Federal Register

Tuesday,

September 28, 2010

Part III

Securities and Exchange Commission

17 CFR Parts 229 and 249

Short-Term Borrowings Disclosure; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 249

[Release Nos. 33–9143; 34–62932; File No. S7–22–10]

RIN 3235–AK72

Short-Term Borrowings Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to enhance the disclosure that registrants provide about short-term borrowings. Specifically, the proposals would require a registrant to provide, in a separately captioned subsection of Management's Discussion and Analysis of Financial Condition and Results of Operations, a comprehensive explanation of its short-term borrowings, including both quantitative and qualitative information. The proposed amendments would be applicable to annual and quarterly reports, proxy or information statements that include financial statements, registration statements under the Securities Exchange Act of 1934, and registration statements under the Securities Act of 1933. We are also proposing conforming amendments to Form 8–K so that the Form would use the terminology contained in the proposed short-term borrowings disclosure requirement.

In a companion release, we are providing interpretive guidance that is intended to improve overall discussion of liquidity and capital resources in Management's Discussion and Analysis of Financial Condition and Results of Operations in order to facilitate understanding by investors of the liquidity and funding risks facing the registrant.

DATES: Comments should be received on or before November 29, 2010.

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–22–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–22–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christina L. Padden, Attorney Fellow in the Office of Rulemaking, at (202) 551–3430, or Stephanie L. Hunsaker, Associate Chief Accountant, at (202) 551–3400, in the Division of Corporation Finance; or Wesley R. Bricker, Professional Accounting Fellow, Office of the Chief Accountant at (202) 551–5300; U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Item 303 [1] of Regulation S–K [2] and amendments to Forms 8–K [3] and 20–F [4] under the Securities Exchange Act of 1934 ("Exchange Act").[5]

The proposed amendments include:

- A new disclosure requirement in Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") relating to short-term borrowings that would be designated as Item 303(a)(6) of Regulation S–K;
- Amendments to Item 303(b) of Regulation S–K that would require interim period disclosure of short-term borrowings with the same level of detail as is proposed for annual presentation;
- Conforming amendments to Item 5 of Form 20–F to add short-term borrowings disclosure requirements;
- Conforming amendments to the definition of "direct financial obligations" in Items 2.03 and 2.04 of Form 8–K; and
- Revisions to Item 303 of Regulation S–K and Item 5 of Form 20–F to update the references to United States generally accepted accounting principles ("U.S. GAAP") to reflect the release by the Financial Accounting Standards Board ("FASB") of its FASB Accounting Standards Codification ("FASB Codification").

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I. Background and Summary

Over the past several years, we have provided guidance and have engaged in rulemaking initiatives to improve the presentation of information about funding and liquidity risk.[6] As we have

[1] 17 CFR 229.303.

[2] 17 CFR 229.10 *et al.*

[3] 17 CFR 249.308.

[4] 17 CFR 249.220f.

[5] 15 U.S.C. 78a *et seq.*

[6] *See, e.g.,* Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments, Release No. 33–8144 (Nov. 4, 2002) [67 FR 68054] (the "OBS Proposing Release"); Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments, Release

emphasized in past guidance, MD&A disclosure relating to liquidity and capital resources is critical to an assessment of a company's prospects for the future and even the likelihood of its survival.[7] We believe that leverage and liquidity continue to be significant areas of focus for investors,[8] particularly as many failures in the financial crisis arose due to liquidity constraints.[9]

A critical component of a company's liquidity and capital resources is often its access to short-term borrowings for working capital and to fund its operations.[10] Traditional sources of funding, such as trade credit, bank loans, and long-term or medium-term debt instruments, remain important for many types of businesses.[11] However, other short-term financing techniques, including commercial paper, repurchase transactions and securitizations, have become increasingly common among financial institutions and industrial companies alike.[12]

Recent events have shown that these types of arrangements can be impacted, sometimes severely and rapidly, by illiquidity in the markets as a whole.[13] When market liquidity is low, short-term borrowings present increased risks: that financing rates will increase or terms will become unfavorable, that it will be more costly or impossible to roll over short-term borrowings, or for financial institutions, that demand depositors will withdraw funds.[14]

Moreover, short-term financing arrangements can present complex accounting and disclosure issues, even when market conditions are stable.[15] Due to their short-term nature, a company's use of such arrangements can fluctuate materially during a reporting period, which means that presentation of period-end amounts of short-term borrowings alone may not be indicative of that company's funding needs or activities during the period. For example, a bank that routinely enters into repurchase transactions during the quarter might curtail that activity at quarter-end,[16] resulting in a period-end amount of outstanding borrowings that does not necessarily reflect its business operations or related risks. Likewise, a retailer may have significant short-term borrowings during the year to finance inventory that is sold by year-end (and where those short-term borrowings are repaid by year-end). In that case, where the need to finance inventory purchases fluctuates, impacted by the timing and volume of inventory sales, the ability to have access to short-term borrowings may be very important to the company. Therefore, although the financial services sector has been in the spotlight, the issues arising from short-term borrowings are not limited to that sector.[17]

Recent events have suggested that investors could benefit from additional transparency about companies' short-term borrowings, including particularly whether these borrowings vary materially during reporting periods compared to amounts reported at period-end without investor appreciation of those variations.[18] Although current MD&A rules generally require disclosure of a registrant's use of short-term borrowing arrangements and the registrant's exposure to related risks and uncertainties,[19] without a specific

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No. 33–8182 (Jan. 28, 2003) [68 FR 5982] (the "OBS Adopting Release") (adopting rules for disclosure in MD&A of off-balance sheet arrangements and aggregate contractual obligations); and Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056] (the "2003 Interpretive Release") (providing interpretive guidance on disclosure in MD&A, including liquidity and capital resources).

[7] *See* 2003 Interpretive Release, *supra* note 6, at 75062. *See also* Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33–8056 (Jan. 22, 2002) [67 FR 3746] (the "2002 Interpretive Release") and the OBS Adopting Release, *supra* note 6.

[8] *See* L. H. Pedersen, *When Everyone Runs for the Exit,* 5 Int'l J. Cent. BankING 177 (2009) ("[t]he global crisis that started in 2007 provides ample evidence of the importance of liquidity risk * * * [t]he crisis spilled over to other credit markets, money markets, convertible bonds, stocks and over-the-counter derivatives."); M. Brunnermeier, *Deciphering the Liquidity and Credit Crunch 2007–2008,* 23 J. Econ. Persp. 77 (2009); M. Brunnermeier & L. Pedersen, *Market Liquidity and Funding Liquidity,* 22 Rev. Fin. Stud. 2201 (2009); R. Huang, *How Committed Are Bank Lines of Credit? Evidence from the Subprime Mortgage Crisis,* (working paper) (Aug. 2010), *available at http://www.phil.frb.org/research-and-data/publications/working-papers/2010/wp10-25.pdf;* P. Strahan *et al., Liquidity Risk Management and Credit Supply in the Financial Crisis,* (working paper) (May 2010), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601992.*

[9] *See, e.g.,* K. Ayotte & D. Steele, *Bankruptcy or Bailouts?,* 35 J. CORP. L. 469 (2010) (discussing illiquidity and insolvency for financial institutions in the context of the recent financial crisis); *When the River Runs Dry,* ECONOMIST, Feb. 11, 2010 ("Many of those clobbered in the crisis were struck down by a sudden lack of cash or funding sources, not because they ran out of capital.").

[10] *See* D. Booth & J. Renier, *Fed Policy in the Financial Crisis: Arresting the Adverse Feedback Loop,* FRBD Economic Letter (Sept. 2009), *available at http://www.dallasfed.org/research/eclett/2009/el0907.html* ("Many businesses were hampered by the squeeze on short-term financing, a key source of working capital needed to prevent deeper reductions in inventories, jobs and wages.").

[11] *See, generally,* B. Becker & V. Ivashina, *Cyclicality of Credit Supply: Firm Level Evidence* (May 2010) (Harvard Working Paper); C. M. James, *Credit Market Conditions and the Use of Bank Lines of Credit,* FRBSF Economic Letter 2009–27 (Aug. 2009), *available at http://www.frbsf.org/publications/economics/letter/2009/el2009-27;* M. Campello *et al., Liquidity Management and Corporate Investment During a Financial Crisis* (July 2010) (working paper) (examining how non-financial companies choose among various sources of liquidity), *available at http://faculty.fuqua.duke.edu/~charvey/Research/Working_Papers/W99_Liquidity_management_and.pdf;* V. Ivashina & D. Scharfstein, *Bank Lending During the Financial Crisis of 2008,* J. FIN. ECON. (forthcoming), *available at* http://ssrn.com/*abstract=1297337* (examining the increase in draw-downs or threats of draw-downs of existing credit lines by commercial and industrial firms and the related impact on bank lending).

[12] *See* S. Sood, *Is the Ride Coming to an End?,* Global Investor, May 1, 2009 ("Treasurers need to look harder at a broader range of funding alternatives, *e.g.,* debt factoring, invoice factoring and trade finance which are essentially forms of collateralized financing"); M. Lemmon *et al., The Use of Asset-backed Securitization and Capital Structure in Industrial Firms: An Empirical Investigation* (May 2010), *available at http://www.fma.org.*

[13] *See* J. Tirole, *Illiquidity and All Its Friends* (Bank for International Settlements, Working Paper No. 303, 2010), *available at http://www.bis.org* ("[t]he recent crisis, we all know, was characterized by massive illiquidity." In addition, "Overall there has been a tremendous increase in the proportion of short-term liabilities in the financial sector"). *See also, e.g.,* P. Eavis, *Lehman's Racy Repo,* WALL ST. J., Mar. 12, 2010 (suggesting that repo financing "is highly vulnerable in times of panic, as the credit crisis showed"); A. Martin *et al., Repo Runs,* FRBNY Staff Report No. 444 (Apr. 2010) (demonstrating that institutions funded by short-term collateralized borrowings are subject to the threat of runs similar to those faced by commercial banks).

[14] *See, e.g.,* Brunnermeier, *supra* note 8, at 79–80; *see also* C. Borio, *Market Distress and Vanishing Liquidity: Anatomy and Policy Options* (Bank for International Settlements, Working Paper No. 158, 2004), *available at http://www.bis.org* ("Under stress, risk management practices, funding liquidity constraints, and in the most severe cases, concerns with counter-party risk become critical.").

[15] *See, e.g.,* the Division of Corporation Finance, Sample Letter Sent to Public Companies Asking for Information Related to Repurchase Agreements, Securities Lending Transactions, or Other Transactions Involving the Transfer of Financial Assets (Mar. 2010) (the "2010 Dear CFO Letter"), *available at http://www.sec.gov/divisions/corpfin/guidance/cforepurchase0310.htm.*

[16] *See* V. Kotomin & D. Winters, *Quarter-End Effects in Banks: Preferred Habitat or Window Dressing?,* 29 J. FIN. RES. 1 (2006); M. Rappaport & T. McGinty, *Banks Trim Debt, Obscuring Risks,* WALL ST. J., May 25, 2010.

[17] *See, e.g.,* W. Dudley, President & CEO, FRBNY, Remarks at the Center for Economic Policy Studies Symposium: More Lessons From the Crisis, (Nov. 13, 2009), *available at http://newyorkfed.org/newsevents/speeches/2009/dud091113.html* (noting "[a] key vulnerability turned out to be the misplaced assumption that securities dealers and others would be able to obtain very large amounts of short-term funding even in times of stress."); J. Lahart, *U.S. Firms Build Up Record Cash Piles,* WALL ST. J., June 10, 2010 ("In the darkest days of late 2008, even large companies faced the threat that they wouldn't be able to do the everyday, short-term borrowing needed to make payrolls and purchase inventory.").

[18] *See, e.g.,* Financial Crisis Inquiry Commission, Hearing on "The Shadow Banking System" (May 5, 2010) (transcript *available at http://www.fcic.gov/hearings/pdfs/2010-0505-Transcript.pdf*).

[19] *See* Item 303(a)(1) and (2) of Regulation S–K and Instruction 5 to paragraph 303(a) [17 CFR 229.303] (noting that liquidity generally shall be

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requirement to disclose information about intra-period short-term borrowings, investors may not have access to sufficient information to understand companies' actual funding needs and financing activities or to evaluate the liquidity risks faced by companies during the reporting period. To address these issues, we are proposing to amend the MD&A requirements to enhance disclosure that registrants provide regarding the use and impact of short-term financing arrangements during each reporting period. The principal aspects of the proposals are outlined below.

First, the proposed amendments would add new disclosure requirements relating to short-term borrowings, similar to the provisions for annual disclosure of short-term borrowings that are currently applicable to bank holding companies in accordance with the disclosure guidance set forth in Industry Guide 3, Statistical Disclosure by Bank Holding Companies ("Guide 3").[20] The proposed amendments would codify the Guide 3 provisions for disclosure of short-term borrowings in Regulation S–K, would require disclosure on an annual and quarterly basis, and would be expanded to apply to all companies that provide MD&A disclosure, not only to financial institutions. If the proposals are adopted, we expect to authorize the Commission's staff to eliminate the corresponding provisions of Guide 3 to avoid redundant disclosure requirements.[21]

Second, we are proposing amendments to the requirements applicable to "foreign private issuers" in the "Operating and Financial Review and Prospects" item in Form 20–F to add short-term borrowings disclosure requirements, which would be substantially similar to the proposed amendments to MD&A, but without the requirement for quarterly reporting since foreign private issuers are not subject to quarterly reporting requirements.

