
Report on Modernization and Simplification of Regulation S-K

**As Required by Section 72003 of the
Fixing America's Surface Transportation 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 recommendations contained herein.

November 23, 2016

Table of Contents

I. Introduction	1
II. Scope of this Report.....	2
A. Modernization of Property Disclosures for Mining Registrants.....	3
B. Smaller Reporting Company Definition.....	3
C. Disclosure Update and Simplification.....	4
D. Exhibit Hyperlinks and HTML Format.....	4
III. Consultation with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies.....	4
IV. Staff Recommendations	6
A. General	6
B. Core Company Business Information	8
Item 102 (Description of Property)	8
C. Company Performance, Financial Information and Future Prospects	9
Item 303 (Management’s Discussion and Analysis)	9
D. Management and Certain Security Holders, Corporate Governance	11
Item 401 (Directors, Executive Officers, Promoters and Control Persons).....	11
Item 405 (Compliance with Section 16(a) of the Exchange Act).....	12
Item 407 (Corporate Governance)	13
E. Registration Statement and Prospectus Provisions.....	14
Item 501 (Forepart of Registration Statement and Prospectus Cover Page).....	14
Item 503 (Risk Factors).....	16
Item 508 (Plan of Distribution).....	16
Item 512 (Undertakings)	17
F. Exhibits.....	19
G. Manner of Delivery Recommendations	21
V. Conclusion.....	23

Report on Modernization and Simplification of Regulation S-K

I. Introduction

In December 2013, the Commission's staff ("we" or "the staff") issued a report on the Commission's disclosure requirements under Regulation S-K (the "S-K Study"),¹ which was mandated by Section 108 of the Jumpstart Our Business Startups Act (the "JOBS Act").² Based on the recommendations in the S-K Study and at the request of Chair Mary Jo White,³ we initiated a comprehensive evaluation of the information our rules require registrants to disclose, how this information is presented, where and how this information is disclosed, and how the Commission can leverage technology as part of these efforts (collectively, the "Disclosure Effectiveness Initiative").⁴ As part of this ongoing initiative, we are considering whether existing disclosure requirements should be modified or eliminated, whether new disclosure requirements should be created, and whether disclosures could be presented and provided more effectively. A review of this magnitude is of great significance to investors and companies, and demands broad-based outreach for views on how to address a host of interrelated issues identified by investors, companies, and other market participants.

In December 2015, Congress passed the Fixing America's Surface Transportation Act (the "FAST Act").⁵ The FAST Act includes two sections that direct the Commission to modernize and simplify the requirements in Regulation S-K.

First, Section 72002 of the FAST Act directs the Commission to amend Regulation S-K to "further scale or eliminate requirements . . . to reduce the burden on emerging growth companies, accelerated filers, smaller reporting companies, and other smaller issuers, while still providing all material information to investors." This section also directs the Commission to

¹ *Report on Review of Disclosure Requirements in Regulation S-K* (Dec. 2013), [available at https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf](https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf).

² Pub. L. No. 112-106, Sec. 108, 126 Stat. 306 (2012). Section 108 of the JOBS Act required the Commission to conduct a review of Regulation S-K to determine how it could be updated and simplify the registration process for emerging growth companies ("EGCs"). To identify areas of Regulation S-K that may be appropriate for simplification or modernization as they relate to EGCs as specified in Section 108 of the JOBS Act, the staff concluded in 2012 that it would be important to first understand and consider the history of all the provisions in Regulation S-K. The staff also concluded at that time 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. *See* S-K Study, at 3.

³ *See SEC Issues Staff Report on Public Company Disclosure* (Dec. 20, 2013), [available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982).

⁴ For more information, please see the Commission's Disclosure Effectiveness Initiative Spotlight Page, [available at https://www.sec.gov/spotlight/disclosure-effectiveness.shtml](https://www.sec.gov/spotlight/disclosure-effectiveness.shtml). *See also Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)], [available at https://www.sec.gov/rules/concept/2016/33-10064.pdf](https://www.sec.gov/rules/concept/2016/33-10064.pdf).

⁵ Pub. L. No. 114-94, 129 Stat. 1312 (2015).

“eliminate provisions . . . that are duplicative, overlapping, outdated, or unnecessary.”⁶ The Commission must take action on these amendments within 180 days of the enactment of the FAST Act to the extent it determines the amendments require no further study. As discussed in Section II.A-D of this report, the Commission has issued releases responsive to the mandates set forth in Section 72002 of the FAST Act.

Second, Section 72003 of the FAST Act directs the Commission to carry out a study of Regulation S-K’s requirements and to consult with the Commission’s Investor Advisory Committee (the “IAC”) and Advisory Committee on Small and Emerging Companies (the “ACSEC”).⁷ The Commission must then issue a report to Congress within 360 days of enactment of the FAST Act.⁸ The report must be followed within 360 days by proposed rules to implement the recommendations made in the report.⁹ Section 72003 makes clear that revisions made to Regulation S-K under Section 72002 do not satisfy the Commission’s rulemaking requirements under Section 72003.¹⁰

II. Scope of this Report

Section 72003 of the FAST Act requires this report to include: “(1) all findings and determinations made in carrying out the study [described in Section I above]; (2) specific and detailed recommendations on modernizing and simplifying the requirements in regulation S–K in a manner that reduces the costs and burdens on companies while still providing all material information; and (3) specific and detailed recommendations on ways to improve the readability and navigability of disclosure documents and to discourage repetition and the disclosure of immaterial information.”¹¹

We have carried out the study required by Section 72003. The study reflects our work on the concept release on the business and financial disclosure required by Regulation S-K published earlier this year (the “Concept Release”),¹² public comment on the Concept Release,¹³

⁶ FAST Act § 72002(1)-(2).

⁷ FAST Act § 72003(a)-(b). The study must: (1) determine how best to modernize and simplify the Regulation S-K requirements in a manner that reduces the costs and burdens on issuers while still providing all material information; (2) emphasize a company-by-company approach that allows relevant and material information to be disseminated to investors without boilerplate language or static requirements while preserving completeness and comparability of information across registrants; and (3) evaluate methods of information delivery and presentation and explore methods for discouraging repetition and the disclosure of immaterial information. Id. at § 72003(a).

⁸ Id. at § 72003(c).

⁹ Id. at § 72003(c)-(d).

¹⁰ Id. at § 72003(e).

¹¹ Id. at § 72003(c).

¹² *Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)], available at <https://www.sec.gov/rules/concept/2016/33-10064.pdf>.

¹³ Although relevant comments will be discussed more fully in any Commission rulemaking releases issued pursuant to Section 72003 of the FAST Act, in Section IV below we refer to several of the comments that have

our experience with Regulation S-K arising from the Division of Corporation Finance's disclosure review program, the responses to the Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters (the "Regulation S-K Subpart 400 Release"),¹⁴ and our internal review of the history and development of Regulation S-K. We have also consulted with the IAC and the ACSEC and have considered their thoughts and recommendations.¹⁵

This report does not reiterate the amendments to Regulation S-K that are responsive to the Section 72003 mandate that the Commission proposed in the following releases.

A. Modernization of Property Disclosures for Mining Registrants

On June 16, 2016, the Commission proposed revisions to the property disclosure requirements for mining registrants and related guidance, currently set forth in Item 102 of Regulation S-K and in Industry Guide 7.¹⁶ The proposed revisions are intended to provide investors with a more comprehensive understanding of a registrant's mining properties, which should help them make more informed investment decisions. The proposed revisions would also modernize the Commission's disclosure requirements and policies for mining properties by aligning them with current industry and global regulatory practices and standards. In addition, the Commission proposed rescinding Industry Guide 7 and including the Commission's mining property disclosure requirements in a new subpart of Regulation S-K.

