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**Report on Review of Disclosure Requirements in Regulation S-K**

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**As Required by Section 108 of the  
Jumpstart Our Business Startups Act**



This is a report by the staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings or conclusions contained herein.

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**REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS OF REGULATION S-K**  
**As Required by Section 108 of the Jumpstart Our Business Startups Act**

**I. Introduction**

**A. Congressional Mandate**

On April 5, 2012, Congress passed the Jumpstart Our Business Startups Act (the “JOBS Act”)<sup>1</sup>. Section 108 of the JOBS Act requires the Securities and Exchange Commission (the “Commission”) to conduct, within 180 days of enactment of the JOBS Act, a review of Regulation S-K to determine how such requirements can be updated to modernize and simplify the registration process. Specifically, Section 108 provides as follows:

- (a) Review. — The Securities and Exchange Commission shall conduct a review of its Regulation S-K (17 CFR 229.10 et seq.) to —
- (1) comprehensively analyze the current registration requirements of such regulation;
  - and
  - (2) determine how such requirements can be updated to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements for issuers who are emerging growth companies.
- (b) Report. — Not later than 180 days after the enactment of this title, the Commission shall transmit to Congress a report of the review conducted under subsection (a). The report shall include the specific recommendations of the Commission on how to streamline the registration process in order to make it more efficient and less

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<sup>1</sup> Pub. L. No. 112-106, [126 Stat. 306] (2012).

burdensome for the Commission and for prospective issuers who are emerging growth companies.

## **B. Scope of the Review**

The staff of the Commission has conducted a review of the Regulation S-K disclosure requirements and prepared this report pursuant to Section 108 of the JOBS Act.<sup>2</sup> Title I of the JOBS Act created a new category of issuer called an “emerging growth company,” which is defined as a company that had not completed its first registered sale of common equity securities on or before December 8, 2011 and has total annual gross revenues of less than \$1 billion during its most recently completed fiscal year.<sup>3</sup> Among other things, emerging growth companies can take advantage of a variety of scaled disclosure and other accommodations, including exemptions from or modifications to certain Regulation S-K disclosure requirements, as discussed in more detail in Section III of this report.<sup>4</sup> These scaled requirements for emerging growth companies

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<sup>2</sup> The staff notes the specific mandate to analyze the “registration requirements” of Regulation S-K. As Regulation S-K does not contain registration requirements, the staff undertook a review of Regulation S-K’s disclosure requirements and provides recommendations on how to approach modernizing and simplifying those requirements.

<sup>3</sup> See JOBS Act Section 101; Securities Act of 1933 Section 2(a)(19) [15 USC 77b(a)(19)]; Securities Exchange Act of 1934 Section 3(a)(80) [15 USC 78c(a)(80)]. A company retains its status as an emerging growth company until the earliest of the following:

- the last day of its fiscal year during which its total annual gross revenues are \$1 billion or more;
- the date it is deemed to be a large accelerated filer under the Commission’s rules;
- the date on which it has issued more than \$1 billion in non-convertible debt in the previous three years; or
- the last day of the fiscal year following the fifth anniversary of the first registered sale of common equity securities of the issuer.

<sup>4</sup> The scaled requirements for emerging growth companies were effective upon enactment without the need for rulemaking by the Commission. Title I of the JOBS Act is based on a recommendation of the IPO Task Force in its October 2011 report presented to the U.S. Department of the Treasury. The IPO Task Force developed from a working group formed at the U.S. Department of the Treasury’s Access to Capital Conference in March 2011. See IPO Task Force, Rebuilding the IPO On-Ramp: Putting Emerging Growth Companies and the Job Market Back on the Road to Growth (Oct. 20, 2011), available at [http://www.sec.gov/info/smallbus/acsec/rebuilding\\_the\\_ipo\\_on-ramp.pdf](http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf).

were based in part on the scaled disclosure system applicable to smaller reporting companies.<sup>5</sup> According to the IPO Task Force, these revisions were expected to reduce internal and external compliance costs for emerging growth companies by 30% to 50%.<sup>6</sup> Section 108 of the JOBS Act directs the Commission to comprehensively analyze Regulation S-K to find additional ways for the requirements to be updated to modernize and simplify the registration process and reduce the costs and other burdens of the disclosure requirements for emerging growth companies.

To identify areas of Regulation S-K that may be appropriate for simplification or modernization as they relate to emerging growth companies as specified in Section 108 of the JOBS Act, the staff concluded that it would be important to first understand and consider the history of all the provisions in Regulation S-K. The staff also concluded that a full review of Regulation S-K would be appropriate since there may be simplifications, modernizations, revisions or eliminations that would be suitable for all issuers. In addition, and as discussed below, the staff recognized the limitations of conducting a review that did not look at the disclosure regime as a whole. The disclosure requirements in Regulation S-K have an impact on the costs and burdens of conducting registered offerings, including IPOs by emerging growth companies, but also have an impact on the ongoing compliance burden associated with public company status. A review of all requirements of Regulation S-K would have a benefit for issuers beyond the period that they may qualify for emerging growth company status. Therefore, in

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<sup>5</sup> See IPO Task Force, Rebuilding the IPO On-Ramp: Putting Emerging Growth Companies and the Job Market Back on the Road to Growth (Oct. 20, 2011), at 19, available at [http://www.sec.gov/info/smallbus/acsec/rebuilding\\_the\\_ipo\\_on-ramp.pdf](http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf). (“While helpful for companies with market capitalizations of less than \$75 million, the existing small company regulations do not provide relief for most companies considering an IPO, including high-growth, venture-backed companies that generate significant job growth....These companies go public in order to finance their growth and typically raise between \$50 million and \$150 million dollars to do so. While still far smaller and with fewer resources than larger companies, they must adhere to the same rules that the very largest companies do and therefore bear compliance costs disproportionate to their size.”)

<sup>6</sup> Id.

conducting its review of the requirements of Regulation S-K, the staff evaluated the requirements for public companies generally, as a first step towards addressing Section 108's focus on the impact of the requirements on issuers who are emerging growth companies. In this regard, the staff's review is intended to facilitate the improvement of disclosure requirements applicable to companies at all stages in their development, not only for companies that qualify as emerging growth companies.

The staff reviewed, among other things, Regulation S-K, Commission releases and comment letters on Commission regulatory actions pertaining to Regulation S-K. In addition, the Commission has provided the opportunity for the public to comment generally on regulatory initiatives to be undertaken in response to the JOBS Act.<sup>7</sup> The public comments that were submitted regarding the Section 108 study are discussed in Section III of this report.

In light of the focus of the mandate in Section 108, the staff's review of line-item disclosure requirements did not include two subparts of Regulation S-K — Regulation AB and Regulation M-A — that were adopted relatively recently and are carefully tailored and relevant to specific types of registrants or transactions. Regulation AB, which was adopted in 2004, sets forth the basis for disclosure in both registration statements under the Securities Act of 1933 (the "Securities Act") and reports under the Securities Exchange Act of 1934 (the "Exchange Act") for asset-backed securities.<sup>8</sup> Under Regulation AB, asset-backed securities issuers are subject to a

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<sup>7</sup> See Public Comments on SEC Regulatory Initiatives Under the JOBS Act, available at <http://www.sec.gov/spotlight/jobsactcomments.shtml>.

<sup>8</sup> See Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506], available at <http://www.sec.gov/rules/final/33-8518.htm>. In addition, the staff recently undertook a comprehensive review of Regulation AB and the Commission issued a proposal in April 2010 to revise several aspects of that regulation. See Asset-Backed Securities, Release No. 33-9117 (Apr. 7, 2010) [75 FR 23328], available at <http://www.sec.gov/rules/proposed/2010/33-9117.pdf>. In July 2011, the Commission revised and re-proposed certain asset-backed securities rules that were initially proposed in April 2010 in light of provisions added by the Dodd-Frank Wall Street Reform and Consumer Protection Act and comments received on the April 2010 proposals. See Re-proposal of Shelf Eligibility Conditions for Asset-Backed

separate disclosure and reporting regime that is designed to address their particular structure and operations.<sup>9</sup> Regulation M-A, which was adopted in 1999, sets forth the disclosure requirements for business combination transactions.<sup>10</sup> Regulation M-A was adopted to simplify and integrate the disclosure requirements for tender offers, going-private transactions and other extraordinary transactions in one central location within the Commission's regulations.<sup>11</sup> In addition, the staff's review did not encompass the disclosure requirements for foreign private issuers.<sup>12</sup>

The disclosure requirements of Regulation S-K are closely intertwined with other requirements under the Commission's rules and forms that were not included in the staff's review, such as the disclosure requirements contained in the forms for periodic and current reports, the rules relating to disclosure format and presentation and the regulations governing the process of registration under the Securities Act.<sup>13</sup> Likewise, Regulation S-X<sup>14</sup> establishes disclosure

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Securities and Other Additional Requests for Comment, Release No. 33-9244 (July 26, 2011 ) [76 FR 47948], available at <http://www.sec.gov/rules/proposed/2011/33-9244.pdf>.

<sup>9</sup> Among other changes, the 2004 rules updated and clarified the Securities Act registration requirements for asset-backed securities offerings, consolidated and codified interpretive positions to allow modified Exchange Act reporting that is more tailored and relevant to asset-backed securities and provided tailored disclosure guidance and requirements for Securities Act and Exchange Act filings involving asset-backed securities.

<sup>10</sup> See Regulation of Takeovers and Security Holder Communications, Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408], available at <http://www.sec.gov/rules/final/33-7760.htm#seciii>.

<sup>11</sup> Id. These rule amendments also significantly liberalized the communications rules in connection with business combination transactions.

<sup>12</sup> The Commission has adopted separate disclosure requirements relating to foreign private issuers which cover many of the same matters as set forth in Regulation S-K. Form 20-F [17 CFR 249.220f] is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. The disclosure requirements in Form 20-F are based on international disclosure standards endorsed by the International Organization of Securities Commissions (IOSCO). See International Disclosure Standards, Release No. 33-7745 (Sept. 28, 1999) [64 FR 53900], available at <http://www.sec.gov/rules/final/34-41936.htm>.

Some requirements and instructions of Regulation S-K refer to foreign private issuers; these have been included in the review set forth in Section III.

<sup>13</sup> 17 CFR 230.401-230.498. As noted in Part IV below, Regulation S-K also contains several items that relate to technical requirements for the content and presentation of registration statements and prospectuses. Such items are not a focus of the staff's current review. See text accompanying notes 81 - 85.

requirements related to the form and content of, and requirements for, financial statements included in a filing and requires that domestic issuer financial statements filed with the Commission be prepared in accordance with generally accepted accounting principles (“GAAP”),<sup>15</sup> and U.S. generally accepted accounting principles (“U.S. GAAP”) also establishes requirements for disclosure to be presented in the notes to the financial statements of a domestic issuer. The staff’s review did not encompass a review of disclosure requirements developed through interpretations in Commission releases and staff interpretations and guidance. The staff’s review also did not look at whether there are factors external to the Commission’s rules that may have contributed to the length and complexity of company filings and the costs of compliance, such as Commission enforcement actions and judicial opinions.

As discussed in detail below, the Commission has undertaken several initiatives over the years to review and update its disclosure and registration requirements, ranging from targeted revisions of certain rules to comprehensive reviews of its rules and regulations. Certain disclosure items have been updated and reviewed relatively frequently, while others have changed little since they were first put in place after the enactment of the Securities Act. The staff believes that a comprehensive inventory of the Commission’s disclosure regulations that identifies the origin and purpose of existing disclosure requirements and sets forth the history of updates to those

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<sup>14</sup> 17 CFR part 210.

<sup>15</sup> Regulation S-X requires that financial statements filed with the Commission be prepared in accordance with generally accepted accounting principles. See Rule 4-01(a) of Regulation S-X.

The Commission has recognized the financial accounting and reporting standards of The Financial Accounting Standards Board (the “FASB”) as “generally accepted” for purposes of the federal securities laws, unless the Commission directs otherwise. See Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release No. 33-8221 (April 25, 2003) [68 FR 23333].

Under Rule 4-01(a) of Regulation S-X, foreign private issuers may use U.S. GAAP, International Financial Reporting Standards as issued by the International Accounting Standards Board, or a comprehensive body of accounting principles other than U.S. GAAP accompanied by a reconciliation to U.S. GAAP.



requirements is an essential first step in formulating recommendations with respect to modernizing and simplifying disclosure. The staff is not aware of a single source that presents a clear picture of the scope, frequency and purpose of past revisions to the disclosure requirements. In light of this, the staff determined to structure the study as follows:

The study first presents the regulatory history of the integrated disclosure system and Regulation S-K as well as an overview of prior Commission initiatives to review and modernize disclosure requirements. This overview includes initiatives to adapt the disclosure regime to changes in technology and changing trends in communications. Next, the study presents a detailed review of the disclosure items in Regulation S-K, the Industry Guides,<sup>16</sup> and related rules and forms and summarizes input received from commenters on Section 108 of the JOBS Act. Finally, the study concludes with a discussion of staff recommendations for the Commission's consideration as potential next steps, including an outline of economic principles to consider and preliminary conclusions that can be drawn from the staff's review of the disclosure requirements.

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<sup>16</sup> From time to time, beginning in 1962, the Commission has published guides for the preparation and filing of registration statements and periodic reports, representing the policies and disclosure standards followed by the Commission's Division of Corporation Finance in order to assist issuers in the preparation of their registration statements and reports. See Acceleration of Registration Statements, Release No. 33-4475 (April 26, 1962) [27 FR 3990]. By 1979, there were 63 guides for the preparation and filing of registration statements and five guides for the preparation and filing of periodic reports. This report refers to these historical guides interchangeably as "the guides" or "the guides for the preparation of registration statements and reports" or identifies a particular guide by its number. The five guides that applied only to periodic reports are identified in this report as "Exchange Act Guides."

As described in detail in Section III below, over time, some of these Guides were codified as requirements in Regulation S-K, some were eliminated and those that pertained to specific industries were included in the list of industry guides in Items 801 and 802 of Regulation S-K but were not codified as rules. See Rescission of Guides and Redesignation of Industry Guides, Release No. 33-6384 (Mar. 3, 1982) [47 FR 11476], at 11476 ("The list of industry guides has been moved into Regulation S-K, which serves as the central repository of disclosure requirements under the Securities Act and Exchange Act, in order to more effectively put registrants on notice of their existence. These guides remain as an expression of the policies and practices of the Division of Corporation Finance and their status is unaffected by this change.") Although they have not been codified as Commission requirements, the industry guides listed in Items 801 and 802 (the "Industry Guides") have been included in the review summarized in this report.

## II. Summary and Background of Disclosure Rules

Regulation S-K sets forth requirements for disclosure (other than financial statement disclosure) under both the Securities Act and the Exchange Act and is applicable to both public offerings and ongoing reporting requirements.<sup>17</sup> It is a key part of the Commission’s “integrated disclosure system,” which was created in 1982 following many years of analysis of the disclosure rules under the Securities Act and the Exchange Act.<sup>18</sup> Under the integrated disclosure system, most registration and reporting forms under the Securities Act and the Exchange Act refer to Regulation S-K for many of their substantive disclosure requirements.<sup>19</sup>

Prior to the adoption of the integrated disclosure system, separate disclosure regimes applied to Securities Act registration statements and Exchange Act periodic reporting, which often resulted in overlapping and duplicative requirements. The Securities Act requires that a registration statement under that Act contain the information specified in Schedule A,<sup>20</sup> but the Commission may exercise its rulemaking authority to prescribe additional information or may permit prescribed information to be omitted as it deems necessary or appropriate in the public interest or for the protection of investors.<sup>21</sup> The Commission has exercised this broad authority

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<sup>17</sup> As specified in Item 10(a) [17 CFR 229.10], Regulation S-K states the requirements for the content of the non-financial statement portions of registration statements under the Securities Act and various filings under the Exchange Act to the extent provided in the relevant forms.

<sup>18</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380].

<sup>19</sup> For example, Form S-1, the basic registration form under the Securities Act, and Form 10-K, the annual reporting form under the Exchange Act, each require registrants to provide a description of their business in accordance with the requirements of Item 101 of Regulation S-K.

<sup>20</sup> Schedule A requires issuers to provide information such as: general information about the company, its business and capital structure; information about the directors, principal officers, promoters and 10% stockholders and remuneration of officers and directors; information about the offering, including the purposes of the offering and use of proceeds, the offering expenses, estimated net proceeds, the proposed public offering price and underwriters’ commissions or discounts; financial statements of the issuer and of any business to be acquired through the proceeds of the issue; and copies of agreements made with underwriters, opinions of counsel on legality of the issue, material contracts, the issuer’s organizational documents and agreements or indentures affecting any securities offered.

<sup>21</sup> Securities Act Section 7 [15 USC 77g].

over the years to promulgate various registration forms and disclosure requirements. As discussed in detail below, many of the disclosure requirements contained in Regulation S-K today originated in Schedule A and in the specialized registration statement forms developed by the Commission over the years to adapt the Schedule A requirements to specific circumstances.<sup>22</sup>

In 1966, Milton Cohen, in an influential article, suggested the integration of the requirements under the two statutes.<sup>23</sup> Cohen's suggestion of a coordinated disclosure system was echoed in the Commission's 1969 Disclosure Policy Study led by Commissioner Francis Wheat (often referred to as the Wheat Report).<sup>24</sup> The Wheat Report recommended expansion of the availability of Form S-7, which was the first streamlined registration form adopted by the Commission, and greater coordination of the disclosure requirements of the Securities Act and Exchange Act.

The Commission's Advisory Committee on Corporate Disclosure issued a report in 1977 that recommended that the Commission adopt a single integrated disclosure system; specifically a single form that would replace all registration forms and periodic reporting forms then in

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<sup>22</sup> Since early in its history, the Commission has created registration forms tailored to elicit information from different types of market participants and transactions. For example, in 1941, the Commission adopted Form S-3 for use by mining companies in the promotional stage (rescinded 1981), and in 1953, Form S-8 was adopted for use by stock purchase plans. In 1954, Form S-9 was adopted for registration of high grade debt securities (rescinded 1976). In 1967, the Commission adopted Form S-7, for the first time allowing streamlined registration for certain reporting companies (rescinded 1982). In 1979, the Commission adopted Form S-18 for use by smaller issuers (rescinded in 1992). Several other forms have been adopted and repealed over time. The current structure for domestic companies comprises Form S-1, the basic registration form, Form S-3, a short form registration statement for certain reporting companies, Form S-4 for registration of securities issued in business combination transactions and other exchange offers, Form S-6 for securities of certain unit investment trusts, Form S-8 for securities offered to employees under certain plans and Form S-11 for securities of certain real estate companies.

<sup>23</sup> See Milton H. Cohen, Truth in Securities Revisited, 79 Harv. L. Rev. 1340 (1966).

<sup>24</sup> See Disclosure to Investors – A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts, Policy Study, available at [www.sechistorical.org/museum/Museum\\_Papers/museum\\_Papers\\_Chron.php#1960](http://www.sechistorical.org/museum/Museum_Papers/museum_Papers_Chron.php#1960) (Mar. 27, 1969).

existence and that would set forth all Commission-established general disclosure requirements.<sup>25</sup>

After this report was issued, the Commission adopted the first version of Regulation S-K, which included two items – Item 1, Description of Business (now Item 101) and Item 2, Description of Property (now Item 102).<sup>26</sup> This marked the first time that the principal disclosure items were made uniform for both registration statements and periodic reports. Over time, and as discussed in detail below, additional disclosure items were added to Regulation S-K,<sup>27</sup> and it was expanded and reorganized in 1982 as the repository for the uniform non-financial statement disclosure requirements of documents filed with the Commission under the Securities Act and the Exchange Act.<sup>28</sup>

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<sup>25</sup> See Report of the Advisory Committee on Corporate Disclosure, Cmte. Print 95-29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess (Nov. 3, 1977).

<sup>26</sup> See Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554].

<sup>27</sup> In 1978, additional disclosure requirements were moved from Securities Act and Exchange Act forms and reconciled into uniform disclosure requirements in Regulation S-K. These requirements were: Item 3, Directors and Officers (now Item 401), Item 4 Management Remuneration and Transactions (now Item 402), Item 5 Legal Proceedings (now Item 103) and Item 6 Principal Security Holders and Security Holdings of Management (now Item 403). See Uniform and Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949 (July 28, 1978) [43 FR 34402].

In 1980, five more disclosure requirements were moved from Securities Act and Exchange Act forms and reconciled into uniform disclosure requirements in Regulation S-K. See Amendments Regarding Exhibit Requirements Release No. 33-6230 (Aug. 27, 1980) [45 FR 58822] (adopting Item 7, Exhibits (now Item 601)); Amendments to Annual Report Form, Related Forms, Rules, Regulations and Guides; Integration of Securities Act Disclosure Systems, Release No. 33-6231 (Sept. 2, 1980) [45 FR 63630] (adopting Item 9 Market Price of the Registrant’s Securities and Related Security Holder Matters (now Item 201), Item 10 Selected Financial Data (now Item 301) and Item 11 Management’s Discussion and Analysis of Financial Condition and Results of Operations (now Item 303)); and General Revision of Regulation S-X, Release No. 33-6233 (Sept. 2, 1980) [45 FR 63660] (adopting Item 12 Supplementary Financial Information (now Item 302)).

<sup>28</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380]. As part of this process, some of the item requirements were revised or reorganized in minor ways; the adopting release notes, however, that certain items (Items 101, 102, 103, 302, 401, 402 and 403) were expected to be the subject of a future “sunset” review and therefore major changes were not considered. At the same time, the Commission authorized the rescission of the Division of Corporation Finance guides for the preparation and filing of registration statements and reports under the Securities Act and Exchange Act, other than those setting forth disclosure guidelines applicable to specific industries. The guides relating to procedural matters were incorporated into Regulation C and the General Rules under the Securities Act and Exchange Act, the guides related to disclosure requirements were incorporated into Regulation S-K and the guides calling for

As the Commission stated at the time the integrated disclosure system was adopted, the “goal of the Commission’s integrated disclosure program has been to revise or eliminate overlapping or unnecessary disclosure and dissemination requirements wherever possible, thereby reducing burdens on registrants while at the same time ensuring that security holders, investors and the marketplace have been provided with meaningful nonduplicative information upon which to base investment decisions.”<sup>29</sup> Set forth below is a chronological overview of several of the relevant revisions, studies and reviews that have been undertaken in the past. Many initiatives have focused on the Commission’s disclosure requirements, while others have focused on the process of securities offerings and company reporting under the Commission’s rules. In addition to the Commission’s own initiatives, certain modifications or additions to Regulation S-K have been mandated by legislative changes, some of the most significant of which are also discussed below.

*Simplified Reporting for Small Issuers.*

In 1979, the Commission, in recognition of the difficulties small businesses were facing in accessing the public capital markets, adopted on an experimental basis a simplified registration form, Form S-18, for use by issuers that were not already subject to reporting obligations with the Commission and that were seeking to register securities for sale to the public for cash not exceeding an aggregate offering price of \$5 million.<sup>30</sup> The Form S-18 adopting release notes

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industry-specific disclosure were redesignated as “industry guides” and listed in Items 801 and 802 of Regulation S-K. See Rescission of Guides and Redesignation of Industry Guides, Release No. 33-6384 (Mar. 3, 1982) [47 FR 11476]. See also note 16, supra.

<sup>29</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380].

<sup>30</sup> See Simplified Registration and Reporting Requirements for Small Issuers, Release No. 33-6049 (April 3, 1979) [44 FR 21562]. The offering ceiling was raised to \$7.5 million in 1983. See Revisions to Optional Form S-18, Release No. 33-6489 (Sept. 23, 1983) [48 FR 45386].

When the Commission proposed Form 18 and corresponding amendments to the Form 10-K financial statement requirements, the Commission simultaneously announced its intention to hold a series of public

“[t]he rationale behind ... the amendments adopted today is that an issuer not subject to the reporting requirements of the Commission at the time the registration statement is filed under the Securities Act may, consistent with the protection of investors, raise a limited amount of capital without immediately incurring the full range of disclosure and reporting requirements imposed upon other issuers. These procedures are intended to facilitate the process by which a small business, over a period of time, might raise a limited amount of capital publicly and then come into full compliance with the periodic reporting requirements imposed upon other issuers, thereby gaining a broader access to the capital markets without being impeded by the immediate burdens confronting many small, non-reporting issuer[s].” The disclosure items included in Form S-18 were generally consistent with the corresponding items in Form S-1, the general registration form, but Form S-18 called for narrative disclosure that was less extensive than that required by Form S-1. For example, unlike Form S-1, Form S-18 did not require a five-year comparative summary of operations, detailed disclosure about lines of business, or, if the offering would not result in a material change in the issuer’s capital structure, disclosure about capitalization. In addition, Form S-18 allowed issuers to file, as part of the registration statement, audited consolidated statements

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hearings about a variety of issues relating to small businesses’ access to capital. See Examination of the Effects of Rules and Regulations on the Ability of Small Businesses to Raise Capital and the Impact on Small Businesses of Disclosure Requirements Under the Securities Acts, Release No. 33-5914 (Mar. 6, 1978) [43 FR 10876]. The Commission held 21 days of hearings and considered the comments at the hearings and in the public comment record on the proposal in its final rules. See Simplified Registration and Reporting Requirements for Small Issuers, Release No. 33-6049 (April 3, 1979) [44 FR 21562]. As described in both the proposing and adopting release, the simplified registration and reporting requirements of Form 18 were “in the nature of an experiment.” See Simplified Registration and Reporting Requirements for Small Issuers, Release No. 33-5915 (Mar. 6, 1978) [43 FR 10887] and Simplified Registration and Reporting Requirements for Small Issuers, Release No. 33-6049 (April 3, 1979) [44 FR 21562]. After a period of a year or more of monitoring its use, the Commission intended to “determine whether the form functioned as an effective means for small issuers to raised limited amounts of capital through a registered public offering... whether the form should be retained, and if so, whether the conditions for its availability should be revised.” Id. Following that review, and in response to a recommendation of the SEC Government Business Forum on Small Business Capital Formation (Final Report, November 1982), the Commission raised the offering ceiling in 1983. See Revisions to Optional Form S-18, Release No. 33-6489 (Sept. 23, 1983) [48 FR 45386].

of income, source and application of funds, and other stockholders' equity for two fiscal years instead of the three years of such financial statements required by Form S-1. These financial statements were required to be prepared in accordance with GAAP, but the other requirements of Regulation S-X did not apply.