Third, we are proposing conforming amendments to the definition of "direct financial obligations" in Items 2.03 and 2.04 of Form 8–K.

Finally, the proposed amendments would update the references to U.S. GAAP in Item 303 of Regulation S–K and Item 5 of Form 20–F to reflect the FASB Codification.

Over time, to enhance the information provided to investors through MD&A we have supplemented the principles-based disclosure requirements governing MD&A with more detailed and specific MD&A disclosure requirements, such as the contractual obligations table and the off-balance sheet arrangements disclosure requirements.[22] Our proposal to require quantitative and qualitative information about short-term borrowings is similarly designed to enhance investor understanding of a company's financial position and liquidity. We emphasize, however, that the addition of these specific disclosure requirements to MD&A supplements, and is not a substitute for the required discussion and analysis that enables investors to understand the company's business as seen through the eyes of management.[23]

In a companion release, we are providing interpretive guidance that is intended to improve the overall discussion of liquidity and funding in MD&A in order to facilitate understanding by investors of the liquidity and funding risks facing registrants.

II. Discussion of the Proposed Amendments

A. Short-Term Borrowings Disclosure

1. Existing Requirements for Disclosure of Short-Term Borrowings

Existing MD&A requirements call for discussion and analysis of a registrant's liquidity and capital resources. With respect to liquidity, registrants must identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way.[24] Registrants are also required to identify and separately describe internal and external sources of liquidity.[25] With respect to capital resources, a registrant is required to describe any known material trends, favorable or unfavorable, in its capital resources, indicating any expected material changes in the mix and relative cost of such resources.[26] In its discussion of capital resources, a registrant is also required to consider changes between equity, debt and any off-balance sheet financing arrangements.[27] However, other than in connection with this discussion of liquidity and capital resources under Item 303(a)(1) and (2) of Regulation S–K, companies that do not provide Guide 3 disclosure are not subject to any line item requirements for the reporting of specific data regarding short-term borrowing amounts or information about intra-period borrowing levels.

Registrants that are bank holding companies provide statistical disclosures in accordance with the industry guidance set forth in Guide 3.[28] Guide 3 is primarily intended to provide supplemental data to facilitate analysis and to allow for comparisons of sources of income and evaluations of exposures to risk.[29] One of the important provisions of Guide 3 is annual disclosure of average, maximum month-end, and period-end amounts of short-term borrowings.[30] Registrants that follow the provisions of Guide 3 provide three years of annual data, broken out into three categories of short-term borrowings, namely: Federal funds purchased and securities sold under agreements to repurchase, commercial paper, and other short-term borrowings.[31] We believe that this data

discussed on both a long-term and short-term basis); *see also* 2002 Interpretive Release, *supra* note 7 (providing interpretive guidance on MD&A, noting "registrants should consider describing the sources of short-term funding and the circumstances that are reasonably likely to affect those sources of liquidity").

[20] *See* 17 CFR 229.801, Item VII.

[21] Guide 3, as originally promulgated in 1968 under the designations Guide 61 and Guide 3, served as an expression of the policies and practices of the Commission's Division of Corporation Finance in order to assist issuers in the preparation of their registration statements and reports. *See* Guides for Preparation and Filing of Registration Statements, Release No. 33–4936 (Dec. 9, 1968) [33 FR 18617]. In 1982, these guides were redesignated as Securities Act Industry Guide 3 and Exchange Act Industry Guide 3, and were included in the list of industry guides in Items 801 and 802 of Regulation S–K, but were not codified as rules. *See* Rescission of Guides and Redesignation of Industry Guides, Release No. 33–6384 [47 FR 11476], at 11476 ("The list of industry guides has been moved into Regulation S–K, which serves as the central repository of disclosure requirements under the Securities Act and Exchange Act, in order to more effectively put registrants on notice of their existence. These guides remain as an expression of the policies and practices of the Division of Corporation Finance and their status is unaffected by this change.") If the proposed amendments are adopted, the Commission would authorize its staff to amend Guide 3 to eliminate Item VII in its entirety.

[22] *See* Items 303(a)(4) and (5) of Regulation S–K [17 CFR 229.303(a)(4) and (5)].

[23] *See* 2003 Interpretive Release, *supra* note 6, at 75056.

[24] *See* Item 303(a)(1) of Regulation S–K [17 CFR 229.303(a)(1)].

[25] *Id.*

[26] *See* Item 303(a)(2)(ii) of Regulation S–K [17 CFR 229.303(a)(2)].

[27] *Id.*

[28] *See* 17 CFR 229.801. Bank holding companies typically include this disclosure in the MD&A section of their filings.

[29] *See* Proposed Revision of Financial Statement Requirements and Industry Guide Disclosures for Bank Holding Companies, Release No. 33–6417 (July 9, 1982) [47 FR 32158] at 32159.

[30] *See* Item VII of Guide 3.

[31] *Id.* Item VII of Guide 3 calls for the presentation of information for each category of short-term borrowings that is reported in the financial statements pursuant Article 9 of Regulation S–X. Rule 9–03.13(3) of Regulation S–X [17 CFR 210.9–03.13(3)] requires separate balance sheet disclosure of "amounts payable for (1) Federal funds

is useful to show the types of short-term financings constituting a portion of the bank holding company's liquidity profile, as well as to highlight differences between period-end and intra-period short-term financing activity and the overall liquidity risks it faces during the period. Given the utility of this data in analyzing liquidity and funding risks, we are proposing to require all registrants to provide disclosure in their MD&A similar to the short-term borrowings information called for by Guide 3.[32] Further, since liquidity and funding risks can change rapidly over the course of a year, we are proposing to require the information for both annual and interim periods.

We note that, in 1994, in connection with the elimination of various financial statement disclosure schedules, the Commission eliminated a short-term borrowings disclosure requirement for registrants that were not bank holding companies, which was similar to the existing Guide 3 short-term borrowings disclosure guidance.[33] Former Rule 12–10 of Regulation S–X [34] required those registrants to include with their financial statements a schedule of short-term borrowings that disclosed the maximum amount outstanding during the year, the average amount outstanding during the year, and the weighted-average interest rate during the period, with amounts broken out into specified categories of short-term borrowings.[35]

While former Rule 12–10 of Regulation S–X was similar to the short-term borrowing requirements proposed in this release, we believe there are important differences. In proposing to eliminate the schedule, the Commission noted that "the disclosures concerning the registrant's liquidity and capital resources that are required in MD&A would appear to be sufficiently informational to permit elimination of the short-term borrowing schedule." [36] Although we believe that a thorough discussion of liquidity and capital resources under existing MD&A requirements often would provide qualitative information comparable to that elicited by the proposed requirements, we expect that the proposed requirements would serve as a useful framework for the provision of both quantitative and qualitative information about short-term borrowings that would supplement the registrant's discussion of liquidity and capital resources. We also believe that, in contrast to the presentation required in the financial statement schedule that was eliminated in 1994, the information would be more useful to investors if it is provided in MD&A, in tabular form, coupled with a discussion and analysis to provide context for the quantitative data.

Among the primary reasons cited for the repeal of Rule 12–10 were the practical difficulties involved in gathering the data and preparing meaningful disclosure.[37] We note that some of those practical difficulties may be less relevant today because of technological advancements in accounting systems that have become more widely used by companies since 1994. In addition, the requirements proposed today contain a number of features designed to address some of the practical difficulties cited by prior commentators in connection with former Rule 12–10. More importantly, however, recent events suggest that more detailed information about average short-term borrowings would facilitate a better understanding of whether a registrant's period-end figures are indicative of levels during the period. In light of these changes, we believe the balance of factors may have shifted, such that the utility of the disclosure justifies the burden of preparing it.

2. Proposed New Short-Term Borrowings Disclosure in MD&A

Summary of Proposed Requirements

We are proposing to amend our MD&A requirements to include a new section that would provide tabular information about a company's short-term borrowings, as well as a discussion and analysis of those short-term borrowings. We note that the current Guide 3 disclosure of short-term borrowings does not call for a qualitative discussion of the reasons for use by a registrant of the particular types of financing techniques, or of the drivers of differences between average amounts and period-end amounts outstanding for the period. We believe that including a requirement for a narrative explanation together with tabular data would provide important information so that investors can better understand the role of short-term financing and its related risks to the registrant as viewed through the eyes of management.

The proposed amendments would codify in Regulation S–K the Guide 3 provisions for disclosure of short-term borrowings applicable to bank holding companies and would apply to all companies that provide MD&A disclosure, not only to bank holding companies and other financial institutions. If the proposals are adopted, we expect to authorize the Commission's staff to eliminate the corresponding provisions of Guide 3 in their entirety to avoid redundant disclosure requirements for bank holding companies. As proposed, registrants would be required to provide disclosure in MD&A of:

- The amount in each specified category of short-term borrowings at the end of the reporting period and the weighted average interest rate on those borrowings;
- The average amount in each specified category of short-term borrowings for the reporting period and the weighted average interest rate on those borrowings;
- For registrants meeting the proposed definition of "financial company," the maximum daily amount of each specified category of short-term borrowings during the reporting period; and
- For all other registrants, the maximum month-end amount of each specified category short-term borrowings during the reporting period.

We believe that the largest amount of short-term borrowings outstanding during the period is an important data point for assessing the intra-period fluctuation of short-term borrowings and, thus, of liquidity risk. Given the critical nature of liquidity and funding matters to a financial company's business activities, we believe it may be important for an investor to know the maximum amount that a financial company has borrowed in any given period as an indication of its short-term financing needs. We are proposing that financial companies be required to

purchased and securities sold under agreements to repurchase, (2) commercial paper, and (3) other short-term borrowings."

[32] As described below in this release, in codifying the Guide 3 short-term borrowings provisions in Regulation S–K, we are proposing several changes from the existing provisions of Item VII of Guide 3. The changes include: Expanding the categories of short-term borrowings that require disclosure; expanding the applicability to all registrants that are required to provide MD&A disclosure; requiring financial companies to provide disclosure of the daily maximum amount during the period, as well as averages on a daily average basis; requiring a discussion and analysis of short-term borrowings arrangements; and requiring quarterly reporting of short-term borrowings. *See* "Proposed New Short-Term Borrowings Disclosure in MD&A."

[33] *See* Financial Statements of Significant Foreign Equity Investees and Acquired Foreign Businesses of Domestic Issuers and Financial Schedules, Release No. 33–7118 (Dec. 13, 1994) [59 FR 65632].

[34] 17 CFR 210.12–10.

[35] The categories in former Rule 12–10 were amounts payable to: banks for borrowings; factors or other financial institutions for borrowings; and holders of commercial paper.

[36] *See* Financial Statements of Significant Foreign Equity Investees and Acquired Foreign Businesses of Domestic Issuers and Financial Schedules, Release No. 33–7055 (Apr. 19, 1994) [59 FR 21814], at 21818.

[37] *See* Release No. 33–7118, *supra* note 30, at 65635.

disclose the maximum daily amount of short-term borrowings outstanding. Both Guide 3 and former Rule 12–10 called for disclosure of the maximum month-end amounts, which is the standard we are proposing to require for registrants that are not "financial companies." As explained below, we are proposing monthly, rather than daily, maximum amounts for non-financial companies in view of the costs that non-financial companies may encounter in recording daily amounts and the information needs of investors.

Definition of Short-Term Borrowings

Under the proposed rule, "short-term borrowings" would be defined by reference to the various categories of arrangements that comprise the short-term obligations reflected in a registrant's financial statements, and all registrants would be required to present information for each category of short-term borrowings.[38] Specifically, as proposed, "short-term borrowings" would mean amounts payable for short-term obligations that are:

- Federal funds purchased and securities sold under agreements to repurchase;
- Commercial paper;
- Borrowings from banks;
- Borrowings from factors or other financial institutions; and
- Any other short-term borrowings reflected on the registrant's balance sheet.[39]

These categories are derived from the categories of short-term borrowings specified in Guide 3 and Rule 9–03 of Regulation S–X,[40] as well as certain categories of current liabilities set forth in Rule 5–02 of Regulation S–X.[41] Registrants that are bank holding companies and other companies that follow Guide 3 prepare their financial statements in accordance with Article 9 of Regulation S–X and present separate line items for categories of short-term borrowings on the face of their balance sheets under Rule 9–03 of Regulation S–X. Registrants that are commercial or industrial companies prepare their financial statements in accordance with Article 5 of Regulation S–X and present separate categories of current liabilities on the face of their balance sheets under Rule 5–02 of Regulation S–X.[42]

Categories and Disaggregation

Rather than creating different disclosure categories for registrants based solely on existing financial reporting rules applicable to certain types of entities, the proposed requirement draws on the categories from both Rule 9–03 and Rule 5–02 so that a registrant must present each of the categories that is relevant to the types of short-term financing activities it conducts, even if that category is not required to be reported as a separate line item on its balance sheet under Regulation S–X.[43] As a result, for example, registrants currently subject to Guide 3 would need to provide disclosure for the same categories as all other registrants. We believe this approach will result in more meaningful disclosure, since it will elicit more specific information regarding the borrowing methods actually used by the registrant. Foreign private issuers that do not prepare financial statements under U.S. GAAP would be permitted to provide disclosure of categories that correspond to the classifications used for such types of short-term borrowings under the comprehensive set of accounting principles that the company uses to prepare its primary financial statements, so long as the disclosure is provided at a level of detail that satisfies the objective of the disclosure requirement.[44]

The proposed requirements do not include a quantitative threshold for purposes of disaggregating amounts into categories of short-term borrowings. For bank holding companies, this would be a change from existing Guide 3 instructions, which allow categories to be aggregated where they do not exceed 30% of the company's stockholders' equity at the end of the period.[45] On the one hand, including such a threshold could ease the compliance burden for a company where the distinction among categories of short-term borrowings is not material. On the other hand, including such a quantitative threshold could diminish the comparability of information across companies and, more fundamentally, could defeat the objective of specifically highlighting the types of short-term borrowing arrangements that expose registrants to liquidity risks. Accordingly, the allocation of amounts into the various categories is intended to achieve this purpose so that investors can assess the proportionate exposure to the funding risk and market risk inherent in the borrowing arrangements.