B. Smaller Reporting Company Definition

On June 27, 2016, the Commission proposed amendments to the definition of "smaller reporting company" in Item 10(f) of Regulation S-K and other Commission rules (the "SRC Release").¹⁷ The proposed amendments would expand the number of registrants that qualify as smaller reporting companies and are intended to promote capital formation and reduce compliance costs while maintaining investor protections. If the amendments are adopted, registrants with a public float of less than \$250 million, or with zero public float and revenues below \$100 million in the most recently completed fiscal year for which audited financial

informed our specific and detailed recommendations. Unless otherwise indicated, the comments cited are to the Concept Release, and all comments submitted on the Concept Release are available at <https://www.sec.gov/comments/s7-06-16/s70616.htm>.

¹⁴ *Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters*, Release No. 33-10198 (Aug. 25, 2016) [81 FR 59927 (Aug. 31, 2016)], available at <https://www.sec.gov/rules/other/2016/33-10198.pdf>.

¹⁵ Many of the recommendations in this report are necessarily preliminary in nature. Ongoing outreach and study will be necessary in connection with any rulemaking that may arise from the recommendations. We anticipate that in connection with such rulemaking the Commission would provide further discussion and analysis of the proposed amendments and their potential economic effects.

¹⁶ *Modernization of Property Disclosures for Mining Registrants*, Release No. 33-10098 (June 16, 2016) [81 FR 41651 (June 27, 2016)], available at <https://www.sec.gov/rules/proposed/2016/33-10098.pdf>.

¹⁷ *Amendments to Smaller Reporting Company Definition*, Release No. 33-10107 (June 27, 2016) [81 FR 43130 (July 1, 2016)], available at <https://www.sec.gov/rules/proposed/2016/33-10107.pdf>.

statements are available, would qualify as smaller reporting companies. Currently, the smaller reporting company definition uses a \$75 million threshold for the public float test and a \$50 million threshold for the revenues test. In addition, the Commission proposed amending the “accelerated filer” and “large accelerated filer” definitions in Exchange Act Rule 12b-2 to preserve the application of the current thresholds contained in those definitions.

C. Disclosure Update and Simplification

On July 13, 2016, in its Disclosure Update and Simplification Release (the “Disclosure Update Release”), the Commission proposed amendments to certain disclosure requirements including various provisions in Regulation S-K, that may have become redundant, overlapping, outdated, or superseded, in light of other Commission disclosure requirements, U.S. generally accepted accounting principles (“U.S. GAAP”), International Financial Reporting Standards (“IFRS”), or changes in the information environment.¹⁸ This release also solicited comment on certain Commission disclosure requirements that overlap with, but require information incremental to, U.S. GAAP to determine whether to retain, modify, eliminate, or refer them to the Financial Accounting Standards Board (“FASB”) for potential incorporation into U.S. GAAP.

D. Exhibit Hyperlinks and HTML Format

On August 31, 2016, the Commission proposed rules that would require registrants that file registration statements and periodic and current reports that are subject to the exhibit requirements under Item 601 of Regulation S-K, or that file on Forms F-10 or 20-F, to include a hyperlink to each exhibit listed in the exhibit index of these filings (the “Hyperlinks Release”).¹⁹ To enable the inclusion of such hyperlinks, the proposed amendments would also require that registrants submit all such filings in HyperText Markup Language (“HTML”) format.

In addition, because these recommendations are intended to address the specific mandates in Section 72003(c) discussed above, they do not include other potential changes to the disclosure regime that the staff is continuing to assess as part of the Disclosure Effectiveness Initiative.

III. Consultation with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies

The IAC was established in accordance with Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.²⁰ One of the principal purposes of the IAC is to

¹⁸ *Disclosure Update and Simplification*, Release No. 33-10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)], available at <https://www.sec.gov/rules/proposed/2016/33-10110.pdf>.

¹⁹ *Exhibit Hyperlinks and HTML Format*, Release No. 33-10201 (Aug. 31, 2016) [81 FR 62689 (Sept. 12, 2016)], available at <https://www.sec.gov/rules/proposed/2016/33-10201.pdf>.

²⁰ Pub. L. No. 111-203 (July 21, 2010).

advise and consult with the Commission on issues relating to the effectiveness of disclosure.²¹ The IAC is also charged with submitting its findings and recommendations to the Commission.²²

Since the adoption of the FAST Act, Commission staff has consulted with the IAC on its Disclosure Effectiveness Initiative and the requirements of Section 72003 of the FAST Act. On June 15, 2016, the IAC submitted a letter to the Commission on the Disclosure Effectiveness Initiative and the Concept Release.²³ In that letter, the IAC made several recommendations with respect to manner of delivery and specific disclosure issues.²⁴ We have considered the IAC's comments in developing the recommendations discussed below.

The ACSEC was established in accordance with Section 9(c) of the Federal Advisory Committee Act.²⁵ The ACSEC's purpose is to advise the Commission on its rules and policies as they relate to emerging privately held small businesses and publicly traded companies with less than \$250 million in public market capitalization.²⁶ The ACSEC periodically submits recommendations for the Commission's consideration.

In September 2015, the ACSEC issued recommendations about expanding simplified disclosure for smaller issuers.²⁷ The recommendation to include companies with a public float of up to \$250 million in the definition of "smaller reporting company" is reflected in the SRC Release. On October 5, 2016, consistent with the requirements of Section 72003 of the FAST Act and in consultation with Commission staff, the ACSEC dedicated a portion of its meeting to discussing Regulation S-K disclosure requirements. At the meeting, the ACSEC affirmed its previous recommendations to the Commission on expanding simplified disclosure and discussed additional recommendations relevant to this report.²⁸ We have considered the ACSEC's recommendations in developing the recommendations below.

²¹ See IAC Charter, Art. 3(2).

²² Id. at Art. 4.

²³ Letter from the IAC (June 15, 2016), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf>.

²⁴ The IAC encouraged the Commission to expand the requirements for machine readable formatting, layered disclosure, global identifiers to facilitate identification of the registrant and its subsidiaries, and structured data. The IAC also recommended that the Commission consider improvements to EDGAR and disclosure requirements related to non-GAAP financial measures, public policy and sustainability, stock repurchases, and taxes. See id.

²⁵ ACSEC Charter, Art. 2.

²⁶ See ACSEC Charter, Art. 3.

²⁷ See *Recommendations about Expanding Simplified Disclosure for Smaller Issuers* (Sept. 23, 2015), available at <https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-expanding-simplified-disclosure-for-smaller-issuers.pdf>.

²⁸ See Transcript, Meeting of SEC Advisory Committee on Small and Emerging Companies (Oct. 5, 2016) ("ACSEC Meeting Transcript"), at 17-53, available at <https://www.sec.gov/info/smallbus/acsec/acsec-transcript-100516.pdf>.

IV. Staff Recommendations

The following specific and detailed recommendations are provided pursuant to Section 72003(c) of the FAST Act. These recommendations are presented as items for the Commission's consideration, recognizing that many of the changes to Regulation S-K discussed in this report would need to be published for public comment before being implemented. As part of that process, the Commission also would consider, and solicit comment on, the potential economic effects of the proposed changes, including their effects on efficiency, competition, and capital formation.

The recommendations are accompanied by a brief summary²⁹ of the current rules and a discussion of the findings and determinations we have made in complying with Section 72003(a) of the FAST Act. The discussion starts with recommendations on specific items of Regulation S-K, which are generally listed in numerical order. We have not provided recommendations on every item in Regulation S-K, despite studying possible changes to those items. Finally, we discuss manner of delivery recommendations.

A. General

A.1. Revise Item 10(d) to permit incorporation by reference of documents that have been on file with the Commission for more than five years, but require specific descriptions of the locations of such documents and a hyperlink to the incorporated document on EDGAR.

