule 406 and Rule 24b-2.

[198] *See* Rule 12b-20 [17 CFR 240.12b-20], Rule 408(a) [17 CFR 230.408(a)] and proposed Item 601(b)(10)(iv).

necessary to prevent competitive harm to the registrant. Upon request, registrants would be expected to promptly provide supplemental materials to the staff similar to those currently required in a confidential treatment request, including an unredacted paper copy of the exhibit and an analysis of why the redacted information is both (i) not material and (ii) would cause competitive harm if publicly disclosed.[199] The timing of any staff review would not alleviate a registrant's obligation to disclose all material information and its obligation to limit redactions to those provisions and terms that are both (i) not material and (ii) would cause competitive harm if publicly disclosed. Registrants could request confidential treatment of this supplemental information pursuant to Rule 83 while it is in the staff's possession. If the registrant's supplemental materials do not support its redactions, similar to the process the staff currently follows for confidential treatment requests under Rule 406 and Rule 24b-2, the staff may request that the registrant file an amendment that includes some, or all, of the previously redacted information.[200]

The Concept Release did not request comment on the confidential treatment process, other than its request for comment about omitting schedules and attachments to exhibits; however, two commenters noted that the requirement to file material agreements causes registrants to expend significant resources in preparing confidential treatment requests.[201] We

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[199] This analysis would be substantially the same as is currently required in confidential treatment requests submitted in reliance on Rule 80(b)(4) [17 CFR 200.80(b)(4)] pursuant to Rule 406 or Rule 24b-2.

[200] Upon completion of the staff's review, the materials would be returned or destroyed if the registrant complies with the procedures outlined in Rule 418 or 12b-4.

[201] *See* Letter from Fenwick and letter from Davis Polk 1 (requesting that the Commission reconsider the utility of the (b)(10) exhibit filing requirement).

believe that simplifying and streamlining this process would be consistent with the FAST Act mandate to revise Regulation S-K in a manner that reduces the costs and burdens on registrants while providing investors all material information. In addition, we believe the proposal would result in limiting the dissemination of sensitive information because registrants would not be required to provide an un-redacted copy of each exhibit at the time of filing in order to request confidential treatment. Instead, this information would only be required on request in connection with a staff filing review.

Request for Comment

49. Should registrants be permitted to omit confidential information from exhibits filed pursuant to Item 601(b)(10) that is both (i) not material and (ii) competitively harmful if publicly disclosed without submitting a confidential treatment request as proposed? Similarly, should we amend our investment company forms to permit investment companies to omit confidential information from exhibits?
50. Would the disclosure provided in exhibits change under the proposed amendments? Why or why not?
51. Under the proposed amendments, if the registrant's supplemental materials do not support its redactions, the staff may request that the registrant file an amendment that includes some, or all, of the previously redacted information. In these situations, should we require registrants to include an explanatory note describing why the amendment is being provided? Should we also require that any amendment highlight the previously redacted information?

52. Should we allow registrants to omit confidential information from exhibits other than those filed pursuant to Item 601(b)(10) that is both (i) not material and (ii) competitively harmful if publicly disclosed? For instance, should registrants be allowed to omit similar information from exhibits filed pursuant to Item 601(b)(2)? Should they be allowed to omit similar information from exhibits filed pursuant to other subsections of Item 601? If so, which subsections and why?

53. Should we apply the proposed amendments discussed in Section II.E.2. (Information Omitted from Exhibits) to forms that include their exhibits requirements in the form or do not separately reference Item 601 of Regulation S-K (*e.g.*, Schedule 13E-3 and Schedule 13-D)? If so, what forms should be amended and to what extent? If not, why? Are there special considerations associated with change of control transactions, going private transactions, or beneficial ownership reporting that render the provision of information in exhibits material to an investment or voting decision? What are the costs and benefits of applying the proposed amendments to these forms? How do they differ from the costs and benefits of applying the proposed amendments to Regulation S-K?[202]

3. Material Contracts (Item 601(b)(10)(i))

Item 601(b)(10)(i) requires registrants to file every material contract not made in the ordinary course of business, provided that one of two tests is met: (i) the contract must be

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[202] We are proposing to apply the proposed amendments to Form 20-F to maintain a consistent approach to the exhibit filing requirements for domestic registrants and foreign private issuers. *See infra* Section II.E.5 (Exhibits – Application to Foreign Private Issuers).

performed in whole or in part at or after the filing of the registration statement or report, or (ii) the contract was entered into not more than two years before that filing.[203]

The first test captures contracts that have not been fully performed prior to the filing date. The second test—the two-year look back—captures material contracts that were fully performed before the filing date.[204] Currently, all registrants subject to Item 601 must consider both tests when deciding whether a material, non-ordinary course contract must be filed as an exhibit.

Consistent with the recommendations in the FAST Act Report,[205] we are proposing amendments to Item 601(b)(10)(i) that would limit the two-year look back test to newly reporting registrants. Proposed Instruction 1 to Item 601(b)(10)(i) defines a "newly reporting registrant" as any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, whether or not such registrant has ever previously been subject to the reporting requirements of Section 13(a) or 15(d), and any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation.[206] As an example, a registrant that is filing its first registration statement under the Securities Act or the Exchange Act, or filing its first Form 10-K

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[203] Item 601(b)(10)(i) of Regulation S-K [17 CFR 229.601(b)(10)(i)].

[204] The two-year look back is included in Schedule A of the Securities Act [15 U.S.C. 77aa(24)] and serves as a "cutoff period" so registrants would not have to file material contracts that may have been fully performed many years prior to registration. When Section 12(g) was added to the Exchange Act in 1964, the Commission was authorized to issue rules requiring such material contracts to be filed with Exchange Act reports. *See* Section 12(b)(1)(I) of the Exchange Act; H.R. Rep. No. 88-1418, 83rd Cong., 2nd Sess., 1964. Prior to the enactment of Section 12(g), the Exchange Act reporting requirements were applicable only to listed companies.

[205] *See* FAST Act Report, *supra* note 2, at Recommendation F.3.

[206] *See* proposed Instruction 1 to paragraph (b)(10) of Item 601.

since the revival of its reporting obligation,[207] would be required to file material agreements under Item 601(b)(10)(i) for the two-year look back period.[208] The definition of "newly reporting registrant" under the proposed instruction also would include any registrant that (a) was a shell company, other than a business combination related shell company, as defined in Rule 12b-2 under the Exchange Act, immediately before completing a transaction that has the effect of causing it to cease being a shell company, and (b) has not filed a registration statement or Form 8-K, as required by Item 2.01 and Item 5.06 of that form, since the completion of the transaction (or, in the case of foreign private issuers, has not filed a Form 20-F since the completion of the transaction).[209] Under the proposed amendments, a registrant meeting this definition would be required to file material agreements for the two-year look back period. The proposed amendments would help ensure that investors receive access to agreements containing material information, including agreements entered into by newly reporting registrants up to two years prior to the commencement of their reporting obligations. Registrants with established reporting histories would not be required to comply with the two-year look back requirement because investors would continue to have access to any material agreements previously filed on

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[207] *See* Exchange Act Rules Compliance and Disclosure Interpretation 153.02 (stating that a Form 10-K for the previous fiscal year is the first report due after a reporting obligation is revived), *available at* https://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm (last updated December 8, 2016).

[208] In the case of a registrant with a suspended reporting obligation that, less than two years later, is revived, the proposed requirement to file material agreements for the two-year look back period may be satisfied by incorporating by reference and hyperlinking to agreements previously filed on EDGAR and filing any material agreements entered into while the registrant was not reporting. *See Exhibit Hyperlinks Adopting Release*, *supra* note 14, at 14135.

[209] Under the proposed amendment, the definition of "newly reporting registrant" would not include reporting companies completing merger transactions with business combination-related shell companies.

EDGAR.[210] As such, the proposed amendments would streamline reporting obligations while maintaining investor protections.

Request for Comment

54. Should we revise Item 601(b)(10)(i) to limit the two-year look back test to newly reporting registrants as proposed?
55. Should the two-year look back requirement apply to a registrant completing a reverse merger involving any public shell company that is not a business combination-related shell company as proposed? Why or why not?
56. Should the proposed amendment be broadened to require that a public company acquiring or merging with a non-public company must apply the two-year look back test to agreements entered into by the non-public company prior to the transaction date?
57. Should registrants that have revived reporting obligations be required as proposed, to file material contracts for the full two-year look back period, regardless of how long their prior reporting obligation was suspended? Alternatively, if the registrant's reporting obligation was suspended for less than two years prior to revival, should the registrant only be required to file agreements entered into while the obligation was suspended?

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[210] Schedule A of the Securities Act requires that registrants file "every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing." *See* Schedule A, paragraph 24 [15 U.S.C. 77aa(24)]. Due to the availability of filings on EDGAR, as noted above, we believe the two-year look back requirement does not provide additional investor protection when applied to registrants with a reporting history.

4. Subsidiaries of the Registrant and Entity Identifiers (Item 601(b)(21)(i))

Item 601(b)(21) requires a registrant to list as an exhibit all of its subsidiaries, the state, or other jurisdiction of incorporation or organization of each, and the names under which those subsidiaries do business.[211] The name of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a "significant subsidiary" under Rule 1-02(w) of Regulation S-X.[212]

Consistent with the staff's recommendation in the FAST Act Report,[213] we are proposing amendments to Item 601(b)(21)(i) that would require registrants to include in the exhibit the legal entity identifier ("LEI"), if one has been obtained, of the registrant and each subsidiary listed. An LEI is a 20-character, alpha-numeric code that allows for unique identification of entities engaged in financial transactions. LEIs are intended to improve market transparency by providing clear identification of participants.[214] Fees are not imposed on investors for use of, or access to, LEIs. All of the associated reference data needed to understand, process, and use LEIs is widely and freely available. These associated reference data also are not subject to any usage

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[211] Item 601(b)(21)(i) of Regulation S-K [17 CFR 229.601(b)(21)(i)].

[212] Item 601(b)(21)(ii) of Regulation S-K [17 CFR 229.601(b)(21)(ii)].

[213] *See* FAST Act Report, *supra* note 2, at Recommendation F.4.

[214] *See* Arthur B. Kennickell, Bd. of Governors of the Fed. Reserve Sys., *Identity, Identification and Identifiers: The Global Legal Entity Identifier System* (Nov. 8, 2016), *available at* https://www.federalreserve.gov/econresdata/feds/2016/files/2016103pap.pdf.

restrictions. There is a cost of obtaining an LEI for registrants: a one-time fee of $75-$119 and $50-$99 in annual maintenance fees.[215]

In the Concept Release, we solicited comment on whether we should require registrants to disclose their LEI and the LEIs of their subsidiaries (if available) in Exhibit 21 and how this information would benefit investors. Many commenters supported requiring disclosure of LEIs,[216] with most of them recommending that we require both the registrant and its subsidiaries to obtain and disclose LEIs.[217] These commenters generally stated that the use of LEIs would improve investors' ability to understand registrants' risk profiles. In this regard, commenters

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[215] *See* Glob. Legal Entity Identifier Found., *Frequently Asked Questions - Fees, Payment and Taxes*, *available at* https://lei.bloomberg.com/docs/faq; and Glob. Mkt. Entity Identifier Util., *GMEI Utility Pricing, available at* https://www.gmeiutility.org/gmeiUtilityPricing.jsp. *See also,* Letter from SIFMA.

[216] *See, e.g.,* Letters from Data Coalition (July 21, 2016) ("Data Coalition") (recommending that the Commission adopt the "if available" disclosure standard as an interim step prior to requiring registrants to obtain and disclose LEIs); Bloomberg (recommending that filers should be required to obtain an LEI); SIFMA (noting that regulators have driven the expansion of the LEI system and expressing support for recent regulations that impose requirements upon certain investment companies to obtain an LEI); and XBRL US (recommending that the Commission require registrants to obtain an LEI for every company in their corporate structure; stating that use of LEIs would improve the functionality of filings by identifying participants in financial transactions and bringing clarity to interrelationships between entities). *See also* Letters from E. Bean; SEC Investor Advisory Committee (June 15, 2016) ("IAC 1") (stating that LEIs could facilitate the work of the Commission and other prudential regulators related to systemic risk, firm interconnectivity, and leverage at broker-dealers, asset managers, and other market participants and benefit investors trying to understand complex structures); Owner Subcommittee of the SEC's Investor Advisory Committee (Nov. 22, 2016) ("IAC 2"); Main Street Alliance (July 5, 2016); The Financial Accountability and Corporate Transparency Coalition (July 6, 2016); Citizens for Tax Justice; GRI (July 21, 2016); American Sustainable Business Council, Citizens for Tax Justice, FACT Coalition, Fair Share, Global Financial Integrity and Main Street Alliance (July 21, 2016); Americans for Tax Fairness (July 21, 2016); AFL-CIO (July 21, 2016); Oxfam America (July 21, 2016); S. Percoco; Americans for Financial Reform (Aug. 10, 2016); NYSCRF; Global Legal Identity Identifier Foundation (July 21, 2016); and CFA Institute. *See also* letter from TagniFi, LLC (Jan. 27, 2016) [Disclosure Effectiveness letter] ("TagniFi").

[217] *See id.* Two commenters opposed an LEI requirement, stating that "there is no global standard for LEI." *See* Letters from Financial Executives International and General Motors.

observed that LEIs would allow investors to link third-party data with structured data from the Commission to produce more meaningful analysis.[218]

The proposed amendment is intended to modernize the disclosure requirements under Regulation S-K by requiring registrants to provide any LEIs obtained for themselves or their listed subsidiaries to investors. This proposal would allow investors to use the LEI to more quickly and precisely identify registrants and their subsidiaries. Our proposal is consistent with prior regulatory efforts. For example, as part of our recent investment company reporting modernization efforts, we adopted rules requiring certain registrants and funds to obtain LEIs to provide a consistent means of identification.[219] Due in part to these and other similar global regulatory efforts, the usage of LEIs has increased over the last few years.[220]

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[218] *See, e.g.*, Letters from SIFMA, Bloomberg, and Data Coalition. *See also Nationally Recognized Statistical Rating Organizations*, Release No. 34-72936 (Aug. 27, 2014) [79 FR 55077 (Sept. 15, 2014)] (the "2014 NRSRO Amendments Release") and *Credit Risk Retention*, Release No. 34-73407 (Oct. 22, 2014) [79 FR 77601 (Dec. 24, 2014)] (the "Credit Risk Retention Release").

[219] *See Investment Company Reporting Modernization*, Release No. 33-10231 (Nov. 18, 2016) [81 FR 81870]) (the "IM Modernization Adopting Release"). *See also id.* at n.61 (discussing additional contexts in which the Commission has required LEIs, including Form PF – Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors, *available at* http://www.sec.gov/rules/final/2011/ia-3308-formpf.pdf); *Regulation SBSR–Reporting and Dissemination of Security-Based Swap Information*, Release No. 34-74244 (Feb. 11, 2015) [80 FR 14564 (Mar. 19, 2015)]. *See also 2014 NRSRO Amendments Release*, *supra* note 218; *Credit Risk Retention Release*, *supra* note 218.

[220] *See, e.g.*, Legal Entity Identifier Regulatory Oversight Comm., *The Global LEI System and regulatory uses of the LEI* (Nov. 5, 2015), *available at* http://www.leiroc.org/publications/gls/lou_20151105-1.pdf (progress report by the Legal Identifier Regulatory Oversight Committee, including an annex listing regulatory actions in the United States, the EU countries, and eight other countries which require, request, or allow the use of LEIs). The global LEI system currently has over 580,000 registrations and is growing. *See* Global LEI Foundation daily updated "concatenated file," which includes all LEIs issued globally and related LEI reference data, *available at* https://www.gleif.org/en/lei-data/gleif-concatenated-file/lei-download# or http://openleis.com. *See also* Glob. Legal Entity Identifier Found., *Regulatory Use of the LEI* (providing an overview of current and proposed global regulatory activities involving LEI), *available at* https://www.gleif.org/en/about-lei/regulatory-use-of-the-lei; Global LEI Data Quality Reports Archive, *available at* https://www.gleif.org/en/lei-data/gleif-data-

We recognize that many registrants and their subsidiaries may not have LEIs. Accordingly, our proposals would require disclosure of LEIs only for those registrants and subsidiaries that choose to obtain this identifier. Below, we solicit comment as to whether to require registrants and their subsidiaries to obtain LEIs.

Request for Comment

58. Should we require registrants to include in Exhibit 21 the LEI (if one has been obtained) of the registrant and each subsidiary required to be listed in the exhibit? Would requiring registrants to disclose LEIs in Exhibit 21 as proposed, provide investors with sufficient access to that information? Is there another location in registrant filings, other than Exhibit 21, where LEI information would be more accessible to investors? For example, should a registrant be required to disclose its LEI, if it has one, on the cover page of each registration statement, periodic filing, or current report and provide the LEIs for its significant subsidiaries in an exhibit?

59. If we require registrants to include LEIs in Exhibit 21 as proposed, should we also require them to provide that information as machine-readable data? If so, what structured data format would be the most useful to investors? For example, the Commission recently adopted amendments requiring investment companies to provide LEIs in XML format.[221] Should we require registrants that have already obtained LEIs to disclose their

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quality-management/about-the-data-quality-reports/archive# (showing total number of LEIs issued, renewed, reactivated and lapsed from January 2016 through April 2017).

[221] *See IM Modernization Adopting Release*, *supra* note 219.

LEIs in XML format? Or, for consistency with the proposal to tag information on the cover page of certain forms using Inline XBRL format,[222] should we require disclosure of LEIs in Inline XBRL format? What would be the additional cost to registrants to provide LEIs in XML, Inline XBRL, or another machine-readable format?

60. In light of the many comments received on the costs and benefits of LEIs,[223] should our rules encourage or require registrants and each subsidiary thereof required to be listed in Exhibit 21 to obtain an LEI? If so, how should we structure our rules to achieve this purpose?

61. Some registrants have numerous subsidiaries or affiliates operating globally, while other registrants have simple corporate structures. Should we require certain types of registrants, such as larger registrants or subsidiaries, to obtain LEIs? For example, should we limit the requirement to large accelerated filers, well-known seasoned issuers, or foreign private issuers?

5. Application to Foreign Private Issuers

The Commission previously adopted amendments to conform the exhibit requirements in Form 20-F to the requirements in Item 601.[224] To maintain a consistent approach to the exhibit requirements for domestic registrants and foreign private issuers, the proposed amendments

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[222] *See infra* Section II.G.1 (Tagging Cover Page Data).

[223] *See supra* notes 216 to 218 and accompanying text.

[224] *See International Disclosure Standards Release*, Release No. 33-7637 (Feb. 2, 1999) [64 FR 6261 (Feb. 9, 1999)] (expressing the Commission's intention "to conform the exhibit requirements for Form 20-F with the exhibit requirements for registration statements filed by U.S. issuers under the Exchange Act" and stating that all of the Form 20-F exhibit requirements "are required for domestic issuers filing a registration statement on Form 10 or an annual report on Form 10-K").

would require foreign private issuers to provide information in exhibit filings comparable to the information provided by domestic registrants under Item 601(a)(5), Item 601(a)(6), Item 601(b)(4)(vi), Item 601(b)(10)(i), Item 601(b)(10)(iv), and Item 601(b)(21), as proposed. In each case, we believe that the justifications for the proposed amendments to Item 601 are equally applicable to Form 20-F.

We are not proposing similar changes to Form 40-F. Form 40-F generally permits Canadian issuers to use Canadian disclosure documents to satisfy the Commission's registration and disclosure requirements. As a result, the exhibit requirements in Form 40-F are largely in accordance with Canadian disclosure standards.

Request for Comment

62. Should we amend the exhibit requirements of Form 20-F so that they are consistent with the requirements under Item 601 as proposed? Why or why not? Are there any unique considerations with respect to foreign private issuers in this context?
63. Should we make corresponding changes to the exhibit requirements in Form 40-F? Why or why not?
64. Would the proposed amendments conflict with home-country requirements in some jurisdictions? If so, please explain.

F. Incorporation by Reference

To reduce duplicative disclosure, registrants have been permitted to incorporate previously filed information into their filings since the enactment of the Securities Act and the

Exchange Act.[225] Initially, incorporation by reference was limited to exhibits, but over time we have increasingly permitted incorporation by reference in other contexts. The rules and instructions governing incorporation by reference are now found in a variety of regulations, including Regulation S-K, Regulation C, Regulation 12B and many of the Commission's forms.

In the FAST Act Report, the staff recommended that the Commission consider consolidating, clarifying, and updating Item 10(d) of Regulation S-K and the other rules governing incorporation by reference.[226] Consistent with our mandate under the FAST Act, our proposed amendments would revise Item 10(d), Rule 411,[227] Rule 12b-23,[228] and a number of our forms to simplify and modernize these rules while still providing all material information. Our proposed amendments would also rescind Rule 12b-32.[229] In addition, to provide for a consistent set of incorporation by reference rules for investment companies and investment advisers, we are proposing parallel amendments to Rule 0-4[230] and a number of forms under the Investment Company Act,[231] certain conforming amendments to Rule 0-6[232] under the

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[225] *See* Federal Trade Commission Release No. 33-47 (Sept. 22, 1933) (allowing for incorporation by reference of exhibits filed with registration statements); Release No. 34-51 (Nov. 27, 1934) (allowing for incorporation by reference of exhibits filed with the Commission under the Exchange Act or filed with an exchange).

[226] *See* FAST Act Report, *supra* note 2, at Recommendations A.1 and A.2.

[227] 17 CFR 230.411.

[228] 17 CFR 240.12b-23.

[229] 17 CFR 240.12b-32.

[230] 17 CFR 270.0-4.

[231] 15 U.S.C. 80a-1 *et seq*.

[232] 17 CFR 275.0-6.

Investment Advisers Act,[233] and the rescission of Rule 8b-23,[234] Rule 8b-24,[235] and Rule 8b-32[236] under the Investment Company Act (certain provisions of which would be consolidated into proposed new Rule 0-4). The proposed amendments would streamline the requirements associated with incorporation by reference and facilitate investor access to incorporated documents through the use of hyperlinks. The proposed amendments are also consistent with the Commission's longstanding acceptance of incorporation by reference in the interests of encouraging registrants to eliminate duplicative disclosures.

Our proposed amendments respond to some of the recommendations from commenters on the Concept Release. Commenters generally supported the use of incorporation by reference.[237] A number of commenters recommended expanding the ability to incorporate by reference.[238] Some commenters, while supporting the use of incorporation by reference, cautioned that it should not excessively fragment disclosure or make disclosure more difficult to access.[239]

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[233] 15 U.S.C. 80b-1 *et seq*.

[234] 17 CFR 270.8b-23.

[235] 17 CFR 270.8b-24.

[236] 17 CFR 270.8b-32.

[237] *See* Letters from Wachtell, Lipton, Rosen & Katz (May 16, 2016) ("Wachtell"); Ball Corporation (July 19, 2016) ("Ball"); Chamber 2; FedEx; CGCIV; International Integrated Reporting Council (July 20, 2016) ("IIRC"); California State Teachers' Retirement System (July 21, 2016) ("CalSTRS"); Edison Electric and AGA; American Federation of State, County and Municipal Employees (July 21, 2016) ("AFSCME"); Fenwick; and NIRI.

[238] *See* Letters from Wachtell; Chamber 2; FedEx; CGCIV; IIRC; Edison Electric and AGA; Fenwick; IAC 1; and NIRI.

[239] *See* Letters from IIRC and CalSTRS. The IIRC recommended emphasizing the use of incorporation by reference for "supplementary" information so as to focus the disclosure in a document on "core" information.

1. Item 10(d)

Item 10 of Regulation S-K[240] contains general requirements on the application of Regulation S-K. Item 10(d) focuses on incorporation by reference.[241] Item 10(d) states that, where rules, regulations, or instructions to the forms permit incorporation by reference, a document may be incorporated by reference to the specific document and to the prior filing or submission in which that document was physically filed or submitted. Item 10(d) generally prevents registrants from incorporating by reference a portion of a document that itself also incorporates pertinent information by reference.[242] It also prohibits incorporating documents by reference if they have been on file with the Commission for more than five years and do not fall within one of the exceptions provided in the rule.[243]

Consistent with the staff's recommendation in the FAST Act Report, we are proposing to eliminate the five-year limit in Item 10(d). This requirement originated from the Commission's policy on retention of hard copy records of filings, as set forth in the Commission's Rules of Practice.[244] This requirement previously imposed a 10-year limit but was reduced to five years

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[240] 17 CFR 229.10.

[241] 17 CFR 229.10(d).

[242] Indirect incorporation by reference is permitted when the registrant is expressly required to incorporate a document by reference and, in the case of asset-backed issuers, under Item 1100(c) of Regulation AB [17 CFR 229.1100(c)]. *See* Item 10(d).

[243] *See infra* note 247 and accompanying text (discussing the exceptions).

[244] *See Rules of Practice*, Release No. 34-35833 (June 9, 1995) [60 FR 32738 (June 23, 1995)] (moving the requirements from Rule 24 of the Commission's Rules of Practice to Item 10(d)). We are also proposing to eliminate remaining references to Rule 24 in Regulation S-K and other rules and forms. *See, e.g.*, Rule 411(d) and Form N-2.

in 1977 to allow for the Commission's "orderly destruction of unneeded filings."[245] At the time, the Commission noted that the "cost of storage outweighs the usefulness to the Commission and to the public of many if not most of these records."[246] Nevertheless, exceptions were added for documents contained in registration statements of reporting registrants and for documents that a registrant identifies by file number that have not been disposed of pursuant to the Commission's Records Control Schedule.[247] Given these broad exceptions and the current practice of retaining documents electronically, the five-year limit now serves little purpose and may lead to confusion about which documents may be incorporated by reference.[248]

Without the provisions relating to the five-year limit, little substance remains in Item 10(d). Therefore, to simplify the requirements, we are proposing to move the remaining provision in Item 10(d) prohibiting indirect incorporation by reference into the other rules governing incorporation by reference.[249] In the FAST Act Report, the staff recommended

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[245] *See* 25 FR 6719 (July 15, 1960) (adopting Rule 24); *Incorporation by Reference*, Release No. 33-5818 (Mar. 18, 1977) [42 FR 16922 (Mar. 30, 1977)] (adopting an amendment to Rule 24 reducing the 10-year limit to five years).

[246] *Notice of (1) Proposed Amendments to Rule 24 of the Rules of Practice and All Other Commission Rules Relating to Incorporation By Reference and Basic Documents and (2) Proposed Revocation of Securities Exchange Act Rule 12b-34*, Release No. 33-5711 (May 21, 1976) [41 FR 105 (May 28, 1976)] (proposing a three-year limit with certain "basic documents" being retained for a longer period).

[247] *See* Item 10(d)(1)-(2) and the Commission's Records Control Schedule [17 CFR 200.80f].

[248] We believe that it is very unlikely that a registrant would attempt to incorporate by reference to a document that was filed with the Commission but is no longer available because it was not submitted on EDGAR and has been destroyed pursuant to the Records Control Schedule. For example, the Commission retains Securities Act and Exchange Act registration statements, reports and proxy materials that have not been filed on EDGAR for 30 years. *See* Records Control Schedule [17 CFR 200.80f]. Under the proposed amendments, a registrant would not be permitted to incorporate by reference to a destroyed document because it would render its disclosure incomplete, unclear, or confusing. *See, e.g.*, proposed Rule 411(e) and Rule 12b-23(e).

[249] *See* the proposed amendments to Rule 411, Rule 12b-23, Rule 0-4, and Rule 0-6. Paragraph (d) of Item 10 also states that, when incorporation by reference is permitted, a document may be incorporated by reference to the

consolidating the incorporation by reference rules in Item 10(d). After considering this recommendation, we believe that consolidating these procedural rules in Regulation C and Regulation 12B (and, for investment companies and investment advisers, in Rule 0-4 under the Investment Company Act and Rule 0-6 under the Investment Advisers Act, respectively[250]) would better align with the Commission's original intent of focusing Regulation S-K on substantive disclosure requirements.[251]

Request for Comment

65. Should we consolidate the requirements governing incorporation by reference as proposed? Would the proposed structure of the incorporation by reference rules be simpler for registrants, particularly smaller registrants, to follow? Instead of preserving the different rules for incorporation by reference under Regulation C and Regulation 12B,

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specific document and to the prior filing or submission in which such document was physically filed or submitted. We are proposing to eliminate this provision because similar provisions exist in Rule 411(d), Rule 12b-23(b), Rule 0-4(c), and Rule 0-6(c).