In circumstances where aggregate amounts within a category of short-term borrowings are subject to a wide range of interest rates and exchange rates, we note that disclosure of those aggregate amounts may not be comparable or meaningful. For example, a company with operations outside of the United States may have, for a variety of reasons (such as the need to finance its subsidiaries in local currency or as a hedge against an asset denominated in that currency), foreign currency-denominated borrowings that have a significantly higher interest rate than the rate on its dollar-denominated borrowings. Under those circumstances, combining the dollar-denominated borrowings with the foreign currency-denominated borrowings could distort the presentation of the interest rates for the company, causing the combined weighted average interest rate on the

[38] Consistent with the approach taken in Guide 3 and in former Rule 12–10 of Regulation S–X, we propose to define "short-term borrowings" by reference to the amounts payable for various categories of short-term obligations that are typically stated separately on the balance sheet in accordance with Regulation S–X. Under U.S. GAAP, short-term obligations are those that are scheduled to mature within one year after the date of an entity's balance sheet or, for those entities that use the operating cycle concept of working capital, within an entity's operating cycle that is longer than one year. *See* FASB ASC 210–10–20. As such, the proposed definition of short-term borrowings is intended to be a subset of short-term obligations under U.S. GAAP.

[39] This last category is derived from the balance sheet line item in Rule 9–03.13(3) of Regulation S–X [17 CFR 210.9–03.13(3)] for "other short-term borrowings." Amounts that a registrant includes on its balance sheet under a line item for "other short-term borrowings" that do not fall into one of the other proposed categories would be disclosed under this category.

[40] 17 CFR 210.9–03.

[41] Rule 5–02.19(a) of Regulation S–X [17 CFR 210.5–02.19(a)] also requires separate disclosure in the balance sheet of amounts payable to trade creditors, related parties, and underwriters, promoters and employees (other than related parties). Consistent with the approach taken in former Rule 12–10 of Regulation S–X and in existing Guide 3 provisions, we are proposing to define short-term borrowings more narrowly than "current liabilities" or "short-term obligations."

[42] Registrants that are insurance companies follow Article 7 of Regulation S–X, which also incorporates certain standards of Article 5. For example, under Rule 7–03.16(b), insurance companies must include disclosure required by Rule 5–02.19(b), if the aggregate short-term borrowings from banks, factors and other financial institutions and commercial paper issued exceeds five percent of total liabilities. *See* 17 CFR 210.5–02.19(b) and 17 CFR 210.7–03.16(b).

[43] In such circumstances, a registrant should consider whether additional information should be provided to identify the financial statement line items where the period-end short-term borrowings amounts are reported.

[44] *See* proposed Instruction 1 to Item 5.H of Form 20–F. This approach is consistent with the existing Instruction 5 to Item 5 of Form 20–F for issuers that file financial statements that comply with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB"). It is also consistent with the approach taken for tabular disclosure of contractual obligations in Form 20–F for filers that do not use U.S. GAAP.

[45] *See* Instruction to Item VII of Guide 3. If the proposals are adopted, we expect to authorize our staff to eliminate Item VII of Guide 3 in its entirety. In that case, a registrant that provides Guide 3 information would need to follow the proposed Item 303(a)(6) for its short-term borrowings disclosure in MD&A.

borrowings to be much higher than the company would incur to borrow in U.S. dollars alone. This would be particularly true if the borrowings are denominated in the currency of an economy that has experienced high rates of inflation. To address this issue, the proposal would include a requirement to further disaggregate amounts by currency or interest rate to the extent necessary to promote understanding or to prevent aggregate amounts from being misleading. Additional footnote disclosure describing the method for disaggregation is proposed to be required where necessary to an understanding of the data, stating, for example, the timing and exchange rates used for currency translations and any other pertinent data relating to the calculation of the amounts provided.

Requirements for "Financial Companies" and Other Companies

As noted above, the proposed rule would distinguish between registrants that engage in financial activities as their business and all other registrants for purposes of calculating and reporting maximum amounts outstanding and average amounts outstanding during the reporting period. Registrants that are "financial companies" would be required to compile and report data for the maximum daily amounts outstanding (meaning the largest amount outstanding at the end of any day in the reporting period) and the average amounts outstanding during the reporting period computed on a daily average basis (meaning the amount outstanding at the end of each day, averaged over the reporting period). Registrants that are not "financial companies" would be required to report the maximum month-end amounts outstanding (meaning the largest amount outstanding at the end of the last day of any month in the reporting period) and would be required to disclose the basis used for calculating the average amounts reported. These registrants would not be required to present average outstanding amounts computed on a daily average basis, but, under the proposal, the averaging period used must not exceed a month.

For purposes of the proposed requirement, a "financial company" would mean a registrant that, during the relevant reported period, is engaged to a significant extent [46] in the business of lending, deposit-taking, insurance underwriting or providing investment advice, or is a broker or dealer as defined in Section 3 of the Exchange Act,[47] and includes, without limitation, an entity that is, or is the holding company of, a bank, a savings association, an insurance company, a broker, a dealer, a business development company,[48] an investment adviser, a futures commission merchant, a commodity trading advisor, a commodity pool operator, or a mortgage real estate investment trust.[49] Although this non-exclusive list [50] would be provided in the rule as guidance to registrants, the proposed definition itself is intentionally flexible, so that disclosure of maximum daily amount outstanding and the average amount outstanding during the reporting period computed on a daily average basis would be required to be provided by registrants that are engaged to a significant extent in the business of lending, deposit-taking, insurance underwriting, providing investment advice, or are brokers or dealers or any of the other enumerated types of entities, regardless of their nominal industry affiliation, organizational structure or primary regulator.

Some registrants that are engaged in both financial and non-financial businesses may meet the definition of "financial company," such as manufacturing companies that have a subsidiary that provides financing to its customers to purchase its products. For those registrants, the costs involved in providing averages computed on a daily average basis and maximum daily amounts of short-term borrowings may not be justified by the benefit to investors, where only a portion of their activities are financial in nature. To address this, the proposal would provide an instruction that would permit a company to provide separate short-term borrowings disclosure for its financial and non-financial business operations. A company relying on the instruction would be required to provide averages computed on a daily average basis and maximum daily amounts for the short-term borrowings arrangements of its financial operations, and would be permitted to follow the requirements and instructions applicable to non-financial companies for purposes of the short-term borrowings arrangements of its non-financial operations. The instruction would also require the company to provide an explanatory footnote to the table with information to enable readers to understand how the operations were grouped for purposes of the disclosure.

Although investors could benefit from having all registrants provide data for maximum daily amounts and average amounts computed on a daily average basis, we preliminarily believe that it is appropriate to limit these daily requirements to entities that are engaged

[46] We are not proposing a specific threshold or definition of "significant" for this purpose. As described below, we are proposing an instruction that allows a registrant to present the short-term borrowings attributable to any non-financial operations separately using the reporting rules for non-financial companies.

[47] 15 U.S.C. 78c. *See also* proposed Item 303(a)(6)(iv) of Regulation S–K and Item 5.H.4 of Form 20–F.

[48] Business development companies are a category of closed-end investment companies that are not registered under the Investment Company Act of 1940, but are subject to certain provisions of that Act. *See* Section 2(a)(48) and Sections 54–65 of the Investment Company Act of 1940 [15 U.S.C. 80a–2(a)(48) and 80a–53–64].

[49] A mortgage real estate investment trust, or mortgage REIT, is a type of real estate investment trust that invests in mortgages and interests in mortgages. Mortgage REITs typically rely on the exemption from registration under the Investment Company Act of 1940 provided by Section 3(c)(5)(C) of that Act. [15 U.S.C. 80a–3(c)(5)(C)].

[50] We note that the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111–203) ("Dodd-Frank Act") includes defined terms for "financial institution," "financial company," and "non-bank financial company" which are used in various contexts in that legislation. Our proposed definition of "financial company" is informed by the terms used in the legislation, but is not exactly the same. Because each of those terms has a definition specific to the regulatory purpose of the section of the legislation in which it is used, none is perfectly aligned with the disclosure aim of our proposed requirement. Therefore, in keeping with the over-arching principles-based approach to MD&A requirements, we are proposing a definition of "financial company" based on the types of business activities that expose a company to similar liquidity risks that banks face.

The enumerated examples of entities that would be considered "financial companies" for purposes of the proposed rule are similar to the entities covered by the definition of "financial institution" contained in Sec. 803 of the Dodd-Frank Act, which includes: A depository institution, as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); a branch or agency of a foreign bank, as defined in Section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101); an organization operating under Section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601–604a and 611 through 631); a credit union, as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752); a broker or dealer, as defined in Section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c); an investment company, as defined in Section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3); an insurance company, as defined in Section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a–2); an investment adviser, as defined in Section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2); a futures commission merchant, commodity trading advisor, or commodity pool operator, as defined in Section 1a of the Commodity Exchange Act (7 U.S.C. 1a); and any company engaged in activities that are financial in nature or incidental to a financial activity, as described in Section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

In addition, we expect that registrants that meet the existing definition of "bank holding company" in Rule 1–02 of Regulation S–X [17 CFR 210.1–02] would be "financial companies" under the proposed definition.

in activities that are financial in nature. Because of the nature of their business activities, we believe it may be important for an investor to have information about the daily amounts of borrowings of financial companies, particularly where borrowed funds are invested in assets that contribute to their earnings activities. We believe that most banks would be able to track daily short-term borrowings without unreasonable effort or expense, and some companies that engage in financial businesses may already track this type of information for their own risk management purposes.

We expect that many other non-bank companies that engage in these types of activities do not currently track this information on a daily basis, so this proposed requirement could impose significant costs on these entities. On balance, however, we preliminarily believe that the importance of the information in the financial company setting justifies the increased costs. By contrast, for companies that are not financial companies, we are not proposing to require maximum daily amounts or averages calculated on a daily average basis because we preliminarily believe that the information with respect to those issuers is less important to investors than in the context of financial companies, and that the combination of our existing and proposed requirements should provide sufficient information about their use of short-term borrowings. However, we request comment on this issue below.

Narrative Discussion of Short-Term Borrowings

In order to provide context for the short-term borrowings data, we are also proposing to require a narrative discussion of short-term borrowings arrangements.[51] This narrative discussion is not currently included in Guide 3. The topics proposed to be included would be:

• A general description of the short-term borrowings arrangements included in each category (including any key metrics or other factors that could reduce or impair the registrant's ability to borrow under the arrangements and whether there are any collateral posting arrangements) and the business purpose of those arrangements;[52]

• The importance to the registrant of its short-term borrowings arrangements to its liquidity, capital resources, market-risk support, credit-risk support or other benefits;[53]

• The reasons for the maximum amount for the reporting period, including any non-recurring transactions or events, use of proceeds or other information that provides context for the maximum amount; and

• The reasons for any material differences between average short-term borrowings for the reporting period and period-end short-term borrowings.

This proposed short-term borrowings discussion and analysis is intended to highlight short-term financing activities and to complement the other MD&A requirements relating to liquidity and capital resources, but it is not intended to be repetitive of other disclosures relating to liquidity and capital resources. In preparing the short-term borrowings disclosure, we anticipate that a registrant would need to consider its disclosures of cash requirements presented in the contractual obligations table, its disclosures of off-balance sheet arrangements, as well as its other liquidity and capital resources disclosures.[54] For example, the company may have significant payments under operating leases or may have entered into a significant repurchase agreement that is accounted for as a sale that will be settled shortly after the balance sheet date and that are disclosed in the contractual obligations table. To be able to settle these amounts, the company may plan to use existing short-term financing arrangements that will limit its ability to borrow for other purposes, such as making loans or financing inventory, which in turn can impact operations. In this example, the company should discuss these items together and explain the implications. A registrant would need to consider ways to integrate the proposed disclosures, together with disclosures made under existing MD&A requirements, into a clear, comprehensive description of its liquidity profile. For example, a registrant could consider organizing its discussion to address overall liquidity, and then short-term and long-term borrowings and liquidity needs.

As discussed above, we believe investors would benefit from an expanded discussion and analysis about a company's use of short-term borrowings. We believe that disclosure of a company's short-term borrowings data, with a comprehensive discussion of its overall approach to short-term financings and the role of short-term borrowings in the company's funding of its operations and business plan, can provide investors with additional information necessary to better evaluate a registrant's current short-term liquidity profile and potential future trends in its liquidity and funding risks.