Item 10(d) states that no document on file with the Commission for more than five years may be incorporated by reference except for the following:

- Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or
- Documents that the registrant specifically identifies by Commission file number, provided such materials have not been disposed of pursuant to the Commission's Records Control Schedule.³⁰

We recommend that the Commission consider adopting an approach that allows for instant access to incorporated documents through the use of hyperlinks, together with a specific description of the location of the document in the event of broken hyperlinks. Although in limited instances registrants may need to re-file certain older exhibits that were originally filed

²⁹ The summaries of the Commission's requirements are included to provide context to our recommendations in a concise manner. Discussions of current requirements are not interpretive guidance. We encourage readers to refer to the complete body of law and interpretive guidance when reviewing these recommendations or attempting to comply with the rules discussed in this report.

³⁰ The Commission's Records Control Schedule can be found at 17 CFR 200.80f.

prior to EDGAR,³¹ we believe such an approach could greatly improve the readability and navigability of disclosure documents.

A.2. Revise Item 10(d) to consolidate the Commission’s rules on incorporation by reference and to allow registrants to satisfy Regulation S-K’s disclosure requirements in prospectuses by incorporating information by reference to the financial statements.

There is often overlap between disclosure requirements. For example, disclosure of related person transactions under Item 404(a), selected financial data under Item 301, and off-balance sheet arrangements under Item 303(a)(4), among others, provides information that is similar to or duplicative of information disclosed in the financial statements under U.S. GAAP and IFRS.³² This overlap often results in duplicative disclosure that could be addressed by registrants incorporating disclosure by reference to the financial statement footnotes.

Currently, different rules apply to incorporation by reference in different filings with the Commission. For example, Rule 411 provides more restrictive rules for incorporation by reference in prospectuses than Rule 12b-23 provides for Exchange Act registration statements and reports.³³ Beyond differing Securities Act and Exchange Act rules, the Commission’s forms and Item 10(d) add additional complexity to the requirements for incorporation by reference. The multitude of requirements may be confusing to registrants attempting to avoid duplicative disclosure. As such, we recommend that the Commission consider revising the rules and forms to allow for consistent incorporation by reference or cross-referencing to disclosure found elsewhere in a filing, including the financial statements.³⁴ These rules could be consolidated in Item 10(d) for submissions that are required to comply with Regulation S-K.

We recognize, however, that cross-referencing disclosure provided outside of the financial statements within the financial statements may raise questions about the scope of an audit of a company’s financial statements.³⁵ To address this concern, we recommend that the

³¹ We expect this situation to be rare because the Commission began to mandate electronic filings through EDGAR over two decades ago. *See, e.g., Electronic Filing and the EDGAR System: A Regulatory Overview* (Oct. 3, 2006), available at <https://www.sec.gov/info/edgar/regoverview.htm>.

³² *See, e.g.,* Concept Release, Sections IV.B.1 and IV.B.6 (discussing overlapping disclosure requirements for Items 301 and 303(a)(4), respectively).

³³ Compare Rule 411 [17 CFR 230.411] with Rule 12b-23 [17 CFR 240.12b-23]. Rule 12b-23 discusses incorporation of exhibits by reference. In addition to the various Commission rules on incorporation by reference, the forms required to be submitted to the Commission often place additional restrictions and requirements on incorporation by reference.

³⁴ As the Commission noted in the Hyperlinks Release, HTML currently allows electronic documents prepared in this format to include hyperlinks that link to another place within the same document or to a separate document, but the text based American Standard Code for Information Interchange (“ASCII”) format does not. *See* Hyperlinks Release. When considering potential changes to the Commission’s rules for incorporation by reference or cross-referencing, we recommend that the Commission also consider the practicality of requiring such references to be accompanied by an active HTML hyperlink.

³⁵ *See* Concept Release, Section V.A. *See also* Letters from KPMG LLP (July 21, 2016) (“KPMG”); PricewaterhouseCoopers LLP (July 21, 2016) (“PWC”); Grant Thornton LLP (July 21, 2016) (“Grant

Commission consider not permitting the use of incorporation by reference in the financial statements to disclosure found elsewhere.

B. Core Company Business Information

Item 102 (Description of Property)

B.1. Revise Item 102 to clarify that a description of property is required only to the extent that physical properties are material to the registrant's business.

Item 102 requires registrants to “state briefly the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries.” Registrants must also identify the segment that uses the properties and, in some circumstances, describe how the property is held. A description of physical properties remains relevant to certain types of registrants, such as manufacturing companies, hotels, casinos, real estate investment trusts, or companies involved in resource extraction.³⁶ In contrast, registrants in many industries, such as service or technology companies, may occupy properties that are easily replaced and are not material to their operations.

Despite the language that currently limits disclosure to properties that are “materially important” to the registrant, we have observed that this item often results in disclosure of immaterial information.³⁷ We therefore recommend that the Commission consider revising Item 102 to require a description of property only to the extent that physical properties are material to the registrant's business. Clarifying the scope of the requirement may reduce disclosure of immaterial information while still providing information that investors need to make informed investment decisions.³⁸ In addition, we recommend that the Commission consider combining the description of material physical properties with the description of business in Item 101(c).

Thornton”); and Deloitte & Touche LLP (July 15, 2016) (“Deloitte”); Ernst & Young LLP (July 21, 2016) (“Ernst & Young”); Center for Audit Quality (July 21, 2016) (“CAQ”); The PNC Financial Services Group (July 21, 2016) (“PNC”) (suggesting ways to indicate which information has been audited); Crowe Horwath LLP (July 21, 2016).

³⁶ See Concept Release, Section IV.A.6.b.

³⁷ See *id.*

³⁸ In this regard, we also recommend that the Commission consider replacing the use of the term “materially important” with “material,” a more commonly understood and established term in the federal securities laws.

C. Company Performance, Financial Information and Future Prospects

Item 303 (Management’s Discussion and Analysis)

C.1. Revise Item 303(a) to clarify that a registrant need only provide a period-to-period comparison for the two most recent fiscal years presented in the financial statements and may hyperlink to the prior year’s annual report for the additional period-to-period comparison.

Item 303(a)(3) requires a discussion and analysis of a registrant’s results of operations. Instruction 1 to Item 303(a) states that the discussion and analysis shall cover the three-year period covered by the financial statements and use year-to-year comparisons or any other format that in the registrant’s judgment would enhance a reader’s understanding. Instruction 4 to Item 303(a) clarifies that registrants should discuss the causes of material year-to-year changes in the financial statements to the extent disclosure is necessary to an understanding of the registrant’s business as a whole. The instruction expressly provides that a line-by-line analysis of the financial statements as a whole generally is not appropriate and that registrants need not recite the amounts of changes from year-to-year that are readily computable from the financial statements.³⁹ Nevertheless, many registrants continue to provide line-by-line analysis of immaterial changes reflected in the financial statements.

To reduce the amount of repetition in registrants’ annual reports, we recommend that the Commission consider revising Item 303 to clarify that a registrant need only provide a period-to-period comparison for the two most recent fiscal years presented in the financial statements included and may hyperlink to the prior year’s annual report for the additional period-to-period comparison.⁴⁰ This may create additional challenges to consider with respect to auditor association in light of Public Company Accounting Oversight Board (“PCAOB”) standards relating to hyperlinks and incorporation by reference.⁴¹

Alternatively, the Commission could consider revising the instructions to Item 303 to require registrants to discuss changes in results of operations and financial condition over the

³⁹ Instruction 4 to Item 303(a). The instruction also states that the “discussion shall not merely repeat numerical data contained in the consolidated financial statements.”

