

**SECURITIES AND EXCHANGE COMMISSION**

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

**[Release No. 33-10618; 34-85381; IA-5206; IC-33426; File No. S7-08-17]**

**RIN 3235-AM00**

**FAST Act Modernization and Simplification of Regulation S-K**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments 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 adopting parallel amendments to several rules and forms applicable to investment companies and investment advisers, including amendments that would require certain investment company filings to be submitted in HyperText Markup Language format.

**DATES:** *Effective dates:* The final rules are effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], except for the amendments to the rules governing redaction of confidential information in material contracts, which are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. For more information, *see* Section III (Other Matters).

*Compliance dates:* *See* Section IV (Transition Matters) and Section V (Compliance Dates).

**FOR FURTHER INFORMATION CONTACT:** Daniel Greenspan, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430; Michael C. Pawluk or Sean Harrison, 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:** We are adopting amendments to:

Commission Reference		CFR Citation (17 CFR)
Regulation S-K		§ 229.10 through § 229.1208
	Item 10	§ 229.10
	Item 102	§ 229.102
	Item 202	§ 229.202
	Item 303	§ 229.303
	Item 401	§ 229.401
	Item 405	§ 229.405
	Item 407	§ 229.407
	Item 501	§ 229.501
	Item 503	§ 229.503
	Item 512	§ 229.512
	Item 601	§ 229.601
Regulation M-A		§ 229.1000 through § 229.1016
	Item 1016	§ 229.1016
Regulation AB		§ 229.1100 through § 229.1125
	Item 1100	§ 229.1100
Regulation S-T		§ 232.11 through § 232.903
	Rule 11	§ 232.11
	Rule 102	§ 232.102
	Rule 105	§ 232.105
	Rule 303	§ 232.303
	Rule 312	§ 232.312
	Rule 406	§ 232.406

Securities Act of 1933 <sup>1</sup> ("Securities Act")	Rule 405	§ 230.405
	Rule 411	§ 230.411
	Rule 491	§ 230.491
	Form S-1	§ 239.11
	Form S-3	§ 239.12
	Form S-6	§ 239.16
	Form S-11	§ 239.18
	Form N-14	§ 239.23
	Form S-4	§ 239.25
	Form F-1	§ 239.31
	Form F-3	§ 239.33
	Form F-4	§ 239.34
	Form F-7	§ 239.36
	Form F-8	§ 239.37
	Form F-10	§ 239.40
	Form F-80	§ 239.41
	Form SF-1	§ 239.44
	Form SF-3	§ 239.45
Securities Exchange Act of 1934 <sup>2</sup> ("Exchange Act")	Rule 12b-23	§ 240.12b-23
	Schedule 14A	§ 240.14a-101
	Rule 16a-3	§ 240.16a-3
	Form 3	§ 249.103
	Form 4	§ 249.104
	Form 5	§ 249.105
	Form 8-A	§ 249.208a
	Form 10	§ 249.208c
	Form 20-F	§ 249.218
	Form 40-F	§ 249.220f
	Form 8-K	§ 249.308
	Form 10-Q	§ 249.308a
	Form 10-K	§ 249.310
	Form 10-D	§ 249.311
Investment Company Act of 1940 <sup>3</sup> ("Investment Company Act")	Rule 0-4	§ 270.0-4
	Form N-8B-2	§ 274.12

<sup>1</sup> 15 U.S.C. 77a *et seq.*

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 15 U.S.C. 80a-1 *et seq.*

Securities Act and Investment Company Act	Form N-1A	§ 239.15A and § 274.11A
	Form N-2	§ 239.14 and § 274.11a-1
	Form N-3	§ 239.17a and § 274.11b
	Form N-4	§ 239.17b and § 274.11c
	Form N-5	§ 239.24 and § 274.5
	Form N-6	§ 239.17c and § 274.11d
Exchange Act and Investment Company Act	Form N-CSR	§ 249.331 and § 274.128
Investment Advisers Act of 1940 <sup>4</sup> (“Investment Advisers Act”)	Rule 0-6	§ 270.0-6

We are also adopting 17 CFR § 229.105 (new “Item 105”) to Regulation S-K) and rescinding the following:

Commission Reference		CFR Citation (17 CFR)
Exchange Act	Rule 12b-32	§ 240.12b-32
Investment Company Act	Rule 8b-23	§ 270.8b-23
	Rule 8b-24	§ 270.8b-24
	Rule 8b-32	§ 270.8b-32

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<sup>4</sup> 15 U.S.C. 80b-1 *et seq.*

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## I. INTRODUCTION

On October 11, 2017, the Commission proposed amendments to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms,<sup>5</sup> as mandated by the 2015 Fixing America’s Surface Transportation Act (the “FAST Act”).<sup>6</sup> The proposals were based on the Commission’s report to Congress, published on November 23, 2016 (the “FAST Act Report”),<sup>7</sup> which contained “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.”<sup>8</sup> The proposals were also informed by the Commission’s experience with Regulation S-K arising from the Division of Corporation Finance’s disclosure review program and our staff’s broader review of the Commission’s disclosure regime.<sup>9</sup> In addition, the Commission proposed parallel amendments to several rules and forms applicable to

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<sup>5</sup> See *Fast Act Modernization and Simplification of Regulation S-K*, Release No. 33-10425 (Oct. 11, 2017) [82 FR 50998 (Nov. 2, 2017)] (“Proposing Release”).

<sup>6</sup> Pub. L. No. 114-94, Sec. 72003, 129 Stat. 1312 (2015).

<sup>7</sup> See *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> (the “FAST Act Report”).

<sup>8</sup> See FAST Act § 72003(c). Section 72003(c) required the Commission to issue the FAST Act Report and Section 72003(d) required the Commission to issue a proposed rule to implement the recommendations contained in the FAST Act Report.

<sup>9</sup> See the Proposing Release, *supra* note 5, at 50989. We are continuing to consider additional changes to our disclosure regime in connection with recent rule releases and requests for comment. See, e.g., *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)]; *Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)] (the “Concept Release”); and *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)] (the “Regulation S-K Subpart 400 Release”).

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 HyperText Markup Language (“HTML”) format.<sup>10</sup>

Commenters on the Proposing Release generally supported the proposed amendments and the Commission’s efforts to improve and modernize the disclosure requirements of Regulation S-K.<sup>11</sup> While commenters were largely supportive of the proposals, we also received a number of suggestions for modifying the amendments in ways that commenters believed would clarify the revised disclosure requirements, simplify compliance, or more consistently reflect the policy objectives cited in the Proposing Release.

After taking into consideration the public comments, we are adopting the majority of the amendments as proposed. As we discuss further below, in certain cases we are adopting amendments with modifications from those proposed and, in other cases, we have chosen not to adopt the proposed amendments. In the discussion that follows, we first address the proposals we are adopting with modifications from those proposed, then the amendments we are adopting as proposed, and, finally, the proposed amendments we have elected not to adopt.

The changes we are adopting, consistent with the Commission’s mandate under the FAST Act, are intended to improve the quality and accessibility of disclosure in filings by

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<sup>10</sup> 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)] (the “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).

<sup>11</sup> Comment letters related to the Proposing Release are *available at* <https://www.sec.gov/comments/s7-08-17/s70817.htm>. Unless otherwise indicated, comment letters cited in this release are to the Proposing Release.



simplifying and modernizing our requirements. The amendments also clarify ambiguous disclosure requirements, remove redundancies, and further leverage the use of technology. Taken together, we believe these rule changes should result in significant savings of time and money for registrants. We also believe they will increase investor access to information without reducing the availability of material information.

The following table highlights some of the changes we are adopting, as described more fully in Section II (Final Amendments) and elsewhere in this release:

<b>Rule</b>	<b>Summary Description of Amended Rules<sup>12</sup></b>	<b>Principal Objective</b>	<b>Discussed Below In Section</b>
<b>Regulation S-K, Item 303 and Form 20-F</b>	Registrants will generally be able to exclude discussion of the earliest of three years in MD&A if they have already included the discussion in a prior filing.	Simplify disclosure requirements to reduce repetition, reduce costs and burdens to registrants, focus disclosure on material information and improve readability.	<b>II.A.1.</b>
<b>Regulation S-K, Items 601(b)(10) and 601(b)(2) and investment company registration forms</b>	Registrants will be able to omit confidential information in material contracts and certain other exhibits without submitting a confidential treatment request to the Commission, so long as the information is (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed.	Substantially reduce the burden borne by registrants in preparing and responding to confidential treatment requests while still providing all material information to investors.	<b>II.A.2.</b>
<b>Regulation S-K, Item 601(b)(10)</b>	Only newly reporting registrants will be required to file material contracts that were entered within two years of the applicable registration statement or report.	Eliminate duplicative and unnecessary disclosure and reduce costs and burdens to registrants while still providing all material information to investors.	<b>II.B.5.c.</b>
<b>Regulation S-K, Item 601(a)(5) and investment company forms</b>	Registrants will not be required to file attachments to their material agreements if such attachments do not contain material information or were not otherwise disclosed.	Reduce costs and burdens to registrants while still providing all material information to investors.	<b>II.B.5.b.i.</b>
<b>Regulation S-K, Item 102</b>	Registrants will need to provide disclosure about a physical property only to the extent that it is material to the registrant.	Clarify and simplify the disclosure requirement to reduce costs and burdens to registrants, while focusing on material information.	<b>II.B.1.</b>
<b>Forms 8-K, 10-Q, 10-K, 20-F and 40-F</b>	Registrants will be required to disclose on the form cover page the national exchange or principal U.S.	Improve investors' efforts to search news websites and stock market	<b>II.B.4.a.iii. &amp; II.B.7.a.</b>

<sup>12</sup> The information in this chart is not comprehensive and is intended only to highlight some of the more significant aspects of the final amendments. It does not reflect all of the amendments or all of the rules and forms that are affected. All changes are discussed in their entirety below. As such, this table should be read together with the referenced sections and the complete text of this release.

Rule	Summary Description of Amended Rules <sup>12</sup>	Principal Objective	Discussed Below In Section
	market for their securities, the trading symbol, and title of each class of securities.	databases for information about registrants and distinguish among similarly named companies.	
<b>Securities Act Rule 411(b)(4); Exchange Act Rules 12b-23(a)(3), and 12b-32; Investment Company Act Rule 0-4; and Regulation S-T Rules 102 and 105</b>	Registrants will no longer be required to file as an exhibit any document or part thereof that is incorporated by reference in a filing, but instead will be required to provide hyperlinks to documents incorporated by reference.	Improve readability and navigability of disclosure documents and discourage repetition.	<b>II.B.6.i, &amp; II.B.6.b.ii.</b>
<b>Forms 10-K, 10-Q, 8-K, 20-F and 40-F.</b>	Registrants will be required to tag all cover page data in Inline XBRL.	Further enhance investors' use of interactive data to identify, count, sort, compare, and analyze registrants and their disclosures.	<b>II.B.7.a.</b>
<b>Regulation S-T Rules 102 105, 201, 202 and 311; Form N-CSR; and investment company registration forms</b>	Investment companies will be required to file reports on Form N-CSR and registration statements and amendments thereto in HTML format and provide hyperlinks to exhibits and other information incorporated by reference.	Improve navigability of disclosure.	<b>II.B.7.b.</b>

## II. FINAL AMENDMENTS

### A. Adoption of Proposals with Modifications

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

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

##### i. Proposed Amendments

Item 303(a) requires registrants to discuss their financial condition, changes in financial condition, and results of operations.<sup>13</sup> 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

<sup>13</sup> 17 CFR 229.303(a).

cover the three-year period covered by the financial statements and either use year-to-year comparisons or any other format 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.

The Commission proposed to amend Item 303 to clarify that discussion of the earliest year would not be required in certain situations.<sup>14</sup> Specifically, when financial statements included in a filing cover three years,<sup>15</sup> discussion about the earliest year would not have been required under the proposed amendments if (i) that discussion was not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations, and (ii) the registrant had filed its prior year Form 10-K<sup>16</sup> on EDGAR and that Form 10-K included in its Management's Discussion and Analysis ("MD&A") a discussion 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 earliest year in these situations, the proposal was 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-

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<sup>14</sup> See Proposing Release, *supra* note 5, Section II.B.1., n. 46 through 53. See also FAST Act Report, *supra* note 7, at Recommendation C.1.

<sup>15</sup> The proposed amendments to Item 303(a)(3) would not affect smaller reporting companies, as smaller reporting companies 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, the proposed amendments would not affect emerging growth companies that provide two years of audited financial statements. Emerging growth companies 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.

<sup>16</sup> 17 CFR 249.310.

K in a manner that reduces costs and burdens on companies while still providing all material information.

For the reasons discussed in the Proposing Release, the Commission also proposed to eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a).<sup>17</sup> In addition, the Commission proposed 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.<sup>18</sup>

## ii. Comments

The proposal generated a wide range of responses among commenters. While some commenters supported the amendments as proposed,<sup>19</sup> many commenters sought revisions or clarifications to the proposed rule. In particular, several commenters focused their remarks on the proposed conditions by which registrants could omit discussion of the earliest of the three years of financial statements covered by a filing. One commenter opposed the amendments to Item 303, asserting that retaining the discussion of the earliest year would help investors “understand the validity of analysis” in the MD&A where a company’s circumstances have changed.<sup>20</sup>

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<sup>17</sup> See Proposing Release, *supra* note 5, Section II.B.1., at 50993.

<sup>18</sup> *Id.*

<sup>19</sup> See letters from American Fuel and Petrochemical Manufacturers (“American Fuel”), Center for Capital Markets Competitiveness (“CCMC”), Davis Polk & Wardwell (“Davis Polk”), FedEx Corporation (“FedEx”), Fenwick & West LLP (“Fenwick”), Nasdaq, Inc. (“Nasdaq”), and UnitedHealth Group (“UnitedHealth”).

<sup>20</sup> See letter from Public Citizen.

A number of commenters found the first proposed condition to be problematic, largely due to uncertainty over the phrase “material to an understanding.”<sup>21</sup> While many of these commenters supported the concept underlying the proposal, they advocated that the Commission first refine or clarify the materiality condition to ensure that its implementation would have the effect the Commission intended.<sup>22</sup> These commenters questioned how the “material to an understanding” condition would be applied in practice and were uncertain how it differed, if at all, from the standard of materiality registrants already use to fulfill their disclosure obligations.<sup>23</sup> Several commenters advised that without further clarification registrants would be unlikely to omit the discussion of the earliest year for fear that their judgment would be challenged.<sup>24</sup> Along these lines, one commenter predicted that, because of litigation risk, registrants would find it much easier to simply repeat the disclosure made in the prior year rather than expose their assessment of materiality to second-guessing.<sup>25</sup>

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<sup>21</sup> *See, e.g.*, letter from Ernst & Young LLP (“E&Y”) (noting that the proposed standard “could be challenging to apply in practice ... registrants could struggle to consistently evaluate whether discussion of the earliest of the three years is ‘material to an understanding’ ...”).

<sup>22</sup> *See, e.g.*, letters from E&Y (raising a series of interpretive questions about the proposal) and Deloitte & Touche LLP (“Deloitte”) (questioning whether the phrase “material to an understanding” was intended to convey any special considerations beyond a registrant’s customary assessment of materiality).

<sup>23</sup> *See, e.g.*, letter from E&Y (noting the abundance of instances in Regulation S-K where the disclosure requirements reference some variation of materiality, creating a lack of clarity in many cases about whether the Commission intended registrants to evaluate materiality in a different context than its general application under federal securities law).

<sup>24</sup> *See, e.g.*, letters from BDO USA, LLP (“BDO”), CNA Financial Corporation (“CNA”), Cravath, Swaine & Moore LLP (“Cravath”), Institute of Management Accountants (“IMA”), KPMG LLP (“KPMG”), Piercy Bowler Taylor and Kern, CPAs (“Piercy Bowler”), and Society for Corporate Governance (“Society for Corp. Gov.”).

<sup>25</sup> *See* letter from IMA. *See also* letter from Society for Corp. Gov. (suggesting that modifying the default requirement of Item 303 from “disclosure of the earliest year’s discussion, unless not material” to “omission of the earliest year’s discussion, unless material” may more effectively accomplish the Commission’s objective of reducing the amount of immaterial and repetitive disclosure).

To mitigate these concerns and add more certainty to the process, some commenters favored revising the proposal to make the condition less subjective,<sup>26</sup> while others suggested adding conditions that would preclude registrants from omitting disclosure of the earliest year in certain specified situations.<sup>27</sup> Other commenters favored removing the materiality condition altogether because they believed it was unnecessary and would only create confusion.<sup>28</sup> These commenters stated that registrants should be permitted to omit the discussion of the earliest year covered by the financial statement in a filing based solely on the condition that the disclosure was already included in a previous filing. One such commenter noted that it is unnecessary to embed an explicit materiality reference within the proposed rule because materiality is already the overarching principle for a registrant’s disclosure and has been well defined by federal securities law.<sup>29</sup> The commenter went on to state that, as such, materiality is always a factor in disclosure, whether or not the proposed revision makes explicit reference to it. In this context, another commenter asserted that adding an additional materiality assessment would only add ambiguity and complexity to the registrant’s decision whether to include a discussion of the earliest period presented.<sup>30</sup>

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<sup>26</sup> *See, e.g.*, letter from Financial Executive International (“Financial Executives”) (requesting that the rule be revised to permit the omission of the discussion about the earliest year unless there has been a material change to the previous disclosures).

<sup>27</sup> *See, e.g.*, letter from Council of Institutional Investors (“CII”) (suggesting that registrants not be allowed 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).

<sup>28</sup> *See, e.g.*, letters from BDO, Center for Audit Quality (“CAQ”), and Northrop Grumman Corporation (“Grumman”).

<sup>29</sup> *See* letter from CAQ.

<sup>30</sup> *See* letter from BDO.

Several commenters supported expanding the second of the two proposed conditions for omission of the earliest year’s discussion to allow registrants to use filings other than the prior year’s Form 10-K as the reference document.<sup>31</sup> These commenters recommended that any filing available on EDGAR (*e.g.*, Form S-1, Form S-4, Form 8-K, Form 10, etc.) that contains the relevant MD&A discussion should suffice.<sup>32</sup>

Finally, several commenters expressed support for the proposal to eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a), and no commenters opposed it.<sup>33</sup>

### **iii. Final Amendments**

We are adopting amendments to Item 303 in substantially the form proposed, but with modifications in response to comments received. We are adopting as proposed the revision to Instruction 1 of Item 303 that eliminates the reference to year-to-year comparisons. Instruction 1 will now state that registrants may use any presentation that in the registrant’s judgment enhances a reader’s understanding of the registrant’s financial condition, changes in financial condition, and results of operations, without suggesting that any one mode of presentation is preferable to another. We anticipate that many registrants will continue to provide year-to-year comparisons, as this is a familiar and, in many cases, appropriate method of presentation. However, we recognize that this presentation may not always be the most effective format, depending on the unique circumstances of a particular registrant. Also, as proposed, we are

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<sup>31</sup> See letters from BDO, Cravath, Deloitte, E&Y, KPMG, Piercy Bowler, and Sullivan & Cromwell LLP (“Sullivan”).

<sup>32</sup> *Id.*

<sup>33</sup> See letters from CAQ, CCMC, CNA, Cravath, Davis Polk, Fenwick, Financial Executives, Securities Industry and Financial Markets Association (“SIFMA”), and Sullivan.

deleting the reference to five-year selected financial data in Instruction 1 to Item 303(a). Item 303(a)(3)(ii) already requires disclosure of known trends and uncertainties, so we do not anticipate that the removal of similar wording from Instruction 1 will discourage trend disclosure or otherwise reduce disclosure of material information.

We are revising Instruction 1 to Item 303(a) to allow registrants who are providing financial statements covering three years in a filing to omit discussion of the earliest of the three years if such discussion was already included in any other of the registrant's prior filings on EDGAR that required disclosure in compliance with Item 303 of Regulation S-K.<sup>34</sup> Registrants electing not to include a discussion of the earliest year in reliance on this instruction must, however, identify the location in the prior filing where the omitted discussion may be found. These amendments reflect two changes from the proposal.

First, we are expanding the condition regarding the earliest year discussion to allow registrants to rely on *any* prior EDGAR filings that include such discussion. We agree with commenters who recommended expanding this condition to encompass MD&A of the earliest year included in filings other than Form 10-K.<sup>35</sup> We do not believe it is necessary to designate the registrant's prior Form 10-K as the only filing that may serve as the location of the omitted disclosure, so long as the registrant clearly identifies the prior filing that includes the relevant discussion.

Second, we are not adopting, as an explicit condition, that the omitted discussion must not be "material to an understanding" of the registrant's financial condition, changes in financial

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<sup>34</sup> Instruction 1 to Item 303(a), as revised. Amended Form 20-F will include analogous wording in new Instruction 6 to Item 5. *See infra* Section II.A.1.b. of this release.

<sup>35</sup> *See supra* note 31.



condition, and results of operations. This is not to suggest, however, that materiality is not relevant to management’s judgment about what disclosure is provided in MD&A. Materiality remains, as always, the primary consideration. Rather, this change recognizes that the language of the proposed condition was superfluous and never intended to modify, supplement, or alter the overarching materiality analysis that management must undertake with respect to the information it provides investors in MD&A. As several commenters pointed out, this superfluous language may serve to create confusion for registrants and discourage them from tailoring their disclosure in a manner that is most useful for investors.<sup>36</sup>

Although a discussion of the earliest year of the financials could in some circumstances be material, in many cases the entirety of the discussion of the earliest year that was presented in the MD&A of a prior filing would not need to be reiterated if, in management’s view, that discussion is not necessary to understand the financial condition, changes in financial condition, and results of operations.<sup>37</sup> This is the standard that applies to all of MD&A,<sup>38</sup> and our amendments do not change that standard. A registrant’s obligation is to provide investors with all material information, customized in light of the company’s particular circumstances, and presented in a manner that best reflects the discussion and analysis of the business as seen through the eyes of those who manage that business.<sup>39</sup> We continue to encourage registrants to

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<sup>36</sup> See *supra* note 21. For similar reasons, we are not adopting different or additional conditions on the omission of the earliest year discussion as suggested by several commenters. See *supra* notes 26 and 27.

<sup>37</sup> For investors who find the earliest year discussion useful in understanding the MD&A, this information will remain readily available from prior filings on EDGAR. See *supra* note 20.

<sup>38</sup> See Item 303(a): “The discussion ... shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations.”

<sup>39</sup> 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

take the opportunity to reevaluate their disclosure in light of these amendments and determine whether a discussion of the earliest year's information remains material.<sup>40</sup> We believe these amendments underscore the continuing relevance of the Commission's guidance in the 2003 MD&A Release that "it is increasingly important for companies to focus their MD&A on material information. 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."<sup>41</sup>

We believe the revisions to Item 303 that we are adopting give registrants the flexibility to tailor their presentation in MD&A in a manner that is most suitable for their varying circumstances, while at the same time continuing to require that they provide all of the information necessary to an understanding of their financial condition, changes in financial condition and results of operations. In that respect, we view the elimination of references to year-to-year comparisons and the new language in Instruction 1 of Item 303 allowing registrants to omit discussion of the earliest of the three years covered by the financial statements as complementary.

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Interpretive Release"), Sections I.B and III.B.2. *See also Concept Release on Management's Discussion and Analysis of Financial Condition and Operations*, Release No. 6711 (Apr. 17, 1987) [52 FR 13715, 13717] (Apr. 23, 1987)] ("MD&A Concept Release") ("an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company").

<sup>40</sup> *See* 2003 MD&A Interpretive Release, Sections I.B. and III.B.2.; *and see* Proposing Release, *supra* note 5, at 50993.

<sup>41</sup> *See* 2003 MD&A Release, Section III.B.2.

## **b. Application to Foreign Private Issuers**

### **i. Proposed Amendments**

The disclosure requirements for Item 5 of Form 20-F (Operating and Financial Review and Prospects) are substantively comparable to the MD&A requirements under Item 303 of Regulation S-K.<sup>42</sup> To maintain a consistent approach to MD&A for domestic registrants and foreign private issuers, the Commission proposed changes to Form 20-F to conform with the proposed amendments to Instruction 1 to Item 303(a).<sup>43</sup>

### **ii. Comments**

Several commenters supported the proposal to make conforming changes to Form 20-F, and no commenters opposed.<sup>44</sup>

### **iii. Final Amendments**

We are adopting the proposed revisions to Item 5 of Form 20-F, as modified to be consistent with the amendments to Item 303. In its amended form, Item 5 of Form 20-F will provide that, when a filing includes financial statements covering three years, discussion about the earliest year may be omitted if such discussion was already included in the registrant's prior year Form 20-F filed on EDGAR or in any other of the registrant's prior filings on EDGAR that required disclosure in compliance with Item 5 of Form 20-F or with Item 303 of Regulation S-K. Registrants electing not to include a discussion of the earliest year must, however, include a

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<sup>42</sup> 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.

<sup>43</sup> The Commission did not propose 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 MD&A contained in Form 40-F is largely prepared in accordance with Canadian disclosure standards.

<sup>44</sup> *See* letters from BDO, CAQ, Cravath, E&Y, PricewaterhouseCoopers ("PWC"), and Sullivan.

statement that identifies the location in the prior filing where the omitted discussion may be found. Similar to revised Item 303, we are revising the instructions to Item 5 to emphasize that registrants may use any presentation that, in the registrant’s judgment, would enhance a reader’s understanding.

## **2. Redaction of Confidential Information in Material Contract Exhibits**

### **a. Proposed Amendment**

As a general matter, current Item 601(b)(10) requires registrants to file as an exhibit to their applicable disclosure document each of their material contracts entered into within the preceding two years or which is to be performed, at least in part, in the future. It is not unusual for some of the information contained in such exhibits to be highly sensitive, most often for competitive reasons. If such information is not material and is covered by an exemption from the Freedom of Information Act,<sup>45</sup> a registrant may request confidential treatment which, if granted by the Commission, would allow the registrant to redact specific information from the material contract exhibit that it files publicly on EDGAR.

Exchange Act Rule 24b-2 and Securities Act Rule 406 set forth the exclusive procedures for obtaining confidential treatment in regard to exhibits filed under the Exchange Act and Securities Act. Registrants who wish to avail themselves of these rules must submit a detailed application to the Commission that identifies the particular text for which confidential treatment

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<sup>45</sup> 5 U.S.C. 552 (“FOIA”). Rule 80 [17 CFR 200.80 *et seq.*], the Commission’s rule adopted under FOIA, incorporates the criteria for permissible non-disclosure set forth in FOIA. Of the list of available FOIA disclosure exemptions provided in Section 552(b), most applicants for confidential treatment rely on paragraph (b)(4), which exempts certain trade secrets or privileged or confidential commercial or financial information.

is sought, a statement of the legal grounds for the exemption,<sup>46</sup> and an explanation of why, based on the facts and circumstances of the particular case, disclosure of the information is unnecessary for the protection of investors.<sup>47</sup> Upon receipt of the application, known as a “confidential treatment request” or “CTR,” Commission staff will evaluate whether the request appears appropriate and whether to issue comments on the application.

The Commission proposed revisions to Item 601(b)(10) that would permit registrants to omit confidential information from material contracts filed pursuant to that item without the need to submit a CTR, if the information (i) is not material and (ii) would be competitively harmful if publicly disclosed. 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 it may redact the information under the proposed rules would remain unchanged.<sup>48</sup> Redactions made in accordance with revised Item 601(b)(10) should include no more information than necessary to prevent competitive harm to the registrant.

Under the proposal, the requirements for marking exhibits subject to confidential treatment would remain in place as well. Just as registrants must do under the current rules, the proposed amendments would require registrants to:

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<sup>46</sup> Exchange Act Rule 24b-2 and Securities Act 406 require that applicants for confidential treatment justify their nondisclosure on the basis of the applicable exemption(s) from disclosure under Rule 80.

<sup>47</sup> The Division has published procedural and substantive guidance on how to prepare and submit confidential treatment requests in Staff Legal Bulletins 1 and 1A, available on the Commission’s website at <https://www.sec.gov/interps/legal/slbcfl.txt> and <https://www.sec.gov/interps/legal/slbcflr.htm>.