Request for Comment

1. Is information about short-term borrowings and intra-period variations in the level of short-term borrowings useful to investors? If so, should we require specific line item disclosure of this information in MD&A, as proposed, or would existing MD&A requirements for disclosure of liquidity and capital resources provide sufficient disclosure about these issues? If a specific MD&A requirement would be appropriate, does the proposed requirement capture the type of information about short-term borrowings that is important to investors? If not, how should we change the proposed requirement? For example, should we require disclosure of the weighted average interest rate on the short-term borrowings, as proposed?

2. Consistent with the approach taken in Guide 3 and in former Rule 12–10 of Regulation S–X, we propose to define "short-term borrowings" by reference to the amounts payable for various categories of short-term obligations that are typically reflected as short-term obligations on the balance sheet and stated as separate line items in accordance with Regulation S–X. Is the proposed definition sufficiently clear? If not, what changes should be made to the proposed definition? For example, should the definition refer to "short-term obligations" as defined in U.S. GAAP?[55] In connection with any response, please provide information as to the costs associated with the implementation of any changes to the proposed definition.

3. Are the proposed categories of short-term borrowings appropriate? If not, why not, and how should we change the proposed requirement? For example, should we apply different categories to Guide 3 companies as compared to other companies, as was the case when former Rule 12–10 of

[51] *See* proposed Item 303(a)(6)(ii) of Regulation S–K.

[52] A discussion of the business purpose of the arrangements might encompass topics such as the use of proceeds of the borrowings and the reasons for the particular structure of the arrangements.

[53] Similar to the existing requirement in Item 303(a)(4)(i)(B) of Regulation S–K, this proposed requirement is intended to provide investors with an understanding of the importance to the registrant of its short-term borrowings as a financial matter and as they relate to the funding of its operations and to its risk management activities.

[54] *See* Item 303(a)(1) and (a)(2) of Regulation S–K.

[55] *See, e.g.,* FASB ASC 210–10–20 ("Short-term obligations are those that are scheduled to mature within one year after the date of an entity's balance sheet or, for those entities that use the operating cycle concept of working capital described in paragraphs 210–10–45–3 and 210–10–45–7, within an entity's operating cycle that is longer than one year.").

Regulation S–X was in effect? Are the proposed categories appropriately tailored so that companies can monitor and provide the proposed disclosure? In particular, is the category for "any other short-term borrowings reflected on the registrant's balance sheet" too broad? If so, how should it be narrowed? Are there other categories of short-term borrowings that should be broken out? For example, should amounts relating to repurchase arrangements be disaggregated into those that are collateralized by U.S. Treasury securities and those that are collateralized by other assets? If so, please include in your discussion the reasons such information would be meaningful to investors and provide an indication of the costs and burdens associated with providing that level of detail.

4. Is disaggregation by currency or other grouping useful to the understanding of aggregate short-term borrowing amounts? Would the proposed requirement for disaggregation provide an appropriate level of detail? Is it sufficiently clear? Instead, should we prescribe a specified method or threshold for disaggregation? If so, describe it. For example, should we require information to be presented separately by currency where there is a significant amount of borrowings that are not denominated in the company's reporting currency? If so, should we specify a threshold amount (*e.g.,* 5, 15 or 20% of borrowings) and what should that threshold be? Or should the amounts instead be disaggregated into more generalized categories, such as "domestic" and "foreign" borrowings? Please provide details about the costs and benefits of any alternatives to the proposed disaggregation provision, and discuss whether requiring companies to follow a specific disaggregation method would impose practical difficulties on companies (or particular types of companies) when they are gathering and compiling the proposed short-term borrowings disclosure.

5. We note that Guide 3 currently provides a quantitative threshold for separate disclosure of short-term borrowings by category. The proposed short-term borrowings provision does not contain a specific quantitative disclosure threshold for separate disclosure of amounts in the different categories of short-term borrowings. Should we establish a quantitative disclosure threshold for the separate categories of short-term borrowings, such as above a specified percentage of liabilities or stockholders' equity (*e.g.,* 5, 10, 20, 30 or 40%)? If so, how should the threshold be computed? Should this quantitative disclosure threshold apply to all companies?

6. As proposed, "financial companies" would be required to provide the largest daily amount of short-term borrowings. We understand that banks and bank holding companies track this information on a daily basis in connection with the preparation of reports to banking regulators. We also expect that other non-bank companies engaged in financial businesses that would fall within the scope of the proposed requirement do not currently track this type of information on a daily basis. Is this information useful to investors? What are the burdens and costs of requiring registrants that meet the definition of "financial company" but are not banks to meet that requirement?

7. Is the activities-based definition of "financial company" sufficiently clear? Are the activities identified (lending, deposit taking, insurance underwriting, providing investment advice, broker or dealer activities) as part of the definition appropriate, or are they overly-inclusive (or under-inclusive)? Should we provide a definition of the term "significant" as used in the proposed definition? If so, should we provide a numerical, threshold-based definition (*e.g.,* 10% of total assets)? If so, what should the threshold be? Should it relate to assets or should it relate to revenues and income? Should we specify certain types of entities in the definition, as proposed? Should other entities be added to or excluded from the definition? If so, please provide details. Are there any circumstances that would cause an entity to come under the proposed definition that should be excluded, and if so, why?

8. Should all registrants that are financial companies be required to provide the maximum daily amount of short-term borrowings, as proposed? Should registrants that are not financial companies be required to provide the maximum daily amount of short-term borrowings, rather than permitting them to provide the maximum month-end amount as is proposed? Do registrants that are not financial companies have systems to track and calculate this information on a daily basis? What are the burdens and costs of requiring companies engaged in non-financial businesses to meet that requirement? Should registrants that are not financial companies be required to disclose each month-end amount rather than the maximum, as proposed? Should registrants also be required to provide the minimum month-end (or daily for financial companies) amount outstanding? What are the burdens and costs of requiring companies to meet those requirements?

9. Is the proposed accommodation for reporting that would allow financial companies to present information about their non-financial businesses on the same basis as other non-financial companies appropriate? Would this address cause concerns for these companies? Is the proposed instruction to implement this accommodation sufficiently clear?

10. Should registrants be required to provide the largest amount of short-term borrowings outstanding *at any time* during the reporting period (meaning intra-day as opposed to close of business)? Would this amount be difficult for registrants to track?

11. As proposed, registrants that are financial companies would be required to provide average amounts outstanding computed on a daily average basis. Should averages computed on a daily average basis be required only for certain companies (for example, bank holding companies, banks, savings associations, broker-dealers)? If so, why and which companies? In this connection, please describe whether financial companies that are not banks typically close their books on a daily basis and whether they have the systems to track and calculate this daily balance information used to compute averages on a daily average basis. What are the burdens and costs for a registrant (that is not a bank) to meet the proposed requirement? Are some types of businesses, such as multi-nationals, disproportionately affected by such costs? If so, please explain why. Is there an alternative requirement for such a business that would still meet the disclosure objective?

12. As proposed, registrants that are not financial companies would be permitted to use a different averaging period, such as weekly or monthly, so long as the period used is not longer than a month. Is it appropriate to allow this type of flexibility given the possibility that longer averaging periods could mask fluctuations? Are certain borrowing practices more likely to be impacted than others, such as overdrafts used as financing? Is there an alternative requirement or instruction that could eliminate this issue while not imposing undue costs and burdens and still meeting the disclosure objective?

13. Should we require a narrative discussion of short-term borrowing arrangements, as proposed? Are the narrative discussion topics useful to investors? Are there other discussion topics that would be useful to investors? If so, what other topics should we require to be discussed? Should we

tailor the disclosure to omit information that may be unimportant to investors? If so, what information, and why, and which registrants would be affected?

14. Do the proposed discussion topics provide enough flexibility to companies to fully and clearly describe their short-term borrowings arrangements?

15. If the proposals are adopted, we expect to authorize our staff to amend Guide 3 to eliminate Item VII in its entirety. Are there any other technical amendments that would be appropriate, such as the elimination of cross-references in other Commission rules or forms, if the staff removes Item VII from Guide 3?

3. Reporting Periods

As proposed, the requirements would be applicable to annual and quarterly reports and registration statements. For annual reports, information would be presented for the three most recent fiscal years and for the fourth quarter. In addition, registrants preparing registration statements with audited full-year financial statements would be required to include short-term borrowings disclosure for the three most recent full fiscal year periods and interim information for any subsequent interim periods, consistent in each case with general MD&A requirements and instructions applicable to the relevant registration statement form requirements. For quarterly reports, information would be presented for the relevant quarter, without a requirement for comparative data. For registrants that are not subject to Guide 3, we are proposing a yearly phase-in of the requirements for comparative annual data until all three years are included in the annual presentation. This is described under the heading "Transition" in this release. Notwithstanding this transitional accommodation, all registrants would be permitted to provide three full years during the transition period.

A principal objective of the proposed disclosure is to provide transparency about intra-period borrowings activity, as a supplement to disclosure of period-end amounts. To achieve this purpose in each reporting period, we are proposing that disclosure in quarterly reports and interim period disclosure in registration statements include short-term borrowings information presented with the same level of detail as would be provided for annual periods.[56]

Companies would need to include the full presentation of quantitative and qualitative information for short-term borrowings during the interim period, rather than *only* disclosing material changes that have occurred since the previous balance sheet date. In addition, registrants would be required to identify material changes from previously reported disclosures in the discussion and analysis, so that any material changes would be highlighted. This layered approach is intended to enhance transparency of short-term borrowing activities during the specific quarterly period, while still emphasizing material changes so that investors can more easily understand how the exposures have evolved from past reporting periods.

In addition, registrants would be required to provide quarterly short-term borrowings information for the fourth fiscal quarter in their annual report. Because the disclosure is intended to provide additional transparency about a registrant's short-term borrowing practices, including the ability of the registrant to obtain financing to conduct its business, and the costs of that financing, during the year, we believe that short-term borrowings data for the fourth quarter would be useful to investors. As this type of reporting requirement would be a departure from our long-standing approach to the presentation of fourth quarter financial information in MD&A contained in annual reports, we specifically request comment below on this issue, and particularly whether material information as to short-term borrowing activities prior to year-end would be lost without separate quarterly disclosure for the fourth quarter.

As proposed, interim period disclosures would be presented without comparative period data.[57] We believe that this data is most meaningful to show changes from annual borrowing amounts and any intra-period variations from period-end amounts. In addition, because any seasonal trends in the information should generally already be disclosed under existing MD&A requirements, we preliminarily do not believe it is necessary to specifically require prior period comparisons to identify seasonality in borrowing levels. Moreover, other than the presentation of short-term borrowings information for the fourth fiscal quarter, registrants would not be required to include a quarterly breakdown of short-term borrowings information in their annual report. Because quarterly information would be available in Forms 10–Q for all quarters other than the fourth quarter, we do not believe that repeating that quarterly information in the annual report would be useful to investors.

These interim period requirements would not apply to registrants that are foreign private issuers or smaller reporting companies. In addition, smaller reporting companies would be permitted to disclose two fiscal years rather than three, in accordance with existing disclosure accommodations for small entities. For a discussion of the treatment of these types of entities, *see* the discussion under "Treatment of Foreign Private Issuers and Smaller Reporting Companies" in this release.

Request for Comment

16. Are the proposed reporting periods appropriate? Should we require annual short-term borrowings information in annual reports, as proposed? Should annual reports instead include a quarterly breakdown of short-term borrowings information? Should annual reports include quarterly information for the fourth fiscal quarter in addition to annual information, as proposed? For example, would disclosure of information for the fourth fiscal quarter be necessary to highlight any efforts to reduce borrowings at year-end, below the levels prevailing throughout the fourth fiscal quarter? Is the presentation of this information for the fourth fiscal quarter, in isolation without corresponding quarterly financial statements and MD&A for that period, potentially misleading? If so, what additional information should be required? Should quarterly reports be required to include quarterly information, as proposed? Should registration statements be required to include annual and interim information, as proposed? In each case, explain the reasons for requiring the applicable reporting periods and provide information as to whether investors would find the information useful. Please also include details about additional costs involved.

17. Should we require quarterly disclosure at the same level of detail as annual period disclosure, as proposed? Does the proposed presentation provide information that is useful to investors? Describe in detail the costs and benefits of providing full (rather than material changes) interim period disclosures of the proposed short-term borrowings information. Instead, should we require quarterly reports to include disclosure

[56] We are proposing to revise the "Instructions to Paragraph 303(b)" in Item 303 of Regulation S–K to accomplish this change to interim period reporting requirements. The proposed instructions would only apply to disclosure pursuant to Item 303(a)(6). *See* 17 CFR 229.303(b).

[57] Proposed Instruction 8 to Paragraph 303(b) would require the registrant to include narrative discussion that highlights any material changes from prior periods. In doing so, registrants should consider whether including comparative period data would make the presentation of those material changes more clear.

of material changes only? If so, why? How would disclosure of material changes address the issue of transparency of intra-period borrowings?

18. For annual periods, should we require, as proposed, three years of comparative data? Or would data for the current year, without historical comparison periods, provide investors with adequate information? Describe in detail the costs and benefits of providing comparative period disclosures in this context.