[250] As part of these amendments, we are proposing amendments to various Investment Company Act forms to eliminate references to Item 10(d), along with outdated references in our forms and Rule 0-4 and Rule 0-6 to 17 CFR 228.10(f), a former rule under Regulation S-B which was rescinded in 2007. *See Smaller Reporting Company Regulatory Relief and Simplification*, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934 (Jan. 4, 2008)].

[251] *See* FAST Act Report, *supra* note 2, at Recommendation A.2 ("These rules could be consolidated in Item 10(d) for submissions that are required to comply with Regulation S-K."). When the Commission adopted the integrated disclosure system, it indicated that it intended to bifurcate the regulations into procedural requirements and substantive disclosure requirements. *See Proposed Revision of Regulation C, Registration and Regulation 12B, Registration and Reporting*, Release No. 33-6333 (Aug. 6, 1981) [46 FR 41971 (Aug. 18, 1981)] ("In its development of an integrated disclosure system, the Commission has sought to consolidate requirements relating to substantive disclosure and document content in Regulation S-K. The proposals in this release reflect the continuation of that process and also the effort to simplify and consolidate procedural requirements in Regulations C and 12B."); *Integrated Disclosure System Adopting Release*, *supra* note 69 ("The third aspect of the integrated disclosure system consists of Regulation C and Regulation 12B, which contain the procedures to be used in preparing and filing registration statements and reports under the Securities Act and the Exchange Act, respectively."). Nevertheless, the rules governing incorporation by reference could be consolidated in Regulation S-K. We are soliciting comment on whether such an approach would be preferable.

should we combine Rule 411, Rule 12b-23, and Rule 12b-32 in a single item of Regulation S-K? Would that facilitate or streamline compliance with the rules?

66. Should we eliminate Item 10(d)'s five-year limit on incorporation by reference as proposed? Given the exceptions that exist and the Commission's electronic filing requirements, is the five-year limit obsolete? Would eliminating the five-year limit make it difficult for investors to locate information that a registrant incorporates by reference?

67. For investment companies and investment advisers, should we consolidate the different rules for incorporation by reference into Rule 0-4 and Rule 0-6, respectively as proposed? Would this structure be simpler for investment companies and investment advisers to follow, or are there special considerations regarding investment companies and investment advisers that make the current or another structure more appropriate?

2. Securities Act Rule 411, Exchange Act Rule 12b-23 and Rule 12b-32 and Related Rules under the Investment Company Act and Investment Advisers Act

Rule 12b-23 governs incorporation by reference for registration statements filed pursuant to Sections 12(b) and 12(g) of the Exchange Act and reports filed pursuant to Sections 13 and 15(d) of the Exchange Act.[252] Rule 12b-23 broadly allows for incorporation by reference in answer, or partial answer, to any item of an Exchange Act registration statement or report. Rule 12b-32 governs incorporation by reference for exhibits filed with registration statements and reports. Rule 411 governs incorporation by reference for registration statements filed under

[252] *See* Rule 12b-1 [17 CFR 240.12b-1] (setting forth the scope of Regulation 12B).

the Securities Act, including exhibits thereto.[253] Rule 411 restricts incorporation by reference in a prospectus unless otherwise provided in the appropriate form but allows for incorporation by reference similar to Rule 12b-23 for the non-prospectus portions of a registration statement.[254]

Under the Investment Company Act, Rule 0-4 provides general incorporation by reference rules for investment company registration statements, applications, and reports filed with the Commission. Rule 8b-23 (additional incorporation by reference rules for registration statements and reports), Rule 8b-24 (rules regarding summaries or outlines of documents), and Rule 8b-32 (incorporation of exhibits by reference) provide additional incorporation by reference rules for investment company registration statements and reports. Under the Investment Advisers Act, Rule 0-6 governs incorporation by reference for investment adviser applications for Commission orders under the Investment Advisers Act other than applications for registration as an investment adviser.

a. *Exhibit and Other Filing Requirements*

Rule 12b-23(a)(3) under the Exchange Act requires that copies of any information incorporated by reference must be filed as an exhibit, with limited exceptions.[255] This provision

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[253] *See* Rule 400 [17 CFR 230.400] (setting forth the scope of Regulation C).

[254] *See Integrated Disclosure System Adopting Release*, *supra* note 69; *Proposed Revision of Regulation C, Registration and Regulation 12B, Registration and Reporting*, Release No. 33-6333 (Aug. 6, 1981) [46 FR 41971 (Aug. 18, 1981)] ("While it is generally proper to prevent prospectuses from incorporating exhibits which are not delivered, the Commission does not believe it is necessary to impose such limits in connection with Exchange Act reports which are not actually delivered in registered public offerings of securities.").

[255] *See* Rule 12b-23(a)(3) [17 CFR 240.12b-23(a)(3)](providing exceptions for a proxy or information statement incorporated by reference in response to Part III of Form 10-K, a form of prospectus filed pursuant to Rule 424(b) [17 CFR 230.424(b)] incorporated by reference in response to Item 1 of Form 8-A, and information filed on Form 8-K).

was introduced in 1971 so that then-existing microfiche technology for the public dissemination of reports and documents filed with the Commission could function properly.[256] Rule 411(b)(4) under the Securities Act has a more limited exhibit filing provision for non-prospectus information that is incorporated by reference into a document that does not comply with the five-year limit in Item 10(d). Rule 8b-23 under the Investment Company Act generally requires investment company registrants to file with a registration statement or report a copy of any registration statement, report, or prospectus from which information is incorporated by reference, except in cases where the registration statement, report, or prospectus was filed electronically.[257]

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[256] *See Registration and Reporting and Form for Annual Reports of Employee Stock Purchase Plans*, Release No. 34-9048 (Jan. 4, 1971) [36 FR 4483 (Mar. 6, 1971)] ("In order that the microfiche system for the public dissemination of reports and documents filed with [the] Commission may work, the amended rule requires that copies of information or financial statements incorporated by reference, or copies of the pertinent pages of any document containing such information or statement, be filed with the registration statement or report in which it is so incorporated.").

[257] *See* Rule 8b-23(a) [17 CFR 270.8b-23(a)]. In addition, Rule 0-4 under the Investment Company Act and Rule 0-6 under the Investment Advisers Act permit the incorporation by reference as an exhibit in any registration statement, application or report (in the case of Rule 0-4) or in any application (in the case of Rule 0-6) any document or part thereof previously or concurrently filed with the Commission. Both rules also permit the incorporation by reference of financial statements (or parts thereof), although Rule 0-6 specifies that the financial statements (or parts thereof) that are incorporated are to be filed as exhibits. For consistent rules under both Acts, we are proposing amendments to Rule 0-4 to specify that financial statements may be filed as exhibits to investment company applications, as Rule 0-6 currently specifies with respect to applications filed under the Investment Advisers Act.

Furthermore, if the number of copies of any document from which information is incorporated by reference is less than the number of copies required to be filed with a registration statement, application, or report, Rule 0-4 and Rule 0-6 require an investment company or applicant, respectively, to file as many additional copies of the document incorporated by reference as may be necessary to meet the requirements of the registration statement, application, or report. *See* Rule 0-4(a), Rule 0-6(a). We are proposing to eliminate the requirement to file additional copies from Rule 0-4 because most investment company filings are available on EDGAR. Although investment adviser applications are filed in paper format, in the staff's experience, those applications rarely incorporate by reference information as permitted by Rule 0-6. For our regulatory purposes, we do not believe that the number of copies specified in current Rule 0-6 is needed. Thus, for the foregoing reasons and for consistency purposes, we are similarly proposing to eliminate the requirement to file additional copies from Rule 0-6.

We are proposing to eliminate these requirements, consistent with commenters' suggestions and the staff's recommendation in the FAST Act Report to make the rules for incorporation by reference more consistent, and to apply consistent rules for incorporation by reference under the Investment Company Act and Investment Advisers Act.[258] We no longer believe that these requirements are necessary as most Exchange Act filings are made publicly available on EDGAR, and as we generally do not have similar exhibit filing requirements for Securities Act registration statements.[259]

In connection with these proposed amendments, we are also proposing to eliminate the corresponding exhibit requirement in Item 601(b)(99)(ii) of Regulation S-K, which was adopted in connection with Rule 12b-23(a) and Rule 411(b)(4).[260] In addition to Item 601(b)(99), other provisions in Item 601 require documents to be filed as exhibits only when they are incorporated by reference into a filing. For example, Item 601(b)(13) requires a registrant to file an annual report to security holders, Form 10-Q or quarterly report to security holders as an exhibit when the registrant incorporates all or a portion of such reports by reference. Although annual reports to security holders are readily available to investors and the staff outside of EDGAR, we believe it is appropriate to retain the exhibit requirement in these circumstances because some registrants

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[258] *See* Letters from ABA and Fenwick. *See also* FAST Act Report, *supra* note 2, at Recommendation A.2.

[259] We note that investment advisers register and submit some filings to the Commission electronically through the Investment Adviser Registration Depository ("IARD").

[260] *See Integrated Disclosure System Adopting Release*, *supra* note 69 (adopting Item 601(b)(28)(ii), which is now found in Item 601(b)(99)(ii)) and *Proposed Revision of Regulation S-K and Proposed Rescission of Guides for the Preparation and Filing of Registration Statements and Reports*, Release No. 33-6332 (Aug. 6, 1981) [46 FR 41925 (Aug. 18, 1981)].

satisfy their disclosure requirements by incorporating a significant amount of disclosure from these reports. We are not proposing to eliminate these other exhibit filing requirements in Item 601. Nonetheless, we are proposing to eliminate the requirement in Item 601(b)(13) to file a Form 10-Q as an exhibit when it is specifically incorporated by reference into a prospectus. This provision would no longer be necessary because, under the proposed rules, a registrant would be required to include a hyperlink to any information that is incorporated by reference to a document available on EDGAR.[261]

Request for Comment

68. Should we eliminate the requirement in Rule 12b-23(a)(3) and Rule 411(b)(4) that copies of information incorporated by reference be filed as exhibits to registration statements or reports? Would eliminating these requirements encourage incorporation by reference as suggested by some commenters?[262] Would eliminating the requirement make it difficult for investors to locate the incorporated information on EDGAR?
69. Should we modify, as proposed, the exhibit filing provisions in Rule 0-4, Rule 8b-23, and Rule 0-6 regarding materials incorporated by reference? Are there special considerations regarding investment companies and applications under the Investment Advisers Act that merit maintaining or modifying the current provisions we are proposing to eliminate? Should we specify in Rule 0-4, as proposed, that financial statements may be filed as exhibits to investment company applications, as Rule 0-6 currently specifies with respect

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[261] *See infra* Section II.F.2.b. (Incorporation by Reference - Hyperlinks).

[262] *See* Letters from ABA and Fenwick.

to applications filed under the Investment Advisers Act? Given that applications under the Investment Advisers Act are filed with the Commission in paper, should our final rules continue to require the filing of additional copies of materials incorporated by reference?

70. Some documents are required to be filed as exhibits only when they are incorporated by reference into a filing. For example, Item 601(b)(13) requires an annual report to security holders to be filed as an exhibit to a Form 10-K when all or part of the annual report is incorporated by reference into the text of Form 10-K. Should we amend Item 601(b)(13) or other provisions in Item 601 to eliminate these requirements (or is the proposed elimination of Rule 12b-23(a)(3) sufficient to encourage incorporation by reference)? Please address the availability of the information called for by Item 601 to investors and the Commission in your response.[263]

b. *Hyperlinks*

Consistent with the recommendation of commenters and the staff, we are proposing to facilitate greater investor access to disclosure by amending Rule 411, Rule 12b-23, and Rule 0-4 to require hyperlinks to information that is incorporated by reference if that information is available on EDGAR.[264] The Commission recently adopted rules requiring hyperlinks to most

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[263] For example, annual reports are required to be delivered to security holders. *See* Rule 14a-3(b) and Rule 14c-3(a) [17 CFR 240.14a-3(b) and 14c-3]. Such reports must also be provided to the Commission. *See* Rule 14a-3(c) [17 CFR 240.14a-3] and Rule 14c-3(b) (requiring hard copies of these reports to be delivered to the Commission).

[264] *See* Letters from Chamber; FedEx; Fenwick; and CGCIV. *See also* FAST Act Report, *supra* note 2, at n.34. We are not proposing similar amendments to Rule 0-6 because applications under the Investment Advisers Act

exhibits filed pursuant to Item 601, Form F-10[265] or Form 20-F.[266] To accommodate hyperlinks, those filings must be made in HTML format.[267] The requirement to file documents in HTML format would be expanded under the proposed rules to include filings that are subject to the proposed hyperlinking requirements in Rule 411, Rule 12b-23, and Rule 0-4.[268] We believe that expanding the hyperlinking requirement to other information that is incorporated by reference would improve the readability and navigability of disclosure documents and discourage repetition, consistent with our FAST Act mandate.

The proposed requirements for hyperlinking are similar to the requirements for exhibit hyperlinking. Specifically, under the proposed amendments, registrants would not be required to file an amendment to a document solely to correct an inaccurate hyperlink unless, that hyperlink was included in a pre-effective registration statement. An inaccurate hyperlink alone would neither render the filing materially deficient nor affect a registrant's eligibility to use Form S-3[269] or Form F-3.[270] Lastly, we are not proposing to require refiling of information that is

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filed pursuant to that rule are not required to be filed electronically. In addition, applications filed pursuant to Rule 0-6 may incorporate information that may not be filed on EDGAR.

[265] 17 CFR 239.40.

[266] *See Exhibit Hyperlinks Adopting Release*, *supra* note 14, at 14130.

[267] *See id.* at 14130. Larger registrants were required to comply with the rules requiring exhibit hyperlinks for filings submitted on or after September 1, 2017. *Id.* The rules we adopted at that time did not generally apply to investment companies. However, as discussed below, we are proposing to apply similar requirements to certain filings by investment companies in this release. *See infra* Section 0.

[268] *See* proposed Rule 105(e) of Regulation S-T. We do not believe that the proposed amendments would significantly increase the number of filings that must be in HTML format. Filings that are not subject to Rule 411 or Rule 12b-23, such as proxy statements on Schedule 14A, would not be affected by this proposal.

[269] 17 CFR 239.13.

[270] 17 CFR 239.33.

incorporated by reference from a document that was previously filed with the Commission in paper. Similar to our reasoning in the Exhibit Hyperlinks Adopting Release, we believe that requirement would have limited utility given that electronic filing has been required for over two decades and paper filings are currently made in very limited circumstances.[271]

Unlike the requirements for exhibit hyperlinking, however, a registrant would not be required to correct inaccurate hyperlinks in an effective registration statement by including a corrected hyperlink in a subsequent periodic report or a post-effective amendment. We preliminarily believe that it would result in more confusion than clarity if we were to require registrants to re-file disclosure to correct a hyperlink or to include a section solely devoted to corrected hyperlinks in the body of a periodic report or post-effective amendment. This differs from exhibit hyperlinks where the corrected hyperlink would be unobtrusively located in the exhibit index with other exhibits. The requirement in proposed Rule 411, Rule 12b-23, and Rule 0-4 to describe the location of the information incorporated by reference should mitigate the impact of any inaccurate hyperlinks.

Request for Comment

71. As proposed, in most cases a registrant would be required to include a hyperlink to information that it incorporates by reference. Would the proposed hyperlinking requirements significantly increase the compliance burden on registrants? Should we

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[271] *See Exhibit Hyperlinks Adopting Release*, *supra* note 14, at 14131. *See also* FAST Act Report, *supra* note 2, at n.31 and accompanying text.

provide a delayed compliance date for smaller reporting companies and ASCII filers?[272] If so, what compliance date would be appropriate? Should we provide any exceptions to the proposed hyperlinking requirement? For example, should we exclude references to entire forms that are readily accessible on EDGAR, such as Form 10-K, or for particular types of disclosure? If so, which forms or types of disclosure would be appropriate and why?

72. Should investment companies be required to include a hyperlink to information incorporated by reference as proposed? Are there special considerations regarding filings by investment companies that merit modifying the requirement in any way? For example, should investment company applications be required to include a hyperlink to information that is incorporated by reference?

73. When should registrants be required to update inaccurate hyperlinks? Should these updating requirements differ from the requirements to update inaccurate exhibit hyperlinks as proposed?[273] Should we instead require registrants to update hyperlinks in a post-effective amendment or subsequent periodic report?

74. Should we amend our forms to clarify that information incorporated by reference must include a hyperlink to where that information may be found on EDGAR? Would the requirements be sufficiently clear if we include them only in the rules as proposed?

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[272] *See Exhibit Hyperlinks Adopting Release*, at 14130.

[273] *See Exhibit Hyperlinks Adopting Release*, *supra* note 14, at n.73 .

c. *Financial Statements*

In addition to addressing incorporation by reference, the FAST Act Report recommended that we consider revising our rules and forms to allow for consistent cross-referencing to disclosure found elsewhere in a filing.[274] To address the concern that cross-referencing to non-financial information from within the financial statements may raise questions about the scope of an audit or review, the staff recommended that we consider prohibiting the use of such cross-referencing. Several commenters on the Concept Release also supported using cross-references to reduce repetitive disclosure while recommending that the Commission clarify or delineate what information constitutes the set of audited or reviewed financial statements.[275]

In most cases, there is no prohibition on cross-referencing to or incorporating information from the financial statements to satisfy the narrative disclosure requirements of Regulation S-K.[276] In some cases cross-referencing is specifically permitted.[277] Therefore, although we encourage registrants to make use of the disclosure in their financial statements to satisfy other disclosure requirements,[278] we are not proposing clarifying amendments to our rules or forms to address incorporation by reference from the financial statements at this time.

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[274] *See* FAST Act Report, *supra* note 2, at Recommendation A.2.

[275] *See* Letters from Deloitte & Touche LLP (July 15, 2016); CAQ; Ernst & Young 3; PNC; Grant Thornton LLP (July 21, 2016); KPMG; PWC; Crowe Horwath LLP (July 21, 2016) ("Crowe Horwath"); and CFA Institute.

[276] Although Rule 411 restricts incorporation by reference in a prospectus, it does not prohibit cross-references within a prospectus. Also, Securities Act forms, such as Forms S-1 and S-3, permit incorporation by reference in the prospectus if specified conditions are met.

[277] *See, e.g.*, Item 101(b) and Item 101(d)(2) of Regulation S-K [17 CFR 229.101(b) and (d)(2)].

[278] For example, disclosure about legal proceedings, transactions with related persons and matters relevant to MD&A might be disclosed in the financial statements.

By contrast, where financial statements cross-reference or incorporate information from outside the financial statements, it can raise questions as to the scope of an auditor's responsibilities.[279] To address this concern, we are proposing amendments to our rules and forms that would prohibit that type of incorporation by reference or cross-referencing.[280] These amendments would not prohibit cross-references to other parts of a filing when otherwise specifically permitted by our rules.[281] These amendments would also not prohibit incorporating financial information from other filings to satisfy financial reporting requirements when otherwise permitted or required.[282]

We are also proposing an amendment to Rule 0-4 that, except as provided in the Commission's rules, would restrict the incorporation of financial information required to be given in comparative form for two or more fiscal years or periods unless the information incorporated by reference includes the entire period for which the comparative data is given.[283] We are proposing this amendment to provide for consistency with similar restrictions under both

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[279] *See supra* note 275 and accompanying text.

[280] See our proposed amendments to Rule 411, Rule 12b-23, and Rule 0-4 and Securities Act Forms S-1, S-3, S-11, and F-1. This approach would also avoid the concern raised by one commenter that registrants may lose their Securities Act Section 27A [15 U.S.C. 77z-2] safe harbor by cross-referencing to the body of a periodic report within their financial statements. *See* Letter from General Motors. Because Rule 0-6 governs incorporation by reference only for applications filed under the Investment Advisers Act, we are not proposing to make similar amendments to that rule, but request comment on whether the final rule should include such provision.

[281] For example, registrants would continue to be permitted to include cross-references in the financial statements to information outside of the financial statements about segments when that information conforms with generally accepted accounting principles. *See* Item 101(b) of Regulation S-K.

[282] For example, registrants using Form S-3 would continue to be permitted to incorporate financial statements filed with a Form 8-K that reports the acquisition of a significant business. Also, registrants using Form S-4 to report a merger with another registrant would continue to be able to incorporate the financial statements of the registrant filed on Form 10-K and Form 10-Q.

[283] *See* proposed Rule 0-4(b).

current and proposed Rule 411 and Rule 12b-23 and request comment on whether this amendment is appropriate.

Request for Comment

75. Should we amend our rules or forms to clarify or expand when financial statement disclosure may be used to satisfy other disclosure requirements? If so, are there particular areas of disclosure that we should address?
76. To clarify the scope of the financial statements and an auditor's responsibilities, we have proposed prohibiting registrants from incorporating or cross-referencing information outside of the financial statements into their financial statements unless otherwise specifically permitted or required by the Commission's rules. Is the proposed approach appropriate or would an alternative approach better achieve this goal? Should we provide other exceptions to the proposed rule?
77. Are the proposed amendments appropriate for investment companies? Do investment companies raise special considerations that our rules and forms should address? Should we amend Rule 0-6 to provide for similar rules regarding the incorporation by reference of financial statements into applications under the Investment Advisers Act? Why or why not?

d. *Other Amendments*

We are also proposing several non-substantive changes to Rule 411, Rule 12b-23 and Rule 0-4 to streamline, clarify, and conform these rules. One of these proposed changes relates

to the current provisions governing how financial information from another filing may be incorporated by reference.[284] Rule 12b-23 states that financial information incorporated by reference must comply with the requirements of the form or report into which it is incorporated. Rule 411 and Rule 0-4 contain similar language.[285] These provisions could be read to imply that the financial statements must comply with the form on which they were originally filed, rather than the form into which they are being incorporated. We are proposing to eliminate these provisions because all information, not just information incorporated by reference or financial information, must comply with the requirements of the form in which it is used unless otherwise permitted by rule or statute.

The proposed amendments would also eliminate several redundant provisions in Rule 411 and Rule 12b-23. Rule 411(b) provides that information may be incorporated by reference in answer, or partial answer, to any item that calls for information not required to be included in a prospectus "subject to the following provisions." Although presented as conditions to using incorporation by reference, the provisions that follow mostly discuss situations where incorporation by reference is permitted by other parts of these rules. For example, Rule 411(b)(1) states that non-financial information may be incorporated by reference to any document in response to the non-prospectus disclosure requirements in filings under the Securities Act. Rule 12b-23(a) contains a similar structure for any item of a registration

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[284] *See* Rule 411(b)(2) (discussing the incorporation by reference of financial information in the non-prospectus portion of a registration statement) and Rule 12b-23(a)(1).

[285] Similar language also exists in Rule 8b-23, which we are proposing to rescind.

statement or report. Further, Rule 411(b)(3) (for non-prospectus disclosure requirements) and Rule 12b-23(a)(2) both state that incorporating information by reference to other parts of the same filing is generally permitted. Incorporation by reference in all of these contexts is permitted by the broader provisions of Rule 411(b) and Rule 12b-23(a). Accordingly, we are proposing to eliminate paragraphs (b)(1) and (b)(3) of Rule 411 and paragraph (a)(2) of Rule 12b-23, as these provisions are unnecessary.

We are also proposing to move the provisions relating to incorporating exhibits by reference from Rule 12b-32 into Rule 12b-23. Previously, Regulation C had a bifurcated structure, similar to Rule 12b-32 and Rule 12b-23, with both Rule 411 and Rule 447 governing the incorporation of exhibits by reference for Securities Act filings. Rule 447 was consolidated into Rule 411 in 1982.[286] Although Rule 12b-32 is currently found under the exhibits subheading of Regulation 12B, we believe that reducing the number of separate rules governing incorporation by reference would simplify compliance. We are not proposing any substantive changes to Rule 12b-32.[287]

For similar reasons, we are proposing to move the provisions relating to incorporating exhibits by reference from Rule 8b-32 into Rule 0-4, with one exception.[288] Under Rule 8b-

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[286] *See Integrated Disclosure System Adopting Release*, *supra* note 69.

[287] The proposed amendments would conform the language of Rule 12b-32 (as incorporated into Rule 12b-23) with similar language currently found in Rule 411(c). References to 17 CFR 228.10(f), which no longer exists, would be eliminated.

[288] As with the proposed amendments to Rule 12b-23, we are proposing to conform the language of paragraphs (a) and (b) of Rule 8b-32 (as incorporated into Rule 0-4) with similar language currently found in Rule 411(c). References to 17 CFR 228.10(f), which no longer exists, would similarly be eliminated.

32(c), an investment company may only incorporate by reference into a registration statement or report required to be filed electronically an exhibit that was filed in electronic format, unless the exhibit was filed in paper under a hardship exemption and any required confirming copy has been submitted.[289] Given that EDGAR is now the primary method for the filing of investment company registration statements, applications, and reports with the Commission and our rules require the filing of electronic format copies of paper format documents filed under a hardship exemption,[290] this provision is obsolete, and therefore, we are proposing to eliminate it.[291]

We are also proposing additional modifications to Rule 0-4 and Rule 0-6 to modernize and simplify these rules. First, we are proposing to eliminate the requirement that if a certificate of an independent public accountant previously or concurrently filed is incorporated by reference by an investment company (with respect to the filing of a registration statement, application, or report) or an investment adviser (with respect to the filing of an application) a written consent of the accountant must be filed with the filing.[292] We note that Rule 439 under the Securities Act[293] provides a similar requirement for these types of consents for registration statements under the Securities Act. We further note that our investment company registration forms do not require the filing of these consents where a registration statement or amendment is filed only under the

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[289] *See* Rule 8b-32(c).

[290] *See, e.g.*, Rule 201(b) of Regulation S-T [17 CFR 232.201(b)], Notes 2 and 3 to Rule 202 of Regulation S-T [17 CFR 232.202].

[291] *See* paragraph (a)(iv) of Rule 101 of Regulation S-T [17 CFR 232.101] (specifying the investment company filings required to be submitted electronically).

[292] *See* Rule 0-4(b), Rule 0-6(b).

[293] 17 CFR 239.439.

Investment Company Act.[294] We are unaware of circumstances under which a consent would be required in connection with an investment company report or an application filed by an investment company or investment adviser. Therefore, we are proposing to eliminate this requirement from Rule 0-4 and Rule 0-6 but request comment on whether the final rules should retain it.

Second, we are proposing to eliminate the restrictions currently contained in Rule 0-4(d) and Rule 0-6(d) on incorporating by reference exhibits or financial statements made in certain filings.[295] Given that EDGAR is now the primary method for the filing of registration statements and reports with the Commission, and that documents filed on EDGAR remain available regardless of whether a filing is withdrawn, whether a registration statement ceases to be effective, and whether the other circumstances outlined in Rule 0-4(d) and Rule 0-6(d) apply to a particular filing, these provisions are no longer necessary.[296] For our regulatory purposes, we do not believe that the restrictions are needed. Thus, for the foregoing reasons and for consistency purposes, we are proposing to eliminate this provision from Rule 0-4 and Rule 0-6 but request comment on whether the final rules should retain it.

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[294] *See, e.g.*, General Instruction B.2(b) of Form N-1A.

[295] Specifically, the rules restrict the incorporation by reference of exhibits or financial statements which (1) have been withdrawn, (2) were filed in connection with certain registration statements that have ceased to be effective, (3) are contained in filings subject to pending proceedings under (i) Section 8(b) or 8(d) of the Securities Act, (ii) Section 8(e) of the Investment Company Act, (iii) in the case of applications under Rule 0-6, Section 203(e)(1) of the Investment Advisers Act, or (iv) orders under any of the foregoing, and (4) in the case of investment companies, were documents filed in paper and with respect to an electronic filer under a temporary hardship exemption under Rule 201 of Regulation S-T and an electronic copy has not been submitted.

[296] As noted earlier, investment advisers register and submit some filings to the Commission electronically through IARD.