⁴⁰ See Concept Release, Section IV.B.4, Question 110. Several commenters supported modifying Item 303 to eliminate the earlier of the prior-period discussion. See, e.g., Letters from UnitedHealth Group, Incorporated (July 21, 2016) (“UnitedHealth”); the Investment Program Association (July 21, 2016) (“IPA”); The Allstate Corporation (July 21, 2016) (“Allstate”); Securities Industry and Financial Markets Association (July 21, 2016) (“SIFMA”); Ernst & Young; PNC; Fenwick & West (Aug. 1, 2016) (“Fenwick & West”); and Davis Polk & Wardwell LLP (July 22, 2016) (“Davis Polk”). A few of those commenters supported including a hyperlink to the prior filing containing such information. See Letters from UnitedHealth; IPA; and Allstate.

⁴¹ See, e.g., PCAOB AS 2710, which addresses the auditor’s responsibility with respect to other information in documents containing audited financial statements and the related auditor’s report and specifically, PCAOB AS 2710.04, which indicates that while the auditor does not have any “obligation to perform any procedures to corroborate the other information . . . he should read the other information and consider whether such information . . . is materially inconsistent with information, or the manner of its presentation appearing in the financial statements.” See also, e.g., Letters from KPMG; PWC; Ernst & Young; Deloitte; and Grant Thornton.

full two or three-year period of the financial statements included in the filing. This alternative would eliminate Instructions 1 and 4 to Item 303(a)⁴² and add a new instruction requiring registrants to discuss known material trends and uncertainties that impacted the registrant's performance during the period for which financial statements are required, rather than the more granular year-to-year comparisons.

Shifting the focus of the results of operations and financial condition disclosure could reduce repetition from year-to-year of the period-to-period changes in financial results. Registrants would be required to disclose trend information as observed over a longer term, rather than discussing short-term changes that may prove immaterial to investors. A long-term analysis instead of a period-to-period comparison would satisfy the requirement of Item 303(a)(3) to discuss significant changes that materially impacted results while providing investors with information to evaluate the likelihood that past results will be indicative of future results. This approach could also provide a single, comprehensive discussion of trends, events and uncertainties that the registrant has faced in the periods covered by the financial statements presented in the filing, as well as those trends and uncertainties it faces currently.

C.2. Revise Items 303(a)(1) and 303(a)(5) to eliminate the requirement to disclose a table of contractual obligations and instead require registrants to include a hyperlink to the relevant financial statement notes, while requiring additional narrative discussion of liquidity that describes material changes to contractual obligations and the ability to pay such obligations over time.

Item 303(a)(5) requires tabular disclosure of a registrant's known contractual obligations for long-term debt, capital leases, operating leases, purchase obligations and other long-term liability reflected on the registrant's balance sheet.⁴³ The Commission has defined the first three categories of obligations (*i.e.*, long-term debt, capital leases, and operating leases) by reference to the relevant U.S. GAAP accounting pronouncements that require disclosure of these obligations in the financial statements or notes thereto. The fourth category, purchase obligations, is defined as an agreement to purchase goods or services that is enforceable, legally binding on the registrant and specifies all significant terms. The fifth category of contractual obligations captures all other long-term liabilities that are reflected on the registrant's balance sheet under the registrant's applicable GAAP.

While the Commission has indicated that registrants should consider additional narrative discussion outside of the contractual obligations table to promote understanding of tabular data,⁴⁴ registrants typically do not include the additional narrative. Similarly, notes to the financial

⁴² See generally Concept Release, Section IV.B.4, Question 111.

⁴³ Item 303(a)(5) also requires registrants to disclose the amounts of payments due by specified time periods, aggregated by the type of contractual obligation. Registrants must disclose payments due in less than one year, one to three years, three to five years and more than five years, as well as the total aggregate amount of obligations in each category. Amounts are required to be disclosed in the aggregate and there is no materiality qualifier.

⁴⁴ See, e.g., *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 59894 (Sept. 28, 2010)].

statements regarding contractual obligations may not provide insight into the registrant's ability to pay those obligations as they become due.

We recommend that the Commission consider revising Item 303(a)(5) to replace the requirement to disclose a table of contractual obligations with a requirement to include a hyperlink to the relevant financial statement notes, in the same filing, that provide substantially similar disclosure.⁴⁵ When adopting Item 303(a)(5), the Commission recognized that much of the disclosure required by the item is addressed under U.S. GAAP requirements.⁴⁶ The purpose of this item requirement was to provide aggregated information about contractual obligations in a single location and appropriate context for investors to assess the impact of off-balance sheet arrangements with respect to liquidity and capital resources. Hyperlinks could achieve the same access to material information about contractual obligations for investors and eliminate redundant disclosure.⁴⁷

To address any potential loss of disclosure resulting from these recommendations,⁴⁸ we further recommend that the Commission consider revising Item 303(a)(1) to require additional narrative discussion of liquidity that would describe any material changes to contractual obligations and the ability to pay such obligations over time.⁴⁹ Creating an express obligation for the disclosure of contractual obligations in a registrant's liquidity discussion could help to ensure that investors are provided with material information regarding payment obligations and a registrant's ability to meet such obligations.

D. Management and Certain Security Holders, Corporate Governance

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

D.1. Clarify that Instruction 3 to Item 401(b) also applies to Item 401(e) by making it a general instruction to Item 401.

Item 401(b) requires registrants to identify their executive officers by name, age, position, and term of office. Instruction 3 to Item 401(b) allows this information to be excluded from a proxy or information statement prepared by a registrant relying on General Instruction G⁵⁰

⁴⁵ See generally Concept Release, Section IV.B.7, Questions 133. See also, e.g., Letters from Grant Thornton; KPMG; Deloitte; PWC; the U.S. Chamber of Commerce (July 20, 2016) ("Chamber"); CAQ; Fenwick & West; and Chevron Corporation (July 22, 2016) (all supporting eliminating Item 303(a)(5)).

⁴⁶ 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 (Feb. 5, 2003)] (the "Off-Balance Sheet and Contractual Obligations Adopting Release"), at 5986.

⁴⁷ See, e.g., ASC 470-10-50, 840-10-50, 440-10-50, 410, 420, 450 and 710, which address identical or similar disclosure to Item 303(a)(5).

⁴⁸ For example, purchase obligations are not always recognized as liabilities in accordance with U.S. GAAP. See *Off-Balance Sheet and Contractual Obligations Adopting Release* (discussing executory contracts), at 5990.

⁴⁹ See generally Concept Release, Section IV.B.7, Question 133.

⁵⁰ General Instruction G allows the information required by Item 401, among other items, to be incorporated by reference from the registrant's proxy statement if it is filed with the Commission within 120 days after the end

of Form 10-K if that information is furnished in a separate item captioned “Executive officers of the registrant” and included in Part I of the registrant’s Form 10-K. The staff has taken the position that Item 401(e) information, which requires disclosure of the business experience of directors, executive officers, and nominees for such positions, also does not need to be included in proxy statements for executive officers if it is presented in Form 10-K.⁵¹ We recommend that the Commission consider revising the instructions to Item 401 to state that such information is not required in the proxy statement when it is included in Form 10-K.

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

D.2. Revise Item 405(a) to require registrants to rely solely on a review of Forms 3, 4 and 5, and amendments thereto (“Section 16 reports”), submitted on EDGAR instead of furnished under Rule 16a-3(e) when determining whether there are any Section 16 delinquencies that must be disclosed pursuant to Item 405. Because Section 16 reports must be filed electronically on EDGAR, eliminate the redundant requirement in Rule 16a-3(e) that reporting persons furnish them to the registrant.

Item 405(a) requires registrants to disclose each reporting person who failed to file on a timely basis the Section 16 reports relating to the equity securities of the registrant during the most recent fiscal year or prior fiscal years under the caption “Section 16(a) Beneficial Ownership Reporting Compliance.” Rule 16a-3(e) of the Exchange Act states that any person who is required to file Section 16 reports must send or deliver a duplicate of such reports to the person designated by the registrant to receive such reports, or, in the absence of a designation, to the registrant’s corporate secretary or person performing similar functions. Item 405(a) requires registrants to rely solely on a review of such reports and any written representation provided by the reporting person pursuant to Item 405(b)(1) that no Form 5 is required when determining whether there are any Section 16(a) delinquencies that must be disclosed pursuant to Item 405.