<sup>48</sup> See Rule 12b-20 [17 CFR 240.12b-20], Rule 408(a) [17 CFR 230.408(a)], and proposed Item 601(b)(10)(iv).

- mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted;
- 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) would be competitively harmful if publicly disclosed; and
- indicate with brackets where the information has been omitted from the filed version of the exhibit.

Under the proposed revisions, 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 cause competitive harm if publicly disclosed. Upon request, registrants would be expected to promptly provide supplemental materials to the staff similar to those currently required in a CTR, including an unredacted copy of the exhibit and an analysis of why the redacted information is both (i) not material and (ii) would be competitively harmful if publicly disclosed.<sup>49</sup> Pursuant to Rule 83, registrants may request confidential treatment of this supplemental information while it is in the staff's possession. 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, similar to the process the staff currently follows for confidential treatment requests under Rule 406 and Rule 24b-2. After completing its review of the supplemental materials, the Commission or its staff would return or destroy them at the request of the

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<sup>49</sup> This analysis would be substantially the same as is currently required in confidential treatment requests.

registrant if the registrant complies with the procedures outlined in Rule 418 under the Securities Act or Rule 12b-4 under the Exchange Act, as applicable.

#### **b. Comments**

Many commenters favored this proposal.<sup>50</sup> Several commenters that supported the proposal stated that the current rules impose a significant burden on registrants and that reducing the significant cost and time expended to prepare and process confidential treatment requests would provide much needed relief without diminishing the quality of information available to investors.<sup>51</sup> Along these lines, commenters indicated the proposed revisions to Item 601(b)(10) would effectively change only the confidential treatment process, not the substance of registrants' disclosure.<sup>52</sup> For example, two commenters noted that published guidance, such as Staff Legal Bulletins 1 and 1A, is readily available to registrants and sets forth the staff's long established views on appropriate redactions of confidential information in accordance with Rules 406 and 24b-2.<sup>53</sup> Commenters also observed that the staff would retain the ability to review any of the information redacted by registrants from their filings, as necessary on a case-by-case basis. Several commenters noted that the prospect of staff review and request for further information

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<sup>50</sup> See, e.g., letters from Eversheds Sutherland (US) LLP, on behalf of the Committee of Annuity Insurers ("Comm. of Annuity Insurers"), CCMC, Cravath, Davis Polk, FedEx, Fenwick, Financial Executives, Grumman, IMA, Reed Smith LLP ("Reed Smith"), SIFMA, Society for Corp. Gov., and Sullivan (supporting the proposal). *But see*, letters from CII and Public Citizen (opposing the proposal).

<sup>51</sup> See letters from Comm. of Annuity Insurers, Cravath, Davis Polk, FedEx, IMA, Reed Smith, Society for Corp. Gov., and Sullivan. See also letter from Reed Smith (stating that the current requirements for confidential treatment disproportionately burden smaller reporting companies).

<sup>52</sup> See, e.g., letters from Cravath, Davis Polk, and Society for Corp. Gov.

<sup>53</sup> See letters from Cravath and Davis Polk.

would continue to act as a safeguard for investors, much as the staff's selective review process of filings generally operates today.<sup>54</sup>

However, not all commenters supported the proposal. In particular, two commenters expressed concern that if registrants were no longer required to formally request confidential treatment of redactions in their exhibits, they may be motivated to err on the side of redacting much more information than would likely be afforded confidential treatment under the current system.<sup>55</sup>

In the Proposing Release, the Commission asked whether to extend the proposal beyond Item 601 to reach:

- Exhibits required by other subsections of Item 601, including Item 601(b)(2);
- Exhibits required by certain of the Commission's disclosure forms to which the exhibit requirements of Item 601 do not specifically apply;<sup>56</sup> and
- Exhibits required by certain of the Commission's disclosure forms related to investment companies.<sup>57</sup>

Several commenters supported expanding the proposed accommodation to exhibits filed pursuant to Item 601(b)(2), which requires registrants to file as exhibits any plans of acquisition, reorganization, arrangement, liquidation, or succession.<sup>58</sup> One such commenter stated that

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<sup>54</sup> See letters from Comm. of Annuity Insurers, Cravath, Fenwick, Reed Smith, SIFMA, and Society for Corp. Gov.

<sup>55</sup> See letters from CII and Public Citizen.

<sup>56</sup> For example, Form 20-F, for use by foreign private issuers, has its own exhibit requirements that do not reference Item 601 of Regulation S-K. See Item 19 of Form 20-F.

<sup>57</sup> See Proposing Release, *supra* note 5, Section II.E.2.c, at 51004.

<sup>58</sup> See letters from Cravath, Fenwick, SIFMA, and Sullivan.



including Item 601(b)(2) within the coverage of the proposed amendments was a sensible approach given that Item 601(b)(2) exhibits are substantively a subset of 601(b)(10) exhibits. However, this commenter also suggested initially limiting the proposed amendments to Item 601(b)(2) and 601(b)(10) and revisiting potential expanded applicability at a future date.<sup>59</sup>

By contrast, a few commenters favored immediately expanding the proposal beyond 601(b)(2) and 601(b)(10), specifically to underwriting agreements required by Item 601(b)(1)<sup>60</sup> or generally to all exhibits filed pursuant to Item 601.<sup>61</sup> These commenters reasoned that, for purposes of the proposed rule change, there was no meaningful basis to distinguish these additional exhibits from material contracts filed under Item 601(b)(10). One such commenter noted that broadening the rule change to all Item 601 exhibits would promote a more consistent approach to confidential treatment overall.<sup>62</sup>

None of the commenters that supported the proposal objected to an analogous change to the exhibit requirements of Commission disclosure forms for which Item 601(b)(10) does not apply. In addition, two commenters recommended that the proposals should be expanded to provide similar accommodations to investment companies.<sup>63</sup>

### **c. Final Amendment**

We are adopting the amendment to Item 601(b)(10) as proposed. We have, however, slightly revised the language of the amendment to refer to information that “would likely cause

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<sup>59</sup> See letter from Cravath.

<sup>60</sup> See letter from SIFMA.

<sup>61</sup> See letter from Society for Corp. Gov.

<sup>62</sup> *Id.*

<sup>63</sup> See letters from Comm. of Annuity Issuers and Investment Company Institute (“ICI”).

competitive harm” to more closely track the standard under FOIA.<sup>64</sup> In addition, we are amending Item 601(b)(2) in a similar manner to allow registrants to redact immaterial provisions or terms from agreements filed under that item that would likely cause them competitive harm if publicly disclosed.<sup>65</sup> To facilitate consistency across our exhibit requirements, we are also expanding the proposal to certain exhibit related requirements in specified disclosure forms for which Item 601(b)(10) does not apply.<sup>66</sup>

We believe that these amendments will substantially reduce the burden currently borne by registrants in preparing and processing requests for confidential treatment while still providing all material information to investors. As such, we believe these amendments are in keeping with our mandate under the FAST Act. In our view, the sizeable costs to registrants, in terms of financial expenditures, staff time, and potential transactional delays resulting because of time spent on confidential treatment request applications, justifies such an approach where, as here, any corresponding negative impact on investors is expected to be minimal. The amendments to Item 601 do not substantively alter registrant disclosure requirements – they do not affect the principles of what a registrant may or may not permissibly redact from its disclosure for reasons of confidentiality, nor do they change the fundamental disclosure obligations a registrant owes its shareholders under the federal securities laws. Rather, the

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<sup>64</sup> See new paragraph (iv) to Item 601(b)(10).

<sup>65</sup> Additional amendments to the exhibit requirements of Item 601 that will allow registrants to omit (i) schedules, appendices and attachments to exhibits that are not material and (ii) personally identifiable information are discussed *infra* at Section II.B.5.b.i. and ii.

<sup>66</sup> See amendments to Form 20-F (Instructions as to Exhibits), Form 8-K (Instructions 4-6 to Item 1.01), Form N-1A (new Instruction 4 to Item 28), Form N-2 (new Instruction 6 to Item 25.2), Form N-3 (new Instruction 5 to Item 29(b)), Form N-4 (new Instruction 5 to Item 24(b)), Form N-5 (new Instruction 3 of Instructions as to Exhibits), Form N-6 (new Instruction 3 to Item 26), Form N-14 (new Instruction 3 to Item 16), Form S-6 (new Additional Instruction 3 to the Instructions as to Exhibits), and Form N-8B-2 (new Instruction 3 to IX Exhibits).

amendments recognize that the administrative process by which registrants currently are permitted to protect confidential information in certain exhibits is not the most efficient way to serve investors' interests. In response to commenters who expressed concern that registrants would err on the side of redacting much more information than would likely be afforded confidential treatment under the current system, we note that these procedural revisions do not limit the Commission or its staff's prerogative to scrutinize the appropriateness of a registrant's omissions of information from its exhibits. In this regard, we emphasize that the amended rules retain the requirement that exhibits be clearly marked to indicate where immaterial and competitively harmful information has been omitted<sup>67</sup> and that any redactions will remain subject to review and comment at the staff's discretion.<sup>68</sup>

As noted, consistent with several commenters' suggestions, we are adopting revisions to Item 601(b)(2) that will conform to the treatment of exhibits in amended Item 601(b)(10). We agree with those commenters who stated that these exhibits are generally a subset of the material agreements filed under Item 601(b)(10) and should be treated the same way.

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<sup>67</sup> Both Item 601(b)(2)(ii) and new Item 601(b)(10)(iv) require the registrant 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 the redacted exhibit that certain identified information has been excluded from the exhibit because it is both (i) not material and (ii) would likely cause competitive harm 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.

<sup>68</sup> Where applicable, the staff may request that a registrant file an amendment that includes some, or all, of the information previously redacted from an exhibit. We note that the rule, as revised, does not require a registrant to include an explanatory note in its amendment describing why the amendment was necessary. In the Proposing Release, the Commission asked whether it should impose such a requirement. No commenters advocated in favor of such a requirement and, after consideration, we do not think it necessary. This is consistent with the Commission's approach to filing amendments generally, whereby registrants are not required to annotate their changes to documents. We also are mindful that such explanations could, by drawing the attention of the reader, overemphasize the importance of the amended information. *See* letters from Reed Smith and Society for Corp. Gov.

At this time, we are not expanding this approach to other exhibits required by Item 601, given the specialized subject matter and specific considerations relevant to each exhibit. For example, we believe it would be a very rare case that a company would appropriately be able to exclude portions of other exhibits such as the articles of incorporation, bylaws, legal or tax opinions, and codes of ethics. Moreover, by a significant margin, the vast majority of confidential treatment requests handled by the Commission is made in connection with exhibits filed pursuant to Item 601(b)(10).<sup>69</sup>

Finally, to facilitate the consistency of our exhibit requirements across different forms, we are adopting a parallel approach to information omitted from exhibits required by certain other forms and rules for which the exhibit requirements of Item 601 do not apply. For example, as we discuss below, we are adopting amendments to Form 20-F<sup>70</sup> to maintain a consistent approach to the exhibit filing requirements for domestic registrants and foreign private issuers. We are also amending Item 1.01 of Form 8-K to conform to the revisions to Item 601(b)(10)(iv). Item 1.01 of Form 8-K requires the disclosure of material definitive agreements that are not made in the ordinary course of business. The item parallels Item 601(b)(10) of Regulation S-K with regard to the types of agreements that are material to a company, but it does not require that the material agreements themselves be filed as exhibits to the Form 8-K. In 2004, when Item 1.01 was added to Form 8-K, the Commission considered mandating an Item 1.01 exhibit filing requirement but

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<sup>69</sup> For example, in the fiscal year ended 2018, out of 1,239 requests for confidential treatment 1,130 related to exhibits filed pursuant to Item 601(b)(10). Similarly, of the 1,188 CTRs granted by the Commission that year, 1,086 related to exhibits filed pursuant to Item 601(b)(10).

<sup>70</sup> Unlike the exhibit requirements of Form 20-F, which are separate from and do not reference Item 601 of Regulation S-K, the registration statement Forms F-1, F-3, F-4 for foreign private issuers all require registrants to comply with the exhibit requirements of Item 601.

ultimately chose not to do so after considering the views of commenters.<sup>71</sup> Commenters expressed concern that the short Form 8-K filing period would make it too difficult to prepare and submit requests for confidential treatment of sensitive terms of the agreements in a timely manner.<sup>72</sup> Instead, the Commission retained the rule that material agreements disclosed on Form 8-K do not need to be filed until the company's next periodic report or registration statement, but encouraged companies to file such agreements with the Form 8-K to the extent practicable.<sup>73</sup> Accordingly, although the language of Item 1.01 and its instructions reference Item 601(b)(10) of Regulation S-K for purposes of determining which agreements must be reported under this Form 8-K item, they do not specifically incorporate the exhibit filing requirements of Item 601(b)(10). We are therefore adopting changes to Form 8-K to clarify that the accommodations to the exhibit filing requirements extend to Item 1.01 of Form 8-K as well, to the extent such exhibits are filed with the intention of being incorporated into future filings in satisfaction of Item 601(b)(10).

For policy reasons similar to those described above, we are adopting parallel amendments to the registration forms used by investment companies to allow them to redact immaterial provisions or terms from exhibits filed as “other material contracts” that would likely cause the registrant competitive harm if publicly disclosed.<sup>74</sup> We are also extending this treatment to

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<sup>71</sup> See *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date*, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15593] (“2004 8-K Release”), at 15996-7.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 15597.

<sup>74</sup> See new Instruction 4 to Item 28 of Form N-1A; new Instruction 6 to Item 25.2 of Form N-2; new Instruction 5 to Item 29(b) of Form N-3; new Instruction 5 to Item 24(b) of Form N-4; new Instruction 3 of Instructions as to Exhibits of Form N-5; new Instruction 3 to Item 26 of Form N-6; new Instruction 3 to Item 16 of Form N-14; new Additional Instruction 3 to the Instructions as to Exhibits of Form S-6; and new Instruction 3 to IX. Exhibits of Form N-8B-2.

information in reinsurance agreements required to be filed as exhibits under Forms N-3, N-4, and N-6.<sup>75</sup> Staff of the Division of Investment Management has routinely granted confidential treatment as to information in reinsurance agreements in the past. We believe that extending this relief to these specific categories of exhibits will substantially reduce the burden currently borne by registrants in preparing and processing requests for confidential treatment, while still providing all material information to investors holding those contracts.

### **3. Financial Statements: Incorporation by Reference and Cross-Reference of Information<sup>76</sup>**

#### **a. Proposed Amendments**

Having financial statements cross-reference to disclosure in other parts of a filing or incorporate information by reference from other filings can raise questions as to the scope of an auditor's responsibilities.<sup>77</sup> To address this concern, the Commission proposed amendments to our rules and forms that would prohibit such incorporation by reference or cross-referencing.<sup>78</sup> The proposed amendments did not, however, prohibit cross-references to other parts of a filing when otherwise specifically permitted by our rules. The proposed amendments also did not prohibit incorporating financial information from other filings to satisfy financial reporting

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<sup>75</sup> See new Instruction 5 to Item 29(b) of Form N-3, new Instruction 5 to Item 24(b) of Form N-4, and new Instruction 3 to Item 26 of Form N-6. Reinsurance agreements are required to be filed as separate and distinct exhibits within the list of exhibit items required by Forms N-3, N-4, and N-6. Registrants often seek confidential treatment of the negotiated terms and of proprietary information about how they operate their insurance business that is included in these agreements.

<sup>76</sup> For a discussion of other amendments we are adopting that also pertain to our rules regarding incorporation by reference, see Section II.B.6 *infra*.

<sup>77</sup> See Proposing Release, *supra* note 5, Section II.F.2.c. at 51010.

<sup>78</sup> The Commission 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. Because Rule 0-6 governs incorporation by reference only for applications filed under the Investment Advisers Act, the Commission did not propose to make similar amendments to that rule, but did request comment on whether the final amendments should include this provision. We received no comments regarding extending similar amendments to Rule 0-6.

requirements when otherwise permitted or required.<sup>79</sup> In addition, for consistency with both current and proposed Rule 411 and Rule 12b-23, we also proposed an additional amendment to Rule 0-4 providing restrictions on the incorporation of financial information required to be given in comparative form for two or more fiscal years or periods.<sup>80</sup>

#### **b. Comments**

Several commenters supported the proposed amendments,<sup>81</sup> while one commenter opposed.<sup>82</sup> Although this commenter shared the concern over the need to define the scope of the auditor's responsibilities, it stated that prohibiting incorporation by reference or cross-referencing of information into the financial statements was a significant lost opportunity to improve the delivery of information to investors by improving the technology platform on which the Commission collects and disseminates that information. A number of commenters suggested that the final rule permit foreign private issuers on Form 20-F to cross-reference outside the financial statements when expressly permitted by applicable accounting standards, such as IFRS or by law, regulation or by the primary securities regulator in the registrant's home country jurisdiction or market.<sup>83</sup> A few commenters requested confirmation that the proposal would not

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<sup>79</sup> 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. Similarly, investment company registrants using, for example, Form N-1A would continue to be permitted to incorporate financial statements included as part of reports to shareholders that are filed on Form N-CSR.

<sup>80</sup> See proposed Rule 0-4(b).

<sup>81</sup> See letters from BDO, CAQ, Deloitte, E&Y, Grant Thornton LLP ("Grant Thornton"), Piercy Bowler, PWC, and ICI.

<sup>82</sup> See letter from Sullivan.

<sup>83</sup> See letters from CAQ, Deloitte, E&Y, KPMG, and PWC.

affect financial reporting for certain investment company “fund of funds” arrangements, such as a master/feeder arrangement.<sup>84</sup>

### **c. Final Amendments**

We are adopting the amendments as proposed, with the following modification. In response to commenters who were concerned that the proposed amendments may create uncertainty regarding cross-references and incorporation by reference in the financial statements when expressly permitted by applicable accounting standards, such as IFRS, our amendments explicitly provide that 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.<sup>85</sup>

While the use of cross-references and incorporation by reference to present information can help investors access information, navigate disclosure and focus on key information, we believe it is necessary to place restrictions on the ability of registrants to cross-reference and incorporate by reference information into the financial statements. By generally prohibiting this

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<sup>84</sup> See letters from CAQ, KPMG, and PWC. Feeder funds typically invest their assets solely in another investment company (a master fund), and provide financial statements of the master fund together with the feeder fund’s financial statements. Generally, the staff of the Division of Investment Management has taken the position that the financial presentation that is most meaningful in the feeder fund context is unconsolidated, provided that, among other things, the feeder fund attaches the financial statements of the master fund to its financial statements. See Investment Management Guidance Update No. 2014-11, Investment Company Consolidation, available at <http://www.sec.gov/investment/imguidance-2014-11.pdf>; and SEC Staff Generic Comment Letter for Investment Company CFOs (Dec. 30, 1998), available at <https://www.sec.gov/divisions/investment/imlr1230.htm>. The amendments we are adopting today would not change the staff interpretation that the master fund’s financial statements should be attached to the feeder fund’s financial statements and not incorporated by reference.

<sup>85</sup> See, as amended, Rule 411, Rule 12b-23, Rule 0-4, and Forms S-1, S-3, S-11, and F-1.



practice, with certain exceptions as noted above, the amendments address concerns that referencing information outside the audited financial statements to satisfy financial statement disclosure requirements could create confusion about which financial information has been audited or reviewed by the independent auditor.<sup>86</sup> We think these changes will reduce potential confusion and make it less cumbersome for investors to determine what pieces of financial information form a set of audited or reviewed financial statements. While we appreciate the views of the commenter who opposed the amendments on the grounds that they represented a missed opportunity to improve the technology platform on which the Commission collects and disseminates information to investors, broader changes to the Commission’s EDGAR system are outside the scope of this rulemaking and we do not agree that adoption of this change would precondition the Commission’s approach in any future technology changes.

**B. Adoption of Amendments as Proposed**

**1. Description of Property (Item 102)**

**a. Proposed Amendments**

Item 102 of Regulation S-K requires that registrants disclose “the location and general character of the principal plants, mines, and other materially important physical properties of the registrant and its subsidiaries.” The instructions to Item 102 further clarify the type of information required, specifying that registrants:

- must disclose such information as reasonably will inform investors as to the suitability, adequacy, productive capacity, and extent of the registrant’s utilization

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<sup>86</sup> See letter from Deloitte.

of the facilities;<sup>87</sup> and

- should take into account both quantitative and qualitative factors when determining whether properties should be described.<sup>88</sup>

Despite existing language in Item 102 that limits the required information to properties that are “materially important” to the registrant and its subsidiaries, the disclosure elicited in response to this item may not have been consistently material.<sup>89</sup> For many companies, the only physical properties held may be their headquarters, office space, or ancillary facilities, a description of which is likely to be unimportant to an investor’s evaluation of an investment in the company. Even where a description of the registrant’s physical properties is more likely to be salient to investors, such as with manufacturing companies, data centers, or casinos, the language of Item 102 may not provide sufficient clarity to registrants for determining which of their properties must be described. For example, commenters have pointed out that Item 102 contains a mixture of different disclosure triggers, such as references to “principal” plants and mines, “materially important” physical properties, and “major” encumbrances, which together in

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<sup>87</sup> See Instruction 1 to Item 102 of Regulation S-K. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required.

<sup>88</sup> See Instruction 2 to Item 102 of Regulation S-K. Disclosure specific to the mining, oil and gas, and real estate industries is outside the scope of this rulemaking. Instruction 3 of Item 102 applies to the mining industry. The Commission has separately adopted revisions to the property disclosure requirements for mining registrants. See *Modernization of Property Disclosures for Mining Registrants*, Release No. 33-10570 (Oct. 31, 2018) [83 FR 66344 (Dec. 26, 2018)] (“Modernization for Mining Registrants Release”). Instructions 4, 5, and 6 of Item 102 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 of Item 102 applies to the real estate industry.

<sup>89</sup> See the Proposing Release, *supra* note 5, at nn. 21 through 23 and *see generally* Section II.A. of the Proposing Release, *supra* note 5. See also Fast Act Report, *supra* note 7, at Section IV.B.1, and Concept Release, *supra* note 9, at Section IV.A.6.b.

the same disclosure requirement may create unnecessary ambiguity.<sup>90</sup> In addition, while Instruction 2 of Item 102 incorporates the materiality concepts of Instruction 1 to Item 101 of Regulation S-K, Instruction 1 of Item 102 provides no such materiality overlay. This lack of harmony in Item 102 has created uncertainty about the scope of the rule and has likely contributed to the disclosure of immaterial information.

To address this issue, the Commission proposed revising Item 102 to emphasize materiality, which was consistent with several commenters' suggestions and the staff's recommendation in the FAST Act Report.<sup>91</sup> The Commission proposed to amend Item 102 to require disclosure to the extent physical properties are material to the registrant, which would include those properties that are material to the registrant's business.<sup>92</sup> The proposal was also intended to harmonize the various non-industry-specific triggers<sup>93</sup> for disclosure in Item 102 by replacing them with a consistent materiality threshold that would facilitate its application. The Commission also proposed to clarify that the disclosure required under Item 102 may be provided on a collective basis, if appropriate.

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<sup>90</sup> See Section II.A. of the Proposing Release, *supra* note 5, and note 28 of that release (citing to the American Bar Association's comment letter of March 6, 2015 with respect to the Commission's Disclosure Effectiveness initiative).

<sup>91</sup> See FAST Act Report, *supra* note 7, at Recommendation B.1.

<sup>92</sup> In the Proposing Release, the Commission stated the belief that this approach would not inadvertently omit disclosures that would be material to the registrant, but not its ongoing business, such as properties that have value that is material to the registrant but are no longer important to its operations. See Proposing Release, *supra* note 5, Section II.A., at 50991.

<sup>93</sup> In light of the particular significance of this disclosure for registrants in the mining, real estate, and oil and gas industries, the Commission did not propose to modify any of the instructions of Item 102 specific to those industries. Instructions 3 through 7 to Item 102 are industry-specific. For example, Instruction 3 of Item 102 requires that registrants engaged in mining operations must refer to, and if required, provide the disclosure under §§ 229.1300 through 229.1305 (subpart 1300) of Regulation S-K, in addition to any disclosure required by Item 102. See *supra* note 88.

## b. Comments

Many commenters supported the proposal to focus the required disclosure on material physical properties, with several of these commenters stating that the proposed amendments would help reduce unnecessary disclosure.<sup>94</sup> Several commenters suggested different formulations of the rule. For example, one commenter recommended that Item 102 be subsumed into the disclosure objectives of Item 101 and specific references to “material” and “materiality” in the item be omitted in favor of a more precisely articulated disclosure objective.<sup>95</sup> Another commenter suggested that the rule require disclosure only of properties that present specific risks to the registrant, which might mitigate the use of boilerplate disclosure.<sup>96</sup> A third commenter supported the proposed amendment but recommended that it apply uniformly to all issuers regardless of industry, including the real estate and extractive industries.<sup>97</sup>

In the Proposing Release, the Commission also requested comment on whether to further amend Item 102 to require additional disclosure about material properties, such as uncertainties in connection with these properties. A number of commenters responded that requiring such

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<sup>94</sup> See letters from American Fuel (supporting the revision because it “would help reduce disclosure of immaterial information and therefore alleviate the possibility of disclosure overload”), Business Roundtable (stating generally that a focus on materiality “helps filter unnecessary information out of disclosures, providing investors a clearer picture of a company’s business and financial profile”) and Cravath (stating that the proposed amendments “should enhance [Item 102] disclosure where appropriate or eliminate it where not material”), CCMC, CNA, Davis Polk, E&Y, FedEx, Fenwick, Financial Executives, Grumman, IMA, Lark Research, Nasdaq, Reed Smith, SIFMA, Society for Corp. Gov., and Sullivan.

<sup>95</sup> See letter from E&Y, recommending that the disclosure objective for properties should be “to identify assets that contribute significantly to enterprise value, that are unique or provide competitive advantage, that could not be readily replaced or that present a significant risk to the enterprise if the registrant loses [its] use or access to them.”

<sup>96</sup> See letter from IMA (providing as an example the risk of expropriation of an oil and gas facility by an unstable government).

<sup>97</sup> See letter from CCMC (acknowledging that while physical properties will often be material to companies in the real estate and extractive industries, there are many situations where individual properties or groups of related properties are not material to particular issuers in these industries).

additional disclosure would only duplicate existing requirements, such as those in Items 101, 103, 303, and 503(c) of Regulation S-K and Exchange Act Rule 12b-20, as well as the financial statement footnotes.<sup>98</sup>

Finally, some commenters favored removing Item 102 as a separate disclosure item and incorporating it into the description of business required by Item 101,<sup>99</sup> an approach that the staff previously put forward in the FAST Act Report.<sup>100</sup>

### **c. Final Amendment**

We are adopting the amendment to Item 102 as proposed.<sup>101</sup> The revised item makes clear that, unless otherwise specified, disclosure need only be provided about a physical property to the extent that it is material to the registrant. The final rules provide a uniform standard of disclosure based on materiality for non-industry specific properties. Because determinations of materiality are fact-specific and encompass a wide range of possible considerations, we do not think it is appropriate to further limit the criteria for Item 102 disclosure by focusing only on certain specific risks or other narrowly defined measures of materiality. We believe that registrants are best suited to determine which, if any, of their physical properties warrant discussion based on what is material to them in light of their particular circumstances. Under this approach, some physical properties held by a registrant may not be material. In some cases, application of this analysis may result in a description of property on an individual basis or on a collective basis, or may result in no disclosure.

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<sup>98</sup> See letters from American Fuel, Cravath, Davis Polk, Fenwick, Reed Smith, SIFMA, Society for Corp. Gov., and Sullivan.

<sup>99</sup> See letters from E&Y and Sullivan.

<sup>100</sup> See letters from E&Y and Sullivan. See also FAST Act Report, *supra* note 7, at Recommendation B.1.

<sup>101</sup> See revised Item 102.

We have not modified any of the instructions to Item 102 that relate to specific industries. As stated in the Proposing Release, the particular significance and unique considerations of property disclosure for registrants in the mining, real estate, and oil and gas industries weigh in favor of separate consideration.<sup>102</sup>

We are also not opting to combine Item 102 with Item 101, as some commenters recommended. We continue to believe any effort to combine these requirements should be in the context of a broader inquiry into the purpose and function of a registrant's disclosure of its business operations, which was outside of the scope of this rulemaking.