Finally, we are proposing to eliminate the provisions currently contained in Rule 0-4(e) and Rule 0-6(e). These provisions provide that the Commission may refuse to permit incorporation by reference in any case in which, in the Commission's judgment, such incorporation would render a registration statement or report of an investment company or an application filed by an investment adviser incomplete, unclear, or confusing. Instead, for consistency with proposed Rule 411(e) and proposed Rule 12b-23(e), we are proposing to amend Rule 0-4 and Rule 0-6 to contain a general requirement that information must not be incorporated by reference in any case where such information would render the disclosure incomplete, unclear, or confusing.[297]

Request for Comment

78. We are proposing to eliminate several redundant parts of the rules that address incorporation by reference. Are those provisions helpful to understanding whether and when incorporation by reference is permitted? Should we include those provisions in instructions to the rules or in other guidance?
79. Are the proposed amendments appropriate with respect to investment companies, or do investment companies raise special considerations that our rules should address? For example, should our rules maintain the current restriction contained in Rule 8b-32(c) regarding exhibits filed as part of registration statements and reports required to be filed electronically? Should our rules retain the current requirement that a consent be filed

[297] *See* proposed Rule 0-4(e), proposed Rule 0-6(b). A substantially similar provision exists in current Rule 8b-23(c) (which we are proposing to rescind) pertaining to information incorporated by reference into an investment company registration statement or report.

where an independent public accountant certificate is incorporated by reference? Should our rules retain the current prohibitions on incorporating by reference information filed as part of certain filings specified in Rule 0-4(d) and Rule 0-6(d)? In these cases, should our rules retain the current provisions of our rules, or should they be modified in any way? If so, how?

80. Are the proposed amendments to Rule 0-4 and Rule 0-6 sufficient to help ensure that information incorporated by reference into a registration statement, report, or application does not render the disclosure in these documents incomplete, unclear, or confusing? If so, should we, as proposed to provide regulatory consistency between operating companies on the one hand and investment companies and investment advisers on the other, eliminate the current provisions in Rule 0-4(e) and Rule 0-6(e) that the Commission may refuse to permit incorporation by reference in any case in which in its judgment the incorporation would render a registration statement, report, or application incomplete, unclear, or confusing? Why or why not? If retained, should the provisions be modified in any way, and if so, how?

81. Are the proposed rules governing incorporation by reference under the Investment Company Act or Investment Advisers Act sufficiently clear? Should we modify them in any other respect? For example, should our rules expressly permit or prohibit information to be incorporated into the body of an application?

3. Forms

Incorporation by reference is also addressed in our forms.[298] Accordingly, we are proposing revisions to several of the Commission's forms to implement the proposed amendments discussed above. In addition to conforming changes, we are proposing amendments to Form 10, Form 10-K and Form 20-F to allow registrants to exclude item numbers and captions or to create their own captions tailored to their disclosure.[299] The proposed amendments would not affect captions that are expressly required by the forms or Regulation S-K. For example, Form 10-K and Form 20-F require captions for "audit fees," "audit-related fees," "tax fees," and "all other fees." Regulation S-K requires a caption for "risk factors."[300] These proposed amendments are intended to reduce the use of unnecessary cross-references when information may be responsive to more than one disclosure item in the Exchange Act forms.[301]

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[298] Although, as stated above, Rule 411, Rule 12b-23 and Rule 12b-32 generally govern incorporation by reference for filings subject to Regulation C or Regulation 12B, provisions in the forms that cover the same subject matter are controlling. *See* Rule 400 [17 CFR 230.400] (stating that the provisions in a form, or an item of Regulation S-K referred to in such form, will control when they cover the same subject matter as a rule in Regulation C, unless otherwise specifically provided in Regulation C) and Rule 12b-1 (stating that provisions in a form will control when they cover the same subject matter as a rule in Regulation 12B).

[299] Rule 12b-13 requires registrants to include the numbers and captions of all items in these forms. Although provisions in a form control when they cover the same subject matter as a rule in Regulation 12B, these forms do not contradict Rule 12b-13.

[300] The proposed amendments are not intended to change instances where the staff has interpreted a requirement to allow for a caption to be excluded. *See, e.g.*, Regulation S-K Compliance and Disclosure Interpretation 233.02 (discussing the caption called for by Item 407(e)(4)). The proposed amendments would also not eliminate General Instruction G.4 of Form 10-K, which requires captions when the registrant incorporates all of the information in its Form 10-K by reference to its annual report to security holders and its definitive proxy or information statement. In connection with this proposal, we are also proposing to amend Rule 12b-13 to make it clearer that the provisions of a form control over the requirements of that rule.

[301] A commenter recommended amending our rules to include a "policy" on avoidance of duplication that would clarify that a registrant is not required to repeat or include cross-references to disclosure found elsewhere in a document when responding to specific line item requirements; however, we believe amending our forms in the manner proposed would provide clearer guidance for registrants. *See* Letter from ABA.

While item numbers and captions are generally not required in the prospectus portion of most Securities Act filings, they are required in many Exchange Act forms.[302] Although clear disclosure will often call for appropriate headings or captions, the proposed amendments would provide registrants with more flexibility in how they present their disclosure. Increasing flexibility in this manner may reduce repetitive disclosure or unnecessary cross-references when information may be responsive to more than one item and thereby enhance the overall readability of required disclosures.

Request for Comment

82. Should we amend Form 10, Form 10-K, and Form 20-F to eliminate the requirements to include most item numbers and captions as proposed? Would the proposed amendments to these forms lead to disclosure that is less clear or less comparable across registrants? Under the proposed amendments, a few required captions would remain, such as the caption for "risk factors" and the captions required by General Instructions G.4 of Form 10-K.[303] Should we retain these requirements, or should they also be eliminated?
83. Would increasing flexibility in how the disclosure in Form 10, Form 10-K, and Form 20-F is presented lead to less repetitive disclosure? Should we eliminate the requirements to include item numbers and captions in other forms, such as in Part II of Form 10-Q or in Form 8-K?

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[302] *See* Securities Act Rule 404 [17 CFR 230.404] and Exchange Act Rule 12b-13 [17 CFR 240.12b-13]. Rule 404 does not require the numbers or captions of items to be included in a prospectus, but does require them for the non-prospectus portion of a registration statement. *See* Rule 404(d).

[303] *See supra* note 300 and accompanying text.

84. In addition to or in lieu of eliminating the requirements for most item numbers and captions, should we amend our rules to provide guidance on the use of cross-references, as suggested by one commenter?[304] If so, how should the guidance discourage excessive cross-referencing while acknowledging that some cross-references may be necessary to provide clear disclosure? Should the cross-referencing guidance differ based on the nature of the document or the disclosure? For example, should the guidance treat a prospectus differently from a Form 10-K filing, or treat information in the financial statements differently from narrative disclosure?

85. The proposed amendments would not alter the general rule that a prospectus may not incorporate information by reference unless permitted by the appropriate form. Our forms, however, typically provide registrants with significant latitude to incorporate information by reference when specified conditions are met.[305] Should we change the information that may be incorporated by reference into a prospectus under any of our forms? If so, which information, and why?

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[304] *See* Letter from ABA.

[305] For example, subject to certain conditions, Form S-1 allows registrants to incorporate information by reference in most of the items of Part I—Information Required in Prospectus. *See* General Instruction VII and Item 12 of Form S-1.

G. Manner of Delivery[306]

1. Tagging Cover Page Data

Currently, operating company registrants are required to file their financial statements as an exhibit in a machine-readable format using eXtensible Business Reporting Language ("XBRL").[307] This disclosure is required as an exhibit to periodic reports and Securities Act registration statements, including reports on Form 8-K or Form 6-K that contain revised or updated financial statements.

Registrants must also tag in XBRL a specific group of data points that appears on the cover page of the filing. These specific data points, which are tagged according to Regulation S-T and the EDGAR Filer Manual, are known as document and entity identifier elements ("DEIs") and include, among others, form type, company name, filer size, and public float.[308] This information corresponds to some, but not all, of the information that registrants are required to include on the filing cover page. For example, the Form 10-K cover page contains approximately 25 data points. Less than half of those data points are currently required to be

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[306] After consideration of the staff's recommendation G.2. in the FAST Act Report, we are not, at this time, proposing to require the use of external hyperlinks whenever our rules call for the inclusion of an internet address. In the FAST Act Report, the staff recommended requiring external hyperlinks provided that the appropriate technology is available to prevent these hyperlinks from jeopardizing the security and integrity of the EDGAR system. *See* FAST Act Report, *supra* note 2, at n.15.

[307] For domestic disclosure forms, the XBRL data-tagging requirements are imposed through Item 601(b)(101) of Regulation S-K and Rule 405(b) of Regulation S-T. *See* Item 601(b)(101) of Regulation S-K and Rule 405(b) of Regulation S-T [17 CFR 232.405(b)]. For foreign disclosure forms, analogous XBRL tagging requirements are included in the instructions to the relevant forms. *See, e.g.*, paragraphs 100 and 101 of the Instructions to Exhibits to Form 20-F.

[308] *See* Rule 405 of Regulation S-T [17 CFR 232.405]; See also *Interactive Data to Improve Financial Reporting*, Release No. 33-9002 (Jan. 30, 2009) [74 FR 15666] (discussing the requirement to tag document and entity identifier elements, such as form type, company name, and public float, according to Regulation S-T and the EDGAR Filer Manual).

tagged in XBRL. The non-tagged data points include, among others, the exchange on which securities are registered and the state (or jurisdiction) of incorporation.

In the FAST Act Report, the staff recommended that the Commission consider requiring operating company registrants to tag in XBRL all the data points on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F. The staff also recommended that the Commission consider revising the cover page of these forms to include the trading symbol for each class of securities registered under the Exchange Act and require registrants to format this additional data point in XBRL.[309]

We are proposing amendments to require all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F to be tagged in Inline XBRL in accordance with the EDGAR Filer Manual. Under the proposed amendments, the cover page data would appear in HTML format with embedded XBRL data. We recently proposed to require the use of the Inline XBRL format, where XBRL data is embedded into an HTML document, instead of the traditional XBRL format[310] for the submission of operating company financial statements.[311] We intend for the cover page data to be tagged in the same format as this

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[309] *See* FAST Act Report, *supra* note 2, at Recommendations G.1.

[310] In the traditional XBRL format currently required for financial statements, none of the registrant's XBRL data is embedded into an HTML document. Instead, an exhibit containing all XBRL data is filed with the relevant form. Inline XBRL allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate document.

[311] *See Inline XBRL Filing of Tagged Data*, Release No. 33-10323 (Mar. 1, 2017) [82 FR 14282 (Mar. 17, 2017)] ("Inline XBRL Proposing Release"). As part of the proposal, we also proposed to require the use of Inline XBRL format for the submission of mutual fund risk/return summary information. *See also Order Granting Limited and Conditional Exemption Under Section 36(a) of the Securities Exchange Act of 1934 from Compliance with Interactive Data File Exhibit Requirement in Forms 6-K, 8-K, 10-Q, 10-K, 20-F and 40-F to*

other information. Therefore, if the Inline XBRL proposal is not adopted, we are proposing, as an alternative, to require operating company filers to tag each cover page data point in an XBRL exhibit to the relevant filing.

To implement the cover page tagging requirements, we propose to add new Rule 406 to Regulation S-T, new Item 601(b)(104) to Regulation S-K, new paragraph 104 to the "Instructions as to Exhibits" of Form 20-F and new paragraph B.17 to the "General Instructions" of Form 40-F to require registrants to file with each of the specified forms a "Cover Page Interactive Data File." Under the proposed amendments, registrants filing Form 20-F and Form 40-F would be required to tag cover page data only when those forms are used as annual reports. The proposed amendments would not apply to Form 20-F and Form 40-F when used as registration statements. We are also proposing to revise Rule 11 of Regulation S-T to add the term "Cover Page Interactive Data File." The term would be defined as the machine readable computer code that presents the information required by Rule 406 of Regulation S-T in Inline XBRL format.

We believe that the proposal to require mandatory tagging of all data points on the cover pages of the specified forms would allow investors to automate their use of this information. This would enhance their ability to identify, count, sort, and analyze registrants and disclosures to the extent these data points otherwise would be formatted solely in ASCII or HTML. At the same time, we do not expect the incremental compliance burden associated with tagging the

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Facilitate Inline Filing of Tagged Financial Data, Release No. 34-78041 (Jun. 13, 2016) [81 FR 39741 (June 17, 2016)] (exercising exemptive authority "to permit, but not require, operating companies to use Inline XBRL in their periodic and current reports under the Exchange Act through March 2020").

additional cover page information to be significant, given that registrants already are required to tag some of this information as well as information in their financial statements. We therefore believe that the enhanced comparability and usability of these proposed disclosures would justify the burden of requiring registrants to tag the additional data and would help to modernize our disclosure system in a manner consistent with the FAST Act mandate.

We are also proposing amendments to the cover pages of these forms to include the trading symbol for each class of registered securities.[312] Because the cover pages of Form 10-K, Form 20-F, and Form 40-F already require disclosure of the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act and each exchange on which they are registered, our proposed amendments to these forms would revise the cover page to include a corresponding field for the trading symbol. Unlike Form 10-K, Form 20-F, and Form 40-F, however, the cover pages of Form 10-Q and Form 8-K do not currently require disclosure of the title of each class of securities and each exchange on which they are registered. Accordingly, to ensure that registrants and their registered securities are identified in a consistent manner across forms, we are proposing to revise the cover pages of Form 10-Q and Form 8-K to include this disclosure in addition to the trading symbol.

Requiring the disclosure of trading symbols on the cover pages of periodic reports would facilitate investors' efforts to search news websites and stock market databases for information about registrants and distinguish among similarly named companies. Further, we believe that

[312] In the Disclosure Update and Simplification Proposing Release, we have proposed to amend Item 201(a) to also require disclosure of the trading symbol(s) for each class of a registrant's common equity. *See Disclosure Update and Simplification Proposing Release*, *supra* note 13, at 51637.

requiring the tagging of trading symbols would allow investors to sort and compare filings and disclosures more easily and accurately.

Request for Comment

86. Should we require as proposed, all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F to be tagged in Inline XBRL? Should the proposed cover page tagging requirement apply to any other forms (*e.g.*, Form 6-K)?
87. Should we amend the cover pages of Form 10-K, Form 20-F, and Form 40-F to include the trading symbol for each class of registered securities as proposed? Should we also revise the cover pages of Form 10-Q and Form 8-K as proposed, to include the title, trading symbol and exchange of each class of registered securities?
88. Under the proposed amendments, Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F would require each registrant to identify on the cover page of those forms the exchange on which each class of securities is registered. The proposed amendments to Item 501(b)(4) would require each registrant to identify on the cover page of the prospectus its principal U.S. market or markets for the securities being offered. Should we reconcile these differing cover page disclosures? If so, how?
89. If we do not adopt Inline XBRL for the submission of operating company financial statements, should we instead require the cover page data to be tagged using traditional XBRL format?
90. Instead of requiring the cover page data to be tagged using Inline XBRL or traditional XBRL format, should we require the cover page data to be submitted using an XML format? Why or why not?

91. Are there any changes we should make to the proposed amendments to better ensure accurate and consistent tagging? If so, which changes should we make and why?

92. Are there any disclosures discussed in this release that we should require to be provided in a structured format? For example, should we require the use of structured data within Item 303(a) to facilitate readability and navigability of this disclosure for investors? Are there specific elements of Item 303(a) disclosure, such as the table of contractual obligations, which should be provided in a machine-readable structured data format? Would it be useful to investors to require registrants to provide any of the property disclosures under Item 102 in a machine-readable format, such as geospatial coordinates? To the extent that we consider additional structured data requirements in periodic reports, what level and type of structured data requirements would be appropriate? For example, should we require registrants to identify sections, subsections or topics with "block text" labels, or should we require registrants to structure numeric elements and tables individually? What would be the challenges and costs of such an approach? What would be the benefits?

2. Exhibit Hyperlinks and HTML Format for Investment Companies

As discussed above, the Commission recently adopted rules requiring hyperlinks to most exhibits filed pursuant to Item 601, Form F-10, and Form 20-F, and, to accommodate hyperlinks, those filings will be required to be made in HTML.[313] In this release, we are proposing parallel

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[313] *See Exhibit Hyperlinks Adopting Release*, *supra* note 14 at 14130.

amendments to certain of our forms that are used by investment companies and amendments to Rule 102[314] of Regulation S-T to apply similar hyperlinking and HTML requirements to those registrants to facilitate access to these exhibits for investors and other users of the information.

Under the proposed amendments, affected registrants would be required to include a hyperlink to each exhibit identified in a filing's exhibit index, unless the exhibit is filed in paper pursuant to a temporary or continuing hardship exemption under Rule 201 or Rule 202 of Regulation S-T, or pursuant to Rule 311 of Regulation S-T.[315] This requirement would apply to registration statements on Form S-6, Form N-1A, Form N-2, Form N-3, Form N-4, Form N-5, Form N-6, and Form N-14 and to reports on Form N-CSR.[316] Consistent with our rules for operating companies, we are not proposing to require registrants to refile electronically any exhibits filed only in paper.[317] Under the proposed amendments, an electronic filer would also be required to correct an inaccurate or nonfunctioning link or hyperlink to an exhibit.[318]

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[314] 17 CFR 232.102.

[315] As with the rules for operating companies, the proposed rules for investment companies would exclude any XBRL exhibits. *See id.* at 14133.

[316] *See* proposed Instructions as to Exhibits of Form S-6; proposed Instruction to Item 28 of Form N-1A; proposed Instruction 4 to Item 25.2 of Form N-2; proposed Instruction 3 to Item 29(b) of Form N-3; proposed Instruction 3 to Item 24(b) of Form N-4; proposed Instructions as to Exhibits of Form N-5; proposed Item 26 of Form N-6; proposed Instruction to Item 16 of Form N-14; proposed Instruction to Item 12 of Form N-CSR. We are also proposing to amend Forms N-3 and N-14 to clarify that Rule 303 of Regulation S-T applies to registration statements on Forms N-3 and N-14 that are electronically filed. *See* proposed General Instruction G to Form N-3; proposed Instruction to Item 16 of Form N-14.

[317] *See Exhibit Hyperlinks Adopting Release*, *supra* note14, at 14133.

[318] 17 CFR 232.105(d)(2). In the case of a registration statement that is not yet effective, the filer would be required to file an amendment to the registration statement containing the inaccurate or nonfunctioning link or hyperlink. In the case of a report on Form N–CSR, the filer would be required to correct the inaccurate or nonfunctioning link or hyperlink in its next report on Form N-CSR. In the case of a registration statement on Form S-6, Form N-14, Form N-5, Form N-1A, Form N-2, Form N-3, Form N-4, or Form N-6 that has become effective, the filer would be required to correct an inaccurate or nonfunctioning link or hyperlink in the next

In connection with the proposed exhibit hyperlinking requirements, we are also proposing amendments to Rule 105 of Regulation S-T to require investment company registrants to file registration statements and reports that include exhibits in HTML format. Currently, investment company registrants must submit electronic filings to the Commission using the EDGAR system in either ASCII format or HTML format. Because the ASCII format does not support hyperlink functionality, the exhibit hyperlinking requirement would be feasible only if registrants are required to file in HTML. Under the proposed requirement, registrants would be required to file registration statements and reports on Form S-6,[319] Form N-1A,[320] Form N-2,[321] Form N-3,[322] Form N-4, [323] Form N-5,[324] Form N-6,[325] Form N-14, and Form N-CSR[326] in HTML format. While the affected registration statements and reports would be required to be filed in HTML pursuant to the proposed amendments to Rule 105, registrants would continue to be permitted to file in ASCII any schedules or forms that are not subject to the exhibit filing requirements, such as proxy statements, or other documents included with a filing, such as an exhibit.

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post-effective amendment, if any, to the registration statement. Alternatively, an electronic filer may correct an inaccurate or nonfunctioning link or hyperlink in a registration statement that has become effective by filing a post-effective amendment to the registration statement. *Id.*

[319] 17 CFR 239.16.

[320] 17 CFR 239.15A and 17 CFR 274.11A.

[321] 17 CFR 239.14 and 17 CFR 274.11a-1.

[322] 17 CFR 239.17a and 17 CFR 274.11b.

[323] 17 CFR 239.17b and 17 CFR 274.11c.

[324] 17 CFR 239.24 and 17 CFR 274.5.

[325] 17 CFR 239.17c and 17 CFR 274.11d.

[326] 17 CFR 249.331 and 17 CFR 274.128.

Request for Comment

93. Should we require investment company registrants to include hyperlinks in the exhibit index for registration statements and reports as proposed? Should we amend Rule 105 of Regulation S-T to require investment company registrants to file registration statements and reports that include exhibits in HTML format as proposed?
94. Should we revise any additional forms to require exhibit hyperlinks? For example, should we revise a form to require exhibit hyperlinks even though all exhibits filed with this form will be attached to it?
95. Should we require, as proposed, that electronic filers correct an inaccurate or nonfunctioning link or hyperlink? If so, when should the correction be required to be filed?
96. Should we require registrants to refile electronically any exhibit previously filed in paper so that they can include a hyperlink in the exhibit index?
97. What compliance date would be appropriate for investment companies to begin filing in HTML format? Should the compliance date be the same for all affected investment companies, or should we distinguish between larger and smaller investment companies, for example, by providing an extended compliance date for smaller entities? If we provide an extended compliance date for smaller entities, what additional compliance period would be necessary and how should we define those smaller entities? For example, should we define smaller investment companies for these purposes as investment companies that, together with other investment

companies in the same group of related investment companies have net assets of less than $1 billion as of the end of the most recent fiscal year of the investment company?

H. General Request for Comment

We request and encourage any interested person to submit comments regarding the proposed amendments, specific issues discussed in this release and other matters that may have an effect on the proposals. We note that comments that are accompanied by supporting data and analysis are of particular assistance to us.

III. ECONOMIC ANALYSIS

We are mindful of the costs and benefits of our rules. Section 2(b) of the Securities Act, Section 3(f) of the Exchange Act, Section 2(c) of the Investment Company Act, and Section 202(c) of the Investment Advisers Act require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[327] Additionally, Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act, to consider, among other things, the impact that any new rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act.[328]

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[327] 15 U.S.C. 77b(b), 15 U.S.C. 78c(f), 15 U.S.C. 80a-2(c), and 15 U.S.C. 80b-2(c).

[328] 15 U.S.C. 78w(a)(2).

In this release, we are proposing amendments to simplify and modernize disclosure requirements in Regulation S-K and related rules and forms as required by Section 72003 of the FAST Act.[329] The proposed amendments are based on the staff's recommendations in the FAST Act Report. The FAST Act Report was tailored to the statutory mandate of providing specific and detailed recommendations on modernizing and simplifying Regulation S-K in a manner that reduces costs and burdens on registrants while still providing all material information. As discussed above, the proposed amendments reflect the input of public commenters as well as the Commission's experience with Regulation S-K arising from the Division of Corporation Finance's disclosure review program. To promote consistency, we are also proposing parallel amendments to certain rules and forms applicable to investment companies and investment advisers, including proposed amendments that would require certain investment company filings to be submitted in HTML format.

A. Background

1. The Benefits of Information Disclosure

The primary purpose of disclosure under the federal securities laws is to provide investors with the information they need to make informed investment and voting decisions. The separation of ownership and management typically prevents investors from directly observing many managerial decisions and requires them to rely on financial and qualitative disclosures for information. Absent regulation, managers may lack incentives to voluntarily disclose or

[329] Pub. L. No. 114-94, Sec. 72003, 129 Stat. 1312 (2015).

standardize relevant information. As a result, in the absence of disclosure requirements, an information asymmetry often exists between managers and investors that limits the ability of investors to distinguish between well-run and poorly-run companies and can lead to under-supply and inefficient allocation of capital.[330] A disclosure regime that facilitates the disclosure of material, reliable information can reduce informational asymmetries between managers of companies and investors, which can enhance capital formation and the allocative efficiency of the capital markets.

Materiality is a key principle of public company reporting.[331] Efforts to make disclosures more effective typically focus on evaluating whether existing or proposed disclosures provide material information to those using the disclosures. Material disclosures can reduce information asymmetries between managers of companies and investors, decrease the cost of capital, and lead to more efficient share prices and heightened accountability of the managers of companies.[332]

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[330] *See*, Akerlof, George A., *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488-500 (1970).

[331] *See* Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, Cmte. Print 95-29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess. (Nov. 3, 1977), at 320. *available at* http://opc-ad-ils/InmagicGenie/DocumentFolder/report%20of%20the%20advisory%20committee%20on%20corporate%20disclosure%20to%20the%20sec%2011011977.pdf.

[332] *See* Brüggemann, Ulf and Kaul, Aditya and Leuz, Christian and Werner, Ingrid M., *The Twilight Zone: OTC Regulatory Regimes and Market Quality* (June 14, 2017). IGM Working Paper #95; Fisher College of Business Working Paper No. 2013-03-09; European Corporate Governance Institute (ECGI) - Law Working Paper No. 224/2013; Charles A. Dice Center Working Paper No. 2013-09. *Available at* SSRN: https://ssrn.com/abstract=2290492 or http://dx.doi.org/10.2139/ssrn.2290492

See also C. Leuz and P. Wysocki, 2016, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, Journal of Accounting Research Vol. 54, 525-622 and M. Lang,

2. The Costs of Disclosure

Although disclosure requirements benefit investors and financial markets, there are potential drawbacks associated with these requirements. For example, disclosure can be costly for registrants to produce and disclosure of sensitive information can result in competitive disadvantages.

Disclosure of information that is unnecessary or that may not be material also entails costs to investors, if it affects their ability to discern material information effectively. While material disclosures provide important information to investors about their investments, sorting through information that is unnecessary or not material can obscure material information that investors find useful. Consistent with this view, research has found that attention to one subject generally leaves less attention available for others.[333]

In the economic analysis that follows, we first examine the current regulatory and economic landscape that forms the baseline for our analysis. We then analyze the likely economic effects arising from the proposed amendments relative to that baseline. These economic effects include the costs and benefits and impact on efficiency, competition, and capital formation.

B. Baseline

To assess the economic effect of the proposed amendments, we are using as our baseline

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K. Lins, and M. Maffett. *Transparency, Liquidity, and Valuation: International Evidence on When Transparency Matters Most*, Journal of Accounting Research 50 (2012): 729-774.

[333] *See* Pashler, H. E., THE PSYCHOLOGY OF BOARD: ATTENTION (Cambridge, MA: MIT Press 1998) and Hirshleifer, David & Siew Hong Teoh, *Limited attention, information disclosure, and financial reporting*, 36 J. ACCT. & ECON. 337-386 (2003).

the current state of the Commission's filing and disclosure regime. In characterizing the baseline, it is useful to distinguish between operating companies and investment companies. Although both types of registrants are subject to similar registration and reporting requirements, there are differences in the specific rules and forms applicable to each. In particular, on March 1, 2017, the Commission adopted amendments requiring registrants that file registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S-K, or that file Form F-10 or Form 20-F, (*i.e.*, operating companies) to submit these filings in HTML format and to include a hyperlink to each exhibit listed in the exhibit index of these filings.[334] In contrast, there is currently no comparable requirement for investment companies; however, this proposal includes amendments to a set of forms under the Investment Company Act that would apply HTML and hyperlinking requirements to filers of those forms.

For operating companies, the baseline includes the disclosure requirements in Regulation S-K and related rules and forms as well as Commission and staff guidance on the application of those requirements. Table 1 below suggests that the proposed amendments to Regulation S-K and related rules and forms would apply to a substantial number of operating companies. On average, 7,800 different registrants per year have filed periodic reports on Form 10-K and Form 10-Q in recent years. As shown in the table below, approximately 800 foreign private issuers provided periodic information to investors in the U.S. capital markets using Form 20-F and Form

[334] While compliance with these rules was required by September 1, 2017, smaller reporting companies, as well as registrants that are neither accelerated filers nor large accelerated filers, are not required to comply until September 1, 2018. Although these registrants are not yet required to comply with the exhibit hyperlinks and HTML rules, we are treating these rules as part of the baseline for all filers subject to Regulation S-K.

