

**EXISTING REGULATORY PROTECTIONS
UNCHANGED BY EITHER H.R. 3606 OR S. 1933**

*These protections apply to ALL public companies,
including Emerging Growth Companies*

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I. GENERAL ANTI-FRAUD PROVISIONS

- A. **Duty to Disclose All Material Information** – Rule 12b-20 of the Securities Exchange Act of 1934 (the “Exchange Act”) requires that companies must, in addition to providing the information expressly required in a report or other statement to the Securities and Exchange Commission (“SEC”), include any additional material information that may be necessary to make the required statements not misleading in light of the circumstances.
- B. **Liability for False and Misleading Statements** – Section 18 of the Exchange Act imposes liability for false and misleading statements in documents filed with the SEC to any person who makes such false or misleading statements, subject to applicable defenses.
- C. **Exchange Act Section 10(b) and Rule 10b-5** – These provisions broadly prohibit fraudulent and deceptive practices and untrue statements or omissions of material facts in connection with the purchase or sale of any security. Unlike Section 18, these provisions apply to any information released to the public by the issuer and its subsidiaries, including press releases and annual and quarterly reports to shareholders.
- D. **Executive Officer Certification of Reports and Financial Statements** – As discussed in more detail below, a company’s certifying officers can be held personally liable for any untrue statement of material fact or material omission necessary to ensure that statements contained in the reports or other statements to the SEC are not misleading.
- E. **Control Person Liability** – Section 20 of the Exchange Act and Section 15 of the Securities Act of 1933 (the “Securities Act”) provide that a person controlling any person liable under those statutes may be liable jointly and severally and to the same extent as its controlled person for violations of the Exchange Act or the Securities Act.
- F. **Liability for Securities Offerings** – Sections 11 and 12 of the Securities Act impose liability for any material misstatements or omissions made in connection with registered offerings conducted under the Securities Act. Section 5(b)(1) of the Securities Act prohibits the use of any prospectus that does not satisfy SEC requirements. In addition, Section 5(b)(2) of the Securities Act prohibits any

registered sale of a security unless the security is preceded or accompanied by a prospectus that satisfies SEC requirements.

II. SEC DISCLOSURE AND REPORTING OBLIGATIONS

- A. **Regulation FD** – Public companies must comply with Regulation FD’s prohibition on selective disclosure of material nonpublic information.
- B. **Limitations on Use of Non-GAAP Financial Measures** – Regulation G and Item 10(e) of Regulation S-K provide specific requirements for the presentation of any financial measures that are not in compliance with generally accepted accounting principles (“GAAP”). Non-GAAP financial measures must not be misleading and must include a reconciliation to the most nearly comparable GAAP measure.
- C. **Annual Reporting (Form 10-K)** – Under Section 13(a)(2) of the Exchange Act, Companies must, within 90 days of the end of each fiscal year, file with the SEC annual reports that include:
 - 1. Audited Financial Statements
 - a. Companies must provide (i) audited balance sheets, (ii) audited financial statements of income and cash flows and (iii) summary financial data.
 - b. As indicated above, all financial statements must be prepared in accordance with, or reconciled to, GAAP.
 - 2. Description of the Company’s Business – Regulation S-K requires annual reports to include (i) a description of the company’s business, including segments, geographic areas, and competitors; (ii) risk factors affecting the business; (iii) pending legal proceedings; (iv) mine safety disclosures; (v) information about directors and officers, including their compensation and any related party transactions; (vi) management’s discussion and analysis of financial condition and results of operations (“MD&A”); (vii) a description of material contractual obligations, (viii) and discussions of off-balance sheet transactions and market risks.
 - 3. Market Information – Annual reports must also include information about the market for the company’s common equity, related stockholder matters and company purchases of equity securities.
 - 4. Description of the Company’s Corporate Governance Policies – Annual reports must also disclose information about corporate governance policies and compliance with governance requirements such as (i) whether the company maintains a code of ethics for its principal executive officers, and if so, it must file such code with the SEC as an exhibit to its annual report; (ii) whether the company has at least one audit committee financial

expert; (iii) a description of company's leadership structure and why this structure is appropriate; and (iv) a description of risk oversight by the company's board and how such oversight is administered.