All Section 16 reporting persons have been required to file their Section 16 reports electronically on EDGAR since 2005.⁵² In addition, the Commission has stated that “[b]y reviewing Section 16 reports posted on EDGAR, an issuer is readily able to evaluate their

of the fiscal year covered by the Form 10-K.

⁵¹ See Regulation S-K Compliance and Disclosure Interpretation 116.02, available at <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm> (last updated July 26, 2016).

⁵² See *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release 33-8600 (Aug. 3, 2005) [70 FR 46080 (Aug. 9, 2005)] (the “2005 Amendments to Item 405 Release”). In addition, all registrants who maintain a corporate website are required to post any Section 16 reports relating to the equity securities of the registrant on such website pursuant to Rule 16a-3(k) of the Exchange Act, and many registrants satisfy this requirement by providing hyperlinks directly to the electronic filings once they are made on EDGAR. The Commission has noted that any concerns a registrant may have about obtaining an electronic copy of the filing from a Section 16 reporting person in order to satisfy the web posting requirement “would not arise for issuers that rely on a hyperlink (for example, to EDGAR) instead of, or in addition to, direct website posting.” *Mandated Electronic Filing and Web Site Posting for Forms 3, 4 and 5*, Release 33-8230 (May 7, 2003) [68 FR 25788 (May 13, 2003)] (the “Section 16 Mandatory Electronic Filing Release”), at 25790.

timeliness”⁵³ and “issuers also may consult EDGAR to obtain notice of new filings,”⁵⁴ In light of these developments, we recommend that the Commission consider revising Item 405(a) to permit registrants to rely solely on a review of Section 16 reports submitted on EDGAR.⁵⁵ To implement this recommendation, we also recommend that the Commission consider eliminating the requirement in Rule 16a-3(e) that reporting persons furnish the registrant any Section 16 reports filed by them or on their behalf. We believe that a shift to reliance on electronically filed Section 16 reports while retaining the written representation in Item 405(b)(1) could streamline compliance with Item 405 and help to ensure that relevant information is available to registrants.

D.3. Require registrants to include the Section 16(a) Beneficial Ownership Reporting Compliance section in their filings only if they have Section 16(a) delinquencies to report.

Frequently, registrants will include a Section 16(a) Beneficial Ownership Reporting Compliance section in their filings even though they have no Section 16(a) delinquencies to report. To reduce this unnecessary disclosure, we recommend that the Commission consider revising Item 405 to require registrants to include the Section 16(a) Beneficial Ownership Reporting Compliance section in their filings only if they have delinquencies to report. This approach would also allow filings to be more readily searched to determine if any Section 16(a) delinquencies have been disclosed by reducing the number of false positives when searching for the required heading.

Item 407 (Corporate Governance)

D.4. Revise the outdated auditing standard references in Item 407(d)(3).

As noted in the Commission’s concept release on audit committee disclosures, the reference in Item 407(d)(3)(i)(B) to AU Section 380 is outdated.⁵⁶ The staff recommends that the Commission consider revising this disclosure requirement to update the outdated reference.

D.5. Revise Item 407(e)(5) to clarify that EGCs are not required to provide a compensation committee report.

Item 407(e)(5) requires the compensation committee, under the caption “Compensation Committee Report,” to state whether it has reviewed and discussed the Compensation Discussion and Analysis required by Item 402(b) with management, and whether based on this review and

⁵³ 2005 Amendments to Item 405 Release, at 46086.

⁵⁴ Section 16 Mandatory Electronic Filing Release, at 25790.

⁵⁵ In connection with this recommendation, we also recommend that the Commission consider adding an instruction, similar to Instruction 3 to Item 403, that provides that a registrant may rely upon the information in the Section 16 reports submitted on EDGAR unless it knows, or has reason to believe, that such information is not complete or accurate or that a report or an amendment should have been filed and was not.

⁵⁶ *Possible Revisions to Audit Committee Disclosures*, Release No. 33-9862 (July 1, 2015) [80 FR 38995 (July 8, 2015)], at 39003. In addition to correcting the outdated reference, the Concept Release also discusses potential updates to the audit committee disclosure requirements.

discussion, the compensation committee recommended to the board of directors that the Compensation Discussion and Analysis be included in the registrant’s annual report. Smaller reporting companies are not required to provide a compensation committee report.⁵⁷ We recommend the Commission consider revising the disclosure requirements in Item 407(e)(5) to clarify that EGCs also are exempt from the disclosure requirements in Item 407(e)(5), since EGCs are not required to provide Item 402(b) disclosure.⁵⁸

E. Registration Statement and Prospectus Provisions

Item 501 (Forepart of Registration Statement and Prospectus Cover Page)

E.1. Revise the instruction to Item 501(b)(1) to eliminate the requirement for registrants to change their name in certain circumstances.

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

In light of the other restrictions on using another company’s name that exist outside of federal securities law, such as those provided under U.S. trademark law or state law, we believe that the portion of the instruction relating to required name changes may be unnecessary. This is particularly true given that the instruction only requires a name change when the name would (a) cause such confusion, (b) could not be remedied by explanatory disclosure, and (c) does not satisfy the exception described above. We therefore recommend that the Commission consider eliminating this portion of the instruction. The Commission and staff would still be able to address situations in which the registrant’s name is either confusingly similar or misleading in connection with any public interest finding necessary to declare the filing effective.⁵⁹

E.2. Revise Instruction 2 to Item 501(b)(3) to allow for the method of determining pricing to be disclosed elsewhere in the prospectus if a cross-reference is included on the cover page.

Instruction 2 to Item 501(b)(3) states that “[i]f it is impracticable to state the price to the public, explain the method by which the price is to be determined.” We believe that requiring a full explanation of formula pricing on the outside front cover page of the prospectus could reduce the impact of other significant disclosure. Instead, we recommend that the Commission

⁵⁷ See Item 407(g).

⁵⁸ See Jumpstart Our Business Startups Act (JOBS Act) Frequently Asked Questions, Question 15 (Dec. 21, 2015), available at <https://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm>.

⁵⁹ 15 U.S.C. 77h.

consider allowing issuers to include a clear statement that the offering price will be determined by a particular method or formula that is more fully explained in the prospectus. Registrants could be required to accompany that statement with a hyperlink and a clear reference, highlighted by prominent font or in another manner, explaining where in the prospectus the explanation can be found. We recommend that the portion of Instruction 2 to Item 501(b)(3) addressing securities being offered at the market price, or priced using a formula based on market price, be retained and that such disclosure continue to be required on the outside front cover page of the prospectus.

E.3. Revise Item 501(b)(4) to require disclosure of any national securities exchange where the registrant’s securities are listed or, if not listed, the principal U.S. public trading market where such securities are quoted.

Item 501(b)(4) requires the registrant to name the national securities exchange⁶⁰ that lists the securities being offered and to disclose the trading symbol(s) for those securities. Where the securities being offered are not listed on a national securities exchange, this item does not require the disclosure of related information for securities quoted on U.S. public trading markets that are not national securities exchanges. We believe that such information could be useful to investors where the securities being offered are not listed on a national securities exchange but where the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved quotation in the over-the-counter market.⁶¹ We recognize, however, that a registrant cannot always control whether its securities are quoted on an over-the-counter market. We therefore recommend that the Commission consider revising Item 501(b)(4) to require disclosure of the principal U.S. public trading market where the registrant’s securities are quoted if the registrant, through the engagement of a registered broker-dealer, has actively sought and achieved such quotation.

E.4. Reduce the length of the prospectus “subject to completion” legend set forth in Item 501(b)(10) by making the language regarding state law prohibitions optional when it does not apply to the offering.