40-F. The number of registrants filing definitive proxy statements on Schedule 14A has exceeded 5,000 each year.[335]

Table 1: Number of Registrants Filing Various Disclosure Forms from 2012-2016

Year	10-K	10-Q	20-F	40-F	DEF 14A
2012	8240	8381	712	153	5371
2013	7898	8031	690	145	5382
2014	7857	7872	669	143	5259
2015	7767	7676	687	131	5390
2016	7373	7147	675	126	5126

As discussed above, investment companies that file certain forms required by the Investment Company Act would also be affected by the proposed amendments. Table 2 below lists the number of filings filed by investment companies in fiscal year 2016 using EDGAR submission types potentially affected by the proposed amendments, broken out by the number of filings in HTML and ASCII format. From January 1, 2016 to December 31, 2016, investment companies filed 64,522 filings using EDGAR submission types potentially affected by the proposed amendments. Of these filings, the vast majority (58,429) were filed in HTML, while fewer than ten percent (6,093) were filed in ASCII format. As shown in Table 2, most of the filers had substantially more HTML filings than ASCII filings, while the Form S-6 filers had more ASCII filings than HTML filings in 2016.

[335] We note that, in addition to operating companies, registered investment companies file proxy statements as well.

Table 2: Number of Potentially Affected Filings from January 1, 2016 to December 2016[336]

	Number of HTML Filings	Number of ASCII Filings
N-1A Filers	48,150	1,280
N-2 Filers	2,965	77
N-3 Filers	42	6
N-4 Filers	5,247	758
N-6 Filers	1,549	245
S-6 Filers	476	3,727
Total	**58,429**	**6,093**

The proposed amendments would require registrants to include hyperlinks in the case of exhibits included with the forms and exhibits that are incorporated by reference from a previously filed document. To draw a baseline indicative of current disclosure practices, we selected a random sample of 400 filings (359 in HTML and 41 in ASCII) submitted in 2016 that may be affected by the proposed amendments. Table 3 below shows the average and median number of exhibits listed in the sampled filings by the type of exhibit (*i.e.*, filed with the form vs. incorporated by reference).

[336] The figures in this table are presented on the basis of filer type, not on the basis of the form on which the document was filed. Therefore, not all of the filings presented in the table would be subject to the proposed requirements.

Table 3: Number of Exhibits in Sampled Filings[337]

	Number of Exhibits Listed in the Index		Number of Exhibits Filed with the Filing		Number of Exhibits Incorporated by Reference		Number of Sampled Filings
	Average	Median	Average	Median	Average	Median	
N-1A	5.8	0	0.6	0	5.2	0	267
N-2	7.4	2	2.1	2	5.0	0	21
N-3	0	0	0	0	0	0	1
N-4	13.6	0	0.7	0	12.9	0	31
N-6	11.1	0	0.8	0	10.3	0	11
N-14	38.0	38.5	1.5	1	36.5	37.0	6
N-CSR	2.3	3	1.9	0	0.1	0	43
S-6	36	36	5.0	5.0	31.0	31.0	30
All Filings	6.7	N/A	0.9	N/A	5.8	N/A	400

Table 3 shows a significant variation in the number of exhibits listed in the exhibit index across different types of filings. Registration statements on Form N-4, Form N-14, and Form S-6 typically contain a large number of exhibits and had significantly more exhibits incorporated by reference than filings on other forms affected by the proposed amendments. Of the 400 sampled filings, we found that none of them included hyperlinked indexes.

As discussed above, disclosure requirements involve trade-offs between benefits to

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[337] In counting the number of exhibits, we did not include the following exhibits: 101.INS XBRL Instance Taxonomy; 101.SCH XBRL Taxonomy Extension Schema Document; 101.CAL XBRL Taxonomy Extension Calculation Linkbase Document; 101.DEF XBRL Taxonomy Extension Definition Linkbase Document; 101.LAB XBRL Taxonomy Extension Labels Linkbase Document; and 101.PRE XBRL Taxonomy Extension Presentation Linkbase Document because XBRL exhibits are not covered by the proposal.

Average represents the sum of the number of exhibits divided by the number of sampled forms for each form type. *Median* represents the middle number of exhibits for each form type when the numbers of exhibits are listed from the smallest to the largest. For instance, for Form N-2, the number of exhibits listed in the index ranged from 0 to 55, with 2 as the middle number.

investors in terms of reducing information asymmetries and costs to registrants associated with producing disclosure. While the proposed amendments would apply to all registrants subject to the regulation, the trade-offs between the costs and benefits of disclosure requirements would vary across different types of registrants. For example, smaller companies typically have proportionately higher disclosure costs as well as proportionately higher disclosure benefits.[338] That is, the fixed costs of disclosure requirements typically constitute a higher percentage of revenues for smaller companies than for larger companies. However, the benefits of disclosure may be greater for smaller companies because information asymmetries between investors and managers of smaller companies are typically higher than for larger, more seasoned companies with a large following.[339] Compliance costs could be also higher for foreign registrants to the extent that the disclosure requirements in the United States are different from the disclosure requirements in their home countries.

C. Economic Analysis of the Proposed Amendments: General Assessment, Including Impact on Efficiency, Competition, and Capital Formation

In this subsection, we evaluate the broad economic effects of the proposed amendments, including a discussion of their impact on efficiency, competition, and capital formation. The proposals amend a well-established and robust disclosure regime that has existed for many years.

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[338] In its 2015 proposing release to amend the definition of "smaller reporting company," the Commission observed that, based on a review of filings, approximately 42% of registrants qualified as smaller reporting companies. *See Amendments to Smaller Reporting Company Definition*, Release No. 33-10107 (Jun. 27, 2017) [81 FR 43130 (Jul. 1, 2016)], *available at* https://www.sec.gov/rules/proposed/2016/33-10107.pdf.

[339] *See, e.g.*, R. Frankel and X. Li, *Characteristics of a firm's information environment and the information asymmetry between insiders and outsiders*, 37 J. ACCT. ECON. 229, 229-259 (June 2004). *See also*, L. Cheng, S. Liao, and H. Zhang, *The Commitment Effect versus Information Effect of Disclosure – Evidence from Smaller Reporting Companies*, 88 ACCT. REV. 1239, 1239-1263 (2013).

As a result, we expect the aggregate impact of the proposed amendments to be incremental to the effects that have already been realized from the existing disclosure regime.

As discussed above, disclosure provides benefits to participants in financial markets by reducing information asymmetries that exist between investors in a company and managers tasked with operating the company. Both registrants and investors alike would generally benefit from the proposed amendments, because they would simplify the requirements and resulting content of existing disclosures while still providing all material information. The proposed changes to the requirements and resulting improved presentation are expected to increase the usefulness of the disclosures for investors and generally lower the regulatory burden (and compliance costs) for registrants. In addition, the improved information environment associated with modernized and simplified disclosures is expected to incrementally enhance capital formation and the allocative efficiency of the capital markets through more accurate share prices, better accountability of managers and increased capital market liquidity.

We expect some of the proposed amendments to entail modest initial implementation costs. However, we believe that the initial costs would be in manageable amounts. Furthermore, those costs would be offset by future savings as a result of simplified and streamlined disclosure requirements, after implementation. Some of the proposed amendments, such as those that impose new data tagging, hyperlinking, or disclosure requirements, would involve not only implementation costs but would also increase compliance costs for registrants going forward, although as discussed below, we do not expect these additional costs to be significant.

While the purpose of the proposed amendments is to simplify and modernize public company disclosure requirements without loss of material information, we acknowledge that the

proposed amendments could result in a loss of some information in specific cases, as discussed below. This loss of information could potentially increase information asymmetry in those cases, which may have negative implications for investor protection, market transparency, efficiency, and capital formation. In turn, such loss of information could raise the firm's cost of capital.[340] However, we believe this potential adverse effect would be mitigated by the fact that registrants will continue to be required to provide further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.[341]

D. Economic Analysis of the Specific Amendments: Proposals that Clarify and Update Existing Rules

1. Proposals that Clarify or Streamline a Rule's Requirements

a. *Description of Property (Item 102)*

Item 102 requires disclosure of the location and general character of the principal plants, mines, and other materially important physical properties of the registrant and its subsidiaries. The staff has observed, however, that the item may elicit disclosure that is not material.[342] The proposed amendments to Item 102 would clarify that a description of property is required only to the extent physical properties are material to the registrant and make other clarifying

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[340] *See* Easley, D., Hvidkjaer, S., & M. O'Hara, *Is information risk a determinant of asset returns*? 57 J. FINANCE. 2185-2221 (2002).

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

[342] *See* FAST Act Report, *supra* note 2, at Recommendation B.1. *See also Concept Release*, *supra* note 6, at Section IV.A.6.b and SEC Staff's *Report of the Task Force on Disclosure Simplification* (Mar. 5, 1996) *available at* https://www.sec.gov/news/studies/smpl.htm.

amendments.[343] The proposed amendments would not modify the Item 102 requirements for companies in the mining, real estate, and oil and gas industries.

The main benefit of the proposed amendments would be to reduce the amount of duplicative disclosure that is not material by emphasizing materiality and harmonizing the rule's thresholds for disclosure. The proposed amendments also could facilitate compliance and avoid any confusion associated with different disclosure standards. The aggregate reduction in regulatory burden due to the proposed amendments to Item 102 may extend to approximately 6,500 registrants.[344]

When Item 102 was originally adopted, registrants were more likely to maintain large physical properties and other assets, such as mines and manufacturing plants.[345] However, the nature of enterprise has changed dramatically over the last thirty years. Currently, many of the largest and most profitable firms operate in the services and technology industries that are often not characterized by large physical assets. Nevertheless, many modern firms are highly geographically dispersed. As a consequence, information about the geographic operations of these companies—including information about the location of physical properties—could be highly relevant for investors by providing information about important firm customers and employees. We expect that any risk of exclusion of relevant information under the proposed

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[343] *See* Section II.A (Description of Property).

[344] We derive this number by taking the average number of registrants filing annual reports as reported in Table 1 and excluding all companies in the mining, oil and natural gas, and real estate industries.

[345] Since 1935, we have required disclosure similar to that required under Item 102. *See* Release No. 33-276 (January 14, 1935) [*not published in the Federal Register*].

amendment would be minimal, because Item 102 explicitly solicits the disclosure of material information. This risk is further mitigated by the fact that registrants may disclose relevant property information elsewhere in their filings, such as in response to Item 101 (Description of Business).

b. *Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)*

We are proposing a series of amendments to Item 303. In this subsection, we discuss all amendments to Item 303 that are intended to clarify the rule's requirements, while in Subsection E.1 below, we discuss proposals intended to amend the content of MD&A. Instruction 1 to Item 303(a) provides that, generally, MD&A shall cover the three-year period covered by the financial statements and either use year-to-year comparisons or any other formats that in the registrant's judgment would enhance a reader's understanding. Additionally, the instruction states that reference to the five-year selected financial data may be necessary where trend information is relevant.

We are proposing to amend the instructions to Item 303(a) to emphasize that a registrant may use any presentation that would enhance a reader's understanding. As discussed above, our proposed amendments to Item 303(a) are consistent with the Commission's existing interpretive guidance on MD&A. We are also proposing to eliminate mention of the five-year selected financial data in the instructions to Item 303(a) because disclosure requirements for liquidity, capital resources, and results of operations already require trend disclosure.

The proposed amendments emphasize the flexibility available to registrants with respect to the form of MD&A presentation. The major benefit of flexibility is that it allows registrants to frame the information in a way that emphasizes material information. One potential cost

associated with this aspect of the rule is that, in framing the discussion in a way that emphasizes material information, registrants may inadvertently de-emphasize information that investors nevertheless find useful or relevant. To the extent the proposed amendment leads to more tailored disclosure, it also could make disclosure less comparable across registrants and over time.

To maintain a consistent approach to MD&A for domestic registrants and foreign private issuers, we are proposing changes to Form 20-F similar to the proposed changes to Item 303(a).[346] The disclosure requirements for Item 5 of Form 20-F are substantively comparable to the MD&A requirements under Item 303 of Regulation S-K. The economic effects of the proposed amendments to Form 20-F are therefore similar to those for the proposed amendments to Item 303(a) described above.

c. *Risk Factors (Item 503(c))*

Item 503(c) requires disclosure of the most significant factors that make an offering speculative or risky. We are proposing to relocate Item 503(c) from Subpart 500 to Subpart 100 of Regulation S-K.[347] We believe that Subpart 100 is a more appropriate location for the risk factor disclosure requirements, because it covers a broad category of business information and is not limited to offering-related disclosure. Additionally, our proposed amendments would eliminate the risk factor examples that are enumerated currently in Item 503(c).[348]

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[346] *See supra* Section II.C.B.2.

[347] *See supra* Section 0.

[348] *See id.*

We do not expect that relocating the disclosure requirement within Regulation S-K would pose any additional costs to registrants or investors because we are only proposing to change the location of the requirement. The content of the requirement would not change.

With respect to the proposed elimination of the examples in Item 503(c), we believe that this could prompt registrants to more carefully evaluate and classify their risk exposures, which could ultimately benefit investors through more specific and relevant risk factor disclosures. Although examples could be useful to registrants in some cases, they could also anchor or skew the registrant's risk analysis in the direction of the examples.[349]

An alternative to the proposed amendments, as suggested by some commenters, would be to expand or update the list of examples or revise them to specify generic risks that should not be disclosed. While such an approach might lead to incremental improvements in existing disclosures, it would not eliminate the anchoring effect discussed above nor would it serve to discourage generic or "boilerplate" disclosures as effectively as the proposed amendments. It is also possible that a list of generic risks could inadvertently be viewed as exhaustive. In addition, specifying a list of generic risks that should not be disclosed may create a rule that needs to be regularly updated.

d. *Plan of Distribution (Item 508)*

Item 508 requires disclosure about the plan of distribution for securities in an offering, including information about underwriters. We are proposing to amend Rule 405 to define the

[349] There is extensive evidence in psychology and economics that individuals tend to rely too heavily on the first piece of information offered (the "anchor") when making decisions. *See e.g.*, Tversky, A. & Kahneman, D., *Judgment under Uncertainty: Heuristics and Biases*. 185 SCIENCE. 1124–1131 (1974).

term "sub-underwriter" to clarify its application in Item 508 of Regulation S-K.[350] We believe that defining the term "sub-underwriter" would reduce compliance costs by helping registrants to more easily determine what disclosure is required under Item 508. We also believe that a defined term could help investors better understand the role of "sub-underwriters" in the offering process. We do not believe there would be additional costs associated with the proposed amendment, since it merely clarifies an existing disclosure requirement.

e. *Material Contracts (Item 601(b)(10))*

Item 601(b)(10)(i) currently requires registrants to file every material contract not made in the ordinary course of business, provided that the contract meets one of two tests: (i) the contract must be performed in whole or in part at or after the filing of the registration statement or report, or (ii) the contract was entered into not more than two years before that filing.

The second test, the two-year look back, captures material contracts that were fully performed before the filing date. We are proposing amendments to Item 601(b)(10)(i) that would limit the two-year look back test to newly reporting registrants.[351] Proposed Instruction 1 to Item 601(b)(10)(i) defines a "newly reporting registrant" as any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, whether or not such registrant has ever previously been subject to the reporting requirements of Section 13(a) or 15(d), and any registrant that has not

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[350] *See supra* Section 0.

[351] *See supra* Section 0.

filed an annual report since the revival of a previously suspended reporting obligation.[352] As an example, a registrant that is filing its first registration statement under the Securities Act or the Exchange Act, or filing its first Form 10-K since the revival of its reporting obligation, would be required to file material agreements under Item 601(b)(10)(i) for the two-year look back period. The definition of "newly reporting registrant" under the proposed instruction also would include any registrant that (a) was a shell company, other than a business combination related shell company, as defined in Rule 12b-2 under the Exchange Act, immediately before completing a transaction that has the effect of causing it to cease being a shell company, and (b) has not filed a registration statement or Form 8-K, as required by Item 2.01 and Item 5.06 of that form, since the completion of the transaction (or in the case of foreign private issuers, has not filed a Form 20-F since the completion of the transaction).[353] Under the proposed amendments, a registrant meeting this definition would be required to file material agreements for the two-year look back period.

We expect that the proposed amendments would streamline reporting obligations while maintaining investor protections. Although the two-year look back test captures material contracts that were fully performed before the filing date, this test does not provide any new information to the market for registrants with established reporting histories. Excluding these registrants from the two-year look back requirement would marginally reduce their compliance burdens, because they would not need to re-file (or incorporate by reference) agreements that

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[352] *See supra* Section 0.

[353] *See supra* Section 0

were previously filed and are no longer in effect. At the same time, investors would continue to have access to any material agreements that a registrant previously filed on EDGAR.

f. *Proposals with a Minor Effect on Disclosure*

The following proposed amendments are expected to have minor impacts on the disclosure provided:

- Item 401 – proposal would clarify what disclosure about executive officers does not need to be repeated in proxy or information statements if it is already included in Form 10-K.
- Item 405 – proposal would simplify the Section 16 reporting process by allowing registrants to rely on a review of Section 16 reports submitted on EDGAR instead of gathering reports furnished to the registrant.[354]
- Item 501(b)(1) – proposal would eliminate the portion of the item that discusses when a name change may be required and the exception to that requirement.
- Item 501(b)(3) – proposal would allow registrants to move details of an offering price method or formula from the prospectus cover page to another location in the prospectus; the proposal also would require registrants to state that the price will be more fully explained in the prospectus and accompany that statement with a cross-reference to the more detailed offering price disclosure.
- Item 501(b)(10) – proposal would streamline the prospectus legend requirements.
- Incorporation by Reference – proposals would (i) provide clearer guidance on cross-

[354] The proposal would also eliminate the requirement for reporting persons to furnish Section 16 reports to registrants, which could ease the compliance burden on reporting persons.

referencing; (ii) consolidate the requirements for incorporation by reference in Securities Act Rule 411, Exchange Act Rule 12b-23 and related rules under the Investment Company Act and Investment Advisers Act to eliminate redundant or unnecessary requirements; and (iii) allow registrants more flexibility in excluding item numbers and captions or creating their own captions tailored to their disclosure in Form 10, Form 10-K and Form 20-F.

Since the proposed amendments listed above would alter existing disclosure practices only to a minor degree, their implementation would have little economic effect. We believe that the proposed amendments would allow registrants to improve the readability and navigability of disclosure documents and reduce repetition. The proposed amendments also would reduce compliance costs for registrants while preserving all material information. We do not envision any significant incremental costs associated with the proposed amendments because they do not significantly change the required disclosures.

2. Proposals to Update Rules to Account for Subsequent Developments

The following proposed amendments would update existing rules to account for subsequent developments and are expected to have minor impacts on the disclosure provided:

- Item 407(d) – proposal would update the outdated reference to AU sec. 380 in Item 407(d)(3)(i)(B).
- Item 407(e) – proposal would update requirements for compensation committee disclosure to exclude EGCs because they are not required to include a CD&A.
- Item 512 – proposal would eliminate certain undertakings that are redundant and obsolete.

We believe that the proposed amendments listed above would reduce potential confusion in applying our rules, result in more consistent disclosure practices, and ease compliance burdens for registrants, with a minimal impact on the information available to investors. We do not envision any significant incremental costs associated with the proposed amendments, because the substance of the rules would not change.

E. Economic Analysis of the Specific Amendments: Proposals that Simplify the Disclosure Process or Eliminate Disclosures

1. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)

Under the proposed amendments to Item 303 of Regulation S-K, when the financial statements included in a filing cover three years, discussion about the earliest year would not be required if (i) this discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations, and (ii) the registrant has filed its prior year Form 10-K on EDGAR containing MD&A of the earliest of the three years included in the financial statements of the current filing.

We believe that the main economic benefit of the proposed amendments would be to simplify and modernize MD&A as well as increase its readability while still providing all material information. This may facilitate a better understanding of the firm's financial prospects. Because MD&A is typically one of the most labor-intensive pieces of disclosure to produce, eliminating the requirement to discuss the earliest year financial statements in some circumstances could meaningfully reduce compliance costs for registrants.

One potential cost of the proposed amendments is that investors may receive less comparative discussion about earlier period financial results within a filing. Although previously

disclosed information could provide helpful context for the new information being disclosed, this information would have been incorporated into market prices when it was originally presented. There may be certain situations in which this context may be particularly useful in assessing a firm's financial condition—for example, in the case of restatements of prior period financials. Although we recognize these potential costs, we believe their impact would be mitigated by the fact that discussion of earlier year financial results could be excluded only under specified conditions, including that the discussion was not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations.

An alternative to the proposed amendments would be to retain the earliest year requirement but permit registrants to hyperlink to the prior year's report in lieu of repeating this disclosure. This alternative would likely reduce search costs for investors and allow efficient access to previously disclosed information about a firm's financial condition. However, we believe that this alternative would not reduce compliance costs to registrants as effectively as the proposed amendments. Furthermore, this alternative may detract from investor understanding of material information about a firm's financial condition to the extent that it resulted in hyperlinking to information that is no longer material to such an understanding.

2. Information Omitted From Exhibits (Item 601): Item 601(a)(5), Item 601(a)(6), and Item 601(b)(10)(iv)

Proposed Item 601(a)(5) would permit registrants to omit schedules and attachments to exhibits unless they contain information material to an investment or voting decision and that

information is not otherwise disclosed in the exhibit or the disclosure document.[355] The proposed amendments also would require registrants to provide with each exhibit a list briefly identifying the contents of all omitted schedules and attachments.[356] In addition, registrants would be required to provide, on a supplemental basis, a copy of any of the omitted schedules or attachments to the Commission staff upon request.[357]

Allowing registrants to omit schedules and attachments that are not material to all exhibits would lower their filing costs. As noted in Section II.E.2.a above, some commenters have noted that these burdens are exacerbated if the schedules contain commercially sensitive information that would require registrants to file confidential treatment requests. The omission of schedules that are not material would also help investors more clearly focus on the material disclosures.

Based on our review of confidential treatment requests submitted under Rule 406 and Rule 24b-2 granted in fiscal year 2016, we estimate that over 90% of confidential treatment requests are granted for material contracts based on competitive harm to the registrant, discussed below. For the subset of confidential treatment requests that were granted for reasons other than competitive harm to the registrant, we expect that many of those exhibits likely contain schedules or attachments that could be omitted under proposed Item 601(a)(5), although we are unable to reliably estimate how many, because this would depend, in part, on whether the

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[355] *See supra* Section II.E.2.a (Exhibits – Information Omitted from Exhibits, Schedules and Attachments).

[356] *See id*.

[357] *See id*.

schedules contain material information. Any reduction in burden would be incremental to that attributable to the proposed amendments to Item 601(b)(10)(iv), which would likely address over 90% of confidential treatment requests.

Item 601(a)(6), as proposed to be amended, would permit registrants to omit PII without submitting a confidential treatment request under Rule 406 or Rule 24b-2.[358] Under the proposed amendment, registrants also would not be required to provide an analysis in order to redact PII from exhibits. Since the proposed amendment leaves the decision about omission of PII entirely to the registrant, it could result in more liberal redactions. Thus, there is a tradeoff between reduced compliance costs and the potentially adverse effects of reduced disclosure. However, our analysis indicates that the Commission granted very few confidential treatment requests in reliance on the Freedom of Information Act[359] ("FOIA") exemption concerning PII. As an illustration, in fiscal year 2016 only nine confidential treatment requests were granted pursuant to this FOIA exemption. Presumably, most registrants are currently taking advantage of existing staff guidance that PII may be omitted without filing a confidential treatment request. As a result, we do not expect that codifying this accommodation would significantly alter existing disclosure practices.

We are also proposing to add paragraph (b)(10)(iv) to Item 601 to permit registrants to omit confidential information in material contract exhibits filed pursuant to that item that is both (i) not material and (ii) competitively harmful if publicly disclosed, without submitting a

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[358] *See supra* Section II.E.2.b.

[359] 5 U.S.C. § 552.

confidential treatment request.[360] Instead, registrants would be required to mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of each redacted exhibit that certain information is omitted from the filed version of the exhibit.[361] The registrant would also be required to indicate with brackets where the information is omitted from the filed version of the exhibit.[362]

Registrants could be asked by the Commission staff to provide on a supplemental basis an unredacted copy of the exhibit.[363] The staff also could request that the registrant provide an analysis of why the redacted information is both (i) not material and (ii) competitively harmful.[364] Registrants could request confidential treatment of this supplemental information pursuant to Rule 83 while it is in the possession of the staff.

The proposed amendment would significantly reduce the costs associated with preparing confidential treatment requests and expedite the filing process. In this regard, one commenter on the Concept Release reviewed seven different confidential treatment requests on which it assisted clients since 2012 and found that legal fees alone ranged from approximately $35,000 to over $200,000.[365]

Because more than 90% of the confidential treatment requests granted by the

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[360] *See supra* Section II.E.2.c.

[361] *See id*.

[362] *See id*.

[363] *See id*.

[364] *See id*.

[365] *See* Letter from Fenwick.

Commission in fiscal year 2016 were made in reliance on the FOIA exemption concerning competitive harm, the proposed amendments to Item 601(b)(10) to allow registrants to omit competitively harmful information that is not material without filing a confidential treatment request could correspondingly reduce the number and cost of confidential treatment requests pursuant to Rule 406 and Rule 24b-2 by over 90%. However, this reduction in cost would be partially offset by the proposed amendment's provision that the staff may request an analysis similar to the current competitive harm analysis. Registrants would incur costs to prepare and provide this analysis in response to any request from the staff.

One potential cost of the proposed amendments is that information may be redacted that would not otherwise be afforded confidential treatment by the staff. However, based on previous experience and a review of confidential treatment requests, we believe that such instances would be rare. Over the past five fiscal years, very few confidential treatment requests were denied by the staff. Specifically, of the confidential treatment requests filed over the last five fiscal years, on average, approximately 1.0% were withdrawn because the staff determined that the information likely was material to investors.[366] During this time, on average, approximately 95%

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[366] The following confidential treatment requests were filed and withdrawn for likely materiality during the last five fiscal years:

2016: 1,271 filed and approximately 7 withdrawn;

2015: 1,369 filed and approximately 14 withdrawn;

2014: 1,413 filed and approximately 19 withdrawn;

2013: 1,290 filed and approximately 16 withdrawn; and

2012: 1,466 filed and approximately 6 withdrawn.

of confidential treatment requests filed were granted, and requests were rarely denied.[367] Also during the past five fiscal years, on average, approximately 12% of confidential treatment requests filed were revised prior to the request being granted to limit the number of terms redacted based on likely materiality or over broad redactions.[368] Under the proposed amendments, the Commission staff would continue its selective review of registrant filings and would selectively assess whether redactions from exhibits appear to be limited to information that is not material and that would subject the registrant to competitive harm if publicly disclosed.

F. Economic Analysis of the Specific Amendments: Proposals that Require More Disclosure or the Incorporation of New Technology

1. Description of Registrant's Securities (Item 601(b)(4))

Item 202 requires registrants to provide a brief description of their registered capital stock, debt securities, warrants, rights, American Depositary Receipts, and other securities. We are proposing to amend Item 601(b)(4) to require registrants to provide Item 202 disclosure as an exhibit to Form 10-K for each class of securities that is registered under the Exchange Act, rather than limiting this disclosure to registration statements. The proposed amendments would not change existing disclosure obligations under Form 8-K and Schedule 14A, which currently

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[367] In fiscal years 2016 and 2015, no confidential treatment requests were denied. In fiscal years 2014, 2013, and 2012, one, two and one CTR(s) were denied, respectively. On average, during the last five fiscal years, approximately 95% of confidential treatment requests were granted in full and approximately 5% were withdrawn. In addition to withdrawals based on staff determinations that the information was likely material, other reasons confidential treatment requests are withdrawn include that the offering is no longer going forward, the information is already public, or the contract is no longer material.

[368] Confidential treatment requests revised based on materiality and/or overbroad redactions in fiscal years 2016, 2015, 2014, 2013, and 2012, were approximately 119, 139, 183, 184, and 182, respectively.

require registrants to disclose certain modifications to the rights of their security holders and amendments to their articles of incorporation or bylaws. Any modifications and amendments during a fiscal year to the information called for by Item 202 would now also be reflected in an exhibit to the registrant's next annual report.