- D. **Quarterly Reporting (Form 10-Q)** – Under Section 13(a)(1) of the Exchange Act, public companies must, within 45 days after each of the first three fiscal quarters of each year, file with the SEC quarterly reports that include:
1. Condensed Financial Statements – These interim financial statements are unaudited, but are reviewed by independent accountants and subject to Statement on Auditing Standard No. 100.
 2. Additional Information – Quarterly reports must update the annual report in several key areas including (i) MD&A; (ii) any changes in risk factors since the annual report; (iii) quantitative and qualitative disclosures about market risk; (iv) any material legal proceedings; (v) any changes in securities or defaults on senior securities; (vi) mine safety disclosure and (vii) any other materially important event not reported in previous current reports.
- E. **Periodic Reporting (Form 8-K)** – Under Section 13(a)(1) of the Exchange Act, public companies must file current reports with the SEC within four business days after the occurrence of a reportable event.
1. Reportable Events – include events such as (i) the acquisition/disposition of significant assets; (ii) a change in auditors; (iii) any departure or resignation of directors or officers, (iv) material plans or contracts with officers and directors; and (v) many other events important to investors.
- F. **Certification of Reports** – executive officer(s) and principal financial officer(s) must each make individual certifications on each annual and quarterly report.
1. Substance of Certification – Certifying officers must certify that (i) such officer has reviewed the reports; (ii) based upon the officer's knowledge, the report does contain any untrue statement of material fact or material omission necessary to ensure that statements in the reports are not misleading; and (iii) based on such officer's knowledge, the financial statements, and other financial information included in the reports fairly present, in all material aspects, the company's financial condition and results of operations and cash flows.
 2. Internal Control Over Financial Reporting – Certifying officers are responsible for establishing, designing and maintaining effective internal controls, must annually assess and report on the effectiveness of the internal controls, and must disclose any change in the company's internal controls in annual and quarterly reports.

3. Disclosure Responsibilities to the Board of Directors, Audit Committee and Independent Auditors – Certifying officers must disclose to the board, audit committee and the company’s auditors (i) all significant deficiencies and material weaknesses in the design or operation of internal controls and (ii) any fraud, whether or not material, that involves management or any other employee with a significant role in the company’s internal controls.
 4. Criminal Penalties Enforced Against Certifying Officers – Certifying officers that knowingly or willfully certify a report that does not meet the standards summarized above face criminal penalties of up to 20 years in prison and \$5 million in fines.
- G. **Additional Requirements** – The federal securities laws also require public companies to comply with additional disclosure and reporting requirements:
1. **Accounts and Accounting Controls** – Section 13(b)(2) of the Exchange Act requires companies to keep books and records that accurately and fairly reflect transactions and dispositions of assets and to maintain a system of internal accounting controls sufficient to provide reasonable assurance that transactions are executed in accordance with management’s authorization and related requirements.
 2. **Foreign Corrupt Practices Act** – Section 30A of the Exchange Act prohibits public companies and any related persons acting on behalf of a company from bribing any foreign official, political party or candidate for political office for the purpose of obtaining or retaining business.
 3. **Prohibition on Personal Loans to Directors and Executive Officers** – Section 402 of Sarbanes-Oxley prohibits any issuer from directly or indirectly extending, maintaining or arranging credit in the form of a personal loan to or for any director or executive officer.
 4. **Whistleblower Procedures and Rules** – Section 301 of Sarbanes-Oxley requires audit committees to establish procedures for confidential and anonymous “receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters.” In addition, under the Dodd-Frank Act of 2009, the SEC has adopted rules for a program under which monetary awards are given to whistleblowers who disclose fraud directly to the SEC. For successful enforcement actions resulting in monetary sanctions exceeding \$1 million, whistleblowers are entitled to receive between 10% and 30% of the monetary sanctions paid to the SEC.

5. **Regulation M** – Companies must comply with Regulation M whenever they make or propose to make a “distribution” of their stock. Under Regulation M, neither the company nor any of its “affiliated purchasers” may bid for or purchase, or induce others to bid for or purchase, any company stock during the applicable “restricted period” unless a specified exception is available.
6. **Self-Tenders** – Rule 13e-4 under the Exchange Act applies to any tender offer for a company’s shares by the company or one of its affiliates. Under Rule 13e-4, the proposed purchaser must file with the SEC and promptly disseminate public disclosure regarding the proposed purchaser, the issuer and the offer. In addition, the offer must be held open for a minimum period, shareholders must receive withdrawal rights, and other requirements apply to such transactions.
7. **Open-Market Repurchases** – Public companies typically rely on Rule 10b-18 under the Exchange Act to secure a safe harbor from the anti-manipulation requirements of the Exchange Act in connection with open-market bids and purchases made by an issuer with respect to its own shares.
8. **“Going Private” Transactions** – Rule 13e-3 under the Exchange Act imposes filing and disclosure requirements for “going private” transactions (including share purchases and tender offers by a company or an affiliate of a company, as well as mergers, sales of assets and other transactions involving an affiliate of the affected company), that are likely to cause that company’s shares to be held by fewer than 300 holders of record or to be delisted from a stock exchange.