*Introduction of the Electronic Disclosure System.*

When the integrated disclosure system was introduced, corporate disclosure and offering documents were submitted to the Commission and made available to investors and market participants exclusively in paper form. The Commission first began to develop an electronic disclosure system in the early 1980s,<sup>31</sup> and since that time has been continually enhancing and modernizing electronic access to filings, as well as requiring more filings to be made electronically rather than in paper form.

Today, registrants generally must make their Commission filings electronically through the EDGAR system,<sup>32</sup> and the Commission provides free access to EDGAR on a real-time basis through the Commission's web site.<sup>33</sup> In addition to ongoing efforts to improve EDGAR, the Commission has required companies to provide financial information on EDGAR in interactive data files, in order to make financial information easier for investors to analyze, as well as to help

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<sup>31</sup> The pilot program for the Electronic Data Gathering, Analysis and Retrieval ("EDGAR") was established in 1983 pursuant to a Congressional mandate, and the system was fully implemented, effective January 30, 1995. The pilot program utilized technology available at the time — documents were submitted to and accepted by the Commission using three different media: computer diskettes, magnetic tapes and direct transmission over telephone lines using modems. For a summary of the development of EDGAR, see the staff's report, "Electronic Filing and the EDGAR System: A Regulatory Overview," (Oct. 3, 2006), available at <http://www.sec.gov/info/edgar/regoverview.htm>.

<sup>32</sup> A limited number of forms continue to be required or permitted to be filed in paper. For example, the Commission requires paper filing of Form 1-A [17 CFR 239.90] and permits paper filing of Form 144 [17 CFR 239.144].

<sup>33</sup> Real-time access to filings was initiated on May 30, 2002; previously, there was a delay of at least 24 hours before filings appeared on the Commission's website. See Press Release dated May 30, 2002, available at <http://www.sec.gov/news/press/2002-75.htm>.

automate regulatory filings and business information processing.<sup>34</sup> The Commission also uses interactive data in its own analytics, to improve its understanding of the functioning of the market and the impact of regulation.<sup>35</sup>

### *Regulation S-B.*

In 1992, the Commission adopted an integrated disclosure system tailored specifically to small business issuers.<sup>36</sup> Under this integrated system, issuers that met the definition of small business issuer<sup>37</sup> were eligible to use specialized forms under the Securities Act and Exchange Act that referenced disclosure requirements located in a newly-created Regulation S-B.<sup>38</sup> Regulation

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<sup>34</sup> See Interactive Data to Improve Financial Reporting, Release No. 33-9002 (Jan. 30, 2009) [74 FR 6776] available at <http://www.sec.gov/rules/final/2009/33-9002.pdf>. See also Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

Companies create interactive data files by defining – or “tagging” – their financial statements using elements and labels from a standard list of interactive data tags. Data tagging provides a format for enhancing financial and other reporting data using electronic formats such as eXtensible Mark-Up Language (XML) and its derivatives, such as eXtensive Business Reporting Language (XBRL). General information concerning interactive data is available on the Commission’s web site at <http://www.sec.gov/spotlight/xbrl.shtml>. See also XBRL Voluntary Financial Reporting Program on the EDGAR System, Release No. 33-8529 (Feb. 3, 2005) [70 FR 6556]; and Extension of Interactive Data Voluntary Reporting Program on the EDGAR System to Include Mutual Fund Risk/Return Summary Information, Release No. 33-8823 (July 11, 2007) [72 FR 39290].

Initiatives regarding interactive data, such as XBRL, are outside the scope of the review described in this report.

<sup>35</sup> For an example of the use of interactive data by Commission staff, see Electronic Filing and Revision of Form D, Release No. 33-8891 (Feb. 6, 2008) [73 FR 10592], available at <http://www.sec.gov/rules/final/2008/33-8891.pdf>.

<sup>36</sup> See Small Business Initiatives, Release No. 33-6949 (July 30, 1992) [57 FR 36442], available at <http://www.sec.gov/rules/final/6949.txt>.

<sup>37</sup> At the time Regulation S-B was adopted, small business issuers were defined as companies with annual revenues of less than \$25 million whose voting stock did not have a public float of \$25 million or more. As discussed below, in 2007 the Commission established a category of “smaller reporting companies,” for which the primary determinant for eligibility is that the company has less than \$75 million in public float.

<sup>38</sup> The new forms created in connection with the adoption of an integrated registration, reporting and qualification system for small business issuers were a new Securities Act registration form, Form SB-2 and new Exchange Act Forms 10-SB, 10-KSB and 10-QSB to satisfy registration, annual and quarterly reporting obligations under that statute, respectively. Form SB-2 was the designated Securities Act registration form for small business issuers and had no dollar limit for offerings. See Small Business Initiatives, Release No. 33-6949 (July 30, 1992) [57 FR 36442], available at <http://www.sec.gov/rules/final/6949.txt>.

The Commission subsequently adopted an additional Securities Act registration form, Form SB-1, which



S-B provided for simplified disclosure requirements for these issuers and was intended to reduce compliance costs and improve ability of start-ups and other small businesses to obtain financing through the public markets.

The narrative disclosure requirements of Regulation S-B generally paralleled those in Regulation S-K at the time, although where such requirements had been simplified or not required by Form S-18, Regulation S-B generally tracked the substantive disclosure requirements of Form S-18. With the adoption of Form SB-2, a new registration form for small business issuers, Form S-18 was repealed. The financial information required by Regulation S-B was substantially the same as that required by Form S-18, with an added component to address interim financial statement requirements. Consistent with the Form S-18 requirements, Regulation S-B did not require disclosure equivalent to Regulation S-K Item 301 (selected financial data) or Regulation S-K Item 302 (supplementary financial information). Among the items that were simplified for small business issuers were Item 101(a) (description of business), which permitted small business issuers to disclose three years of business development instead of five years as required for larger issuers, and Item 402 (executive compensation), which permitted small business issuers to provide disclosure based upon Form S-18's more limited requirements as opposed to Item 402 of Regulation S-K.<sup>39</sup> As discussed below, Regulation S-B's scaled disclosure requirements have subsequently been incorporated into Regulation S-K (retaining the scaled requirements)<sup>40</sup> and the specialized small business issuer forms have been rescinded.

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permitted transitional small business issuers to register securities under the Securities Act using the Regulation A model of disclosure with two years of audited financial statements. See Additional Small Business Initiatives, Release No. 33-6996 (April 28, 1993) [58 FR 26509], available at <http://www.sec.gov/rules/final/33-9669.txt>.

<sup>39</sup> See Small Business Initiatives, Release No. 33-6949 (July 30, 1992) [57 FR 36442], available at <http://www.sec.gov/rules/final/6949.txt>.

<sup>40</sup> Item 10(f) of Regulation S-K describes the application to smaller reporting companies of the item

*Task Force on Disclosure Simplification.*

The Task Force on Disclosure Simplification, comprising staff from across the Commission, was formed in 1995 to “review rules and forms affecting capital formation, with a view toward streamlining, simplifying, and modernizing the overall regulatory scheme without compromising or diminishing important investor protections.”<sup>41</sup> In March 1996, members of the Commission staff delivered the Report of the Task Force on Disclosure Simplification to the Commission. It recommended a number of areas where simplification and modernization of the registration and offering process could be accomplished. The Task Force made several recommendations relating to changes to Regulation S-K, including recommendations to:

- Streamline Item 101’s disclosure requirements relating to the description of the registrant’s business by eliminating duplication of quantitative information provided in the financial statements;
- Revise Item 102 relating to the description of property to elicit more meaningful and material disclosure;
- Limit the scope of Item 507, relating to securities offered for the account of a company’s individual security holders, so that a company only would have to disclose information regarding certain of its selling affiliates and significant beneficial owners rather than all of its selling security holders; and
- Modernize the existing Industry Guides, consider adopting additional industry-specific disclosure rules and relocate all such guides and rules within Regulation S-K.

In 1996 and 1997, the Commission adopted rule changes and eliminated several forms and rules based on many of the Task Force’s recommendations.<sup>42</sup>

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requirements of Regulation S-K and lists the scaled disclosure requirements available to smaller reporting companies.

<sup>41</sup> Report of the Task Force on Disclosure Simplification, [available at](http://www.sec.gov/news/studies/smpl.htm) [www.sec.gov/news/studies/smpl.htm](http://www.sec.gov/news/studies/smpl.htm) (Mar. 5, 1996).

<sup>42</sup> See Phase One Recommendations of Task Force on Disclosure Simplification, Release No. 33-7300 (May 31, 1996) [61 FR 30397], [available at](http://www.sec.gov/rules/final/33-7300.txt) <http://www.sec.gov/rules/final/33-7300.txt> (eliminating 44 rules and four forms determined to be no longer necessary or appropriate in the public interest for the protection of investors and adopting other minor rule changes); Phase Two Recommendations of Task Force on Disclosure Simplification, Release No. 33-7431 (July 18, 1997) [62 FR 43581], [available at](http://www.sec.gov/rules/final/34-38850.txt) <http://www.sec.gov/rules/final/34-38850.txt> and <http://www.sec.gov/rules/final/34-38850a.txt> (rescinding

*Report of the Advisory Committee on the Capital Formation and Regulatory Processes.*

In 1995, the Commission also chartered the Advisory Committee on the Capital Formation and Regulatory Processes to provide advice to the Commission on, among other things, the regulatory process and the disclosure and reporting requirements relating to public offerings of securities. The members of the Advisory Committee included representatives of investment banks, securities lawyers, accountants and academics. In 1996, the Advisory Committee issued its report and recommendations.<sup>43</sup> Although the Advisory Committee's primary recommendation was that the Commission further the integrated disclosure system by implementing a system based on "company registration,"<sup>44</sup> the report also recommended specific changes to disclosure requirements, including requiring management certifications to the Commission of Forms 10-K, 10-Q and 8-K, enhancements to current reports on Form 8-K and requiring risk factor disclosure to be provided in annual reports on Form 10-K.

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two forms and one rule, and adopting and amending rules to eliminate unnecessary requirements and to streamline the disclosure process). The changes to Regulation S-K included eliminating a requirement in Item 501(b) of Regulation S-K that registrants provide a cross-reference sheet immediately following the facing page of the prospectus showing the location of the information required to be included in response to the items in the form, eliminating the red ink requirement in Item 501(c)(8) of Regulation S-K that had been applicable to the prospectus caption "Subject to Completion" and related legend, and eliminating four infrequently used items from the list of required exhibits in Item 601(b). The recommended changes to Items 101, 102 and 507 of Regulation S-K, described above in the accompanying text, were not implemented.

<sup>43</sup> See Report of The Advisory Committee on the Capital Formation and Regulatory Processes (July 24, 1996), [available at http://www.sec.gov/news/studies/capform.htm](http://www.sec.gov/news/studies/capform.htm).

<sup>44</sup> Generally, as envisioned by the Advisory Committee, under a company registration system, an issuer would, on a one-time basis, file a registration statement (deemed effective immediately) that includes information similar to that currently provided in an initial short-form shelf registration statement. This registration statement could then be used for all types of securities and all offerings. All current and future Exchange Act reports would be incorporated by reference into that registration statement, and around the time of an offering, transactional and updating disclosures would be filed with the Commission and incorporated into the registration statement. See Securities Act Concepts and Their Effects on Capital Formation, Release No. 33-7314 (July 25, 1996) [61 FR 40044], [available at http://www.sec.gov/rules/concept/33-7314.txt](http://www.sec.gov/rules/concept/33-7314.txt).

*Securities Act Concept Release.*

In 1996, after receiving the reports of the Task Force on Disclosure Simplification and of the Advisory Committee on the Capital Formation and Regulatory Processes, the Commission issued a concept release regarding regulation of the securities offering process.<sup>45</sup> The release sought input on a number of significant issues, including whether the concept of company registration should be pursued, whether other methods of increasing the integration of Securities Act and Exchange Act disclosure and other processes should be considered and whether existing or further reliance on Exchange Act filings should be accompanied by enhancements to Exchange Act reporting. Many of the issues raised in the concept release were revisited in the Commission's 1998 proposals to modernize the securities offering process,<sup>46</sup> and in the Commission's 2005 Securities Offering Reform rulemaking, which are both discussed below.<sup>47</sup>

*Plain English Initiative.*

In 1996, in an effort to improve the clarity and utility of disclosure documents, the Division of Corporation Finance started a pilot program for public companies willing to file documents under the Securities Act or the Exchange Act written in plain English. Following that experience, in 1998 the Commission adopted new rules requiring issuers to write certain sections of prospectuses in plain English and gave specific guidance on how to make prospectuses clear,

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<sup>45</sup> See Securities Act Concepts and Their Effects on Capital Formation, Release No. 33-7314 (July 25, 1996) [61 FR 40044], available at <http://www.sec.gov/rules/concept/33-7314.txt>.

<sup>46</sup> See The Regulation of Securities Offerings, Release No. 33-7606A (Nov. 13, 1998) [63 FR 67174], available at <http://www.sec.gov/rules/proposed/337606a1.txt>; <http://www.sec.gov/rules/proposed/337606a2.txt>; and <http://www.sec.gov/rules/proposed/337606a3.txt>.

<sup>47</sup> See Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722], available at <http://www.sec.gov/rules/final/33-8591.pdf>.

concise and understandable, and Commission staff prepared a handbook with practical tips on how to prepare plain English documents.<sup>48</sup>

*1998 Securities Act Rule Proposals.*

In 1998, the Commission proposed new rules under the Securities Act that were intended to modernize the securities offering process to recognize the evolution of the securities markets and securities products since the Securities Act's adoption.<sup>49</sup> The release proposed to replace most existing registration statement forms with two basic forms and would have provided large seasoned issuers with flexibility to craft disclosure about offerings, allowed the most seasoned issuers to control the timing of filing and effectiveness of offering registration statements, eased restrictions on communications around offerings and placed increased emphasis on Exchange Act reporting. Although the underlying premise of the proposals was supported by commenters at the time, most commenters indicated dissatisfaction with a number of the specifics in the 1998 proposals. Final rules were not adopted.

*Guidance on the Use of Electronic Media.*

The Commission first published guidance on the use of electronic media to deliver information to investors in 1995.<sup>50</sup> This guidance focused on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act, the

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<sup>48</sup> See Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370], available at <http://www.sec.gov/rules/final/33-7497.txt>.

<sup>49</sup> See The Regulation of Securities Offerings, Release No. 33-7606A (Nov. 13, 1998) [63 FR 67174], available at <http://www.sec.gov/rules/proposed/337606a1.txt>; <http://www.sec.gov/rules/proposed/337606a2.txt>; and <http://www.sec.gov/rules/proposed/337606a3.txt>.

<sup>50</sup> See Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458], available at <http://www.sec.gov/rules/interp/33-7233.txt>. Earlier that year, the Commission's staff had provided its first guidance to brokers on how they could deliver prospectuses electronically, which laid the groundwork for the Commission's future interpretive releases on the use of electronic media for the delivery of materials to investors. See Brown & Wood SEC No-Action Letter (pub. avail. Feb 17, 1995).

Exchange Act and the Investment Company Act of 1940.<sup>51</sup> Next, in 1996, the Commission published guidance on the electronic delivery of required information by broker-dealers (including municipal securities dealers) and transfer agents under the Exchange Act and investment advisers under the Investment Advisers Act of 1940,<sup>52</sup> and provided additional examples supplementing the 1995 guidance.<sup>53</sup> In 1999, the Commission addressed the use of electronic media in the context of offshore sales of securities and investment services,<sup>54</sup> and cross-border tender offers.<sup>55</sup> In 2000, the Commission acknowledged the significant impact that the internet, by facilitating rapid and widespread information dissemination, had on capital raising techniques, public company communications and business operations and the structure of the securities industry and provided guidance on the application of the federal securities laws to electronic media for issuers of all types.<sup>56</sup> In doing so, the Commission considered the significant benefits that investors could gain from the increased use of electronic media, as well as the potential for electronic media, as instruments of inexpensive mass communication, to be used to defraud the investing public.

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<sup>51</sup> 15 U.S.C. §§ 80a-1 – 80a-64.

<sup>52</sup> 15 U.S.C. §§ 80b-1 – 80a-64.

<sup>53</sup> See Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for the Delivery of Information; Additional Examples Under the Securities Act of 1993, Securities Exchange Act of 1934, and Investment Company Act of 1940, Release No. 33-7288 (May 9, 1996) [61 FR 24644], available at <http://www.sec.gov/rules/interp/33-7288.txt>.

<sup>54</sup> See Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Release No. 33-7516 (Mar. 23, 1998) [63 FR 14806], available at <http://www.sec.gov/rules/interp/33-7516.htm>.

<sup>55</sup> See Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 33-7759, Section II.G Internet Disclosure, (Oct. 22, 1999) [64 FR 61382] available at <http://www.sec.gov/rules/final/33-7759.htm>.

<sup>56</sup> See Use of Electronic Media, Release No. 33-7856 (April 28, 2000) [65 FR 25843], available at <http://www.sec.gov/rules/interp/34-42728.htm>.

*The Sarbanes-Oxley Act of 2002.*

The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”) mandated a number of changes to improve the responsibility of public companies for their financial disclosures. The Sarbanes-Oxley Act required the Commission to take several rulemaking actions in order to implement its provisions, many of which resulted in changes to Regulation S-K’s disclosure requirements. For example, the Sarbanes-Oxley Act required the Commission to adopt rules requiring chief executive officers and chief financial officers of registrants to certify financial and other information in their companies’ quarterly and annual reports.<sup>57</sup> As a part of this, the Commission added Items 307 and 308 to Regulation S-K, requiring certain disclosures related to disclosure controls and procedures and internal control over financial reporting to be made in periodic

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<sup>57</sup> The Commission had proposed certification requirements prior to the Sarbanes-Oxley Act mandate. In 1977, the Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, which led to the establishment of the integrated disclosure system, first advanced the idea of requiring senior executives to review the Exchange Act reports filed on behalf of the company they manage. This recommendation was based on the Advisory Committee’s finding that the disclosures made in Exchange Act reports tended to be of a lesser quality than the disclosures made in Securities Act filings.

In 1980, the Commission amended Form 10-K to require that the annual report be signed on behalf of a company by the company’s principal executive officer, its principal financial officer, its controller or principal accounting officer and by at least the majority of the board of directors, based on the expectation that corporate officers and directors would pay more attention to the disclosures made and would participate more fully in the preparation of the reports if they had to sign them. See Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides; Integration of Securities Act Disclosure Systems, Release No. 34-17114 (Sept. 2, 1980) [45 FR 63630].

The 1998 release proposing reform of the Securities Act offering process also proposed revisions to the signature sections of registration statements and periodic reports to mandate that the persons required to sign them certify that they had read them and that they knew of no untrue statement of a material fact or omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. While some commenters supported the proposal, a larger number opposed it, asserting that the requirement would impose unreasonable administrative burdens and expose corporate officers to increased liability. See The Regulation of Securities Offerings, Release No. 33-7606A (Nov. 13, 1998) [63 FR 67174], available at <http://www.sec.gov/rules/proposed/337606a1.txt>; <http://www.sec.gov/rules/proposed/337606a2.txt>; and <http://www.sec.gov/rules/proposed/337606a3.txt>.

In June 2002, before the enactment of the Sarbanes-Oxley Act, the Commission proposed new certification requirements for annual and quarterly reports, and proposed to require companies to maintain procedures to provide reasonable assurance that the company is able to collect, process and disclose the information required in its annual, quarterly and current reports. See Certification of Disclosure in Companies’ Quarterly and Annual Reports, Release No. 34-46079 (June 14, 2002) [67 FR 41877], available at <http://www.sec.gov/rules/proposed/34-46079.htm>.

reports that contain certifications.<sup>58</sup> Other Regulation S-K changes resulting from the Sarbanes-Oxley Act include the adoption of Item 406, which implemented the Sarbanes-Oxley Act requirement that companies disclose whether they have a code of ethics for their CEO, CFO and senior accounting personnel,<sup>59</sup> amendments to Item 303 to implement the Sarbanes-Oxley Act requirement that companies disclose all material off-balance sheet transactions,<sup>60</sup> and the addition of a requirement to Item 401, which implemented the Sarbanes-Oxley Act requirement that companies disclose information about financial experts serving on their audit committees.<sup>61</sup> In addition, the Commission adopted amendments to the disclosure requirements for current reports

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<sup>58</sup> See Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 33-8124 (Aug. 29, 2002) [67 FR 57276], [available at](http://www.sec.gov/rules/final/33-8124.htm) <http://www.sec.gov/rules/final/33-8124.htm>; Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reporting, Release No. 33-8238 (June 5, 2003) [68 FR 36636], [available at](http://www.sec.gov/rules/final/33-8238.htm) <http://www.sec.gov/rules/final/33-8238.htm>.

Before the enactment of the Sarbanes-Oxley Act, the Commission twice proposed an internal control report requirement. See Disclosure Required by Sections 404, 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33-8138 (Oct. 22, 2002) [67 FR 66208], [available at](http://www.sec.gov/rules/proposed/33-8138.htm) <http://www.sec.gov/rules/proposed/33-8138.htm>. First, in 1979, following the enactment of the Foreign Corrupt Practices Act ("FCPA"), the Commission proposed internal controls reporting by management and an assessment by accountants, intended to implement the internal accounting controls requirements in the FCPA. Some commenters criticized the proposal for its close correlation to the FCPA requirements and for the scope and content of the management report, while others noted significant private-sector initiatives that had been undertaken on these issues. See Statement of Management on Internal Accounting Control, Release No. 34-15772 (April 30, 1979) [44 FR 26702]. The Commission formally withdrew the proposal in 1980. See Statement of Management on Internal Accounting Control, Release No. 34-16877 (June 6, 1980) [45 FR 40134]. In 1988, following the recommendations of the Treadway Commission, the Commission again proposed rules that would have required a report of management's responsibilities with respect to financial reporting, including its responsibilities for the company's internal control system, and an assessment of the effectiveness of that system. While a majority of commenters generally supported the proposal, several noted that private sector organizations were working to develop standards for reporting on the effectiveness of internal controls. See Report of Management's Responsibilities, Release No. 34-25925 (July 19, 1988) [53 FR 28009].

<sup>59</sup> See Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33-8177 (Jan. 23, 2003) [68 FR 15353], [available at](http://www.sec.gov/rules/final/33-8177.htm) <http://www.sec.gov/rules/final/33-8177.htm>.

<sup>60</sup> See Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Release No. 33-8182 (Jan. 28, 2003) [68 FR 5982], [available at](http://www.sec.gov/rules/final/33-8182.htm) <http://www.sec.gov/rules/final/33-8182.htm>.

<sup>61</sup> See Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33-8177 (Jan. 23, 2003) [68 FR 15353], [available at](http://www.sec.gov/rules/final/33-8177.htm) <http://www.sec.gov/rules/final/33-8177.htm>. Section 407 directed the Commission to adopt rules (1) requiring a company to disclose whether its audit committee includes at least one member who is a financial expert and (2) defining the term "financial expert."



on Form 8-K to address the mandate under Section 409 of the Sarbanes-Oxley Act for disclosure “on a rapid and current basis” of material information regarding changes in a company’s financial condition or operations.<sup>62</sup>

*Securities Offering Reform.*

In 2005, the Commission adopted rules modifying the registration, communications and offering processes under the Securities Act.<sup>63</sup> The rule changes continued the Commission’s efforts toward integrating disclosure and processes under the Securities Act and the Exchange Act by addressing communications related to registered securities offerings, delivery of information to investors and procedural aspects of the offering and capital formation processes.

In addition, the Commission sought to recognize the role that technology plays in timely informing the market and investors about important corporate information and developments.<sup>64</sup> Accordingly, the rule changes contemplated and accommodated the use of communications technology to communicate with investors. The 2005 reforms also encouraged electronic and

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<sup>62</sup> See Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15594] (expanded the number of reportable events and shortened the filing deadline for many events to four business days after the occurrence of a triggering event), [available at](http://www.sec.gov/rules/final/33-8400.htm) <http://www.sec.gov/rules/final/33-8400.htm>. The Commission originally proposed the amendments in June 2002, before the enactment of the Sarbanes-Oxley Act. The final rules added eight new disclosure items, transferred two items from other periodic report forms and expanded two items.

The eight new disclosure items include: entry into a material non-ordinary course agreement; termination of a material non-ordinary course agreement; creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement; triggering events that accelerate or increase a material direct financial obligation or a material obligation under an off-balance sheet arrangement; material costs associated with exit or disposal activities; material impairments; notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing; and non-reliance on previously issued financial statements or a related audit report or completed interim review (restatements). The two disclosure items transferred, in part, from the periodic reports are disclosure of unregistered sales of equity securities and material modifications to rights of security holders. The amendments expanded the requirements for departure of directors or principal officers, election of directors or appointment of principal officers and amendments to articles of incorporation and bylaws and change in fiscal year.

<sup>63</sup> See Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722], [available at](http://www.sec.gov/rules/final/33-8591.pdf) <http://www.sec.gov/rules/final/33-8591.pdf>.

<sup>64</sup> See Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722], [available at](http://www.sec.gov/rules/final/33-8591.pdf) <http://www.sec.gov/rules/final/33-8591.pdf>.

web-based solutions for the delivery of information to investors, such as the introduction of an “access-equals-delivery” model and the use of hyperlinks in written offers to meet the “accompanied or preceded by a prospectus” standard.