Information about Exchange Act registered securities allows investors to assess the existing capital structure of registrants, which can help investors understand better their exposure to risks and their control rights. Requiring Item 202 disclosure as an exhibit to annual reports would improve investors' access to information about their rights as security holders, thereby facilitating more informed investment and voting decisions.

The proposed requirements would impose some incremental compliance costs for registrants to include the proposed disclosure with their annual reports. Table 1 above shows that on average 7,800 registrants file Form 10-K each year and therefore would be subject to the new Item 601(b)(4) exhibit filing requirement. However, because registrants already prepare very similar disclosure to satisfy existing disclosure obligations under Form 8-K and Schedule 14A and would be able to incorporate by reference and hyperlink to prior disclosure, so long as there has not been any change to the information called for by Item 202, we expect these incremental costs to be minimal.

2. Subsidiaries of the Registrant and Entity Identifiers (Item 601(b)(21))

Item 601(b)(21) requires a registrant to list in an exhibit its subsidiaries, the state or other jurisdiction of incorporation or organization of each, and the names under which those subsidiaries do business. We are proposing amendments to Item 601(b)(21)(i) that would require registrants to include in the exhibit the LEI, if one has been obtained, of the registrant and each

subsidiary listed.[369]

A key benefit of LEIs is that they allow for unique identification of entities engaged in commercial and financial transactions. For various reasons, firm and subsidiary names can be spelled and recorded differently across filings, corporate websites, and standard databases. In addition, subsidiaries can share the same (or very similar) names. These issues can make names poor identifiers of market participants, which could be an obstacle in some forms of investment analysis involving computerized data access.

In contrast, LEIs provide clear and unique identification of market participants that facilitates the statistical analysis and aggregation of firm financial data. In this regard, some commenters have observed that improved identifiers would allow investors to link third-party data with structured data from Commission filings to produce more meaningful analysis.[370] As a consequence, a standard identifier of firms and firm subsidiaries has the potential to improve not only individual investment decisions but also the efficiency of the overall market.

Disclosure of LEIs would also facilitate the ability of investors and the Commission to link the information disclosed in Commission filings with data from other filings or sources as LEIs become more widely used by regulators and the financial industry. This could aid in the performance of market analysis studies, surveillance activities, and systemic risk monitoring by the Commission and other regulators.

The proposed amendments would impose an incremental cost on registrants to include

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[369] *See supra* Section 0.

[370] *See id*.

LEIs in the Item 601(b)(21) exhibit. We do not expect this incremental cost to be significant, however, given that this information should be readily available to registrants. Our proposals would require disclosure of LEIs only for those registrants and subsidiaries that have obtained this identifier, thereby not imposing additional costs.[371] As a result, the benefits of LEI disclosure outlined above may be limited to the extent that not all reporting entities obtain an identifier.

Moreover, standard identifiers, such as LEIs, are most beneficial to registrants and investors when a broad array of firms in the market adopt them. For example, a widely adopted identifier would facilitate the electronic link and cross-referencing of various informational items over a large group of registrants. Staff experience indicates that LEI adoption rates are currently low, which limits its benefits to investors and other users of financial information.[372] If LEIs are not widely used, firms may not have incentives to obtain an LEI. Since coordination among firms with regard to adoption is difficult to accomplish, LEIs could remain underutilized.

3. Tagging Cover Page Data

We are proposing to require registrants to tag all of the information on the cover page of

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[371] The use of and access to LEIs is free for investors. All of the associated reference data needed to understand, process and use LEIs is also widely and freely available. However, the cost of obtaining a LEI for registrants currently entails a one-time fee of $75-$119, and $50-$99 per year in annual maintenance fees.

[372] For example, in the context of Form ADV, which similarly requires an LEI to be reported only if the entity already has one, the Commission has noted that just 6.8% of registered investment advisers report an LEI when filing the form. *See Form ADV and Investment Advisers Act Rules*, Release No. IA-4509 (Aug. 25, 2016) [81 FR 60417 (Sept. 1, 2016)], at 114.

However, see also the discussion in the text around note 220, *supra*. Although overall adoption rates appear low, the use of LEIs may be increasing as a result of global regulatory efforts. *See* Glob. Legal Entity Identifier Found., *Regulatory Use of the LEI*, *available at* https://www.gleif.org/en/about-lei/regulatory-use-of-the-lei (last visited July 13, 2017).

Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F using Inline XBRL (or, if the Commission's recent proposal to require Inline XBRL for the submission of operating company financial statements is not adopted, in an XBRL exhibit to the relevant filing) in accordance with the EDGAR Filer Manual. To implement the cover page tagging requirements, we propose to add new Rule 406 to Regulation S-T, new Item 601(b)(104) to Regulation S-K, new paragraph 104 to the "Instructions as to Exhibits" of Form 20-F and new paragraph B.17 to the "General Instructions" of Form 40-F to require registrants to file with each of the specified forms a "Cover Page Interactive Data File" containing cover page data. We are also proposing to revise Rule 11 of Regulation S-T to add the term "Cover Page Interactive Data File." Our proposals also would amend the cover pages of these forms to include the trading symbol for each class of the registrant's registered securities.[373]

Investment analysis increasingly relies on quantitative statistical methods. Machine-readable formats greatly facilitate quantitative analysis because they allow for the corresponding items to be imported directly into various platforms for data analysis. Thus, tagging all the data points on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F could decrease the costs to investors for implementing quantitative data analysis. We

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[373] Because the cover pages of Form 10-K, Form 20-F, and Form 40-F already require disclosure of the title of each class of securities registered pursuant to Section 12(b) of the Exchange Act and each exchange on which they are registered, our proposed amendments to these forms would revise the cover page to include a corresponding field for the trading symbol. Unlike these forms, however, the cover pages of Form 10-Q and Form 8-K do not currently require disclosure of the title of each class of securities and each exchange on which they are registered. Accordingly, to ensure that registrants and their registered securities are identified in a consistent manner across forms, we are proposing to revise the cover pages of Form 10-Q and Form 8-K to include this disclosure in addition to the trading symbol.

acknowledge that the amendment would impose additional costs on registrants but expect the additional burden to be minimal, given that registrants already furnish a substantial amount of information contained in these forms in a structured format.

An alternative to the Inline XRBL or traditional XBRL format is to specify an XML format for the cover pages of Form 8-K, Form 10-K, Form 10-Q, Form 20-F, and Form 40-F. An XML format could have a variety of implementations ranging from filers submitting the data according to a designated technical framework to inputting the cover page information in a web-fillable format within EDGAR. We are not proposing this approach, because the Inline XBRL and traditional XBRL format provide more precise rules that facilitate consistent input and data validation by filers and enhance the analytical capabilities of data users. Moreover, the Inline XBRL and traditional XBRL format have more robust data validation capabilities, which could help to ensure better data quality for investors. Inline XBRL also would not suffer from possible data quality discrepancies that may occur from filers rekeying the information from their cover page for submission in XBRL or XML.

4. Proposals for Additional Disclosure with Minimal Additional Costs to Registrants

The following proposed amendments are expected to impose only limited compliance costs on registrants:

- Incorporation by Reference – proposal would require hyperlinks internal to EDGAR for documents incorporated by reference.[374]

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[374] *See supra* Section 0.

- Item 501(b)(4) – proposal would require disclosure on the prospectus cover page of any national securities exchange where the securities being offered are listed or, if not listed, the principal United States market or markets for the securities being offered and the corresponding trading symbols, if any. [375]

Requiring registrants to include hyperlinks to information that is incorporated by reference could improve the readability and navigability of disclosure documents by allowing users to be taken directly to the incorporated information by clicking on a link rather than having to locate the information on EDGAR. Although requiring the inclusion of hyperlinks for incorporated information would impose an additional compliance burden on registrants, we do not expect this burden to be significant given that hyperlinks are relatively easy to implement and involve minimal cost.

In the case of Item 501(b)(4), expanding the existing requirements for trading market disclosure to encompass information about markets that are not "national securities exchanges" would benefit investors by helping them to better assess their trading costs. The disclosure would impose some additional disclosure costs on registrants. However, we do not expect these costs to be significant given that registrants should have ready access to this information. In this regard, we note that the required disclosure would be limited to the principal United States market or markets where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation.

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[375] *See supra* Section 0.c.

G. Economic Analysis of HTML and Hyperlinking Requirements of Forms under the Investment Company Act

As discussed above, we are proposing HTML and hyperlinks requirements for filers of certain forms under the Investment Company Act. Broadly speaking, we believe the proposed amendments would reduce search costs for investors. In particular, we believe that exhibit hyperlinks would help investors and other users to access a particular exhibit more efficiently as they would not need to search within the filing or through different filings made over time to locate the exhibit. Requiring exhibit hyperlinks may make it easier for investors and other users to find and access a particular exhibit that was originally filed with a previous filing.

To the extent that hyperlinks ease the navigation process for investors and other users, hyperlinks may also facilitate a more thorough review of a registrant's registration statements, applications, and reports and encourage more effective monitoring over time. The potential reduction of search costs and the enhanced ability of investors to review a registrant's disclosure may result in more informed investment and voting decisions, potentially enhancing allocative efficiency, and capital formation by registrants.

We expect that hyperlinks would be more beneficial in reducing search costs in the case of exhibits incorporated by reference than in the case of exhibits filed with the filing, and in particular, we expect these benefits to be most pronounced in the case of incorporation by reference from a filing that was not recently filed because more recent filings are displayed first on the EDGAR search results page. Further, we expect hyperlinks would have greater benefits in the case of registrants that submit more filings.

As a result of the proposed amendments, we expect that both HTML and ASCII registrants would incur compliance costs to include hyperlinks in their exhibit indexes. The cost

of inserting a hyperlink to an exhibit incorporated by reference would likely be greater than the cost of inserting a hyperlink to an exhibit filed with the document. While the average cost itself of inserting a hyperlink is minimal, the total hyperlinking costs for registrants would be a function of two main factors: (1) how many registration statements, applications and reports a registrant files that require an exhibit index; and (2) how many exhibits in the exhibit index of these registration statements, applications, and reports are either filed with the filing or incorporated by reference.

Filers reporting in ASCII would incur costs to switch to HTML, in addition to the costs of including hyperlinks in their exhibit indexes. We expect that the costs of switching to HTML would not be significant because the cost of software with built-in HTML and hyperlink features is minimal. Overall, given the modest costs involved, we do not expect that the proposed amendments would have significant competitive effects for registrants.

Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and whether the rules, if adopted, would promote efficiency, competition, and capital formation or have an impact on investor protection. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates.

IV. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of our rules and forms that would be affected by the proposed amendments contain “collection of information” requirements within the meaning of the

Paperwork Reduction Act of 1995 ("PRA").[376] The Commission is submitting the proposal to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[377] The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the collections of information are:

"Regulation S-K" (OMB Control No. 3235-0071);[378]

"Regulation S-T" (OMB Control No. 3235-0424);

"Regulation 12B" (OMB Control No. 3235-0062);

"Regulation C" (OMB Control No. 3235-0074);

"Family of rules under section 8(b) of the Investment Company Act of 1940" (OMB Control No. 3235-0176);

"Form S-1" (OMB Control No. 3235-0065);

"Form S-3" (OMB Control No. 3235-0073);

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[376] 44 U.S.C. 3501 *et seq*.

[377] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[378] The paperwork burdens for Regulation S-K, Regulation S-T, Regulation C and Regulation 12B are imposed through the forms that are subject to the requirements in these regulations and are reflected in the analysis of those forms. To avoid a PRA inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to each of these regulations.

“Form S-4” (OMB Control No. 3235-0324);

“Form S-6” (OMB Control No. 3235-0184);

“Form S-11” (OMB Control No. 3235-0067);

“Form N-14” (OMB Control No. 3235-0336);

“Form F-1” (OMB Control No. 3235-0258);

“Form F-3” (OMB Control No. 3235-0256);

“Form F-4” (OMB Control No. 3235-0325);

“Form F-7” (OMB Control No. 3235-0325);

“Form F-8” (OMB Control No. 3235-0378);

“Form F-80” (OMB Control No. 3235-0404);

“Form F-10” (OMB Control No. 3235-0380);

“Form SF-1” (OMB Control No. 3235-0707);

“Form SF-3” (OMB Control No. 3235-0690);

“Form 10” (OMB Control No. 3235-0064);

“Form 20-F” (OMB Control No. 3235-0288);

“Form 40-F” (OMB Control No. 3235-0381);

“Form 10-K” (OMB Control No. 3235-0063);

“Form 10-Q” (OMB Control No. 3235-0070);

“Form 8-A” (OMB Control No. 3235-0056);

“Form 8-K” (OMB Control No. 3235-0060);

“Form 10-D” (OMB Control No. 3235-0604);

“Schedule 14A” (OMB Control No. 3235-0059);

"Schedule 14C" (OMB Control No. 3235-0057);

"Form N-1A" (OMB Control No. 3235-0307);

"Form N-2" (OMB Control No. 3235-0026);

"Form N-3" (OMB Control No. 3235-0316);

"Form N-4" (OMB Control No. 3235-0318);

"Form N-5" (OMB Control. No. 3235-0169);

"Form N-6" (OMB Control No. 3235-0503); and

"Form N-CSR" (OMB Control No. 3235-0570).

The forms, reports, and regulations listed above were adopted under the Securities Act, the Exchange Act or the Investment Company Act. The regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic and current reports, distribution reports and proxy, and information statements filed by registrants to help investors make informed investment and voting decisions. Other forms and reports are filed by entities regulated by the Investment Company Act in connection with the Commission's oversight of these entities.

We are proposing amendments, which are described in more detail in Section II above, based on the recommendations made in the FAST Act Report, as required by Section 72003 of the FAST Act. The proposed amendments are intended to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms in a manner that reduces the costs and burdens on registrants while continuing to provide all material information to investors. The proposed amendments are also intended to improve the readability and navigability of the Commission's disclosure documents and discourage repetition and disclosure

of immaterial information. In addition, we are proposing parallel amendments to several rules and forms applicable to investment companies and investment advisers to provide for a consistent set of incorporation by reference and hyperlinking rules for these entities, including proposed amendments that would require certain investment company filings to be submitted in HTML format.

B. Summary of the Proposed Amendments' Impact on Collection of Information

In this section, we summarize the proposed amendments and their general impact on the paperwork burden associated with the forms listed in Section IV.A. In Section IV.C. below, we provide revised burden estimates for each form.

1. Proposed Amendments Expected to Decrease Burdens

a. *Description of Property (Item 102)*

The proposed amendments to Item 102 of Regulation S-K would clarify that a description of property is only required to the extent physical properties are material to the registrant and make other clarifying amendments.[379] The staff has observed that the current disclosure standard may lead registrants, in some instances, to devote resources to providing disclosure on properties that are not material. Although the proposed amendments to Item 102 are expected to help registrants avoid unnecessary disclosure in some instances, the amendments are clarifying in nature and therefore we do not believe they would significantly affect the paperwork burden associated with affected forms. Accordingly, we estimate that the paperwork burden would be

[379] *See supra* Section 0.

reduced by 0.5 hours for each form affected by the proposed amendments. We expect that Form S-1,[380] Form S-4,[381] Form 10, and Form 10-K would be affected by this proposed amendment.

b. *Management's Discussion and Analysis (Item 303)*

The proposed amendments to Item 303 would allow registrants, in some circumstances, to eliminate the earliest year of the MD&A discussion.[382] The proposed amendments would also eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a) and clarify that registrants may use their discretion in selecting the best format for their MD&A presentation.[383] The combined effects of these amendments would be to eliminate the burden on registrants to prepare and provide repetitive disclosure that is not material. The proposed amendments are of particular significance, because MD&A is typically one of the most labor-intensive sections of any form in which it is required. We anticipate that the proposed amendments to simplify and clarify the MD&A requirements would reduce the paperwork burden associated with related forms.

We estimate that the aggregate impact of the proposed amendments would be a four hour reduction in paperwork burden each time Item 303 information is required to be included in a form. We estimate that the aggregate impact of the proposed corresponding amendments to Form 20-F would result in a four hour reduction each time information under Item 5 of that

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[380] 17 CFR 239.11.

[381] 17 CFR 239.25.

[382] *See supra* Section 0.

[383] *See supra id.*

form is required. We expect that Form S-1,[384] Form S-4,[385] Form S-11,[386] Form F-1,[387] Form F-4,[388] Form 10, Form 10-K, Form 10-Q, and Form 20-F would be affected by this proposed amendment.

c. *Directors, Executive Officers, Promoters and Control Persons (Item 401, Item 405 and Item 407)*

The proposed amendments to Item 401, Item 405, and Item 407 of Regulation S-K would simplify and modernize executive officer, Section 16(a) compliance and corporate governance disclosure requirements. The proposed amendments to Item 401 would simplify the rules for determining what disclosure about executive officers may be included in Form 10-K when other disclosure in Part III of Form 10-K will be incorporated by reference to the registrant's definitive proxy or information statement.[389] The proposed amendments to Item 405 would allow registrants to rely on a review of Section 16 reports submitted on EDGAR rather than reports furnished to the registrant when providing disclosure about Section 16(a) compliance.[390] Finally, the proposed amendments to Item 407 clarify the applicable auditing standard and the disclosure requirements for the compensation committees of EGCs.[391]

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[384] 17 CFR 239.11.

[385] 17 CFR 239.25.

[386] 17 CFR 239.18.

[387] 17 CFR 239.31.

[388] 17 CFR 239.34.

[389] *See supra* Section 0.

[390] *See id.*

[391] *See id.*

The proposed amendments to Item 401, Item 405, and Item 407 would clarify and streamline existing disclosure requirements, and in that respect are expected to marginally reduce compliance costs for registrants. We estimate that the proposed amendments would reduce the paperwork burden for each affected form by 0.5 hours. We expect that Form S-1, Form S-4, Form S-11, Form 8-K, Form 10, Form 10-K, and Form 10-Q would be affected by this proposed amendment.

d. *Exhibits (Item 601)*

i. Information Omitted From Exhibits (Item 601(a)(5), Item 601(a)(6), and Item 601(b)(10)(iv))

We are proposing several amendments to Item 601 of Regulation S-K. Many of these amendments affect provisions related to the Commission's confidential treatment process. Specifically, the proposed amendments to Item 601(a)(5), Item 601(a)(6), and Item 601(b)(10)(iv) would permit registrants to omit, without submitting a confidential treatment request, schedules and attachments that are not material, personally identifiable information and confidential information in material contract exhibits that is both (i) not material and (ii) competitively harmful if publicly disclosed.

For purposes of the PRA, we consider the time and cost to prepare and submit a confidential treatment request to be part of the paperwork burden associated with preparing and filing the related disclosure form. We estimate that elimination of the need to prepare and submit a confidential treatment request to omit confidential information from exhibits filed pursuant to Item 601(b)(10) that is both (i) not material and (ii) competitively harmful if publicly disclosed would reduce internal burden hours by ten hours per request for an estimated 20% of registrants that prepare the confidential treatment request without relying on outside

counsel, and reduce external costs by $4,000 per request for an estimated 80% of registrants that retain outside counsel for this work.[392]

Proposed Item 601(a)(5) would permit registrants to omit entire schedules and attachments to exhibits unless the schedules contain information material to an investment or voting decision and that information is not otherwise disclosed in the exhibit or the disclosure document. The threshold for omission under proposed Item 601(a)(5) is lower than for omission under the proposed amendment to Item 601(b)(10) because registrants would not be required to show that the information would cause competitive harm if publicly disclosed.

Based on our review of confidential treatment requests granted in fiscal year 2016, we estimate that over 90% of these requests were granted for material contracts based on competitive harm to the registrant. For the remainder, we expect that many of those exhibits likely contain schedules that could be omitted under proposed Item 601(a)(5). However, we are unable to reliably estimate how many of these requests would be unnecessary under the proposed amendments to Item 601(a)(5) because this would depend, in part, on whether the schedules contain material information. Given that the proposed amendments to Item 601(b)(10) would likely address over 90% of the confidential treatment requests submitted to the Commission, and to avoid overestimating the decrease in paperwork burden arising from the proposed amendments, we are not making an additional adjustment to our burden estimates in respect of

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[392] The $4,000 cost estimate is calculated as follows: 10 hours x $400 per hour of outside counsel work = $4,000. See *infra* note 412.

the amendment to Item 601(a)(5) but are soliciting comment on ways to reasonably estimate such an adjustment.[393]

Based on these assumptions, we expect the annual internal burden hours and professional costs devoted to the confidential treatment process to decrease each time exhibit information described in Item 601(a)(5), Item 601(a)(6), or Item 601(b)(10)(iv) is omitted or redacted. In fiscal year 2016, 43% of confidential treatment requests were filed for Form 10-Q, 18% for Form 10-K, 13% for Form 8-K, 8% for Form S-1, 4% for Form 20-F, and 1% each for Form 10 and Form F-1. We are therefore ascribing changes in paperwork burdens and costs to these forms in these same proportions.

ii. Material Contracts Exhibits (Item 601(b)(10)(i))

The proposed amendment to Item 601(b)(10)(i) would limit the two-year look back filing requirement for material contracts to newly reporting registrants. Registrants that are not newly reporting registrants would no longer be required to comply with this filing requirement and thus would incur reduced compliance burdens. However, we believe that the current burden associated with the two-year look back requirement is minimal. Therefore, the proposed amendments are not expected to result in a significant reduction of the paperwork burden associated with the affected forms. We estimate that the paperwork burden would be reduced by 0.5 hours for each form affected by the proposed amendment. We expect that Form 10,

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[393] For similar reasons, we are making no additional adjustment to our burden estimates in respect of the amendments to Item 601(a)(6). In fiscal year 2016, only nine confidential treatment requests were granted by the Commission for documents containing PII. This suggests that most registrants are currently taking advantage of existing staff guidance that PII may be omitted without filing a confidential treatment request.

Form 10-K, Form S-1, Form S-4, Form F-1, Form F-3, Form F-4, Form S-11, and Form SF-1 would be affected by this proposed amendment.

2. Proposed Amendments Expected to Increase Burdens

a. *Registration Statement and Prospectus Provisions (Item 501(b))*

We are proposing to amend Item 501(b) to require disclosure on the cover page of the prospectus of any national securities exchange where the securities being offered are listed or, if not listed, the principal United States market or markets for the securities being offered and the corresponding trading symbols, if any.[394] The proposed amendments would incrementally increase the compliance burden on registrants by requiring them to provide disclosure about trading markets other than national exchanges. Because we are proposing to limit the incremental disclosure to those trading markets where the registrants, through the engagement of a registered broker-dealer, has actively sought and achieved quotation, we believe this information should be readily available to registrants and impose only a minimal paperwork burden.

Accordingly, we estimate that the proposed amendment would slightly increase the paperwork burden associated with each affected form by 0.25 hours. We expect that Form S-1, Form S-3, Form S-4, Form S-11, Form F-1, Form F-3, Form F-4, Form SF-1,[395] and Form SF-3[396] would be affected by this proposed amendment.

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[394] *See supra* Section 0.

[395] 17 CFR 239.44.

[396] 17 CFR 239.45.

b. *Exhibits (Item 601(b)(4)(vi) and (b)(21))*

Proposed new Item 601(b)(4)(vi) would require registrants to file an Item 202 description of their Exchange Act registered securities as an exhibit to Form 10-K. The proposed amendments to Item 601(b)(21) would require disclosure of an LEI (if one has been obtained) for each registrant and any subsidiaries required to be disclosed in the exhibit.

We expect that the new requirements under Item 601(b)(4)(vi) would slightly increase the paperwork burden on registrants because registrants would be required to provide a description of registered securities annually. However, registrants would be able to incorporate by reference and hyperlink to prior disclosure if the information called for by Item 202 remains unchanged from prior years, thus mitigating any increase in the anticipated burden. Accordingly, we estimate the proposed amendments would increase the paperwork burden associated with Form 10-K and Form 20-F by 0.5 hours.

We expect that the proposed amendments to Item 601(b)(21) would also increase the burden on registrants; however, we expect this increase to be slight because LEI information should be readily available and would be only required if an identifier has already been obtained. Those registrants that have not obtained LEIs would not incur an additional burden. Accordingly, we estimate that the proposed amendments to Item 601(b)(21) would increase the paperwork burden associated with each affected form by 0.25 hours. We expect that Form S-1, Form S-4, Form F-1, Form 10, Form 10-K, Form S-11, Form SF-1, and Form SF-3 would be affected by the proposed amendment to Item 601(b)(21).

c. *Manner of Delivery*

Proposed new Rule 406, proposed new Item 601(b)(104), proposed new paragraph 104 to "Instructions as to Exhibits" of Form 20-F and proposed new Instruction 17 to "Information To Be Filed on this Form" of Form 40-F would require registrants to tag every data point on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F using Inline XBRL, including certain new data points added pursuant to the proposed amendments.[397] Although expanded data tagging would result in an increase in the burden associated with related forms, we note that registrants are already required to tag certain cover page information as well as financial statement information. For this reason, we believe most registrants already will have developed the internal resources or engaged outside professionals to assist them in complying with existing data tagging requirements.[398] In this respect, we do not believe the cover page tagging requirement would result in significant additional burdens for registrants.

Accordingly, we estimate that the requirement to tag additional cover page items would impose an increased paperwork burden of one hour for each affected form. We expect that Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F would be affected by the proposed new rules and form amendments.

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[397] *See supra* Section 0.

[398] As discussed above, the Commission recently proposed to require the use of the Inline XBRL format instead of the traditional XBRL format for the submission of operating company financial statements, and we intend for the cover page data to be tagged in the same format as this other information. *See id.* In the Inline XBRL Proposing Release, we provided estimates of the change in paperwork burden associated with the transition to Inline XBRL. *See supra* note 310. Because we expect to require the Inline XBRL format for tagging cover page data only if the Inline XBRL proposal has been adopted, we are not including PRA burden estimates related to the transition to Inline XBRL in this release.

As described in more detail above, we are proposing amendments to certain of our forms that are used by investment companies and amendments to Rule 102 of Regulation S-T to apply hyperlinking and HTML requirements to those registrants to facilitate access to most exhibits for investors and other users of the information.[399] We anticipate that the proposed amendments will increase the burdens and costs for registrants to prepare and file registration statements and reports on the affected forms. Because the software tools to prepare and file documents in HTML are widely used and available at minimal cost, we do not believe this requirement would appreciably change the existing burden estimates for the affected registration statements or reports, which already include the time and expense to prepare and file in electronic format on EDGAR. We believe the burdens associated with hyperlinking exhibits would be small as the registrant would already be preparing the exhibits and exhibit index for the related filing and would have readily available all the information necessary to create the hyperlinks. We assume that the average burden hours of requiring exhibit hyperlinks would vary based on the number of exhibits that are included with a filing, as discussed in detail below.[400]

3. Proposed Amendments Not Expected to Meaningfully Affect Burdens

a. *Registration Statement and Prospectus Provisions (Item 501(b), Item 503(c), Item 508 and Item 512)*

The proposed amendments to Item 501(b)(1), Item 501(b)(3), and Item 501(b)(10) would, respectively, eliminate misleading company name disclosure requirements, explicitly allow

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[399] *See supra* Section 0.

[400] *See infra* Section 0.

registrants to include a clear statement that the offering price will be determined by a particular method or formula (and require a cross reference to the offering price method or formula disclosure), and permit registrants to exclude some portion of the legend relating to state law in the prospectus for an offering that is not prohibited by state blue sky law.[401] The proposed amendments to Item 503(c) would relocate the current risk factor disclosure requirements to Subpart 100 and eliminate the risk factor examples without substantively changing the underlying disclosure requirements.[402] The proposed amendment to Item 508 would define the term "sub-underwriter" to clarify one aspect of the required disclosure about the plan of distribution for a registered securities offering.[403] The proposed amendments to Item 512 would eliminate certain undertakings that are redundant or obsolete.[404]

We believe these proposed amendments would not meaningfully affect the paperwork burden associated with the related forms because these amendments modernize and clarify certain requirements and do not substantively change the required disclosure. Therefore, we are not making any adjustments to the paperwork burden of affected forms due to these proposed amendments.

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[401] The proposed amendments would also streamline 501(b) by combining paragraphs (b)(10) and (b)(11) without substantive change.

[402] *See supra* Section 0.

[403] *See supra* Section 0.