19. Is the proposed disclosure for the current interim period sufficient, or should we also require comparative period data? If so, which comparative periods would be most useful? Explain how prior period comparisons would be useful to investors; for example, would prior period comparisons be needed to identify seasonality in borrowing levels? If so, instead of requiring comparative data, should we specifically require companies to qualitatively describe trends or seasonality in borrowing levels? Describe in detail the costs and benefits of providing comparative period disclosures in this context.

20. Should we require year-to-date information in addition to quarterly information for interim periods? Would year-to-date information be useful to investors? Describe in detail the costs and benefits of providing year-to-date information in this context.

4. Application of Safe Harbors for Forward-Looking Statements

In some instances, the disclosure provided in response to the proposed short-term borrowings narrative discussion requirements could include disclosure of forward-looking information.[58] We are not, however, proposing to extend the safe harbor in Item 303(c) of Regulation S–K to include disclosures of forward-looking information made pursuant to proposed Item 303(a)(6). This safe harbor was adopted in connection with the adoption of Items 303(a)(4) and (a)(5) and explicitly applies the statutory safe harbors of Sections 27A[59] of the Securities Act and 21E[60] of the Exchange Act to those Items in order to remove possible ambiguity about whether the statutory safe harbors would be available for that information.[61] The disclosure required by Items 303(a)(4) and (a)(5) consists primarily of forward-looking information, and as such, issuers and market participants expressed particular concerns about the application of existing safe harbors to that disclosure.[62] In the proposing release for Item 303(c), we requested comment as to whether the safe harbor in Item 303(c) should be expanded to cover all forward-looking information in MD&A.[63] We declined to adopt such an expansion. We preliminarily believe that the proposed short-term borrowings disclosure requirements, which primarily concern disclosure of historical amounts together with qualitative information about the registrant's use of short-term borrowings, would not present any distinctive issues under the application of the statutory safe harbor, and, accordingly, we are not proposing to provide any specific provision or guidance as to its application to this information. Companies would need to treat forward-looking information disclosed pursuant to proposed Item 303(a)(6) in the same manner as other MD&A disclosure for purposes of the statutory safe harbor. We further note that nothing in the proposed requirements would limit (or expand) the scope of the statutory safe harbor, the safe harbor rules under Securities Act Rule 175 or Exchange Act Rule 3b–6, or Item 303(c) of Regulation S–K.

Request for Comment

21. Is there any need for further guidance from the Commission with respect to the application of either the statutory or the rule-based safe harbors to the information called for by the proposed short-term borrowings disclosure requirement? If so, please provide details as to the potential ambiguity in the application of existing safe harbors. In particular, what information called for by the proposed requirements raises doubt as to the applicability of the statutory safe harbor or the safe harbor rules under Securities Act Rule 175 or Exchange Act Rule 3b-6?

22. Should Item 303(c) of Regulation S–K be revised to also cover forward-looking information disclosed pursuant to the proposed short-term borrowings disclosure requirement?

B. Treatment of Foreign Private Issuers and Smaller Reporting Companies

1. Foreign Private Issuers (Other Than MJDS Filers)

The proposed amendments would apply to foreign private issuers that are not MJDS filers.[64] The existing MD&A-equivalent disclosure requirements in Form 20–F[65] currently mirror the substantive MD&A requirements for U.S. companies, and we believe that our proposed changes to the MD&A requirements for U.S. companies would provide important disclosure to investors that should also be provided by foreign private issuers. Accordingly, we are proposing a new paragraph H under Item 5 (Operational and Financial

[58] *See generally* proposed Item 303(a)(6)(ii)(B), (C) and (D) of Regulation S–K.

[59] 15 U.S.C. 77z–2.

[60] 15 U.S.C. 78u–5.

[61] *See* OBS Adopting Release, *supra* note 6, at 5993.

[62] *See, e.g.,* Letter of Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law in Response to the OBS Proposing Release, *available at http://www.sec.gov/rules/proposed/s74202.shtml* ("[B]ecause of the inherent predictive nature of disclosures of contingent liabilities and commitments. * * * [W]e are concerned that the failure to include that provision would lead to a negative inference that such disclosure is not covered by the safe harbor.").

In the OBS Adopting Release, the Commission emphasized that notwithstanding the safe harbor provided in Item 303(c) of Regulation S–K, the statutory safe harbor, by its terms, as well as the safe harbor rules under Securities Act Rule 175 [17 CFR 230.175] and Exchange Act Rule 3b–6 [17 CFR 240.3b–6] may be available for the forward-looking disclosure required by Items 303(a)(4) and (5) of Regulation S–K.

[63] *See* OBS Proposing Release, *supra* note 6, at 68065–68066.

[64] The term "MJDS filers" refers to registrants that file reports and registration statements with the Commission in accordance with the requirements of the U.S.-Canadian Multijurisdictional Disclosure System (the "MJDS"). The definition for "foreign private issuer" is contained in Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)]. A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that has more than 50% of its outstanding voting securities held of record by U.S. residents and any of the following: A majority of its officers and directors are citizens or residents of the United States, more than 50% of its assets are located in the United States, or its business is principally administered in the United States.

[65] Form 20–F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

In designing the integrated disclosure regime for foreign private issuers the Commission endeavored to "design a system that parallels the system for domestic issuers but also takes into account the different circumstances of foreign registrants." Integrated Disclosure System for Foreign Private Issuers, Release No. 33–6360 (Nov. 20, 1981) [46 FR 58511]. As such, the requirements of Item 5 of Form 20–F are analogous to those in Item 303 of Regulation S–K. Although the wording is not identical, we interpret Item 5 as requiring the same disclosure as Item 303 of Regulation S–K. *See* Rules, Registration and Annual Report for Foreign Private Issuers, Release No. 34–16371 (Nov. 29, 1979) [44 FR 70132] (adopting Form 20–F and stating that the Commission would consider revisions when MD&A requirements in Regulation S–K were adopted); Integrated Disclosure System for Foreign Private Issuers, Release No. 33–6360 (revising Form 20–F to add requirements consistent with the MD&A requirements in Regulation S–K); International Disclosure Standards, Release No. 33–7745 (Sept. 28, 1999)[64 FR 53900] (adopting revisions to Form 20–F to conform to international disclosure standards endorsed by the International Organization of Securities Commissions in 1998); *see also* OBS Adopting Release, *supra* note 6, at 5992 n. 135.

Review and Prospects) in Form 20–F covering short-term borrowings.

Because foreign private issuers using a comprehensive set of accounting principles other than U.S. GAAP might capture data and prepare their financial statements using different categories of short-term borrowings, we propose to include an instruction to paragraph H that would permit a foreign private issuer to base the categories of short-term borrowings used in the rule on the classifications for such types of short-term borrowings under the comprehensive set of accounting principles which the company uses to prepare its primary financial statements, so long as the disclosure is provided in a level of detail that satisfies the objective of the Item 5.H disclosure requirement.[66] This approach is consistent with the approach to contractual obligations disclosure in Item 5.F, for which foreign private issuers are instructed to base their tabular disclosure on the classifications of obligations used in the generally accepted accounting principles under which the company prepares its primary financial statements.[67] Similarly, in connection with references to FASB pronouncements used in Item 5 of Form 20–F, issuers that file financial statements that comply with IFRS as issued by the IASB are instructed to "provide disclosure that satisfies the objective of Item 5 disclosure requirements."[68] Other than this instruction regarding the categorization of short-term borrowings, the short-term borrowings disclosure requirement proposed for Form 20–F is substantially similar to the proposed provision applicable to U.S. issuers.

The reporting periods applicable to U.S. issuers are proposed to also apply to foreign private issuers, except with respect to quarterly reporting. For annual reports on Form 20–F, foreign private issuers would present three years of annual short-term borrowings data, subject to the proposed transition accommodation applicable to all registrants that are not bank holding companies. Foreign private issuers preparing registration statements with audited full-year financial statements would be required to include short-term borrowings disclosure for the three most recent full fiscal year periods and quarterly information for any subsequent interim periods included in the registration statement in accordance with the requirements of the relevant registration statement form. The proposed amendments for U.S. issuers would require quarterly disclosure of short-term borrowings in quarterly reports on Form 10–Q.[69] Foreign private issuers, however, are not required to file quarterly reports with the Commission, and therefore the proposed amendments would not apply to Form 6–K[70] reports submitted by foreign private issuers.[71] Thus, unless a foreign private issuer (other than an MJDS filer) files a Securities Act registration statement that must include interim period financial statements and related MD&A-equivalent disclosure,[72] it would not be required to update its disclosure under proposed Item 5.H of Form 20–F more than annually.

Request for Comment

23. Should we apply the proposed amendments to foreign private issuers' annual reports on Form 20–F, as proposed? Or should we exclude these annual reports from the scope of the amendments? If so, why?

24. Should we apply the proposed amendments to foreign private issuers' registration statements, as proposed? Or should these registration statements be excluded from the scope of the proposed rules? In particular, should we not require the interim period short-term borrowings information to be included in the registration statements of foreign private issuers? If not, why?

25. Should we limit the application of the new disclosure requirements to foreign private issuers that are banks or bank holding companies, or that are financial companies? If so, why?

26. Is the instruction to proposed Item 5.H regarding the categories of short-term borrowings appropriate? Is the instruction clear? If not, how can it be clarified?

2. MJDS Filers

The proposed amendments would not affect MJDS filers. The disclosure provided by Canadian issuers is generally that which is required under Canadian law, and we do not propose to depart from our approach with respect to financial disclosure provided by MJDS filers. Accordingly, we are not proposing to further amend Form 40–F at this time.

Request for Comment

27. Should we amend Form 40–F to include the new short-term borrowings disclosure requirements? If so, why?

3. Smaller Reporting Companies

Smaller reporting companies currently provide disclosure pursuant to Item 303, subject to the special accommodation provided in Item 303(d) that, among other things, permits the exclusion of tabular disclosure of contractual obligations under Item 303(a)(5). The proposed short-term borrowings disclosure requirements would apply to smaller reporting companies, except that quarterly disclosures would not be required unless material changes have occurred during that interim period (as is the case under existing requirements for interim period disclosure) and information for the fourth fiscal quarter would not be required in annual reports. To this end, we propose to amend Item 303(d) to clarify that smaller reporting companies need only provide the proposed Item 303(a)(6) information on an annual basis and, in interim periods, if any material changes have occurred.[73] In addition, for smaller reporting companies providing financial information on net sales and revenues and on income from continuing operations for only two years, only two years of short-term borrowings information would be required, consistent with the scaled MD&A disclosure requirement for smaller reporting companies under existing Item 303(d).

This accommodation for interim period disclosure is intended to balance the practical impact of the disclosure requirement with the need to enhance

[66] *See* proposed Instruction 1 to Item 5.H of Form 20–F.

[67] *See* Instruction 2 to Item 5.F of Form 20–F.

[68] *See* Instruction 5 to Item 5 of Form 20–F.

[69] 17 CFR 249.308a. *See* proposed Instruction 8 to Item 303(b) of Regulation S–K [17 CFR 229.303(b)].

[70] 17 CFR 249.306. A foreign private issuer must furnish under cover of Form 6–K material information that it: Makes public or is required to make public under its home country laws, files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange under the rules of the stock exchange or distributes or is required to distribute to security holders. In instances where a foreign private issuer is furnishing interim information on short-term borrowings under those circumstances, we would encourage the foreign private issuer to consider providing an update to its annual short-term borrowings disclosure, although it would not be required to do so.

[71] This treatment is consistent with the approach we took when adopting off-balance sheet arrangements and contractual obligations disclosure. *See* OBS Adopting Release, *supra* note 6, at 5992 n. 139.

[72] The proposed amendments would apply to Securities Act registration statements on Forms F–1 [17 CFR 239.31], F–3 [17 CFR 239.33] and F–4 [17 CFR 239.34]. Each of these registration statements references the disclosure requirements in Form 20–F.

[73] Proposed "Instruction 8 to Paragraph 303(b)" would exclude smaller reporting companies from the requirement to provide all the information specified in paragraph (a)(6) in interim periods. As proposed, Item 303(d) would state that smaller reporting companies are only required to provide material changes to the information specified in proposed Item 303(a)(6) in interim periods. The proposed revisions to Item 303(d) would not affect the existing accommodation for disclosure of Item 303(a)(5) information.

disclosure of liquidity risks facing smaller reporting companies. While liquidity risks, particularly those arising from short-term borrowings, are equally important for smaller reporting companies, we also believe that smaller reporting companies are likely to have fewer complex financing alternatives available. Accordingly, we believe that smaller reporting companies would not likely have as many significant changes to the liquidity profile presented in periodic reports as other reporting companies. Thus, we do not believe that the burden of preparing expanded interim period reporting is justified by the incremental information that would be provided compared to that provided under the existing interim updating model applicable to smaller reporting companies.

Request for Comment

28. Does the proposal strike the proper balance between imposing proportional costs and burdens on smaller reporting companies while providing adequate information to investors? Would the proposed new short-term borrowings disclosure be useful to investors in smaller reporting companies? Are there any features of the proposed requirements that would impose unique difficulties or significant costs for smaller reporting companies? If so, how should we change the requirements to reduce those difficulties or costs while still achieving the disclosure objective?

29. Should we provide the proposed exemption for interim period updating to smaller reporting companies? If not, please discuss whether the expanded level of interim period disclosure by smaller reporting companies would be useful to investors and why.