## **2. Management, Security Holders, and Corporate Governance**

### **a. Amendment to Item 401 of Regulation S-K (Directors, Executive Officers, Promoters, and Control Persons)**

Item 401 of Regulation S-K sets forth disclosure requirements about the identity and background information of a registrant's directors, executive officers, and significant employees.<sup>103</sup> Form 10-K, which is one of several forms that calls for such disclosure, allows registrants to incorporate this information (and all other information required by Part III of Form 10-K) by reference to their definitive proxy or information statement.<sup>104</sup> As an alternative

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<sup>102</sup> See *supra* note 88, noting that the Commission has separately adopted revisions to the property disclosure requirements for mining registrants.

<sup>103</sup> Item 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)].

<sup>104</sup> General Instruction G.3 of Form 10-K. This instruction 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 definitive proxy or information statement (prepared in accordance with Schedule 14A) if the statement is filed with the Commission within 120 days after the end of the fiscal year covered by the Form 10-K. If the definitive proxy statement or information statement is not filed within the 120-day period or is not required to be filed with the Commission, the Part III information must be filed as part of the Form 10-K, or an amended Form 10-K, no later than the end of the 120-day period.

to incorporating this information by reference to a definitive proxy or information statement, Instruction 3 to Item 401(b) allows registrants to include required information about their executive officers in Part I of Form 10-K. If a registrant chooses this alternative, Instruction 3 states that the registrant is not required to repeat that information in its definitive proxy or information statement.

To make clear that Instruction 3 applies to any executive officer disclosure required by Item 401, and therefore registrants need not duplicate such disclosure in their definitive proxy or information statement if they have already provided it in their Form 10-K, the Commission proposed to clarify the scope of the instruction by moving it from Item 401(b) and making it a general instruction to Item 401. The Commission also proposed to revise the required caption for the disclosure if it is included in Part I of Form 10-K to reflect a “plain English” approach. The required caption would be “Information about our Executive Officers” instead of “Executive officers of the registrant.”

Several commenters supported the amendments to Item 401 as proposed, and no commenters opposed.<sup>105</sup> One commenter suggested further expanding the instruction in Item 401 to allow registrants to omit additional disclosure from their definitive proxy or information statement if the disclosure was previously filed on Form 10-K.<sup>106</sup>

We are adopting the amendment to Item 401, as proposed, to eliminate any confusion

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<sup>105</sup> See letters from CCMC, Cravath, FedEx, Fenwick, Nasdaq, and Society for Corp. Gov.

<sup>106</sup> See letter from Cravath (regarding previously filed Item 404 disclosure). *But see* letter from Society for Corp. Gov. (arguing against expanding the instruction to Item 404 and other disclosure items relating to executive officers).

arising from the current location of the instruction.<sup>107</sup> We are not expanding this amendment to cover other Part III disclosure about executive officers, such as Item 404 disclosure about related-party transactions, because doing so could result in bifurcating Part III disclosure between the Form 10-K and a separate proxy or information statement based on whether a party is an executive officer of the registrant. We think it is preferable to have the disclosure required by the Item in one filing.

**b. 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,<sup>108</sup> which must be filed electronically on EDGAR.<sup>109</sup> Item 405 requires registrants to disclose each reporting person<sup>110</sup> who failed to file Section 16 reports on a timely basis during the most recent fiscal year or prior fiscal years.<sup>111</sup> The

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<sup>107</sup> New Instruction to Item 401 of Regulation S-K.

<sup>108</sup> See Form 3, Form 4, and Form 5.

<sup>109</sup> Reporting persons have been required to file their Section 16 reports on EDGAR since 2003. 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)] (“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.

<sup>110</sup> 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.”

<sup>111</sup> 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*



disclosure is required under the caption “Section 16(a) Beneficial Ownership Reporting Compliance.” Rule 16a-3(e) currently requires reporting persons to furnish a duplicate of those Section 16 reports to the registrant.<sup>112</sup> Registrants are instructed under Item 405(a) to provide the required disclosure relying solely on their review of such furnished reports and any written representation provided by such persons that no Form 5 is required.<sup>113</sup>

As described in the Proposing Release, the Commission proposed the following changes:<sup>114</sup>

- Eliminate the requirement in Rule 16a-3(e) that reporting persons furnish Section 16 reports to the registrant.
- Amend Item 405 to:
  - o Clarify that registrants may, but are not required, to rely only on Section 16 reports that have been filed on EDGAR (as well as any written representations from the reporting persons) to assess whether there are any Section 16 delinquencies to disclose.<sup>115</sup>
  - o Change the disclosure heading required by Item 405(a)(1) from “Section 16(a) Beneficial Ownership Reporting Compliance” to the more specific “Delinquent Section 16(a) Reports” and encourage registrants to exclude

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*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).

<sup>112</sup> See 17 CFR 240.16a-3(e).

<sup>113</sup> See Item 405(a) and (b)(1).

<sup>114</sup> See Proposing Release, *supra* note 5, Section II.C.2 at 50995-6. These proposed amendments were based on staff recommendations in the FAST Act Report, which called for revisions to Item 405 and Rule 16a-3(e) in light of the availability of Section 16 reports on EDGAR. See FAST Act Report, *supra* note 7, at Recommendation D.2. See also Section 16 Mandatory Electronic Filing Release, *supra* note 109, at 25790.

<sup>115</sup> Proposed Item 405(b).

this heading altogether when they have no Section 16(a) delinquencies to report.

- Eliminate the checkbox on the cover page of Form 10-K (and the related instruction in Item 10 of Form 10-K) whereby the registrant indicates that there is no disclosure of delinquent filers in the Form 10-K and, to the best of the registrant's knowledge, will not be included in a definitive proxy or information statement incorporated by reference.

We received several comments on the proposed amendments,<sup>116</sup> all of which generally supported the revisions, with some commenters recommending slight modifications to the rules as proposed.<sup>117</sup>

We are adopting the amendments to Item 405, Section 16a-3(e), and the cover page of Form 10-K, as proposed. We believe these amendments, taken together, will improve the Section 16 disclosure regime for the benefit of both registrants and investors by making the rules more straightforward, compliance less burdensome, and the disclosure itself more streamlined.

Rule 405, as amended, will allow registrants to leverage the availability of Section 16 reports on EDGAR to perform their diligence for Item 405 disclosures more efficiently and with a greater degree of confidence in the results.<sup>118</sup> By shifting the focus of a registrant's inquiry to

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<sup>116</sup> See letters from CCMC, Cravath, FedEx, Fenwick, and Society for Corp. Gov.

<sup>117</sup> See letter from Society for Corp. Gov. (suggesting that changing the caption to "Delinquent Section 16(a) Reports" was unnecessary) and letter from Cravath (suggesting that there may be some value in requiring affiliates, other than officers and directors, to provide registrants with electronic notice of delinquent Section 16 reports).

<sup>118</sup> See revised Item 405(b) [17 CFR 229.405(b)]. Revised Item 405(b) permits registrants to rely on a review of Section reports filed electronically with the Commission during the registrant's most recent fiscal year and any written representations from reporting persons that no Form 5 is required.

Section 16 reports filed electronically on EDGAR, revised Item 405 modernizes and simplifies the registrant’s compliance with Item 405 while still providing all material information. However, registrants are not restricted to only these documents and may, but are not required, to expand the scope of their inquiry.<sup>119</sup> Consistent with this shift away from furnished reports, as proposed, we are also removing the provision in Rule 16a-3(e) that requires Section 16 reporting persons to provide a duplicate copy of their reports to the registrant. This provision, which predates EDGAR and the requirement that all reporting persons electronically file their Section 16 reports, has become unnecessary.<sup>120</sup>

We are also changing the required caption in Item 405(a)(1) from “Section 16(a) Beneficial Ownership Reporting Compliance” to “Delinquent Section 16(a) Reports” and including an instruction to this item to clarify that registrants are encouraged not to provide this caption if there are no delinquencies to report, as proposed. This revision is intended to minimize unnecessary disclosure and, at the same time, facilitate the ability of investors to identify and monitor Section 16 delinquencies.

Finally, we are modifying the cover page of Form 10-K, as proposed, to eliminate the checkbox indicating the absence of Item 405 disclosure in a registrant’s Form 10-K and its

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<sup>119</sup> Item 405 previously provided that the registrant “shall” make its disclosure “based solely upon” the Section 16 reports furnished to it pursuant to Rule 16a-3(e) and any written representation from a reporting person that no Form 5 is required. As stated in the Proposing Release, this language could 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). Therefore, revised Item 405(b) provides that registrants “may” rely only on the Section 16 reports and the written representation. As a result, if a registrant were 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, as revised. *See* Proposing Release, *supra* note 5, at 50995.

<sup>120</sup> For the same reason, we are not amending our rules to require that reporting persons provide notice to the registrant when they file a Section 16 report on EDGAR. We believe such a notice requirement is not only unnecessary, but contrary to the objectives of this rulemaking to streamline our disclosure rules and make them less burdensome.

definitive proxy or information statement incorporated by reference. We believe the value of this cover page disclosure has outlived its usefulness as a tool to facilitate the staff's processing and review of the form.<sup>121</sup>

### **3. Corporate Governance (Item 407)**

Several disclosure requirements related to corporate governance are consolidated in Item 407.<sup>122</sup> The Commission proposed amendments to update a reference to an outdated auditing standard in Item 407(d)(3)(i)(B) and proposed to revise Item 407(e)(5) to clarify that emerging growth companies ("EGCs") are not required to provide a compensation committee report.<sup>123</sup> We are adopting these amendments as proposed, as further discussed below.

#### **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").<sup>124</sup> As described in the Proposing Release, the reference to AU sec. 380 has become outdated.<sup>125</sup> As such, the Commission proposed to update the reference to AU sec. 380 in Item 407(d)(3)(i)(B) by

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<sup>121</sup> See Proposing Release, *supra* note 5, Section II.C.2 at 50995-6.

<sup>122</sup> 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)].

<sup>123</sup> See FAST Act Report, *supra* note 7, at Recommendations D.4 and D.5.

<sup>124</sup> See Instruction 3 to Item 407(d) of Regulation S-K.

<sup>125</sup> See Proposing Release, *supra* note 5, Section II.C.3.a. at 50996.

referring more broadly to “the applicable requirements of” the Public Company Accounting Oversight Board (“PCAOB”) and the Commission.<sup>126</sup> Several commenters supported the proposed amendments, and no commenters opposed.<sup>127</sup> We are therefore adopting the amendments to Item 407(d)(3)(i)(B) as proposed. We believe this language will more easily accommodate any future changes to audit committee communication requirements.

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

Item 407(e)(5)<sup>128</sup> 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).<sup>129</sup> 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. The Commission proposed 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.<sup>130</sup> Specifically, the proposed amendment added a reference to EGCs in Item 407(g), which currently excludes smaller reporting companies from Item 407(e)(5), among other provisions of Item 407. Several commenters supported the proposed amendments, and no

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<sup>126</sup> See Auditing Standard No. 1301, *Communications with Audit Committees* (“AS 1301”), including 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 Exchange Act Rule 10A-3 [17 CFR 240.10A-3].

<sup>127</sup> See letters from BDO, CAQ, CCMC, Cravath, Deloitte, E&Y, FedEx, Fenwick, Nasdaq, PWC, Society for Corp. Gov., and Sullivan. Two of these commenters also encouraged the staff to publish guidance that catalogs the specific PCAOB and Commission rules that are covered by revised Item 407(d)(3)(i)(B) at the time to avoid confusion and provide clarity to registrants. See letters from Cravath and Society for Corp. Gov. The staff will consider the necessity of such additional guidance.

<sup>128</sup> 17 CFR 229.407(e)(5).

<sup>129</sup> 17 CFR 229.402(b).

<sup>130</sup> See Item 402(l) of Regulation S-K.

commenters opposed.<sup>131</sup> Accordingly, we are adopting the amendments to Item 407(e)(5) as proposed.

#### **4. Registration Statement and Prospectus Provisions**

##### **a. Outside Front Cover Page of the Prospectus (Item 501(b))**

Item 501(b)<sup>132</sup> sets forth disclosure requirements related to the outside front cover page of prospectuses.<sup>133</sup> The proposed amendments were intended to streamline these requirements and to provide registrants with greater flexibility in designing a cover page tailored to their business and the particular offering. We are adopting these amendments as proposed, as discussed below.

##### **i. 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 instruction indicates that the registrant may be required to change its name. The instruction provides an exception, however, if the registrant is an "established

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<sup>131</sup> See letters from CAQ, Cravath, FedEx, Fenwick, Nasdaq, Society for Corp. Gov., and CCMC.

<sup>132</sup> 17 CFR 229.501(b).

<sup>133</sup> See FAST Act Report, *supra* note 7, at Recommendations E.1-5.

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.”<sup>134</sup>

As discussed in the Proposing Release, in an effort to streamline Item 501(b)(1), the Commission proposed to eliminate the portion of the instruction to Item 501(b) that discusses when a name change may be required and the exception to that requirement.<sup>135</sup>

A few commenters supported the proposed amendment to Instruction 1 of Item 501(b)(1),<sup>136</sup> while some opposed it.<sup>137</sup> One commenter encouraged the Commission to eliminate the language about a registrant being required to change its name because this subject matter is already addressed by state law, as well as common law and federal trademark law.<sup>138</sup> The commenter asserted that the Commission’s resources should not be devoted to matters “outside its core mission of investor protection that are already addressed by other regulators and non-securities laws.”<sup>139</sup> However, one of the commenters who objected to the proposal stated

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<sup>134</sup> This policy reflected in Item 501(b)(1) with regard to misleading company names was first articulated by the Commission in 1969 in response to an increase in the number of registrants using names that the staff considered to be misleading. 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 103; *Rescission of Guides and Redesignation of Industry Guides*, Release No. 33-6384 (Mar. 3, 1982) [47 FR 11476 (Mar. 16, 1982)].

<sup>135</sup> *See* Proposing Release, *supra* note 5, Section II.D.1.a. at 50997.

<sup>136</sup> *See* letters from K. Bishop, CCMC, and Fenwick.

<sup>137</sup> *See* letters from Cravath and Sullivan.

<sup>138</sup> *See* letter from K. Bishop.

<sup>139</sup> *Id.*

that the Commission should be developing and expanding guidance on misleading names, not reducing it, noting that this issue continues to raise investor protection concerns.<sup>140</sup>

After considering these comments, we have decided to adopt the amendment as proposed. Our intent is to streamline the instruction to Item 501(b) in accordance with the objectives of this rulemaking to modernize and simplify our disclosure requirements, not to signal a change in Commission policy with respect to the use of potentially misleading company names. We continue to believe that a registrant's name could mislead investors under some circumstances. However, these situations can typically be addressed by the addition of clarifying disclosure and exercise of the Commission's discretion to take registration statements effective commensurate with the public interest and the protection of investors.<sup>141</sup>

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

Item 501(b)(3) requires disclosure on the prospectus front cover page 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.<sup>142</sup> 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.

In situations where it is not practicable to provide a price for the securities, Instruction 2 to Item 501(b)(1)(3) permits registrants to explain the method by which the price is to be

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<sup>140</sup> See letter from Sullivan.

<sup>141</sup> 15 U.S.C. 77h.

<sup>142</sup> 17 CFR 229.501(b)(3). Item 501(b)(3) also includes specific disclosure requirements for offerings being made on a minimum/maximum basis.



determined.<sup>143</sup> The Commission proposed to amend Instruction 2 to explicitly allow registrants to include a clear statement on the cover page, when applicable, that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus. This proposal was based on the belief that investors may be better served if registrants were given the option to provide a full explanation of the pricing method in the body of the prospectus, with a reference to this more fulsome disclosure displayed prominently on the prospectus cover page.

After considering the responses from a number of commenters who supported this proposal,<sup>144</sup> with no commenters opposed, we are adopting the amendment to Item 501(b)(3). We continue to believe that requiring a detailed explanation of the pricing method on the outside front cover page of the prospectus could reduce the impact of other significant disclosures and is unnecessary so long as the cover page clearly directs investors to the location in the prospectus where the disclosure is provided in full.

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

Item 501(b)(4) requires a registrant to disclose on the prospectus cover page the name of any national securities exchanges that list the securities being offered and the trading symbols for those securities. A “national securities exchange” is defined in the Exchange Act as a securities exchange that has registered with the Commission under Section 6 of the Exchange Act.<sup>145</sup>

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<sup>143</sup> 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, the registrant should indicate the market and market price of the securities as of the latest practicable date. The Commission did not propose any change to this portion of the instruction.

<sup>144</sup> See letters from Cravath, Fenwick, Sullivan, and CCMC.

<sup>145</sup> See Section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f].

Item 501(b)(4) is specific to “national securities exchanges” and does not, under its terms, require registrants to identify markets that are not national securities exchanges.<sup>146</sup>

The Commission proposed to amend Item 501(b)(4) to require disclosure on the prospectus cover page of the principal United States market or markets for the securities being offered and the corresponding trading symbols based on the premise that the information required by Item 501(b)(4) could be important to investors even as to markets that are not “national securities exchanges.”<sup>147</sup> The Commission proposed to expand the scope of the item only to the principal United States markets where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation. By limiting the proposal in this way, the Commission acknowledged that registrants cannot always control whether their securities are quoted on an over-the-counter market and should not be burdened with making that determination.

Several commenters supported the proposal,<sup>148</sup> and only one commenter opposed it.<sup>149</sup> The commenter that opposed expanding the cover page disclosure of applicable securities markets stated that the identification of trading markets other than national securities exchanges

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<sup>146</sup> Item 501(b)(4) requires registrants whose securities are listed on “any national securities exchange or the Nasdaq Stock Market” to identify the market(s) and trading symbol(s) for the securities. The Nasdaq Stock Market became operational as a registered national securities exchange on August 1, 2006, following the Commission’s approval of its application for registration on January 13, 2006. A list of registered national exchanges is available on the Commission’s website at <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

<sup>147</sup> The proposed changes to Item 501(b)(4) align with recent amendments to Item 201(a) [17 CFR 229.201(a)]. See *Disclosure Update and Simplification*, Release No. 33-10532 (Aug. 17, 2018) [83 FR 50148 (Oct. 4, 2018)] (the “Disclosure Update and Simplification Release”) at 51688.

<sup>148</sup> See letters from CCMC, Cravath (noting that in connection with the implementation of the European Union Market Abuse Regulation, many registrants have discovered that it is possible for third parties— without any participation by or even notice to the registrant—to list the registrant’s securities on a securities exchange), Fenwick, and Sullivan.

<sup>149</sup> See letter from Nasdaq.

on the prospectus cover page may confuse investors by suggesting that the markets were equivalent to national exchanges.<sup>150</sup>

We are adopting amended Item 501(b)(4), as proposed. We continue to believe, as stated in the Proposing Release, that investors would benefit from the addition of this information.<sup>151</sup> In adopting this disclosure requirement, we considered the concern that the presentation of this information on the prospectus cover page might suggest to some investors that the registrant's principal United States market, while not a national securities exchange, carries the imprimatur of an exchange registered under Section 6(b) of the Exchange Act. It is not clear, however, that providing the name of the principal market on the prospectus cover page, in and of itself, is sufficient to create an inference about the quality of the market, or that such identification carries any implication about the market that would not already be produced by identification of the market under the existing prospectus disclosure requirements of Item 202 and Item 508 of Regulation S-K.<sup>152</sup> Therefore, we do not think that there is a significant risk that investors will equate the principal market or markets listed on the cover page with a national stock exchange.

#### **iv. 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

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<sup>150</sup> *Id.* The commenter pointed out that national securities exchanges are registered under Section 6(b) of the Exchange Act and therefore subject to more rigorous requirements than non-registered domestic exchanges. Cover page disclosure of these other exchanges might, in the commenter's view, give them the “imprimatur” of a national securities exchange, thus complicating the disclosure rather than streamlining it.

<sup>151</sup> See Proposing Release, *supra* note 5, Section II.D.1.c. at 50998.

<sup>152</sup> Item 202 [17 CFR 229.202] requires a description of the registrant's securities, including relevant market information. Item 508 [17 CFR 229.508] pertains to disclosure about the plan of distribution of the securities offering, including identification of the exchange, if any, on which the securities are to be offered.

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.<sup>153</sup>

The legend requirement has remained mostly unchanged since 1958, even after the National Securities Markets Improvement Act (“NSMIA”) allowed for preemption of state blue sky laws in many offerings.<sup>154</sup> The Commission proposed 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 laws. This change would allow for a more tailored prospectus cover page in recognition of the changes to securities law brought by NSMIA.

The Commission also proposed to streamline Item 501(b) by consolidating existing Item 501(b)(11), regarding the use of Rule 430A, into Item 501(b)(10) for the sake of simplicity without substantive change.

A number of commenters supported the amendments to Item 501(b)(10) that would simplify the “subject to completion” legend on preliminary prospectuses, and no commenters opposed these amendments.<sup>155</sup> Therefore, and for the reasons noted in the Proposing Release, we are adopting the revisions to Item 501(b)(10) as proposed.

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<sup>153</sup> 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.

<sup>154</sup> Pub. L. No. 104-290, 110 Stat. 3416 (1996).

<sup>155</sup> See letters from CCMC, Cravath, Fenwick, and Sullivan.

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

Item 503(c) requires disclosure of the most significant factors that make an offering speculative or risky.<sup>156</sup> This risk factor disclosure was initially called for only in the offering context,<sup>157</sup> but in 2005 the risk factor disclosure requirements were extended to periodic reports and registration statements on Form 10.<sup>158</sup> Consistent with this change, the Commission proposed to relocate Item 503(c) to new Item 105, as Subpart 100 covers a broad category of business information and is not limited to offering-related disclosure.<sup>159</sup>

The Commission also proposed amendments that would eliminate the specific risk factor examples that are currently enumerated in Item 503(c). Although Item 503(c) is principles-based, and the Commission has eschewed “boiler plate” risk factors that are not tailored to the unique circumstances of each registrant, the following examples of factors that may make an offering speculative or risky have remained unchanged since the Commission first published guidance on risk factor disclosure in 1964:<sup>160</sup>

- a registrant’s lack of an operating history;

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<sup>156</sup> 17 CFR 229.503(c).

<sup>157</sup> *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)].

<sup>158</sup> *See Securities Offering Reform*, Release No. 33-8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] (“Securities Offering Reform Adopting Release”).

<sup>159</sup> Additionally, the proposed amendments use the term “registrant” instead of “issuer.” Use of and reference to “registrant” instead of “issuer” was 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]. The Commission also proposed amendments to several Commission forms that require risk factor disclosure and reference Item 503(c). The 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). The proposed amendments did 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).

<sup>160</sup> *See Guides for Preparation and Filing of Registration Statements*, Release No. 33-4666 (Feb. 7, 1964) [29 FR 2490 (Feb. 15, 1964)].

- a registrant’s lack of profitable operations in recent periods;
- a registrant’s financial position;
- a registrant’s business or proposed business; and
- the lack of a market for a registrant’s common equity securities or securities convertible into or exercisable for common equity securities.

As discussed in the Proposing Release, the Commission’s principles-based approach to risk factor disclosure is not consonant with the item’s list of examples of material risks.<sup>161</sup> 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, the Commission was concerned that the inclusion of any examples in Item 503(c), whether to illustrate the specific kinds of risks that should be disclosed or generic risks that should be avoided, could anchor or skew the registrant’s risk analysis in the direction of the examples.<sup>162</sup>

Numerous commenters supported the proposed amendments to relocate the risk factor disclosure requirements from Item 503(c) to new Item 105 and eliminate the examples of risk factors that currently appear in the rule.<sup>163</sup> Commenters generally agreed that the examples are not helpful because they are written generically and, as such, are not well suited to the particular circumstances and material risks of individual registrants. Some commenters pointed out that the

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<sup>161</sup> See Proposing Release, *supra* note 5, Section II.D.2. at 50998-10.

<sup>162</sup> See Proposing Release, *supra* note 5, at n. 145.

<sup>163</sup> See letters from American Fuel, BDO, CAQ, Cravath, Edison Electric Institute & American Gas Association, E&Y, Fenwick, Financial Executives, PNC Financial Services Group (“PNC”), Reed Smith, SIFMA, Sullivan, and UnitedHealth.

examples may even prompt registrants to include risk factors that address the risks highlighted in the examples even if they are not material to their business.<sup>164</sup> One commenter opposed the elimination of examples in Item 503(c) because, in its view, the examples are helpful guidance that brings focus to the risk factor disclosures.<sup>165</sup> The commenter suggested that eliminating the examples may not further the Commission’s objective of eliciting more specific and relevant risk factor disclosure.

We are adopting the amendments as proposed. With respect to the elimination of the specific examples of material risks currently found in Item 503(c), we continue to think that retaining these examples, which have remained unchanged since they were first articulated in 1964, would be inconsistent with the Commission’s emphasis on principles-based requirements that encourage registrants to provide risk disclosure that is more precisely calibrated to their particular circumstances and therefore more meaningful to investors. By removing this language from the risk factor disclosure rules, we seek to encourage registrants to focus on their own risk identification processes.

### **c. Plan of Distribution (Item 508)**

Item 508 requires disclosure about the plan of distribution for securities in an offering, including information about underwriters. Paragraph (a) requires disclosure about the principal underwriters and any 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-

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<sup>164</sup> See, e.g., letters from Reed Smith and SIMFA.

<sup>165</sup> See letter from CII.

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 the issuer of the securities as to which he is an underwriter.”<sup>166</sup> The Commission accordingly proposed to amend Rule 405 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.<sup>167</sup>

A number of commenters supported the proposed amendments to Rule 405 and no commenters opposed them.<sup>168</sup> We are therefore adopting the amendment to add the definition of “sub-underwriter” to Rule 405, as proposed.

#### **d. Undertakings (Item 512)**

Item 512 provides undertakings that a registrant must include in Part II of its registration statement, depending on the type of offering. As further described in the Proposing Release, the Commission proposed the following amendments to eliminate undertakings that are duplicative of other rules or that have become unnecessary due to developments since their adoption.<sup>169</sup>

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<sup>166</sup> Rule 405.

<sup>167</sup> 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. The Commission proposed to amend Rule 491 to reference “sub-underwriter,” consistent with the proposed amendments to Rule 405. The proposed definition of sub-underwriter would not change the meaning of that term in Rule 491.

<sup>168</sup> See letters from CCMC, Cravath, and Sullivan.

<sup>169</sup> See Proposing Release, *supra* note 5, Section II.D.4. at 51000-1.



Specifically, the Commission proposed to eliminate Item 512(c)<sup>170</sup> in its entirety because it is no longer necessary,<sup>171</sup> and proposed to eliminate the Item 512(d), Item 512(e), and Item 512(f) undertakings, because they are obsolete.<sup>172</sup>

A number of commenters supported the proposed amendments to the undertakings and no commenters opposed them.<sup>173</sup> Accordingly, and for the reasons noted in the Proposing Release, we are amending Item 512 to remove the undertakings in paragraphs 512(c), (d), (e), and (f), as proposed.

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<sup>170</sup> 17 CFR 229.512(c).

<sup>171</sup> See Proposing Release, *supra* note 5, Section II.D.4. at 51000. 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. The Item requires a registrant 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 different terms than the offer to existing security holders, the registrant must undertake to file a post-effective amendment. The purpose of the undertaking is to provide current information about warrants or rights offerings. See FAST ACT Report, *supra* note 7, at Recommendation E.8. Given that the registrant would already have to register and disclose the offering to existing security holders, as well as the reoffering to the public, the undertaking is duplicative and unnecessary. Furthermore, disclosure of material changes in the terms of the offering would also be required as part of the Item 512(a)(1) undertaking, thus obviating the need for Item 512(c).

<sup>172</sup> *Id.* at 51000-1. Item 512(d) is applicable when the securities to be registered are to be offered at competitive bidding. Item 512(e) sets forth undertakings that are required if the registration statement incorporates by reference in the prospectus all or any part of the annual report to security holders meeting the requirements of Rule 14a-3 or Rule 14c-3 under the Exchange Act. Item 512(f) pertains to equity offerings of registrants that are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act. Each of these items is no longer necessary because of prior changes in our rules, as described in the Proposing Release. For example, the undertaking in Item 512(d) arose from a requirement in the Public Utility Holding Company Act of 1935 (“PUHCA”) that public utility company securities be sold through competitive bidding. That requirement was rescinded in 1994 and PUHCA was repealed by Congress in 2005.