*Advisory Committee on Smaller Public Companies.*

The Commission chartered the Advisory Committee on Smaller Public Companies in 2005 to assess the regulatory system for smaller companies and make recommendations to the Commission for changes.<sup>65</sup> The Advisory Committee was composed of representatives of small and mid-sized issuers in a variety of industries, investors, legal and accounting professionals, investment banking and venture capital professionals and academics. In 2006, the Advisory Committee published its recommendations, which included several recommendations relating to scaling disclosure and financial reporting requirements for smaller companies.<sup>66</sup> Specifically, among other things, the Advisory Committee recommended that the Commission:

- establish a new system of scaled or proportional securities regulation for smaller public companies;<sup>67</sup>
- incorporate the scaled disclosure accommodations (then available to small business issuers under Regulation S-B) into Regulation S-K, make them available to all “microcap companies” and cease prescribing separate specialized disclosure forms for smaller companies; and
- incorporate the primary scaled financial statement accommodations available to small business issuers under Regulation S-B into Regulation S-K or Regulation S-X and make them available to all “microcap companies” and “smallcap companies.”

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<sup>65</sup> The Advisory Committee’s Final Report, as well as webcasts, transcripts and copies of materials distributed in connection with all of the Advisory Committee’s meetings, are available at <http://www.sec.gov/info/smallbus/acspc.shtml>.

<sup>66</sup> See Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission (April 23, 2006), available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>.

<sup>67</sup> In its recommendations, the Advisory Committee refers to “smaller public companies” to mean public companies with equity capitalizations of approximately \$787 million or less; companies with equity capitalizations between approximately \$128 million and \$787 million generally would qualify as “smallcap companies” and companies with equity capitalizations below approximately \$128 million generally would qualify as “microcap companies.” See id.

*Smaller Reporting Company Regulatory Relief and Simplification.*

In 2007, the Commission adopted amendments intended to provide regulatory relief for smaller companies reporting under its rules, including changes to Regulation S-K that moved the scaled disclosure requirements for smaller companies from Regulation S-B into Regulation S-K.<sup>68</sup> Several of the 2007 amendments had their genesis in the recommendations made by the Advisory Committee on Smaller Public Companies in 2006, discussed above. These rules expanded the number of smaller companies eligible to use scaled disclosure by establishing a category of “smaller reporting companies,” for which the primary determinant for eligibility is that the company has less than \$75 million in public float (i.e. the aggregate market value of the issuer’s outstanding voting and non-voting common equity held by non-affiliates). When a company is unable to calculate public float, however, such as if it has no common equity outstanding or no market price for its outstanding common equity exists at the time of the determination, the standard is less than \$50 million in revenue in the last fiscal year. The 2007 amendments simplified the disclosure and reporting requirements for smaller companies by moving Regulation S-B’s scaled disclosure items into Regulation S-K (and Regulation S-X, as applicable), eliminating the SB forms and permitting smaller reporting companies to comply with the scaled disclosure requirements on an item-by-item basis.

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<sup>68</sup> See Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934], available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>. In 2007, the Commission also adopted rules that liberalized the eligibility requirements for certain short-form registration statements. See Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, Release No. 33-8878 (Dec. 19, 2007) [72 FR 73534], available at <http://www.sec.gov/rules/final/2007/33-8878.pdf>.

*Advisory Committee on Improvements to Financial Reporting.*

In 2007, the Commission established the Advisory Committee on Improvements to Financial Reporting (frequently called the “CIFI R Committee”) to examine the U.S. financial reporting system with the goal of reducing unnecessary complexity and making financial information more useful and understandable for investors. The CIFI R Committee was composed of representatives of issuers and investors, legal, accounting and investment professionals, banking regulators, credit rating agencies, broker-dealers and proponents of interactive data. As its focus was on financial reporting, the CIFI R Committee did not recommend specific changes to Regulation S-K. Several of its recommendations, however, were directed at increasing the usefulness of information in periodic reports.<sup>69</sup> The CIFI R Committee recommended requiring a short executive summary at the beginning of a company’s annual and quarterly reports that would concisely describe the most important themes and significant matters from managements’ perspective, along with an index identifying where investors could find more detailed information on particular subjects. In addition, it recommended updating the Commission’s interpretive guidance on the use of electronic media in order to promote greater use of corporate websites for the dissemination of information on a company’s financial performance. The CIFI R Committee also recommended requiring the filing of interactive data-tagged financial statements with periodic reports.

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<sup>69</sup> See Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission (Aug. 1, 2008), available at <http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf>. In addition, the CIFI R Committee advocated a joint process between the FASB and the Commission to develop a disclosure framework that would eliminate redundancies and provide a single source of disclosure guidance across all financial reporting standards. Its other recommendations focused on enhancing the accounting standards-setting process, improving the substantive design of new accounting standards, delineating authoritative interpretive guidance and clarifying guidance on financial statements and accounting judgments.

*Guidance on the Use of Websites.*

In 2008, the Commission published guidance on the use of company websites, in order to promote the use of company websites as a means for companies to communicate and provide information to investors under the Securities Act and the Exchange Act.<sup>70</sup> The guidance focused on the following areas: (1) when information posted on a company website is “public” for purposes of the applicability of Regulation FD,<sup>71</sup> (2) company liability for information on company websites, including previously posted information, hyperlinks to third-party information, summary information and the content of interactive web sites, (3) the types of controls and procedures advisable with respect to such information and (4) the format of information presented, with the focus on readability not printability.

*21<sup>st</sup> Century Disclosure Initiative.*

In 2008, the Commission announced an agency-wide initiative, with the goal of preparing a plan for future action to modernize the Commission’s disclosure system. The Initiative’s report, issued in 2009, recommended that the Commission design and implement a new disclosure system in which interactive data would replace plain-text disclosure documents, while retaining the substantive content and filing schedule of the current system.<sup>72</sup>

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<sup>70</sup> See Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>. As noted above, this guidance was prompted in part by a recommendation by the CIFI R Committee. See Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting, Release No. 33-8896 (Feb. 14, 2008) (“CIFI R Progress Report”), available at <http://www.sec.gov/rules/other/2008/33-8896.pdf>.

More recently, in April 2013, in connection with an investigation of the use of social media to announce operational metrics, the Commission provided guidance to issuers regarding how its 2008 guidance and Regulation FD apply to disclosure made through social media channels. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act, Release No. 34-69279 (Apr. 2, 2013), available at <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

<sup>71</sup> 17 CFR §243.100 et seq.

<sup>72</sup> See 21<sup>st</sup> Century Disclosure Initiative: Staff Report, Toward Greater Transparency: Modernizing the Securities and Exchange Commission’s Disclosure System (Jan. 2009), available at

*The Dodd-Frank Act.*

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), enacted in 2010, made significant changes in the regulatory landscape for the Commission and tasked the Commission with writing a large number of new rules and conducting several studies and reports.<sup>73</sup> In addition to provisions relating to derivatives regulation, clearance and settlement activities, registration of private fund advisers, credit rating agency regulation, reforms to the asset-backed securitization process, and many others, the Dodd-Frank Act includes an array of corporate governance, executive compensation and specialized disclosure provisions that have an impact on the requirements of Regulation S-K.

The requirements currently in place include disclosure under Item 402 of Regulation S-K of an issuer’s consideration of the “say-on-pay” vote required by Section 951 of the Dodd-Frank Act,<sup>74</sup> disclosure under Item 407 of Regulation S-K relating to issuers’ compensation committees and the use of compensation consultants required by Section 952 of the Dodd-Frank Act,<sup>75</sup> and disclosure under new Item 104 of Regulation S-K of mine safety matters required by Section 1503 of the Dodd-Frank Act.<sup>76</sup> The Commission also is required by the Dodd-Frank Act to adopt

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<http://www.sec.gov/spotlight/disclosureinitiative/report.pdf>. The Commission adopted rules requiring companies to provide financial statement information in the XBRL interactive data format in 2009. See Interactive Data to Improve Financial Reporting, Release No. 33-9002 (Jan. 30, 2009) [74 FR 6776], available at <http://www.sec.gov/rules/final/2009/33-9002.pdf>.

<sup>73</sup> Pub. L. 111-203, 124 Stat. 1376, H.R. 4173.

<sup>74</sup> See Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 33-9178 (Jan. 25, 2011) [76 FR 6010], available at <http://www.sec.gov/rules/final/2011/33-9178.pdf>.

<sup>75</sup> See Listing Standards for Compensation Committees, Release No. 33-9330 (June 20, 2012) [77 FR 38421], available at <http://www.sec.gov/rules/final/2012/33-9330.pdf>.

<sup>76</sup> See Mine Safety Disclosure, Release No. 33-9286 (Dec. 21, 2011) [76 FR 81761], available at <http://www.sec.gov/rules/final/2011/33-9286.pdf>.

In addition, in August 2012, as mandated by Sections 1502 and 1504 of the Dodd-Frank Act, the Commission adopted new rules and forms for the disclosure of certain payments by resource extraction issuers and for information about the use of conflict minerals. These disclosure requirements are not part of

several additional rules related to corporate governance and executive compensation that either are required to be, or may be, included in Regulation S-K, such as new disclosure requirements about executive compensation and company performance under Dodd-Frank Act Section 953(a) and chief executive officer pay ratios under Dodd-Frank Act Section 953(b).<sup>77</sup>

*Other Recent Initiatives.*

The Commission's Advisory Committee on Small and Emerging Companies,<sup>78</sup> which was formed in 2011, has had several discussions at public meetings since its formation about the Commission's disclosure requirements and in February 2013 voted to make recommendations to the Commission with respect to scaling certain disclosure requirements for small to mid-size public companies.<sup>79</sup>

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Regulation S-K. See Disclosure of Payments by Resource Extraction Issuers, Release No. 34-67717 (Aug. 22, 2012) [77 FR 56365], available at <http://www.sec.gov/rules/final/2012/34-67717.pdf> and Conflict Minerals, Release No. 34-67716 (Aug. 22, 2012) [77 FR 56273], available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>. The resource extraction issuer disclosure rules have been vacated and remanded by the District Court for the District of Columbia (see American Petroleum Institute v. SEC, Civ. A. No. 12-1688, 2013 WL 3307114, (D.D.C. Jul. 2, 2013) and the conflict minerals rule remains the subject of ongoing litigation (see National Ass'n of Mfrs. v. SEC, Civ. A. No. 12-cv-635, 2013 WL 3803918 (D.D.C. Jul. 23, 2013)).

Similarly, in August 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub.L. No. 112-158, was enacted, which requires issuers to provide disclosure in their annual and quarterly reports filed with the Commission about certain business activities relating to Iran. This requirement was self-executing and therefore the disclosure requirement is not part of Regulation S-K.

<sup>77</sup> See Pay Ratio Disclosure, Release No. 33-9452 (Sept. 18, 2013) [78 FR 60559], available at <http://www.sec.gov/rules/proposed.shtml>.

<sup>78</sup> The Advisory Committee's objective is to provide the Commission with advice on its rules, regulations, and policies as they relate to capital raising by emerging privately held small businesses and publicly traded companies with less than \$250 million in public market capitalization through securities offerings, including private and limited offerings and initial and other public offerings, trading in the securities of emerging companies and smaller public companies, and public reporting and corporate governance requirements of emerging companies and smaller public companies.

<sup>79</sup> The Advisory Committee's February 2013 recommendations, as well as transcripts and copies of materials distributed in connection with all of the Advisory Committee's meetings, are available at <http://www.sec.gov/info/smallbus/acsec.shtml>.

In particular, the Advisory Committee recommended that the Commission revise its smaller reporting company rules to incorporate the exemptions applicable to emerging growth companies, exempt smaller reporting companies from requirements to provide interactive data in connection with periodic reports and revise the exhibit requirements in Item 601 to permit the omission of immaterial schedules and attachments

### III. Review of Disclosure Requirements in Regulation S-K

This section provides a summary of the staff’s review of the disclosure items in Regulation S-K. For each item, the summary notes general background information about the adoption of the requirement and the origins of particular disclosure requirements where they pre-date, in some form, their inclusion in Regulation S-K. The summary also provides a brief description of the significant substantive amendments to the disclosure requirements and, where applicable, summarizes the recommendations submitted by commenters through the Commission’s website. The items have been grouped into topical categories in order to provide an overview of the current disclosure framework. The topical categories, however, differ from the current headings in Regulation S-K to provide a better understanding of the substantive areas that are covered by current rules as well as the substantive areas that might be addressed in future recommendations for disclosure reform.<sup>80</sup>

As noted above, in implementing the integrated disclosure system, the Commission included in Regulation S-K various requirements that had been instructions to the registration statement and periodic reporting forms and rules. Accordingly, several items in Regulation S-K relate to requirements for the contents and presentation of registration statements and prospectuses, including the following:

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to material contracts.

<sup>80</sup> For example, requirements for risk factor disclosure are currently set forth under Subpart 229.500 – Registration Statement and Prospectus Provisions. This report, however, discusses the risk factor requirements of Item 503(c) under a heading entitled “Requirements Relating to Risk and Risk Management.”

The staff acknowledges, moreover, that some items or portions of Regulation S-K item requirements may fall into more than one topical category (e.g., some provisions in management’s discussion and analysis of financial condition and results of operations (“MD&A”) under Item 303, such as liquidity and capital resources, off-balance sheet arrangements or tabular disclosure of contractual obligations, could have been grouped together with provisions relating to risk and risk management). The categories used in this report are intended to provide a conceptual structure to the review of disclosure requirements and are not intended to have any interpretive or substantive effect with respect to current requirements.



- Item 10 – General<sup>81</sup>
- Item 501 – Forepart of the Registration Statement and Outside Front Cover Page of Prospectus
- Item 502 – Inside Front and Outside Back Cover Pages of Prospectus
- Item 503 (a) and (b) – Prospectus Summary and Address<sup>82</sup>
- Item 510 – Disclosure of Commission Position on Indemnification for Securities Act Liabilities<sup>83</sup>
- Item 512 – Undertakings.<sup>84</sup>

In addition, Item 601 (Exhibits) sets forth the requirements for exhibits to registration statements and periodic reports.<sup>85</sup> We have excluded these requirements from the summary below in order to

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<sup>81</sup> Item 10, formerly Item 1, was adopted as part of the original Regulation S-K in order to set forth the rules for application of the regulation. See Release No. 33-5893 (Dec. 23, 1977). In 1982, the Commission added its policy on the use of securities ratings in filings. See Release No. 33-6383 (March 3, 1982) [47 FR 11380]. In 1995, in connection with comprehensive revisions to the Commission’s Rule of Practice, former Rule 24 concerning incorporation by reference was moved from the Rules of Practice into Item 10. See Rules of Practice, Release No. 34-35833 (June 9, 1995) [60 FR 32737]. In 2003, the Commission adopted amendments to add requirements regarding the use of non-GAAP financial measures in filings. See Conditions for Use of Non-GAAP Financial Measures, Release No. 33-8176 (Jan. 6, 2003) [68 FR 4820]. In 2007, Item 10 was amended to add the scaled disclosure requirements from former Regulation S-B. See Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934].

<sup>82</sup> A requirement for the registrant’s address and telephone number to be included in the prospectus (not only in a related registration statement) was originally published as an interpretive guide in 1970. See Definitive Guide Relating to Disclosure in Prospectus of Registrant’s Business Address and Telephone Number, Release No. 33-5102 (Nov. 12, 1970) [35 FR 17990]. This was in response to complaints received from investors and state regulatory agencies that had been “unable to communicate conveniently with registrants because that information had not been given.” See The Commission’s Annual Report for 1971 available at [http://www.sec.gov/about/annual\\_report/1971.pdf](http://www.sec.gov/about/annual_report/1971.pdf).

<sup>83</sup> This requirement for disclosure about the Commission’s position on indemnification was adopted in its current form as part of the expansion and reorganization of Regulation S-K in 1982. See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380]. It was based on a provision added in 1968 to the guides. See Guide 46 in Guides for Preparation and Filing of Registration Statements Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617]. See also note 16, supra. The original disclosure requirements relating to indemnification of directors and officers were included in Form S-1 in 1947, in order to codify disclosure practice at the time. See Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224].

<sup>84</sup> A requirement for the disclosure of undertakings to file periodic reports was first added to Form A-2 in 1937. See Amendment No. 30 to Form A-2, Release No. 33-1345 (March 26, 1937) [2 FR 604].

<sup>85</sup> The requirement for the filing of copies of various documents as exhibits to the registration statement arises from the provisions in Schedule A of the Securities Act. Paragraphs (28) through (31) require the filing of underwriting agreements, opinions of counsel as to the validity of the shares and legality of the offering, material contracts, corporate charter documents, and agreements or indentures affecting the offered securities. Over time, additional requirements for exhibits were adopted as part of the forms for registration

focus on the requirements that call for registrants to prepare detailed, company-specific disclosures because we believe that those are the requirements that would benefit most from a review of the policy goals and historical context of current rules.<sup>86</sup>

## **A. Requirements Relating to the Registrant’s Business and Operations**

### Item 101 – Description of Business

*General background.* This requirement is derived from Schedule A of the Securities Act, which requires a description of the general character of the business actually transacted or to be transacted by the issuer.<sup>87</sup> Requirements similar to Item 101(a) (*General development of business*) and (c) (*Narrative description of business*) were included in the earliest forms of registration statements and annual reports adopted by the Commission.<sup>88</sup> In 1947, the

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statements and periodic reports. In the late 1970s, in connection with the implementation of an integrated disclosure system, the staff of the Division of Corporation Finance conducted a review of the exhibit requirements contained in the various forms under the Securities Act and Exchange Act. An exhibit requirement, similar to existing Item 601, was added to Regulation S-K in 1980, which standardized the filing requirements for exhibits and eliminated 13 exhibit requirements that were deemed to be of limited interest to investors and the Commission. See Release No. 33-6230 (Aug. 27, 1980) [45 FR 58822].

<sup>86</sup> Concerns have been raised about some of these areas, in particular, the exhibit requirements. See February 2013 recommendations of the Advisory Committee on Smaller and Emerging Companies, *supra* note 79, Letter from Daniel J. Winnike, Fenwick West LLP et al., dated June 19, 2012 (“Silicon Valley Letter”), available at <http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk-1.pdf> and Letter from Mike Liles, dated April 10, 2013 (“Letter from Mike Liles”) (endorsing the recommendations in the Silicon Valley Letter), available at <http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewregsk-4.pdf>.

As discussed below under the heading “Potential Areas for Further Study,” the staff believes these requirements, including the exhibit requirements, relating to filings under the Securities Act and Exchange Act should be reviewed in connection with a reassessment of the presentation of non-financial statement information contained in offering documents and periodic reports.

<sup>87</sup> See Schedule A, paragraph (8).

<sup>88</sup> See, e.g., Items 5 and 6 of Form A-2 adopted in 1935, which required registrants “to outline briefly the general character of the business done and intended to be done by the registrant and its subsidiaries” and “the general development of the business for the preceding five years.” See Release No. 33-276 (Jan. 14, 1935) [*not published in the Federal Register*]. In addition, Items 3 through 5 of Form A-1, adopted in 1933, required registrants to briefly describe the “character of business done or intended to be done,” disclose a list of states where the issuer owned property and was qualified to do business, and the length of time the registrant had been engaged in its business. See Release No. 33-5 (July 6, 1933).

Form A-1 was the first form adopted under the Securities Act and was designed to be generally applicable. Form A-1 generally consisted of the requirements in Schedule A of the Securities Act, with additional detail

Commission adopted requirements in Form S-1 that required a description of the relative importance of a registrant's materially important lines of business and required, where material, a brief description of the general competitive conditions in the industry.<sup>89</sup> In 1951, the Commission adopted amendments to Form S-1 that required a description of the relative importance of each product or service (or class of similar products or services) that contributed 15% or more to the gross volume of business for the fiscal year.<sup>90</sup> In 1969, the Commission adopted amendments to Form S-1 that required, for companies engaged in more than one line of business, separate reporting of the percentage of total sales and revenue or loss for each line of business that contributed 10% or more to total sales and revenues or income.<sup>91</sup> In 1973, pursuant to the National Environmental Policy Act of 1969,<sup>92</sup> additional disclosure regarding compliance with environmental laws was added to the description of business disclosure requirements in Form S-1 and Forms 10 and 10-K.<sup>93</sup> Also in 1973, following its investigation of the hot issues markets,<sup>94</sup>

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on financial data requirements. Later in 1933, several specialized forms were adopted for certain types of securities, such as certificates of deposit and voting trust certificates, and certain types of transactions, such as exchange offers and securities issued pursuant to a plan of reorganization. See Harold H. Neff, Securities Registration Forms, 51 Harv. L. Rev. 1354 (1937-1938).

Form A-1 was deemed impracticable for use by older, more seasoned issuers, and in the first year following the enactment of the statute only four seasoned companies had used the form. To address these concerns, Form A-2 was adopted in 1935 with specific requirements for seasoned issuers, emphasizing disclosure relating to the operations during the periods for which financial statements were required rather than requirements relating to the company's history and formation. See id.

<sup>89</sup> See Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224].

<sup>90</sup> See Form S-1 For Registration of Securities, Release No. 3429 (Nov. 1, 1951) [16 FR 11635].

<sup>91</sup> See Adoption of Amendments to Forms S-1, S-7 and 10, Release No. 33-4988 (July 14, 1969) [34 FR 12176]. It has been suggested that line of business reporting arose, in part, in response to a wave of merger activity in the early 1960s, which focused attention from anti-trust advocates and investors on issues relating to conglomerates, generally, and the transparency of the profitability of segments in a diversified enterprise. See, e.g., A.A. Sommer, Jr., SEC "Line of Business" Reporting Requirements, 44 St. John's L. Rev. 926 (1969-1970).

<sup>92</sup> Pub. L. 91-190, 42 U.S.C. 4321-4347.

<sup>93</sup> See Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release No. 33-5386 (April 10, 1973) [38 FR 12100].

<sup>94</sup> See Public Investigation in the Matter of Hot Issues Securities Market (hearings), File No. 4-148; see also

the Commission adopted several new disclosure requirements, including information about the status of the development of new products, more detailed information about the competitive conditions and position of the issuer in the industry in which it operates and, for certain development stage companies, a description of their plans of operation.<sup>95</sup> In 1976, the Commission adopted an amendment to Form S-1 to require disclosure about capital expenditures relating to environmental compliance.<sup>96</sup> As first adopted in 1977, Regulation S-K required a description of the general development of the business, financial information about the industry segments,<sup>97</sup> a narrative description of the business and financial information about foreign and domestic operations and export sales.<sup>98</sup> These requirements were similar to paragraphs (a) through (d) of current Item 101.

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“Hot Issues” Securities Markets, Release No. 33-5204 (Oct. 21, 1971) [36 FR 21229] and Hot Issues, Release No. 33-5274 (July 26, 1972) [37 FR 16005]. The term hot issues markets refers to markets in which new issues of securities experience substantial price increases in the aftermarket.

<sup>95</sup> See New Ventures, Meaningful Disclosure, Release No. 33-5395 (June 1, 1973) [38 FR 17202]. The adopting release notes that, in making investment decisions, venture capitalists and underwriters generally obtain specific information from companies about their competitive position and the methods of competition in their respective industries, and accordingly, the new requirements would provide that type of information to investors.

These amendments also added requirements for the disclosure of the amount of backlog orders, the source and availability of raw materials essential to the business, the importance, duration and effect of all material intellectual property held by the company, the number of employees, and the estimated dollar amount of research and development expenditures during the last two years.

<sup>96</sup> See Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure, Release No. 33-5704 (May 6, 1976) [41 FR 21632]. As discussed in the adopting release, this rulemaking was part of the Commission’s consideration of the impact of the National Environmental Policy Act of 1969 on its disclosure regime.

<sup>97</sup> In 1976, the FASB issued SFAS No. 14, “Financial Reporting for Segments of a Business Enterprise,” which required corporations to disclose certain financial information by “industry segment” (as defined in SFAS No. 14) and by geographic area. The business description requirements adopted in 1977 as part of Regulation S-K sought to integrate the information to be furnished under SFAS No. 14 with the narrative and financial disclosures required in various forms. See Industry Segment Reporting; Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554]. The FASB subsequently superseded SFAS No. 14 through the issuance of SFAS No. 131, Disclosures about Segments of an Enterprise and Related Information, in June 1997. The guidance from SFAS No. 131 is currently included in the FASB Accounting Standards Codification (FASB ASC) in Topic 280, Segment Reporting.

<sup>98</sup> See Industry Segment Reporting; Adoption of Disclosure Regulation and Amendments of Disclosure Forms

*Summary of past substantive changes to the requirement.* In connection with the Plain English disclosure reforms adopted in 1998, the requirements for “Available Information,” “Reports to Security Holders” and “Enforceability of Civil Liabilities Against Foreign Persons” were moved to the description of business, rather than being required on the inside front and back cover of the prospectus.<sup>99</sup> In 1999, requirements for financial information about a registrant’s business segments were revised to reflect changes in U.S. GAAP standards for operating segments and guidance was provided to clarify that the requirements calling for disclosure about principal products and services are broader than the U.S. GAAP requirements and require a discussion of the principal markets for and methods of distribution of each segment’s products and services.<sup>100</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Item 101(h) provides scaled disclosure requirements for smaller reporting companies. A smaller reporting company is required to provide a description of the development of its business during the most recent three years, including its form and year of organization, any bankruptcy proceedings, any material reclassification, merger, sale or purchase of assets outside the ordinary course of business and a description of the business. The description of business requirements are less detailed than those for other reporting companies and do not require information about seasonality (as required for other registrants in Item 101(c)(1)(v)), working capital practices (Item 101(c)(1)(vi)), identification of significant customers (Item 101(c)(1)(vii)), backlog information (Item

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and Rules, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554].