Item 501(b)(10) requires that registrants using a preliminary prospectus include a “subject to completion” legend that advises readers that the information will be amended or completed. It also requires a statement that the prospectus is not an offer to sell or a solicitation of an offer to buy securities in any state where the offer or sale is not permitted. This requirement was originally introduced in 1958 to harmonize the legend with that required by state securities administrators at the time.⁶² Although the legend has been altered over time, it has not been substantially changed since its introduction. Significantly, it remains a requirement in all offerings subject to Item 501(b)(10) even after the National Securities Markets

⁶⁰ A “national securities exchange” is a securities exchange that has registered with the Commission under Section 6 of the Exchange Act. See Section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f].

⁶¹ See, e.g., the OTCQX and OTCQB Tiers of the OTC Markets (www.otcmartets.com).

⁶² *Communications Not Deemed a Prospectus; Prospectus for Use Prior to Effective Date* (Jan. 7, 1958) [23 FR 184 (Jan. 10, 1958)]. This requirement was originally in Rule 433, a predecessor to the current requirement.

Improvement Act (NSMIA) allowed for preemption of state blue sky laws in many contexts.⁶³ In recognition of the changes to securities law brought by NSMIA, we recommend that the Commission consider revising Item 501(b)(10) to allow registrants to exclude that portion of the legend when it does not apply to the offering.

E.5. Combine Item 501(b)(10) and (11) to address in one paragraph all the situations where the “subject to completion” legend is required.

Item 501(b)(11) requires the “subject to completion” legend discussed in Item 501(b)(10) to be provided if a registrant relies on Rule 430A to omit pricing information and the prospectus is used after the effectiveness of the registration statement but before the public offering price is determined. By adding similar language to Item 501(b)(10), the Commission could eliminate Item 501(b)(11) and consolidate the rules requiring the “subject to completion” legend to be included. We therefore recommend that the Commission consider combining paragraphs (b)(10) and (b)(11) in Item 501.

Item 503 (Risk Factors)

E.6. Relocate “Risk Factors” from Item 503(c) to a new, separate item (Item 105) in Subpart 100 of Regulation S-K.

The Commission first published guidance regarding risk factor disclosure in 1964.⁶⁴ When adopting the integrated disclosure system in 1982, the Commission included the risk factors in Subpart 500 of Regulation S-K, along with other offering-related disclosure requirements.⁶⁵ This organization was consistent with Commission rules at the time, which did not require registrants to provide risk factor disclosure in their periodic reports. In 2005, however, the Commission added risk factor disclosure requirements to periodic reports on Forms 10-K and 10-Q, as well as registration statements on Form 10.⁶⁶ To eliminate this anachronism, we recommend that the Commission consider moving the requirements to new Item 105 in Subpart 100, which covers a broad category of business information and is not specific to securities offerings.

Item 508 (Plan of Distribution)

E.7. Clarify the application of the term “sub-underwriters” in Item 508(h).

Item 508(h) requires disclosure of the discounts and commissions to be allowed or paid to dealers. If any dealers are paid any additional discounts or commissions for acting as “sub-underwriters,” Item 508(h) allows the registrant to include a general statement to that effect

⁶³ Pub. L. No. 104-290, 110 Stat. 3416 (1996).

⁶⁴ *Guides for Preparation and Filing of Registration Statements*, Release No. 33-4666 (Feb. 7, 1964) [29 FR 2490 (Feb. 15, 1964)].

⁶⁵ *Adoption of Integrated Disclosure System*, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380 (Mar. 16, 1982)].

⁶⁶ See Securities Offering Reform Adopting Release.

without giving the additional amounts to be sold. “Sub-underwriters” is not a defined term and its application may be unclear. In light of the disclosure regarding “principal underwriters” in Item 508(a) and the definition of “principal underwriter” in the Commission’s Securities Act rules,⁶⁷ we recommend that the Commission consider clarifying that the term “sub-underwriter” applies to dealers acting as underwriters that are not disclosed pursuant to Item 508(a).

Item 512 (Undertakings)

E.8. Eliminate the Item 512(c) undertaking because it is duplicative and unnecessary.

Item 512(c) requires a registrant to include undertakings if it registers a warrant or rights offering to existing security holders and the securities not purchased by such security holders are reoffered to the public. The undertaking requires a registrant to supplement the prospectus to disclose the results of the subscription offer and the terms of any subsequent reoffer to the public. If any public reoffer is made on different terms than the offer to existing security holders, then the registrant undertakes to file a post-effective amendment. The purpose of the undertaking is to provide current information about warrants or rights offerings.⁶⁸

We recommend that the Commission consider eliminating this undertaking because the registrant would have to register all the securities currently being offered, both those to existing shareholders pursuant to the rights offering as well as those that would be offered in an underwritten offering. Any material changes in the terms for the underwritten offer would have to be disclosed under the Item 512(a)(1)(iii) undertaking or, if the Commission adopts our recommended approach to that undertaking, under Rule 415.

E.9. Eliminate the Item 512(d), (e), and (f) undertakings because they are obsolete.

Item 512(d) requires a registrant to include undertakings if the securities it registers are to be offered at competitive bidding to underwriters. The undertaking requires a registrant to use its best efforts to distribute a Section 10(a) prospectus to prospective bidders, underwriters, and dealers and to file a post-effective amendment reflecting the results of the bidding and any related terms. The purpose of the undertaking was to ensure that public utilities holding companies, subject to the Public Utility Holding Company Act of 1935 (“PUHCA”), provided adequate information to underwriters in connection with the offering and filed a post-amendment to reflect the winning bidder and related terms of the offering.⁶⁹ The Item 512(d) undertaking

⁶⁷ 17 CFR 230.405.

⁶⁸ The Item 512(c) undertaking was included in the Securities Act forms and guides, prior to the enactment of the integrated disclosure system in 1982. *See, e.g., Notice of Proposed Revision of Form S-4*, Release No. 33-3667 (July 31, 1956) [21 FR 6025 (Aug. 11, 1956)] and *Notice of Proposed Form S-11 for Registration of Securities of Certain Real Estate Companies*, Release No. 33-4347 (Apr. 10, 1961) [26 FR 3280 (Apr. 18, 1961)]. The origin of this undertaking is unclear.

⁶⁹ *See Notice of Proposal to Adopt Rule 415 Relating to Competitive Bidding Registration Statements, To Amend Rules 424, 427, 455, 471 and 472 and to Rescind Rule 460*, Release No. 33-3491-Z (Nov. 10, 1953) [18 FR

was related to Rule 50 under PUHCA which required that public utility company securities be sold through competitive bids. We recommend that the Commission consider eliminating this undertaking, because the Commission rescinded Rule 50 in 1994,⁷⁰ and effective in 2006 Congress repealed PUHCA.⁷¹ To the extent that public utilities continue to use competitive bidding,⁷² they can file prospectuses that contain the pricing and underwriter disclosure pursuant to Rule 430A and such documents will be subject to the liability provisions of that rule.