<sup>173</sup> See letters from Cravath, FedEx, Nasdaq, Sullivan, and CCMC.

## 5. Exhibits

### a. 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.<sup>174</sup>

Registrants provide Item 202 disclosure about registered securities in their registration statements,<sup>175</sup> but are not required to provide this disclosure in their Form 10-K or Form 10-Q.<sup>176</sup>

The Commission proposed to amend Item 601(b)(4)<sup>177</sup> 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.<sup>178</sup> The proposed amendments were intended to be in addition to the current requirement to file a complete copy of the amended articles of

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<sup>174</sup> 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 rulemaking; 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.

<sup>175</sup> 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 9, at Section IV.D.2.

<sup>176</sup> 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.

<sup>177</sup> 17 CFR 229.601(b)(4).

<sup>178</sup> To the extent that a registrant has previously filed an exhibit to a Form 10-K containing Item 202 disclosure, under the proposal 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* Instruction 3 to proposed Item 601(b)(4)(vi).

incorporation or bylaws under Item 601(b)(3)<sup>179</sup> in order to increase investors' ease of access to information about the rights and obligations of each class of securities registered.<sup>180</sup>

We received responses from a number of commenters on the proposal to require Item 202 information as an exhibit to Form 10-K.<sup>181</sup> Several commenters supported the Commission's proposal to consolidate into one exhibit the description of a registrant's securities, but emphasized that the ability of registrants to incorporate the required information by reference to prior filings was essential to minimizing the registrants' compliance burden.<sup>182</sup> One commenter acknowledged the initial, one-time burden required to comply with the new exhibit requirement, but thought this cost was outweighed by the benefit to investors from making the information easier to locate.<sup>183</sup> This commenter stated that the effect of the requirement would be to "put all registrants on a level playing field."<sup>184</sup> In contrast, some commenters opposed the proposal

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<sup>179</sup> See Item 601(b)(3) of Regulation S-K [17 CFR 229.601(b)(3)]. The Commission proposed to 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.

<sup>180</sup> Proposed Item 601(b)(4)(vi) would require Item 202 disclosure only for securities that are registered under Section 12 of the Exchange Act. 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) did not include Item 202(e).

<sup>181</sup> See letters from Ball Corporation ("Ball"), CCMC, CII, Cravath, Davis Polk, Fenwick, Financial Executives, Reed Smith, SIFMA, Soc. For Corp Gov., and Sullivan.

<sup>182</sup> See, e.g., letters from Davis Polk, Fenwick, Society for Corp. Gov., and Sullivan. One commenter indicated that without the option to incorporate by reference, preparation of new exhibits with multiple classes of registered debt securities would exceed the associated 0.5 hour paperwork burden estimated in the Proposing Release because of the time needed to prepare the disclosure and have it reviewed by outside counsel. See letter from Davis Polk.

<sup>183</sup> See letter from SIFMA.

<sup>184</sup> *Id.*

because, in their view, the information required by new Item 601(b)(4)(vi) would be duplicative of information already readily available to investors on EDGAR.<sup>185</sup>

We are adopting amendments to Item 601(b)(4) as proposed. Although the information required by this item will necessarily overlap with disclosure that may already be found in a registrant's publicly available registration statements, we think that providing all of this information in one location is a better alternative for investors than requiring them to search for and piece together the information they need from multiple documents that may span many years. By virtue of new 601(b)(4)(vi), investors will be able to easily locate an updated description of their rights as security holders by referring to the registrant's most recent annual report. We believe this will facilitate investors' access to information without imposing significant additional costs on registrants, particularly given the registrant's ability to incorporate the information by reference<sup>186</sup> and the existing requirement to hyperlink exhibits that are incorporated by reference.<sup>187</sup>

We note that these amendments do not change existing disclosure obligations under Form 8-K and Schedule 14A, which require registrants to disclose certain modifications to the rights of their security holders and amendments to their articles of incorporation or bylaws.<sup>188</sup>

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<sup>185</sup> See letters from Ball, Cravath, and Financial Executives (noting obligations under Form 8-K and Schedule 14A). See also Proposing Release, *supra* note 5 at Section II.E.1. at nn. 180 and 181.

<sup>186</sup> See Instruction 3 to new Item 601(b)(4)(vi).

<sup>187</sup> See Item 601(a)(2) of Regulation S-K.

<sup>188</sup> 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.

Under new Item 601(b)(4)(vi), any modifications and amendments during a fiscal year should also be reflected in the Item 202 disclosure provided in an exhibit to the registrant's annual report for such year.<sup>189</sup>

**b. Additional Information Omitted From Exhibits (Item 601 and Investment Company Forms)<sup>190</sup>**

**i. Schedules and Attachments to Exhibits**

Under existing rules in Item 601 of Regulation S-K, registrants generally must file complete copies of any required exhibits. Very often, these exhibits include a number of schedules, appendices, and other similar attachments which can be quite lengthy but not necessarily material to investors. Except for paragraph (b)(2) of Item 601,<sup>191</sup> which applies only to material plans of acquisition, reorganization, arrangement, liquidation, or succession, registrants must file every required exhibit under Item 601 in its entirety, irrespective of the materiality of particular information in the exhibits. Because the information in certain schedules or similar attachments to the exhibits may not be material to investors, a uniform filing

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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 to 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.

<sup>189</sup> 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, new Item 601(b)(4)(vi) requires a registrant to update the description of securities in the exhibit filed with its Form 10-K.

<sup>190</sup> See *supra* at Section II.A.2. for a discussion of our amendment to the exhibit requirements in Item 601(b)(10) pertaining to material contracts.

<sup>191</sup> 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.

requirement for this information is not commensurate with the corresponding costs and burden imposed on registrants, particularly when the schedules, appendices, and other attachments contain proprietary or otherwise sensitive information.

Consequently, the Commission proposed Item 601(a)(5) to expand the existing accommodation in Item 601(b)(2) to include all exhibits filed under Item 601. Similar to current Item 601(b)(2), proposed Item 601(a)(5) would permit registrants to omit entire schedules and similar attachments to required exhibits, provided: (i) they did not contain material information and (ii) were not otherwise disclosed in the exhibit or the disclosure document. Just as with Item 601(b)(2), proposed Item 601(a)(5) was qualified by the requirement that the filed exhibit must contain a list briefly identifying the contents of any omitted schedules and attachments.<sup>192</sup> The Commission also requested comment on whether it should apply the proposed amendments to forms that contain their exhibit requirements in the form and do not separately reference Item 601 of Regulation S-K. The Commission similarly requested comment on whether it should amend the investment company rules or forms to permit investment companies to omit entire schedules and attachments to required exhibits on similar terms.

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<sup>192</sup> See proposed Item 601(a)(5) of Regulation S-K. Unlike the current version of Item 601(b)(2), proposed Item 601(a)(5) would not require registrants to include with their list of omitted schedules an explicit agreement to furnish a supplemental copy of any omitted schedule to the Commission upon request. Nonetheless, registrants may be required to provide a copy of any omitted schedule to the Commission staff upon request. 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.

Commenters generally supported the proposal, with several noting the excessive burden on registrants under the current rules without a corresponding benefit to investors.<sup>193</sup> One commenter stated that the rationale for the proposed amendments to Item 601 of Regulation S-K was applicable to other forms,<sup>194</sup> while another favored expanding the scope of the proposal specifically to include rules and forms under the Investment Company Act.<sup>195</sup> Another commenter stated that the required list identifying any omitted schedules or attachments was unnecessary if a comparable list already exists in the exhibit.<sup>196</sup>

We are adopting new Item 601(a)(5) as proposed. When the Commission first adopted Item 601(b)(2) in 1980, it noted that many of the schedules then received by the staff were “not material for investor information or protection and are unnecessary for Commission review purposes.”<sup>197</sup> The same reasoning provides the basis for expanding the accommodation in Item 601(b)(2) to other exhibits filed pursuant to Item 601. For similar reasons, we are adding comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A,<sup>198</sup> our investment company registration forms, and Form N-CSR.<sup>199</sup> As discussed, each exhibit that

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<sup>193</sup> See letters from Business Roundtable, CCMC, Cravath, Davis Polk, FedEx, Fenwick, Financial Executives, Grumman, PNC, SIFMA, Society for Corp. Gov., Sullivan, and UnitedHealth.

<sup>194</sup> See letter from Society for Corp. Gov.

<sup>195</sup> See letter from ICI.

<sup>196</sup> See letter from Cravath.

<sup>197</sup> *Amendments Regarding Exhibit Requirements*, Release No. 33-6230 (Aug. 27, 1980) [45 FR 58822 (Sept. 5, 1980)], at 5.

<sup>198</sup> See new Instruction 1 to Item 1016.

<sup>199</sup> See new Instruction 2 to Item 28 of Form N-1A; new Instruction 4 to Item 25.2 of Form N-2; new Instruction 3 to Item 29(b) of Form N-3; new Instruction 3 to Item 24(b) of Form N-4; new Instruction 1 of Instructions as to Exhibits of Form N-5; new Instruction 1 to Item 26 of Form N-6; new Instruction 1 to Item 16 of Form N-14; new Additional Instruction 1 to the Instructions as to Exhibits of Form S-6; new Instruction 1 to IX. Exhibits of Form N-8B-2; and new Instruction 2 to Item 13 of Form N-CSR.

includes omitted schedules or other attachments in reliance on these new provisions must contain a list briefly identifying the contents of each such schedule or attachment, which is a requirement that mirrors the language in Item 601(b)(2). However, in response to one commenter’s suggestion, we are clarifying that the amendments do not require that registrants prepare a separate list if that information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments.

**ii. Personally Identifiable Information**<sup>200</sup>

The Commission generally does not publish or make available information that “would constitute a clearly unwarranted invasion of personal privacy.”<sup>201</sup> Exhibits filed pursuant to Item 601 may include sensitive personally identifiable information, such as bank account numbers, social security numbers, home addresses, and similar information (“PII”).

As a matter of practice, the staff generally does not object where a registrant omits PII from exhibits without also submitting a confidential treatment request under Rule 406 or Rule 24b-2. To codify this current staff practice, the Commission proposed new Item 601(a)(6) to allow registrants to omit PII from their required Item 601 exhibits without submitting a confidential treatment request for the information. In proposing this amendment, the Commission also anticipated the added benefit of better safeguarding PII by limiting its dissemination. In the Proposing Release, the Commission asked whether similar amendments

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<sup>200</sup> See *supra* at Section II.A.2. for a discussion of our amendments to the exhibit requirements in Item 601(b)(10) pertaining to material contracts.

<sup>201</sup> 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).



should be made to forms that contain their exhibit requirements in the form and do not separately reference Item 601 of Regulation S-K, as well as investment company forms.

Several commenters supported the proposed amendment to Item 601, and no commenters opposed.<sup>202</sup> In addition, one commenter indicated that the same rationale applied to other forms<sup>203</sup> and two other commenters specifically recommended that a similar accommodation be extended to investment companies.<sup>204</sup>

We are adopting new Item 601(a)(6) as proposed. For the same policy reasons as discussed above, we are also adding comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A,<sup>205</sup> our investment company registration forms, and Form N-CSR.<sup>206</sup> Under the amendments, registrants may redact information if disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. Registrants who choose to avail themselves of this accommodation may provide their exhibit with appropriate redactions and need not include an analysis supporting the redactions at the time of filing.

### **c. 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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<sup>202</sup> See, e.g., letters from American Fuel, CCMC, Cravath, Davis Polk, FedEx, Grumman, ICI, PNC, and Society for Corp. Gov.

<sup>203</sup> See *supra* note 194.

<sup>204</sup> See letters from ICI and Society for Corp. Gov.

<sup>205</sup> See new Instruction 2 to Item 1016.

<sup>206</sup> See new Instruction 3 to Item 28 of Form N-1A; new Instruction 5 to Item 25.2 of Form N-2; new Instruction 4 to Item 29(b) of Form N-3; new Instruction 4 to Item 24(b) of Form N-4; new Instruction 2 of Instructions as to Exhibits of Form N-5; new Instruction 2 to Item 26 of Form N-6; new Instruction 2 to Item 16 of Form N-14, new Additional Instruction 2 to the Instructions as to Exhibits of Form S-6; new Instruction 2 to IX. Exhibits of Form N-8B-2; and new Instruction 3 to Item 13 of Form N-CSR.

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.<sup>207</sup> 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.<sup>208</sup>

The Commission proposed amendments to Item 601(b)(10)(i) that would limit the two-year look back test to “newly reporting registrants,” as that term was defined in the proposed revision to Instruction 1 of Item 601(b)(10). The proposal required registrants meeting this definition to file material agreements for the two-year look back period. The proposed amendments were intended to 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, however, would no longer be subject to the two-year look back requirement because investors would continue to have access to any material agreements previously filed on EDGAR. As such, the amendments were proposed to streamline reporting obligations while maintaining investor protections.

A number of commenters supported the proposed amendments, and no commenters opposed them.<sup>209</sup> Accordingly, we are adopting amendments to Item 601(b)(10)(i) and

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<sup>207</sup> Item 601(b)(10)(i) of Regulation S-K [17 CFR 229.601(b)(10)(i)].

<sup>208</sup> 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, 83<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., 1964. Prior to the enactment of Section 12(g), the Exchange Act reporting requirements were applicable only to listed companies.

<sup>209</sup> *See* letters from CCMC, Cravath, Fenwick, SIFMA, and Sullivan.

Instruction 1 of Item 601(b)(10) as proposed. We believe restricting the two-year look back to newly-reporting registrants is consistent with the original objective of the disclosure requirement and will help to eliminate unnecessary disclosures without impairing investor information or protection. Accordingly, under the revised item all registrants are required to file as an exhibit 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, newly reporting registrants are also required to file every contract that was 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.<sup>210</sup>

As proposed, we are adopting a definition of “newly reporting registrant” that includes:

- registrants that are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act at the time of filing;
- registrants that have not filed an annual report since the revival of a previously suspended reporting obligation;<sup>211</sup> and
- 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

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<sup>210</sup> Item 601(b)(10)(i), as revised.

<sup>211</sup> In the case of a registrant with a suspended reporting obligation that, less than two years later, is revived, the 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 10, at 14135.

statement or Form 8-K as required by Items 2.01 and 5.06 of that form, since the completion of such transaction (or, in the case of foreign private issuers, has not filed a Form 20-F since the completion of the transaction).<sup>212</sup>

**d. 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.<sup>213</sup> To maintain a consistent approach to the exhibit requirements for domestic registrants and foreign private issuers, the Commission proposed amendments to require foreign private issuers to provide information in exhibit filings comparable to the information provided by domestic registrants under the proposed amendments to Item 601. Specifically, the Commission proposed to amend the “Instructions to Exhibits” in Form 20-F to include revised language comparable to Items 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) of Regulation S-K.

In the Proposing Release, the Commission asked whether it should amend the exhibit requirements of Form 20-F so that they are consistent with the requirements under Item 601. A few commenters supported the proposal,<sup>214</sup> and no commenters opposed.

Accordingly, and for the reasons noted in the Proposing Release, we are adopting amendments to Form 20-F to align the exhibit requirements of the form with similar amendments we are adopting today that are applicable to domestic registrants. In each case, we believe that

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<sup>212</sup> The definition of “newly reporting registrant” does not include reporting companies completing merger transactions with business combination-related shell companies.

<sup>213</sup> 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”).

<sup>214</sup> See letters from Cravath and Sullivan.

the justifications for the proposed amendments to Item 601 are equally applicable to Form 20-F.<sup>215</sup>

## **6. Incorporation by Reference<sup>216</sup>**

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.<sup>217</sup> Initially, incorporation by reference was limited to exhibits, but over time the Commission has 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.

Consistent with our mandate under the FAST Act, the Commission proposed amendments to revise Item 10(d), Rule 411, Rule 12b-23, and a number of our forms to simplify and modernize these rules while still providing all material information. The Commission also proposed to rescind Rule 12b-32. In addition, to provide for a consistent set of incorporation by reference rules for investment companies and investment advisers, the Commission proposed parallel amendments to Rule 0-4 and a number of forms under the Investment Company Act, certain conforming amendments to Rule 0-6 under the Investment Advisers Act, and the

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<sup>215</sup> The Commission did not propose similar changes to the exhibit requirements of 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.

<sup>216</sup> For a discussion of our amendments that impact the ability to incorporate by reference or cross-reference information into the financial statements, *see* Section II.A.3 *supra*.

<sup>217</sup> *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).

rescission of Rules 8b-23, 8b-24, and 8b-32 under the Investment Company Act (certain provisions of which would be consolidated into the amendments to Rule 0-4).

The proposed amendments were intended to streamline the requirements associated with incorporation by reference and facilitate investor access to incorporated documents through the use of hyperlinks. The proposed amendments were also consistent with the Commission's longstanding acceptance of incorporation by reference in the interests of encouraging registrants to eliminate duplicative disclosures.

**a. Item 10(d)**

Item 10 of Regulation S-K contains general requirements on the application of Regulation S-K and Item 10(d) focuses on incorporation by reference.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup>

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<sup>218</sup> 17 CFR 229.10(d).

<sup>219</sup> 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).

<sup>220</sup> *See* Proposing Release, *supra* note 5, Section II.F.1.a. at 51007-8.

As discussed in the Proposing Release, the Commission proposed to eliminate the five-year limit in Item 10(d).<sup>221</sup> Given the broad exceptions to the rule and the current practice of retaining documents electronically, we believe the five-year limit now serves little purpose and may lead to confusion about which documents may be incorporated by reference.<sup>222</sup> 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.<sup>223</sup>

Several commenters supported the proposal, and no commenters opposed.<sup>224</sup> Therefore, and for the reasons noted in the Proposing Release, we are adopting these amendments as proposed.

**b. 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.<sup>225</sup> 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.

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<sup>221</sup> *Id.* Without the provisions relating to the five-year limit, little substance remains in Item 10(d). Therefore, to simplify the requirements, the Commission proposed to move the remaining provision in Item 10(d) prohibiting indirect incorporation by reference into the other rules governing incorporation by reference.

<sup>222</sup> 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].

<sup>223</sup> *See, e.g.*, proposed Rule 411(e) and Rule 12b-23(e).

<sup>224</sup> *See* letters from Chamber, Cravath, Fenwick, Financial Executives, Nasdaq, Society for Corp. Gov., Sullivan, UnitedHealth, and ICI.

<sup>225</sup> *See* Rule 12b-1 [17 CFR 240.12b-1] (setting forth the scope of Regulation 12B).

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 the Securities Act, including exhibits thereto.<sup>226</sup> 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.<sup>227</sup>

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. 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.

#### **i. 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.<sup>228</sup> Rule 411(b)(4)

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<sup>226</sup> See Rule 400 [17 CFR 230.400] (setting forth the scope of Regulation C).

<sup>227</sup> See Integrated Disclosure System Adopting Release, *supra* note 103; *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.”).

<sup>228</sup> 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). This provision 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. See *Registration and Reporting and Form for Annual Reports of Employee Stock Purchase Plans*, Release No. 34-9048 (Jan. 4,



under the Securities Act, which is more limited and pertains to non-prospectus information that is incorporated by reference, requires that the incorporated information be filed as an exhibit if it does not comply with the five-year limit in Item 10(d). Rule 8b-23 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 is filed electronically.<sup>229</sup>

The Commission proposed to eliminate these requirements to make the rules for incorporation by reference more consistent, and to apply consistent requirements for incorporation by reference under the Investment Company Act and Investment Advisers Act. We no longer believe that these requirements are necessary, as most Exchange Act filings are

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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.”).

<sup>229</sup> See Rule 8b-23(a) [17 CFR 270.8b-23(a)]. In addition, Rule 0-4 and Rule 0-6 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, the Commission proposed 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). The Commission proposed 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, the Commission similarly proposed to eliminate the requirement to file additional copies from Rule 0-6.

made publicly available on EDGAR, and as we generally do not have similar exhibit filing requirements for Securities Act registration statements.<sup>230</sup>

The Commission also proposed 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).<sup>231</sup> 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 a report 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 satisfy their disclosure requirements by incorporating a significant amount of disclosure from these reports. The Commission did not propose to eliminate these other exhibit filing requirements in Item 601. Nonetheless, the Commission did propose 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 will no longer be necessary because, under the rules we are adopting, a registrant will be required to include a hyperlink to any information that is incorporated by reference to a document available on EDGAR.<sup>232</sup>

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<sup>230</sup> Investment advisers register and submit some filings to the Commission electronically through the Investment Adviser Registration Depository (“IARD”).

<sup>231</sup> See Integrated Disclosure System Adopting Release, *supra* note 103 (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)].

<sup>232</sup> See *infra* Section II.B.6.b.ii.

Several commenters supported the proposal and no commenters opposed it.<sup>233</sup> Therefore, and for the reasons noted in the Proposing Release, we are adopting the amendments, as proposed.

## ii. Hyperlinks

The Commission proposed 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.<sup>234</sup> The Commission recently adopted rules requiring hyperlinks to most exhibits filed pursuant to Item 601, Form F-10,<sup>235</sup> or Form 20-F.<sup>236</sup> To accommodate hyperlinks, those filings must be made in HTML format.<sup>237</sup> Accordingly, the Commission proposed to expand the requirement to file documents in HTML to include filings that are subject to the hyperlinking requirements proposed in Rule 411, Rule 12b-23, and Rule 0-4.

Commenters generally supported the proposals,<sup>238</sup> although some thought it would be helpful for the Commission to provide further clarification on some aspects of the rule.<sup>239</sup> One commenter suggested that the Commission make clear that incorporating only a portion of a

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<sup>233</sup> See letters from American Fuel, CAQ, Chamber, Cravath, Davis Polk, E&Y, Fenwick, Piercy Bowler, PNC, Reed Smith, Society for Corp. Gov., Sullivan, and ICI.

<sup>234</sup> The Commission did not propose similar amendments to Rule 0-6 because applications under the Investment Advisers Act 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.

<sup>235</sup> 17 CFR 239.40.

<sup>236</sup> See Exhibit Hyperlinks Adopting Release, *supra* note 10, at 14130.

<sup>237</sup> See *id.* at 14130. The rules adopted by the Commission at that time did not generally apply to investment companies. However, as discussed below, we are adopting similar requirements to certain filings by investment companies in this release. See *infra* Section II.B.7.b.

<sup>238</sup> See letters from CAQ, Davis Polk, E&Y, Fenwick, Grant Thornton, Grumman, KPMG, Piercy Bowler, Public Citizen, Reed Smith, Society for Corp. Gov., ICI, and Morningstar, Inc. (“Morningstar”).

<sup>239</sup> See letters from Davis Polk and E&Y.

document filed on EDGAR is permissible,<sup>240</sup> while another commenter recommended that the Commission provide instructions for registrants to clarify which hyperlinks and cross-references relate to information incorporated by reference in the current filing and which are provided only for reader convenience and navigability.<sup>241</sup> Other commenters thought the Commission should consider allowing exceptions to the rule in certain situations.<sup>242</sup> Specifically, one commenter believed hyperlinks to Forms 10-K, 10-Q, and 8-K and definitive proxy statements should not be required, as they can be easily located by investors.<sup>243</sup> Another commenter believed hyperlinks should not be required in filings that also incorporated by reference to subsequently filed documents.<sup>244</sup> In addition, another commenter suggested that the Commission allow registrants and the staff to develop more experience with the recently adopted exhibit hyperlinking requirements prior to requiring additional hyperlinking.<sup>245</sup>

We are adopting the amendments to Rule 411, Rule 12b-23, and Rule 0-4 as proposed. By requiring an active hyperlink to information on EDGAR if it has been incorporated by reference into a registration statement or prospectus, we believe these amendments will improve the readability and navigability of disclosure documents and discourage repetition, consistent with our FAST Act mandate.

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<sup>240</sup> See letter from Davis Polk.

<sup>241</sup> See letter from E&Y (noting that this clarification would benefit the PCAOB's work regarding the scope of an auditor's responsibility for information in a filing subject to the requirements of AS 2710, *Other Information in Documents Containing Audited Financial Statements*).

<sup>242</sup> See letters from Fenwick and Reed Smith.

<sup>243</sup> See letter from Fenwick.

<sup>244</sup> See letter from Reed Smith (stating that the use of hyperlinks, particularly in connection with shelf registration statements, could direct readers to stale or superseded information).

<sup>245</sup> See letter from Cravath.

We do not believe that additional clarification in the new rules regarding the ability to incorporate portions of a previous filing by reference is necessary because existing rules regarding incorporation by reference already allow for this, and the new hyperlinking requirement does not change the substance of these rules.<sup>246</sup> Nor have we excluded hyperlinks to Forms 10-K, 10-Q, 8-K and definitive proxy statements when those forms are incorporated by reference, as suggested by one commenter.<sup>247</sup> Such a restriction would reduce investors' ease of access to information and, therefore, the utility of the amendments. Moreover, as this commenter noted, the requirement is not anticipated to be a significant compliance burden for registrants.

With respect to one commenter's suggestion that we provide an exception to the hyperlinking requirement where a registration statement incorporates by reference subsequently filed documents,<sup>248</sup> we do not believe that this circumstance warrants a change to the rule. In the case of a shelf registration statement on Form S-3, for example, while it is correct that documents incorporated by reference under Item 12 of that form may become stale over time, the item requires the registrant to clearly state that the prospectus also incorporates by reference "all documents subsequently filed under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering." Accordingly, we do not believe that the existence of hyperlinks to the previously filed information will cause confusion among investors regarding

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<sup>246</sup> See Securities Act Rule 411 and Exchange Act Rule 12b-23, which state that "where only certain pages of a document are incorporated by reference . . . , the document from which the [information or material] is taken shall be clearly identified in the reference."

<sup>247</sup> See letter from Fenwick.

<sup>248</sup> See letter from Reed Smith.

the scope of information incorporated by reference or cause investors to disregard subsequently filed reports.

We are also not adopting instructions, as suggested by one commenter, which would require registrants to differentiate between hyperlinked information incorporated by reference in the current filing and hyperlinks provided only for reader convenience and navigability.<sup>249</sup> The new rules are solely meant to introduce a navigation feature and do not impose additional or modified requirements regarding what information may be incorporated by reference.

Finally, we are not delaying compliance with the new hyperlinking requirements, as suggested by one commenter, in the case of operating companies.<sup>250</sup> Delaying compliance seems unnecessary given that the exhibit hyperlinking rules have been in effect for all operating companies since September 1, 2018 and our amendments in this rulemaking are only incremental to the current rules.<sup>251</sup> Technologically, these new amendments requiring hyperlinks for information incorporated by reference are no different than existing hyperlink disclosure requirements. Therefore, we anticipate any additional compliance burden for operating companies will not be significant. However, as outlined below in Section V.2, we are adopting a transition period for investment companies that is intended to provide them with time to prepare filings to include hyperlinks to exhibits and to information incorporated by reference, as well as help mitigate the cost burdens related to switching to HTML format for investment companies currently submitting filings in ASCII.

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<sup>249</sup> See letter from E&Y.

<sup>250</sup> See letter from Cravath.

<sup>251</sup> See Exhibit Hyperlinks Adopting Release, *supra* note 10.

Under the amendments we are adopting, registrants are not 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, similar to the existing requirements for exhibit hyperlinking. An inaccurate hyperlink alone would neither render the filing materially deficient nor affect a registrant's eligibility to use Form S-3, Form SF-3, or Form F-3. In addition, registrants are not required to refile information that is incorporated by reference from a document that was previously filed with the Commission in paper. Similar to the Commission's reasoning in the Exhibit Hyperlinks Adopting Release, we believe such a 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.<sup>252</sup>

Unlike the requirements for exhibit hyperlinking, however, a registrant is not required to correct inaccurate hyperlinks to information incorporated by reference in an effective registration statement by including a corrected hyperlink in a subsequent periodic report or a post-effective amendment. We 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 amended 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.