[404] *See supra* Section 0.

b. *Incorporation by Reference*

We are proposing amendments to simplify and modernize the rules and forms governing incorporation by reference. Under the proposed amendments, certain existing requirements for incorporation by reference would be consolidated into Rule 411, Rule 12b-23, Rule 0-4, and Rule 0-6.[405] The proposed amendments would also eliminate several redundant or outdated requirements. In addition, the proposed amendments would provide registrants with additional flexibility in organizing the disclosure in Form 10, Form 10-K, and Form 20-F by permitting them to exclude item numbers and captions or create their own captions tailored to the disclosure in these forms [406] These proposals are expected to decrease reporting burdens associated with incorporating information by reference in Commission filings, leading to an estimated 0.5 hour reduction in paperwork burden per affected form. However, this decrease would be offset by an estimated 0.5 hour increase in paperwork burden per affected form due to the proposed amendments requiring registrants to include hyperlinks to information incorporated by reference when that information is available on EDGAR.[407] Accordingly, we are not making any adjustments to the paperwork burden of affected forms due to these proposed amendments.

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[405] *See supra* Section 0.

[406] *See id.*

[407] *See id.*

C. Burden and Cost Estimates to the Proposed Amendments

As discussed below, we expect that the proposed amendments would, in the aggregate, reduce the paperwork burden on respondents. The change in burden, however, would differ depending on the form because not all of the proposed amendments would apply to each form.

These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the nature of their business.

The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a registrant to prepare and review disclosure required under the proposed amendments. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the registrant internally is reflected in hours.

1. Form 10-K and Form 10-Q; Schedule 14A and Schedule 14C

The proposed amendments are estimated to significantly reduce the paperwork burdens associated with Form 10-K [408] and Form 10-Q as well as Schedule 14A and Schedule 14C.[409] For purposes of the PRA, we estimate that 75% of the burden of preparation for these Exchange

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[408] Schedules 14A and 14C require disclosure under Subpart 400 of Regulation S-K. This disclosure is often incorporated, in relevant part, into Part III of a registrant's Form 10-K. Therefore, our burden estimates for Form 10-K contemplate that Part III disclosure may be incorporated by reference to Schedules 14A or 14C.

[409] Schedule 14A requires that registrants, under certain circumstances, provide disclosure under Item 303. Our burden estimate for Schedule 14A assumes that registrants would duplicate the disclosure provided under this Item in the most recent Form 10-K and/or Form 10-Q.

Act reports is carried by the registrant internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.[410]

Table 4 below illustrates the total annual compliance burden, in hours and in costs, [411] of the affected collections of information resulting from the proposed amendments.[412]

Table 4. Incremental Paperwork Burden under the Proposed Amendments for Exchange Act Forms

	Current Annual Responses	Proposed Number of Affected Responses	Current Burden Hours	Change in Burden Hours	Change in Company Hours	Change in Professional Hours	Change in Professional Costs
10-K	8,137	8,137	12,228,620	(32,703)	(23,325)	(9,378)	($3,715,600)
10-Q	22,907	22,907	3,220,037	(73,181)	(63,884)	(9,297)	($3,718,800)
8-K	118,387	118,387	507,665	116,867	88,490	28,377	$11,350,800

2. Form S-1, Form S-3, Form S-4, Form F-3, Form F-4, Form SF-1, Form SF-3, Form 10, and Form 20-F

The proposed amendments are estimated to significantly reduce the paperwork burden associated with Form S-1, Form S-3, Form S-4, Form F-3, Form F-4, and Form 20-F. For registration statements on Form 10, Form S-1, Form S-3, Form S-4, Form F-1, Form F-3, Form

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410 We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms and other persons who regularly assist registrants in preparing and filing reports with the Commission.

411 For convenience, the estimated hour and cost burdens in the tables in this section have been rounded to the nearest whole number.

412 The burdens associated with the proposed amendments to the forms listed in Table 4, other than the confidential treatment request proposal, have been estimated by assuming that 75% of the burden is borne by the company and 25% is borne by outside counsel at $400 per hour. The burdens associated with submitting confidential treatment requests in connection with the forms listed in Table 4 have been estimated by assuming that the average request requires approximately ten hours of preparation and that 20% of the burden is borne by the company and 80% of the burden is borne by outside counsel at $400 per hour.

F-4, Form SF-1, and Form SF-3, and Exchange Act report Form 20-F, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.

Table 5 below illustrates the total annual compliance burden, in hours and in costs, of the affected collections of information resulting from the proposed amendments.[413]

Table 5. Incremental Paperwork Burden under the Proposed Amendments for Registration Statements.

	Current Annual Reponses	Proposed Number of Affected Responses	Current Burden Hours	Change in Burden Hours	Change in Company Hours	Change in Professional Hours	Change in Professional Costs
S-1	901	901	150,242	(5,514)	(1,325)	(4,189)	($1,675,600)
S-3	1,082	1,082	127,806	(301)	(78)	(223)	($89,200)
S-4	551	551	564,731	(2,803)	(700)	(2,103)	($841,200)
S-11	100	100	19,476	(450)	(112)	(338)	($135,200)
SF-3	71	71	24,495	36	9	27	$10,800
F-1	63	63	26,917	(431)	(98)	(333)	($133,200)
F-3	107	107	4,467	(10)	(1)	(9)	($3,600)
F-4	68	68	24,769	(281)	(70)	(211)	($84,400)
10	238	238	12,805	(1390)	(342)	(1,048)	($419,200)
20-F	725	725	479,501	(2454)	(588)	(1,866)	($746,400)
40-F	160	160	17,197	160	40	120	$40,000

[413] The burdens associated with the proposed amendments to the forms listed in Table 5, other than the confidential treatment request proposal, have been estimated by assuming that 25% of the burden is borne by the company and 75% is borne by outside counsel at $400 per hour. The burdens associated with submitting confidential treatment requests in connection with the forms listed in Table 5 have been estimated by assuming that the average request requires approximately ten hours of preparation and that 20% of the burden is borne by the company and 80% of the burden is borne by outside counsel at $400 per hour.

Table 6. Current and Revised Burdens under the Proposed Amendments for Securities Act and Exchange Act Forms

	Current Burden		Revised Burden	
	Burden Hours (A)	Cost (B)	Burden Hours (C)	Costs (D)
10-K	12,228,620	$1,631,470,000	12,205,295	$1,627,754,400
10-Q	3,220,037	$429,368,808	3,156,153	$425,650,008
8-K	507,665	$67,688,700	596,155	$79,039,500
S-1	150,242	$180,290,100	148,917	$178,614,900
S-3	127,806	$153,367,008	127,728	$153,277,808
S-4	564,731	$677,677,104	564,031	$676,835,904
S-11	19,476	$23,371,200	19,364	$23,236,000
SF-3	24,495	$29,394,000	24,504	$29,404,800
F-1	26,917	$32,300,100	26,819	$32,166,900
F-3	4,467	$5,360,700	4465	$5,357,100
F-4	24,769	$29,722,800	24,699	$29,638,400
10	12,805	$15,366,042	12,463	$14,946,842
20-F	479,501	$575,400,600	478,913	$574,654,200
40-F	17,197	$20,636,800	17,237	$20,684,800

3. Form 8-A, Form 10-D, Form 40-F, Form F-7, Form F-8, Form F-10, and Form F-80

The proposed amendments to Form 8-A,[414] Form 10-D, Form 40-F, Form F-7,[415] Form F-8,[416] Form F-10, and Form F-80[417] are not expected to meaningfully reduce the associated

[414] 17 CFR 249.208a.

[415] 17 CFR 239.37.

paperwork burden for these forms. Accordingly, we have not included a tabular presentation of the impact on the total annual compliance burden of these forms as a result of these proposed amendments.

4. Form S-6, Form N-1A, Form N-2, Form N-3, Form N-4, Form N-5, Form N-6, Form N-14, and Form N-CSR

The proposed amendments to Form S-6,[418] Form N-1A,[419] Form N-2,[420] Form N-3,[421] Form N-4, [422] Form N-5,[423] Form N-6,[424] Form N-14, and Form N-CSR[425] are expected to increase the burdens and costs for registrants to prepare and file registration statements and reports on the affected forms, but we believe the burdens associated with hyperlinking exhibits would be small.[426] We assume that the average burden hours of requiring exhibit hyperlinks would vary based on the number of exhibits that are included with a filing. For purposes of the PRA, based on the average and median number of exhibits shown in Table 3 above and the staff's experience, we estimate that the average burden for a registrant to hyperlink to exhibits would be one hour per response for each of the affected forms. As discussed above, we are not

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416 17 CFR 239.38.

417 17 CFR 239.41.

418 17 CFR 239.16.

419 17 CFR 239.15A and 17 CFR 274.11A.

420 17 CFR 239.14 and 17 CFR 274.11a-1.

421 17 CFR 239.17a and 17 CFR 274.11b.

422 17 CFR 239.17b and 17 CFR 274.11c.

423 17 CFR 239.24 and 17 CFR 274.5.

424 17 CFR 239.17c and 17 CFR 274.11d.

425 17 CFR 249.331 and 17 CFR 274.128.

426 *See supra* Section IV.B.2.c.

making any adjustments to the paperwork burden of affected forms due to the proposed amendments to simplify and modernize the rules and forms governing incorporation by reference.[427]

The table below shows the total annual compliance burden, in hours and in costs, of the collections of information resulting from the proposed amendments.[428] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the exhibit hyperlinks. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. For purposes of the PRA, we estimate that 25% of the burden of preparation is carried by the registrant internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.[429]

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427 *See supra* Section IV.B.3.b.

428 For convenience, the estimated hour and cost burdens in the table have been rounded to the nearest whole number.

429 We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. These estimates are based on our estimates for the parallel requirement for operating companies. *Exhibit Hyperlinks Adopting Release*, *supra* note 14 at 14139.

Table 6. Incremental Paperwork Burden Under the Proposed Amendments to Forms for Investment Companies

Forms	Proposed number of affected responses (A)	Incremental burden hours/form (B)	Total incremental burden hours (C) = (A) × (B)	25% internal burden (D) = (C) × 0.25	75% outside professional (E) = (C) × 0.75	Professional costs (F) = E × $400
Form S-6	2,498	1	2,498	625	1,874	$749,600
Form N-1A	6,002	1	6,002	1,501	4,502	$1,800,800
Form N-2	166	1	166	42	125	$50,000
Form N-3	20	1	20	5	15	$6,000
Form N-4	1,653	1	1,653	413	1,240	$496,000
Form N-5	1	1	1	0	1	$400
Form N-6	472	1	472	118	354	$141,600
Form N-14	192	1	192	48	144	$57,600
Form N-CSR	6,898	1	6,898	1,725	5,174	$2,069,600
Total			17,902			$5,371,600

D. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, with reference to File No. S7-08-17. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-08-17 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[430] a rule is "major" if it has resulted, or is likely to result in:

- an annual effect on the U.S. economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

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[430] 5 U.S.C. 801 *et seq*.

We request comment on whether our proposal would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment, or innovation.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with the Regulatory Flexibility Act.[431] It relates to proposed amendments to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms to implement Section 72003 of the FAST Act and provide consistent incorporation by reference and hyperlinking requirements in the rules and forms applicable to investment companies and investment advisers.

A. Reasons for, and Objectives of, the Proposed Action

The purpose of the proposed amendments is to modernize and simplify Commission disclosure requirements in a manner that reduces costs and burdens on companies while still providing all material information. Specifically, the proposed amendments would modernize and simplify these disclosure requirements by clarifying, consolidating, relocating and eliminating, or updating various Commission rules that govern public company disclosure. The

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[431] 5 U.S.C. 601 *et seq*.

proposed amendments would also modernize the rules by requiring cover page data to be tagged in a machine-readable format, requiring disclosure of LEIs and requiring hyperlinks to be included in some documents filed on EDGAR. The proposed amendments would largely implement the staff's recommendations in the FAST Act Report, as required by Section 72003(d) of the FAST Act. In addition, the proposed amendments would apply parallel incorporation by reference and hyperlinking requirements in the rules and forms used by investment companies and investment advisers to provide a consistent set of requirements for these registrants.

B. Legal Basis

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3(b), 12, 13, 14, 15, 16, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, Sections 6(c), 8, 24(a), 30, and 38 of the Investment Company Act of 1940, as amended and Sections 204, 206A, 210, and 211 of the Investment Advisers Act of 1940, as amended.

C. Small Entities Subject to the Proposed Rules.

The proposed amendments would affect some registrants that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[432] For purposes of the Regulatory Flexibility Act, under

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[432] 5 U.S.C. 601(6).

our rules, an issuer, other than an investment company or an investment adviser, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[433] An investment company, including a business development company,[434] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[435] An investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[436] We estimate that there are 837 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.[437] In addition, we estimate that, as of December 2016, there are 130 investment companies that would be subject to the proposed amendments that may be considered small entities. Finally, we

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[433] *See* Securities Act Rule 157 [17 CFR 230.157] and Exchange Act Rule 0-10(a) [17 CFR 240.0-10(a)].

[434] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64].

[435] *See* Investment Company Act Rule 0-10(a) [17 CFR 270.0-10(a)].

[436] *See* Investment Advisers Act Rule 0-7(a) [17 CFR 275.0-7(a)].

[437] This estimate is based on a review of Form 10-K and 20-F filings (from EDGAR XBRL) with fiscal periods ending between January 31, 2015 and January 31, 2016.

estimate that, as of August 1, 2017, there are 557 investment advisers that may be subject to the proposed amendments that may be considered small entities.[438]

D. Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the purpose of the proposed amendments is to modernize and simplify the Commission's disclosure requirements and provide consistent incorporation by reference and hyperlinking rules for investment companies and investment advisers. If adopted, the majority of the proposed amendments are expected to have an incremental effect on existing reporting, recordkeeping and other compliance burdens for all issuers, including small entities.[439] Many of the proposed amendments would simplify and streamline existing disclosure requirements in ways that are expected to reduce compliance burdens. Some of the proposed amendments, like those that impose new data tagging,[440] hyperlinking[441] or disclosure requirements[442] would increase compliance costs for registrants, although we do not expect these additional costs to be significant.

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[438] This estimate is based on Commission-registered investment adviser responses to Form ADV, Item 5.F and Item 12.

[439] We recognize that the fixed costs of disclosure requirements typically constitute a higher percentage of revenues for smaller companies than for larger companies. However, the benefits of disclosure may be greater for smaller companies because information asymmetries between investors and managers of smaller companies are typically higher than for larger, more seasoned companies with a large following. *See, e.g.*, R. Frankel and X. Li, *Characteristics of a firm's information environment and the information asymmetry between insiders and outsiders*, 37 J. ACCT. ECON. 229, 229-259 (June 2004). *See also*, L. Cheng, S. Liao, and H. Zhang, *The Commitment Effect versus Information Effect of Disclosure – Evidence from Smaller Reporting Companies*, 88 ACCT. REV. 1239, 1239-1263 (2013).

[440] *See, e.g.*, *supra* Section 0 (Tagging Cover Page Data).

[441] See, e.g., *supra* Section 0 (Exhibit Hyperlinks and HTML format for Investment Companies).

[442] See e.g., *supra* Section II.D.1.c (Market for the Securities (Item 501(b)(4)).

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

We believe the proposed amendments would clarify, consolidate and simplify compliance and reporting requirements for small entities and other registrants. As discussed above, we believe the majority of the proposed amendments would simplify and streamline disclosure requirements in ways that are expected to reduce compliance burdens.[443] We do not believe that the proposed amendments would impose any significant new compliance obligations. Accordingly, we generally do not believe it is necessary to establish different

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[443] *See supra* Sections 0 (Economic Analysis) and 0 (Paperwork Reduction Act).

compliance and reporting requirements or timetables or to exempt small entities from all or part of the proposed amendments. We note in this regard that the Commission's existing disclosure requirements provide for scaled disclosure requirements and other accommodations for small entities, and the proposed amendments would not alter these existing accommodations.

Finally, with respect to using performance rather than design standards, the proposed amendments generally use design rather than performance standards in order to promote uniform filing requirements for all registrants. In some instances, the proposed amendments would modernize and simplify existing design standards. For example, the proposed amendments to Item 303(a) would emphasize the flexibility currently available to registrants with respect to the form of MD&A presentation.[444] In other instances, the proposed amendments may result in additional flexibility when preparing disclosures. For example, proposed Item 601(a)(5) would expand registrants' ability to omit schedules and attachments that are not material to exhibits.[445] As another example, the proposed amendments to Item 102 would clarify that the threshold for disclosure about registrants' physical properties is based on materiality.[446]

G. Request for Comment

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

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[444] *See supra* Section 0 (Year-to-Year Comparisons (Instruction 1 to Item 303(a)).

[445] *See supra* Section 0 (Schedules and Attachments to Exhibits).

[446] *See supra* Section 0 (Description of Property).

- how the proposed rule and form amendments can achieve their objective while lowering the burden on small entities;
- the number of small entity companies that may be affected by the proposed rule and form amendments;
- the existence or nature of the potential effects of the proposed amendments on small entity companies discussed in the analysis; and
- how to quantify the effects of the proposed amendments.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of that effect. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules themselves.

VII. STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AND FORM AMENDMENTS

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3(b), 12, 13, 14, 15, 16, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, Sections 6(c), 8, 24(a), 30, and 38 of the Investment Company Act of 1940, as amended, and Sections 204, 206A, 210, and 211 of the Investment Advisers Act of 1940, as amended.

List of Subjects in 17 CFR Parts 229, 230, 232, 239, 240, 249, 270, 274, and 275

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are proposing to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

1. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78 mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq*.; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

§ 229.10 [Amended].

2. Remove and reserve paragraph (d) of § 229.10.

3. Amend § 229.102 by revising the introductory text, Instruction 1 and Instruction 2 to read as follows:

§ 229.102 (Item 102) Description of property.

To the extent material, disclose the location and general character of the registrant's principal physical properties. In addition, identify the segment(s), as reported in the financial statements, that use the properties described. If any such property is not held in fee or is held subject to an encumbrance that is material to the registrant, so state and describe briefly how held.

Instructions to Item 102: 1. What is required is information that will reasonably inform investors as to the suitability, adequacy, productive capacity, and extent of utilization of the

principal physical properties of the registrant and its subsidiaries, to the extent the described properties are material. A registrant should engage in a comprehensive consideration of the materiality of its properties. If appropriate, descriptions may be provided on a collective basis; detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and shall not be given.

2. Disclosures with respect to this item need only be provided to the extent the properties are material to the registrant. In determining materiality under this Item, the registrant should take into account both quantitative and qualitative factors. See Instruction 1 to Item 101 of Regulation S-K (§ 229.101).

* * * * *

4. Add § 229.105 to read as follows:

§ 229.105 (Item 105) Risk factors.

Where appropriate, provide under the caption "Risk Factors" a discussion of the most significant factors that make an investment in the registrant or offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply generically to any registrant or any offering. Explain how the risk affects the registrant or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk. If the risk factor discussion is included in a registration statement, it must immediately follow the summary section. If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based

on Rule 430A (§ 230.430A(a) of this chapter). The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

5. Amend § 229.202 by revising Instruction 3 under "Instructions to Item 202" to read as follows:

§ 229.202 (Item 202) Description of registrant's securities.

* * * * *

3. Section 305(a)(2) of the Trust Indenture Act of 1939, U.S.C. 77aaa *et seq*., as amended ("Trust Indenture Act"), shall not be deemed to require the inclusion in a registration statement, prospectus, or annual report on Form 10-K of any information not required by this Item or Item 601(b)(4)(vi) of this chapter.

* * * * *

6. Amend § 229.303 by revising Instruction 1 under "Instructions to paragraph 303(a)" to read as follows:

§ 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

* * * * *

Instructions to paragraph 303(a): 1. The registrant's discussion and analysis shall be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition and results of operations. Generally, the discussion shall cover the periods covered by the financial statements included in the filing and the registrant may use any presentation that in the registrant's judgment enhances a reader's understanding. A smaller reporting company's discussion shall cover the

two-year period required in Article 8 of Regulation S-X and may use any presentation that in the registrant's judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, discussion about the earliest year would not be required if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition and results of operations and (ii) the registrant has filed its prior year Form 10-K on EDGAR containing management's discussion and analysis of the earliest of the three years included in the financial statements of the current filing. An emerging growth company, as defined in Rule 405 of the Securities Act (§ 230.405 of this chapter) or Rule 12b-2 of the Exchange Act (§ 240.12b-2 of this chapter), may provide the discussion required in paragraph (a) of this Item for its two most recent fiscal years if, pursuant to Section 7(a) of the Securities Act of 1933 (15 U.S.C 77g(a)), it provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of the emerging growth company's common equity securities.

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7. Amend § 229.401 by removing Instruction 3 to paragraph (b) of Item 401and adding an Instruction to Item 401 to read as follows:

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

* * * * *

Instruction to Item 401. The information regarding executive officers called for by this Item need not be furnished in proxy or information statements prepared in accordance with Schedule 14A or Schedule 14C under the Exchange Act (§ 240.14a-101 and § 240.14c-101 of this chapter) if you are relying on General Instruction G of Form 10-K under the Exchange Act

(§ 249.310 of this chapter), such information is furnished in a separate section captioned "Information about our Executive Officers," and is included in Part I of your annual report on Form 10-K.

8. Revise § 229.405 to read as follows:

§ 229.405 (Item 405) Compliance with Section 16(a) of the Exchange Act.

(a) *Reporting obligation*. Every registrant having a class of equity securities registered pursuant to Section 12 of the Exchange Act (15 U.S.C. 78*l*) and every closed-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) must:

(1) Under the caption "Delinquent Section 16(a) Reports," identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than ten percent of any class of equity securities of the registrant registered pursuant to Section 12 of the Exchange Act, or any other person subject to Section 16 of the Exchange Act with respect to the registrant because of the requirements of Section 30 of the Investment Company Act ("reporting person") that failed to file on a timely basis reports required by Section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required form. A known failure to file would include, but not be limited to, a failure to file a Form 3, which is required of all reporting persons, and a failure to file a Form 5 in the absence of the written representation referred to in paragraph (b)(3) of this section, unless the registrant otherwise knows that no Form 5 is required.

Instruction 1 to paragraph (a) of Item 405. If no disclosure is required, registrants are encouraged to exclude the caption "Delinquent Section 16(a) Reports."

Instruction 2 to paragraph (a) of Item 405. The registrant is only required to disclose a failure to file timely once. For example, if in the most recently concluded fiscal year a reporting person filed a Form 4 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the registrant should disclose that late filing and transaction pursuant to this Item 405 with respect to the most recently concluded fiscal year, but not in material filed with respect to subsequent years.

(b) *Scope of the Inquiry*. In determining whether disclosure is required pursuant to paragraph (a), the registrant may rely only on the following:

(1) A review of Forms 3 and 4 (17 CFR 249.103 and 249.104) and amendments thereto filed electronically with the Commission during the registrant's most recent fiscal year;

(2) A review of Forms 5 (17 CFR 249.105) and amendments thereto filed electronically with the Commission with respect to the registrant's most recent fiscal year; and

(3) Any written representation from the reporting person that no Form 5 is required. The registrant must maintain the representation in its records for two years, making a copy available to the Commission or its staff upon request.

9. Amend § 229.407 by revising paragraphs (d)(3)(i)(B) and (g) to read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(d) * * *

(3)(i) * * *

(B) The audit committee has discussed with the independent auditors the matters required to be discussed by the applicable requirements of the Public Company Accounting Oversight Board ("PCAOB") and the Commission;

* * * * *

(g) *Smaller reporting companies and emerging growth companies*. (1) A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1), is not required to provide:

(A) The disclosure required in paragraph (d)(5) of this Item in its first annual report filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) following the effective date of its first registration statement filed under the Securities Act (15 U.S.C. 77a *et seq*.) or Exchange Act (15 U.S.C. 78a *et seq*.); and

(B) The disclosure required by paragraphs (e)(4) and (e)(5) of this Item.

(2) A registrant that qualifies as an "emerging growth company," as defined in Rule 405 of the Securities Act (§230.405 of this chapter) or Rule 12b-2 of the Exchange Act (§240.12b-2 of this chapter) , is not required to provide the disclosure required by paragraph (e)(5) of this Item.

* * * * *

10. Amend § 229.501 by:

a. Revising the instruction under "Instruction to paragraph 501(b)(1)", Instruction 2 under "Instructions to paragraph 501(b)(3)", paragraph (b)(4) and paragraph (b)(10); and

b. Removing paragraph (b)(11) to read as follows:

§ 229.501 (Item 501) Forepart of Registration Statement and Outside Front Cover Page of Prospectus.

* * * * *

(b) * * *

(1) * * *

Instruction to paragraph 501(b)(1): If your name is the same as that of a company that is well known, include information to eliminate any possible confusion with the other company. If your name indicates a line of business in which you are not engaged or in which you are engaged only to a limited extent, include information to eliminate any misleading inference as to your business.

* * * * *

Instructions to paragraph 501(b)(3): * * *

2. If it is impracticable to state the price to the public, explain the method by which the price is to be determined. Instead of explaining the method on the outside front cover page of the prospectus, you may state that the offering price will be determined by a particular method or formula that is described in the prospectus and include a cross-reference to the location of such disclosure in the prospectus, including the page number. Highlight the cross-reference by prominent type or in another manner. If the securities are to be offered at the market price, or if the offering price is to be determined by a formula related to the market price, indicate the market and market price of the securities as of the latest practicable date.

* * * * *

(4) *Market for the securities*. The national securities exchange(s) where the securities being offered are listed. If the securities being offered are not listed on a national securities exchange, the principal United States market(s) where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation. In each case, also disclose the corresponding trading symbol(s) for the securities on such market(s).

* * * * *

(10) *Prospectus "Subject to Completion" legend*.

(i) If you use the prospectus before the effective date of the registration statement or if you use Rule 430A [§ 230.430A of this chapter] to omit pricing information and the prospectus is used before you determine the public offering price, include a prominent statement that:

(A) The information in the prospectus will be amended or completed;

(B) A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

(C) The securities may not be sold until the registration statement becomes effective; and

(D) The prospectus is not an offer to sell the securities, and it is not soliciting an offer to buy the securities, in any state where offers or sales are not permitted.

(ii) The legend called for by paragraph (b)(10)(i) of this Item may be in the following or other clear, plain language:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

(iii) Registrants may exclude the statement in paragraph (b)(i)(D) of this Item if the offering is not prohibited by state law.

* * * * *

§ 229.503 [Amended].

11. Amend § 229.503 by removing "risk factors" from the section heading and removing and reserving paragraph (c).

§ 229.512 [Amended].

12. Remove and reserve paragraphs (c), (d), (e), and (f) of § 229.512.

13. Amend § 229.601 by:

a. Revising paragraph (a)(1);

b. Adding paragraphs (a)(5) and (a)(6);

c. Revising entry (b)(4) from the exhibit table in paragraph (a) to add a subsection (vi) titled "Description of registrant's securities" and to add an "X" under column 10-K;

d. Revising entry (21) from the exhibit table in paragraph (a) to read "Subsidiaries of the registrant and entity identifiers ";

e. Revising entry (104) from the exhibit table in paragraph (a) to read "Cover Page Interactive Data File" and adding an "X" under columns 8-K, 10-Q and 10-K;

f. Adding paragraph (b)(4)(vi) and the instructions to paragraph (b)(4)(vi) and paragraph (b)(10)(iv);

g. Revising paragraphs (b)(2), (b)(10), (b)(13), (b)(21)(i), and (b)(99); and

h. Adding paragraph (b)(104) to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) *Exhibits and index required*. (1) Subject to Rule 411(c) (§ 230.411(c) of this chapter) under the Securities Act and Rule 12b-23(c) (§ 240.12b-23(c) of this chapter) under the Exchange Act regarding incorporation of exhibits by reference, the exhibits required in the exhibit table must be filed as indicated, as part of the registration statement or report.

* * * * *

(5) Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed unless such schedules contain information material to an investment or voting decision and that information is not otherwise disclosed in the exhibit or the disclosure document. Each exhibit filed must contain a list briefly identifying the contents of all omitted schedules. In addition, the registrant must provide a copy of any omitted schedule to the Commission staff upon request.

(6) The registrant may redact information from exhibits required to be filed by this Item if disclosure of such information would constitute a clearly unwarranted invasion of personal privacy (*e.g.*, disclosure of bank account numbers, social security numbers, home addresses and similar information).