Item 512(e) requires a registrant that “specifically incorporates by reference . . . in the prospectus all or any part of the annual report to security holders meeting the requirements of Rule 14a-4 or Rule 14c-3” to undertake to deliver with the prospectus the latest annual report and, if required interim information is not included in the prospectus, the latest quarterly report that is incorporated by reference in the prospectus. The purpose of the undertaking was to ensure that the registrant would deliver incorporated annual and quarterly reports with the prospectus, as required by Form S-2.⁷³ We recommend that the Commission consider eliminating this undertaking, because it was adopted in connection with the adoption of Form S-2, which was eliminated in connection with the Securities Offering Reform Act in 2005.⁷⁴

Item 512(f) requires a non-reporting registrant in an underwritten equity offering to undertake to provide to the underwriter at the closing the certificates required by the underwriter to permit prompt delivery to each purchaser. The purpose of the undertaking was to ensure that the registrant would deliver sufficient certificates to the underwriter at closing to permit aftermarket trading in new issues.⁷⁵ We recommend that the Commission consider eliminating

7300 (Nov. 18, 1953)]; *Adoption of Rule 415 Relating to Competitive Bidding Registration Statements, Amendment of Rules 424, 427, 455, 471 and 472 and Rescission of Rule 460*, Release No. 33-3494 (Jan. 13, 1954) [19 FR 399 (Jan. 22, 1954)]; and *Phase-One Recommendations of Task Force on Disclosure Simplification*, Release No. 33-7300 (May 31, 1996) [61 FR 30397 (June 14, 1996)] (“1996 Disclosure Simplification Recommendations”). This undertaking was in effect prior to the adoption of Rule 430A, which now permits omission of pricing and underwriter related terms from the effective registration statement if the issuer includes this information in a prospectus or post-effective amendment after the effective date.

⁷⁰ See 1996 Disclosure Simplification Recommendations (citing *Public Utility Holding Company Act Rules*, Release No. 35-26031 (Apr. 20, 1994) [59 FR 21922 (Apr. 28, 1994)]).

⁷¹ See *Rescission of Outdated Rules and Forms, and Amendments to Correct References*, Release No. 33-9273 (Nov. 4, 2011) [76 FR 71872 (Nov. 21, 2011)]. Congress repealed PUHCA effective 2006. See Pub. L. No. 109-58, 119 Stat. 594 (2005).

⁷² Registration statements filed in connection with securities to be offered through competitive bidding are rarely used. See Louis Loss, Joel Seligman, & Troy Paredes, *Securities Regulation* (5th ed. 2016) (“Loss et al.”) §2.A.4. Competitive Bidding. According to Loss et al., competitive bidding is now used by “municipalities and public instrumentalities.”

⁷³ See *Proposed Comprehensive Revision to System for Registration of Securities Offerings*, Release No. 33-6235 (Sept. 2, 1980) [45 FR 63693 (Sept. 25, 1980)].

⁷⁴ See *Securities Offering Reform*, Release No. 33-8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] (the “Securities Offering Reform Adopting Release”).

⁷⁵ See *Hot Issues: Meaningful Disclosure*, Release No. 33-5274 (July 26, 1972) [37 FR 16005 (Aug. 9, 1972)] (the “Hot Issues Release”); and *New Ventures, Meaningful Disclosure*, Release No. 33-5395 (June 1, 1973) [38 FR 17202 (June 29, 1973)]. In 1972, an investigation revealed that “one of the imperfections affecting aftermarket trading in new issues is the occasional failure of issuers to furnish securities in such denominations and

this undertaking because since the adoption of this undertaking in the early 1970s, “[v]irtually all equities securities trades in the United States are cleared and settled through the National Securities Clearing Corporation (NSCC) and the Depository Trust Company (DTC), clearing agency subsidiaries of the Depository Trust and Clearing Corporation (DTCC).”⁷⁶

F. Exhibits

F.1. Revise Item 601 to require registrants to file a description of their securities as an exhibit to Form 10-K.

Item 202 requires registrants to provide a brief description of the capital stock, debt, warrants, rights, American Depositary Receipts, or any other securities that are being registered. The disclosure requirement is limited to registration statements. Changes in the terms and conditions of registered securities must be disclosed on Form 8-K and Schedule 14A.⁷⁷ Although registrants are required to file complete copies of their articles of incorporation and bylaws as exhibits to Form 10-K, they are not required to provide Item 202 disclosure within the report.⁷⁸

We recommend that the Commission consider expanding Item 601 to require registrants to provide a description of the rights and obligations of each class of their registered securities as an exhibit to Form 10-K. In the exhibit, registrants would provide the disclosure currently required under Item 202 for each class of securities. Descriptions of outstanding securities that are not required to be registered under the Exchange Act could be omitted. Once filed, registrants would be permitted to incorporate this new exhibit by reference to prior filings and, if the Commission adopts the amendments proposed in the Hyperlinks Release, the exhibit index would include hyperlinks to the prior filings. To the extent the registrant is required to report changes in the terms and conditions of its securities on Form 8-K, it could reflect those changes in an amended description of securities filed with its next Form 10-K. This potential change could facilitate investors’ access to information about the terms of their securities without imposing significant additional costs on registrants.

F.2. Permit the omission of attachments and schedules filed with exhibits, unless they contain information that is material to an investment decision that has not been disclosed otherwise.

Item 601(b)(2) requires registrants to file as exhibits plans of acquisition, reorganization, arrangement, liquidation, or succession. The rule expressly states that schedules or similar

registered in such manner as to permit adequate and prompt delivery to each purchaser. Accordingly, one of the proposals is that nonreporting registrants formally undertake in registration statements filed on Forms S-1 and S-2 that they will deliver the certificates to the underwriter at the closing for prompt delivery to customers.”
See Hot Issues Release, at 16007.

⁷⁶ See Loss et al. §7.E.2. Current Law.

⁷⁷ See Concept Release, Section IV.D.2. See Item 3.03 of Form 8-K (material modifications) and Item 12 of Schedule 14A.

⁷⁸ See Concept Release, Section IV.D.2 (discussing the challenges investors face in finding Item 202 information).

attachments to these exhibits shall not be filed unless they contain information which is material to an investment decision and has not been disclosed otherwise. There is no similar provision permitting registrants to omit schedules or similar attachments to other exhibits.

We recommend that the Commission consider revising Item 601 to permit registrants to omit attachments and schedules to all exhibits, unless they contain information that is material to an investment decision that has not been disclosed otherwise.⁷⁹ We also recommend that the Commission consider requiring registrants to file with each exhibit a list briefly identifying the nature of the contents of the omitted schedules and attachments and an agreement to furnish supplementally a copy of any omitted attachments or schedules to the Commission upon request.⁸⁰

Frequently the information contained in attachments and schedules is not material to investors or has been described sufficiently elsewhere in the exhibit or in the disclosure. Such immaterial information might include detailed product specifications attached to royalty agreements; implementation plans attached to service agreements; premises descriptions and plots as schedules to real estate leases; and licensing agreements with schedules listing immaterial patents.⁸¹ Permitting registrants to exclude immaterial attachments could reduce the time and costs associated with filing exhibits without sacrificing material information. This potential change could also ease registrants' regulatory burden by reducing costs associated with requesting confidential treatment of proprietary information included in immaterial attachments and schedules.⁸²

F.3. Limit the two-year look back requirement in Item 601(b)(10)(i) to newly reporting registrants.

Item 601(b)(10)(i) requires registrants to file every contract not made in the ordinary course of business if the contract is material to the registrant and is to be performed at or after the filing of the registration statement or report or was entered into not more than two years before such filing. The two-year look back requirement was instituted in the context of requiring material contracts for newly reporting registrants that were entered into within the last two years but may have been fully performed before the period covered by the report.⁸³ The requirement, however, applies to all registrants and all filings.

⁷⁹ See Recommendations of the SEC Advisory Committee on Small and Emerging Companies Regarding Disclosure and other Requirements for Smaller Public Companies, Recommendation Number 5 (Adopted Feb. 1, 2013), available at <https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-smaller-public-co-ltr.pdf>. Several commenters expressed support for such a revision. See Letters from Davis Polk; Chamber; and Fenwick & West.

⁸⁰ See Concept Release, Section IV.G.2.b, Question 231.

⁸¹ See Concept Release, Section IV.G.2.b.

⁸² See Securities Act Rule 406 and Exchange Act Rule 12b-24.

⁸³ See Concept Release, Section IV.G.5, Question 249.