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<sup>252</sup> See Exhibit Hyperlinks Adopting Release, *supra* note 10, at 14131. See also FAST Act Report, *supra* note 7, at n. 31 and accompanying text.

### iii. Other Amendments

As discussed in detail in the Proposing Release, the Commission proposed several non-substantive changes to Rule 411, Rule 12b-23, Rule 0-4, and Rule 0-6 to streamline, clarify, and conform these rules.<sup>253</sup>

Several commenters supported the proposal, and no commenters opposed.<sup>254</sup> For the reasons noted in the Proposing Release, we are adopting the proposed amendments to Rule 411, Rule 12b-23, Rule 12b-32, Rule 0-4, and Rule 0-6, as proposed.

## 7. Manner of Delivery

### a. Tagging Cover Page Data

Currently, operating company registrants<sup>255</sup> are required to file their financial statements as an exhibit in a machine-readable format using eXtensible Business Reporting Language (“XBRL”).<sup>256</sup> This disclosure is required as an exhibit to periodic reports and Securities Act registration statements, as well as reports on Form 8-K or Form 6-K that contain revised or updated financial statements. The Commission recently adopted rules requiring the use of Inline

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<sup>253</sup> See Proposing Release, *supra* note 5, Section II.F.2.d. at 51011-2.

<sup>254</sup> See letters from American Fuel, CAQ, CCMC, Cravath, Davis Polk, E&Y, Fenwick, Piercy Bowler, PNC, Reed Smith, Society for Corp. Gov., and Sullivan.

<sup>255</sup> As used in this context, operating companies do not include any investment company that is registered under the Investment Company Act, any business development company, as defined in Section 2(a)(48) of that Act [15 U.S.C. 80a-2(a)(48)], any entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S-X [17 CFR 210.6-01 through 210.6-10], or asset-backed issuers. See *Interactive Data to Improve Financial Reporting*, Release No. 33-9002 (Jan. 30, 2009) [74 FR 6776 (Feb. 10, 2009)], as corrected by Release No. 33-9002A (Apr. 1, 2009) [74 FR 15666 (Apr. 7, 2009)] (the “XBRL Adopting Release”), at 6780-1, nn. 69 and 78 and accompanying text.

<sup>256</sup> 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. XBRL data-tagging requirements do not apply to asset-backed securities filings because issuer financial statements are generally not required or provided in filings made pursuant to Regulation AB (17 CFR 229.1100 et seq.). See the XBRL Adopting Release, *supra* note 255, at n. 78.



XBRL format, where XBRL data is embedded into the HTML document, instead of the traditional XBRL format<sup>257</sup> for the submission of operating company financial statements and risk/return summary information for open-end management investment companies.<sup>258</sup>

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 and include, among others, form type, company name, filer size, and public float.<sup>259</sup> 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 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.

The Commission proposed 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

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<sup>257</sup> In the traditional XBRL format for financial statements, which will be phased out as operating companies transition to Inline XBRL, as discussed *infra* at note 258, 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.

<sup>258</sup> See *Inline XBRL Filing of Tagged Data*, Release No. 33-10514 (June 28, 2018) [83 FR 40846 (July 10, 2018)] ("Inline XBRL Adopting Release"). Operating companies that are currently required to submit financial statement information in XBRL and open-end management investment companies that are currently required to submit risk/return summary XBRL data will be required, on a phased-in basis, to transition to Inline XBRL. The date of mandatory compliance with the Inline XBRL rules depends on the type of filer. See Section III.A.1.c. of the Inline XBRL Adopting Release.

<sup>259</sup> See Rule 405 of Regulation S-T [17 CFR 232.405]; See also XBRL Adopting Release (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).

XBRL in accordance with the EDGAR Filer Manual.<sup>260</sup> To implement the cover page tagging requirements, the Commission also proposed 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.”<sup>261</sup> The Commission also proposed 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.

In addition, the Commission proposed amendments to the cover pages of these forms to include the trading symbol for each class of registered securities.<sup>262</sup> 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, the Commission proposed amendments to these forms that 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

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<sup>260</sup> See Proposing Release, *supra* note 5, Section II.G.1. at 51013-4.

<sup>261</sup> The Commission proposed that 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, not as registration statements. See Proposing Release, *supra* note 5, at 51014.

<sup>262</sup> In the Disclosure Update and Simplification Release, the Commission amended 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 Release, *supra* note 147, at Section IV.C.1.(a).

a consistent manner across forms, the Commission proposed to revise the cover pages of Form 10-Q and Form 8-K to include this disclosure in addition to the trading symbol.

Commenters were divided in their responses to the proposal. Several commenters believed that tagging cover page data would be useful and viewed XBRL generally as a benefit to investors in collecting and analyzing financial information.<sup>263</sup> Some commenters further recommended expanding the proposal to require that additional information be tagged.<sup>264</sup> By contrast, a number of other commenters opposed the proposal, and were skeptical that the benefit of tagging cover page data justified the costs of compliance.<sup>265</sup> Noting their concerns over the burdens already incurred by registrants to satisfy existing data-tagging obligations, some commenters urged that studies be undertaken to assess investor usage of XBRL information before expanding XBRL requirements any further.<sup>266</sup>

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<sup>263</sup> See letters from Calcbench, Inc. (“Calcbench”), Grumman, Merrill Corporation (“Merrill”), Morningstar, and XBRL US, Inc. (“XBRL US”).

<sup>264</sup> See, e.g., letters from Calcbench (supporting the expansion of XBRL tagging to MD&A), Merrill (recommending extending the proposed tagging requirements to Form 6-K), and XBRL US (recommending requiring XBRL tagging of additional forms, such as the Form 8-K earnings report). *But see* letter from Grumman (recommending that the proposal not be extended to MD&A, earnings releases, or proxy statements because the costs of compliance would outweigh the benefits). In the Proposing Release, the Commission asked whether there were any additional disclosures discussed in the release that should be required in machine-readable structured format, such as within Item 303(a) or any property disclosures under Item 102. See Proposing Release, *supra* note 5, at 51014. We are not adopting these additional tagging requirements at this time, several of which are beyond the scope of this rulemaking.

<sup>265</sup> See letters from CCMC, FedEx, Financial Executives, IMA, Society for Corp. Gov., and UnitedHealth.

<sup>266</sup> See letter from CCMC and IMA. We note that the Inline XBRL Adopting Release included a discussion of current XBRL usage levels indicating “a wide range of XBRL data users, including investors, financial analysts, economic research firms, data aggregators, academic researchers, filers seeking information on their peers for benchmarking purposes, and Commission staff.” See Inline XBRL Adopting Release, *supra* note 258, at 40850.

After considering the comments, we are adopting the amendments as proposed.<sup>267</sup> By increasing the capacity for automation of the data gathering process, we believe these amendments will further enhance investors' use of interactive data to identify, count, sort, compare, and analyze registrants and their disclosures.<sup>268</sup> For example, an investor will be able to more readily and accurately identify registrants that are listed on a specific exchange and that identified themselves as well known seasoned issuers in their last annual report. Similarly, the Inline XBRL tagging of the new ticker symbol disclosure requirement will make it easier to relate/link a specific security to the underlying registrant. In addition, the amendments will allow the Commission to make enhancements to the EDGAR system to enable investors to search for filings with these specific criteria. The new filing requirements will also be of benefit to the Commission, as the Commission and its staff will be able to more readily sort and analyze filings to, among other things, improve data and analysis for rulemaking initiatives.

We do not expect the incremental compliance burden associated with tagging the 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. The amendments will also facilitate future enhancements to the EDGAR system by utilizing the tagged information to reduce duplicative entry of information into both the filing and the submission header at the time of filing.

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<sup>267</sup> As proposed, the amendments apply to Form 20-F or Form 40-F only when those forms are used as annual reports, not registration statements. *See* new paragraph 104 to Instructions as to Exhibits of Form 20-F and new paragraph B.17 of General Instructions to Form 40-F.

<sup>268</sup> *See* the Recommendations of the Investor Advisory Committee Regarding the SEC and the Need for the Cost Effective Retrieval of Information by Investors (Jul. 25, 2013), *available at* <http://www.sec.gov/spotlight/investor-advisory-committee-2012/data-tagging-resolution-72513.pdf> (recommending, among other things, that the Commission promote the use of machine-readable data tagging formats in filings with the Commission).

### **b. 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 hyperlinking, those filings are required to be made in HTML.<sup>269</sup> The Commission proposed parallel amendments to Regulation S-T Rules 102 and 105 and certain of our registration and reporting forms that are used by investment companies that would apply similar exhibit hyperlinking and HTML submission requirements in those forms to facilitate access to exhibits by investors and other users of the information. Specifically, the proposed amendments would require an investment company filing a registration statement on Forms S-6, N-1A, N-2, N-3, N-4, N-5, N-6, and N-14, or reports on Form N-CSR, to include a hyperlink to each exhibit identified in that filing's exhibit index, unless the exhibit is filed in paper pursuant to an exemption under Rule 201, Rule 202, or Rule 311 of Regulation S-T.

One commenter supported the proposed amendments to require exhibit hyperlinks and associated HTML submission requirements, stating that it would help investors' ability to navigate through EDGAR filings and advance investor protection.<sup>270</sup> Another commenter requested clarification on how the proposed HTML submission requirement would affect filers

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<sup>269</sup> See Exhibit Hyperlinks Adopting Release, *supra* note 10, at 14130.

<sup>270</sup> See letter from ICI.

on Form N-4 and Form N-6 who use type 1 modules under EDGARLink<sup>271</sup> to make these submissions because the type 1 modules are only supported by ASCII, and not HTML.<sup>272</sup>

After considering the comments, we are requiring, as proposed, investment companies filing registration statements on Forms S-6, N-14, N-5, N-1A, N-2, N-3, N-4, N-6, and reports on Form N-CSR, to include a hyperlink to each exhibit (other than an exhibit filed in XBRL) identified in the 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.<sup>273</sup> In addition, we are extending similar exhibit hyperlinking and HTML filing requirements to filings on Form N-8B-2.<sup>274</sup> Consistent with our rules for operating companies, we are not requiring investment companies to refile electronically any exhibits previously filed in paper.<sup>275</sup>

A registered investment company will be required to correct an inaccurate or nonfunctioning link or hyperlink to an exhibit as follows. In the case of a registration statement that is not yet effective, the filer will be required to file an amendment to the registration

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<sup>271</sup> EDGARLink is an application that is used by electronic filers to facilitate the preparation, validation, and transmission of electronic format documents to EDGAR. EDGARLink works interactively with EDGAR and is available for download from the Commission's website.

<sup>272</sup> See letter from G. Stanzione. Modules are partial or complete documents that are intended to be included in an electronic submission. In connection with our ongoing efforts to upgrade EDGAR, we are updating type 1 and type 2 modules to permit their use in connection with filings made in HTML. These updates are expected to be completed by June 2019.

<sup>273</sup> See Rule 102(d); Rule 105(d) of Regulation S-T.

<sup>274</sup> Form N-8B-2 is the form used by unit investment trusts other than separate accounts that are currently issuing securities to register under the Investment Company Act. The form requires the registration statement to include exhibits similar to those required under the Commission's other investment company registration forms. We believe extending similar exhibit hyperlinking and HTML filing requirements to filings on Form N-8B-2 would further achieve our objective of facilitating access to exhibits by investors and other users of the information.

<sup>275</sup> See Instruction 1 to paragraph (d) of Rule 105.

statement containing the inaccurate or nonfunctioning link or hyperlink. In the case of a registration statement that has become effective, the filer will be required to correct an inaccurate or nonfunctioning link or hyperlink in the next post-effective amendment, if any, to the registration statement.<sup>276</sup> In the case of a report on Form N-CSR, the filer will be required to correct the inaccurate or nonfunctioning link or hyperlink in its next report on Form N-CSR.

In connection with the exhibit hyperlinking requirements, we are also adopting an amendment to Regulation S-T Rule 105 to require filings on Forms S-6, N-14, N-5, N-1A, N-2, N-3, N-4, N-6, N-8B-2, and N-CSR be submitted in HTML format. Prior to this amendment, electronic filers were permitted to submit such filings in either the ASCII format or HTML format. Because the ASCII format does not support hyperlink functionality, the exhibit hyperlinking requirement is feasible only if documents are filed in HTML. Accordingly, electronic filers will now be required to file registration statements and reports on Form N-CSR (and any amendments thereto) in HTML format.<sup>277</sup>

## **C. Proposed Amendments Not Being Adopted**

### **1. Forms – Captions and Item Numbers**

The Commission proposed 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

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<sup>276</sup> See Instruction 2 to paragraph (d) of Rule 105. We proposed to amend Instruction 2 to paragraph (d) of Rule 105 to include a new provision pertaining to an investment company registration statement that has become effective that contains an inaccurate or nonfunctioning link or hyperlink. That new provision would have required the filer to correct the link or hyperlink in the next post-effective amendment, if any, to the registration statement. We are not adopting the proposed amendment because the provision would be duplicative of the current provision of Instruction 2 to paragraph (d) of Rule 105.

<sup>277</sup> See amendments to Regulation S-T Rule 105(d). While the affected registration statements and reports will be required to be filed in HTML pursuant to the amendments to S-T Rule 105, registrants will 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.

disclosure.<sup>278</sup> The proposed amendments did not affect captions that are expressly required by the forms or Regulation S-K.<sup>279</sup> The proposed amendments were 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. The Commission stated its belief that 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.

Of the commenters who addressed the issue, a majority opposed the proposal to amend Form 10, Form 10-K, and Form 20-F to eliminate the requirements to include most item numbers and captions.<sup>280</sup> While they supported the Commission's intent to allow registrants greater flexibility over the presentation of their disclosure, these commenters cautioned that this change could make an investor's task more challenging. Commenters suggested that the required captions and item numbers help investors navigate filings, make it more easy to locate information important to them, and enhance their ability to compare information in different filings.

In light of these comments, we have decided not to adopt the proposed changes to the item number and caption requirements of Form 10, Form 10-K, and Form 20-F. Upon further review, we believe that any potential benefits from the amendments that would accrue to

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<sup>278</sup> 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.

<sup>279</sup> 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."

<sup>280</sup> *See, e.g.*, letters from Fenwick and Reed Smith. *But see* letter from E&Y (supporting the proposal for providing registrants more flexibility in organizing disclosures and tailoring their presentation).



registrants and investors by permitting more variability in the presentation of disclosure could be outweighed by the risk that the changes could impair an investor's ability to use and navigate the information efficiently and effectively.

## 2. Subsidiaries of the Registrant and Entity Identifiers

Item 601(b)(21)(i) 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.<sup>281</sup> The Commission proposed amendments to Item 601(b)(21)(i) that would require registrants to also include in the exhibit the legal entity identifier (“LEI”), if one has been obtained, of the registrant and each subsidiary listed.

Comments on the proposal were mixed. Commenters who were in favor of the proposal<sup>282</sup> generally stated that LEIs will make it easier for investors, analysts, and regulators to understand relationships between interrelated companies and more accurately assess investment risk.<sup>283</sup> Several commenters, however, expressed doubts about the benefits of the information<sup>284</sup> or were concerned that it would be costly and time consuming to acquire and maintain LEIs, particularly for registrants with numerous subsidiaries or affiliates operating globally.<sup>285</sup> In light of these comments, we have decided not to adopt the amendments to Item 601(b)(21)(i) as proposed.

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<sup>281</sup> Item 601(b)(21)(i) of Regulation S-K [17 CFR 229.601(b)(21)(i)].

<sup>282</sup> See letters from CII, The FACT Coalition, Merrill, Morningstar, and XBRL US.

<sup>283</sup> See, e.g., letters from CII, Morningstar, and XBRL US.

<sup>284</sup> See, e.g., letters from Cravath, Financial Executives (indicating that such rules may not be necessary outside the financial services industry), IMA, and UnitedHealth.

<sup>285</sup> See letter from Financial Executive. See also letters from Ball and CCMC.

#### **D. Removal of Outdated Requirement**

Rule 312 of Regulation S-T permitted issuers of asset-backed securities, for their filings filed on or before June 30, 2012, to post static pool disclosures on an Internet Web site under certain conditions in lieu of filing the information on EDGAR. This temporary accommodation lapsed on June 30, 2012, and in 2014, in the adopting release for revisions to disclosure requirements for asset-backed securities, the Commission reiterated that issuers are no longer able to use Rule 312 as a means to provide their static pool information.<sup>286</sup> As stated in that release, the Commission did not remove Rule 312 at that time since asset-backed issuers that previously provided static pool information via a website were required to retain all versions of the information provided through the website for a period of not less than five years. Because the period for retention has now lapsed, the rule has become obsolete due to the passage of time, and therefore we are removing Rule 312 from Regulation S-T.<sup>287</sup>

#### **III. OTHER MATTERS**

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Section 553(d) of the Administrative Procedure Act generally requires an agency to

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<sup>286</sup> See *Asset-Backed Securities Disclosure and Registration*, Release No. 33-9638 (Sept. 4, 2014) [79 FR 57184 at 57258].

<sup>287</sup> We find that there is good cause to adopt the amendment without notice and comment. Because the amendment makes a technical change to eliminate an obsolete provision, notice and comment are unnecessary. See 5 U.S.C. 553(b)(B).

publish an adopted rule in the Federal Register 30 days before it becomes effective.<sup>288</sup> This requirement does not apply, however, if the adopted rule is a “substantive rule which grants or recognizes an exemption or relieves a restriction.”<sup>289</sup> We find that our amendments to the rules governing redaction of confidential information in material contracts, discussed in Section II.A.2. above, are substantive rules that relieve a restriction. Specifically, these amendments relieve registrants of the requirement to prepare and process confidential treatment requests for information in their material contracts filed as exhibits, so long as the information is not material and is likely to cause competitive harm to the registrant if publicly disclosed.<sup>290</sup> Accordingly, the following provisions are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]: amendments to Items 601(b)(2)(ii) and 601(b)(10)(iv) of Regulation S-K; paragraph 4(a) of Instructions as to Exhibits of Form 20-F; Instruction 6 to Item 1.01 of Form 8-K; new Instruction 4 to Item 28 of Form N-1A; new Instruction 6 to Item 25.2 of Form N-2; new Instruction 5 to Item 29(b) of Form N-3; new Instruction 5 to Item 24(b) of N-4; new Instruction 3 of Instructions as to Exhibits of Form N-5; new Instruction 3 to Item 26 of Form N-6; new Instruction 3 to Item 16 of Form N-14; new Additional Instruction 3 to the Instructions as to Exhibits of Form S-6; and new Instruction 3 to IX. Exhibits of Form N-8B-2.<sup>291</sup>

#### **IV. TRANSITION MATTERS**

If a registrant has a confidential treatment request pending at the time the amended rules governing redaction of confidential information in material contracts become effective, the

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<sup>288</sup> See 5 U.S.C. 553(d).

<sup>289</sup> See 5 U.S.C. 553(d)(1).

<sup>290</sup> See *supra* Section II.A.2.c.

<sup>291</sup> *But see infra* Section V.B. for a discussion of the compliance dates for the HTML filing and exhibit hyperlinking requirements.

registrant may, but is not required to, withdraw its pending application. The Commission and its staff will continue to process pending CTR applications that are not withdrawn, following established procedures. Registrants who opt to withdraw their CTR applications in order to rely on the amended rules are advised to refile the exhibit or exhibits, in redacted form, in an amended filing with the Commission that conforms to the amended rules. Registrants should contact the Assistant Director office, or in the case of an investment company the Division of Investment Management's Disclosure Review and Accounting Office, responsible for reviewing their filings to coordinate the withdrawal of any confidential treatment application and the refiling of the exhibit or exhibits.

## **V. COMPLIANCE DATES**

Except as noted above in Section III (Other Matters) and below, registrants will be required to comply with these amendments beginning [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

### **A. Tagging of Cover Page Data**

We are adopting phased compliance dates for the requirements to tag data on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F in Inline XBRL. To mitigate the potential burden associated with the transition of filers and preparers to Inline XBRL generally, these dates are identical to the compliance dates for mandatory compliance with the Inline XBRL rules set forth in the Inline XBRL Adopting Release.<sup>292</sup> The date of compliance depends on the type of filer, as follows:

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<sup>292</sup> See *supra* note 258.

<b>Operating Companies</b>	<b>Compliance Date<sup>293</sup></b>
Large accelerated filers that prepare their financial statements in accordance with U.S. GAAP	Reports for fiscal periods ending on or after June 15, 2019
Accelerated filers that prepare their financial statements in accordance with U.S. GAAP	Reports for fiscal periods ending on or after June 15, 2020
All other filers	Reports for fiscal periods ending on or after June 15, 2021

As illustrated, we are adopting a three-year phase-in whereby: (i) large accelerated filers that prepare their financial statements in accordance with U.S. GAAP will be required to comply with the cover page tagging requirements in reports for fiscal periods ending on or after June 15, 2019; (ii) accelerated filers that prepare their financial statements in accordance with U.S. GAAP will be required to comply in reports for fiscal periods ending on or after June 15, 2020; and (iii) all other filers that are subject to the cover page tagging requirements, including foreign private issuers that prepare their financial statements in accordance with IFRS, will be required to comply in reports for fiscal periods ending on or after June 15, 2021. Domestic form filers<sup>294</sup> will be required to comply beginning with their first Form 10-Q for a fiscal period ending on or after the applicable compliance date, as opposed to the first filing for a fiscal period ending on or after that date.<sup>295</sup>

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<sup>293</sup> Form 10-Q filers will not become subject to the Inline XBRL requirements with respect to Form 10-K or any other form until after they have been required to comply with the Inline XBRL requirements for their first Form 10-Q for a fiscal period ending on or after the applicable compliance date for the respective category of filers.

<sup>294</sup> Form 20-F and 40-F filers do not have quarterly report filing obligations and are therefore not affected by this provision.

<sup>295</sup> As an example, a Form 10-Q filer in the first phase-in group with a calendar fiscal year end will be required to begin compliance with its Form 10-Q for the period ending June 30, 2019. As a further example, a Form 10-Q filer in the first phase-in group with a June 30 fiscal year end will be required to begin compliance with its Form 10-Q for the period ending September 30, 2019.

To be consistent with existing Inline XBRL data-tagging requirements, these cover page tagging requirements only apply to electronic filers that file the specified forms and who are required to submit Interactive Data Files in Inline XBRL format under Regulation S-T.<sup>296</sup> Therefore, the requirements do not apply to non-operating companies such as any investment companies registered under the Investment Company Act, business development companies, as defined in Section 2(a)(48) of that Act,<sup>297</sup> entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X,<sup>298</sup> or asset-backed issuers.

#### **B. Hyperlinks and HTML Format for Investment Companies**

We are adopting a transition period that is intended to provide investment company registrants time to prepare filings to include hyperlinks to exhibits and to information incorporated by reference, as well as help mitigate the cost burdens related to switching over to HTML format for registrants currently submitting filings in ASCII. All registration statement and Form N-CSR filings made on or after April 1, 2020 must be made in HTML format and comply with the rule and form amendments pertaining to the use of hyperlinks. However, we welcome early compliance with the new filing requirements.

### **VI. ECONOMIC ANALYSIS**

We are sensitive to the economic effects that may result from the amendments. Securities Act Section 2(b),<sup>299</sup> Exchange Act Section 3(f),<sup>300</sup> and Investment Company Act

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<sup>296</sup> See new Rule 406 of Regulation S-T [17 CFR 232.406].

<sup>297</sup> 15 U.S.C. 80a-2(a)(48).

<sup>298</sup> 17 CFR 210.6-01 through 210.6-10.

<sup>299</sup> 5 U.S.C. 77b(b).

Section 2(c)<sup>301</sup> 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. Additionally, Exchange Act Section 23(a)(2)<sup>302</sup> requires us, when adopting rules and amendments under the Exchange Act, to consider the impact that any new rule will have on competition and not to adopt any rule or amendment that will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The expected economic effects of the amendments, as well as possible alternatives to the amendments, are discussed in detail below. Where possible, we have sought to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the amendments. However, we are unable to reliably quantify many of the economic effects due to limitations on available data. Therefore, parts of the discussion below are qualitative in nature, although we try to describe, where possible, the direction of these effects.

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. At the same time, there are potential drawbacks associated with disclosure requirements. For example, disclosure can be costly for registrants to produce and disclosure of sensitive information can result in

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<sup>300</sup> 15 U.S.C. 78c(f).

<sup>301</sup> 15 U.S.C. 80a-2(c).

<sup>302</sup> 15 U.S.C. 78w(a)(2).

competitive disadvantages. These general considerations help to frame our analysis of the potential economic effects of the amendments, as discussed in detail below.<sup>303</sup>

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 rule amendments relative to that baseline. These economic effects include the costs and benefits and impact on efficiency, competition, and capital formation.

#### **A. Baseline**

To assess the economic effect of the amendments, we are using as our baseline 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 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. In contrast, there is currently no comparable requirement for investment companies.

For operating companies, the baseline includes the disclosure requirements in Regulation S-K and related rules and forms as well as existing guidance on the application of those requirements. Table 1 below suggests that the amendments to Regulation S-K and related rules

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<sup>303</sup> See Proposing Release Section III.A. for detailed discussion of the benefits and costs of disclosure.



and forms will apply to a substantial number of operating companies. On average, about 7,400 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 40-F. The number of registrants filing definitive proxy statements on Schedule 14A has exceeded 5,000 each year.<sup>304</sup>

**Table 1: Number of Registrants Filing Various Disclosure Forms from 2014–2018**

<b>Year</b>	<b>10-K</b>	<b>10-Q</b>	<b>20-F</b>	<b>40-F</b>	<b>DEF 14A</b>
<b>2014</b>	7,857	7,872	669	143	5,259
<b>2015</b>	7,767	7,676	687	131	5,390
<b>2016</b>	7,373	7,147	675	126	5,126
<b>2017</b>	7,074	6,816	658	129	5,104
<b>2018</b>	6,907	6,549	679	127	5,063

As discussed above, investment companies making filings on certain forms required by the Commission will also be affected by the amendments. Table 2 below lists the number of filings filed by investment companies in calendar year 2018 using EDGAR submission types potentially affected by the amendments, broken out by the number of filings in HTML and ASCII format. From January 1, 2018 to December 31, 2018, investment companies filed 64,470 filings using EDGAR submission types potentially affected by the amendments. Of these filings, the vast majority (58,137) were filed in HTML, while 10% (6,333) were filed in ASCII format. As shown in Table 2, in 2018, more filings were made in HTML than ASCII format, with the exception of filings on Form N-8B-2 and Form S-6 where more filings were made in ASCII than HTML format.

<sup>304</sup> We note that, in addition to operating companies, registered investment companies file proxy materials as well.

**Table 2: Number of Potentially Affected Filings from January 1, 2018 to December 31, 2018**

	Number of HTML Filings	Number of ASCII Filings
N-1A	42,316	329
N-2	1,514	20
N-3	26	9
N-4	5,374	650
N-5	0	0
N-6	1,614	190
N-8B-2	1	3
N-14	271	0
N-CSR	6,575	134
S-6	446	4,998
<b>Total</b>	<b>58,137</b>	<b>6,333</b>

The amendments will 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 (347 in HTML and 53 in ASCII) submitted in 2017 that may be affected by the 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).

**Table 3: Number of Exhibits in Sampled Filings<sup>305</sup>**

	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	34.8	0	2.1	0	32.8	0	203

<sup>305</sup> Relative to the random sample in Table 3 of the Proposing Release, the random sample in Table 3 of this release excludes definitive materials filed under the Securities Act Rule 497 because these materials do not include exhibits.

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 amendments.

The random sampling did not result in any Forms N-5 and N-8B-2 being drawn.