30. Would the gathering of data and preparation of expanded interim period disclosure be burdensome to smaller reporting companies? Could the proposed requirement be structured a different way for smaller reporting entities so as to enable interim period reporting without imposing a significant cost? If so, please provide details of such an alternative.

31. Are the nature of the short-term borrowings and the related risks different for smaller reporting companies such that additional or alternate disclosure would be appropriate? In particular, would the proposed annual requirement for disclosing short-term borrowings information cause a smaller reporting company to collect the same data it would need to collect for interim reporting, such that the expanded level of interim period disclosure proposed for registrants that are not smaller reporting companies would not be unduly burdensome?

C. Leverage Ratio Disclosure Issues

Many observers believe that high leverage at financial institutions, in the U.S. and globally, was a contributing factor to the financial crisis.[74] As a result, investors and market participants are increasingly focused on leverage ratio disclosures, particularly for banks and for non-bank financial institutions.[75] Similarly, we believe that investors may benefit from additional transparency about the capitalization and leverage profile of non-financial companies, particularly for those companies that rely heavily on external financing and credit markets to fund their businesses and future growth.

Under U.S. GAAP, bank holding companies are currently required to disclose certain capital and leverage ratios (calculated in accordance with the requirements of their primary banking regulator) in the financial statements that are included in filings with the Commission.[76] The Commission's staff has observed that some bank holding companies also include disclosure of these ratios in their MD&A presented in annual and quarterly reports. The financial statement disclosure by bank holding companies of their capital and leverage ratios provides to investors some of the same information that banking regulators use to assess a bank's capital adequacy and leverage levels.[77] For U.S. banks and thrifts, the standards applied by the various banking agencies are substantially uniform,[78] which means that the ratios that bank holding companies are required to include in their financial statements filed with the Commission should be calculated using consistent methodology. Consistent with existing disclosure rules, where disclosed ratios are likely to be materially impacted by known events such as short-term borrowings, contractual obligations or off-balance sheet arrangements, or are not otherwise indicative of the registrant's leverage profile, additional disclosure would be required in order to provide an understanding of the registrant's financial condition and prospects.[79]

We are considering whether to extend a leverage ratio disclosure requirement to companies that are not bank holding companies. We understand that, outside the banking industry, a variety of metrics are used to evaluate a company's debt levels and capital adequacy. There does not appear to be a "one-size-fits all" leverage ratio that is used by companies or investors. For example, we understand that financial analysts, credit analysts and other sophisticated users of financial statements tend to apply their own models and calculate their own ratios for use in their analyses of a registrant's financial health, using their own proprietary calculation methods.[80] We also understand that there is not a consensus on how to measure and treat "off-balance sheet" leverage for purposes of calculating leverage or capital ratios. We are requesting comment today as to the scope of a potential disclosure requirement, and importantly, how such a requirement would take into account the differences among metrics and industries while still providing comparability.

Request for Comment

32. Should all types of registrants be required to provide leverage ratio disclosure and discussion? Are there differences among industries or types of businesses that would need to be addressed in such a requirement so that

[74] *See, e.g.,* Financial Stability Board, *Report of the Financial Stability Forum on Addressing Procyclicality in the Financial System* (2009) *available at http://www.financialstabilityboard.org/publications/r_0904a.pdf;* S. Deng, *SIVs, Bank Leverage and Subprime Mortgage Crisis,* (Dec. 2009), *available at http://ssrn.com/abstract=1319431.*

[75] *See, e.g.,* K. D'Hulster, *The Leverage Ratio,* WORLD BANK PUB. POL'Y J. (2009); J. Gabilondo, *Financial Moral Panic! Sarbanes-Oxley, Financier Folk Devils, and Off-Balance Sheet Arrangements,* 36 SETON HALL L. REV. 781 (2006) (proposing that a financial transparency ratio would reduce the public information gap arising from off-balance sheet arrangements); P. M. Hildebrand, Vice-Chairman of the Governing Board of the Swiss National Bank, *Is Basel II Enough? The Benefits of a Leverage Ratio,* London School of Economics Financial Markets Group Lecture, Dec. 15, 2008, *available at http://www.bis.org/review/r081216d.pdf;* Standard & Poor's, *The Basel III Leverage Ratio is a Raw Measure but Could Supplement Risk Based Capital Measures,* April 15, 2010, *available at http://www.bis.org/publ/bcbs165/splr.pdf.*

[76] *See* FASB ASC 942–505–50, *Regulatory Capital Disclosures.* Specifically, bank holding companies must present their required and actual ratios and amounts of Tier 1 leverage, Tier 1 risk based capital, and total risk based capital, (for savings institutions) tangible capital, and (for certain banks and bank holding companies) Tier 3 capital for market risk. Under U.S. GAAP, bank holding companies are required to include this information in the footnotes to their financial statements.

[77] *See* Regulation Y, Appendices A (Risk-Based Capital), B (Leverage Measure) and D (Tier I Leverage Measure) [12 CFR 225].

[78] *See* The Federal Reserve Board *et al., Joint Report: Differences in Capital and Accounting Standards among the Federal Banking and Thrift Agencies* (Feb. 5, 2003) [68 FR 5976].

[79] *See, e.g.,* Item 303(a)(1) of Regulation S–K, and Instructions 1, 2 and 3 to Paragraph 303(a).

[80] *See, e.g.,* P. Kraft, *Rating Agency Adjustment to GAAP Financial Statements and Their Effect on Ratings and Bond Yields* (Nov. 1, 2009) at *http://ssrn.com/abstract=1266381.*

it is meaningful to investors? If so, how should "leverage ratio" be defined in this context? Is comparability across companies and industries important, or is the disclosure more meaningful if it is presented in the context of the particular registrant's business?

33. Rather than extending the leverage ratio disclosure requirement to include all registrants, should we extend it only to other financial institutions or financial services companies? If so, how should the scope of included companies be defined? Would the proposed definition of "financial company" used in proposed Item 303(a)(6) work for this purpose? How should "leverage ratio" be defined in this context? Is there a different metric that would be more useful to investors? Should the ratio include "off-balance sheet" leverage or off-balance sheet equity adjustments? If so, describe how such a ratio would be calculated. What are the costs and benefits of defining a leverage ratio that would be applicable to all registrants? Where relevant, discuss the usefulness of a standardized ratio requirement given that many users of financial statements make their own calculations.

34. Should bank holding companies be required to include the same level of disclosure of leverage and capital ratios for quarterly financial statements as they do for annual financial statements, rather than quarterly reporting of material changes? Should additional disclosures be required to accompany existing ratio disclosure that would make it more meaningful?

D. Technical Amendments Reflecting FASB Codification

On June 30, 2009, the FASB issued FASB Statement of Financial Accounting Standards No. 168, *The FASB Accounting Standards Codification and the Hierarchy of Generally Accepted Accounting Principles—a replacement of FASB Statement No. 162,* to establish the FASB Codification as the source of authoritative non-Commission accounting principles recognized by the FASB to be applied by nongovernmental entities in the preparation of financial statements in conformity with U.S. GAAP. In August 2009, we issued guidance regarding the interpretation of references in the Commission's rules and staff guidance to specific standards under U.S. GAAP in light of the FASB Codification.[81] As noted in that interpretive release, the Commission and its staff intend to embark on a longer term rulemaking and updating initiative to revise comprehensively specific references to specific standards under U.S. GAAP in the Commission's rules and staff guidance. Although we plan to make those comprehensive changes at a later date, we believe it is appropriate, at the same time that we propose to make other amendments to Item 303 of Regulation S–K and Item 5 of Form 20–F, to propose technical amendments to these provisions to reflect the FASB Codification. These proposed technical amendments include:

- Updating the U.S. GAAP references in the definition of "off-balance sheet arrangement" in Item 303(a)(4)(ii) of Regulation S–K and Item 5.E.2 of Form 20–F;
- Updating U.S. GAAP references in the existing definitions of "Long-Term Debt Obligation," "Capital Lease Obligation" and "Operating Lease Obligation" in Item 303(a)(5)(ii) of Regulation S–K; [82] and
- Updating U.S. GAAP references in instructions 8 and 9 of the Instructions to Paragraph 303(a) of Regulation S–K.

As part of our continuing initiative to update the references in the Commission's rules and staff guidance, we believe that these proposed technical amendments would assist registrants in applying the relevant definitions and instructions, without needing to spend time and resources to identify the corresponding FASB provision as contemplated by the interpretive guidance.

Request for Comment

35. Are there any additional revisions to the provisions of Regulation S–K or Form 20–F affected by the proposal that would be necessary or appropriate to reflect the release by the FASB of its FASB codification?

E. Conforming Amendments to Definition of "Direct Financial Obligation" in Form 8–K

We are proposing revisions to the definition of "direct financial obligation" used in Items 2.03 and 2.04 of Form 8–K to conform to the definition of short-term borrowings used in proposed Item 303(a)(6). Specifically, the proposed amendment would revise paragraph (4) of the definition of "direct financial obligation" contained in Item 2.03(c) of Form 8–K.[83]

The current definition of "direct financial obligation" was adopted as part of the 2004 adoption of Items 2.03 and 2.04 of Form 8–K, in connection with updates to Form 8–K to require real-time disclosure of material information regarding changes in a company's financial condition or operations as mandated by Section 409 of the Sarbanes-Oxley Act of 2002.[84] Items 2.03 and 2.04 of Form 8–K are intended to provide real-time disclosure when a company becomes obligated under a direct financial obligation or off-balance sheet arrangement that is material to the company, and upon the triggering of an increase or acceleration of any of those types of transactions where the impact would be material to the company. This real-time disclosure was intended to supplement and align with the requirements for annual and quarterly disclosure of off-balance sheet arrangements and contractual obligations under Items 303(a)(4) and (a)(5) of Regulation S–K. Acknowledging the importance of short-term financing disclosure to an understanding of a company's financial condition and risk profile, we included certain short-term debt obligations in the definition of "direct financial obligations," along with the long-term debt, leases and purchase obligations identified by reference to Item 303(a)(5) of Regulation S–K.

We believe it is appropriate to align the existing reporting requirements for short-term debt obligations under Items 2.03 and 2.04 of Form 8–K with the new proposed definition of short-term borrowings in Item 303(a)(6), in order to continue to provide consistency of disclosure. Accordingly, we are

[81] *See* Commission Guidance Regarding the Financial Accounting Standards Board's Accounting Standards Codification, Release No. 33–9062A (Aug. 19, 2009)[74 FR 42772] (stating that, concurrent with the effective date of the FASB Codification, references in the Commission's rules and staff guidance to specific standards under U.S. GAAP should be understood to mean the corresponding reference in the FASB Codification).

[82] The instructions to Item 5.F (Tabular Disclosure of Contractual Obligations) of Form 20–F direct registrants to provide disclosure of contractual obligations (other than purchase obligations, for which a definition is provided) based on the classifications used in the generally accepted accounting principles under which the registrant prepares its primary financial statements. Accordingly, no update for FASB codification is necessary for Item 5.F of Form 20–F.

[83] Item 2.03(c) defines a "direct financial obligation" as any of the following: (1) a long-term debt obligation, as defined in Item 303(a)(5)(ii)(A) of Regulation S–K [17 CFR 229.303(a)(5)(ii)(A)]; (2) a capital lease obligation, as defined in Item 303(a)(5)(ii)(B) of Regulation S–K [17 CFR 229.303(a)(5)(ii)(B)];(3) an operating lease obligation, as defined in Item 303(a)(5)(ii)(C) of Regulation S–K [17 CFR 229.303(a)(5)(ii)(C)]; or (4) a short-term debt obligation that arises other than in the ordinary course of business. The item defines "short-term debt obligation" as a payment obligation under a borrowing arrangement that is scheduled to mature within one year, or, for those companies that use the operating cycle concept of working capital, within a company's operating cycle that is longer than one year.

[84] Public Law 107–204, 116 Stat. 745 (2002). *See* Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date, Release No. 33–8400 (Mar. 16, 2004) [69 FR 15594].

proposing to amend clause (4) of the definition of direct financial obligation to refer to "a short-term borrowing, as defined in Item 303(a)(6)(iii) of Regulation S–K (17 CFR 229.303(a)(6)(iii) that arises other than in the ordinary course of business." [85] In doing so, however, we propose to retain the existing carve-out in the definition of direct financial obligation for obligations that arise in the ordinary course of business, in order to maintain the focus of Items 2.03 and 2.04 on real-time disclosure of individual transactions that are not routine or "ordinary course" financing transactions. If we were to eliminate the ordinary course of business carve-out in the definition, we do not believe that the level of material information provided would justify the burden on registrants to prepare, and the burden on investors to review and understand, potentially voluminous disclosure about routine transactions. In addition, we believe that the proposed short-term borrowings disclosures in MD&A would provide investors with timely information about fluctuations in short-term borrowings levels and about short-term borrowings practices, such that current reporting on Form 8–K of particular instances of significant fluctuations that arise due to ordinary course transactions would not necessarily provide additional insight to investors. Moreover, a registrant that experiences a material increase in short-term borrowings during a reporting period that is not consistent with past practices would likely need to consider carefully whether the underlying transactions causing the fluctuations fall within the meaning of "ordinary course of business" for purposes of Items 2.03 and 2.04.