III. CORPORATE GOVERNANCE STANDARDS

- A. **Exchange Act and Sarbanes-Oxley Corporate Governance Requirements** – Companies listed on a national securities exchange are subject to the following corporate governance requirements pursuant to the Exchange Act and the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”):
 1. Audit Committee (Section 10A(m) of the Exchange Act)
 - a. *Establish Audit Committee* – to be directly responsible for the appointment, compensation, retention and oversight of the company’s auditors.
 - b. *Independence Requirement* – each member of the audit committee must be independent.
 - c. *Financial Expert* – at least one member of the audit committee must have financial management expertise, in accordance with Section 407 of Sarbanes-Oxley.

- d. *Whistleblower Protection* – the audit committee must establish procedures to receive and respond to any complaints and concerns regarding the company’s accounting, accounting controls or auditing matters.

2. Independent Auditor

- a. *Qualifications and Reporting* - auditor must be registered with and follow the auditing standards, rules and reporting requirements of the Public Company Accounting Oversight Board (“PCAOB”). Auditor must comply with the independence rules of the SEC and the PCAOB.
- b. *Audit Partner Rotation* – companies must rotate their audit firm partners every five years, in accordance with Section 203 of Sarbanes-Oxley.
- c. *No Conflicts of Interest with Auditor* – an outside auditor may not perform audit services for a company if a chief executive officer, controller, chief financial officer or any other equivalent person of the company was employed by that auditor and participated in the audit of the company during the one-year period preceding the date of the audit, in accordance with Section 206 of Sarbanes-Oxley.
- d. *Prohibition on Improperly Influencing Auditors* – Section 303 of Sarbanes-Oxley prohibits any officer or director of an issuer from directly or indirectly taking action to coerce, manipulate, mislead, or fraudulently influence any auditor of financial statements that are required to be filed with the SEC.

3. *Duty of Attorney to Report Securities Violations* – Section 307 of Sarbanes-Oxley requires attorneys to report specified violations to the company’s chief legal officer or chief executive officer and, if such persons do not respond appropriately within a reasonable time, to report further to the company’s board of directors or audit committee. These reporting obligations apply if the attorney is representing a company before the SEC and becomes aware of evidence of a material violation of federal or state securities laws or any other federal or state laws or a material breach of fiduciary duty by the company, or any officer, director, employee or agent of the company.

- B. **Listing Standards** – Companies must also comply with the corporate governance standards established by any securities exchange upon which they list securities, such as the New York Stock Exchange or NASDAQ, which are often more rigorous.

IV. PROXY STATEMENT OBLIGATIONS

- A. **Duty to Deliver Proxy Statement (Regulation 14A)** – Solicitations of proxies or consents in respect of a company’s shares are subject to the SEC’s proxy rules. Under Section 14 of the Exchange Act, companies must deliver a detailed proxy statement to stockholders in connection with their annual meetings to address such issues as (i) the election of directors; (ii) selection of accountants, (iii) voting on stockholder proposals; (iv) adoption or approval of amendments to the corporate documents, stock option or other plans; and (v) other material issues and transactions.
- B. **Anti-Fraud Requirements** – In addition to general anti-fraud requirements under the federal securities laws, Rule 14a-9 specifically prohibits false or misleading statements made in connection with any proxy solicitation.

V. REPORTING OBLIGATIONS OF OFFICERS, DIRECTORS AND SIGNIFICANT SHAREHOLDERS

- A. **Reporting Persons (Forms 3 & 4)** – Under Section 16(a) of the Exchange Act, a company’s directors, certain designated officers, and 10% stockholders must continually report their direct or indirect beneficial ownership of the company’s equity and derivative securities.
- B. **Disgorgement of Short-Swing Profits** – Section 16(b) of the Exchange Act imposes strict liability on reporting persons to pay to the company any “short-swing profits” realized on a purchase and sale (or vice versa) of the company’s shares within any six-month period, regardless of whether the reporting person was in possession of or used inside information in connection with the trades.
- C. **5% Stockholder (Schedule 13D)** – Under Section 13(d)(1) of the Exchange Act, any person who acquires direct or indirect beneficial ownership of more than 5% of a company’s common stock must, within 10 calendar days after the acquisition, send a statement on Schedule 13D to the company and the SEC, stating (i) the identity, residence, citizenship and nature of beneficial ownership of the shareholder, (ii) the source and amount of funds used in making the purchases, and (iii) the purpose of the purchases. Institutional investors, passive investors and certain other persons may report their beneficial ownership on a short-form Schedule 13G.