* * * * *

(b) * * *

(2) *Plan of acquisition, reorganization, arrangement, liquidation, or succession.* Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation, or arrangement and any amendments thereto described in the statement or report.

* * * * *

(4) * * *

(vi) For each class of securities that is registered under Section 12 of the Exchange Act, provide the information required by Item 202(a)-(d) and (f) of Regulation S-K (§ 229.202 of this chapter), Description of registrant's securities.

* * * * *

Instruction 1 to paragraph (b)(4)(vi). A registrant is only required to provide the information called for by Item 601(b)(4)(vi) if it is filing an annual report under Exchange Act Section 13(a) or 15(d).

Instruction 2 to paragraph (b)(4)(vi). For purposes of Item 601(b)(4)(vi), all references in Item 202 to securities to be or being registered, offered, or sold will mean securities that are registered as of the end of the period covered by the report with which the exhibit is filed. In addition, for purposes of this Item, the disclosure will be required for classes of securities that have not been retired by the end of the period covered by the report.

Instruction 3 to paragraph (b)(4)(vi). The registrant may incorporate by reference to a prior annual report under Exchange Act Section 13(a) or 15(d) containing the disclosure required by Item 601(b)(4)(vi) of Regulation S-K, as applicable, so long as there has not been any change to the information called for by Item 202, (Description of the registrant's securities) since the filing date of the linked filing. Such hyperlink will be deemed to satisfy the requirements of Item 601(b)(4)(vi) for the current filing.

* * * * *

(10) *Material contracts.* (i) Every contract not made in the ordinary course of business that is material to the registrant and is to be performed in whole or in part at or after the filing of

the registration statement or report. In addition, for newly reporting registrants, every contract not made in the ordinary course of business that is material to the registrant and that was entered into not more than two years before the date on which such registrant:

(A) first files a registration statement or report; or

(B) completes a transaction that had the effect of causing it to cease being a public shell company.

The only contracts that need to be filed are those to which the registrant or a subsidiary of the registrant is a party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

* * * * *

(iv) The registrant may redact provisions or terms of exhibits required to be filed by paragraph (b)(10) of this Item if those provisions or terms are both (i) not material and (ii) competitively harmful to the registrant if publicly disclosed. If it does so, the registrant should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both (i) not material and (ii) competitively harmful to the registrant if publicly disclosed. The registrant also must indicate by brackets where the information is omitted from the filed version of the exhibit.

If requested by the Commission staff, the registrant must promptly provide an unredacted paper copy of the exhibit on a supplemental basis. The Commission staff also may request the registrant to provide its materiality and competitive harm analyses on a supplemental basis. Upon evaluation of the registrant's supplemental materials, the Commission staff may request

the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's materiality and competitive harm analyses.

The registrant may request confidential treatment of the supplemental material submitted under paragraph (iv) of this Item pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission staff. After completing its review of the supplemental information, the Commission staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 or 12b-4 (§ 230.418 or 240.12b-4 of this chapter).

Instruction 1 to paragraph (b)(10) of Item 601: For purposes of paragraph (b)(10)(i) of this Item, a "newly reporting registrant" is (i) any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, whether or not such registrant has ever previously been subject to the reporting requirements of Section 13(a) or 15(d), (ii) any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation, and (iii) any registrant that (a) was a shell company, other than a business combination related shell company, as defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before completing a transaction that has the effect of causing it to cease being a shell company and (b) has not filed a registration statement or Form 8-K as required by Items 2.01 and 5.06 of that form, since the completion of such transaction. For example, newly reporting registrants would include (i) a registrant that is filing its first registration statement under the Securities Act or the Exchange Act, and (ii) a registrant that was a public shell company, other than a business

combination related shell company, and completes a reverse merger transaction causing it to cease being a shell company.

Instruction 2 to paragraph (b)(10): With the exception of management contracts, in order to comply with paragraph (iii) above, registrants need only file copies of the various compensatory plans and need not file each individual director's or executive officer's personal agreement under the plans unless there are particular provisions in such personal agreements whose disclosure in an exhibit is necessary to an investor's understanding of that individual's compensation under the plan.

Instruction 3 to paragraph (b)(10): If a material contract is executed or becomes effective during the reporting period reflected by a Form 10-Q or Form 10-K, it must be filed as an exhibit to the Form 10-Q or Form 10-K filed for the corresponding period. See paragraph (a)(4) of this Item. With respect to quarterly reports on Form 10-Q, only those contracts executed or becoming effective during the most recent period reflected in the report must be filed.

* * * * *

(13) *Annual or quarterly report to security holders.* (i) The registrant's annual report to security holders for its last fiscal year or its quarterly report to security holders, if all or a portion thereof is incorporated by reference in the filing. Such report, except for those portions thereof that are expressly incorporated by reference in the filing, is to be furnished for the information of the Commission and is not to be deemed "filed" as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate must be manually signed in one copy. *See* Rule 439 (§ 230.439 of this chapter).

(ii) Electronic filings. If all, or any portion, of the annual or quarterly report to security holders is incorporated by reference into any electronic filing, all, or such portion of the annual or quarterly report to security holders so incorporated, must be filed in electronic format as an exhibit to the filing.

* * * * *

(21) *Subsidiaries of the registrant and entity identifiers.* (i) List the following information for the registrant and each of its subsidiaries: the name, the legal entity identifier (if a legal entity identifier has been obtained), the state or other jurisdiction of incorporation or organization, and the names under which the entity does business. This list may be incorporated by reference from another filed document which includes a complete and accurate list. "Legal entity identifier" means, with respect to any registrant or its subsidiaries, the legal entity identifier as assigned by a utility endorsed or otherwise governed by the Global LEI Regulatory Oversight Committee or accredited by the Global LEI Foundation.

* * * * *

(99) *Additional exhibits.* (i) Any additional exhibits that the registrant may wish to file must be so marked as to indicate clearly the subject matters to which they refer.

(ii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by "other methods" than those specified in paragraphs (a) or (b) of § 230.158 of this chapter, it must be filed as an exhibit to the Form 10-Q or the Form 10-K, as appropriate, covering the period in which the earnings statement was released.

* * * * *

(104) *Cover Page Interactive Data File*. A Cover Page Interactive Data File (as defined in § 232.11 of this chapter) as required by Rule 406 of Regulation S-T (17 CFR 232.406), and in the manner provided by the EDGAR Filer Manual.

* * * * *

14. Amend § 229.1100 by:

a. Revising Instruction 1 to paragraph (c)(1) of Item 1100; and

b. Redesignating instructions 2 through 5 to paragraph (c)(1) as "Instruction 2 to paragraph (c)(1) of Item 1100.", "Instruction 3 to paragraph (c)(1) of Item 1100", "Instruction 4 to paragraph (c)(1) of Item 1100.", and "Instruction 5 to paragraph (c)(1) of Item 1100" to read as follows:

§ 229.1100 (Item 1100) General.

* * * * *

Instruction 1 to paragraph (c)(1) of Item 1100. In addition to the conditions in paragraph (c)(1) of this section, any information incorporated by reference must comply with all applicable Commission rules pertaining to incorporation by reference, such as Rule 303 of Regulation S-T (§ 232.303 of this chapter), Rule 411 of Regulation C (§ 230.411 of this chapter), and Rule 12b-23 of Regulation 12B (§ 240.12b-23 of this chapter), except that for purposes of paragraph (c)(1), an asset-backed issuer may incorporate by reference to a second document that incorporates pertinent information by reference to a third document.

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

15. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78*ll*(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

16. Amend § 230.405 by adding in alphabetical order the definition of Sub-underwriter to read as follows:

§ 230.405 Definition of terms.

* * * * *

Sub-underwriter. The term *sub-underwriter* means a dealer that is participating as an underwriter in an offering by committing to purchase securities from a principal underwriter for the securities but is not itself in privity of contract with the issuer of the securities.

* * * * *

17. Revise § 230.411 to read as follows:

§ 230.411 Incorporation by reference.

(a) *Prospectus.* Except as provided by this section, Item 1100(c) of Regulation AB (§ 229.1100(c) of this chapter) for registered offerings of asset-backed securities, or unless otherwise provided in the appropriate form, information must not be incorporated by reference into the prospectus. Where a summary or outline of the provisions of any document is required in the prospectus, the summary or outline may incorporate by reference particular items, sections or paragraphs of any exhibit and may be qualified in its entirety by such reference. In any

financial statements, incorporating by reference, or cross-referencing to, information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules.

(b) *Information not required in a prospectus.* Information may be incorporated by reference in answer, or partial answer, to any item of a registration statement that calls for information not required to be included in a prospectus. Except as provided in the Commission's rules, financial information required to be given in comparative form for two or more fiscal years or periods must not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given. In any financial statements, incorporating by reference, or cross-referencing to, information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules.

(c) *Exhibits.* Any document or part thereof filed with the Commission pursuant to any Act administered by the Commission may be incorporated by reference as an exhibit to any registration statement filed with the Commission by the same or any other person. If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant must file with the reference a statement containing the text of such modification and the date thereof.

(d) *Hyperlinks.* Include an active hyperlink to information incorporated into a registration statement or prospectus by reference if such information is publicly available on the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") at the

time the registration statement or prospectus is filed. For hyperlinking to exhibits, please refer to Item 601 of Regulation S-K (§ 229.601 of this chapter) or the appropriate form.

(e) *General.* Include an express statement clearly describing the specific location of the information you are incorporating by reference. The statement must identify the document where the information was originally filed or submitted and the location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. For example, unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document.

18. Revise § 230.491 to read as follows:

§ 230.491 Information to be furnished under paragraph (6) of Schedule B.

Any foreign government filing a registration statement pursuant to Schedule B of the act need state, in furnishing the information required by paragraph (6), the names and addresses only of principal underwriters, namely, underwriters in privity of contract with the registrant, provided they are designated as principal underwriters and a brief statement is made as to the discounts and commissions to be received by sub-underwriters or dealers.

PART 232—REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

19. The authority citation for part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

20. In § 232.11 in alphabetical order add the definition of *Cover Page Interactive Data File* in to read as follows:

§ 232.11 Definitions of terms used in Part 232.

* * * * *

Cover Page Interactive Data File. The term *Cover Page Interactive Data File* means the machine-readable computer code that presents in Inline XBRL electronic format the cover page information for specified forms as required by Rule 406 (§ 232.406 of this chapter).

NOTE to definition of Cover Page Interactive Data File: When a filing is submitted using Inline XBRL, if permitted or required and as provided by the EDGAR Filer Manual, a portion of the Cover Page Interactive Data File must be embedded into a form with the remainder submitted as an exhibit to the form.

* * * * *

21. Revise the second sentence of paragraph (a) and the third sentence of paragraph (d) of § 232.102 to read as follows:

§ 232.102 Exhibits.

(a) * * * Previously filed exhibits, whether in paper or electronic format, may be incorporated by reference into an electronic filing to the extent permitted by Rule 411 under the

Securities Act (§ 230.411 of this chapter), Rule 12b-23 under the Exchange Act (§ 240.12b-23 of this chapter), Rule 0-4 under the Investment Company Act (§ 270.0-4 of this chapter) or Rule 303 of Regulation S-T (§ 232.303). * * *

* * * * *

(d) * * * For electronic filings on Form S–6 (§ 239.16 of this chapter), Form N–14 (§ 239.23 of this chapter), Form F–10 (§ 239.40 of this chapter), Form 20–F (§ 249.220f of this chapter), Form N–5 (§ 274.5 of this chapter), Form N-1A (§ 274.11A of this chapter), Form N–2 (§ 274.11a-1 of this chapter), Form N–3 (§ 274.11b of this chapter), Form N–4 (§ 274.11c of this chapter), Form N–6 (§ 274.11d of this chapter), Form N–CSR (§ 274.128 of this chapter), or filings subject to Item 601 of Regulation S–K (§ 229.601 of this chapter), each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language or an exhibit that is filed with Form ABS–EE (§ 249.1401 of this chapter)) must include an active link to an exhibit that is filed with the document or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR. * * *

* * * * *

22. Amend § 232.105 by revising paragraph (d) and adding paragraph (e) as follows:

§ 232.105 Use of HTML and hyperlinks.

* * * * *

(d) Electronic filers submitting Form S–6 (§ 239.16 of this chapter), Form N–14 (§ 239.23 of this chapter), Form F-10 (§239.40 of this chapter), Form 20-F (§249.220f of this chapter), Form N–5 (§ 274.5 of this chapter), Form N–1A (§ 274.11A of this chapter), Form N–2 (§ 274.11a-1 of this chapter), Form N–3 (§ 274.11b of this chapter), Form N–4 (§ 274.11c of this

chapter), Form N–6 (§ 274.11d of this chapter), Form N–CSR (§ 274.128 of this chapter), or a registration statement or report subject to Item 601 of Regulation S-K (§229.601 of this chapter), must submit such registration statement or report in HTML and each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language or an exhibit filed with Form ABS-EE (§249.1401 of this chapter)) must include an active link to an exhibit that is filed with the registration statement or report or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR, unless such exhibit is filed in paper pursuant to a temporary or continuing hardship exemption under Rules 201 or 202 of Regulation S-T (§232.201 or §232.202) or pursuant to Rule 311 of Regulation S-T (§232.311).

Instructions to paragraph (d): (1) No hyperlink is required for any exhibit incorporated by reference that has not been filed with the Commission in electronic format.

(2) An electronic filer must correct an inaccurate or nonfunctioning link or hyperlink to an exhibit, in the case of a registration statement that is not yet effective, by filing an amendment to the registration statement containing the inaccurate or nonfunctioning link or hyperlink; or, in the case of a registration statement that has become effective or an Exchange Act report, an electronic filer must correct the inaccurate or nonfunctioning link or hyperlink in the next Exchange Act periodic report that requires, or includes, an exhibit pursuant to Item 601 of Regulation S-K (§229.601 of this chapter), Form N–CSR (§ 274.128 of this chapter), or, in the case of a foreign private issuer (as defined in §229.405 of this chapter), Form 20-F (§249.220f of this chapter) or Form F-10 (§239.40 of this chapter). In the case of a registration statement on Form S–6 (§ 239.16 of this chapter), Form N–14 (§ 239.23 of this chapter), Form N–5 (§ 274.5 of this chapter), Form N–1A(§ 274.11A of this chapter), Form N–2 (§ 274.11a-1 of this chapter), Form N–3 (§

274.11b of this chapter), Form N–4 (§ 274.11c of this chapter), or Form N–6 (§ 274.11d of this chapter) that has become effective, an electronic filer must correct an inaccurate or nonfunctioning link or hyperlink in the next post-effective amendment, if any, to the registration statement. Alternatively, an electronic filer may correct an inaccurate or nonfunctioning link or hyperlink in a registration statement that has become effective by filing a post-effective amendment to the registration statement.

(e) Except for exhibits, which are covered by paragraph (d) of this section, electronic filers that are incorporating information by reference pursuant to Rule 411 under the Securities Act (§ 230.411 of this chapter), Rule 12b-23 under the Exchange Act (§ 240.12b-23 of this chapter), or Rule 0-4 under the Investment Company Act (§ 270.0-4 of this chapter)] must submit such registration statement or report in HTML and must include an active hyperlink to such incorporated information when required by those rules. A hyperlink is not required if the incorporated information is filed in paper pursuant to a temporary or continuing hardship exemption under Rules 201 or 202 of Regulation S-T (§232.201 or §232.202) or pursuant to Rule 311 of Regulation S-T (§232.311).

Instruction 1 to paragraph (e) of Rule 105. No hyperlink is required for any information incorporated by reference that has not been filed with the Commission in electronic format.

Instruction 2 to paragraph (e) of Rule 105. In the case of a registration statement that is not yet effective, an electronic filer must correct an inaccurate or nonfunctioning hyperlink by filing an amendment to such registration statement.

* * * * *

23. Revise the first sentence of paragraph (b) of § 232.303 to read as follows:

§ 232.303 Incorporation by reference.

* * * * *

(b) If a filer incorporates by reference into an electronic filing any portion of an annual or quarterly report to security holders, it must also file the portion of the annual or quarterly report to security holders in electronic format as an exhibit to the filing, as required by Regulation S-K Item 601(b)(13) (§ 229.601(b)(13) of this chapter). ***

24. Add §232.406 to read as follows:

* * * * *

§ 232.406 Cover Page XBRL Data Tagging.

Electronic filers submitting Forms 10-K (§249.310 of this chapter), 10-Q (§249.308a of this chapter), 8-K (§249.308 of this chapter), 20-F (§249.220f of this chapter) and 40-F (§249.240f of this chapter) must tag in Inline XBRL electronic format, in the manner provided by the EDGAR Filer Manual, all of the information provided by the electronic filer on the cover page of these forms.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

25. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m,78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

* * * * *

26. Amend Form S-1 (referenced in § 239.11) by revising the last sentence of Instruction V. under "General Instructions", the first paragraph of Instruction VII. under "General Instructions" and Item 3 to read as follows:

Note: The text of Form S-1 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

V. Registration of Additional Securities

* * * *See* Rule 439(b) under the Securities Act (17 CFR 230.439(b)).

* * * * *

VII. Eligibility to Use Incorporation by Reference

If a registrant meets the following requirements in paragraphs A-F immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 11 of this Form in accordance with Item 11A and Item 12 of this Form. Notwithstanding the foregoing, in the financial statements, incorporating by reference or cross-

referencing to information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules. * * *

* * * * *

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges. Furnish the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter).

* * * * *

27. Amend Form S-3 (referenced in § 239.13) by revising the last sentence of Instruction IV.A. under "General Instructions", Item 3, and paragraph (d) of Item 12 to read as follows:

Note: The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

IV. Registration of Additional Securities and Additional Classes of Securities

A. Registration of Additional Securities Pursuant to Rule 462(b). * * * *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

* * * * *

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges. Furnish the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter).

* * * * *

Item 12. Incorporation of Certain Information by Reference.

* * * * *

(d) Any information required in the prospectus in response to Item 3 through Item 11 of this Form may be included in the prospectus through documents filed pursuant to Section 13(a), 14, or 15(d) of the Exchange Act that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement. Notwithstanding the foregoing, in the financial statements, incorporating by reference or cross-referencing to information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules.

* * * * *

28. Amend Form S–6 (referenced in § 239.16) by revising "Instructions as to Exhibits" to add a paragraph to read as follows:

Note: The text of Form S–6 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–6

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

29. Amend Form S-11 (referenced in § 239.18) by revising the last sentence of Instruction G. under "General Instructions", the first paragraph of instruction H. under "General Instructions" and Item 3(a) to read as follows:

Note: The text of Form S-11 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-11

FOR REGISTRATION UNDER THE SECURITIES ACT OF 1933
OF SECURITIES OF CERTAIN REAL ESTATE COMPANIES

GENERAL INSTRUCTIONS

* * * * *

G. Registration of Additional Securities

* * * Any opinion or consent required in the Rule 462(b) registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion

relates to the securities registered pursuant to Rule 462(b). *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

H. Eligibility to Use Incorporation by Reference

If a registrant meets the following requirements in paragraphs 1-6 immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 28 of this Form in accordance with Item 28A and Item 29 of this Form. Notwithstanding the foregoing, in the financial statements, incorporating by reference or cross-referencing to information outside of the financial statement is not permitted unless otherwise specifically permitted or required by the Commission's rules. * * *

* * * * *

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges.

(a) Furnish the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter).

* * * * *

30. Amend Form N–14 (referenced in § 239.23) by:

a. Revising the third paragraph of General Instruction G; and

b. Revising the Instruction to Item 16 to add a paragraph to read as follows:

Note: The text of Form N–14 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–14

* * * * *

GENERAL INSTRUCTIONS

* * * * *

G. Incorporation by Reference and Delivery of Prospectuses or Reports Filed with the Commission

* * * * *

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus) and rule 303 of Regulation S-T [17 CFR 232.303] (specific requirements for electronically filed documents).

* * * * *

Item 16. Exhibits

* * * * *

Instruction:

* * * * *

Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

31. Amend Form S-4 (referenced in § 239.25) by revising the last sentence of Instruction K. under "General Instructions" and the first sentence of Item 3 to read as follows:

Note: The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-4

REGISTRATION STATEMENT
UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

K. Registration of Additional Securities.

* * * Any opinion or consent required in the Rule 462(b) registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

* * * * *

Item 3. Risk Factors, Ratio of Earnings to Fixed Charges and Other Information.

Provide in the forepart of the prospectus a summary containing the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter) and the following:

* * * * *

32. Amend Form F-1 (referenced in § 239.31) by revising the last sentence of Instruction V. under "General Instructions", the first paragraph of instruction VI. under "General Instructions" and Item 3 to read as follows:

Note: The text of Form F-1 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

V. Registration of Additional Securities

* * * *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

VI. Eligibility to Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Item 3 and Item 4 of this Form in accordance with Item 4A and Item 5 of this Form. Notwithstanding the foregoing, in the financial statements, incorporating by reference or cross-referencing to

information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules.

* * * * *

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges. Furnish the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter).

* * * * *

33. Amend Form F-3 (referenced in § 239.33) by revising the last sentence of Instruction IV.A. under "General Instructions" and Item 3 to read as follows:

Note: The text of Form F-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

IV. Registration of Additional Securities and Additional Classes of Securities

A. Registration of Additional Securities Pursuant to Rule 462(b). * * * *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

* * * * *

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges.

Furnish the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter).

* * * * *

34. Amend Form F-4 (referenced in 239.34) by revising the last sentence of Instruction H. under "General Instructions" and Item 3 to read as follows:

Note: The text of Form F-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

H. * * * *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

* * * * *

Item 3. Risk Factors, Ratio of Earnings to Fixed Charges and Other Information.

Provide in the forepart of the prospectus a summary containing the information required by Items 105 and 503 of Regulation S-K (§ 229.105 and § 229.503 of this chapter) and the following:

* * * * *

35. Revise Item 3 of Form F-7 (referenced in § 239.37) to read as follows:

Note: The text of Form F-7 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-7

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

PART I — INFORMATION REQUIRED TO BE SENT TO SHAREHOLDERS

* * * * *

Item 3. Incorporation of Certain Information by Reference

Information called for by this Form, including exhibits, may be incorporated by reference at the Registrant's option from documents that the Registrant has filed previously with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act or submitted to the Commission pursuant to Rule 12g3-2(b) under the Exchange Act. For information that you are incorporating by reference, identify the document where the information was originally filed or submitted and the specific location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document. If any information is incorporated by reference into the prospectus, the prospectus must provide the name, address and telephone number of an officer of the Registrant from whom copies of such information may be obtained upon request without charge.

* * * * *

36. Revise Item 3 of Form F-8 (referenced in § 239.38) to read as follows:

Note: The text of Form F-8 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

PART I — INFORMATION REQUIRED TO BE DELIVERED TO OFFEREES OR PURCHASERS

* * * * *

Item 3. Incorporation of Certain Information by Reference

Information called for by this Form, including exhibits, may be incorporated by reference at the Registrant's option from documents that the Registrant has filed previously with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act or submitted to the Commission pursuant to Rule 12g3-2(b) under the Exchange Act. For information that you are incorporating by reference, identify the document where the information was originally filed or submitted and the specific location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document. If any information is incorporated by reference into the prospectus, the

prospectus must provide the name, address, and telephone number of an officer of the Registrant from whom copies of such information may be obtained upon request without charge.

* * * * *

37. Revise Item 4 of Form F-10 (referenced in § 239.40) to read as follows:

Note: The text of Form F-10 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-10

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

PART I — INFORMATION REQUIRED TO BE DELIVERED TO OFFEREES OR PURCHASERS

* * * * *

Item 4. Incorporation of Certain Information by Reference

Information called for by this Form, including exhibits, may be incorporated by reference at the Registrant's option from documents that the Registrant has filed previously with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act or submitted to the Commission pursuant to Rule 12g3-2(b) under the Exchange Act. For information that you are incorporating by reference, identify the document where the information was originally filed or submitted and the specific location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Unless expressly permitted or required, disclosure must not be incorporated by reference from a second document

if that second document incorporates information pertinent to such disclosure by reference to a third document. If any information is incorporated by reference into the prospectus, the prospectus must provide the name, address, and telephone number of an officer of the Registrant from whom copies of such information may be obtained upon request without charge.

* * * * *

38. Revise Item 3 of Form F-80 (referenced in § 239.41) to read as follows:

Note: The text of Form F-80 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-80

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

PART I – INFORMATION REQUIRED TO BE DELIVERED TO OFFEREES OR PURCHASERS

* * * * *

Item 3 Incorporation of Certain Information by Reference

Information called for by this Form, including exhibits, may be incorporated by reference at the Registrant's option from documents that the Registrant has filed previously with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act or submitted to the Commission pursuant to Rule 12g3-2(b) under the Exchange Act. For information that you are incorporating by reference, identify the document where the information was originally filed or submitted and the specific location of the information within that document. The statement must be made at the

particular place where the information is required, if applicable. Unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document. If any information is incorporated by reference into the prospectus, the prospectus must provide the name, address, and telephone number of an officer of the Registrant from whom copies of such information may be obtained upon request without charge.

* * * * *

39. Amend Form SF-1 (referenced in § 239.44) by revising the last sentence of Instruction III. under "General Instructions" and the last sentence of Item 2 to read as follows:

Note: The text of Form SF-1 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SF-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

III. Registration of Additional Securities

* * * *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

* * * * *

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Furnish the information required by Items 105 and 503 of Regulation S-K (17 CFR 229.105 and 17 CFR 229.503) and Item 1103 of Regulation AB (17 CFR 229.1103).

* * * * *

40. Amend Form SF-3 (referenced in § 239.45) by revising the last sentence of Instruction III. under "General Instructions" and the last sentence of Item 2 to read as follows:

Note: The text of Form SF-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SF-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

III. Registration of Additional Securities Pursuant to Rule 462(b).

* * * *See* Rule 439(b) under the Securities Act [17 CFR 230.439(b)].

* * * * *

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Furnish the information required by Items 105 and 503 of Regulation S-K (17 CFR 229.105 and 17 CFR 229.503) and Item 1103 of Regulation AB (17 CFR 229.1103).

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

41. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

42. Revise § 240.12b-13 to read as follows:

§ 240.12b-13 Preparation of statement or report.

Except as provided by the appropriate form, the statement or report must contain the numbers and captions of all items of such form. The text of the items may be omitted if the answers thereto are so prepared as to indicate to the reader the coverage of the items without the necessity of referring to the text of the items or instructions thereto. Where any item requires information to be given in tabular form, it must be given in substantially the tabular form specified in the item. All instructions, whether appearing under the items of the form or elsewhere therein, must be omitted. Unless expressly provided otherwise, if any item is inapplicable or the answer thereto is in the negative, an appropriate statement to that effect must be made.

43. Revise § 240.12b-23 to read as follows:

§ 240.12b-23 Incorporation by reference.

(a) *Registration statement or report*. Except as provided by this section or in the appropriate form, information may be incorporated by reference in answer, or partial answer, to any item of a registration statement or report.

(b) *Financial information.* Except as provided in the Commission's rules, financial information required to be given in comparative form for two or more fiscal years or periods must not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given. In the financial statements, incorporating by reference, or cross-referencing to, information outside of the financial statements is not permitted unless otherwise specifically permitted or required by the Commission's rules.

(c) *Exhibits.* Any document or part thereof filed with the Commission pursuant to any Act administered by the Commission may be incorporated by reference as an exhibit to any statement or report filed with the Commission by the same or any other person. Any document or part thereof filed with an exchange pursuant to the Act may be incorporated by reference as an exhibit to any statement or report filed with the exchange by the same or any other person. If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant must file with the reference a statement containing the text of any such modification and the date thereof.

(d) *Hyperlinks.* You must include an active hyperlink to information incorporated into a registration statement or report by reference if such information is publicly available on the

Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") at the time the registration statement or form is filed. For hyperlinking to exhibits, please refer to Item 601 of Regulation S-K (§ 229.601 of this chapter) or the appropriate form.

(e) *General.* Include an express statement clearly describing the specific location of the information you are incorporating by reference. The statement must identify the document where the information was originally filed or submitted and the location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. For example, unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document.