Request for Comment

36. Instead of amending the definition of "direct financial obligation" to refer to proposed Item 303(a)(6), should the category of short-term financings included in the definition of "direct financial obligation" for purposes of Items 2.03 and 2.04 of Form 8–K differ from the standard used in proposed Item 303(a)(6)? Describe how the standards should differ and explain why. For example, should we retain the existing reference to "short-term debt obligation" instead?

37. Is the proposed definition of short-term borrowings sufficiently tailored so as to exclude borrowing obligations that arise in the ordinary course of business, so that the carve-out in the definition of direct financial obligation is unnecessary? Should the carve-out for obligations that arise in the ordinary course of business be retained, as proposed? Describe the costs and burdens for companies if the carve-out were eliminated, particularly the burden on management to make an assessment of materiality of each short-term borrowing transaction within the filing timeframe. Is current reporting of routine short-term borrowing transactions that are material to the registrant sufficient? Would the new reporting requirements regarding short-term borrowing practices and average borrowings sufficiently improve reporting on this topic, so that Form 8–K reporting of ordinary course short-term borrowings would be unnecessary? Explain why or why not.

F. Transition

In connection with the proposed short-term borrowings disclosure, we are proposing a transition accommodation for registrants that are not bank holding companies or subject to Guide 3 that would, for purposes of the annual reporting requirement, permit those companies to phase in compliance with the comparable annual period disclosure under proposed Item 303(a)(6). In the initial year of the transition period, these companies would be required to include short-term borrowings information for the most recent fiscal year and permitted to omit information for the two preceding fiscal years. In the second year of the transition period, these companies would be required to include the two most recent fiscal years, and permitted to omit the third preceding fiscal year. In the third year of the transition period, and thereafter, these companies would be required to include disclosure for the each of the three most recent fiscal years as prescribed in proposed Item 303(a)(6)(v). This transition accommodation would not apply to bank holding companies or other companies subject to Guide 3, since those companies already provide this disclosure for the three most recent fiscal years (or two fiscal years for certain smaller bank holding companies).[86]

Request for Comment

38. Is the proposed transition accommodation appropriate? Should we require all companies to present all required periods at the outset?

39. Would the proposed transition accommodation be useful for registrants? Is it sufficiently clear? Should we extend it to cover bank holding companies? If so, why?

40. Are any other transition accommodations necessary for any aspects of the proposed requirements? Would any of the proposed requirements present any particular difficulty or expense that should be addressed by a transition accommodation? If so, please explain what would be needed and why. For example, should we provide a transition period to allow smaller reporting companies and/or non-bank companies time to set up systems to gather the data for the proposed disclosure? If so, what should that period be?

III. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[87] We are submitting the proposed amendments to the Office of Management and Budget (OMB) for review in accordance with the PRA.[88] The titles for the collection of information are:

(A) "Regulation S–K" (OMB Control No. 3235–0071); [89]

(B) "Form 10–K" (OMB Control No. 3235–0063);

(C) "Form 10–Q" (OMB Control No. 3235–0070);

(D) "Form 8–K" (OMB Control No. 3235–0060);

(E) "Form 20–F" (OMB Control No. 3235–0288);

(F) "Form 10" (OMB Control No. 3235–0064);

[85] *See* proposed revisions to Item 2.03(c)(4) of Form 8–K.

[86] *See* General Instruction 3 of Guide 3.

[87] 44 U.S.C. 3501 *et seq.*

[88] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[89] The paperwork burden from Regulation S–K and the Industry Guides is imposed through the forms that are subject to the disclosures in Regulation S–K and the Industry Guides and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience, we estimate the burdens imposed by each of Regulation S–K and the Industry Guides to be a total of one hour.

(G) "Form S–1" (OMB Control No. 3235–0065);
(H) "Form F–1" (OMB Control No. 3235–0258);
(I) "Form S–4" (OMB Control No. 3235–0324);
(J) "Form F–4" (OMB Control No. 3235–0325);
(K) "Proxy Statements—Regulation 14A (Commission Rules 14a–1 through 14a–15) and Schedule 14A" (OMB Control No. 3235–0059);
(L) "Information Statements—Regulation 14C (Commission Rules 14c–1 through 14c–7) and Schedule 14C" (OMB Control No. 3235–0057); and
(M) "Form N–2" (OMB Control No. 3235–0026).

These regulations, schedules and forms were adopted under the Securities Act and the Exchange Act, and in the case of Form N–2, the Investment Company Act of 1940.[90] They set forth the disclosure requirements for periodic and current reports, registration statements, and proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending each form or schedule constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We anticipate that the proposed amendments to Item 303 of Regulation S–K and to Item 5 of Form 20–F would increase existing disclosure burdens for annual reports on Form 10–K and Form 20–F, quarterly reports on Form 10–Q, current reports on Form 8–K, proxy and information statements, and registration statements on Forms 10, S–1, F–1, S–4, F–4 and N–2 by requiring new disclosure and discussion of short-term borrowings to be provided on an annual and interim basis.

At the same time, the proposed technical amendments to Item 303 of Regulation S–K and Item 5.E of Form 20–F that update references to U.S. GAAP to reflect the FASB Codification would not increase existing disclosure burdens for annual reports on Form 10–K and Form 20–F, quarterly reports on Form 10–Q, current reports on Form 8–K, proxy and information statements, and registration statements on Forms 10, S–1, F–1, S–4, F–4 and N–2.

We also estimate that the amendments to the definition of "direct financial obligation" for purposes of disclosure requirements in Items 2.03 and 2.04 of Form 8–K would not increase existing disclosure burdens for filings of Form 8–K. Although we propose to amend the existing definition to conform to the terminology used in the proposed MD&A requirements, we propose to retain the existing carve-out for ordinary course obligations. Thus, we assume that the proposed change in the definition would not substantially change the existing scope of the disclosure requirement, and, therefore, the proposed amendments would not increase the number of Form 8–K filings nor add incremental costs and burdens to the existing disclosure burden under Form 8–K. We solicit comment on whether our assumption is correct, and if not, how to estimate the additional number of Forms 8–K that would be filed pursuant to the proposed amendments to the definition of "direct financial obligation." We note that, based on the number of filings made under Items 2.03 and 2.04 of Form 8–K in 2009, only approximately 4% of all Form 8–K filings would be made in connection with those Items.

Compliance with the proposed amendments would be mandatory. Responses to the information collections would not be kept confidential, and there would be no mandatory retention period for the information disclosed.

B. Burden and Cost Estimates Related to the Proposed Amendments

As discussed below, we have estimated the average number of hours a company would spend preparing and reviewing the proposed disclosure requirements and the average hourly rate for outside professionals. In deriving our estimates, we recognize that some companies would experience costs in excess of those averages in the first year of compliance with the proposed amendments, and some companies may experience less than the average costs. The estimates of reporting and cost burdens provided in this PRA analysis address the time, effort and financial resources necessary to provide the proposed collections of information and are not intended to represent the full economic cost of complying with the proposal.

For purposes of the PRA, we estimate that over a three year period, the average annual incremental paperwork burden for all companies to prepare the disclosure that would be required under the proposals to be approximately 872,458 hours of company personnel time and a cost of approximately $144,061,000 for the services of outside professionals.[91] These estimates include the time and the cost of implementing data gathering systems and disclosure controls and procedures, the time and cost of in-house preparers, review by executive officers, in-house counsel, outside counsel, in-house accounting staff, independent auditors and members of the audit committee, and the time and cost of filing documents and retaining records.

Our methodologies for deriving the burden hour and cost estimates presented in the tables below represent the average burdens for all registrants who are required to provide the disclosure, both large and small. As discussed elsewhere in this release, the time required to prepare the proposed disclosures could vary significantly depending on, among other factors, the nature of the registrant's business, its capital structure, its internal controls and disclosure controls systems, its risk management systems and other applicable regulatory requirements. In addition, the estimates do not distinguish between registrants that are bank holding companies and other registrants. Although bank holding companies and other companies that currently provide Guide 3 disclosure would already collect and disclose on an annual basis some of the information covered by the new requirements, the new requirements are not identical to the provisions of Guide 3. Accordingly, for purposes of these estimates, we assume that bank holding companies would have the same burden as other registrants, although they might not actually incur additional expenses for those portions of the new requirements that are the same as the existing provisions of Guide 3.

Because our estimates assume that 100% of public companies engage in short-term borrowings from time to time, we estimate that the same percentage of companies would be impacted by the proposed disclosure requirements for short-term borrowings.[92] Therefore, for those companies that do not engage in short-term borrowing activities during a reporting period, the incremental burdens and costs may be lower than our estimate. However, because these

[90] 15 U.S.C. 80a–1 *et seq.*

[91] We calculated an annual average over a three-year period because OMB approval of PRA submissions covers a three-year period. For administrative convenience, the presentation of totals related to the paperwork burden hours have been rounded to the nearest whole number. The estimates reflect the burden of collecting and disclosing information under the PRA. Other costs associated with the proposed amendments are discussed in below under "Cost-Benefit Analysis."

[92] We further assume that the proposed amendments would not affect the number of filings.

companies may still need to implement systems and controls to capture short-term borrowings data that is not currently collected, we have assumed that they would share the same average burden and cost estimate. In addition, we assume that the burden hours of the proposed amendments would be comparable to the burden hours related to similar disclosure requirements, such as off-balance sheet arrangements disclosure requirements,[93] contractual obligations disclosure requirements,[94] and requirements for the qualitative and quantitative disclosure of market risk,[95] which call for quantitative and/or qualitative discussion and analysis of financial data.

We derived the estimates by estimating the total amount of time it would take a company to implement systems to capture the data, implement related disclosure controls and procedures, prepare and review the disclosure pursuant to the proposed short-term borrowings requirements. We first estimated the total amount of time it would take a company to prepare and review the proposed disclosure for each form, using the estimates for the comparable disclosure requirements identified above as a starting point. Because we believe that the proposed rules would impose an increased burden on companies in connection with the implementation of data gathering systems and the implementation of related disclosure controls and procedures as compared to those comparable disclosure requirements, we added hours to those estimates, to reflect our best estimate of the additional time needed to implement the new systems.

The tables below illustrate the total incremental annual compliance burden of the collection of information in hours and in cost under the proposed amendments for annual reports, proxy and information statements, quarterly reports and current reports on Form 8–K under the Exchange Act (Table 1) and for registration statements under the Securities Act and Exchange Act (Table 2). There is no change to the estimated burden of the collection of information under Regulation S–K because the burdens that Regulation S–K imposes are reflected in our revised estimates for the forms. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the proposed disclosure requirements. We recognize that some registrants may need to include MD&A disclosure in more than one filing covering the same period, accordingly actual numbers may be lower than our estimates.

We have based our estimated number of annual responses on the actual number of filings during the 2009 fiscal year, with three exceptions. First, we reduced the number of annual responses for Schedules 14A and 14C, based on our belief that only a minimal number of companies that file these schedules would need to prepare MD&A disclosure for the filing, rather than incorporating by reference from a periodic report. Second, we reduced the number of annual responses for Form N–2, based on our estimate of the number of Form N–2 filings made by business development companies in 2009 because only business development companies are required to include MD&A disclosure in a Form N–2.[96] In addition, we recognize that smaller reporting companies would be exempted from "full" interim period reporting in their quarterly reports rather than only reporting material changes on a quarterly basis. To reflect this, we reduced the number of annual responses of Forms 10–Q by our estimate of the number of Forms 10–Q filed by smaller reporting companies.[97]

For Exchange Act reports and proxy and information statements, we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.[98] For registration statements, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company is reflected in hours.

TABLE 1—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR ANNUAL REPORTS, QUARTERLY REPORTS, FORMS 8–K AND PROXY AND INFORMATION STATEMENTS

	Annual responses[99]	Incremental burden hours/form	Total incremental burden hours	75% Company	25% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*$400
10–K	13,545	40	541,800	406,350	135,450	$54,180,000
20–F	942	30	28,260	7,065	21,195	8,478,000
10–Q	28,841	20	574,840	431,130	143,710	57,484,000
8–K	115,795	0	0	0	0	0
SCH 14A	365	30	10,950	8,212.5	2,737.5	1,095,000
SCH 14C	34	30	1,020	765	255	102,000
Total	159,522	150	1,156,860	853,522.5	303,347.5	121,339,000

[93] OBS Adopting Release, *supra* note 6, at 5994 (which we estimated to be 14.5 hours for annual reports and proxy statements, 16 hours for registration statements and 10 hours for quarterly reports).

[94] OBS Adopting Release, *supra* note 6, at 5994 (which we estimated to be 7.5 hours for annual reports and proxy statements, 8.5 hours for registration statements and 3 hours for quarterly reports).

[95] Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Qualitative and Quantitative Information About Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Release No. 33–7386 (Jan. 31, 1997) [62 FR 6044] (which we estimated to be 80 hours total per registrant).

[96] The current estimate of annual responses for Form N–2 is 205. Our best estimate of the total number of Forms N–2 filed in 2009 by business development companies is 29. Accordingly, for purposes of Table 2, we reduced the current estimate of annual responses for Form N–2 (205 Form N–2 filings) to 29 Form N–2 filings.

[97] This adjustment is based on our best estimate of the number of Forms 10–Q filed by smaller reporting companies in 2009.

[98] For Form 20–F, we estimate that 25% of the burden is carried by the company and 75% by outside professionals because we assume that foreign private issuers rely more heavily on outside counsel for preparation of the Form.