N-2	20.9	24	4.9	3	16	12	7
N-3	171.5	171.5	14	14	157.5	157.5	2
N-4	58.2	37.5	3.1	3	55.1	35	24
N-5	NA	NA	NA	NA	NA	NA	0
N-6	183	183	14	14	169	169	1
N-8B-2	NA	NA	NA	NA	NA	NA	0
N-14	19.5	19.5	8.5	8.5	11	11	2
N-CSR	2.3	2	2.1	2	0.2	0	120
S-6	6.8	8	2	2	4.8	4	41
All Filings	24.1	2	2.3	2	21.8	0	400

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

Disclosure requirements involve trade-offs between benefits to investors in terms of reducing information asymmetries and costs to registrants associated with producing disclosure. While the amendments will apply to all registrants subject to the regulation, the trade-offs between the costs and benefits of disclosure requirements will vary across different types of registrants. For example, because many of the costs associated with disclosure do not vary with firm size, smaller companies may have higher disclosure costs in proportion to their revenues. Smaller companies also may have relatively higher disclosure benefits.<sup>306</sup> While the fixed costs

<sup>306</sup> Based on a review of filings, the Commission observed in a recent rulemaking that approximately 39% of registrants qualified as smaller reporting companies. See *Smaller Reporting Company Definition*, Release No. 33-10513; 34-83550; File No. S7-12-16 (Sept. 10, 2018), available at <https://www.sec.gov/rules/final/2018/33-10513.pdf>. Literature provides evidence consistent with the idea that the costs of disclosure requirements can be higher for smaller than larger firms. See, e.g., Engel, E., Hayes, R.M., & Wang, X., *The Sarbanes-Oxley Act and firms' going private decisions*. 44 J. OF ACC. AND ECON. 116, 116–145 (2007). Literature also provides some evidence that the benefits of disclosure requirements can be higher for smaller firms. See, e.g., Eleswarapu, V.R., Thompson, R., & Venkataraman, K., *The Impact of Regulation Fair Disclosure: Trading Costs and Information Asymmetry*. 39 J. OF FIN. AND QUANT. ANAL. 209, 209–225 (2004).

of disclosure requirements typically constitute a higher percentage of revenues for smaller companies than for larger companies, 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 companies. The costs of disclosure requirements can 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.

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

In this section, we evaluate the broad economic effects of the amendments, including a discussion of their impact on efficiency, competition, and capital formation. The amendments will discourage repetition and disclosure of information that is immaterial (*see, e.g.*, amendments to Item 102 and Instruction 1 to Item 303(a)); will decrease investors' information processing costs (*see, e.g.*, Rule 411, Rule 12b-23, and Rule 0-4); and will decrease registrants' costs to prepare filing materials (*see, e.g.*, amendment to Item 601(b)(10)). The amendments modify a well-established and robust disclosure regime that has existed for many years. As a result, we expect the aggregate impact of the amendments (in the form of more accurate share prices, better accountability of managers, and increased capital market liquidity) to be incremental to the effects that have already been realized from the existing disclosure regime.

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 should generally benefit from the amendments because they are designed to simplify the requirements and resulting content of existing disclosures while still providing all material information. We believe that changes to the

requirements will result in improved presentation of information, which we expect to increase the usefulness of the disclosures for investors and generally lower the regulatory burden (and compliance costs) for registrants. In addition, we expect that improving the information environment with modernized and simplified disclosures for all filers will 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 do not expect that the amendments will have a substantial effect on competition.

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

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 amendments could result in a loss of some information in certain cases, as discussed below. However, we believe the potential loss of information would be mitigated by the fact that registrants will continue to be required to provide material information, as may be necessary to

make the required statements, in the light of the circumstances under which they are made, not misleading.<sup>307</sup>

**C. Economic Analysis of the Specific Amendments: Amendments that Clarify, Streamline, or Update Existing Rules**

**1. Amendments 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.<sup>308</sup> The amendments to Item 102 will clarify that a description of property is required only to the extent physical properties are material to the registrant and will make other clarifying amendments.<sup>309</sup>

The amendments will not modify the Item 102 requirements for companies in the mining, real estate, and oil and gas industries.

The main benefit of the amendments will be to reduce the amount of disclosure that is not material by emphasizing materiality and harmonizing the rule's thresholds for disclosure. The amendments also can facilitate compliance and avoid any confusion associated with different disclosure standards. The reduction in regulatory burden due to the amendments to Item 102 may extend to approximately 6,300 registrants.<sup>310</sup>

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<sup>307</sup> See Rule 12b-20 [17 CFR 240.12b-20] and Rule 408(a) [17 CFR 230.408(a)].

<sup>308</sup> See FAST Act Report, *supra* note 7, at Recommendation B.1. See also Concept Release, *supra* note 9, 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>.

<sup>309</sup> See *supra* Section II.B.1.

<sup>310</sup> We derive this number by taking the average number of registrants filing Forms 10-K between 2014 and 2018 as reported in Table 1 and excluding all companies in the mining, oil and natural gas, and real estate industries

When Item 102 was originally adopted, registrants were more likely than they are today to maintain large physical properties and other assets, such as manufacturing plants.<sup>311</sup> For example, today's technology firms and finance firms tend to hold substantially less real estate than manufacturing firms held in the 1980s. The amendment to Item 102 accounts for this change in the nature of enterprise by clarifying that disclosure about a physical property need only be provided to the extent that it is material to the registrant. The risk of loss of information important for investment and voting decisions under the amendment is mitigated by the fact that Item 102 explicitly requires disclosure of material information and the fact that registrants may continue to 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 and Item 5 of Form 20-F)**

We are adopting a series of amendments to Item 303.<sup>312</sup> In this section, we discuss all amendments to Item 303 that are intended to clarify the rule's requirements, while in Section IV.D.1. below, we discuss amendments to 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

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as of 2018. *See infra* Section VII.C.1.a. for a discussion of the estimated reduction in paperwork burden as a result of the amendments to Item 102.

<sup>311</sup> Since 1935, we have required disclosure similar to that required under Item 102. *See* Release No. 33-276 (Jan. 14, 1935) [*not published in the Federal Register*].

<sup>312</sup> *See supra* Section II.A.1.a.iii.

reference to the five-year selected financial data may be necessary where trend information is relevant.

We are adopting as proposed the revision to Instruction 1 of Item 303 that eliminates the reference to year-to-year comparisons. Instruction 1 will now state that registrants may use any presentation that in the registrant's judgment enhances a reader's understanding of the registrant's financial condition, changes in financial condition, and results of operations, without suggesting that any one mode of presentation is preferable to another. We are also deleting the reference to five-year selected financial data in Instruction 1 to Item 303(a) as proposed.

These 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 and allows registrants to omit information that is not material. One potential cost associated with this aspect of the amendment is that, to the extent the amendments lead to disclosure that varies more across firms and across a single firm's filings, they also may 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 adopting changes to Form 20-F similar to the changes to Item 303(a).<sup>313</sup> 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 amendments to Form 20-F are therefore similar to those for the amendments to Item 303(a) described above.

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<sup>313</sup> See *supra* Section II.A.1.b.iii.



### 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 relocating Item 503(c) from Subpart 500 to Subpart 100 of Regulation S-K.<sup>314</sup> 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 amendments will eliminate the risk factor examples that are enumerated currently in Item 503(c).<sup>315</sup>

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

With respect to the elimination of the examples in Item 503(c), we believe that this may prompt registrants to more carefully evaluate and classify their risk exposures, which can ultimately benefit investors through more specific and relevant risk factor disclosures. In particular, the elimination of the examples in Item 503(c) can benefit investors because providing examples might anchor or skew the registrant's risk analysis in the direction of the examples.<sup>316</sup>

An alternative to the 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

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<sup>314</sup> See *supra* Section II.B.4.b.

<sup>315</sup> See *id.*

<sup>316</sup> 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. 1124–1131 (1974).

discourage generic or “boilerplate” disclosures as effectively as the 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 amending Rule 405 to define the term “sub-underwriter” to clarify its application in Item 508 of Regulation S-K.<sup>317</sup> We believe that defining the term “sub-underwriter” will reduce compliance costs by helping registrants to more easily determine what disclosure is required under Item 508. We also believe that a defined term can help investors better understand the role of “sub-underwriters” in the offering process. Because the amendment merely clarifies an existing disclosure requirement, we believe any incremental costs would be nominal.<sup>318</sup>

**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. We are

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<sup>317</sup> See *supra* Section II.B.4.c.

<sup>318</sup> See *infra* Section VII.C.3.a.

amending Item 601(b)(10)(i) to limit the two-year look back test to “newly reporting registrants,” as that term is defined in the proposed revision to Instruction 1 of Item 601(b)(10).<sup>319</sup>

We expect that the amendments will streamline reporting obligations while maintaining investor protection. 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 will marginally reduce their compliance burdens because they will not need to re-file (or incorporate by reference) agreements that were previously filed and are no longer in effect.<sup>320</sup> At the same time, investors will continue to have access to any material agreements that a registrant previously filed on EDGAR.

#### **f. Amendments with a Minor or No Effect on Disclosure**

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

- Item 401 – amendment will 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.<sup>321</sup>
- Item 405 – amendment will 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.<sup>322</sup>

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<sup>319</sup> See *supra* Section II.B.5.c.

<sup>320</sup> See *infra* Section VII.C.1.d.ii. for a discussion of the estimated reduction in paperwork burden as a result of the amendment to Item 601(b)(10)(i).

<sup>321</sup> See *supra* Section II.B.2.a. See also *infra* Section VII.C.1.c. for a discussion of the estimated reduction in paperwork burden as a result of the amendment to Item 401.

- Item 501(b)(1) – amendment will eliminate the portion of the item that discusses when a name change may be required and the exception to that requirement.<sup>323</sup>
- Item 501(b)(3) – amendment will allow registrants to move details of an offering price method or formula from the prospectus cover page to another location in the prospectus; the amendment also will 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.<sup>324</sup>
- Item 501(b)(10) – amendment will streamline the prospectus legend requirements.<sup>325</sup>
- Incorporation by Reference – amendments will (i) provide clearer guidance on cross-referencing and (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. With respect to cross-referencing or incorporating by reference to non-financial statement information from the financial statements, the amendments provide that incorporating by reference, or cross-referencing to, information

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<sup>322</sup> See *supra* Section II.B.2.b. The amendment will also eliminate the requirement for reporting persons to furnish Section 16 reports to registrants, which could ease the compliance burden on reporting persons. See *infra* Section VII.C.1.c. for a discussion of the estimated reduction in paperwork burden as a result of the amendment to Item 405.

<sup>323</sup> See *supra* Section II.B.4.a.i. The amendment to Item 501(b)(1) is not expected to meaningfully affect paperwork burdens. See *infra* Section VII.C.3.a.

<sup>324</sup> See *supra* Section II.B.4.a.ii. The amendment to Item 501(b)(3) is not expected to meaningfully affect paperwork burdens. See *infra* Section VII.C.3.a.

<sup>325</sup> See *supra* Section II.B.4.a.iv. The amendment to Item 501(b)(10) is not expected to meaningfully affect paperwork burdens. See *infra* Section VII.C.3.a.

outside of the financial statements is only permitted when permitted or required by the Commission's rules, U.S. GAAP, or IFRS.<sup>326</sup>

- Rule 312 – amendment will not affect disclosure because the temporary accommodation that filers can post static pool disclosures on an Internet website in lieu of filing the information on EDGAR lapsed in June 30, 2012. The amendment also will not affect recordkeeping costs because the requirement to retain all versions of the information provided through the website lapsed in June 30, 2017.<sup>327</sup>

We believe that the above amendments, which will alter existing disclosure practices only to a minor degree, will allow registrants to improve the readability and navigability of disclosure documents and reduce repetition. Because the amendments do not significantly change the required disclosures and continue to elicit all material information, we do not envision any significant incremental costs associated as a result of the amendments.

An alternative amendment that we considered was to allow registrants to exclude item numbers and captions or to create their own captions tailored to their disclosure in Form 10, Form 10-K, and Form 20-F. The benefit of such an amendment would be that it potentially would 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. Nevertheless, as noted by commenters, this amendment potentially would hamper the ability of investors to navigate filings, locate information important to them, and compare information across registrants.

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<sup>326</sup> See *supra* Sections II.A.3.c. and II.B.6. The amendments governing incorporation by reference are not expected to meaningfully affect paperwork burdens. See *infra* Section VII.C.3.b.

<sup>327</sup> See *supra* Section II.D.

Another alternative that we considered was to require registrants to include in the exhibit of all of their subsidiaries the LEI, if one has been obtained, of the registrant and each subsidiary listed, and require the LEIs to be tagged using Inline XBRL. The benefits of such an amendment would be that it potentially would allow investors to use LEIs to more quickly and precisely identify registrants and their subsidiaries, and thus better understand relationships between interrelated companies and the associated risks.<sup>328</sup> Nevertheless, as noted by some commenters, it would be costly and time consuming to acquire and maintain LEIs, particularly for registrants with numerous subsidiaries or affiliates operating globally, while at the same time LEIs may not provide additional material information to investors.<sup>329</sup>

## **2. Amendments to Update Rules to Account for Subsequent Developments**

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

- Item 407(d) – amendment will update the outdated reference to AU sec. 380 in Item 407(d)(3)(i)(B).<sup>330</sup>
- Item 407(e) – amendment will update requirements for compensation committee disclosure to exclude EGCs because they are not required to include a CD&A.<sup>331</sup>
- Item 512 – amendment will eliminate certain undertakings that are redundant and obsolete.<sup>332</sup>

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<sup>328</sup> See *supra* notes 282 and 283.

<sup>329</sup> See *supra* notes 284 and 285.

<sup>330</sup> See *supra* Section II.B.3.a. See also *infra* Section VII.C.1.c. for a discussion of the estimated reduction in paperwork burden as a result of the amendment to Item 407(d).

<sup>331</sup> See *supra* Section II.B.3.b. See also *infra* Section VII.C.1.c for a discussion of the estimated reduction in paperwork burden as a result of the amendment to Item 407(e).

We believe that the amendments listed above will 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 amendments because the substance of the rules will not change.

**D. Economic Analysis of the Specific Amendments: Amendments that Simplify the Disclosure Process or Eliminate Disclosures**

**1. Management’s Discussion and Analysis (Item 303 and Item 5 of Form 20-F)**

We are revising Instruction 1 to Item 303(a) and Item 5 of Form 20-F to allow registrants who are providing financial statements covering three years in a filing to omit discussion of the earliest of the three years if such discussion was already included in any other of the registrant’s prior filings on EDGAR that required disclosure in compliance with Item 303 of Regulation S-K or Item 5 of Form 20-F; provided, that registrants electing not to include a discussion of the earliest year in reliance on this instruction identify the location in the prior filing where the omitted discussion may be found.<sup>333</sup>

We believe that the main economic benefit of the amendments to Item 303 and Item 5 of Form 20-F will be to simplify and modernize MD&A while still providing all material information. This is intended to 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

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<sup>332</sup> See *supra* Section II.B.4.d. The amendment to Item 512 is not expected to meaningfully affect paperwork burdens. See *infra* Section VII.C.3.a.

<sup>333</sup> See *supra* Section II.A.1.a.iii.

produce, eliminating the requirement to discuss the earliest year financial statements in some circumstances can meaningfully reduce compliance costs for registrants.<sup>334</sup>

One potential cost of the amendments is that investors may receive less information about earlier period financial results within a filing. Although previously disclosed information can provide helpful context for the new information being disclosed, this information would have been incorporated into market prices of publicly traded firms when it was originally presented. In addition, registrants electing not to include a discussion of the earliest year in reliance on this instruction will be required to identify the location in the prior filing where the omitted discussion may be found, which will mitigate the omission of the discussion in the filing at issue.

## **2. Information Omitted from Exhibits**

Item 601(a)(5), as amended, will permit registrants to omit schedules and attachments to all exhibits under Item 601 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.<sup>335</sup> The amendments also will require registrants to provide with each exhibit a list briefly identifying the contents of all omitted schedules and attachments. In addition, registrants will be required to provide, on a supplemental basis, a copy of any of the omitted schedules or attachments to the Commission staff upon request. We are also adding comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A, the investment company registration forms, and Form N-CSR.

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<sup>334</sup> See *infra* Section VII.C.1.b for a discussion of the estimated reduction in paperwork burden as a result of the amendments to Item 303(a) and Item 5 of Form 20-F.

<sup>335</sup> See *supra* Section II.B.5.b.i.



Allowing registrants to omit schedules and attachments that are not material to all exhibits should lower their filing costs. The omission of schedules that are not material will also help investors more clearly focus on the material disclosures.

We are unable to estimate the number of schedules and attachments that will be omitted as a result of the amendments of Item 601(a)(5), Item 1016 of Regulation M-A, and the investment company registration forms because we cannot determine whether a schedule and attachment contains material information without additional information from registrants.<sup>336</sup> Nevertheless, we believe that the number of schedules and attachments that will be omitted as a result of the amendments likely will be small. The reason is that Item 601(a)(5), Item 1016 of Regulation M-A, and the investment company registration forms only permit schedules and attachments that contain no material information to be omitted, and we believe that the majority of the schedules and attachments contain at least some material information and thus cannot be omitted. Consequently, while there will be some reductions in filing costs associated with the amendments, any such reductions likely will be small.

Item 601(a)(6), as amended, will permit registrants to omit PII without submitting a confidential treatment request under Rule 406 or Rule 24b-2.<sup>337</sup> Under the amendment, registrants also will not be required to provide an analysis in order to redact PII from exhibits. We are also adding comparable provisions to the exhibit requirements of Item 1016 of Regulation M-A and the investment company registration forms. Since the amendments leave

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<sup>336</sup> See *infra* Section VII.C.1.d.i.2 for a discussion of the reduction in paperwork burden as a result of the amendments to Item 601(a)(5), Item 1016 of Regulation M-A, and the investment company registration forms. While there will be some reduction in burden associated with these amendments, we do not believe the reduction will be significant enough to warrant an adjustment to our burden estimates.

<sup>337</sup> See *supra* Section II.B.5.b.ii.

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 received very few confidential treatment requests in reliance on the FOIA exemption concerning PII. As an illustration, in fiscal year 2018, the Commission received 14 confidential treatment requests pursuant to this FOIA exemption, out of which 10 were granted. Presumably, most registrants are currently taking advantage of the existing staff position that PII may be omitted without filing a confidential treatment request. As a result, we do not expect that codifying this accommodation will significantly alter existing disclosure practices or will significantly reduce the costs associated with preparing analysis and confidential treatment requests to omit PII.<sup>338</sup>

We are also amending 601(b)(10) and (2) and certain related requirements in specified disclosure forms for which Item 601(b)(10) does not apply to permit registrants to omit confidential information in material contract exhibits that is both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed, without submitting a confidential treatment request.<sup>339</sup> The disclosure forms for which Item 601(b)(10) does not apply and that will be affected by the amendment are Forms 20-F, 8-K, N-1A, N-2, N-3, N-4, N-5, N-6, N-8B-2, N-14, and S-6. Instead of requesting confidential treatment, registrants will 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

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<sup>338</sup> See *infra* Section VII.C.1.d.i.3 for a discussion of the reduction in paperwork burden as a result of the amendments related to PII. We believe that the amendments will result in some incremental reduction in burden, although we do not believe the reduction will be significant enough to warrant an additional adjustment to our burden estimates.

<sup>339</sup> See *supra* Section II.A.2.c.

information is omitted from the filed version of the exhibit. The registrant will also be required to indicate with brackets where the information is omitted from the filed version of the exhibit.

Registrants can be asked by the Commission staff to provide on a supplemental basis an unredacted copy of the exhibit. The staff also can request that the registrant provide an analysis of why the redacted information is both (i) not material and (ii) would likely cause it competitive harm if publicly disclosed. Registrants may request confidential treatment of this supplemental information pursuant to Rule 83 while it is in the possession of the staff.

The amendment will significantly reduce the costs associated with preparing confidential treatment requests and expedite the filing process.<sup>340</sup> The largest cost associated with the confidential treatment request process is the cost to prepare the letter and application for the request, which can require substantial legal analysis. The amendment of Items 601(b)(10) and (2) will eliminate the costs associated with preparing confidential treatment requests, except for cases when Commission staff asks the registrant to provide an analysis of why the redacted information is immaterial and would likely cause the registrant competitive harm if publicly disclosed.

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.<sup>341</sup> A commenter on the Proposing Release mentioned that “[d]uring [its] 2017 fiscal year, [it] submitted 39 confidential treatment requests, and [it] submitted a total of 17 confidential treatment requests during the first two quarters

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<sup>340</sup> See *infra* Section VII.C.1.d.i.1 for a discussion of the estimated reduction in paperwork burden as a result of the amendments related to confidential information in material contracts.

<sup>341</sup> See letter from Fenwick.

of [its] 2018 fiscal year. Attorneys and paralegals at [the] company spend an average of 80 hours each quarter preparing redacted exhibits and related confidential treatment requests.”<sup>342</sup>

According to another commenter, any cost savings likely will be more pronounced for smaller companies “because smaller reporting companies have a lower threshold for determining whether a contract is material and therefore required to be filed publicly in the first place” and for companies in certain industries that require confidential treatment more frequently (*e.g.*, biotechnology).<sup>343</sup>

Because more than 90% of the confidential treatment requests granted by the Commission in fiscal year 2018 were made in reliance on the FOIA exemption concerning competitive harm, the amendments 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%. This cost reduction will be mitigated by the fact that registrants will continue to incur costs associated with preparing the redacted exhibits for filing and negotiating with counterparties over what terms of the agreement can be publicly disclosed. In addition, this cost reduction partially will be offset by the amendment’s provision that the staff may request an analysis similar to the current competitive harm analysis. Registrants will incur costs to prepare and provide this analysis in response to any request from the staff.

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<sup>342</sup> The 80-hour burden estimate provided by the commenter includes both time spent to prepare redacted exhibits and time spent to prepare confidential treatment requests. Under the amendments to Items 601(b)(10) and (2), registrants will continue to spend time preparing redacted exhibits to file with the Commission, regardless of whether they will submit a confidential treatment request for those exhibits. Hence the 80-hour burden estimate likely overstates any cost savings associated with removing the need to submit a confidential treatment request under the amendments to Items 601(b)(10) and (2). *See* letter from FedEx Corporation.

<sup>343</sup> *See* letter from Reed Smith.

One potential cost of the 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 will be rare. Over the past two fiscal years, about 11% of the confidential treatment requests granted by the Commission were revised by the registrant in response to staff comments to reduce and/or modify the requested redactions. In addition, 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% were withdrawn because the staff determined that the information likely was material to investors.<sup>344</sup> During this time, on average, approximately 95% of confidential treatment requests filed were granted, and requests were rarely denied.<sup>345</sup> Also during the past five fiscal years, on average, approximately 11% 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 overly broad redactions.<sup>346</sup> Under the amendments, the Commission staff will continue its selective review of

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<sup>344</sup> The following confidential treatment requests were received and withdrawn for likely materiality during the last five fiscal years:

2018: 1,239 received and approximately 2 withdrawn;  
2017: 1,226 received and approximately 4 withdrawn;  
2016: 1,271 received and approximately 7 withdrawn;  
2015: 1,369 received and approximately 14 withdrawn; and  
2014: 1,413 received and approximately 19 withdrawn.

<sup>345</sup> In fiscal years 2018, 2017, 2016, and 2015, no CTRs were denied. In fiscal year 2014, one CTR was denied. On average, during the last five fiscal years, approximately 95% of confidential treatment requests were granted 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.

<sup>346</sup> Confidential treatment requests revised based on materiality and/or overbroad redactions in fiscal years 2018, 2017, 2016, 2015, and 2014 were approximately 133, 137, 119, 139, and 183, respectively.

registrant filings and will selectively assess whether redactions from exhibits appear to be limited to information that is not material and that would likely cause the registrant competitive harm if publicly disclosed. This selective review process will mitigate the risk that material information may be redacted from Commission filings as a result of the proposed amendments.

**E. Economic Analysis of the Specific Amendments: Amendments 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 amending 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.<sup>347</sup> The amendments will 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. Any modifications and amendments during a fiscal year to the information called for by Item 202 will 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 better understand their exposure to risks and their control rights. Currently, this information is not always easy to locate because it requires cross-referencing to the date of the original offering of each type of security, and in

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<sup>347</sup> See *supra* Section II.B.5.a.

the cases of companies that have not issued new securities since Item 202 came into effect, this information may not be available.<sup>348</sup> Requiring Item 202 disclosure as an exhibit to annual reports will improve investors' access to information about their rights as security holders, thereby facilitating more informed investment and voting decisions. This requirement also will level the playing field across registrants because the same type of information will be available for all registrants' securities.<sup>349</sup>

The requirements will impose some incremental compliance costs for registrants to include the additional disclosure with their annual reports.<sup>350</sup> Table 1 above shows that on average approximately 7,600 registrants file Form 10-K each year and therefore will 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 will 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.<sup>351</sup>

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<sup>348</sup> See letter from SIFMA.

<sup>349</sup> *See id.*

<sup>350</sup> *See infra* Section VII.C.2.b. for a discussion of the estimated increase in paperwork burden as a result of the amendment to Item 601(b)(4).

<sup>351</sup> One commenter suggested that without the option to incorporate by reference "preparation of new exhibits by a registrant with multiple classes of registered debt securities would substantially exceed the 0.5 hours of paperwork burden estimated on page 158 of the proposing release, since exhibit preparation would require making conforming edits to the 'Description of Notes' for each class of security and might also involve combining disclosure from a base prospectus and prospectus supplement into one narrative. We also anticipate that a registrant would request outside transaction counsel to review the exhibit, increasing the cost and preparation time." *See* letter from Davis Polk. Another commented, however, argued that "[a]lthough there will be an initial burden (in drafting new disclosure or expanding old/existing disclosure) for issuers with securities that caused them to become subject to Section 12 before Item 202 came into effect, in those cases this burden will be a one-time event, and in all other cases registrants will only need to copy the Item 202 from the offering of each Section 12 registered security to the Item 202 annual report exhibit." *See* letter from SIFMA.

## 2. Tagging Cover Page Data

We are requiring registrants to tag all of the information on the cover page of Form 10-K, Form 10-Q, Form 8-K, Form 20-F, and Form 40-F using Inline XBRL.<sup>352</sup> To implement the cover page tagging requirements, we are adding 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 revising Rule 11 of Regulation S-T to add the term “Cover Page Interactive Data File.” In addition, we are amending the cover pages of these forms to include the trading symbol for each class of the registrant’s registered securities.<sup>353</sup>

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 can decrease the costs to investors for implementing quantitative data analysis. In addition, relevant information will be available more quickly, at a more granular level, with greater accuracy, and

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<sup>352</sup> See *supra* Section II.B.7.a.

<sup>353</sup> 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, the amendments to these forms 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 revising the cover pages of Form 10-Q and Form 8-K to include this disclosure in addition to the trading symbol.



with greater efficiency.<sup>354</sup> We acknowledge that the amendment will impose additional costs on registrants but expect the additional burden to be small, given that registrants already furnish a substantial amount of information contained in these forms in a structured format.<sup>355</sup> The amendments will also facilitate future enhancements to the EDGAR system by utilizing the tagged information to reduce duplicative entry of information into both the filing and the submission header at the time of filing. One commenter stated that it would take 1-2 hours to complete tagging for a cover page, that tagging the cover page a second time would require less time, and that filers would be able to use their current XBRL tagging processes to perform the cover page tagging.<sup>356</sup> The same commenter indicated that the biggest challenge with the tagging requirements is that the legal department may be required to prepare certain filings whereas the finance department is responsible for preparing other filings, but that this issue will only affect certain companies.

An alternative to the Inline XBRL 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-

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<sup>354</sup> See letter from XBRL US and Morningstar. See XBRL Adopting Release, *supra* note 255, for a discussion of the benefits of data tagging. See also *Inline XBRL Filing of Tagged Data*, Release No. 33-10323 (Mar. 1, 2017) [82 FR 14282 (Mar. 17, 2017)], at n. 169 and Inline XBRL Adopting Release, *supra* note 258, at n. 71 for a discussion of academic research on the benefits of XBRL.

Some commenters questioned the extent to which the cost of data tagging for registrants outweighs the potential value to investors. See letters from CCMC, Financial Executives International, IMA, Nasdaq, Society for Corp. Gov., and UnitedHealth.

<sup>355</sup> See *infra* Section VII.C.2.c. for a discussion of the estimated increase in paperwork burden as a result of the requirement to tag cover page data.