We recommend that the Commission consider limiting the two-year look back requirement to newly reporting registrants, consistent with its original objective. Investors seeking information about registrants with no reporting history may benefit from access to recent material contracts, even those that have been fully performed at the time of filing. Such information could be material to an investor's understanding of the business as a whole and may not be available through other sources. Registrants that are subject to reporting requirements would have previously filed those contracts and investors could access that information through the registrant's EDGAR filings. This potential change could eliminate redundant disclosure without reducing the information available to investors.

F.4. Revise Item 601(b)(21) to require disclosure of legal entity identifiers (“LEIs”) for the registrant and within the list of significant subsidiaries.

Item 601(b)(21) requires a registrant to list all of its subsidiaries, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business. The name of a particular subsidiary generally may be omitted if it would not meet the definition of “significant subsidiary” under Regulation S-K.

A LEI is a 20-character, alpha-numeric code that connects to key reference information that allows for unique identification of entities engaged in financial transactions. Efforts to expand the use of a universal LEI system have progressed significantly over the last few years. Recently, the Commission has adopted rules requiring disclosure of LEIs in certain circumstances.⁸⁴

We recommend that the Commission consider revising Item 601(b)(21) to require registrants to include the LEI of the registrant and each subsidiary included on the list, to the extent that each entity has an LEI. This recommendation is consistent with the views of the IAC and other commenters, which have expressed support for disclosure of subsidiary LEIs to facilitate identification of the registrant and its subsidiaries.⁸⁵ We believe the additional information could allow investors to better understand the registrant's corporate structure and certain transactional risks at minimal additional cost to registrants.⁸⁶

G. Manner of Delivery Recommendations

G.1. Require machine-readable tagging of all of the information presented on the cover page of a registrant's periodic and current reports.

Operating company registrants currently are required to file financial statement information in machine-readable format using eXtensible Business Reporting Language

⁸⁴ See Concept Release, Section IV.G.7.c, for a more detailed discussion of LEIs and the Commission's recent rulemaking activity involving LEIs.

⁸⁵ See, e.g., Letters from IAC; SIFMA; American Sustainable Business Council, et al. (July 21, 2016); and Americans for Financial Reform (Aug. 10, 2016).

⁸⁶ See Letter from SIFMA.

(“XBRL”) as an exhibit to their periodic reports and Securities Act registration statements, as well as reports on Form 8-K or Form 6-K that contain revised or updated financial statements.⁸⁷ Tagged disclosures include the registrant’s primary financial statements, financial statement footnotes, and financial statement schedules.⁸⁸ The XBRL exhibit also must include certain “document and entity identifiers” (“DEIs”), such as form type, company name, and public float.⁸⁹ This information corresponds to some, but not all, of the information that registrants are required to include on the filing cover page. For example, the Form 10-K cover page contains approximately 25 data points while only 9 of those data points are designated DEIs. Data points that are not designated as DEIs, and thus are not currently tagged, include the exchange on which securities are registered, the state or country of incorporation, and filer status (e.g., smaller reporting company or large accelerated filer).

We recommend that the Commission consider expanding the data tagging requirements to include all information presented on the cover page of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F. Mandatory tagging of this additional information could enhance the ability of investors to identify, count, sort, and analyze registrants and disclosures.⁹⁰

In addition, we recommend that the Commission consider requiring registrants to include on the cover page and tag the ticker symbol for each class of securities registered under the Exchange Act. The ticker symbol can be a particularly useful entity and securities identifier, and requiring it to be tagged would allow investors to more quickly and accurately identify filings and disclosure about particular registrants or their securities.

G.2. Require the use of hyperlinks whenever the rules call for the inclusion of a web address, provided the appropriate technology is available to prevent such hyperlinks from jeopardizing the security and integrity of the EDGAR system.

Several items of Regulation S-K require, encourage, or permit a registrant to include its internet address or website when available. These references vary between “internet address” and “Web site address.” For example, the following provisions call for registrants to include a web address:

- Item 101(e)(3) requires accelerated and large accelerated filers to disclose their internet address and encourages other filers to do so as well.⁹¹

⁸⁷ See Item 601(b)(101) of Regulation S-K.

⁸⁸ See Item 601(b)(101) of Regulation S-K and Item 405(b) of Regulation S-T.

⁸⁹ See Edgar Filer Manual Vol. II Sections 6.5.20, 6.5.21, and 6.5.26 (providing a complete list of required document and entity identifiers), available at <https://www.sec.gov/info/edgar/edgarfm-vol2-v37.pdf>.

⁹⁰ See Letter from Data Coalition (July 21, 2016) (“Data Coalition”).

⁹¹ The Commission has proposed to amend Regulation S-K and various forms to require all issuers to disclose their internet address. See Disclosure Update Release, Section IV.B.3.

- Items 406(c)-(d) require a registrant to provide its internet address in connection with disclosing its code of ethics or certain amendments to, or waivers from, its provisions if the registrant chooses to satisfy its disclosure requirements by website posting.
- Item 407 contains several requirements to include web addresses, such as Item 407(a)(2),⁹² the instruction to Item 407(b)(2),⁹³ the instruction to Item 407(f),⁹⁴ and Instruction 2 to Item 407.⁹⁵

To facilitate investor access to websites included in the registrant's disclosure documents, we recommend that the Commission consider requiring registrants to include hyperlinks to the website along with the web address.⁹⁶ In making this recommendation, we do not intend to change the current application of securities law liability to those documents.⁹⁷ Furthermore, adopting such a requirement would depend on the appropriate technology being available to prevent such hyperlinks from jeopardizing the security and integrity of the EDGAR system.

V. Conclusion

Any proposed rules that follow this report, as contemplated by Section 72003(c)-(d) of the FAST Act, may differ from these recommendations depending on a variety of factors, including the staff's continued study of Regulation S-K, additional comments we receive from the public and other public engagement, economic developments, changes in industry or technology, the Commission's views on these matters, and other developments.

We encourage the public to submit their thoughts and comments on the recommendations discussed in this report and related matters in anticipation of the rulemakings required by the

⁹² Item 407(a)(2) states that if a registrant uses its own definitions for determining director independence, then it must disclose whether those definitions are available to securityholders on its website and, if so, provide its web address.

⁹³ This instruction provides that in lieu of providing the board's attendance policy for annual meetings and attendance in the prior year's meeting, the registrant may provide its web address where such information appears.

⁹⁴ This instruction allows for the same approach for describing the process for securityholders to send communications to the board of directors.

⁹⁵ This instruction requires registrants to disclose whether its audit, compensation, or nominating committee charter is available on the registrant's website. If the charter is not available on the registrant's website, then the charter must be appended to the proxy or information statement at least once every three fiscal years.

⁹⁶ In this regard, we recommend that the Commission also amend Rule 105(b) of Regulation S-T [17 CFR 232.105(b)] to allow electronic filers to include hyperlinks to websites outside of the EDGAR system.

⁹⁷ If a registrant includes a hyperlink in its filing, whether or not the link is permitted by Commission rules, the information in the linked material is not considered part of the filing for determining compliance with disclosure obligations. However, inclusion of the link will cause the registrant to be subject to the civil liability and antifraud provisions of the federal securities laws for the information contained in the linked material. Rule 105(c) of Regulation S-T [17 CFR 232.105(c)]. Similarly, if a registrant hyperlinks to another hyperlink, the registrant will be treated as making all the hyperlinked material its own for liability purposes. See Rulemaking for EDGAR System, Release No. 33-7855 (Apr. 24, 2000) [65 FR 24788 (Apr. 27, 2000)].

FAST Act. Comments may be submitted using the Commission's Internet comment forms (<https://www.sec.gov/spotlight/disclosure-effectiveness.shtml>) or by sending an e-mail to rule-comments@sec.gov. Please include "FAST Act Report" on the subject line. To help us process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's Internet Web site. All submissions received will be posted without change; we do not edit personal identifying information from submissions. You should only make submissions that you wish to make available publicly. For further information, please contact Shehzad K. Niazi, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.