<sup>99</sup> See Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370]. Current requirements for disclosure regarding the enforceability of civil liabilities against foreign persons are generally similar to the provisions of Guide 8 published in 1964. See Guides for Preparation and Filing of Registration Statements, Release No. 33-4666 (Feb. 15, 1964) [29 FR 2490].

<sup>100</sup> See Segment Reporting, Release No. 33-7620 (Jan. 5, 1999) [64 FR 1728], available at <http://www.sec.gov/rules/final/33-7620.txt>.

101(c)(1)(viii)) and certain material government contracts (Item 101(c)(1)(ix)). The scaled requirements also call for information about the need for government approval of principal products and services, which is not a specific requirement for other reporting companies.

*Comments submitted to the Commission's JOBS Act website.* Two commenters recommended eliminating from Item 101 the requirement to disclose the amount of backlog orders believed to be firm, asserting that the concept of backlog is not a meaningful metric for most emerging growth companies and that eliminating the requirement for emerging growth companies will not compromise the delivery of meaningful disclosure to investors.<sup>101</sup> These commenters also raised a question as to whether the concept of backlog (or for businesses other than industrials, some other measure of committed revenue that is not yet reflected in the financial statements) is more appropriately addressed in MD&A. Similar recommendations were made by another commenter, who suggested eliminating the requirement for all companies, not only emerging growth companies, or moving the requirement to MD&A.<sup>102</sup> This commenter believed that this was one example of requirements that should be reviewed because they are industry specific rather than applicable to all entities.

#### Item 102 – Description of Property

*General background.* In 1935, the Commission adopted, as part of registration statement Form A-2, a requirement for a brief description of the general character and location of “principal plants and other important units” of the registrant and its subsidiaries (and, for property not held in fee, a description of how the property was held).<sup>103</sup> That requirement also called for a brief

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<sup>101</sup> See Silicon Valley Letter and Letter from Mike Liles.

<sup>102</sup> See Letter from Ernst & Young, dated September 11, 2012 (Letter from Ernst & Young”), available at <http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk-3.pdf>.

<sup>103</sup> See Release No. 33-276 (Jan. 14, 1935).

description of the material franchises and concessions held by the registrant or its subsidiaries. In 1977, a similar requirement for a description of property was one of the two original disclosure items contained in Regulation S-K.<sup>104</sup> The 1977 requirement was substantially similar to the current requirement, except that it also contained provisions relating to extractive enterprises. At the time, the Commission proposed a requirement that would have required registrants to describe the physical properties that were material to each of its segments; instead, in response to commenters, the adopted requirement focused on properties that were material to the registrant and its subsidiaries and required registrants to identify the segments that use the property, in order to “improve an investor’s understanding of a particular segment’s future operations.”<sup>105</sup>

*Summary of past substantive changes to the requirement.* In 1982, in connection with the integration of disclosure requirements, the Commission moved the provisions in this item relating to oil and gas operations into a new Industry Guide, Guide 2.<sup>106</sup> In 1999, in connection with changes to segment reporting requirements, Item 102 was revised to require the identification of segments as reported in the financial statements.<sup>107</sup> In 2008, the instructions to Item 102 were revised to reflect the new oil and gas disclosure provisions in Subpart 1200.<sup>108</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

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<sup>104</sup> See Industry Segment Reporting; Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554].

<sup>105</sup> Industry Segment Reporting; Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554].

<sup>106</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

<sup>107</sup> See Segment Reporting, Release No. 33-7620 (Jan. 5, 1999) [64 FR 1728], available at <http://www.sec.gov/rules/final/33-7620.txt>.

<sup>108</sup> See Modernization of Oil and Gas Reporting, Release No. 33-8995 (Dec. 31, 2008) [74 FR 2157], available at <http://www.sec.gov/rules/final/2008/33-8995.pdf>. The oil and gas provisions in Subpart 1200 updated and replaced Industry Guide 2. See Section III.F. Items 1201 to 1208 – Disclosure by Registrants Engaged in Oil and Gas Producing Activities.

*Comments submitted to the Commission's JOBS Act website.* One commenter recommended that property disclosure should not be required for entities where physical plant or properties are not a significant element of enterprise value.<sup>109</sup>

## **B. Requirements Relating to the Registrant's Financial Condition**

### Item 301 – Selected Financial Data

*General background.* This requirement was originally adopted in 1980 as part of Form 10-K, to replace a former requirement calling for a summary of operations data,<sup>110</sup> in light of a concern that the operations summaries provided by registrants duplicated information otherwise available in the financial statements and may have unduly emphasized income over other enterprise performance measures.<sup>111</sup> The selected financial data requirement was designed to highlight historical trends in significant data relating to financial condition and results of operations over a five-year period. In 1982, upon the adoption of integrated disclosure requirements, this requirement was moved from Form 10-K into Regulation S-K.<sup>112</sup> At that time, the requirement was amended to move provisions relating to the ratio of earnings to fixed charges to Item 503 of Regulation S-K and to add a requirement for a brief description of factors that could materially affect the comparability of the data or uncertainties that could cause the data to not be indicative of the registrant's future financial condition or results of operations.

*Summary of past substantive changes to the requirement.* In 1982, in connection with the adoption of an integrated disclosure system for non-U.S. registrants, this requirement was

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<sup>109</sup> See Letter from Ernst & Young.

<sup>110</sup> A requirement for a five-year summary of operations data was added to Form 10-K in 1970. See Adoption of Revised Form 10-K, Release No. 34-9000 (Oct. 21, 1970) [35 FR 16919].

<sup>111</sup> See Amendments to Annual Report Form, Related Forms, Rules, Regulations and Guides; Integration of Securities Act Disclosure Systems, Release No. 33-6231 (Sept. 2, 1980) [45 FR 63630].

<sup>112</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (March 3, 1982) [47 FR 11380].



amended by adding provisions applicable to foreign private issuers regarding exchange rates and currency used.<sup>113</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Smaller reporting companies are not required to provide disclosure under Item 301.<sup>114</sup> In a registration statement, an emerging growth company is permitted to provide selected financial data only for the periods for which audited financial statements are included in the registration statement. In periodic reports following its IPO, an emerging growth company may provide selected financial data for periods for which financial statements were presented in the IPO and periods thereafter.<sup>115</sup>

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 302 – Supplementary Financial Data

*General background.* A requirement for disclosure of selected quarterly financial data was originally adopted as part of Regulation S-X and required the disclosure as part of the financial statements. In 1980, in connection with an initiative to streamline Regulation S-X, this requirement was moved to Regulation S-K.<sup>116</sup> As indicated in the adopting release, this move was made, in part, because the information was not required to be audited and, therefore, it was considered appropriate to move the disclosure outside of the financial statements. For the same

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<sup>113</sup> See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Dec. 1, 1982) [47 FR 54764].

<sup>114</sup> See Item 301(c), adopted in 2007 in Smaller Reporting and Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934], available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>.

<sup>115</sup> See JOBS Act Section 102(b); Securities Act Section 7(a)(2)(A) [15 USC 77g(a)(2)(A)]; Exchange Act Section 13(a) [15 USC 78m(a)]. As discussed in Section I.B. of this report, Title I of the JOBS Act provided emerging growth companies with a variety of scaled disclosure and other accommodations, including exemptions from or modifications to certain Regulation S-K disclosure requirements. These provisions were effective upon enactment of the JOBS Act without rulemaking by the Commission.

<sup>116</sup> See General Revision of Regulation S-X, Release No. 33-6233 (Sept. 2, 1980) [45 FR 63660].

reason, disclosure requirements relating to disagreements with accountants was also moved at that time from Regulation S-X to this item in Regulation S-K.

*Summary of past substantive changes to the requirement.* In 1982, the Commission added requirements for supplemental oil and gas disclosure in connection with a change in accounting standards.<sup>117</sup> In 1987, as a result of changes in accounting standards, the Commission adopted amendments that eliminated former requirements for the disclosure of the effects of changing prices on the registrant's business.<sup>118</sup> In 1999, the Commission expanded the application of this item to all registrants, other than foreign private issuers, with securities registered under Section 12(b) or (g) of the Exchange Act.<sup>119</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Item 302 only applies to registrants, other than foreign private issuers, that have securities registered under Section 12(b) or (g) of the Exchange Act, and, accordingly, it would not apply to a typical IPO company until after the IPO. In addition, smaller reporting companies are not required to provide disclosure under Item 302.<sup>120</sup>

*Comments submitted to the Commission's JOBS Act website.* None.

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<sup>117</sup> See Supplemental Disclosures of Oil and Gas Producing Activities, Release No. 33-644 (Dec. 15, 1982) [47 FR 57911].

<sup>118</sup> See Disclosure of the Effects of Inflation and Other Changes in Prices, Release No. 33-6728 (Aug. 6, 1987) [52 FR 30917].

<sup>119</sup> See Audit Committee Disclosure, Release No. 34-42266 (Dec. 22, 1999) [64 FR 73389]. Before the amendments, only larger, more widely-held companies were subject to Item 302(a), which required disclosure of selected quarterly financial data as well as reconciliations and descriptions of any adjustments to quarterly information previously reported in a Form 10-Q, and the selected quarterly financial data was required to be reviewed by the company's independent auditors. One of the objectives noted in the release was that "[i]nappropriate earnings management could be deterred by imposing more discipline on the process of preparing interim financial information before filing such information with the Commission." *Id.*, at 73392.

<sup>120</sup> See Item 302(c), adopted in Smaller Reporting and Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934], available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>.

Item 303 – Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A)

*General background.* In 1968, the Commission published Guide 22, which called for a summary of earnings, including a discussion of unusual conditions that affected the appropriateness of the earnings presentation and requiring footnotes indicating adverse changes in operating results subsequent to the latest period included in the earnings summary.<sup>121</sup> In 1974, the Commission expanded this requirement, publishing Exchange Act Guide 1 (for periodic reports) and amending Guide 22 to call for a narrative discussion of a registrant’s financial statements, under captions entitled “Management’s Discussion and Analysis of the Summary of Earnings” and “Management’s Discussion and Analysis of the Summary of Operations.”<sup>122</sup> In addition to the summary, the amended guides called for a full narrative explanation that would enable investors to appraise the quality of earnings and operating results and included a percentage test for disclosure.<sup>123</sup> In 1980, the requirement was added to Regulation S-K, with expanded requirements relating to liquidity and capital resources, new requirements emphasizing trends and the identification of significant events or uncertainties, requirements for disclosure of the effects of inflation and changing prices, and the percentage tests for disclosure were eliminated.<sup>124</sup> Rather than focusing on prescriptive, line-item disclosure requirements, MD&A requirements

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<sup>121</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617].

<sup>122</sup> See Guidelines for Registration and Reporting, Release No. 33-5520 (Aug. 14, 1974) [39 FR 31894].

<sup>123</sup> Registrants were required to discuss items of revenue or expense that changed more than 10% from the prior period or changed more than 2% of the average net income or loss for the most recent three years presented.

<sup>124</sup> See Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides; Integration of Securities Acts Disclosure Systems, Release No. 33-6231 (Sept. 2, 1980) [45 FR 63630].

were intended to function as principles-based requirements, in order to elicit meaningful, company-specific disclosure.<sup>125</sup>

*Summary of past substantive changes to the requirement.* In 1982, the Commission adopted instructions for compliance by foreign private issuers.<sup>126</sup> In 1987, the Commission adopted amendments to the instructions to this item to clarify that registrants are only required to discuss the impact of inflation and other changes in prices when those changes are considered material.<sup>127</sup> In 2003, as mandated by Section 401 of the Sarbanes-Oxley Act, the Commission adopted requirements for the disclosure of off-balance sheet arrangements. At this time, requirements for tabular disclosure of contractual obligations were also adopted, in order to consolidate information about a registrant's future payment obligations and commitments in a single location to provide context for an assessment of a registrant's liquidity and capital resource needs and demands.<sup>128</sup>

In addition, from time to time, the Commission has published interpretive guidance on various aspects of the MD&A requirements.<sup>129</sup>

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<sup>125</sup> See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056], available at <http://www.sec.gov/rules/interp/33-8350.htm>. The MD&A requirements are intended to satisfy three principal objectives: (1) to provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management, (2) to enhance the overall financial disclosure and provide the context within which financial information should be analyzed, and (3) to provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance. See *id.*

<sup>126</sup> See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Dec. 1, 1982) [47 FR 54764].

<sup>127</sup> See Disclosure of the Effects of Inflation and Other Changes in Prices, Release No. 33-6728 (Aug. 3, 1987) [52 FR 30917].

<sup>128</sup> See Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Release No. 33-8182 (Jan. 28, 2003) [68 FR 5982], available at <http://www.sec.gov/rules/final/33-8182.htm>.

<sup>129</sup> See Management's Discussion and Analysis of Financial Conditions and Results of Operations, Release No. 33-6349 (Sept. 28, 1981), 23 SEC Docket 962 [Release not published in the Federal Register]; Concept Release on Management's Discussion and Analysis of Financial Condition and Results of Operations,

*Scaled requirements or exemptions for specified classes of registrants.* Smaller reporting companies and emerging growth companies that present only two years of financial statement information are permitted to provide analysis of two years rather than three years. In addition, smaller reporting companies are not required to comply with the contractual obligations table requirements in paragraph (a)(5).

*Comments submitted to the Commission's JOBS Act website.* Several commenters submitted recommendations for updating MD&A requirements. Two commenters recommended eliminating or reducing disclosure in MD&A relating to a company's historical practice for establishing the fair value of the company's common stock in connection with stock-based compensation, suggesting that this information is not significant to investors.<sup>130</sup> In contrast,

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Release No. 6711 (April 17, 1987) [52 FR 13715] (seeking public comment on the adequacy of MD&A disclosures generally and on proposed revisions submitted by members of the professional accounting community); Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Release No. 33-6835 (May 18, 1989) [54 FR 22427], [available at](http://www.sec.gov/rules/interp/33-6835.htm) <http://www.sec.gov/rules/interp/33-6835.htm>; Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences By Public Companies, Investment Advisors, Investment Companies, and Municipal Securities Issuers, Release No. 33-7558 (July 29, 1998) [63 FR 41394], [available at](http://www.sec.gov/rules/interp/33-7558.htm) <http://www.sec.gov/rules/interp/33-7558.htm>; Cautionary Advice Regarding Disclosure About Critical Accounting Policies, Release No. 33-8040 (Dec. 12, 2001) [66 FR 65013], [available at](http://www.sec.gov/rules/other/33-8040.htm) <http://www.sec.gov/rules/other/33-8040.htm>; Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8056 (Jan. 22, 2002) [67 FR 3746], [available at](http://www.sec.gov/rules/other/33-8056.htm) <http://www.sec.gov/rules/other/33-8056.htm>; Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056], [available at](http://www.sec.gov/rules/interp/33-8350.htm) <http://www.sec.gov/rules/interp/33-8350.htm>; Commission Guidance Regarding Disclosure Relating to Climate Change, Release No. 33-9106 (Feb. 2, 2010) [75 FR 6290], [available at](http://www.sec.gov/rules/interp/2010/33-9106.pdf) <http://www.sec.gov/rules/interp/2010/33-9106.pdf>; Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis, Release No. 33-9144 (Sept. 17, 2010) [75 FR 59896], [available at](http://www.sec.gov/rules/interp/2010/33-9144.pdf) <http://www.sec.gov/rules/interp/2010/33-9144.pdf>.

<sup>130</sup> See Silicon Valley Letter and Letter from Mike Liles. These commenters acknowledge that Item 303 does not expressly require this disclosure. These commentators suggest that the disclosure is being provided by companies to address the Commission's interpretive guidance regarding disclosure about critical accounting policies, the judgments and uncertainties affecting the application of those policies and the likelihood that materially different amounts would be reported under different conditions or different assumptions. See Cautionary Advice Regarding Disclosure About Critical Accounting Policies, Release No. 33-8040 (Dec. 12, 2001) [66 FR 65013], [available at](http://www.sec.gov/rules/other/33-8040.htm) <http://www.sec.gov/rules/other/33-8040.htm>, and Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056], [available at](http://www.sec.gov/rules/interp/33-8350.htm) <http://www.sec.gov/rules/interp/33-8350.htm>. These commentators also assert that companies are providing

another commenter strongly opposed that recommendation, noting that such disclosure is meaningful for institutional investors.<sup>131</sup>

One commenter recommended that the requirement in annual reports for the repetition of prior year-over-year analysis should be eliminated, because the comparison detracts from a comprehensive analysis of a three-year trend, and, in any event, MD&A disclosures for the previous year can be easily obtained on EDGAR.<sup>132</sup> This commenter also observed changes in accounting standards have created redundancies with MD&A requirements. As an example, this commenter noted that many of the required financial statement disclosures related to variable interest entities, now specified by FASB ASC Topic 810, Consolidation, address the objectives of the MD&A off-balance sheet arrangements requirements.<sup>133</sup>

#### Item 503 (d) – Ratio of Earnings to Fixed Charges

*General background.* A requirement to present a ratio of earnings to fixed charges was first adopted in 1954 in connection with the adoption of Form S-9, a short-form registration statement for registration of non-convertible, fixed interest debt.<sup>134</sup> Use of Form S-9 was conditioned on the issuer’s ability to demonstrate a minimum coverage of fixed charges. Over time, the Commission added similar ratio requirements to other Commission registration statement and reporting forms (including Forms S-1, S-7, S-11, 10 and 10-K) as part of the

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this disclosure in response to comments from the Division of Corporation Finance.

<sup>131</sup> See Letter from Council of Institutional Investors, dated August 9, 2012, available at <http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk-2.pdf>.

<sup>132</sup> See Letter from Ernst & Young.

<sup>133</sup> See Letter from Ernst & Young (referring to Proposed Accounting Standards Update on FASB’s website, Financial Instruments (Topic 825): Disclosures about Liquidity Risk and Interest Rate Risk).

<sup>134</sup> Registration Statement, Release No. 33-3509 (July 21, 1954) [19 FR 4630] (noting that the new form substantially reduced the information requirements on the basis that “much of the information required by the general registration form is not of material significance to investors in view of the senior position of the securities, the history of the issuer, the earnings coverages, etc., of companies eligible to use the form.”).

“Summary of Operations” requirements and adopted numerous changes in the requirements governing the calculation and presentation of the ratio.<sup>135</sup> In 1971, the Commission published interpretations on the calculation of the ratio.<sup>136</sup> In 1980, the Commission issued a concept release that requested comments on whether the requirements for presentation of historical and pro forma ratios should be retained or deleted.<sup>137</sup> In 1980, as part of amendments to Form 10-K in connection with the integrated disclosure project, the then-existing ratio requirements in the various forms were moved from the Summary of Operations to the Selected Financial Data provisions.<sup>138</sup> In 1982, the Commission adopted amendments to the ratio of earnings to fixed charges and added the requirement to Item 503 of Regulation S-K.<sup>139</sup>

*Summary of past substantive changes to the requirement.* In 1982, in connection with the adoption of the integrated disclosure system for foreign private issuers, this requirement was amended to add a provision regarding the calculation of the ratio by foreign private issuers on the

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<sup>135</sup> See Ratio of Earnings to Fixed Charges, Release No. 33-6285 (Feb. 6, 1981) [46 FR 12756] (describing history of ratio requirement).

<sup>136</sup> See Computation of Ratio of Earnings to Fixed Charges, Release No. 33-5158 (June 16, 1971) [36 FR 11918](Accounting Series Release 119); and Coverage of Fixed Charges, Release No. 33-5176 (Aug. 10, 1971)[36 FR 16506](Accounting Series Release 122).

<sup>137</sup> See Ratio of Earnings to Fixed Charges, Release No. 33-6196 (Mar. 7, 1980) [45 FR 16498]. For a summary of the comments received in connection with the concept release, see Ratio of Earnings to Fixed Charges, Release No. 33-6285 (Feb. 6, 1981)[46 FR 12757] (noting that commenters were split in their support for retaining the requirement, with some asserting the general usefulness of the disclosure as an analytical tool and a method for showing trends).

<sup>138</sup> See Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides; Integration of Securities Acts Disclosure Systems, Release No. 33-6231 (Sept. 2, 1980) [45 FR 63630] (noting that, in light of the issuance of the related concept release, the ratio requirements were being included in the forms as an interim measure and a rule proposal was expected to be considered in the future). In 1981, the Commission proposed to amend Item 10 (“Selected Financial Data) of Regulation S-K to include a modified version of the ratio requirement. See Ratio of Earnings to Fixed Charges, Release No. 33-6285 (Feb. 6, 1981) [46 FR 12756].

<sup>139</sup> See Adoption of an Integrated Disclosure System, Release No. 33-6383 (March 3, 1982) [47 FR 11380]. At the time, the Commission rescinded and withdrew the related Accounting Series Releases (Nos. 119 and 122) and Topics 3B and 9B of Staff Accounting Bulletin No. 40, because they discussed elements of the computation of the ratio that were covered in the amended rules. The release also notes that the provisions were located among the other offering-related items because the ratio was only being required in certain Securities Act filings.

basis of their primary financial statements.<sup>140</sup> In 1998, the Commission adopted a requirement to present the ratio in the summary section of the prospectus.<sup>141</sup> In 2007, in connection with the simplification of rules for smaller reporting companies, the Commission added an exemption for smaller reporting companies to this item, in conformity with the former Regulation S-B requirements.<sup>142</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Smaller reporting companies are not required to comply with this item.<sup>143</sup>

*Comments submitted to the Commission's JOBS Act website.* One commenter recommended the elimination of the ratio of earnings to fixed charges requirement, as it “appears an anachronism in the age of sophisticated financial modeling and analysis, facilitated by the wealth of data available from issuer financial statements.”<sup>144</sup>

#### Item 304 – Changes in and Disagreements with Accountants on Accounting and Financial Disclosure

*General background.* A requirement for disclosure of disagreements with accountants was originally adopted as part of Regulation S-X. In 1980, the disclosure requirement relating to disagreements with accountants was moved from Regulation S-X into the Regulation S-K

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<sup>140</sup> See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Dec. 1, 1982) [47 FR 54764].

<sup>141</sup> See Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370], available at <http://www.sec.gov/rules/final/33-7497.txt> (also revising the numbering of the item, and adding a reference to the exhibit requirement in Item 601(b)(12) for the filing of a statement showing the computation of the components of the ratio). The related proposing release proposed to move the requirement to Item 301 (“Selected Financial Data”) on the basis that most companies presented the information in that section; the adopting release does not address the reasons for changing that approach. See Plain English Disclosure, Release No. 33-7380 (Jan. 14, 1997) [62 FR 3152], available at <http://www.sec.gov/rules/proposed/34-38164.txt>.

<sup>142</sup> See Smaller Reporting Company Regulatory Relief and Simplification, Release No 33-8876 (Dec. 19, 2007) [73 FR 934], available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>.

<sup>143</sup> See Item 503(e).

<sup>144</sup> See letter from Ernst & Young.



provisions requiring supplementary financial data (Item 302).<sup>145</sup> In 1988, the Commission adopted a new Item 304 that combined the requirements formerly included in Item 302 with the disclosure requirements in Form 8-K that relate to changes in accountants.<sup>146</sup>

*Summary of past substantive changes to the requirement.* In 1989, the Commission adopted amendments to this item and to the requirements of Form 8-K to facilitate more timely disclosure regarding changes in a registrant's independent accountants.<sup>147</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

### Item 307 – Disclosure Controls and Procedures

*General background.* In 2002, in connection with the adoption of certification requirements mandated by Section 302 of the Sarbanes-Oxley Act, the Commission also adopted new Item 307 requiring disclosure in the registrant's quarterly and annual reports about its evaluation of the effectiveness of its disclosure controls and procedures and whether there have been significant changes in the registrant's internal controls or in other factors that could significantly affect internal controls subsequent to the evaluation.<sup>148</sup> This requirement does not apply to filings made under the Securities Act.

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<sup>145</sup> See General Revision of Regulation S-X, Release No. 33-6233 (Sept. 2, 1980) [45 FR 63660].

<sup>146</sup> See Disclosure Amendments to Regulations S-K, Form 8-K and Schedule 14A Regarding Changes in Accountants and Potential Opinion Shopping Situations, Release No. 33-6766 (April 12, 1988) [53 FR 12924].

<sup>147</sup> See Acceleration of the Timing for Filing Forms 8-K Relating to Changes in Accountants and Resignations of Directors; Amendments to Regulation S-K Regarding Changes in Accountants, Release No. 33-6822 (March 2, 1989) [54 FR 9770].

<sup>148</sup> See Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 33-8124 (Aug. 29, 2002) [67 FR 57276], available at <http://www.sec.gov/rules/final/33-8124.htm>. Section 906 of the Sarbanes-Oxley Act imposed a separate certification requirement subject to specific federal criminal provisions that was effective upon enactment without Commission rulemaking.

*Summary of past substantive changes to the requirement.* In 2003, the Commission amended the date to be used for the evaluation of disclosure controls and procedures (from “as of a date within 90 days of the filing date” to “as of the end of the period”).<sup>149</sup> These amendments also moved disclosure requirements relating to changes in internal control over financial reporting to a new Item 308.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission’s JOBS Act website.* None.

### Item 308 – Internal Control over Financial Reporting

*General background.* As mandated by Section 404 of the Sarbanes-Oxley Act, the Commission adopted this provision in 2003 requiring registrants that are subject to Exchange Act reporting requirements to include in their annual reports a report of management on the registrant’s internal control over financial reporting and an attestation report by the registrant’s auditors on management’s assessment of the internal controls.<sup>150</sup> This requirement does not apply to filings made under the Securities Act.

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<sup>149</sup> See Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reporting, Release No. 33-8238 (June 5, 2003) [68 FR 36636], [available at](http://www.sec.gov/rules/final/33-8238.htm) <http://www.sec.gov/rules/final/33-8238.htm>.