<sup>356</sup> See letter from XBRL US.

fillable format within EDGAR. We are not adopting this approach because the Inline XBRL format provides 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 will help to ensure better data quality for investors. Inline XBRL also does 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.<sup>357</sup>

### **3. Amendments for Additional Disclosure with Minimal Additional Costs to Registrants**

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

- Incorporation by Reference – amendment will require hyperlinks internal to EDGAR for documents incorporated by reference.<sup>358</sup>
- Item 501(b)(4) – amendment will 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.<sup>359</sup>

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<sup>357</sup> Registrants that use Inline XBRL would incur costs to switch to a newer technology, if such technology became available. Nevertheless, based on our experience with the Inline XBRL voluntary filing program—when filers switched from XBRL to Inline XBRL—we believe any such switching costs likely would be minimal. *See* Inline XBRL Adopting Release, *supra* note 258.

<sup>358</sup> *See supra* Section II.B.6.b.ii. *See infra* Section VII.C.3.b. for a discussion of the effect on paperwork burdens as a result of this amendment.

<sup>359</sup> *See supra* Section II.B.4.a.iii. *See infra* Section VII.C.2.a. for a discussion of the estimated increase in paperwork burden as a result of the amendments to Item 501(b)(4).

Requiring registrants to include hyperlinks to information that is incorporated by reference can 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 and the updating of inaccurate hyperlinks for incorporated information will impose an additional compliance burden on registrants,<sup>360</sup> we do not expect this burden to be significant given that hyperlinks are relatively easy to implement and involve minimal cost and because Commission rules already require registrants to be familiar with hyperlinking.<sup>361</sup>

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” will benefit investors by helping them to better assess their trading costs. The disclosure will 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 will 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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<sup>360</sup> See *infra* Section II.B.6.b.ii for a discussion of hyperlinking requirements and the requirements to file an amendment to a document to correct an inaccurate hyperlink.

<sup>361</sup> See Exhibit Hyperlinks Adopting Release, *supra* note 10.

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

As discussed above, we are adopting HTML and hyperlinks requirements for filers of certain forms under the Investment Company Act.<sup>362</sup> Broadly speaking, we believe the amendments will reduce search costs for investors. In particular, we believe that exhibit hyperlinks will help investors and other users to access a particular exhibit more efficiently as they will 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 will 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. 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 will have greater benefits in the case of registrants that submit more filings.

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<sup>362</sup> See *supra* Sections II.B.6.b.ii and II.B.7.b.

As a result of the amendments, we expect that both HTML and ASCII registrants will incur compliance costs to include hyperlinks in their exhibit indexes. While the average cost itself of inserting a hyperlink is minimal, the total hyperlinking costs for registrants will 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) the number of exhibits filed or incorporated by reference in the filing.<sup>363</sup>

Filers reporting in ASCII will incur costs to switch to HTML, in addition to the costs of including hyperlinks in their exhibit indexes. As Table 2 above shows, during calendar year 2018, approximately 10% of the filings that will be affected by the amendments were filed in ASCII. The limited use of ASCII indicates that the final amendments will affect only a limited number of registrants on a one-time basis. While the registrants that file forms in ASCII that will be affected by the amendment to require HTML are primarily small entities, we expect that the costs of switching to HTML will not be significant because the cost of software with built-in HTML and hyperlink features is minimal. In addition, the costs associated with the HTML and hyperlinking requirements will be mitigated by the adoption of a transition period that is intended to provide investment company registrants time to prepare filings to include hyperlinks and mitigate the cost burdens related to switching over to HTML format.<sup>364</sup>

Overall, given the modest costs involved, we do not expect that the amendments will have significant competitive effects for registrants.

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<sup>363</sup> See *infra* Section VII.C.2.c. for a discussion of the estimated increase in paperwork burden as a result of the requirements related to HTML and hyperlinks.

<sup>364</sup> See *supra* Section V.

## VII. PAPERWORK REDUCTION ACT

### A. Background

Certain provisions of our rules and forms that would be affected by the amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>365</sup> We published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and have submitted these requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>366</sup> 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),<sup>367</sup>

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

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

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

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<sup>365</sup> 44 U.S.C. 3501 *et seq.*

<sup>366</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>367</sup> 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.

“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);

“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);  
“Form N-8B-2” (OMB Control No. 3235-0186); 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, and/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.

As described in more detail above, we are adopting amendments 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 the Commission's disclosure documents and discourage repetition and disclosure of immaterial information. In addition, we are adopting 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 amendments that will require certain investment company filings to be submitted in HTML format.

#### **B. Summary of Comment Letters and Revisions to PRA Estimates**

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that directly addressed the PRA analysis of the proposed amendments.<sup>368</sup>

As discussed, we have made some changes to the proposed amendments as a result of comments received, but we do not expect any of those changes to meaningfully impact our assessment of the compliance burdens for purposes of the PRA. Accordingly, we have not revised the estimates from the Proposing Release of each amendment's impact on the per hour burden for each affected form. However, we have modified the overall burden estimates for each form to reflect the most current collections of information data from OMB and updated data on confidential treatment requests for the Commission's most recently completed fiscal year.

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<sup>368</sup> One commenter referenced the estimated increase of 0.5 hours to the paperwork burden associated with Form 10-K and Form 20-F expected to result from new Item 601(b)(4)(iv), but did not comment on the underlying analysis. *See* letter from Davis Polk.

## **C. Summary of the Amendments' Impact on Collections of Information**

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

### **1. Amendments Expected to Decrease Burdens**

#### **a. Description of Property (Item 102)**

The amendments to Item 102 of Regulation S-K make clarifying changes to the disclosure requirements of that item, including specifying that a description of property is only required to the extent physical properties are material to the registrant.<sup>369</sup> The staff has observed that the current disclosure standard may lead registrants, in some instances, to devote resources to providing disclosure about properties that are not material. Although the amendments to Item 102 are expected to help registrants avoid unnecessary disclosure, the amendments clarify, but do not reduce, existing requirements and therefore we do not believe they would significantly affect the paperwork burden associated with affected forms. Accordingly, we estimate that the paperwork burden will be reduced by 0.5 hours for each form affected by the amendments. We expect that Form S-1, Form S-4, Form 10, and Form 10-K will be affected by this amendment.

#### **b. Management's Discussion and Analysis (Item 303 of S-K and Item 5 of Form 20-F)**

The amendments to Item 303 and Item 5 of Form 20-F allow registrants, in some circumstances, to omit discussion of the earliest year from the MD&A.<sup>370</sup> The amendments also eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a) and

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<sup>369</sup> See *supra* Section II.B.1.

<sup>370</sup> See *supra* Section II.A.1.

clarify that registrants may use their discretion in selecting the best format for their MD&A presentation.<sup>371</sup> The combined effects of these amendments will be to eliminate the burden on registrants to prepare and provide repetitive disclosure that is not material. The 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 amendments to simplify and clarify the MD&A requirements will reduce the paperwork burden associated with affected forms.

We estimate that the aggregate impact of the amendments will 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 corresponding amendments to Form 20-F will result in a four hour reduction each time information under Item 5 of that form is required. We expect that Form S-1, Form S-4, Form S-11, Form F-1, Form F-4, Form 10, Form 10-K, Form 10-Q, and Form 20-F will be affected by this amendment.

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

The amendments to Item 401, Item 405, and Item 407 of Regulation S-K simplify and modernize our executive officer, Section 16(a) compliance and corporate governance disclosure requirements. The amendments to Item 401 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.<sup>372</sup> The amendments to Item 405 allow registrants to rely on a review of Section 16 reports submitted on EDGAR rather than reports furnished to the registrant when providing

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<sup>371</sup> *See id.*

<sup>372</sup> *See supra* Section II.B.2(a).

disclosure about Section 16(a) compliance.<sup>373</sup> Finally, the amendments to Item 407 clarify the applicable auditing standard and the disclosure requirements for the compensation committees of EGCs.<sup>374</sup>

The amendments to Item 401, Item 405, and Item 407 clarify and streamline existing disclosure requirements, and in that respect are expected to marginally reduce compliance costs for registrants. We estimate that the amendments will 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 will be affected by this amendment.

#### **d. Exhibits**

##### **i. Information Omitted From Exhibits**

We are adopting several amendments to Item 601 of Regulation S-K, as well as the exhibit requirements of certain of the Commission's disclosure forms to which Item 601 does not apply.<sup>375</sup> This includes exhibits required by certain of the Commission's disclosure forms related to investment companies.<sup>376</sup> Many of these amendments affect provisions related to the Commission's confidential treatment process.<sup>377</sup> As discussed in more detail below, we expect the annual internal burden hours and professional costs devoted to the confidential treatment process to decrease each time exhibit information is omitted or redacted in reliance on the amendments.

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<sup>373</sup> See *supra* Section II.B.2(b).

<sup>374</sup> See *supra* Section II.B.3.

<sup>375</sup> See *supra* Sections II.A.2. and II.B.5.

<sup>376</sup> See *id.*

<sup>377</sup> *Id.*

## 1) Confidential Information in Material Contracts

The amendments will, in most cases, eliminate the need for registrants to submit a CTR when they redact information from material contracts in reliance on the FOIA exemption for information that likely would result in competitive harm to the registrant if disclosed.<sup>378</sup> Accordingly, our assumption is that implementation of the amendments will significantly reduce the number and corresponding costs of confidential treatment requests received by the Commission. However, it is difficult to predict with certainty the magnitude of the reduction because, as noted, the Commission and its staff will retain the discretion to comment on a registrant's redactions from its exhibits and, where appropriate, request an analysis similar to the competitive harm analysis that is currently required as part of the existing CTR application process.<sup>379</sup> If such a request is made, a registrant would incur costs to prepare and provide this analysis that may be on par with the costs typically associated with the existing CTR application process.<sup>380</sup> Although such costs would somewhat offset the reduction in burden resulting from the amendments, we believe that, in the aggregate, the amendments will nevertheless result in significant savings in time and money.

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

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<sup>378</sup> 5 U.S.C. 552(b)(4). *See supra* note 45.

<sup>379</sup> *See supra* Section II.A.2.

<sup>380</sup> We recognize that there will remain some burden associated with preparing redacted exhibits even if a CTR application is not required (for example, a registrant's determination of which terms in a material contract to redact involves time and effort, particularly if the registrant must negotiate with its counterparty to the contract regarding which terms to redact and which to make public; there may also be additional costs if outside legal advisors are involved). For that reason, when calculating the expected reduction in PRA burden, we did not make any adjustments to the burden associated with preparing redacted exhibits.

filing the related disclosure form. We estimate that the elimination of the need to prepare and submit a confidential treatment request in reliance on these amendments will 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<sup>381</sup> for an estimated 80% of registrants that retain outside counsel for this work.

In fiscal year 2018, over 90% of the CTR applications that were received by the Commission related to material contracts filed as exhibits requesting confidential treatment on the basis of FOIA exemption (b)(4),<sup>382</sup> in the following proportions: 39% were filed for Form 10-Q, 22% for Form 10-K, 12% for Form 8-K, 12% for Form S-1, 0% for Form S-3, 1% for Form S-4, 0% for Form S-11, 3% for Form 20-F, 1% for Form 10, 2% for Form F-1, 0% for Form F-3, and 0% for Form F-4. We are therefore ascribing changes in paperwork burdens and costs to these forms in these same proportions.

## **2) Schedules and Attachments to Exhibits**

The adoption of new Item 601(a)(5) in Regulation S-K<sup>383</sup> will permit registrants to omit entire schedules and attachments to exhibits required by Item 601, so long as the omitted schedules and attachments contain no material information and the omitted information is not otherwise disclosed in the exhibit or the disclosure document. The threshold for omission under

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<sup>381</sup> The \$4,000 cost estimate is calculated as follows: 10 hours x \$400 per hour of outside counsel work = \$4,000.

<sup>382</sup> *See supra* note 378. Less than 1% of the CTR applications that were received in fiscal year 2018 were related to exhibits filed with Investment Company Act forms. Accordingly, while there will be some reduction in burden associated with the Investment Company Act forms, we do not believe the reduction will be significant enough to warrant an adjustment to our burden estimates.

<sup>383</sup> *See supra* Section II.B.5.b.i.

new Item 601(a)(5) is lower than for omission under the amendment to Item 601(b)(10) discussed above, because the omission of schedules and attachments to exhibits under Item 601(a)(5) is not conditioned on the risk of the registrant suffering competitive harm if the information were to be disclosed. In addition to new Item 601(a)(5), we are adopting analogous amendments to Item 1016 of Regulation M-A,<sup>384</sup> Form 20-F,<sup>385</sup> Item 1.01 of Form 8-K,<sup>386</sup> certain investment company registration forms,<sup>387</sup> and Form N-CSR,<sup>388</sup> thereby allowing registrants to omit immaterial schedules and attachments to exhibits required by those other rules and forms.

For purposes of the Paperwork Reduction Act, we assume these amendments will result in some reduction in burden associated with the omission of immaterial schedules and attachments to exhibits, where applicable. In order to calculate the impact of these amendments, we considered as a baseline all exhibits with schedules and attachments that are currently filed under Item 601 of Regulation S-K, Item 1016 of Regulation M-A, Form 20-F, Item 1.01 of Form 8-K, and applicable investment company forms.<sup>389</sup> We did not include in this total, however, exhibits filed under Item 601(b)(2) of Regulation S-K, as that Item already permits registrants to omit immaterial schedules and attachments to required exhibits.

We then sought to estimate the percentage of all such schedules and attachments that contain no material information and for which the registrant has not otherwise disclosed such

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<sup>384</sup> See *supra* Section II.B.5.b.i., discussing the amended instructions to Item 1016 of Regulation M-A.

<sup>385</sup> See the Instructions to Exhibits in Form 20-F, as amended.

<sup>386</sup> See new Instruction 4 to Item 1.01 of Form 8-K.

<sup>387</sup> These are exhibits filed pursuant to Forms N-1A, N-2, N-3, N-4, N-5, N-6, N-14, N-8B-2, and S-6.

<sup>388</sup> See *supra* Section II.B.5.b.i.

<sup>389</sup> *Id.*

information elsewhere in the exhibit or disclosure filing. However, we are unable to reliably estimate the volume of schedules and attachments that could be omitted under these amendments, and therefore how many potential confidential treatment requests would be unnecessary, because this would depend, in part, on whether the schedules contain material information. As a result, there is no practicable way for us to determine with confidence which information in those attachments and schedules is immaterial and therefore eligible to be omitted. In any event, we believe the impact of the amendments on registrants' paperwork burden will be relatively minor, particularly in comparison to the impact of our amendments to 601(b)(10)(iv) and parallel amendments to Form 20-F, Item 1.01 of Form 8-K, and various investment company forms. Accordingly, while there will be some reduction in burden associated with these amendments, we do not believe the reduction will be significant enough to warrant an adjustment to our burden estimates. Consistent with the view stated in the Proposing Release, we believe this approach to be advisable in order to avoid overestimating the decrease in paperwork burden.

### **3) Personally Identifiable Information**

The adoption of new Item 601(a)(6) in Regulation S-K will permit registrants to omit PII from their exhibits without submitting a confidential treatment request.<sup>390</sup> In addition, we are adopting analogous amendments to Item 1016 of Regulation M-A,<sup>391</sup> Form 20-F,<sup>392</sup> Item 1.01 of Form 8-K,<sup>393</sup> certain investment company registration forms,<sup>394</sup> and Form N-CSR.<sup>395</sup>

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<sup>390</sup> See *supra* Section II.B.5.b.ii.

<sup>391</sup> See *supra* Section II.B.5.b.i., discussing the amended instructions to Item 1016 of Regulation M-A.

<sup>392</sup> See the Instructions to Exhibits in Form 20-F, as amended.

<sup>393</sup> See new Instruction 4 to Item 1.01 of Form 8-K.



For purposes of the Paperwork Reduction Act, we assume the amendments will result in some incremental reduction in burden, although we do not believe the reduction will be significant enough to warrant an additional adjustment to our burden estimates.

The exemption in FOIA that corresponds most closely to PII is FOIA Exemption 6, which covers information that, if disclosed, “would constitute a clearly unwarranted invasion of personal privacy.”<sup>396</sup> In recent years, the Commission has issued very few confidential treatment orders in reliance on FOIA Exemption 6. For example, in fiscal year 2018, only 14 confidential treatment requests were received by the Commission, out of which 10 were granted for documents containing PII. Presumably, most registrants are currently taking advantage of the existing staff position that PII may be omitted without filing a confidential treatment request. As a result, we do not expect that codifying this accommodation will significantly alter existing disclosure practices.

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

The amendment to Item 601(b)(10)(i) limits the two-year look back filing requirement for material contracts to newly reporting registrants.<sup>397</sup> Registrants that are not newly reporting registrants will not be required to comply with this filing requirement and thus will incur reduced compliance burdens. However, we believe that the current burden associated with the two-year look back requirement is minimal. Therefore, the amendments are not expected to result in a significant reduction of the paperwork burden associated with the affected forms.

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<sup>394</sup> See *supra* note 387.

<sup>395</sup> See *supra* Section II.B.5.b.ii.

<sup>396</sup> 5 U.S.C. 552(b)(6).

<sup>397</sup> See *supra* Section II.B.5.c.

We estimate that the paperwork burden will be reduced by 0.5 hours for each form affected by the amendment. We expect that Form 10, Form 10-K, Form 20-F, Form S-1, Form S-4, Form F-1, Form F-3, Form F-4, Form S-11, and Form SF-1 will be affected by this amendment.

## **2. Amendments Expected to Increase Burdens**

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

We are amending 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.<sup>398</sup> The amendments will incrementally increase the compliance burden on registrants by requiring them to provide disclosure about trading markets other than national exchanges. Because we are limiting the incremental disclosure to those trading markets where the registrant, 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 amendment will 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, and Form SF-3 will be affected by this amendment.

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<sup>398</sup> See *supra* Section II.B.4.a.iii.

### **b. Exhibits (Item 601(b)(4)(vi))**

New Item 601(b)(4)(vi) requires registrants to file an Item 202 description of their Exchange Act registered securities as an exhibit to Form 10-K.<sup>399</sup> Similarly, we are amending the instructions to exhibits in Form 20-F to provide a parallel requirement.<sup>400</sup>

We expect that the new requirements under Item 601(b)(4)(vi) will slightly increase the paperwork burden on registrants because registrants will be required to provide a description of registered securities annually. However, registrants will 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 amendments will increase the paperwork burden associated with Form 10-K and Form 20-F by 0.5 hours.

### **c. Manner of Delivery**

New Rule 406, new Item 601(b)(104), new paragraph 104 to “Instructions as to Exhibits” of Form 20-F and new Instruction 17 to “Information To Be Filed on this Form” of Form 40-F 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 amendments.<sup>401</sup> Although expanded data tagging will 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 have developed the internal resources or engaged outside professionals

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<sup>399</sup> See *supra* Section II.B.5.a.

<sup>400</sup> See *id.*

<sup>401</sup> See *supra* Section II.B.7.a.

to assist them in complying with existing data tagging requirements.<sup>402</sup> In this respect, we do not believe the cover page tagging requirement will result in significant additional burdens for registrants.

Accordingly, we estimate that the requirement to tag additional cover page items will 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 will be affected by the new rules and form amendments.

As described in more detail above, we are adopting amendments to Regulation S-T and certain of our forms used by investment companies to require investment companies to submit filings on those forms in HTML format and to include a hyperlink from each exhibit identified in the exhibit index of such forms. We anticipate that these amendments will increase the burdens and costs for investment companies to prepare and file the affected forms, but we believe the associated burdens will be small as an investment company preparing a filing, will already be preparing the exhibits and exhibit index for such filing and will have readily available all of the information necessary to create a hyperlink. For purposes of the PRA, we assumed that the average burden hours of requiring exhibit hyperlinks will vary based on the number of exhibits that are included with a filing. Based on the average and median number of exhibits shown in

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<sup>402</sup> As discussed above, the Commission recently adopted rules requiring operating companies that are currently required to submit financial statement information in XBRL and open-end management investment companies that are currently required to submit risk/return summary XBRL data to transition to Inline XBRL on a phased-in basis. The date of mandatory compliance with the Inline XBRL rules depends on the type of filer. *See* Inline XBRL Adopting Release, *supra* note 258. Because the Commission estimated the burden associated with the transition to Inline XBRL in that release, for purposes of this PRA analysis we only consider the incremental burden corresponding to our adoption of the amendments discussed in this release.

Table 3 above and the staff's experience, we estimate that the average burden for an investment company to hyperlink to exhibits will be one hour per response for each of the affected forms.

### **3. 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 amendments to Item 501(b)(1), Item 501(b)(3), and Item 501(b)(10) will, respectively, streamline company name disclosure requirements, explicitly allow registrants to include a clear statement on the cover page of the prospectus 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.<sup>403</sup> The amendments to Item 503(c) relocate the current risk factor disclosure requirements to Subpart 100 and eliminate the risk factor examples without substantively changing the underlying disclosure requirements.<sup>404</sup> The amendment to Item 508 defines the term “sub-underwriter” to clarify one aspect of the required disclosure about the plan of distribution for a registered securities offering.<sup>405</sup> The amendments to Item 512 eliminate certain undertakings that are redundant or obsolete.<sup>406</sup>

We believe these amendments will not meaningfully affect the paperwork burden associated with the affected forms because these amendments modernize and clarify certain

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<sup>403</sup> See *supra* Section II.B.4.a. The amendments also streamline 501(b) by combining paragraphs (b)(10) and (b)(11) without substantive change.

<sup>404</sup> See *supra* Section II.B.4.b.

<sup>405</sup> See *supra* Section II.B.4.c.

<sup>406</sup> See *supra* Section II.B.4.d.

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 amendments.

**b. Incorporation by Reference**

We are adopting amendments to simplify and modernize the rules and forms governing incorporation by reference. Under the amendments, certain existing requirements for incorporation by reference have been consolidated into Rule 411, Rule 12b-23, Rule 0-4, and Rule 0-6.<sup>407</sup> The amendments also eliminate several redundant or outdated requirements, including the rescission of rules under the Investment Company Act.<sup>408</sup> In addition, we are adopting amendments to our rules and forms that prohibit incorporation by reference or cross-referencing, in the financial statements, to information outside of the financial statements.<sup>409</sup> These amendments 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 will be offset by an estimated 0.5 hour increase in paperwork burden per affected form due to the amendments requiring registrants to include hyperlinks to information incorporated by reference when that information is available on EDGAR.<sup>410</sup> Accordingly, we are not making any adjustments to the paperwork burden of affected forms due to these amendments.

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<sup>407</sup> See *supra* Section II.B.6.

<sup>408</sup> *Id.*

<sup>409</sup> See *supra* Section II.A.3.

<sup>410</sup> See *supra* Section II.B.6.b.ii.

#### **D. Burden and Cost Estimates to the Amendments**

As discussed below, we expect that the amendments will, in the aggregate, reduce the paperwork burden on respondents. The change in burden, however, will differ depending on the form because not all of the amendments 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 annual responses by the estimated average amount of time it would take a registrant to prepare and review disclosure required under the 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 amendments are estimated to reduce the paperwork burdens associated with Form 10-K<sup>411</sup> and Form 10-Q as well as Schedule 14A and Schedule 14C.<sup>412</sup> For purposes of the PRA, we estimate that 75% of the burden of preparation for these Exchange Act reports is

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<sup>411</sup> 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.

<sup>412</sup> Schedule 14A requires that registrants, under certain circumstances, provide disclosure under Item 303. Our burden estimate for Schedule 14A assumes that registrants will duplicate the disclosure provided under this Item in the most recent Form 10-K and/or Form 10-Q.

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.<sup>413</sup>

Table 4 below illustrates the total annual compliance burden, in hours and in costs,<sup>414</sup> of the affected collections of information resulting from the amendments.<sup>415</sup>

**Table 4. Incremental Paperwork Burden under the Amendments for Exchange Act Forms**

	Current Annual Responses	Estimated 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	14,217,344	(31,040)	(21,872)	(9,168)	(\$3,667,150)
10-Q	22,907	22,907	3,241,957	(61,777)	(43,853)	(17,924)	(\$7,169,600)
8-K	118,387	118,387	685,255	176,170	132,903	43,267	\$17,306,800

**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 amendments are estimated to reduce the paperwork burden associated with Form S-1, Form S-3, Form S-4, Form S-11, Form F-1, Form F-4, Form 10, 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 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

<sup>413</sup> 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 will 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.

<sup>414</sup> For convenience, the estimated hour and cost burdens in the tables in this section have been rounded to the nearest whole number.

<sup>415</sup> The burdens associated with the amendments to the forms listed in Table 4, other than the confidential treatment request amendments, 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.



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 amendments.<sup>416</sup>

**Table 5. Incremental Paperwork Burden under the Amendments for Registration Statements.**

	Current Annual Responses	Estimated 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	150,998	(5,670)	(1,348)	(4,322)	(\$1,728,725)
S-3	1,657	1,657	196,930	(414)	(104)	(310)	(\$124,000)
S-4	551	551	565,079	(3,033)	(751)	(2,282)	(\$912,625)
S-11	64	64	12,514	(304)	(76)	(228)	(\$91,200)
SF-3	71	71	24,548	18	4	13	\$5,325
F-1	63	63	26,980	(548)	(123)	(425)	(\$169,925)
F-3	112	112	4,467	(28)	(7)	(21)	(\$8,400)
F-4	39	39	14,245	(107)	(27)	(80)	(\$32,175)
10	216	216	11,774	(880)	(217)	(664)	(\$265,400)
20-F	725	725	480,226	(1,991)	(480)	(1,511)	(\$604,575)
40-F	132	132	14,187	198	50	148	\$59,200

<sup>416</sup> The burdens associated with the amendments to the forms listed in Table 5, other than the confidential treatment request amendments, 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 Amendments for Securities Act and Exchange Act Forms**

	Current Burden		Revised Burden	
	Burden Hours (A)	Costs (B)	Burden Hours (C)	Costs (D)
10-K	14,217,344	\$1,896,280,869	14,195,472	\$1,892,613,719
10-Q	3,241,957	\$432,290,354	3,198,104	\$425,120,754
8-K	685,255	\$91,367,630	818,158	\$108,674,430
S-1	150,998	\$181,197,300	149,650	\$179,468,575
S-3	196,930	\$236,322,036	196,826	\$236,198,036
S-4	565,079	\$678,094,704	564,328	\$677,182,079
S-11	12,514	\$15,016,968	12,438	\$14,925,768
SF-3	24,548	\$29,457,900	24,552	\$29,463,225
F-1	26,980	\$32,375,700	26,857	\$32,205,775
F-3	4,760	\$5,712,000	4,753	\$5,703,600
F-4	14,245	\$17,093,700	14,218	\$17,061,525
10	11,774	\$14,128,888	11,558	\$13,863,488
20-F	480,226	\$576,270,600	479,746	\$575,666,025
40-F	14,187	\$17,025,360	14,237	\$17,084,560

**3. Form 8-A, Form 10-D, Form 40-F, Form F-7, Form F-8, Form F-10, and Form F-80**

The amendments to Form 8-A,<sup>417</sup> Form 10-D, Form F-7,<sup>418</sup> Form F-8,<sup>419</sup> Form F-10, and Form F-80<sup>420</sup> are not expected to meaningfully reduce the associated 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 amendments.

<sup>417</sup> 17 CFR 249.208a.

<sup>418</sup> 17 CFR 239.37.

<sup>419</sup> 17 CFR 239.38.

<sup>420</sup> 17 CFR 239.41.

#### **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, Form N-8B-2, and Form N-CSR**

The amendments to Regulation S-T that will require investment companies filing on Forms S-6, N-1A, N-2, N-3, N-4, N-5, N-6, N-14, N-8B-2, or N-CSR to submit these documents in HTML format and to include a hyperlink to each exhibit identified in the exhibit index of these documents are expected to increase the burdens and costs for investment companies that prepare and file these registration statements and reports. For purposes of the PRA, we estimated the average burden for an investment company to hyperlink to exhibits based on the median number of exhibits that are filed with an affected form.

The table below shows the changes in professional costs and burden hours from the burden estimates currently approved by OMB and the new burden estimates under the amendments. The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time—one hour—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 investment company at an average cost of \$400 per hour.<sup>421</sup>

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<sup>421</sup> 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. *See Exhibit Hyperlinks Adopting Release, supra* note 10, at 14139.