§ 240.12b-32 [Removed and reserved].

44. Remove and reserve § 240.12b-32.

45. Revise the first sentence of Note D.1 of § 240.14a-101 to read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

D. * * *

1. Disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document. * * *

* * * * *

46. Remove and reserve paragraph (e) of § 240.16a-3.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

47. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

48. Remove and reserve paragraph (c) of General Instruction 3 to Form 3 (referenced in § 249.103).

49. Remove and reserve paragraph (c) of General Instruction 2 to Form 4 (referenced in § 249.104).

50. Remove and reserve paragraph (c) of General Instruction 2 to Form 5 (referenced in § 249.105).

51. Amend Form 8-A (referenced in § 249.208a) by revising the Instructions as to Exhibits to read as follows:

Note: The text of Form 8-A does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-A

FOR REGISTRATION OF CERTAIN CLASSES OF SECURITIES
PURSUANT TO SECTION 12(b) OR (g) OF THE

SECURITIES EXCHANGE ACT OF 1934

* * * * *

INSTRUCTIONS FOR EXHIBITS

If the securities to be registered on this form are to be registered on an exchange on which other securities of the registrant are registered, or are to be registered pursuant to Section 12(g) of the Act, copies of all constituent instruments defining the rights of the holders of each class of such securities, including any contracts or other documents which limit or qualify the rights of such holders, must be filed as exhibits with each copy of the registration statement filed with the Commission or with an exchange, subject to Rule 12b-23(c) regarding incorporation of exhibits by reference.

52. Amend Form 10 (referenced in 249.210) by revising the first sentence in Item 1A and Instruction C(a) under "General Instructions" to read as follows:

Note: The text of Form 10 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10

GENERAL FORM FOR REGISTRATION OF SECURITIES
Pursuant to Section 12(b) or (g) of the Securities Exchange Act of 1934

* * * * *

INFORMATION REQUIRED IN REGISTRATION STATEMENT

* * * * *

Item 1A. Risk Factors.

Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 105 of Regulation S-K (§ 229.105 of this chapter) applicable to the registrant. * * *

* * * * *

GENERAL INSTRUCTIONS

* * * * *

C. Preparation of Registration Statement.

(a) This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the registration statement on paper meeting the requirements of Rule 12b-12 [17 CFR 240.12b-12]. The numbers or captions of items are not required unless expressly required by this form or the referenced disclosure requirements. The text of the items may be omitted. Otherwise, the answers to the items must be prepared in the manner specified in Rule 12b-13 [17 CFR 240.12b-13].

* * * * *

53. Amend Form 20-F (referenced in § 249.220f) by:

a. Adding a field to the cover page to include trading symbol(s);

b. Revising Instruction C(a) under "General Instructions";

c. Adding Instruction 6 under "Instructions to Item 5";

d. Revising Instruction 1(b) under "Instructions to Item 10";

e. Revising Instructions 1 and 2 under "Instructions to Item 12";

f Revising the introductory text, Instruction 4(a) and Instruction 8 and adding Instructions 2(d) and 104 under "Instructions As To Exhibits" to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 20-F

* * * * *

Securities registered or to be registered pursuant to Section 12(b) of the Act.

Title of each class	Trading Symbol(s)	Name of each exchange on which registered

* * * * *

GENERAL INSTRUCTIONS

* * * * *

C. How to Prepare Registration Statements and Reports on this Form.

(a) Do not use this Form as a blank form to be filled in; use it only as a guide in the preparation of the registration statement or annual report. General Instruction E states which items must be responded to in a registration statement and which items must be responded to in an annual report. The number or captions of items are not required unless expressly required by this form. You may also omit the text following each caption in this Form, which describes what must be disclosed under each item. Omit the text of all instructions in this Form. If an item is inapplicable or the answer to the item is in the negative, respond to the item by making a statement to that effect.

* * * * *

Item 5. Operating and Financial Review and Prospects

* * * * *

Instructions to Item 5:

* * * * *

6. Generally, the discussion shall cover the periods covered by the financial statements and the registrant may use any format that in the registrant's judgment enhances a reader's understanding.

   For registrants providing financial statements covering three years in a filing, disclosure about the earliest year would not be required if (i) that disclosure is not material to an understanding of the registrant's financial condition, changes in financial condition and results of operations and (ii) the registrant has filed its prior year Form 20-F on EDGAR containing an Operating and Financial Review and Prospects discussion of the earliest of the three years included in the financial statements of the current filing.

* * * * *

Item 10. Additional Information

* * * * *

Instructions to Item 10:

* * * * *

1 ***

(b) If the information called for by Item 10.B has been reported previously in a registration statement on Form 20-F or a registration statement filed under the Securities Act and has not changed, you may incorporate that information by a specific reference in the annual report to the previous registration statement or, to the extent that this information has been provided in the

exhibit required by instruction 2(d) of the Instructions as to Exhibits, you may refer to the exhibit for this information.

* * * * *

Item 12. Description of Securities Other than Equity Securities

* * * * *

Instructions to Item 12:

* * * * *

1. If you are using the form as an annual report, provide the information required by Item 12.D.3 and Item 12.D.4 under this Item of your annual report and provide the remainder of the information required by this Item in an exhibit to such report pursuant to paragraph 2(d) of Instructions as to Exhibits.

2. You do not need to include any information in a registration statement, prospectus, or annual report on Form 20-F in response to Item 305(a)(2) of the Trust Indenture Act of 1939, 15 U.S.C. 77aaa *et seq*., as amended, if the information is not otherwise required by this Item or Instruction 2(d) under Instructions as to Exhibits of this Form.

INSTRUCTIONS AS TO EXHIBITS

File the exhibits listed below as part of an Exchange Act registration statement or report. Exchange Act Rule 12b-23(c) explains the circumstances in which you may incorporate exhibits by reference. Exchange Act Rule 24b-2 explains the procedure to be followed in requesting confidential treatment of information required to be filed.

Previously filed exhibits may be incorporated by reference. If any previously filed exhibits have been amended or modified, file copies of the amendment or modification or copies of the entire exhibit as amended or modified.

If the Form 20-F registration statement or annual report requires the inclusion, as an exhibit or attachment, of a document that is in a foreign language, you must provide instead either an English translation or an English summary of the foreign language document in accordance with Exchange Act Rule 12b-12(d) (17 CFR 240.12b-12(d)) for both electronic and paper filings. You may submit a copy of the unabridged foreign language document along with the English translation or summary as permitted by Regulation S-T Rule 306(b) (17 CFR 232.306(b)) for electronic filings or by Exchange Act Rule 12b-12(d)(4) (17 CFR 240.12b-12(d)(4)) for paper filings.

Include an exhibit index in each registration statement or report you file, immediately preceding the exhibits you are filing. The exhibit index must list each exhibit according to the number assigned to it below. If an exhibit is incorporated by reference, note that fact in the exhibit index. For paper filings, the pages of the manually signed original registration statement should be numbered in sequence, and the exhibit index should give the page number in the sequential numbering system where each exhibit can be found.

Schedules (or similar attachments) to the exhibits required by this Form 20-F are not required to be filed unless such schedules contain information material to an investment or voting decision and that information is not otherwise disclosed in the exhibit or the disclosure document. Each exhibit filed must contain a list briefly identifying the contents of all omitted

schedules. In addition, the registrant must provide a copy of any omitted schedule to the Commission staff upon request.

The registrant may redact information from exhibits required to be filed by this Form 20-F if disclosure of that that information would constitute a clearly unwarranted invasion of personal privacy (*e.g.*, disclosure of bank account numbers, social security numbers, home addresses and similar information). The registrant is not required to undertake or provide to the Commission upon request a materiality or competitive harm analysis of this redacted information.

* * * * *

2 * * *

(d) If a registrant is filing an annual report under Exchange Act Section 13(a) or 15(d), the registrant must provide as an exhibit a description of the rights of each class of securities that is registered under Section 12 of the Exchange Act as of the end of the period covered by the report with which the exhibit is filed. The description must include information for the securities comparable to that required by Item 9.A.3, A.5, A.6, and A.7, Item 10.B.3, B.4, B.6, B.7, B.8, B.9, and B.10, and Item 12.A, 12.B, 12.C, and 12.D.1 and 12.D.2 of Form 20-F (collectively, the "Description of Securities"). However, for purposes of this paragraph 2(d), all references in those Items to securities to be or being registered, offered or sold will mean securities that are registered as of the end of the period covered by the report with which the exhibit is filed. In addition, for purposes of this Item, the disclosure will be required for classes of securities that have not been retired by the end of the period covered by the report. A registrant may incorporate by reference and provide an active hyperlink to a prior periodic filing containing the

disclosure required by this paragraph 2(d) so long as there has not been any change to the information called for by the Description of Securities since the filing date of the linked filing. Such hyperlink will be deemed to satisfy the requirements of this paragraph 2(d) for the current filing.

* * * * *

4.(a) Every contract not made in the ordinary course of business that is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report. In addition, for newly reporting registrants, every contract not made in the ordinary course of business that is material to the registrant and that was entered into not more than two years before the date on which such registrant:

(i) first files a registration statement or report; or

(ii) completes a transaction that had the effect of causing it to cease being a public shell company.

The only contracts that must be filed are those to which the registrant or a subsidiary of the registrant is a party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

The registrant may redact provisions or terms of exhibits required to be filed by this Form 20-F if those provisions or terms are both (i) not material and (ii) competitively harmful to the registrant if publicly disclosed. If it does so, the registrant should mark the exhibit or exhibits to indicate that portions of the exhibit or exhibits have been omitted and include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both (i) not material and (ii) competitively harmful to the

registrant if publicly disclosed. The registrant also must indicate by brackets where the information is omitted from the filed version of the exhibit.

If requested by the Commission staff, the registrant must provide an unredacted paper copy of the exhibit on a supplemental basis. The Commission staff also may request the registrant to provide its materiality and competitive harm analyses on a supplemental basis. Upon evaluation of the registrant's supplemental materials, the Commission staff may request the registrant to amend its filing to include in the exhibit any previously redacted information that is not adequately supported by the registrant's materiality and competitive harm analyses.

The registrant may request confidential treatment of the supplemental material submitted to the Commission or the staff pursuant to Rule 83 (17 CFR 200.83) while it is in the possession of the Commission staff. After reviewing the supplemental information, the Commission staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 or 12b-4 (17 CFR 230.418 or 17 CFR 240.12b-4).

Note: A "newly reporting registrant" is (i) any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, whether or not such registrant has ever previously been subject to the reporting requirements of Section 13(a) or 15(d), (ii) any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation, and (iii) any registrant that (a) was a shell company, other than a business combination related shell company, as defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before completing a transaction that has the effect of causing it to cease being a shell company and (b) has not filed a Form 20-F since the completion of such transaction. For example, newly

reporting registrants would include (i) a registrant that is filing its first registration statement under the Securities Act or the Exchange Act, and (ii) a registrant that was a public shell company, other than a business combination related shell company, and completes a reverse merger transaction causing it to cease being a shell company.

* * * * *

8. List the following information for the registrant and each of its subsidiaries: the name, the legal entity identifier (if any), the state or other jurisdiction of incorporation or organization, and the names under which the entity does business. This list may be incorporated by reference from another filed document which includes a complete and accurate list. "Legal entity identifier" means, with respect to any registrant or its subsidiaries, the legal entity identifier as assigned by a utility endorsed by the Global LEI Regulatory Oversight Committee or accredited by the Global LEI Foundation. You may omit the names of subsidiaries that, in the aggregate, would not be a "significant subsidiary" as defined in rule 1-02(w) of Regulation S-X as of the end of the year covered by the report. You may omit the names of multiple wholly owned subsidiaries carrying on the same line of business, such as chain stores or service stations, if you give the name of the immediate parent company, the line of business and the number of omitted subsidiaries broken down by U.S. and foreign operations.

* * * * *

102 and 103 [Reserved]

104. *Cover Page Interactive Data File*. If the Form 20-F is being used as an annual report, a Cover Page Interactive Data File (as defined in 17 CFR 232.11) as required by Rule 406 of Regulation S-T [17 CFR 232.406], and in the manner provided by the EDGAR Filer Manual.

54. Amend Form 40-F (referenced in § 249.240f) by:

a. Adding a field to the cover page to include trading symbol(s); and

b. Adding paragraph B.17 under "General Instructions" to read as follows:

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 40-F

* * * * *

Securities registered or to be registered pursuant to Section 12(b) of the Act.

Title of each class	Trading Symbol(s)	Name of each exchange on which registered

* * * * *

B. Information To Be Filed on this Form

* * * * *

(17) Cover Page Interactive Data File. If the Form 40-F is being used as an annual report, a Cover Page Interactive Data File (as defined in 17 CFR 232.11) as required by Rule 406 of Regulation S-T [17 CFR 232.406], in the manner provided by the EDGAR Filer Manual and listed as exhibit 104.

* * * * *

55. Amend Form 8-K (referenced in § 249.308) by adding a field to the cover page for securities registered pursuant to Section 12(b) of the Exchange Act, the title of each class of such securities, trading symbol(s) and name of each exchange on which registered:

Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

* * * * *

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered

* * * * *

56. Amend Form 10-Q (referenced in § 249.308a) by adding a field to the cover page for securities registered pursuant to Section 12(b) of the Exchange Act, the title of each class of such securities, trading symbol(s) and name of each exchange on which registered:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

* * * * *

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered

* * * * *

57. Amend Form 10-K (referenced in § 249.310) by:

a. Revising Instruction (C)(1) and the last sentence of Instruction (G)(3) under "General Instructions", the first sentence in Item 1A, and paragraph (a) under "Supplemental Information to be Furnished With Reports Filed Pursuant to Section 15(d) of the Act by Registrants Which Have Not Registered Securities Pursuant to Section 12 of the Act";

b. Removing the second sentence of Instruction (G)(4) under "General Instructions", the checkbox that relates to disclosure under Item 405, and the instruction to Item 10; and

c. Adding a field to the cover page to include trading symbol(s) to read as follows:

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS

* * * * *

C. Preparation of Report.

(1) This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report on paper meeting the requirements of Rule 12b-12. Except as provided in this instruction and General Instruction G, the answers to the items must be prepared in the manner specified in Rule 12b-13. The numbers or captions of items are not required unless expressly required by this form or the referenced disclosure requirements.

* * * * *

G. Information to be Incorporated by Reference.

* * * * *

(3) * * * See the Instruction to Item 401 of Regulation S-K (§ 229.401 of this chapter).

* * * * *

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

* * * * *

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered

* * * * *

Item 1A. Risk Factors. Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 105 of Regulation S-K (§ 229.105 of this chapter) applicable to the registrant. * * *

* * * * *

Supplemental Information to be Furnished With Reports Filed Pursuant to Section 15(d) of the Act by Registrants Which Have Not Registered Securities Pursuant to Section 12 of the Act

(a) Except to the extent that the materials enumerated in (1) and/or (2) below are specifically incorporated into this Form by reference, every registrant which files an annual report on this Form pursuant to Section 15(d) of the Act must furnish to the Commission for its information, at the time of filing its report on this Form, four copies of the following: * * *

* * * * *

58. Amend Form 10-D (referenced in § 249.312 of this chapter) by:

a. Removing and reserving General Instruction D(2)(a); and

b. Revising General Instruction D(2)(d) to read as follows:

Note: The text of Form 10-D does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-D

ASSET-BACKED ISSUER
DISTRIBUTION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS

* * * * *

(d) Exchange Act Rules 12b-23 (17 CFR 240.12b-23) (additional rules on incorporation by reference for reports filed pursuant to Sections 13 and 15(d) of the Act).

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1934

59. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, 80a-39, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

60. Revise § 270.0-4 to read as follows:

§270.0-4 Incorporation by reference.

(a) *Registration statements and reports*. Except as provided by this section or in the appropriate form, information may be incorporated by reference in answer, or partial answer, to any item of a registration statement or report. Where an item requires a summary or outline of the provisions of any document, the summary or outline may incorporate by reference particular items, sections, or paragraphs of any exhibit and may be qualified in its entirety by such reference.

(b) *Financial information.* Except as provided in the Commission's rules, financial information required to be given in comparative form for two or more fiscal years or periods must not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given. In the financial statements, incorporating by reference, or cross-referencing to, information provided pursuant to the non-

financial information disclosure requirements is not permitted unless otherwise specifically permitted or required by the Commission's rules.

(c) *Exhibits*. Any document or part thereof, including any financial statement or part thereof, filed with the Commission pursuant to any Act administered by the Commission may be incorporated by reference as an exhibit to any registration statement, application, or report filed with the Commission by the same or any other person. If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant must file with the reference a statement containing the text of any such modification and the date thereof.

(d) *Hyperlinks.* Include an active hyperlink to information incorporated into a registration statement, application, or report by reference if such information is publicly available on the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") at the time the registration statement, application, or report is filed. For hyperlinking to exhibits, please refer to the appropriate form.

(e) *General*. Include an express statement clearly describing the specific location of the information you are incorporating by reference. The statement must identify the document where the information was originally filed or submitted and the location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. For example, unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document.

§ 270.8b-23 [Removed and reserved].

61. Remove and reserve § 270.8b-23.

§ 270.8b-24 [Removed and reserved].

62. Remove and reserve § 270.8b-24.

§ 270.8b-32 [Removed and reserved].

63. Remove and reserve § 270.8b-32.

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1934

64. The authority citation for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78(o)(d), 80a-8, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

65. Amend Form N–5 (referenced in § 274.5 of this chapter) by revising "Instructions as to Exhibits" to add a paragraph to read as follows:

Note: The text of Form N–5 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–5

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active

hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

66. Amend Form N–1A (referenced in § 274.11A of this chapter) by:

a. Revising General Instruction D.2; and

b. Revising the Instruction to Item 28 to read as follows:

Note: The text of Form N–1A does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–1A

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GENERAL INSTRUCTIONS

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D. Incorporation by Reference

* * * * *

2. General Requirements

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S–T [17 CFR 232.303] (specific requirements for electronically filed documents); and rule 0-4 [17 CFR 270.0-4] (additional rules on incorporation by reference for Funds).

* * * * *

Item 28. Exhibits

* * * * *

Instruction

Each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language) must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

A Fund that is a Feeder Fund also must file a copy of all codes of ethics applicable to the Master Fund.

* * * * *

67. Amend Form N–2 (referenced in § 274.11a-1 of this chapter) by

a. Revising General Instruction F; and

b. Revising the Instructions to Item 25.2 to add Instruction 4 to read as follows:

Note: The text of Form N–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–2

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GENERAL INSTRUCTIONS

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F. Incorporation by Reference

Incorporation by reference permits a Registrant to include documents and exhibits filed previously with the Commission as part of the registration statement by making reference to where, and under what designation, these documents can be found in previous filings. A Registrant may incorporate all or part of the Statement of Additional Information (the "SAI")

into the prospectus delivered to investors without physically delivering the SAI with the prospectus, so long as the SAI is available to investors upon request at no charge and any information or documents incorporated by reference into the SAI are provided along with the SAI, except to the extent provided by paragraph F.3 below.

In general, a Registrant may incorporate by reference, in response to any item of Form N-2 not required to be included in the prospectus, any information contained elsewhere in the registration statement or in other statements, applications, or reports filed with the Commission.

A Registrant may incorporate by reference into the prospectus or the SAI in response to Item 4.1 or 24 of this form the information contained in Form N-CSR [17 CFR 249.331 and 274.128] or any report to shareholders meeting the requirements of Section 30(e) of the 1940 Act [15 U.S.C. 80a-29(e)] and Rule 30e-1 [17 CFR 270.30e-1] thereunder (and a Registrant that has elected to be regulated as a business development company may so incorporate into Items 4.2, 8.6.c, or 24 of this form the information contained in its annual report under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq*.] (the "Exchange Act")), provided:

1. The material incorporated by reference is prepared in accordance with, and covers the periods specified by, this form.
2. The Registrant states in the prospectus or the SAI, at the place where the information required by Items 4.1, 4.2, 8.6.c, or 24 of this form would normally appear, that the information is incorporated by reference from a report to shareholders or a report on Form N-CSR. (The Registrant also may describe briefly, in either the prospectus, the SAI, or Part C of the registration statement (in response to Item 25.1) those portions of

the report to shareholders or report on Form N-CSR that are not incorporated by reference and are not a part of the registration statement.)

3. The material incorporated by reference is provided with the prospectus and/or the SAI to each person to whom the prospectus and/or the SAI is sent or given, unless the person holds securities of the Registrant and otherwise has received a copy of the material. (The Registrant must state in the prospectus and/or the SAI that it will furnish, without charge, a copy of such material on request and provide the name, address, and telephone number of the person to contact.)

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S-T [17 CFR 232.303] (specific requirements for electronically filed documents); and rule 0-4 [17 CFR 270.0-4] (additional rules on incorporation by reference for investment companies).

* * * * *

Item 25. Financial Statements and Exhibits

* * * * *

2. Exhibits:

* * * * *

Instructions

* * * * *

4. Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active

hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

68. Amend Form N–3 (referenced in § 274.11b of this chapter) by:

a. Revising General Instruction G; and

b. Revising the Instructions to Item 29(b) to add Instruction 3 to read as follows:

Note: The text of Form N–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–3

* * * * *

GENERAL INSTRUCTIONS

* * * * *

G. Incorporation by Reference

A Registrant may, at its discretion, incorporate all or part of the Statement of Additional Information into the prospectus, without physically delivering the Statement of Additional Information to investors with the prospectus. But the Statement of Additional Information must be available to the investor upon request at no charge and any information or documents incorporated by reference into the Statement of Additional Information must be provided along with the Statement of Additional Information.

In general, a Registrant may incorporate by reference, in the answer to any item of Form N-3 not required to be in the prospectus, any information elsewhere in the registration statement or in other statements, applications, or reports led with the Commission.

Subject to these rules, a Registrant may incorporate by reference into the prospectus or the Statement of Additional Information in response to Items 4(a) or 28 of Form N-3 the information in Form N-CSR [17 CFR 249.331 and 274.128] or any report to contract owners meeting the requirements of Section 30(e) of the 1940 Act [15 U.S.C. 80a-29(e)] and Rule 30e-1 [17 CFR 270.30e-1] provided:

1. The material incorporated by reference is prepared in accordance with, and covers the periods specified by, this Form.
2. The Registrant states in the prospectus or the Statement of Additional Information, at the place where the information would normally appear, that the information is incorporated by reference from a report to security holders or a report on Form N-CSR. The Registrant may also describe, in either the prospectus, the Statement of Additional Information, or Part C of the Registration Statement (in response to Item 29(a)), any parts of the report to security holders or the report on Form N-CSR that are not incorporated by reference and are not a part of the Registration Statement.
3. The material incorporated by reference is provided with the prospectus or the Statement of Additional Information to each person to whom the prospectus or the Statement of Additional Information is given, unless the person holds securities of the Registrant and otherwise has received a copy of the material. However, Registrant must state in the prospectus or the Statement of Additional Information that it will furnish, without charge, another copy of such report on request and the name, address, and telephone number of the person to contact.

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S-T [17 CFR 232.303] (specific requirements for electronically filed documents); and rule 0-4 [17 CFR 270.0-4] (additional rules on incorporation by reference for investment companies).

* * * * *

Item 29. Financial Statements and Exhibits

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(b) Exhibits:

* * * * *

Instructions

* * * * *

3. Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

69. Amend Form N–4 (referenced in § 274.11c of this chapter) by

a. Revising General Instruction G; and

b. Revising the Instructions to Item 24(b) to add Instruction 3 to read as follows:

Note: The text of Form N–4 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–4

* * * * *

GENERAL INSTRUCTIONS

* * * * *

G. Incorporation by Reference

A Registrant may, at its discretion, incorporate all or part of the Statement of Additional Information into the prospectus, without physically delivering the Statement of Additional Information to investors with the prospectus. But the Statement of Additional Information must be available to the investor upon request at no charge and any information or documents incorporated by reference into the Statement of Additional Information must be provided along with the Statement of Additional Information.

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S-T [17 CFR 232.303] (specific requirements for electronically filed documents); and rule 0-4 [17 CFR 270.0-4] (additional rules on incorporation by reference for investment companies).

In general, a Registrant may incorporate by reference, in the answer to any item of Form N-4 not required to be in the prospectus, any information elsewhere in the registration statement or in other statements, applications, or reports led with the Commission.

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Item 24. Financial Statements and Exhibits

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(b) Exhibits:

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Instructions:

* * * * *

3. Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

70. Amend Form N–6 (referenced in § 274.11d of this chapter) by:

a. Revising General Instruction D.2; and

b. Revising Item 26 to read as follows:

Note: The text of Form N–6 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–6

* * * * *

GENERAL INSTRUCTIONS

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B. Filing and Use of Form N–6

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4. What rules apply to the filing of a registration statement on Form N–6?

* * * * *

D. Incorporation by Reference

* * * * *

2. General Requirements:

All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: rule 411 under the Securities Act [17 CFR 230.411] (general rules on incorporation by reference in a prospectus); rule 303 of Regulation S-T [17 CFR 232.303] (specific requirements for electronically filed documents); and rule 0-4, [17 CFR 270.0-4] (additional rules on incorporation by reference for investment companies).

* * * * *

Item 26. Exhibits

Subject to General Instruction D regarding incorporation by reference and rule 483 under the Securities Act [17 CFR 230.483], file the exhibits listed below as part of the registration statement. Letter or number the exhibits in the sequence indicated and file copies rather than originals, unless otherwise required by rule 483. Reflect any exhibit incorporated by reference in the list below and identify the previously filed document containing the incorporated material. Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

(a) * * *

* * * * *

71. Amend Form N–CSR (referenced in § 274.128 of this chapter) by

a. Revising General Instruction D; and

b. Revising the Instruction to Item 12 to read as follows:

Note: The text of Form N–CSR does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N–CSR

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GENERAL INSTRUCTIONS

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D. Incorporation by Reference

A registrant may incorporate by reference information required by Items 4, 5, and 12(a)(1). No other Items of the Form shall be answered by incorporating any information by reference. The information required by Items 4 and 5 may be incorporated by reference from the registrant's definitive proxy statement (filed or required to be filed pursuant to Regulation 14A (17 CFR 240.14a-1 *et seq*.)) or definitive information statement (filed or to be filed pursuant to Regulation 14C (17 CFR 240.14c-1 *et seq*.)) involving the election of directors, if such definitive proxy statement or information statement is filed with the Commission not later than 120 days after the end of the fiscal year covered by an annual report on this Form. All incorporation by reference must comply with the requirements of this Form and the following rules on incorporation by reference: Rule 303 of Regulation S-T (17 CFR 232.303) (specific requirements for electronically filed documents); Rule 12b-23 under the Exchange Act (17 CFR 240.12b-23) (additional rules on incorporation by reference for reports filed pursuant to Sections 13 and 15(d)

of the Exchange Act); and Rule 0-4 (17 CFR 270.0-4) (additional rules on incorporation by reference for investment companies).

* * * * *

Item 12. Exhibits.

* * * * *

Instruction to Item 12.

Letter or number the exhibits in the sequence that they appear in this item. Each exhibit identified in the exhibit index must include an active link to an exhibit that is filed with the report or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If the report is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.

* * * * *

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

72. The authority citation for Part 275 continues to read, in part, as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

73. Revise § 275.0-6 to read as follows:

§275.0-6 Incorporation by reference in applications.

(a) *Exhibits*. Any document or part thereof, including any financial statement or part thereof, filed with the Commission pursuant to any Act administered by the Commission may be incorporated by reference as an exhibit to any application filed with the Commission by the same

or any other person. If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant must file with the reference a statement containing the text of any such modification and the date thereof.

(b) *General.* Include an express statement clearly describing the specific location of the information you are incorporating by reference. The statement must identify the document where the information was originally filed or submitted and the location of the information within that document. The statement must be made at the particular place where the information is required, if applicable. Information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing. For example, unless expressly permitted or required, disclosure must not be incorporated by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document.

(c) *Definition of Application.* For purposes of this rule, an "application" means any application for an order of the Commission under the Act other than an application for registration as an investment adviser.

By the Commission.

Dated: October 11, 2017

Brent J. Fields
Secretary

[FR Doc. 2017-22374 Filed: 11/1/2017 8:45 am; Publication Date: 11/2/2017]