<sup>150</sup> *Id.* As initially adopted, accelerated filers were to comply with the requirements for their first fiscal year ending on or after June 15, 2004, and issuers that were not accelerated filers as of June 15, 2005 were to comply for their first fiscal year ending on or after April 15, 2005. In 2004, the Commission extended the compliance dates for accelerated and non-accelerated filers. See Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release No. 33-8392 (Feb. 24, 2004) [69 FR 9722] [available at](http://www.sec.gov/rules/final/33-8392.htm) <http://www.sec.gov/rules/final/33-8392.htm>.

The Commission postponed the Section 404(b) auditor attestation requirement for non-accelerated filers twice in 2005. See Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Non-Accelerated Filers and Foreign Private Issuers; Extension of Compliance Dates, Release No. 33-8545 (Mar. 2, 2005) [70 FR 11528] [available at](http://www.sec.gov/rules/final/33-8545.htm) <http://www.sec.gov/rules/final/33-8545.htm>, and Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Companies that Are Not Accelerated Filers, Release No. 33-8618 (Sept. 22, 2005) [70 FR 56825] [available at](http://www.sec.gov/rules/final/33-8618.pdf) <http://www.sec.gov/rules/final/33-8618.pdf>.

In August 2006, the Commission postponed compliance for foreign private issuers that were accelerated

*Summary of past substantive changes to the requirement.* In 2006, a transition provision was adopted for newly public companies, permitting such a registrant to delay compliance until it either had filed or had been required to file an annual report for the prior fiscal year.<sup>151</sup> In 2007, the requirements were amended to clarify that the auditors are only required to provide a single opinion on the effectiveness of the registrant’s internal controls over financial reporting (rather than two separate opinions covering the effectiveness of the internal controls and another on management’s assessment of their effectiveness).<sup>152</sup> In 2010, pursuant to Section 989G of the

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filers until their first fiscal year ending on or after July 15, 2007. See Internal Control Over Financial Reporting In Exchange Act Periodic Reports of Foreign Private Issuers that Are Accelerated Filers, Release No. 33-8730A (Aug. 9, 2006) [71 FR 47056] available at <http://www.sec.gov/rules/final/2006/33-8730a.pdf>. In December 2006, the Commission extended the compliance date for Section 404(a) for non-accelerated filers to their first fiscal year ending on or after December 15, 2007 and extended the Section 404(b) compliance date for non-accelerated filers to their first fiscal year ending on or after December 15, 2008. See Internal Control Over Financial Reporting in Exchange Act Reports of Non-Accelerated Filers and Newly Public Companies, Release No. 33-8760 (Dec. 15, 2006) [71 FR 76580], available at <http://www.sec.gov/rules/final/2006/33-8760.pdf>.

In June 2008, the Commission approved a further extension of the Section 404(b) compliance date for non-accelerated filers to fiscal years ending on or after December 15, 2009. See Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Release No. 33-8934 (June 26, 2008) [73 FR 38094] available at <http://www.sec.gov/rules/final/2008/33-8934.pdf>.

In October 2009, the Commission provided a final extension of the Section 404(b) compliance date for non-accelerated filers to fiscal years ending after June 15, 2010. See Internal Control Over Financial Reporting in Exchange Act Reports of Non-Accelerated Filers, Release No. 33-9072 (Oct. 13, 2009) [74 FR 53628] available at <http://www.sec.gov/rules/final/2009/33-9072.pdf>.

Although the term “non-accelerated filer” is not defined in Commission rules, it is used in this report to refer to a reporting company that does not meet the definition of either an “accelerated filer” or a “large accelerated filer” under Exchange Act Rule 12b-2. Under Exchange Act Rule 12b-2, an accelerated filer is an issuer that “had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of the issuer’s most recently completed second fiscal quarter” and a large accelerated filer is an issuer that “had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer’s most recently completed second fiscal quarter”. In addition, for both definitions, the issuer needs to have been subject to reporting requirements for at least 12 calendar months, have filed at least one annual report, and not be eligible to use the requirements for smaller reporting companies for its annual and quarterly reports.

<sup>151</sup> See Internal Control Over Financial Reporting in Exchange Act Reports of Non-Accelerated Filers and Newly Public Companies, Release No. 33-8760 (Dec. 15, 2006) [71 FR 76580], available at <http://www.sec.gov/rules/final/2006/33-8760.pdf>.

<sup>152</sup> See Amendments to Rules Regarding Management’s Report on Internal Control over Financial Reporting, Release No. 33-8809 (June 20, 2007) [72 FR 35310], available at <http://www.sec.gov/rules/final/2007/33-8809.pdf>.

Dodd-Frank Act (which provides that Section 404(b) of the Sarbanes-Oxley Act does not apply to registrants that are non-accelerated filers), the Commission adopted an exemption for non-accelerated filers.<sup>153</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Non-accelerated filers, a category that generally includes smaller reporting companies, are not subject to the requirements of Item 308(b) (attestation report of the registered public accounting firm). In addition, a newly public company is not required to comply with Item 308(a) (management's annual report on internal control over financial reporting) or Item 308(b) until it either has filed or has been required to file an annual report for the prior fiscal year. Under the JOBS Act, emerging growth companies are not required to provide Sarbanes-Oxley Act Section 404(b) auditor attestations of internal control over financial reporting and, accordingly, are not subject to Item 308(b).

*Comments submitted to the Commission's JOBS Act website.* None.<sup>154</sup>

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<sup>153</sup> See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Release No. 33-9142 (Sept. 15, 2010) [75 FR 57385], [available at](http://www.sec.gov/rules/final/2010/33-9142.pdf) <http://www.sec.gov/rules/final/2010/33-9142.pdf>.

<sup>154</sup> Although no comments were submitted about this item to the Commission's website, the staff notes that one of the recommendations emerging from the 31st Annual SEC Government-Business Forum on Small Business Capital Formation in 2012 was that the Commission should expand the exemption from the auditor attestation requirement of Item 308(b) to companies with less than \$250 million in public float and possibly up to \$500 million in public float. See 31st Annual SEC Government-Business Forum on Small Business Capital Formation Final Report (Nov. 15, 2012), [available at](http://www.sec.gov/info/smallbus/gbfor31.pdf) <http://www.sec.gov/info/smallbus/gbfor31.pdf>. The staff of the Office of the Chief Accountant published a study in 2011 on the auditor attestation requirements for companies with less than \$250 million in public float, as mandated by Section 989G(b) of the Dodd-Frank Act. See Study and Recommendations on Section 404(b) of the Sarbanes-Oxley Act of 2002 For Issuers With Public Float Between \$75 million and \$250 million, [available at](http://www.sec.gov/news/studies/2011/404bfloat-study.pdf) <http://www.sec.gov/news/studies/2011/404bfloat-study.pdf>. The United States Government Accountability Office published a study in 2013 on the exemption from auditor attestation requirements for smaller issuers, as mandated by Section 989I of the Dodd-Frank Act. See GAO-13-582, Internal Controls – SEC Should Consider Requiring Companies to Disclose Whether They Obtained An Auditor Attestation, [available at](http://www.gao.gov/assets/660/655710.pdf) <http://www.gao.gov/assets/660/655710.pdf>.

## C. Requirements Relating to Management, Security Holders and Corporate Governance

### Item 401 – Directors, Executive Officers, Promoters and Control Persons

*General background.* This requirement is derived from the provisions in Schedule A of the Securities Act calling for the names and addresses of directors, executive officers, promoters and certain beneficial owners of securities.<sup>155</sup> In 1933, the Commission’s predecessor adopted a similar requirement as part of registration statement Form A-1.<sup>156</sup> In 1935, the Commission adopted Form A-2, which added a requirement for a brief description of “the business experience of the principal executive officers for the last five years.”<sup>157</sup> In 1973, following its investigation of the hot issues markets in 1971, the Commission adopted amendments to Form S-1 to expand the disclosure requirements relating to the performance and background of management, including expanded information about the nature of responsibilities in prior positions, the age of officers and directors, the nature of any family relationships amongst directors and officers, the involvement of officers and directors in specified types of legal proceedings during the past ten years, and, for IPO companies, information about the experience of key personnel (such as research scientists or production managers) who, although they are not executive officers, are expected to make significant contributions to the business.<sup>158</sup> In 1978, the requirement was added to Regulation S-K, combining the requirements from various forms.<sup>159</sup>

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<sup>155</sup> See Schedule A paragraphs 4 and 6.

<sup>156</sup> See Items 11 through 13 of Form A-1, adopted in Release No. 33-5 (July 6, 1933) [*not published in the Federal Register*].

<sup>157</sup> See Items 30 and 31 of Form A-2.

<sup>158</sup> See New Ventures, Meaningful Disclosure, Release No. 33-5395 (June 1, 1973) [38 FR 17202]. At the time, a proposal to also require compensation information relating to previous positions held by executive officers was not adopted, because commenters believed that the information would not be material and could result in personnel problems. *Id.*

<sup>159</sup> See Uniform and Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949

*Summary of past substantive changes to the requirement.* In 1982, in connection with a comprehensive reexamination of the disclosure requirements and procedural provisions for the solicitation of proxies, the Commission revised the disclosure requirements relating to the business experience of executive officers and directors, by adding a requirement to also disclose whether the individual has been employed at an entity that is a parent, subsidiary or affiliate of the registrant.<sup>160</sup> In 1984, in response to hearings in December 1983 held by the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, the Commission expanded the information required regarding involvement in legal proceedings relating to federal commodities law and added a requirement for disclosure about involvement in legal proceedings by promoters and control persons.<sup>161</sup> In 2003, in connection with Section 407 of the Sarbanes-Oxley Act, the Commission added new disclosure requirements applicable to annual reports or proxy statements calling for information about whether the registrant has an audit committee financial expert and information about the registrant's audit committee.<sup>162</sup> Later in 2003, following a review by the Division of Corporation Finance of the proxy rules relating to the

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(July 28, 1978) [43 FR 34402]. At this time, the Commission reduced the number of years (from ten years to five years) for which involvement in legal proceedings must be reported.

<sup>160</sup> See Disclosure of Certain Relationships and Transactions Involving Management, Release No. 33-6441 (Dec. 2, 1982) [47 FR 55661].

<sup>161</sup> See Disclosure of Certain Legal Proceedings Involving Directors, Executive Officers, Promoters and Control Persons, Release No. 33-65-45 (Aug. 9, 1984) [49 FR 32762]. In connection with the revisions to executive compensation disclosure requirements in 2006, the requirements for disclosure regarding promoters was changed to require disclosure if the registrant had a promoter at any time during the last five fiscal years, rather than if the registrant was organized within the last five fiscal years. See Executive Compensation and Related Party Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158, at 53203], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

<sup>162</sup> See Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33-8177 (Jan. 23, 2003) [68 FR 5110], available at <http://www.sec.gov/rules/final/33-8177.htm>, and Standards Relating to Listed Company Audit Committees, Release No. 33-8220 (April 9, 2003) [68 FR 18788], available at <http://www.sec.gov/rules/final/33-8220.htm>. These requirements were subsequently consolidated and moved to Item 407 in connection with the revisions to executive compensation disclosure requirements in 2006. See Executive Compensation and Related Party Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

election of directors, the Commission added a provision requiring disclosure when a registrant makes material changes to the procedures by which security holders may recommend nominees to the board of directors.<sup>163</sup> In 2009, amendments were adopted to respond to investors' increased focus on corporate accountability, expanding the requirements for disclosure of involvement in legal proceedings to span ten years (from five years) and adding additional covered proceedings including fraud and violations of Federal or state securities and commodities laws. These amendments also added new requirements for annual disclosure of the particular experience, qualifications, attributes or skills of each director or nominee that led the board to conclude that the person should serve as a director of the registrant.<sup>164</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None. In 2007, in connection with its Smaller Reporting Company Relief and Simplification initiative and the integration of the requirements of Regulation S-B into Regulation S-K, the Commission adopted amendments that required smaller reporting companies to comply with the same requirements as other companies under Item 401.<sup>165</sup>

*Comments submitted to the Commission's JOBS Act website.* None.

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<sup>163</sup> See Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Release No. 33-8340 (Nov. 24, 2003) [68 FR 66992], available at <http://www.sec.gov/rules/final/33-8340.htm>.

<sup>164</sup> See Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334], available at <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

<sup>165</sup> Under Regulation S-B the disclosure pertaining to petitions filed under Federal bankruptcy laws or state insolvency laws did not cover personal bankruptcy petitions. See Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (December 19, 2007) [73 FR 934], available at <http://www.sec.gov/rules/final/2007/33-8876.pdf> (noting that “it is appropriate to require disclosure about a personal bankruptcy petition filed by or against a director or officer of a smaller reporting company given that, in light of the generally smaller level of operations of smaller reporting companies, it may be material to an evaluation of the ability or integrity of any director or person to be nominated to become a director or executive office of the smaller reporting company”).

## Item 402 – Executive Compensation

*General background.* Disclosure requirements regarding executive and director compensation are set forth in Schedule A to the Securities Act.<sup>166</sup> In 1933, the first form of registration statement, Form A-1, included a requirement similar to the Schedule A provision calling for tabular disclosure of the total remuneration paid by the issuer, its subsidiaries and affiliates during the past year and the ensuing year to each director and to any officer or other person whose aggregate remuneration exceeds \$25,000.<sup>167</sup> In 1935, new registration statement Form A-2 (for seasoned issuers), included a requirement calling for tabular disclosure of the name and aggregate remuneration of the three highest paid officers, the aggregate remuneration of all other officers of the registrant and the aggregate remuneration of all employees who received remuneration in excess of \$20,000 during the fiscal year.<sup>168</sup> In 1938, the Commission promulgated its first executive and director compensation disclosure rules for proxy statements.<sup>169</sup>

In 1942, the Commission adopted comprehensive revisions to the proxy requirements, including disclosure of management salaries and of corporate dealings with officers.<sup>170</sup> At the same time, the Commission adopted Form S-1 which incorporated the requirements of former

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<sup>166</sup> See Schedule A, paragraph 14 (calling for “the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to....its officers and other persons, naming them wherever such remuneration exceeded \$25,000 during any such year”).

<sup>167</sup> See Form A-1 Item 47, adopted in Release No. 33-5, (July 6, 1933) [*not published in the Federal Register*].

<sup>168</sup> See Release No. 33-276 (Jan. 14, 1935) [*not published in the Federal Register*].

<sup>169</sup> In 1935, the Commission adopted its first proxy rules, Regulation LA, which established standards for proxy solicitations without addressing disclosure requirements applicable to particular subject matters. See Release No. 34-378 (Sept. 24, 1935). In 1938, the Commission adopted Regulation X-14, the predecessor of current Schedule 14A, which set forth specific disclosure requirements for proxy statements. Item 7(b) of these regulations required specified disclosure of compensation received by nominees if action was to be taken for director elections or other officials. See Amended Proxy Rules, Release No. 34-1823 (Aug. 11, 1938) [3 FR 1991].

<sup>170</sup> See Solicitation of Proxies Under the Act, Release No. 34-3347 (Dec. 18, 1942) [7 FR 10655].



Form A-2.<sup>171</sup> In 1947, the Commission amended the requirements of Form S-1 to clarify that separate compensation disclosure for individual officers, directors and specified other persons is only required where there is a material relationship to the registrant or to the registrant's management.<sup>172</sup> In 1948, the Commission amended Schedule 14A in order to clarify that information is required for compensation earned by directors or officers in all capacities as well as for services as directors or officers, to require a breakdown of the various types of compensation paid to the directors and three most highly paid officers, as well as additional information as to the indebtedness to the issuer of any director or officer.<sup>173</sup> Later in 1948, the Commission amended the requirements of Form S-1 to consolidate the requirements into a single item, to clarify that information is required as to pension and retirement payments for officers and directors and to change the disclosure requirement for each director and officer whose aggregate remuneration was in excess of \$20,000 to any director whose aggregate remuneration was in excess of \$25,000 and the three highest paid officers whose remuneration exceeded that amount.<sup>174</sup>

In 1952, the Commission amended executive compensation requirements again in connection with revisions to Schedule 14A, permitting aggregated (rather than itemized) disclosure of compensation amounts and adding more detailed requirements for disclosure of deferred compensation.<sup>175</sup> In 1973, the Commission adopted amendments raising the disclosure

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<sup>171</sup> See Forms for Registration, Release No. 33-2887 (Dec. 18, 1942) [7 FR 10653].

<sup>172</sup> See Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224]; See also Notice of Proposed Rules and Form and Proposed Repeal of Certain Forms, Release No. 33-3171 (Nov. 18, 1946) [11 FR 13764] (describing the proposed changes adopted in Release No. 33-3186).

<sup>173</sup> See Solicitation of Proxies, Release No. 34-4185 (Nov. 5, 1948) [13 FR 6679].

<sup>174</sup> See Miscellaneous Amendments, Release No. 33-3323 (Dec. 31, 1948) [14 FR 91].

<sup>175</sup> See Solicitation of Proxies, Release No. 34-4775 (Dec. 11, 1952) [17 FR 11431] (introducing tabular disclosure requirements for pensions and deferred compensation).

threshold for named officers and directors to \$40,000.<sup>176</sup> In 1978, the Commission combined separate disclosure requirements (“Remuneration of Directors and Officers,” “Options to Purchase Securities,” and “Interest of Management and Others in Certain Transactions”) in the various forms into a single caption in Regulation S-K (“Management Remuneration and Transactions”) in order to standardize disclosure requirements relating to compensation and related party transactions.<sup>177</sup>

*Summary of past substantive changes to the requirement.* In 1978, the Commission expanded the scope of executive compensation disclosure to reflect changes in the diversity and complexity of management remuneration packages.<sup>178</sup> In 1980, the Commission adopted amendments to the tabular remuneration disclosure requirements to streamline the disclosure and to add a requirement for a separate pension table.<sup>179</sup> In 1983, as part of its Proxy Review Program, the Commission adopted amendments that were intended to simplify disclosure requirements, reduce compliance burdens and allow registrants greater flexibility in selecting a presentation format for disclosure of executive compensation.<sup>180</sup> These amendments limited

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<sup>176</sup> See New Ventures, Meaningful Disclosure, Release No. 33-5395 (June 1, 1973) [38FR 17202].

<sup>177</sup> See Uniform and Integrated Reporting Requirements: Directors and Executive Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949 (July 28, 1978) [43 FR 34402].

<sup>178</sup> See Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33-6003 (Dec. 4, 1978) [43 FR 58181] (raising the disclosure threshold from \$40,000 to \$50,000 in light of inflation, and requiring tabular disclosure for all forms of compensation, including requirements for disclosure of the dollar value of perquisites for named executive officers and by directors and officers as a group, and increasing the number of named executive officers and directors from three to five).

<sup>179</sup> See Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33-6261 (Nov. 14, 1980) [45 FR 76982] (also clarified the definition of “executive officer” for purposes of individuals who may be included as named executive officers, confirming that employees of subsidiaries may be deemed executive officers of the registrant for purposes of compensation disclosure).

<sup>180</sup> See Disclosure of Executive Compensation, Release No. 33-6486 (Sept. 23, 1983) [48 FR 44467] (also eliminating directors from the group of named individuals for whom compensation disclosure was required, raising the disclosure threshold from \$50,000 to \$60,000 and adopting a threshold for the disclosure of “other compensation” of the lesser of \$25,000 or 10% of the cash compensation reported in the cash compensation table).

tabular disclosure to cash compensation and adopted a primarily narrative approach to compensation disclosure.

In 1992, the Commission adopted amendments that expanded disclosure requirements, mandating formatted tabular disclosure for all forms of compensation covering three years, requiring a compensation committee report and a stock performance graph, and changing the named executive officers for whom disclosure was required.<sup>181</sup> In 1993, the Commission expanded the scope of the covered executive officers to include any individual who served as chief executive officer during the year and any executive officer who departed during the year who would have qualified as one of the four highest paid executive officers.<sup>182</sup>

In 2006, following a reassessment of the executive compensation disclosure requirements, the Commission adopted amendments that combined a broader-based tabular disclosure presentation with expanded narrative disclosure designed to give investors information about how and why a company arrived at specific executive compensation decisions and policies.<sup>183</sup> In 2009,

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<sup>181</sup> See Executive Compensation Disclosure, Release No. 33-6962 (Oct. 16, 1992) [57 FR 48126]. The amendments changed the group of named executive officers – previously requiring the five most highly compensated executive officers whose compensation exceeded \$60,000 – to the CEO (regardless of level of pay) and the four most highly paid executive officers whose compensation exceeded \$100,000. The amendments also required the compensation committee to report on the corporate performance factors that it relied on in making specific compensation awards for named executive officers and describe the general policies of the committee in determining senior executive compensation. The amendments also required the disclosure of a line graph showing the cumulative total return to shareholders of the registrant over a period of at least the previous five years, together with the comparable return to shareholders for stocks included in a recognized industry index or a group of peer companies selected by the registrant. In addition, the amendments raised the threshold for reporting perquisites to \$50,000 in order to reflect the impact of inflation.

<sup>182</sup> See Executive Compensation Disclosure; Securityholder Lists and Mailing Requests, Release No. 33-7032 (Nov. 22, 1993) [58 FR 63010] (also adopting requirements to disclose year-end restricted stock holdings regardless of whether the grants were made during the period, requirements to disclosure specific assumptions and adjustments underlying grant-date valuations, and amendments to the timing of weighting self-constructed indices used in performance graph disclosure).

<sup>183</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>. Later in 2006, the Commission adopted further amendments to the summary compensation table and director compensation table with respect to stock awards and option awards to provide disclosure of the compensation cost of awards over the

the Commission further amended its rules to require new disclosure regarding compensation and other corporate governance matters, which were intended to enable investors to better analyze board performance, decision making processes and compensation practices, including the new requirement for compensation disclosure and analysis (“CD&A”).<sup>184</sup>

In 2011, as directed by Section 951 of the Dodd-Frank Act, the Commission adopted requirements relating to tabular and narrative disclosure of golden parachute compensation arrangements in the context of proxy statements for mergers and similar transactions.<sup>185</sup> In 2013, the Commission issued proposed rules to implement Section 953(b) of the Dodd-Frank Act that would require pay ratio disclosure.<sup>186</sup> The Commission’s staff is currently working on recommendations for proposals to implement Sections 953(a), 954 and 955 of the Dodd-Frank Act regarding pay-for-performance disclosure, stock exchange listing standards relating to compensation clawback policies, and employee and director hedging disclosure.

*Scaled requirements or exemptions for specified classes of registrants.* Item 402(l) provides scaled disclosure requirements for smaller reporting companies, recognizing that executive compensation arrangements for these companies are typically less complex than those of larger public companies and, therefore, smaller reporting companies would likely be disproportionately burdened by disclosure requirements designed to capture more complicated

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requisite service period in accordance with FAS 123R, Share-Based Payment, along with disclosure of the grant date fair value of those awards on a grant-by-grant basis in the grants of plan-based awards table. See Executive Compensation Disclosure, Release No. 33-8765 (Dec. 22, 2006) [71 FR 78338], available at <http://www.sec.gov/rules/final/2006/33-8765.pdf>.

<sup>184</sup> See Proxy Disclosure Enhancements, Release No. 33-9089A (Dec. 16, 2009) [74 FR 68334], available at <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

<sup>185</sup> See Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 33-9178 (Jan. 25, 2011) [76 FR 6010], available at <http://www.sec.gov/rules/final/2011/33-9178.pdf>.

<sup>186</sup> See Pay Ratio Disclosure, Release No. 33-9452 (Sept. 18, 2013) [78 FR 60559], available at <http://www.sec.gov/rules/proposed.shtml>.

compensation arrangements.<sup>187</sup> Smaller reporting companies are only required to provide information in the summary compensation table for the last two fiscal years, rather than three. In addition, they are only required to provide compensation information about the principal executive officer, the two most highly compensated executive officers and up to two additional individuals no longer serving as executive officers at year end (rather than the principal executive officer, the principal financial officer, the three most highly paid executive officers and up to two additional individuals no longer serving as executive officers). In addition, the scaled requirements do not call for disclosure in the summary compensation table of the change in present value of pension benefits, do not call for disclosure of a pension benefits table and do not require CD&A. In connection with the say-on-pay requirements, smaller reporting companies were granted a temporary exemption that allows smaller reporting companies and IPO companies that qualify as smaller reporting companies to delay compliance until the first annual or other meeting of shareholders occurring on or after January 21, 2013.

In addition, under Section 102(c) of the JOBS Act, emerging growth companies are permitted to follow the same requirements that are applicable to smaller reporting companies and are exempt, under Section 102(a) of the JOBS Act, from the requirements of Section 953(b) of the Dodd-Frank Act relating to CEO pay ratio disclosure.<sup>188</sup>

*Comments submitted to the Commission's JOBS Act website. None.*<sup>189</sup>

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<sup>187</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158, 53192], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

<sup>188</sup> See JOBS Act Section 102(a) and (c). As discussed in Section I.B. of this report, Title I of the JOBS Act provided emerging growth companies with a variety of scaled disclosure and other accommodations, including exemptions from or modifications to certain Regulation S-K disclosure requirements.

<sup>189</sup> One of the recommendations emerging from the 29th Annual SEC Government-Business Forum on Small Business Capital Formation in 2010, was that the Commission exempt smaller reporting companies from the golden parachute vote provisions and, in particular, the chart in Item 402(t). Forum participants also recommended that the Commission not require smaller reporting companies to comply with the

## Item 403 – Security Ownership of Certain Beneficial Owners and Management

*General background.* This requirement is derived from the provision in Schedule A of the Securities Act calling for the amount of securities held by each member of management and owners of more than 10% of any class of the issuer’s stock and the amount for which each has indicated an intention to subscribe.<sup>190</sup> In 1933, the Commission’s predecessor included similar provisions in Form A-1.<sup>191</sup> In 1935, the Commission adopted more streamlined requirements in Form A-2, but still called for the name and address of both the record holder and the beneficial owner (if known).<sup>192</sup> In 1947, the Commission adopted revisions to Form S-1, consolidating the requirements relating to security holdings into one item and amending requirements for individual reporting of share ownership of management with a requirement for aggregate amounts of equity securities owned by directors and officers as a group.<sup>193</sup> In 1948, the Commission simplified the format of the tabular presentation.<sup>194</sup> In 1977, following the passage of the Williams Act in 1968 (which added Section 13(d) to the Exchange Act)<sup>195</sup> and a series of public hearings held in 1974 by the Commission and Congress on beneficial ownership reporting,<sup>196</sup> the Commission adopted

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requirements of Section 953 of the Dodd-Frank Act, when adopted.