**Table 7. Incremental Paperwork Burden under the Amendments to Forms for Investment Companies**

Form	Current Annual Responses (A)	Estimated Number of Affected Responses	Current Burden Hours	Change in Burden Hours	Change in Company Hours	Change in Professional Hours	Change in Professional Costs
S-6	2,498	2,498	106,620	2,498	625	1,874	\$749,600
N-1A	6,002	6,002	1,596,749	6,002	1,501	4,502	\$1,800,800
N-2	166	166	73,250	166	42	125	\$50,000
N-3	20	20	2,500	20	5	15	\$6,000
N-4	1,653	1,653	343,117	1,653	413	1,240	\$496,000
N-5	1	1	117	1	0	1	\$400
N-6	472	472	85,269	472	118	354	\$141,600
N-14	192	192	97,280	192	48	144	\$57,600
N-CSR	6,898	6,898	174,085	6,898	1,725	5,174	\$2,069,600

**Table 8. Current and Revised Burdens under the Amendments to Forms for Investment Companies**

Form	Current Burden		Revised Burden	
	Burden Hours (A)	Costs (B)	Burden Hours (C)	Costs (D)
S-6	106,620	\$67,359,556	107,245	\$68,108,956
N-1A	1,596,749	\$129,338,408	1,598,250	\$131,139,008
N-2	73,250	\$4,668,396	73,292	\$4,718,196
N-3	2,500	\$164,144	2,505	\$168,944
N-4	343,117	\$36,308,889	343,530	\$36,804,789
N-5	117	\$10,000	117	\$10,400
N-6	85,269	\$5,316,892	85,387	\$5,364,092
N-14	97,280	\$4,498,000	97,328	\$4,517,200
N-8B2	40	\$40,000	88	\$40,300
N-CSR	174,085	\$3,129,984	175,810	\$5,199,384

## VIII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Final Regulatory Flexibility Analysis (“FRFA”) has been prepared in accordance with the Regulatory Flexibility Act (“RFA”).<sup>422</sup> It relates to amendments that modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms to

<sup>422</sup> 5 U.S.C. 601 *et seq.*

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. Need for, and Objectives of, the Amendments**

The purpose of the 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 amendments modernize and simplify these disclosure requirements by clarifying, consolidating, relocating and eliminating, or updating various Commission rules that govern public company disclosure. The amendments also modernize the rules by requiring cover page data to be tagged in a machine-readable format and requiring hyperlinks to be included in some documents filed on EDGAR. The amendments largely implement the staff’s recommendations in the FAST Act Report, as required by Section 72003(d) of the FAST Act. In addition, to provide for a consistent set of rules to govern incorporation by reference and hyperlinking, the Commission is also adopting parallel amendments to several rules and forms applicable to investment companies and investment advisers.<sup>423</sup>

**B. Significant Issues Raised by Public Comments**

In the Proposing Release, the Commission requested comment on any aspect of the Initial Regulatory Flexibility Analysis (“IRFA”), including how the proposed rule and form amendments can achieve their objective while lowering the burden on small entities, the number

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<sup>423</sup> The need for, and objectives of, the final rules are discussed in more detail throughout this release, particularly in Sections I and II, *supra*.

of small entities that would be affected by the proposed rule and form amendments, the existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis, and how to quantify the effects of the proposed amendments. We did not receive comments specifically addressing the IRFA. We did, however, receive one comment letter that addressed an aspect of the proposed amendments that could potentially affect small entities. Specifically, one commenter who supported the proposal to permit registrants to redact confidential information in some circumstances without submitting a confidential treatment request noted the benefits that would accrue in particular to smaller reporting companies.<sup>424</sup> This commenter stated that the time and expense involved in preparing requests for confidential treatment disproportionately burdens smaller reporting companies compared to larger companies because smaller companies have a lower threshold for determining whether a contract is material and must be publicly filed. In addition, the commenter asserted that the legal fees associated with the preparation of a confidential treatment request can be “daunting” for these companies.<sup>425</sup>

### **C. Small Entities Subject to the Amendments**

The amendments will apply to some registrants that are small entities. The RFA defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”<sup>426</sup> For purposes of the RFA, under our rules, an issuer, other than an investment company or an investment adviser, is a “small business” or “small organization” if it had total

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<sup>424</sup> See letter from Reed Smith.

<sup>425</sup> The commenter also mentioned emerging growth biotechnology companies undertaking an IPO, which it stated “are hardest hit by the arduous confidential treatment process.” *See id.*

<sup>426</sup> 5 U.S.C. 601(6).

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.<sup>427</sup> An investment company, including a business development company,<sup>428</sup> 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.<sup>429</sup> 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.<sup>430</sup>

We estimate that there are 1,171 issuers that file with the Commission, other than investment companies and investment advisers, that may be considered small entities.<sup>431</sup> In addition, we estimate that, as of June 2018, there were 116 investment companies that would be

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<sup>427</sup> See Securities Act Rule 157 [17 CFR 230.157] and Exchange Act Rule 0-10(a) [17 CFR 240.0-10(a)].

<sup>428</sup> 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].

<sup>429</sup> See Investment Company Act Rule 0-10(a) [17 CFR 270.0-10(a)].

<sup>430</sup> See Investment Advisers Act Rule 0-7(a) [17 CFR 275.0-7(a)].

<sup>431</sup> This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10-K, 20-F and 40-F, or amendments, filed during the calendar year of January 1, 2018 to December 31st, 2018. Analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics. The methodology used to estimate the number of small entities builds upon the methodology used in the Proposing Release. In the Proposing Release, the number of small entities excluded entities that filed Form 40-F and amendments to Forms 10-K, 20-F, and 40-F and was based on entities with fiscal periods ending between January 31, 2015 and January 31, 2016. See Proposing Release, *supra* note 5, at 7.

considered small entities.<sup>432</sup> Finally, we estimate that, as of June 2018, there were approximately 618 investment advisers that would be considered small entities.<sup>433</sup>

#### **D. Projected Reporting, Recordkeeping, and Other Compliance Requirements**

As noted above, the purpose of the amendments is to modernize and simplify the Commission's disclosure requirements and provide consistent incorporation by reference and hyperlinking rules for registrants, including investment companies and investment advisers. The majority of the amendments are expected to have a minor effect on existing reporting, recordkeeping and other compliance burdens for all issuers, including small entities.<sup>434</sup>

Many of the amendments simplify and streamline existing disclosure requirements in ways that are expected to reduce compliance burdens. Some of the amendments, like those that impose new data tagging,<sup>435</sup> hyperlinking,<sup>436</sup> or disclosure requirements<sup>437</sup> will increase compliance costs for registrants, and some of these costs could disproportionately affect small entities. For example, smaller investment company registrants currently reporting in ASCII are more likely to be impacted by the mandated use of HTML. While investment companies that

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<sup>432</sup> This estimate is based on staff review of data obtained from Morningstar Direct as well as data reported on Forms N-CEN, N-Q, 10-K and 10-Q filed with the Commission as of June 2018.

<sup>433</sup> This estimate is based on Commission-registered investment adviser responses to Form ADV, Item 5.F and Item 12.

<sup>434</sup> 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).

<sup>435</sup> *See, e.g., supra* Section II.B.7.a. (Tagging Cover Page Data).

<sup>436</sup> *See, e.g., supra* Section II.B.7.b. (Exhibit Hyperlinks and HTML Format for Investment Companies).

<sup>437</sup> *See, e.g., supra* Section II.B.4.a.iii. (Market for the Securities (Item 501(b)(4)).



file forms in ASCII will incur costs to switch to HTML, in addition to the costs of hyperlinking to exhibits, we expect that the burden to switch from ASCII to HTML will not be significant because the software tools to file in HTML format are now widely used and available at a minimal cost. In addition, during calendar year 2018, approximately 10% of the forms that will be affected by the amendments were filed in ASCII. The limited use of ASCII to file these forms indicates that the final amendments will affect only a limited number of registrants on a one-time basis.

Overall, for the reasons discussed elsewhere in this release, we do not expect these additional costs to be significant relative to existing compliance costs. Moreover, we expect that the benefits of the amended confidential treatment rules accruing to smaller reporting companies, who may be disproportionately burdened by the time and expense involved in preparing requests for confidential treatment,<sup>438</sup> will offset some of their compliance costs that are estimated to increase because of the amendments. The professional skills necessary to comply with the amendments include legal, accounting, and information technology skills.<sup>439</sup>

#### **E. Agency Action to Minimize Effect on Small Entities**

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

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<sup>438</sup> See *supra* note 424.

<sup>439</sup> The final rules are discussed in detail in Section II, *supra*. We discuss the economic impact, including the estimated compliance costs and burdens, of the final rules in Section VI (Economic Analysis) and Section VII (Paperwork Reduction Act), *supra*.

- 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 amendments clarify, consolidate and simplify compliance and reporting requirements for small entities and other registrants. As discussed above, we believe the majority of the amendments simplify and streamline disclosure requirements in ways that are expected to reduce compliance burdens.<sup>440</sup> We do not believe that the amendments will impose any significant new compliance obligations. Accordingly, we generally do not believe it is necessary to establish different compliance and reporting requirements or timetables or to exempt small entities from all or part of the amendments.<sup>441</sup> 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 amendments would not alter these existing accommodations.

Finally, with respect to using performance rather than design standards, the amendments generally use design rather than performance standards in order to promote uniform filing

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<sup>440</sup> See *supra* Sections VI (Economic Analysis) and VII (Paperwork Reduction Act).

<sup>441</sup> As discussed above in Section V (Compliance Dates), the compliance date schedule for cover page tagging will be consistent with the scaled phase-in of Inline XBRL generally. Also, as discussed in Section V, we are adopting a compliance date of April 1, 2020 for registration statement and Form N-CSR filings to be made in HTML format and comply with the rule and form amendments pertaining to hyperlinks. We believe that this transition period will provide sufficient time for investment companies, regardless of size, to comply with the new requirements.

requirements for all registrants. In some instances, the amendments modernize and simplify existing design standards. For example, the amendments to Item 303(a) emphasize the flexibility currently available to registrants with respect to the form of MD&A presentation.<sup>442</sup> In other instances, the amendments may result in additional flexibility when preparing disclosures. For example, new Item 601(a)(5) expands a registrant's ability to omit schedules and attachments to exhibits that are not material.<sup>443</sup> As another example, the amendments to Item 102 clarify that the threshold for disclosure about registrants' physical properties is based on materiality.<sup>444</sup>

## **IX. STATUTORY AUTHORITY**

We are adopting the rule and form amendments contained in this release 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 amending title 17, chapter II of the Code of Federal Regulations as follows:

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<sup>442</sup> See *supra* Section II.A.1.a. (Year-to-Year Comparisons (Instruction 1 to Item 303(a))).

<sup>443</sup> See *supra* Section II.B.5.b.i. (Schedules and Attachments to Exhibits).

<sup>444</sup> See *supra* Section II.B.1. (Description of Property (Item 102)).

**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).

2. Amend § 229.10 by:

- a. Removing and reserving paragraph (d); and
- b. Revising the entry for Item 503 in the Index of Scaled Disclosure Available to Smaller Reporting Companies in paragraph (f) to read “Prospectus summary.”

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.

*Instruction 1 to Item 102:* This item requires 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.

*Instruction 2 to Item 102:* 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 removing the preliminary note, revising Instruction 3 under “Instructions to Item 202,” and adding “Note to § 229.202” to read as follows:

**§ 229.202 (Item 202) Description of registrant’s securities.**

\* \* \* \* \*

*Instructions to Item 202:* \* \* \*

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.

\* \* \* \* \*

Note to § 229.202: If the securities being described have been accepted for listing on an exchange, the exchange may be identified. The document should not, however, convey the impression that the registrant may apply successfully for listing of the securities on an exchange or that, in the case of an underwritten offering, the underwriters may request the registrant to apply for such listing, unless there is reasonable assurance that the securities to be offered will be acceptable to a securities exchange for listing.

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 of the three years may be omitted if such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with Item 303 of Regulation S-K, provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found. 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.

\* \* \* \* \*

7. Amend § 229.401 by removing Instruction 3 to paragraph (b) of Item 401 and 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. 78l) 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) of this section, 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:

(i) 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

(ii) 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)(10)(i)(D) of this Item if the offering is not prohibited by state law.

\* \* \* \* \*

**§ 229.502 (Item 502) Inside front and outside back cover pages of prospectus.**

11. Amend paragraph (a) of § 229.502 by removing the phrase “Item 503 of this Regulation S-K (17 CFR 229.503)” and adding in its place “Item 105 of this Regulation S-K (17 CFR 229.105)”.

**§ 229.503 [Amended].**

12. Amend § 229.503 by removing “and risk factors” from the section heading and removing and reserving paragraph (c).

**§ 229.512 [Amended].**

13. Remove and reserve paragraphs (c), (d), (e), and (f) of § 229.512.

14. 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 (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;
- e. Adding paragraph (b)(4)(vi) and the instructions to paragraph (b)(4)(vi) and paragraph (b)(10)(iv);
- f. Revising paragraphs (b)(2), (b)(10)(i) and the instructions to paragraph (b)(10);
- g. Revising paragraphs (b)(13) 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 provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its 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.*

(i) Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation, or arrangement and any amendments thereto described in the statement or report.

(ii) The registrant may redact provisions or terms of exhibits required to be filed by paragraph (b)(2) of this Item if those provisions or terms are both not material and would likely cause competitive harm 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 not material and would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 (ii) of this Item pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its 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).

\* \* \* \* \*

(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) through (d) and (f) of Regulation S-K (§ 229.202 of this chapter).

\* \* \* \* \*

*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 an exhibit previously filed in satisfaction of 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 (§ 229.202 of this chapter) 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 not material and would likely cause competitive harm 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 not material and would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted copy of the exhibit on a supplemental basis. The Commission or its 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 or its 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 or its staff. After completing its review of the supplemental information, the Commission or its 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 a registrant that is filing its first registration statement under the Securities Act or the Exchange Act, and 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) of this section, 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.

\* \* \* \* \*

(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.

\* \* \* \* \*

15. Amend § 229.1016 by adding Instructions to Item 1016 as follows:

**§ 229.1016 (Item 1016) Exhibits.**

\* \* \* \* \*

*Instructions to Item 1016:*

1. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such

information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

2. 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).

16. Amend § 229.1100 by:

a. Revising Instruction 1 to paragraph (c)(1); 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.

\* \* \* \* \*

**§ 229.1103 (Item 1103) Transaction summary and risk factors.**

17. Amend paragraph (b) of § 229.1103 by removing the phrase “Item 503(c) of Regulation S-K (§ 229.503(c))” and adding in its place “Item 105 of Regulation S-K (17 CFR 229.105)”.

**PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

18. 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, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(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.

\* \* \* \* \*

19. 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.

\* \* \* \* \*

20. 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.

(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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable, 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 or by U.S. Generally Accepted Accounting Principles or International



Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.

(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.

21. 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**

22. 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), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

23. Amend § 232.11 by adding in alphabetical order the definition of *Cover Page Interactive Data File* 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.

\* \* \* \* \*

24. 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 8-K (§ 249.308 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-8B2 (§ 274.12 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. \* \* \*

\* \* \* \* \*

25. 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-8B2 (§ 274.12 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), in the case of an investment company, a report on 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). 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).

*Instructions to paragraph (e):* (1) No hyperlink is required for any information incorporated by reference that has not been filed with the Commission in electronic format.

(2) 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.

\* \* \* \* \*

26. 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). \* \* \*

\* \* \* \* \*

**§ 232.312 [Removed and reserved.]**

27. Remove and reserve § 232.312.

28. 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) or 40-F (§ 249.240f of this chapter) who are required to submit Interactive Data Files (§ 232.11) in Inline XBRL format in accordance with this Regulation S-T 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 that is required on the cover page of these forms.

\* \* \* \* \*

### **PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

29. 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. \* \* \* \* \*

30. 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable. \* \* \*

\* \* \* \* \*

### **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).

\* \* \* \* \*



31. 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.

\* \* \* \* \*

32. 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

\* \* \* \* \*

*Additional Instructions:*

1. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

2. 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).
3. The registrant may redact provisions or terms of exhibits required to be filed by paragraph (9) of section IX of Form N-8B-2 (Exhibits) if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm 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) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

4. 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.

\* \* \* \* \*

33. 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable. \* \* \*

\* \* \* \* \*

#### **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).

\* \* \* \* \*

34. 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 new paragraphs 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**

\* \* \* \* \*

- Instructions:**
1. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.
  2. 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).
  3. The registrant may redact provisions or terms of exhibits required to be filed by paragraph (13) of this Item if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm 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) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the



registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

4. 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.

\* \* \* \* \*

35. 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:

\* \* \* \* \*

36. 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.

\* \* \* \* \*

## **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).

\* \* \* \* \*

37. 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).

\* \* \* \* \*

38. 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:

\* \* \* \* \*

39. 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.

\* \* \* \* \*

40. 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 OFFEREEES 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.

\* \* \* \* \*

41. 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 OFFEREEES 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.

\* \* \* \* \*

42. 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 OFFEREEES 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.

\* \* \* \* \*

43. 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).

\* \* \* \* \*

44. 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**

45. 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, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 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. 1887 (2010); sec. 503 and 602, and Pub. L. 112-106, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

46. 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 or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.

(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].**

47. Remove and reserve § 240.12b-32.

48. 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. \* \* \*

\* \* \* \* \*

§ 240.16a-3 [Amended].

49. Remove and reserve paragraph (e) of § 240.16a-3.

**PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934**

50. 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.

\* \* \* \* \*

51. Remove and reserve paragraph (c) of General Instruction 3 to Form 3 (referenced in § 249.103).

52. Remove and reserve paragraph (c) of General Instruction 2 to Form 4 (referenced in § 249.104).

53. Remove and reserve paragraph (c) of General Instruction 2 to Form 5 (referenced in § 249.105).

54. 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.

\* \* \* \* \*

55. Amend Form 10 (referenced in 249.210) by revising the first sentence in Item 1A 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. \* \* \*

\* \* \* \* \*

56. Amend Form 20-F (referenced in § 249.220f) by:
- a. Adding a field to the cover page to include trading symbol(s);
  - b. Adding Instruction 6 under “Instructions to Item 5”;
  - c. Revising Instruction 1(b) under “Instructions to Item 10”;

- d. Revising Instructions 1 and 2 under “Instructions to Item 12”;
- e. Revising the introductory text and Instruction 4(a) 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**

\* \* \* \* \*

**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, a discussion of the earliest of the three years may be omitted if such discussion



was already included in any other of the registrant's prior filings on EGDAR that required disclosure in compliance with Item 5 of Form 20-F, provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found.

\* \* \* \* \*

**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 they 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

The registrant may redact information from exhibits required to be filed by this Form 20-F if disclosure of 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) would likely cause competitive harm 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) would likely cause competitive harm 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 or its staff, the registrant must provide an unredacted copy of the exhibit on a supplemental basis. The Commission staff also may request that the registrant provide its materiality and competitive harm analyses on a supplemental basis. Upon evaluation of the registrant's supplemental materials, the Commission staff may request that registrant 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.

\* \* \* \* \*

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.

- 57. Amend Form 40-F (referenced in § 249.240f) by:
  - a. Adding a field to the cover page to include trading symbol(s);
  - b. Adding paragraph B.17 under “General Instructions”; and
  - c. Revising paragraph D.1 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.

\* \* \* \* \*

#### D. Application of General Rules and Regulations

(1) Rules 12b-2, 12b-5, 12b-10, 12b-11, 12b-12, 12b-13, 12b-14, 12b-21, 12b-22, 12b-23(a), 12b-23(b), 12b-23(d), 12b-25, 12b-33 and 12b-37 under the Exchange Act shall not apply to filings on this Form. The rules and regulations applicable in the home jurisdiction regarding the form and method of preparation of disclosure documents shall apply to filings on this Form. Exchange Act rules and regulations other than Rules 12b-2, 12b-5, 12b-10, 12b-11, 12b-12, 12b-13, 12b-14, 12b-21, 12b-22, 12b-23(a), 12b-23(d), 12b-23(b), 12b-25, 12b-33 and 12b-37 shall apply to filings on this Form unless specifically excluded in this Form. \*\*\*

\* \* \* \* \*

58. Amend Form 8-K (referenced in § 249.308) by:

- a. 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; and
- b. Adding Instructions 4, 5 and 6 under Item 1.01 to read as follows:

**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

\* \* \* \* \*

Instructions.

\* \* \* \* \*

4. To the extent a material definitive agreement is filed as an exhibit under this Item 1.01, schedules (or similar attachments) to the exhibits are not required to be filed 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. Each exhibit filed must contain a list briefly identifying the contents of all omitted schedules. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

5. To the extent a material definitive agreement is filed as an exhibit under this Item 1.01, the registrant may redact information from the exhibit 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).

6. To the extent a material definitive agreement is filed as an exhibit under this Item 1.01, the registrant may redact provisions or terms of the exhibit if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm to the registrant if publicly disclosed, provided that the registrant intends to incorporate by reference this filing into its future

periodic reports or registration statements, as applicable, in satisfaction of Item 601(b)(10) of Regulation S-K. If it chooses to redact information pursuant to this instruction, 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) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted copy of the exhibit on a supplemental basis. The Commission or its 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 or its 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 Instruction 6 of this Item pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its 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).

\* \* \* \* \*

59. 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

\* \* \* \* \*

60. Amend Form 10-K (referenced in § 249.310) by:

a. Revising 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**

\* \* \* \* \*

**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: \* \* \*

\* \* \* \* \*

61. 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**

62. 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.

\* \* \* \* \*

63. Amend § 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 outside of the financial statements is not permitted unless otherwise specifically permitted or required by the

Commission's rules or by U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, whichever is applicable.

(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].**

64. Remove and reserve § 270.8b-23.

**§ 270.8b-24 [Removed and reserved].**

65. Remove and reserve § 270.8b-24.

**§ 270.8b-32 [Removed and reserved].**

66. Remove and reserve § 270.8b-32.

\* \* \* \* \*

**PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY**

**ACT OF 1934**

67. 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), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, 80a-29, and Pub. L. 111-203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

\* \* \* \* \*

68. Amend Form N-5 (referenced in §§ 239.24 and 274.5 of this chapter) by revising “Instructions as to Exhibits” to add new paragraphs immediately following the introductory text 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.**

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**



Washington, D.C. 20549

Form N-5

**REGISTRATION STATEMENT SMALL BUSINESS INVESTMENT COMPANY  
UNDER THE SECURITIES ACT OF 1933 AND THE INVESTMENT COMPANY ACT  
OF 1940\***

\* \* \* \* \*

INSTRUCTIONS AS TO EXHIBITS

\* \* \* \* \*

*Instructions:*

1. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.
2. 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).
3. The registrant may redact provisions or terms of exhibits required to be filed by paragraph 9 of this Item if those provisions or terms are both (i) not material and (ii)

would likely cause competitive harm 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) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

4. 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.

\* \* \* \* \*

69. Amend Form N-1A (referenced in §§ 239.15A and 274.11A of this chapter) by:
- a. Revising General Instruction D.2; and
  - b. Revising the Instruction to Item 28.

The revisions 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**

\* \* \* \* \*

### **GENERAL INSTRUCTIONS**

\* \* \* \* \*

#### **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

\* \* \* \* \*

### Instructions

1. A Fund that is a Feeder Fund also must file a copy of all codes of ethics applicable to the Master Fund.
2. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.
3. 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).
4. The registrant may redact provisions or terms of exhibits required to be filed by paragraph (h) of this Item if those provisions or terms are both (1)

not material and (2) would likely cause competitive harm 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 (1) not material and (2) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the

request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

5. 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.

\* \* \* \* \*

70. Amend Form N-2 (referenced in §§ 239.14 and 274.11a-1 of this chapter) by
  - a. Revising General Instruction F; and
  - b. Revising the Instructions to Item 25.2 to add Instructions 4, 5, 6, and 7.

The revisions and additions 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**

\* \* \* \* \*

### **GENERAL INSTRUCTIONS**

\* \* \* \* \*

#### **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. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

5. 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).

6. The registrant may redact provisions or terms of exhibits required to be filed by paragraph k. of this Item if those provisions or terms are both (1) not material and (2) would likely cause competitive harm 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 (1) not material and (2) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

7. 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.

\* \* \* \* \*

71. Amend Form N-3 (referenced in §§ 239.17a and 274.11b of this chapter) by:
- a. Revising General Instruction G; and
  - b. Revising the Instructions to Item 29(b) to add Instructions 3, 4, 5, and 6.

The revisions and additions 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 filed 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**

\* \* \* \* \*

(b) Exhibits:

\* \* \* \* \*

**Instructions**

\* \* \* \* \*

3. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

4. 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).

5. The registrant may redact provisions or terms of exhibits required to be filed by paragraphs (9) and (11) of this Item if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm 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) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

6. 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.

\* \* \* \* \*

72. Amend Form N-4 (referenced in §§ 239.17b and 274.11c of this chapter) by
- a. Revising General Instruction G; and
  - b. Revising the Instructions to Item 24(b) to add Instructions 3, 4, 5, and 6.

The revisions and additions 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 filed with the Commission.

\* \* \* \* \*

**Item 24. Financial Statements and Exhibits**

\* \* \* \* \*

(b) Exhibits:

\* \* \* \* \*

*Instructions:*

\* \* \* \* \*

3. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.
4. 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).

5. The registrant may redact provisions or terms of exhibits required to be filed by paragraphs (7) and (8) of this Item if those provisions or terms are both (i) not material and (ii) would likely cause competitive harm 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) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental

information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

6. 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.

\* \* \* \* \*

73. Amend Form N-6 (referenced in §§ 239.17c and 274.11d of this chapter) by:
  - a. Revising General Instruction D.2; and
  - b. Revising Item 26 to add Instructions 1 through 4.

The revisions and additions 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

\* \* \* \* \*

#### **B. Filing and Use of Form N-6**

\* \* \* \* \*

#### **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**

\* \* \* \* \*

##### *Instructions.*

1. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the

omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

2. 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).
3. The registrant may redact provisions or terms of exhibits required to be filed by paragraphs (g) and (j) of this Item if those provisions or terms are both (1) not material and (2) would likely cause competitive harm 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 (1) not material and (2) would likely cause competitive harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

4. 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.

\* \* \* \* \*

74. Amend Form N–8B-2 (referenced in § 274.12 of this chapter) by revising “IX Exhibits” to add Instructions 1 through 4 to read as follows:

**Note: The text of Form N–8B-2 does not, and this amendment will not, appear in the Code of Federal Regulations.**

Form N–8B-2

\* \* \* \* \*

IX

EXHIBITS

\* \* \* \* \*

Instructions.

1. Schedules (or similar attachments) to the exhibits are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.
2. The registrant may redact information from exhibits required to be filed 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).
3. The registrant may redact provisions or terms of exhibits required to be filed by A(9) if those provisions or terms are both (1) not material and (2) would likely cause competitive harm 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 (1) not material and (2) would likely cause competitive

harm 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 or its staff, the registrant must promptly provide an unredacted 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 or its 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 pursuant to Rule 83 (§ 200.83 of this chapter) while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it at the request of the registrant, if the registrant complies with the procedures outlined in Rules 418 (§ 230.418 of this chapter).

4. 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.

\* \* \* \* \*

75. Amend Form N–CSR (referenced in §§ 249.331 and 274.128 of this chapter) by:
- a. Revising General Instruction D;
  - b. Removing “Instruction to Item 11” following paragraph (b) of Item 13 and replacing it with “Instructions to Item 13”; and
  - c. Revising the text following the “Instructions to Item 13”.

The revisions 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

\* \* \* \* \*

## GENERAL INSTRUCTIONS

\* \* \* \* \*

### **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 13. Exhibits.**

\* \* \* \* \*

*Instructions to Item 13.*

1. Letter or number the exhibits in the sequence that they appear in this item. 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.

2. Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not 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. Registrants need not prepare a separate list of omitted information if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. In addition, the registrant must provide a copy of any omitted schedule to the Commission or its staff upon request.

3. 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).

\* \* \* \* \*

**PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940**

76. 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.

77. 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: March 20, 2019

Eduardo A. Aleman  
Deputy Secretary