<sup>190</sup> See paragraph (7) of Schedule A. This provision also calls for security ownership of underwriters.

<sup>191</sup> See Items 28 and 29 of Form A-1. The requirements called for disclosure of the name and address of both the holder of record and the beneficial owner. Form A-1 also provided that, if no shareholder owned more than 10% of the outstanding stock of the issuer, then disclosure was required for the ten largest shareholders of record or beneficial owners.

<sup>192</sup> See Items 33 and 34 of Form A-2. Disclosure for principal shareholders was limited to holders of more than 10% of any class of voting stock, and the alternative requirement for disclosure of the ten largest shareholders was eliminated. The form also required separate disclosure for holdings as of a recent date and as of approximately a year prior to the recent date. See also instruction to Item 33.

<sup>193</sup> See Item 30 of Form S-1. Adopted in Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224]. See also Notice of Proposed Rules and Form and Proposed Repeal of Certain Forms, Release No. 33-3171 (Nov. 18, 1946) [11 FR 13764] (describing the proposed changes adopted in Release No. 33-3186).

<sup>194</sup> See Miscellaneous Amendments, Release No. 33-3323 (Dec. 31, 1948) [14 FR 91].

<sup>195</sup> 15 U.S.C. § 78m (d).

<sup>196</sup> See Investigation into the Matter of Beneficial Ownership, Takeovers and Acquisitions of Securities by

beneficial ownership reporting requirements to provide more objective standards for the application of Section 13(d) of the Exchange Act and, in doing so, integrated the information concerning beneficial ownership of securities of publicly owned corporations into registration statement disclosure and periodic reporting requirements.<sup>197</sup> In 1978, the requirement was added to Regulation S-K, combining the requirements from various forms into a new Item 6.<sup>198</sup>

*Summary of past substantive changes to the requirement.* In 1982, as part of the expansion and reorganization of Regulation S-K, the requirements of former Item 6 were moved to Item 403, without substantive changes. Later in 1982, the Commission adopted amendments to the instructions to Item 403 in order to clarify beneficial ownership disclosure requirements.<sup>199</sup> In 1992, the Commission added a requirement for separate disclosure of the security ownership of each named executive officer.<sup>200</sup> In 2006, the Commission adopted additional requirements for

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Foreign and Domestic Persons, Release Nos. 33-5526 (Sept. 9, 1974) and 33-5538 (Nov. 5, 1974); Disclosure of Corporate Ownership, S. Doc. 93-62, 93d Cong., 2d Sess. (1974) and Hearings on Corporate Disclosure Before the Subcommittees on Inter-Governmental Relations and on Budgeting, Management and Expenditures of the Senate Committee on Government Operations, 93d Cong., 2d Sess. 8 (1974). See also Disclosure of Corporate Ownership, Release No. 33-5609 (Aug. 25, 1975) [40 FR 42212] (proposing release notes that, since the adoption of Sections 13(d) and 14(d) of the Exchange Act in 1968 there had been questions raised about the standards to be applied for determination of beneficial ownership for purposes of the reporting requirements of Sections 13(d) and 14(d), and “the need for improved disclosure in this area has become more apparent recently because of public interest in the identity and nationality of any person who has the power to influence or effect changes in the control of companies”).

<sup>197</sup> See Adoption of Beneficial Ownership Disclosure Requirements, Release No. 33-5808 (Feb. 24, 1977) [42 FR 12342].

<sup>198</sup> See Uniform Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949 (July 28, 1978) [43 FR 34402]. At this time, the Commission reduced the number of years (from ten years to five years) for which involvement of legal proceedings must be reported.

<sup>199</sup> See Disclosure of Certain Relationships and Transactions Involving Management, Release No. 33-6441 (Dec. 2, 1982) [47 FR 55661] (amending Instruction 5 to clarify that shares should only be counted once when computing totals under paragraph (b) and amending Instruction 1 to permit companies to omit the disclosure of ownership percentages that amount to less than 1% of the class of securities).

<sup>200</sup> See Executive Compensation Disclosure, Release No. 33-6992 (Oct. 16, 1992) [57 FR 48126]. Before this requirement, disclosure was only required for directors and officers as a group. In connection with amendments to executive compensation disclosure, the Commission proposed a new table entitled “Total Common Equity Based Holdings,” designed to show the nature and scope of each named executive’s equity stake in the registrant. At the time, the Commission acknowledged that “Many corporate and shareholder

disclosure of shares pledged as collateral by named executive officers, directors and director nominees,<sup>201</sup> as well as the disclosure of directors' qualifying shares.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 404 – Certain Relationships and Related Transactions

*General background.* Schedule A contained a requirement for the disclosure of “the full particulars of the nature and extent of the interest, if any,” of any director, principal executive officer and principal shareholders “in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement.”<sup>202</sup> That requirement was included in Form A-1 adopted in 1933, but included underwriters in the list of related parties covered by the rule. In 1935, the Commission included the requirement in Form A-2 and added a requirement for disclosure of the cost of the property to the related party. In 1948, the Commission revised Form S-1 to expand the requirement from disclosure about interests in property recently acquired by the registrant to disclosure about interests in any material transactions, whether or not they involve the acquisition of property.<sup>203</sup> In 1978, the

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commenters alike have stated that the most effective means of assessing the alignment of stockholder and management interests is by examining the nature and the extent of management equity ownership in the company.” See Executive Compensation Disclosure, Release No. 33-6940 (June 23, 1992) [57 FR 29582]. As noted in the adopting release, this proposed requirement was not adopted in Item 402, and a requirement for security ownership by the named executive officers was added to Item 403(b), as suggested by a number of commenters in order to minimize redundant disclosure.

<sup>201</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>, at 53192. As noted in the adopting release, the Commission believed that, to the extent that shares beneficially owned by named executive officers and directors are used as collateral, the shares may be subject to material risks or contingencies that do not apply to the other shares beneficially owned by these individuals, which could have the potential to influence management's performance and decision-making.

<sup>202</sup> See paragraph (22) of Schedule A.

<sup>203</sup> See Item 32 of Form S-1. Adopted in Miscellaneous Amendments, Release No. 33-3323 (Dec. 31, 1948) [14 FR 91].



Commission added requirements relating to executive officer transactions and relationships to the executive compensation provisions of Regulation S-K.<sup>204</sup> Item 404 was adopted in 1982 in connection with the Commission's comprehensive reexamination of the disclosure requirements and procedural provisions relating to the solicitation of proxies.<sup>205</sup> This item was based primarily on two disclosure requirements relating to transactions and relationships involving the registrant and management or persons connected with management: (1) a requirement in Item 402 of Regulation S-K that was based on the requirements in Schedule A, Forms A-2 and S-1 that called for information regarding transactions involving management and (2) a requirement in Schedule 14A that was adopted in 1978 to elicit disclosure regarding relationships between directors or nominees for director and significant customers, suppliers or creditors of the registrant.<sup>206</sup>

*Summary of past substantive changes to the requirement.* Item 404 was amended in 2006, in connection with amendments to executive compensation disclosure.<sup>207</sup> The requirements were reorganized in an effort to make the requirements clearer and easier to follow, while removing some of the instructions that served to delineate which transactions were excludable or reportable based on bright line tests rather than general materiality analysis.<sup>208</sup> The amendments retained the

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<sup>204</sup> See Uniform and Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949 (July 28, 1978) [43 FR 34402].

<sup>205</sup> See Disclosure of Certain Relationships and Transactions Involving Management, Release No. 33-6441 (Dec. 2, 1982) [47 FR 556611].

<sup>206</sup> See Release No. 34-3347 (Dec. 18, 1942) [7 FR 10653] and Release No. 34-15385 (Dec. 6, 1978) [43 FR 58552].

<sup>207</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

<sup>208</sup> The amendments also removed longstanding instructions as to the materiality standards applicable to the Item (former Instructions 1 and 9 to Item 404(a)), on the basis that they were repetitive of the general materiality standards applicable to all disclosure.

disclosure threshold, but raised it from \$60,000 (the level established in 1983) to \$120,000.<sup>209</sup>

Certain requirements were moved to a new Item 407 in order to consolidate disclosure requirements relating to corporate governance matters and other provisions were streamlined to eliminate duplicative requirements. In addition, a new provision was added to require a description of the registrant's policies and procedures for the review, approval or ratification of transactions with related persons that are reportable under this item. Also at that time, the requirements for disclosure regarding promoters was changed to require disclosure if the registrant had a promoter at any time during the last five fiscal years, rather than if the registrant was organized within the last five fiscal years.

*Scaled requirements or exemptions for specified classes of registrants.* Smaller reporting companies are permitted to follow the scaled requirements set forth in paragraph (d) of this item.

*Comments submitted to the Commission's JOBS Act website.* One commenter recommended revising or eliminating the bright-line quantitative disclosure threshold of \$120,000 for related party transactions, in order to provide a better scaling based on the size of the issuer and the nature of the transaction.<sup>210</sup>

#### Item 405 – Compliance with Section 16(a) of the Exchange Act

*General background.* In response to developments in the trading of derivatives, the prevalence of complex and diverse employee benefit plans and an increase in Section 16 filing delinquencies, the Commission undertook a comprehensive review of the rules and forms under

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<sup>209</sup> At the time, commenters expressed diverse views as to what the appropriate threshold should be. Some supported the increase to \$120,000, while others recommended retaining the \$60,000 threshold, using a minimal dollar threshold, not including any *de minimis* dollar threshold or increasing the threshold further using a sliding scale. The Commission concluded that a fixed dollar threshold would provide the most certainty as to the size of transactions that must be tracked for disclosure purposes and that an increase in the amount based on inflation was appropriate.

<sup>210</sup> See Letter from Ernst & Young.

Section 16 of the Exchange Act in 1987.<sup>211</sup> As a result of that review, in 1991 the Commission adopted a requirement that a registrant identify directors, officers and certain beneficial owners of its securities who failed to file or to timely file required reports under Section 16(a) and the number of delinquent filings.<sup>212</sup> This requirement does not apply to filings made under the Securities Act.

*Summary of past substantive changes to the requirement.* In order to improve the visibility of the disclosure, a provision was added in 1996 to require the disclosure to be presented under a separate caption.<sup>213</sup> Also at that time, the item was amended to clarify the nature of a registrant's obligation to review insiders' filings in order to determine whether any delinquent reports require disclosure. In 2005, following amendments pursuant to the Sarbanes-Oxley Act that required electronic filing of Section 16 reports with the Commission, the item was further

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<sup>211</sup> In general, Section 16 of the Exchange Act [15 U.S.C. 78p] was designed to provide the public with information about securities transaction and holdings of an issuer's directors, officers and significant stockholders and to deter these "insiders" from profiting from short-term trading in issuer securities while in possession of material, non-public information. See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34-37260 (May 31, 1996) [61 FR 30376], available at <http://www.sec.gov/rules/final/37260a.txt> and <http://www.sec.gov/rules/final/37260b.txt>. Section 16 applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Section 12 of the Exchange Act [15 U.S.C. 78l] and each officer and director, generally referred to as reporting persons. Upon becoming a reporting person, or upon the Section 12 registration of a class of equity security, Section 16(a) requires a reporting person to file an initial report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer. To keep this information current, Section 16(a) also requires reporting persons to report changes in such ownership or the purchase or sale of a security-based swap agreement involving those equity securities.

For purposes of Section 16(a) reporting obligations and Section 16(b) short-swing profit recovery, Rule 16a-1(a)(2) uses a different definition of "beneficial owner" than is used under Section 13(d) and the Commission's rules thereunder. Rule 16a-1(a)(2) defines beneficial owner based on whether the person has or shares a direct or indirect pecuniary interest in the securities.

<sup>212</sup> See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34-28869 (Feb. 8, 1991) [56 FR 7242].

<sup>213</sup> See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34-37260 (May 31, 1996) [61 FR 30376], available at <http://www.sec.gov/rules/final/37260a.txt> and <http://www.sec.gov/rules/final/37260b.txt>.

revised to eliminate a provision for the presumption of timely filing for a Section 16 report received by the issuer within three days of the required filing date.<sup>214</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Item 405 only applies to registrants that have a class of equity securities registered under Section 12 of the Exchange Act.

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 406 – Code of Ethics

*General background.* This requirement for disclosure about the registrant's code of ethics and waivers granted under that code was adopted as mandated by Section 406 of the Sarbanes-Oxley Act.<sup>215</sup> This requirement permits a registrant to satisfy the requirement to file a copy of the code of ethics with the Commission by posting it on its website or undertaking in its annual report to provide a copy upon request. This requirement does not apply to filings made under the Securities Act.

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 407 – Corporate Governance

*General background.* This item was adopted in 2006 in connection with amendments to executive compensation disclosure, in order to consolidate various corporate governance

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<sup>214</sup> See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 33-8600 (Aug. 3, 2005) [70 FR 46080], [available at](http://www.sec.gov/rules/final/33-8600.pdf) <http://www.sec.gov/rules/final/33-8600.pdf>.

<sup>215</sup> See Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33-8177 (Jan. 23, 2003) [68 FR 15353], [available at](http://www.sec.gov/rules/final/33-8177.htm) <http://www.sec.gov/rules/final/33-8177.htm>.

requirements into a single item.<sup>216</sup> Not all of the requirements of this item apply to filings under the Securities Act; for example, only disclosure under Item 407(a) (*Director independence*) is required by Form S-1.

*Summary of past substantive changes to the requirement.* In 2009, an additional provision was adopted to require disclosure of whether (and if so, how) the registrant's nominating committee considers diversity in identifying nominees for director.<sup>217</sup> This amendment also requires (1) disclosure of the implementation and effectiveness of any policy the registrant has relating to the consideration of diversity in the identification of nominees, (2) a description of the board's leadership structure and the board's role in the oversight of risk and (3) expanded disclosure about the role of compensation consultants in determining the amount or form of executive and director compensation. In 2012, as mandated by Section 952 of the Dodd-Frank Act, the Commission adopted expanded disclosure requirements relating to compensation consultant conflicts of interest.<sup>218</sup>

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<sup>216</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf> (combining requirements of former Items 306, 401(h), (i) and (j), 404(b) of Regulation S-K and Item 7 of Exchange Act Schedule 14A).

Requirements for disclosure of the existence and composition of the audit committee were added to the Commission's proxy rules in 1974. See Registrants and Independent Accountants: Amended Rules for Increased Disclosure of Relationships, Release No. 33-5550 (Dec. 20, 1974) [40 FR 1010]. In 1999, Item 306 was added to Regulation S-K based on the recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees, which called for the inclusion in the proxy statement of an audit committee report. See Audit Committee Disclosure, Release No. 34-42266 (Dec. 22, 1999), available at <http://www.sec.gov/rules/final/34-42266.htm>. In 2006, as part of the consolidation of corporate governance disclosure requirements, the requirement for disclosure of an Audit Committee Report under Item 306 was moved to Item 407. Item 407 reordered some of the requirements of former Item 306 but did not make substantive changes to the requirements. See id., at note 471.

The requirements of former Item 404(b) for disclosure about director relationships that could affect independence were replaced in 2006 with requirements that were consistent with changes to listing standards. See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

<sup>217</sup> See Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334], available at <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

<sup>218</sup> See Listing Standards for Compensation Committees, Release No. 33-9330 (June 20, 2012) [77 FR 38421],

*Scaled requirements or exemptions for specified classes of registrants.* Pursuant to paragraph (g), a smaller reporting company is not required to provide disclosure of whether it has an audit committee financial expert until its second annual report following the effective date of its initial registration statement under the Securities Act or the Exchange Act. Smaller reporting companies are exempt from the requirement to provide disclosure regarding compensation committee interlocks and insider participation or a compensation committee report.

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 702 – Indemnification of Directors and Officers

*General background.* The original disclosure requirements relating to indemnification of directors and officers were included in Form S-1 in 1947, in order to codify disclosure practice followed at the time.<sup>219</sup> In 1968, a similar requirement was added to the Guides for Preparation and Filing of Registration Statements.<sup>220</sup> In 1982, this requirement for disclosure about indemnification arrangements for officers and directors was adopted in its current form as part of the expansion and reorganization of Regulation S-K.<sup>221</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

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available at <http://www.sec.gov/rules/final/2012/33-9330.pdf>.

<sup>219</sup> See Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224]. See also Notice of Proposed Rules and Form and Proposed Repeal of Certain Forms, Release No. 33-3171 (Nov. 18, 1946) [11 FR 13764] (describing the proposed changes adopted in Release No. 33-3186).

<sup>220</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617].

<sup>221</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

## D. Requirements Relating to the Registrant's Securities

### Item 201 – Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters

*General background.* In 1933, the Commission's predecessor included as part of Form A-1 a requirement for disclosure of historical dividend rates and method of payment for three years in connection with each outstanding class of capital stock.<sup>222</sup> In 1964, the Commission published Guide 10 calling for a statement of dividend policy,<sup>223</sup> later revised as Guide 26 in 1968,<sup>224</sup> and published Guide 13 calling for information about market quotations or disclosure of the absence of an established trading market.<sup>225</sup> In 1980, a requirement for disclosure of market price and dividends on common equity was added to Regulation S-K,<sup>226</sup> aggregating the requirements of paragraph (8) of Rule 14a-3 (which required market price information to be included in the annual report to security holders), Guide 26, Guide 13, and Item 9 of the previous Form 10-K (which required information as to the approximate number of equity security holders).

*Summary of past substantive changes to the requirement.* In 1982, in connection with the reorganization and expansion of Regulation S-K, the requirement was re-designated as Item 201,<sup>227</sup> and, later that year, instructions were added relating to disclosure by foreign private issuers

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<sup>222</sup> See Item 16 of Form A-1. In contrast, Form A-2, adopted in 1935, only required a statement about the dividend rights of capital stock and any limitations in indentures or other agreements on the payment of dividends. See Item 17 of Form A-2.

<sup>223</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4666 (Jan. 20, 1964) [29 FR 2490].

<sup>224</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617].

<sup>225</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4666 (Jan. 20, 1964) [29 FR 2490].

<sup>226</sup> See Amendments to Annual Report Form, Related Forms, Rules, Regulations and Guides; Integration of Securities Acts Disclosure Systems, Release No. 33-6231 (Sept. 2, 1980) [45 FR 63630].

<sup>227</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

regarding securities issued in bearer form or as American Depositary Receipts.<sup>228</sup> In 2001, the Commission adopted additional requirements for tabular disclosure regarding securities authorized for issuance under equity compensation plans, including number of securities, weighted average exercise price, securities available for future issuance and a description of any equity compensation plan that was adopted without the approval of security holders.<sup>229</sup> In 2006, in connection with revisions to executive compensation disclosure requirements, the stock performance graph was moved from Item 402 to new paragraph (e) of Item 201.<sup>230</sup>

*Scaled requirements or exemptions for specified classes of registrants.* Smaller reporting companies are not required to provide the stock performance graph.<sup>231</sup> In addition, the stock

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<sup>228</sup> See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Dec.1, 1982) [47 FR 54768].

<sup>229</sup> See Disclosure of Equity Compensation Plan Information, Release No. 33-8048 (Dec. 21, 2001) [67 FR 232], available at <http://www.sec.gov/rules/final/33-8048.htm>. The disclosure of the weighted average exercise price of options, warrants and rights was added to the final rule in response to recommendations from commenters who asserted that investors need that information to assess the dilutive effect of a registrant's equity compensation program.

Later, in 2003, the SEC approved rules for the NASD and Nasdaq that required shareholder approved of equity compensation plans for companies listed on those exchanges. See Order Approving NYSE and Nasdaq Proposed Rule Changes and Nasdaq Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to NYSE Amendments No. 1 and 2 and Nasdaq Amendments No. 2 and 3 Thereto Relating to Equity Compensation Plans, Release No. 34-48108 (June 30, 2003) [68 FR 39995], available at <http://www.sec.gov/rules/sro/34-48108.htm>.

<sup>230</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>.

The requirement for a stock performance graph was originally adopted in 1992 in connection with an expansion of executive compensation disclosure requirements. See note 181, supra. The graph was intended to complement the newly required discussion in the compensation committee report of the relationship between executive compensation and corporate performance. See Executive Compensation Disclosure, Release No. 33-6940 (June 23, 1992) [57 FR 29582] (briefly noting, in support of the proposed amendments, academic research on the correlation between executive compensation and corporate performance).

In connection with the 2006 rulemaking, the performance graph was proposed to be eliminated given the widespread availability of stock price information and because the disclosure in the Compensation Discussion and Analysis was intended to elicit a broader discussion than the relationship of compensation to performance as reflected by stock price alone. The final rule, however, retained the performance graph due to recommendations by commenters who asserted that the graph provides an easily accessible visual comparison of a company's performance relative to its peers and the market.

<sup>231</sup> See Instruction 6 to Item 201(e).



performance graph is only required in an annual report to security holders that precedes or accompanies a proxy or information statement relating to the election of directors.<sup>232</sup>

*Comments submitted to the Commission's JOBS Act website.* One commenter recommended the elimination of historical stock price disclosure requirements because “data manipulation tools and daily stock information on most finance websites have made the historical stock price disclosures mandated by Item 201 of Regulation S-K largely obsolete.”<sup>233</sup>

Two commenters recommended the elimination of requirements under Item 201(d) relating to the securities issued under compensation plans approved by shareholders and those not approved by shareholders, on the basis that it provides limited information not otherwise available to investors and that information is of marginal significance.<sup>234</sup> In contrast, another commenter strongly opposed that recommendation, noting that such information is meaningful for institutional investors.<sup>235</sup>

#### Item 202 – Description of Registrant’s Securities

*General background.* This requirement stems from a requirement in Schedule A calling for disclosure of the capitalization of the issuer including a description of the classes of capital stock and funded debt and any securities covered by options.<sup>236</sup> In 1933, the Commission’s predecessor included in Form A-1 tabular requirements similar to Schedule A requirements.<sup>237</sup> In 1935, the Commission included in Form A-2 requirements calling for detailed tabular and

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<sup>232</sup> See Instruction 7 to Item 201(e).

<sup>233</sup> See Letter from Ernst & Young.

<sup>234</sup> See Silicon Valley Letter and Letter from Mike Liles.

<sup>235</sup> See Letter from Council of Institutional Investors.

<sup>236</sup> See paragraphs (9) through (12) of Schedule A.

<sup>237</sup> See Form A-1 Items 19 through 25.

narrative disclosure about outstanding securities and securities to be issued.<sup>238</sup> In 1947, the Commission adopted amendments to Form S-1 that eliminated the description of securities that are not being registered, except to the extent material to an evaluation of the securities being registered.<sup>239</sup> In 1955, the Commission adopted amendments to Form S-1 that simplified the tabular requirements regarding capitalization as part of Form S-1 and streamlined the requirements for the description of capital stock, long-term debt or other securities being registered.<sup>240</sup> In 1982, Item 202 was added to Regulation S-K, combining requirements from registration statement forms into a single item.<sup>241</sup>

*Summary of past substantive changes to the requirement.* In 1982, in connection with the adoption of the integrated disclosure system for foreign private issuers, the Commission adopted amendments that added requirements for disclosure regarding American Depositary Receipts and instructions regarding disclosure about fees and charges in connection with American Depositary Receipts.<sup>242</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

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<sup>238</sup> See Form A-2 Items 9 through 20. Tabular disclosure included details about amounts authorized, amounts outstanding, related balance sheet information, amounts held in treasury, held by subsidiaries and parent companies, amounts reserved for officers and employees and amounts reserved for options and warrants.

<sup>239</sup> See Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224]. See also Notice of Proposed Rules and Form and Proposed Repeal of Certain Forms, Release No. 33-3171 (Nov. 18, 1946) [11 FR 13764] (describing the proposed changes adopted in Release No. 33-3186).

<sup>240</sup> See Application for Registration of Securities, Release No. 33-3584 (Oct. 21, 1955) [20 FR 8284]. See also Forms for Registration Statements; Notice of Proposed Rulemaking, Release No. 33-3540 (April 26, 1955) [20 FR 2965].

<sup>241</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380]. The proposing release noted that the market and dividend information and the description of securities to be registered were separated into two items, 201 and 202, in order to exclude from Item 201 any requirements that are not applicable to a Form 10-K or annual report to security holders. See 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. 5, 1981) [46 FR 41925].

<sup>242</sup> See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Dec. 1, 1982) [47 FR 54764].

*Comments submitted to the Commission's JOBS Act website.* None.

Item 701 – Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities

*General background.* This requirement partially stems from paragraph 19 of Schedule A of the Securities Act. A requirement for the disclosure of recent sales of securities by a registrant was included in the first registration statement forms adopted by the Commission.<sup>243</sup> Item 701 was adopted in 1982 in order to address abusive practices in connection with the sale of equity securities, and requires disclosure of information about recent sales of unregistered securities.<sup>244</sup>

*Summary of past substantive changes to the requirement.* In 1996, the Commission added a requirement to disclose the terms of conversion or exercise for convertible or exchangeable securities, warrants or options when the disclosure is provided in a periodic or current report.<sup>245</sup> In 1997, based on the recommendations of the Task Force on Disclosure Simplification, the Commission rescinded Form SR (which required the reporting of the use of proceeds following an IPO) and moved the requirements to paragraph (f) of Item 701.<sup>246</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* Two commenters recommended the elimination of Item 701 information, on the basis that it is not meaningful to investors and can be covered by MD&A requirements for liquidity and capital resources disclosure.<sup>247</sup> These commenters further recommended the elimination of the requirements of

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<sup>243</sup> See, e.g., Form A-2, Item 38.

<sup>244</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

<sup>245</sup> See Periodic Reporting of Unregistered Equity Sales, Release No. 34-37801 (Oct. 10, 1996) [61 FR 54506], available at <http://www.sec.gov/rules/final/34-37801.txt>.

<sup>246</sup> See Phase Two Recommendations of Task Force on Disclosure Simplification, Release No. 33-7431 (July 18, 1997) [62 FR 39755], available at <http://www.sec.gov/rules/final/34-38850.txt>; <http://www.sec.gov/rules/final/3438850a.txt>.

<sup>247</sup> See Silicon Valley Letter and Letter from Mike Liles.

Item 701(f) (and Securities Act Rule 463) because the continuing requirement to provide information in periodic reports regarding the application of proceeds does “not provide investors with useful information inasmuch as cash is fungible and it is impossible for a company to determine whether a dollar of revenue was spent versus a dollar from the net proceeds of a securities offering” and the discussion of cash flow in MD&A should discuss material uses of cash.<sup>248</sup>

### Item 703 – Purchases of Equity Securities by the Issuer and Affiliated Purchasers

*General background.* This requirement was adopted in 2003 in order to enhance transparency of security repurchases by the issuer and its affiliates.<sup>249</sup> As noted in the adopting release, most commenters agreed that this disclosure would provide investors with useful information about the level, frequency and purpose of these repurchase activities.<sup>250</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission’s JOBS Act website.* None.

## **E. Requirements Relating to Risk and Risk Management**

### Item 503 (c) – Risk Factors

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<sup>248</sup> See *id.*

<sup>249</sup> See Purchases of Certain Equity Securities by the Issuer and Others, Release No. 33-8335 (Nov. 10, 2003) [68 FR 64952], [available at](http://www.sec.gov/rules/final/33-8335.htm) <http://www.sec.gov/rules/final/33-8335.htm>.

<sup>250</sup> See *id.*

*General background.* The requirement for disclosure of a summary of risk factors relating to an offering was first set forth in 1968 in Guide 6.<sup>251</sup> Item 503(c) was added to Regulation S-K in 1982 as part of the adoption of the integrated disclosure system, combining the provisions of Guide 6 with the provisions of Guide 5 calling for disclosure of risks arising out of a lack of a trading market.<sup>252</sup>

*Summary of past substantive changes to the requirement.* In 1995, this provision was amended to add a requirement that the risk factors section of a prospectus be captioned with the heading “Risk Factors” and that the section be presented following the summary.<sup>253</sup> In 1998, in connection with the plain English disclosure amendments, this provision was revised to include guidance on presenting risk factors.<sup>254</sup> In 2005, the Commission added risk factor disclosure requirements to annual reports and quarterly reports.<sup>255</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission’s JOBS Act website.* None.

### Item 103 – Legal Proceedings

*General background.* In 1933, the Commission’s predecessor adopted a requirement, as part of Form A-1, calling for a statement of all litigation pending that may materially affect the value of the security to be offered, describing the origin, nature and name of parties to the

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<sup>251</sup> See Guide 6, in Guides for the Preparation and Filing of Registration Statements, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18618].

<sup>252</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

<sup>253</sup> See Prospectus Delivery; Securities Transactions Settlements, Release No. 33-7168 (May 11, 1995) [60 FR 26604], [available at](http://www.sec.gov/rules/final/prosdel.txt) <http://www.sec.gov/rules/final/prosdel.txt>.

<sup>254</sup> See Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370], [available at](http://www.sec.gov/rules/final/33-7497.txt) <http://www.sec.gov/rules/final/33-7497.txt>.

<sup>255</sup> See Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722], [available at](http://www.sec.gov/rules/final/33-8591.pdf) <http://www.sec.gov/rules/final/33-8591.pdf>.

litigation.<sup>256</sup> In 1935, the Commission included in Form A-2 a requirement for a brief description of material, pending legal proceedings and proceedings by governmental authorities, where such proceedings depart from the ordinary routine litigation incident to the kind of business conducted by the registrant or its subsidiaries.<sup>257</sup> The requirement was later expanded in Form S-1 to include (1) a requirement for identification of the court or agency, the date instituted and the names of the principal parties, (2) a requirement that material bankruptcy proceedings involving the registrant or its significant subsidiaries be described and any material proceeding involving a director, officer, affiliate or principal security holder and (3) an exemption for disclosure of proceedings involving claims of less than 15% of the registrant's consolidated current assets.<sup>258</sup> In connection with the National Environmental Policy Act of 1970, the legal proceedings disclosure requirements in Form S-1 and Form 10-K were expanded to require additional disclosure about environmental matters.<sup>259</sup> At the same time, the item was amended to require disclosure of the factual basis of proceedings and the nature of relief sought and the disclosure threshold was reduced from 15% to 10%. The requirement was moved from the forms to Regulation S-K in 1978 as Item 5.<sup>260</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

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<sup>256</sup> See Item 17 of Form A-1.

<sup>257</sup> See Item 40 of Form A-2, adopted in Release No. 33-276 (Jan. 14, 1935).

<sup>258</sup> See Application for Registration of Securities, Release No. 33-3584 (Oct. 21, 1955) [20 FR 8284]. See also Forms for Registration Statements; Notice of Proposed Rulemaking, Release No. 33-3540 (April 26, 1955) [20 FR 2965].

<sup>259</sup> See Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release No. 33-5386 (April 10, 1973) [38 FR 1200].

<sup>260</sup> See Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949 (July 28, 1978) [43 FR 34402].

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* One commenter recommended that the current disclosure threshold, 10% of consolidated current assets, should be reconsidered, because for some companies, the amount of current assets, as opposed to total company value or liquidity, may not appropriately represent materiality.<sup>261</sup>

### Item 305 – Quantitative and Qualitative Disclosures about Market Risk

*General background.* Noting that the use of derivative financial instruments, other financial instruments and derivative commodity instruments had increased significantly, and that some companies had suffered significant, and sometimes unexpected, losses, the staff undertook a review of annual reports in 1994 to assess the quality of disclosure about market risk sensitive instruments, and, following this review, the Commission adopted Item 305 in 1997.<sup>262</sup> In general, this requirement was designed to provide additional information about market risk sensitive instruments, which investors can use to better understand and evaluate the market risk exposures of a registrant.<sup>263</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

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<sup>261</sup> See Letter from Ernst & Young. In recommending a reassessment of quantitative disclosure thresholds, this commenter also suggested that disclosure rules should be coordinated with accounting standards so that the concept of materiality is more consistently applied across disclosures and financial statements. For example, FASB ASC Subtopic 450-20 Loss Contingencies sets forth requirements for the accrual and disclosure of loss contingencies, including those arising in connection with legal proceedings. The requirements of ASC Subtopic 450-20 and Item 103 are not identical, and, as noted by this commenter, the applicable standards of materiality differ.

<sup>262</sup> See Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information about Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Release No. 33-7386 (Jan. 31, 1997) [62 FR 6044], available at <http://www.sec.gov/rules/final/33-7386.txt>.

<sup>263</sup> Id.

*Scaled requirements or exemptions for specified classes of registrants.* Although smaller reporting companies are exempt from this disclosure requirement,<sup>264</sup> the adopting release notes that “if market risk represents a material known risk or uncertainty, [smaller reporting companies], like other registrants, will continue to be required to discuss those risks and uncertainties to the extent required by Management’s Discussion and Analysis.”<sup>265</sup>

*Comments submitted to the Commission’s JOBS Act website.* Two commenters suggest that emerging growth companies should be exempt from Item 305 disclosure. These commenters note that companies that have not yet reached the revenue or market capitalization thresholds that would disqualify them from emerging growth company status are unlikely to face meaningful market risks. These commenters assert that prior to their IPOs, very few emerging growth companies have such significant cash balances or outstanding borrowings that they are subject to interest rate risk that is material to the company and they generally do not engage in hedging activities or commodity trading. Although growing companies increasingly conduct business globally and therefore face traditional foreign exchange rate risk, these companies tend to not trade in foreign currencies and tend to complete offshore sales in U.S. dollars, making exchange rate risk to not typically be a meaningful risk to emerging growth companies.<sup>266</sup>

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<sup>264</sup> See Item 305(e).

<sup>265</sup> Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information about Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Release No. 33-7386 (Jan. 31, 1997) [62 FR 6044], available at <http://www.sec.gov/rules/final/33-7386.txt> , at 10.

<sup>266</sup> See Silicon Valley Letter and Letter from Mike Liles.



Another commenter observed that the FASB has issued for comment an Exposure Draft on liquidity and interest rate disclosures that could create redundancies with some of the disclosures currently required in Items 305 and 303.<sup>267</sup>

## **F. Specialized Disclosure Requirements<sup>268</sup>**

### Items 1201 to 1208 – Disclosure by Registrants Engaged in Oil and Gas Producing Activities

*General background.* Adopted in 2008, these rules replace former Industry Guide 2 with updated and codified in Regulation S-K requirements for oil and gas disclosure, particularly requirements relating to oil and gas reserves.<sup>269</sup> The Commission initially implemented oil and gas disclosure requirements in 1978 and 1982, pursuant to a directive in the Energy Policy and Conservation Act of 1975.<sup>270</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission’s JOBS Act website.* None.

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<sup>267</sup> See Letter from Ernst & Young (referring to Proposed Accounting Standards Update on FASB’s website, Financial Instruments (Topic 825): Disclosures about Liquidity Risk and Interest Rate Risk).

<sup>268</sup> In August 2012, as mandated by Sections 1502 and 1504 of the Dodd-Frank Act, the Commission adopted new rules and forms for the disclosure of certain payments by resource extraction issuers and for information about the use of conflict minerals. See Disclosure of Payments by Resource Extraction Issuers, Release No. 34-67717 (Aug. 22, 2012) [77 FR 56365], available at <http://www.sec.gov/rules/final/2012/34-67717.pdf>, and Conflict Minerals, Release No. 34-67716 (Aug. 22, 2012) [77 FR 56273], available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>. These disclosure requirements are not part of Regulation S-K. The resource extraction issuer disclosure rules have been vacated and remanded by the District Court for the District of Columbia (see American Petroleum Institute v. SEC, Civ. A. No. 12-1688, 2013 WL 3307114, (D.D.C. Jul. 2, 2013) and the conflict minerals rule remains the subject of ongoing litigation (see National Ass’n of Mfrs. v. SEC, Civ. A. No. 12-cv-635, 2013 WL 3803918 (D.D.C. Jul. 23, 2013)).

<sup>269</sup> See Modernization of Oil and Gas Reporting, Release No. 33-8995 (Dec. 31, 2008) [74 FR 2157], available at <http://www.sec.gov/rules/final/2008/33-8995.pdf>.

<sup>270</sup> The Energy Policy and Conservation Act of 1975 directed the Commission to “take such steps as may be necessary to assure the development and observance of accounting practices to be followed in the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States.” See 42 U.S.C. 6201-6422.

## Item 104 – Mine Safety

*General background.* The requirement for disclosure about mine safety was adopted as mandated by Section 1503 of the Dodd-Frank Act.<sup>271</sup> Item 104 became effective January 27, 2012.

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None. Note, however, that Item 104 only applies to entities that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine. Accordingly, it does not apply to registrants conducting an IPO or, more generally, to registrants that do not operate, or have a subsidiary that operates, a mine.

*Comments submitted to the Commission’s JOBS Act website.* None.

## Items 901 to 915 – Roll-up Transactions

*General background.* Adopted in 1991 to respond to concerns raised in Congressional hearings about roll-up transactions,<sup>272</sup> these requirements were intended to enhance the quality of information provided to investors in connection with transactions involving roll-ups of limited partnerships and similar entities.<sup>273</sup>

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<sup>271</sup> See Mine Safety Disclosure, Release No. 33-9286 (Dec. 21, 2011) [76 FR 81762], [available at http://www.sec.gov/rules/final/2011/33-9286.pdf](http://www.sec.gov/rules/final/2011/33-9286.pdf).

<sup>272</sup> A roll-up transaction is a combination or reorganization of one or more public or private limited partnerships or other similar finite-life entities in which the investors in those finite-life entities receive new equity interests in the successor entity.

<sup>273</sup> See Roll-Up Transactions, Release No. 33-6922 (Oct. 30, 1991) [56 FR 57237].

*Summary of past substantive changes to the requirement.* Other than changes adopted in 1994 in connection with amendments to Section 14 of the Exchange Act<sup>274</sup> under the Limited Partnership Rollup Reform Act of 1993 (Pub. L. 103-202, Title III, 107 Stat 2344 (1993)),<sup>275</sup> these items have not been amended.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

### Items 801 and 802 – Industry Guides

*General background.* From time to time, the Commission has published guides for the preparation and filing of registration statements and periodic reports, representing the policies and disclosure standards followed by the Commission's Division of Corporation Finance.<sup>276</sup> In connection with the integrated disclosure system, the guides relating to specific industries were redesignated as industry guides and were listed (but not codified) in Items 801 and 802 of Regulation S-K, in order to remind issuers of industry-specific guidance.<sup>277</sup> Since 1982, some of the Industry Guides have been rescinded or modernized.<sup>278</sup> The following Industry Guides

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<sup>274</sup> 15 U.S.C. 78n(h).

<sup>275</sup> See Limited Partnership Roll-Up Transactions, Release No. 33-7113 (Dec. 1, 1994) [59 FR 63676].

<sup>276</sup> See Rescission of Guides and Redesignation of Industry Guides, Release No 33-6384 (March 3, 1982) [47 FR 11476] (describing history of Industry Guides).

<sup>277</sup> See note 16, supra.

<sup>278</sup> For example, Industry Guide 1 was eliminated in 1996. See Phase One Recommendations of Task Force on Disclosure Simplification, Release No. 33-7300 (May 31, 1996) [61 FR 30397], available at <http://www.sec.gov/rules/final/33-7300.txt>. Industry Guide 1 was originally published in 1968 as Guide 30 (Disclosure of Principal Sources of Electric and Gas Revenues).

Industry Guide 2 was eliminated in 2008, upon the adoption of Subpart 1200 of Regulation S-K. See Modernization of Oil and Gas Reporting, Release No. 33-8995 (Dec. 31, 2008) [74 FR 2157], available at <http://www.sec.gov/rules/final/2008/33-8995.pdf>. In 1982, the disclosure requirements for oil and gas operations contained in Item 2(b) of Regulation S-K were recast as Industry Guide 2, in order to place all industry specific information requirements into the Industry Guides.

generally have not been updated substantively since they were redesignated as part of Items 801 and 802 in 1982:

- Securities Act and Exchange Act Industry Guide 3 – Statistical Disclosure by Bank Holding Companies<sup>279</sup>
- Securities Act Industry Guide 4 – Prospectuses Relating to Interests in Oil and Gas Programs<sup>280</sup>
- Securities Act Industry Guide 5 – Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships<sup>281</sup>
- Securities Act Industry Guide 6 and Exchange Act Industry Guide 4 – Disclosures Concerning Unpaid Claims and Claim Adjustment Expenses of Property-Casualty Insurance Underwriters<sup>282</sup>
- Securities Act and Exchange Act Industry Guide 7 – Description of Property by Issuers Engaged or To Be Engaged in Significant Mining Operations.<sup>283</sup>

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<sup>279</sup> Note, however, that revisions to Industry Guide 3 relating to non-performing loan disclosure requirements were implemented in 1983, and revisions relating to exposures to borrowers in certain foreign countries were implemented in 1986. See Revision of Industry Guide Disclosures for Bank Holding Companies, Release No. 33-6478 (Aug. 11, 1983) [48 FR 37609] and Amendments to Industry Guide Disclosures by Bank Holding Companies, Release No. 33-6677 (Nov. 25, 1986) [51 FR 43594]. Industry Guide 3 was first published in 1976 as Securities Act Guide 61 and Exchange Act Guide 3. See Guides for Statistical Disclosure by Bank Holding Companies, Release No. 33-5735 (Aug. 31, 1976) [41 FR 39007]. In 1982, these Guides were redesignated as Industry Guide 3, applicable under both the Securities Act and the Exchange Act. See Rescission of Guides and Redesignation of Industry Guides, Release No. 33-6384 (March 3, 1982) [47 FR 11476].

<sup>280</sup> While the substantive disclosures relating to oil and gas producing activities were modernized in 2008 (at which time Industry Guide 2 was eliminated), the changes did not impact Securities Act Industry Guide 4. Securities Act Industry Guide 4 is focused on disclosure relating to the offering of interests in oil and gas programs, such as, among others, the terms of the offering, the participation in costs and revenues, application of proceeds and risk factors. Securities Act Industry Guide 4 was first published in 1970 as Guide 55, which was redesignated as Securities Act Industry Guide 4 in 1982. See Definitive Guide for the Preparation of Prospectuses Relating to Interests in Oil and Gas Programs, Release No. 33-5036 (Jan. 19, 1970) [35 FR 1233].

<sup>281</sup> Securities Act Industry Guide 5 was originally published in 1976 as Guide 60 and redesignated as Securities Act Industry Guide 5 in 1982. See Guide for Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships, Release No. 33-5692 (Mar. 17, 1976) [41 FR 17403].

<sup>282</sup> Securities Act Industry Guide 6 and Exchange Act Industry Guide 4 were first published in 1984. See Rules and Guide for Disclosures Concerning Reserves for Unpaid Claims and Claim Adjustment Expenses of Property-Casualty Underwriters, Release No. 33-6559 (Nov. 27, 1984) [49 FR 47594].

<sup>283</sup> Substantive disclosure requirements relating to mining companies were originally promulgated in 1941 as part of Form S-3, a registration statement to be used for shares of mining companies in the promotional stage. See Adoption of Form S-3 for Registration Under the Act of Shares of Mining Corporations in the Promotional Stage, Release No. 33-2672 (Sept. 29, 1941) [6 FR 4964]. In 1981, the Commission rescinded Form S-3 and incorporated the industry specific disclosure requirements into Form S-18, the form for small business issuers. See Availability of Simplified Registration Form to Certain Mining Companies, Release

*Comments submitted to the Commission's JOBS Act website.* None.

## **G. Requirements Relating to Securities Offerings**

### Item 504 – Use of Proceeds

*General background.* This requirement is derived from the provisions in Schedule A of the Securities Act calling for disclosure of the estimated net proceeds to be derived from the security to be offered,<sup>284</sup> as well as details about the specific purposes and approximate amounts of the proceeds to be used and information about the sources of any additional funds to be used.<sup>285</sup> Schedule A also requires detailed disclosure about acquisitions of any property or goodwill outside of the ordinary course of business using proceeds of the offering,<sup>286</sup> and certified financial statements for any business to be acquired using the proceeds of the offering.<sup>287</sup> In 1933, the Commission's predecessor adopted provisions in registration statement Form A-1 that required tabular disclosure about the proceeds of the offering, the offering expenses and the use of proceeds and further details about transactions in which the proceeds are used to acquire property outside the ordinary course of business.<sup>288</sup> In 1935, the Commission adopted similar provisions in Form A-2 and included instructions about proceeds used to discharge loans, proceeds used for

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No. 33-6299 (March 18, 1981) [46 FR 18947]. In 1992, in connection with the Commission's small business initiatives that rescinded Form S-18, Item 17A of Form S-18 was redesignated as Industry Guide 7, so that the industry specific guidance would be applicable to all issuers engaged in mining operations, not only to small business issuers. See Small Business Initiatives, Release No. 33-6949 (July 20, 1992) [57 FR 36447]. A rulemaking petition to amend Industry Guide 7 was submitted to the Commission in October 2012. See Letter from The Society For Mining, Metallurgy and Exploration, Inc., dated October 1, 2012, available at <http://www.sec.gov/rules/petitions/2012/petn4-654.pdf>.

<sup>284</sup> Schedule A paragraph (15).

<sup>285</sup> Schedule A paragraph (13).

<sup>286</sup> Schedule A paragraph (21).

<sup>287</sup> Schedule A (27).

<sup>288</sup> See Form A-1 Items 26, 27, 37, 40 and 51.

working capital and proceeds to be used in conjunction with other funds.<sup>289</sup> In 1964, the Commission published Guide 21 regarding the circumstances under which registrants may disclose in a registration statement alternative uses of proceeds or a statement that management may change the use of proceeds.<sup>290</sup> In 1972, the Commission added a provision to Guide 21 calling for a graphic depiction (in the form of pie charts) of the use of proceeds.<sup>291</sup> This item was added to Regulation S-K as part of the expansion and reorganization of Regulation S-K in 1982, combining the requirements of Form S-1 and Guide 21, but eliminating the requirement for the pie chart.<sup>292</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* In connection with the disclosure simplification for smaller reporting companies, references to Regulation S-X in Instruction 6 to Item 504 were clarified to specifically include references to the scaled financial statement requirements in Article 8 of Regulation S-X for smaller reporting companies.<sup>293</sup>

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 505 – Determination of Offering Price

*General background.* This requirement is partially derived from the provisions in paragraph 16 of Schedule A of the Securities Act calling for disclosure of the proposed offering

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<sup>289</sup> See Form A-2 Items 27 through 29. See also Instructions to Item 28.

<sup>290</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4666 (Jan. 20, 1964) [29 FR 2490].

<sup>291</sup> See Contents of Prospectuses and Guides for Preparation and Filing of Registration Statements, Release No. 33-5378 (July 26, 1972) [37 FR 15985].

<sup>292</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

<sup>293</sup> See Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934], available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>.

price or the method by which the price is to be computed and any proposed variation in price to be offered to particular investors or classes of investors.<sup>294</sup> Following the Commission's investigation of the hot issues markets in 1971, the guides were revised in 1972 to include disclosure about how the offering price was determined in the absence of an established trading market.<sup>295</sup> This item was added to Regulation S-K as part of the expansion and reorganization of Regulation S-K in 1982, based on the provisions of Guide 5 relating to the determination of the offering price.<sup>296</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 506 – Dilution

*General background.* This requirement stems from a similar provision that was first included in the guides in 1968.<sup>297</sup> Following the Commission's investigation of the hot issues markets in 1971, the guides were revised in 1972 to include instructions for registrants to

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<sup>294</sup> Schedule A paragraph (16).

<sup>295</sup> Guide 5 (Voluminous and Verbose Prospectuses) was significantly expanded in 1972 and renamed Guide 5 (Preparation of Prospectuses). This new Guide 5 included two notes, one of which related to disclosure of the determination of the offering price and the other related to disclosure for offerings that were not underwritten on a firm commitment basis. See Guide 5, in Guides for the Preparation and Filing of Registration Statements, Release No. 33-5278 (July 26, 1972) [37 FR 15985]. Guide 5 was rescinded in 1982 as part of the Commission's program to integrate the disclosure requirements of the Securities Act and the Exchange Act. See Rescission of Guides and Redesignation of Industry Guides, Release No. 33-6384 (March 3, 1982) [47 FR 11476].

<sup>296</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380]. See also Proposed Revision of Regulation S-K and Guides for the Preparation and Filing of Registration Statements and Reports, Release No. 33-6276 (Dec. 23, 1980) [46 FR 78] at 91.

<sup>297</sup> See Guide 6, in Guides for the Preparation and Filing of Registration Statements, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18618].

illustrate graphically the dilution of shareholders' equity.<sup>298</sup> In adopting Item 506 as part of Regulation S-K, the Commission noted that commenters believed in the usefulness of dilution disclosure generally, but did not support a mandatory requirement for a graphical illustration of dilution. As adopted, Item 506 did not include a graphical illustration requirement and it contained changes "to minimize the instances where such disclosure would be required of more seasoned companies whose securities are selling on the basis of earnings, and where dilution of book value generally is not material to investors."

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* Two commenters recommend that emerging growth companies be exempted from dilution disclosure requirements, because, according to this commenter, the amount of dilution sustained by investors in an IPO does not appear to be a matter that is regarded as meaningful by investors.<sup>299</sup> These commenters also assert that dilution disclosure can be even less meaningful in the context of companies that have relatively limited operating history because they will rarely have an amount of net tangible book value per share that approaches the level of the initial public offering price in the IPO. These commenters suggest that investors interested in dilution are able to review the recent balance sheet and capitalization information provided in the prospectus to enable them to determine the level of dilution that would be sustained from purchasing shares in the offering.

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<sup>298</sup> See Guide 6, in Guides for the Preparation and Filing of Registration Statements, Release No. 33-5278 (July 26, 1972) [37 FR 15985].

<sup>299</sup> See Silicon Valley Letter and Letter from Mike Liles.



In contrast, another commenter strongly opposed this recommendation, noting that such dilution is an important metric for institutional investors.<sup>300</sup>

#### Item 507 – Selling Security Holders

*General background.* The disclosure of the names of any selling security holders, the amount of securities owned and the amount to be offered were required in Form S-1.<sup>301</sup> This requirement was first adopted in Regulation S-K as an instruction (Instruction 8 to Item 6) to the requirement relating to security ownership of certain beneficial owners and management.<sup>302</sup> In 1982, the Commission revised the requirement and adopted Item 507, based on a provision in Form S-16 (which was originally adopted as a registration statement form for secondary offerings).<sup>303</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K. Changes to the procedures for identifying selling security holders in offering documents were adopted in 2005 in connection with the Commission’s Securities Offering Reform, in order to alleviate timing concerns associated with resale registration statements.<sup>304</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

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<sup>300</sup> See Letter from Council of Institutional Investors.

<sup>301</sup> See, e.g., Form S-1 Instruction 3 to Item 1 and Instruction 3 to Item 19. See Application for Registration of Securities, Release No. 33-3584 (Oct. 21, 1955) [20 FR 8284]. See also Forms for Registration Statements; Notice of Proposed Rulemaking, Release No. 33-3540 (April 26, 1955) [20 FR 2965].

<sup>302</sup> See Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, Release No. 33-5949 (July 28, 1978) [43 FR 34402].

<sup>303</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

<sup>304</sup> See Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722], available at <http://www.sec.gov/rules/final/33-8591.pdf>.

*Comments submitted to the Commission's JOBS Act website.* Two commenters recommended eliminating the requirement to identify each stockholder selling shares in an offering and recommended that disclosure about the amount of shares being sold in the offering by shareholders not identified under Item 403 should be presented in the aggregate.<sup>305</sup>

#### Item 508 – Plan of Distribution

*General background.* This requirement is derived from requirements in Schedule A calling for disclosure of the names and addresses of the underwriters and detailed disclosure of commissions or discounts paid to the underwriters. In 1935, in connection with the adoption of Form A-2, the Commission adopted expanded disclosure requirements relating to underwriting arrangements.<sup>306</sup> In 1947, the Commission rescinded Form A-2 and adopted amendments to Form S-1 that eliminated the requirement for a complete outline of the material provisions of each underwriting contract with the principal underwriters (formerly Item 23 of Form A-2).<sup>307</sup> In 1955, the Commission streamlined the plan of distribution and underwriting discounts and commissions requirements in Form S-1.<sup>308</sup> In 1964, the Commission published Guide 2 (Finders), Guide 7 (Underwriter's Compensation from Conversion of Funds into Foreign Currency) and Guide 22 (Identification of Members of Board of Directors Selected by Underwriters).<sup>309</sup> In 1968, the

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<sup>305</sup> See Silicon Valley Letter and Letter from Mike Liles.

<sup>306</sup> See Items 21 through 26 of Form A-2.

<sup>307</sup> See Miscellaneous Amendments, Release No. 33-3186 (Jan. 8, 1947) [12 FR 224].

<sup>308</sup> See Application for Registration of Securities, Release No. 33-3584 (Oct. 21, 1955) [20 FR 8284]. See also Forms for Registration Statements; Notice of Proposed Rulemaking, Release No. 33-3540 (April 26, 1955) [20 FR 2965]. In 1955, Item 2 of Form S-1 required disclosure of the names of the principal underwriters and the respective amounts underwritten, any material relationships between the principal underwriters and the registrant, the nature of the underwriting arrangements and a brief statement of the discounts and commissions allowed to dealers and sub-underwriters. Item 1 of Form S-1 required tabular information of the price to the public, underwriting discounts and commissions, including finders' fees and proceeds to the registrant or other persons.

<sup>309</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4666 (Jan. 20, 1964) [29 FR 2490].

Commission published amendments to various guides, expanding information about underwriting arrangements and adopting new Guide 16 (Disclosure with Respect to Newly Organized Underwriting Firms), Guide 17 (Disclosure of Underwriting Discounts and Commissions) and Guide 53 (Information As to Over-the-Counter Market for Securities to be Registered) which included disclosure regarding known market makers.<sup>310</sup> In 1973, following the Commission's investigation of the hot issues markets, the Commission adopted amendments to Form S-1 that required, in IPO registration statements, disclosure of the principal underwriter's intentions to confirm sales to their discretionary accounts.<sup>311</sup> This item was added to Regulation S-K as part of the expansion and reorganization of Regulation S-K in 1982 and combined the requirements from Form S-1 and Guides 5, 6, 11, 14, 16, 17, 35 and 53.<sup>312</sup>

*Summary of past substantive changes to the requirement.* In 1993, in connection with amendments to Exchange Act Rule 10b-6 to permit passive market making activities under certain circumstances, the Commission adopted a new requirement for a brief description of passive market-making to be added to the plan of distribution.<sup>313</sup> In 1997, in connection with the adoption of Regulation M, the Commission adopted a new requirement for the disclosure of

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<sup>310</sup> See Guides for Preparation and Filing of Registration Statements, Release No. 33-4936 (Dec. 9, 1968) [33 FR 18617]. At this time, former Guide 2 (Finders) was redesignated as Guide 11; former Guide 7 (Underwriter's Compensation from Conversion of Funds into Foreign Currency) was revised and redesignated as Guide 14; former Guide 22 (Identification of Members of Board of Directors Selected by Underwriters) was redesignated as Guide 35; and additional provisions regarding disclosure of underwriting arrangements were added to Guide 5 (Voluminous and Verbose Prospectuses) and Guide 6 (Introductory Statements).

<sup>311</sup> See New Ventures, Meaningful Disclosure, Release No. 33-5395 (June 1, 1973) [38 FR 17202].

<sup>312</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

<sup>313</sup> See Passive Market Making, Release No. 33-6991 (April 8, 1993) [58 FR 19598]. The adopting release noted that prospectus disclosure was required because "passive market making represents a significant change in the level of distribution participant activity in the market, and bears some resemblance to stabilization activity....". Id., at 19603.

intended stabilizing and other similar activities by selling group members.<sup>314</sup> In 1998, in connection with the adoption of plain English disclosure rules, the Commission adopted revisions that moved requirements regarding stabilization legends and underwriters compensation from Item 502 to Item 508.<sup>315</sup>

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

#### Item 511 – Other Expenses of Issuance and Distribution

*General background.* This requirement stems from a requirement in Schedule A calling for disclosure of amounts of expenses, itemized in reasonable detail, incurred in connection with the sale of the securities being offered, including legal, engineering, certification, authentication and other charges.<sup>316</sup> The Commission's first registration statement forms incorporated a similar requirement.<sup>317</sup> This requirement was adopted in its current form as part of the expansion and reorganization of Regulation S-K in 1982.<sup>318</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission's JOBS Act website.* None.

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<sup>314</sup> See Anti-Manipulation Rules Concerning Securities Offerings, Release No. 33-7375 (Jan. 3, 1997) [62 FR 520], available at <http://www.sec.gov/rules/final/34-38067.txt>.

<sup>315</sup> See Plain English Disclosure, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370], available at <http://www.sec.gov/rules/final/33-7497.txt>.

<sup>316</sup> See Schedule A paragraph (18).

<sup>317</sup> See, e.g., Item 37 of Form A-1 and Item 27(b) of Form A-2.

<sup>318</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

## Item 509 – Interests of Named Experts and Counsel

*General background.* A requirement for the disclosure of the interests of named experts has been required since the initial registration statement forms adopted by the Commission.<sup>319</sup> In 1970, the Commission authorized the publication of a guide relating to disclosure of the interests of counsel and experts in the registrant.<sup>320</sup> The release explained that, “where counsel are named in the prospectus as having passed upon legal matters in connection with the registration or offering of securities potential investors should be told of any interests which such counsel may have in the issuer or in the offering in order that they may judge for themselves the independence and objectivity of such counsel.”<sup>321</sup> Pursuant to this guidance, disclosure was not required for interests not exceeding \$30,000 for firms and \$10,000 for individuals. In 1982, this requirement for disclosure about the interests of named experts and counsel was adopted as part of the expansion and reorganization of Regulation S-K and the threshold for disclosure was raised to \$50,000 for any expert or counsel, including their firms.<sup>322</sup>

*Summary of past substantive changes to the requirement.* There have been no substantive amendments since the requirement was added to Regulation S-K.

*Scaled requirements or exemptions for specified classes of registrants.* None.

*Comments submitted to the Commission’s JOBS Act website.* None.

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<sup>319</sup> See, e.g., Item 50 of Form A-1, adopted in 1933, and Item 42 of Form A-2, adopted in 1935.

<sup>320</sup> See Definitive Guide Relating to Interest of Counsel and Experts in Registrant, Release No. 33-5094 (Oct. 21, 1970) [35 FR 16919].

<sup>321</sup> Id.

<sup>322</sup> See Adoption of Integrated Disclosure, Release No. 33-6383 (March 3, 1982) [47 FR 11380].

## **H. Other Comments Received Relating to Disclosure Requirements**

One commenter<sup>323</sup> recommended that Regulation S-K should be harmonized with the Staff's Compliance and Disclosure Interpretations,<sup>324</sup> and other sources of interpretation and guidance, in order to reduce the complexity facing registrants.

One commenter recommended that, to review Regulation S-K, the Commission develop and articulate a disclosure framework of guiding principles and objectives consistent with its missions and statutory responsibilities and also consult with FASB to establish clear boundaries between financial statement disclosure principles and objectives and those of supplemental disclosures beyond the financial statements. The commenter suggested that the Commission use four factors to review the requirements of Regulation S-K and determine whether disclosure requirements warrant elimination or revision: (1) disclosures created to address a void in GAAP requirements in the past that may now be redundant with footnote disclosures that were mandated later, (2) disclosures of information investors can more easily obtain from sources other than SEC filings, (3) disclosures that have become industry-specific rather than applicable to all entities and (4) disclosures based on purely quantitative thresholds without regard for materiality.<sup>325</sup>

## **IV. Recommendations**

### **A. Overview of Possible Next Steps**

The staff's review of the regulatory history of the disclosure items in Regulation S-K reveals the incremental development of the current requirements, as changes over time have generally sought to address specific disclosure gaps and, in some cases, mandated policy

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<sup>323</sup> See Letter from Davis Polk & Wardwell LLP, dated June 22, 2012, available at <http://www.sec.gov/comments/jobs-title-i/general/general-32.pdf>.

<sup>324</sup> The Staff's Compliance and Disclosure Interpretations are available at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

<sup>325</sup> See Letter from Ernst & Young LLP.

objectives. Although comprehensive reviews of the Commission's disclosure requirements have been conducted from time to time, the last such review was the 1996 Task Force on Disclosure Simplification. Since that time, technological advances have continued to significantly change the ways that businesses operate and communicate with investors, as well as the ways that capital markets function and market participants receive and use information. Also, several events have occurred since 1996 that could be further relevant in motivating a review of disclosure rules: the rise and collapse of the technology sector in 2000, the collapse of Enron, the enactment of the Sarbanes-Oxley Act, the financial crisis of 2008, the enactment of the Dodd-Frank Act and the enactment of the JOBS Act. In light of these changes and events, the staff believes that the Commission's disclosure requirements should be reevaluated in order to ensure that existing security holders, potential investors and the marketplace are provided with meaningful and, to the extent possible in the Commission's rules, non-duplicative information upon which to base investment and voting decisions, that the information required to be disclosed by reporting companies continues to be material and that the disclosure requirements are flexible enough to adapt to dynamic circumstances.

While the study conducted in connection with this report serves as an important starting point, the staff believes that further information gathering and review is warranted in order to formulate specific recommendations regarding specific disclosure requirements. In particular, input from market participants is needed to facilitate the identification of ways to update or add requirements for disclosure that is material to an investment or voting decision, ways to streamline and simplify disclosure requirements to reduce the costs and burdens on public companies, including emerging growth companies, ways to enhance the presentation and communication of information and to understand how technology can play a role in addressing

any of these issues. These market participants would include, among others, issuers of all sizes, investors of all sizes, intermediaries, exchanges and other trading venues, standard setters, analysts, legal and accounting professionals, industry and professional organizations, economists and academics, each of which has a unique perspective.

In addition, the staff notes that economic analysis must further inform any reevaluation of disclosure requirements. In that regard, the following economic principles should be given consideration when reviewing and considering changes to disclosure requirements:

- Improving and maintaining the informativeness of disclosure to existing security holders, potential investors and the marketplace, which is particularly relevant to emerging growth companies that need capital to invest in their businesses;
- The historical objectives of a given rule should be considered, including a consideration of any specific disclosure gaps, mandated policy objectives or other conditions sought to be addressed by a given requirement's adoption, whether such conditions are still applicable, and, if not, whether the potential for a return of those conditions poses risks to potential scaling or elimination of the requirement;
- Whether the information provided by a given rule is available to existing security holders, potential investors and the marketplace on a non-discriminatory basis from reliable sources and, if so, any costs or benefits to such persons from obtaining such information from sources other than the issuer, including the ability of investors to seek appropriate redress;
- The extent to which a given disclosure requirement entails high administrative and compliance costs, especially for emerging growth companies;
- The extent to which disclosure of a company's proprietary information may have competitive or other economic costs, which may be particularly relevant to emerging growth companies;



- Maintenance of the Commission’s ability to conduct an effective enforcement program and deter fraud, especially regarding disclosures shown to be instrumental in detection and deterrence; and
- The importance of maintaining investor confidence in the reliability of public company information, in order to, among other things, encourage capital formation.

Therefore, after considering the information gathered in connection with the preparation of this report, the staff recommends the development of a plan to systematically review (on either a comprehensive or a targeted basis, as discussed below) the disclosure requirements in the Commission’s rules and forms, including Regulation S-K and Regulation S-X, and the related rules concerning the presentation and delivery of information to investors and the marketplace. The review should also include disclosure requirements developed through interpretations in Commission releases and staff interpretations and guidance. In addition, the review should consider whether there are factors external to the Commission’s rules that may have contributed to the length and complexity of company filings and the costs of compliance, such as Commission enforcement actions and judicial opinions. The plan would set forth the scope of the review by identifying the broad topics to be covered and, for each topic, would identify preliminary issues to be considered and the recommended means for gathering information from necessary parties. After conducting the review and related information gathering, the staff would, as appropriate, recommend to the Commission proposals for revisions to the disclosure requirements in the Commission’s rules and forms and the related rules concerning presentation and delivery of information.

The staff has identified two alternative frameworks for structuring such a review: a comprehensive approach (reviewing and updating requirements on a wholesale basis, taking into account the appropriateness of substantive requirements as a whole as well as presentation and

delivery issues) and a targeted approach (reviewing and updating requirements on a topic by topic basis). A comprehensive approach has the benefit of addressing the interplay between all sources of disclosure requirements in order to be better positioned to modernize and simplify the requirements, while also addressing issues relating to presentation and delivery of information. In addition, viewing the disclosure requirements in their entirety would likely help keep the focus on disclosure that is relevant to the total mix of information and better address repetition in filings. The staff acknowledges, however, that such an approach would likely be a longer-term project involving significant staff resources across the Commission.

Alternatively, a targeted approach might allow for a more in-depth analysis of each topic and allow changes to be made more quickly. In addition, a targeted approach could allow the staff to identify and prioritize the review of the most challenging aspects of the current rules. On the other hand, a targeted approach could inhibit efforts to simplify the disclosure regime as a whole, resulting in less streamlined disclosure overall. For example, some requirements, such as the executive compensation disclosure rules, have been, over the years, the focus of successive in-depth reviews but have not been recently considered in the context of the complete set of disclosure requirements. For this reason, any targeted approach should still, as much as practicable, retain an emphasis on the overarching disclosure framework. In a targeted approach, after an open comment period, the Commission would address each of the topics outlined below under the heading “Potential Areas for Further Study,” proposing streamlined and principles-based requirements. This approach could allow for faster movement to adoption of revised rules.

The staff believes that a comprehensive approach would be able to achieve the dual goals of streamlining requirements for companies, including emerging growth companies, and focusing on useful and material information for investors. This is due, in part, to the nature of events and

changes that have occurred since the last comprehensive review in 1996, and in part to balancing the economic principles outlined above. Although the staff is mindful of the practical considerations outlined above with respect to each of the approaches, the staff recommends undertaking a comprehensive review.

Finally, as noted above, the staff expects that such a review would require significant information gathering and analysis and would be of great interest to market participants. Accordingly, in formulating the scope of the review and in conducting the review, the staff recommends gathering information using a variety of methods, including, but not limited to, the staff performing its own research and seeking comment from, holding discussions with, and analyzing information from interested parties, including investors, issuers, auditors, attorneys, underwriters and investment banking professionals, professional and industry organizations, other regulators, standard setters, and academics.

## **B. Potential Areas for Further Study**

This section briefly summarizes the staff's preliminary suggestions for further study and information gathering. These suggestions are not intended to be exclusive or to prioritize any potential areas of further study.

### *Review of Requirements in Regulation S-K.*

Using the information in this report as a starting point for understanding the regulatory history of the requirements, the staff recommends further review and information gathering to identify ways to modernize and simplify the requirements in Regulation S-K in a manner that reduces the costs and burdens on companies while still providing material information.

The staff believes that any such review could be more effective if it addresses the following four issues:

- First, as a general matter, the staff believes that any recommended revisions should emphasize a principles-based approach as an overarching component of the disclosure framework, in order to address the tendency toward implementation of increasing layers of static requirements, while preserving the benefits of a rules-based system affording consistency, completeness and comparability of information across registrants.<sup>326</sup> Similar to the current rules and guidance for MD&A disclosure, a disclosure model based on broad principles could be supplemented, as needed, by timely and transparent guidance by the Commission or staff in order to assist companies in tailoring the broad principles to their facts and circumstances.
- Second, the staff believes that any review of the disclosure requirements should include an evaluation of the appropriateness of current scaled disclosure requirements and whether further scaling would be appropriate for emerging growth companies or other categories of issuers.
- Third, the staff believes that any review of the disclosure requirements should include an evaluation of methods of information delivery and presentation, both through the EDGAR system and other means. For example, the review could explore a possible filing and delivery framework based on the nature and frequency of the disclosures, including a “core” disclosure or “company profile” filing with information that changes infrequently, periodic and current disclosure filings with information that changes from period to period, and transactional filings that have information relating to specific offerings or shareholder solicitations.
- Finally, the staff believes that any review of disclosure requirements should consider ways to present information that would improve the readability and

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For example, one of the recommendations emerging from the 31st Annual SEC Government-Business Forum on Small Business Capital Formation in 2012 was that the Commission add a general instruction to Regulation S-K that would permit smaller reporting companies to omit disclosure pursuant to a line item in Regulation S-K in the event such disclosure is not material from the perspective of a reasonable investor, similar to Rule 502(b) for purposes of disclosure under Regulation D. Forum participants felt that this would “add an element of principles-based disclosure to Regulation S-K.”

navigability of disclosure documents and explore methods for discouraging repetition and the disclosure of immaterial information. In that regard, the review could explore whether technology could be used to make disclosure documents easier to prepare and easier to use. For example, the use of dynamic cross-referencing (such as hyperlinks) could reduce redundancy while ensuring that investors have access to information where relevant. The review could also reevaluate the use of quantitative thresholds and other standards of materiality incorporated into the rules.<sup>327</sup> In addition, this review could identify and reassess requirements calling for information that is already readily accessible to market participants, such as historical stock price information.

In addition to these issues, the staff has identified the following specific areas of Regulation S-K that could benefit from further review:

Risk-related requirements. The requirements for risk-related disclosures should be reviewed in order to improve the disclosures and to identify whether different risk-related disclosures should be required. The review could consider, for example, whether to consolidate requirements relating to risk factors, legal proceedings and other quantitative and qualitative information about risk and risk management into a single requirement. As part of this review, the staff could revisit the requirements for quantitative and qualitative market risk in Item 305 and could review whether alternative approaches to risk disclosures could be more appropriate.

Requirements relating to a registrant's business and operations. The requirements for description of business and description of properties disclosure should be reviewed for continuing relevance in light of changes that have occurred in the way that businesses operate. For example,

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<sup>327</sup> For example, there are quantitative thresholds in Item 103 (Legal Proceedings), Item 404 (Transactions with Related Persons, Promoters and Certain Control Persons) and Item 509 (Interests of Named Experts and Counsel). The staff could revisit the recommendations of the 1996 Disclosure Simplification Task Force to replace quantitative thresholds with general materiality standards and consider providing guidance as necessary with respect to factors that could be considered in making materiality determinations in connection with particular disclosure Items.

information about principal properties, mines and plants was relevant when all businesses needed a physical presence, but is no longer as relevant for businesses that do not require physical locations to operate or can easily substitute physical locations without any material impact on their operations. For businesses that do have properties that are material, disclosure requirements could be refocused on material facts about those properties that would inform investors about the significance of the property to the business and any trends or uncertainties in connection with that property, rather than requiring a list of locations, capacity and ownership. Changes in the way that businesses operate may also make other disclosures relevant that are not expressly addressed under current requirements. For example, requirements could be more specific as to additional disclosure that would be necessary where a business relies heavily on intellectual property owned by a third party or relies on service agreements with third parties to perform necessary business functions.

Requirements relating to description of the business should be reviewed to confirm that the information elicited remains relevant, and such a review could consider issues relating to presentation and delivery of the information, as well as the potential for calibrating the information for different types of investors. In addition, the requirements could be reevaluated in light of their particular emphasis on disclosure relating to non-U.S. operations and risks relating to dependence of any segments on non-U.S. operations.

Corporate governance disclosure requirements. The requirements for corporate governance disclosure should be reviewed to confirm that the information is material to investors and develop ways to obtain disclosure that is presented in a manner that provides investors with effective access to material information and avoids boilerplate. Alternative forms of presentation

of the information, such as including the information in a filing that is only updated when changes occur, should also be evaluated.

Executive compensation requirements. Although the requirements for executive compensation disclosure have been amended more often than any of the other disclosure requirements in Regulation S-K, executive compensation disclosure is sometimes pointed to by companies and practitioners as an area with lengthy, technical disclosure.<sup>328</sup> The executive compensation disclosure requirements should be evaluated in light of these concerns and reviewed to confirm that the required information is useful to investors. The review could also evaluate whether further scaling is appropriate.

Offering-related requirements. The requirements for disclosure relating to offerings have not been reviewed comprehensively, although offerings have significantly changed over the years. These requirements, including, among others, requirements for the presentation of information in prospectuses, required legends and undertakings, should be reviewed in light of the changes in offerings and the shift from paper-based offering documents to electronically-delivered offering materials. In addition, requirements pertaining to underwriting arrangements and compensation could be updated to reflect changes in market practice. Further review could also explore using principles-based requirements for disclosure that are currently required, such as use of proceeds and offering expenses, or combining information about dilution, shares eligible for future sale and securities authorized for issuance under equity plans and under outstanding securities and agreements. Disclosure requirements relating to the securities of a registrant should also be reviewed with a focus on whether principles-based requirements would be appropriate.

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<sup>328</sup> See, e.g., the 2011 survey of Financial Executives International summarized in KPMG & Financial Executives Research Foundation, Disclosure Overload and Complexity: Hidden in Plain Sight (2011), available at <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/disclosure-overload-complexity.pdf>.

Exhibit requirements. Since the last comprehensive review of exhibit requirements was conducted (in 1980), the number of required exhibits has grown. The staff is also aware that some exhibit filings can be difficult to locate on the Commission's EDGAR system,<sup>329</sup> which can cause frustration to market participants. The staff believes it would be beneficial to review the manner in which exhibits are made publicly available on the Commission's website, as well as comprehensively review the requirements to confirm whether the documents called for remain relevant and useful and whether other documents should be added.

Other General Requirements Included in Item 10. Since its adoption in 1977, Regulation S-K has been a catch-all for requirements of general applicability, such as the Commission's policy on the use of securities ratings in filings, the conditions for the use of non-GAAP financial measures and the scaled disclosure requirements for smaller reporting companies. A comprehensive approach to review of the disclosure requirements should also include these topics.

Regulation M-A. The staff recommends considering whether the requirements of Regulation M-A should be included in the review, given that it was adopted more recently (in 1999) than other portions of Regulation S-K. It could be beneficial to seek the input of market participants on whether these requirements should be reviewed.

*Emerging Growth Companies.*

The staff recommends further consideration of the criteria to be used for purposes of eligibility for potential further scaling of disclosure requirements and, in particular, whether companies that meet criteria other than the qualifications for emerging growth company status

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<sup>329</sup> This issue was raised in the 1996 Report of the Task Force on Disclosure Simplification, but the changes to filing procedures recommended at the time were not implemented.



would be appropriate. Careful consideration also should be given to the difference between small business requirements and emerging growth company requirements. The five economic principles discussed above should be considered in determining which companies should be allowed to scale their disclosures and how companies should migrate to a standard disclosure regime as they mature and the extent to which disclosure of previously undisclosed information should later be required. This review should also include consideration of the definitional thresholds for smaller reporting companies, as well as the definitional thresholds for accelerated filers and large accelerated filers.

*Industry Guides.*

The staff recommends reviewing the Industry Guides to evaluate whether they still elicit useful information and conform to industry practice and trends. For example, this could include an evaluation of the guidance set forth in Industry Guide 3 in light of the growth and complexity of financial institutions since it was last amended in 1986, as well as developments in international regulatory reforms in this area. Likewise, the requirements of Industry Guide 5 could be evaluated in light of the changes to the business and financial practices relating to real estate companies since it was issued in 1976. In addition, review could be made as to whether any of the Industry Guide provisions should be codified in Regulation S-K, whether information is duplicative with accounting standards and whether scaled requirements or transition periods should be available for certain classes of registrants.

*Financial Reporting and Disclosure Requirements.*

The financial reporting requirements of Regulation S-X could be comprehensively reviewed, as the last such review was conducted in connection with the implementation of the integrated disclosure system. Another area to review is disclosure requirements that may now be

redundant with financial statement disclosure requirements mandated at a later time. Part of this review could also address the Regulation S-K requirements for annual and quarterly selected financial data disclosure and the ratio of earnings to fixed charges.

*Disclosure Requirements Contained in Rules and Forms.*

The staff recommends reviewing the disclosure requirements that are contained in rules and forms, such as Form 10-Q and Form 8-K, as part of a comprehensive review of all disclosure requirements as well as in connection with issues relating to presentation and delivery of information to investors (including, as noted above, a possible filing and delivery framework based on the nature and frequency of the disclosures).

**C. Conclusion**

In light of the number and breadth of prior initiatives to review the Commission's disclosure requirements summarized in this report, and the detailed inventory of Regulation S-K illustrating the range of topics covered by the disclosure requirements, the staff has identified two possible approaches (a comprehensive approach and a targeted approach) for further work to develop particular recommendations for revised disclosure requirements for all registrants, including emerging growth companies. Although a comprehensive approach would likely be a longer-term project involving significant staff resources across the Commission, the staff believes that a comprehensive approach would be able to achieve the dual goals of streamlining requirements for companies, including emerging growth companies, and focusing on useful and material information for investors. Accordingly, the staff recommends that a comprehensive approach should be used to review and revise the disclosure requirements.