TABLE 2—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR REGISTRATION STATEMENTS

	Annual responses [100]	Incremental burden hours/form	Total incremental burden hours	25% Company	75% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*$400
S–1	1,168	35	40,880	10,220	30,660	$12,264,000
F–1	42	35	1,470	367.5	1,102.5	441,000
S–4	619	35	21,665	5,416.25	16,248.75	6,499,500
F–4	68	35	2,380	595	1,785	714,000
10	238	35	8,330	2,082.5	6,247.5	2,499,000
N–2	29	35	1,015	253.75	761.25	304,500
Total	2,164	210	75,740	18,935	56,805	22,722,000

1. Annual Reports and Proxy/Information Statements

We estimate that the preparation of annual reports currently results in a total annual compliance burden of 21,986,455 hours and an annual cost of outside professionals of $3,591,562,980. We estimate that the preparation of proxy and information statements currently result in a total annual compliance burden of 735,122 hours and an annual cost of outside professionals of $86,608,526.

As set forth in Table 1 above, if the proposals were adopted, we estimate that the incremental cost of outside professionals for annual reports would be approximately $62,658,000 per year and the incremental company burden would be approximately 413,415 hours per year; and, for proxy and information statements, the total incremental cost of outside professionals would be approximately $1,197,000 per year and the incremental company burden would be approximately 8,978 hours per year. For purposes of our submission to the OMB under the PRA, if the proposals were adopted, the total cost of outside professionals for annual reports would be approximately $3,654,220,980 per year and the total company burden would be approximately 22,399,870 hours per year; and the total cost of outside professionals for proxy and information statements would be approximately $87,805,526 per year and the total company burden would be approximately 744,100 hours per year.

2. Quarterly Reports

We estimate that Form 10–Q preparation currently results in a total annual compliance burden of 4,559,793 hours and an annual cost of outside professionals of $607,972,400. As set forth in Table 1 above, if the proposals were adopted, we estimate that the incremental cost of outside professionals for quarterly reports would be approximately $57,484,000 per year and the incremental company burden would be approximately 431,130 hours per year. For purposes of our submission to the OMB under the PRA, if the proposals were adopted, the total cost of outside professionals for quarterly reports would be approximately $665,456,400 per year and the total annual company burden for quarterly reports would be approximately 4,990,923 hours per year.

3. Current Reports on Form 8–K

Form 8–K prescribes information about significant events that a registrant must disclose on a current basis. We are proposing amendments to the definitions used in Items 2.03 and 2.04 of Form 8–K that revise the terminology used, but which we assume would not significantly impact the scope of information required to be disclosed under those items. Accordingly, we estimate that the proposed amendments would not increase the number of current reports filed on Form 8–K nor add incremental costs and burdens to the existing disclosure burden under Form 8–K. If the proposed revisions to Items 2.03 and 2.04 of Form 8–K were adopted, we estimate that, on average, completing and filing a Form 8–K would require the same amount of time currently spent by entities completing the form—approximately 4 hours.

We estimate that Form 8–K preparation currently results in a total annual compliance burden of 493,436 hours and an annual cost of outside professionals of $65,791,500.

4. Registration Statements

We estimate that the preparation of registration statements that would be affected by the proposed amendments currently has a total annual compliance burden of 1,023,273 hours and an annual cost of outside professionals of $1,127,687,401. As set forth in Table 2 above, if the proposals were adopted, we estimate that the incremental cost of outside professionals for registration statements would be approximately $22,722,000 per year and the incremental company burden would be approximately 18,935 hours per year. For purposes of our submission to the OMB under the PRA, if the proposals were adopted, the total cost of outside professionals for registration statements would be approximately $1,150,409,401 per year and the total company burden would be approximately 1,042,208 hours per year.

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of

[99] Except as described above, the number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 fiscal year.

[100] Except as described above, the number of responses reflected in the table equals the actual number of forms filed with the Commission during the 2009 fiscal year.

information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–22–10. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–22–10 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

A. Introduction and Objectives of Proposals

We are proposing amendments to enhance the disclosure that companies provide about short-term borrowings in order to provide more useful disclosure to investors about liquidity and short-term financings and to enhance investor understanding of issuers' liquidity. The proposed amendments are intended to improve disclosure by expanding and supplementing existing requirements.

First, the proposals would require a registrant to provide a comprehensive explanation of its short-term borrowings, including both quantitative and qualitative information. In addition, we are proposing conforming amendments to Form 8–K so that the Form uses the terminology contained in the proposed short-term borrowings disclosure requirement. Finally, we are making technical amendments to Item 303 of Regulation S–K to revise references to U.S. GAAP to reflect the FASB Codification.

The proposals seek to improve transparency of a company's short-term borrowings in order to provide investors with comprehensive information about a company's liquidity profile and demands on capital resources in each reporting period. The proposals also aim to clarify existing MD&A requirements in these areas to assist registrants in preparing disclosure that is meaningful, useful and clear. Ultimately, the proposals are expected to enhance the ability of investors to make informed investment decisions and to allocate capital on a more efficient basis.

We considered alternative regulatory approaches for achieving these objectives, including providing further interpretive guidance on existing MD&A disclosure requirements and encouraging companies to voluntarily provide quantitative and qualitative information on short-term borrowings where material to their financial condition. Although some public companies are voluntarily providing more detailed information as to short-term financings in their MD&A, we have observed that some companies generally do not provided investors with the desired level of detail in their disclosure absent a specific disclosure requirement or guidance, such as Guide 3. To elicit more detailed and comparable disclosures regarding a company's short-term borrowings activities in each reporting period as part of its overall liquidity profile, we are proposing mandated disclosure of short-term borrowings to complement existing MD&A disclosures.

B. Benefits

The proposed disclosures would benefit investors by informing them about the fluctuations in short-term borrowings during the reporting period. Information about the variability of borrowing levels and variations in types of borrowing activities over the course of the reporting period should enable investors to better understand the ability of a registrant to obtain the financing it needs to conduct its business operations and the costs of that financing, and how those may vary during the reporting period. The transparency of the financial statements should increase because investors would be able to learn more about the amount of financial risk taken by the company, its liquidity and capital resources, and the amount of capital deployed in earning activities by the company on an on-going basis during the year, including at quarter-ends. The proposed narrative discussion of the short-term borrowings arrangements, including the importance of those arrangements to the registrant in terms of its liquidity and capital resources, should provide investors with insight into the magnitude of the registrant's short-term borrowing activities, the specific material impact of the short-term borrowing arrangements on the registrant, and the factors that could affect its ability to continue to use those short-term borrowing arrangements.

The proposed disclosures would inform investors about the amount of financial risk taken by the company.[101] For some businesses, short-term borrowings may decrease or increase at quarter- and year-ends due to innate fluctuations in cash flow obligations. In other cases, management may be deliberately reducing short-term debt at period ends.[102] Regardless of the cause, period-end financial statements could be less informative regarding the financial risks taken by companies *during* the period. The proposed disclosures should add transparency to the ongoing risks taken by companies. These disclosures should also help facilitate a more accurate understanding of a company's liquidity and capital resources.

The proposed disclosures should also inform investors about the amount of capital deployed in earning activities by a company and thus help evaluate its overall source of profitability. Investors should benefit from knowing whether the period-end balance sheet fully reflects all intra-period activities and assets. The disclosure should also enable more accurate comparisons between companies that engage in a pattern of borrowing and those that do not.

Thus, the new disclosures should enhance transparency and competition especially in industries where short-term borrowing practices are common. Similar disclosure requirements exist in a more limited fashion for banks and bank holding companies under applicable banking regulations.[103] Therefore, bank regulators find this information to be useful in monitoring the risk of these institutions.[104]

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[101] K. Kelly *et al., Big Banks Move To Mask Risk Levels—Quarter-End Loan Figures Sit 42% Below Peak, Then Rise as New Period Progresses,* Wall St. J., Apr. 9, 2010; and M. Rappaport & T. McGinty, *supra* note 16 (reporting that "the practice, known as end-of-quarter 'window dressing' on Wall Street, suggests that the banks are carrying more risk most of the time than their investors or customers can easily see. This activity has accelerated since 2008 * * *".).

[102] M. Griffiths & D. Winters, *The Turn of the Year in Money Markets: Tests of the Risk-Shifting Window Dressing and Preferred Habitat Hypotheses,* J. BUS, 2005, vol. 78, no. 4.; M. Griffiths & D. Winters, *On a Preferred Habitat for Liquidity at the Turn-of-the-Year: Evidence From the Term-Repo Market,* 12 J. FIN. SERV. RES. 1, 1997; V. Kotomin & D. Winters, *Quarter-End Effects in Banks: Preferred Habitat or Window Dressing?,* 29 J. FIN. SERV. RES. 1, 2006.

[103] Banks and bank holding companies report the quarterly average for Federal funds sold and securities purchased under agreements to resell (FFIEC 031 and 041 Schedule RC–K, and FR Y–9C Schedule HC–K).

[104] *See e.g.,* Board of Governors of the Federal Reserve System, Announcement of Board Approval Under Delegated Authority and Submission to OMB, (March. 18, 2006) [71 FR 11194]. ("The FR Y–9 family of reports historically has been, and

Continued

The proposed amendments are likely to increase transparency. Therefore, information asymmetry and information risk would be lower and investors should demand a lower risk premium and rate of return.[105] Thus, the proposed disclosures would help reduce cost of capital and improve capital allocation and formation in the overall economy.

C. Costs

The proposals to require short-term borrowings disclosure on an annual and quarterly basis are new. In connection with the new disclosure requirements, registrants would be required to incur additional direct costs to which they were previously not subject, and could incur indirect costs as well. Because the proposed requirements require additional disclosures that are not currently provided in connection with Guide 3 compliance, bank holding companies would also incur additional direct and indirect costs to which they were previously not subject. Furthermore, as noted in our PRA analysis, we estimate that registrants would incur higher costs in the initial reporting periods than would be incurred in ongoing reporting periods.

We estimate that the proposals would impose new disclosure requirements on approximately 10,380 public companies.[106] We estimate that the collection of information and the preparation of the disclosure would involve multiple parties, including in-house preparers, senior management, in-house accounting staff, in-house counsel, information technology personnel, outside counsel, outside auditors and audit committee members. For purposes of our PRA analysis, we estimated that company personnel would spend approximately 872,204 hours per year (84 hours per company) to prepare, review and file the proposed disclosure. We also estimated that companies would spend approximately $143,756,500 ($13,849 per company) on outside professionals to comply with the proposed requirements.

We believe that the proposed amendments could increase the costs for some companies to collect the information necessary to prepare the disclosure. We also believe that the proposed amendments will impose different costs for companies, depending on whether they are bank-holding companies that currently provide Guide 3 information, financial companies as defined in the proposed rule, non-financial companies, or smaller reporting companies, as described below. Although management must already consider short-term borrowing information as it prepares its financial statements and MD&A under existing requirements, the proposed amendments could impose significant incremental costs for the collection and calculation of data, particularly in connection with the registrant's initial compliance.

In particular, this disclosure requires the production of new data for companies that are not already reporting this type of data voluntarily or to their primary regulators. In some industries, companies may readily have access to this information in their systems while others may not be producing it on a daily basis as would be required for financial companies under the proposals. For example, insurance companies may find it difficult to produce daily balances for each day that is necessary for the average and maximum short-term borrowing disclosures applicable to them. In addition, companies that are not financial companies under the proposed definition, particularly those with multi-national operations, may not currently be producing the data necessary for the monthly average and maximum short-term borrowings disclosures, and they may be faced with complex calculation issues when gathering the data from multiple jurisdictions. For many companies, the costs of data production may be high.

For bank holding companies currently subject to Guide 3, costs will likely arise primarily from the preparation of incremental disclosure in MD&A (*i.e.,* the proposed requirements for maximum daily amounts instead of maximum monthly amounts and the proposed narrative discussion of short-term borrowings arrangements) as well as quarterly reporting of this information (rather than on an annual basis alone). These bank holding companies already report to the Commission average short-term borrowings data computed based on daily averages on an annual basis, pursuant to Item VII of Guide 3. Of the approximately 10,380 public companies, we estimate that approximately 800 are bank holding companies.

For registrants that meet the proposed definition of "financial company" but that are not bank holding companies, such as insurance companies, broker-dealers, business development companies, and financing companies, the costs imposed could be substantial because, as requirements that are newly applicable to these entities, costs would likely include implementing or adjusting data gathering systems to capture daily balance information, implementing new disclosure controls and procedures, time spent by internal accounting staff to compile the data, as well as the preparation of narrative disclosure. As a portion of these costs would arise from data collection, the costs of compliance in the initial reporting period would likely be higher because systems may need to be implemented or adjusted. We estimate that, in addition to the approximately 800 bank holding companies, approximately 700 registrants would meet the proposed definition of "financial company."

Registrants that do not meet the definition of "financial companies" could have lower costs than those registrants that are financial companies, because they would not be required to compile data based on daily balances. Again, the requirements would be newly applicable, and could require these registrants to incur costs to implement or adjust data gathering systems to capture month-end balance information, the implementation of new disclosure controls and procedures, time spent by internal accounting staff to compile the data, as well as preparation of narrative disclosure. For companies that do not currently close their books on a monthly basis, the costs of gathering the data would likely be higher than those that do, because monthly balances would not be readily available from existing books and records systems. The implementation or adjustment of data gathering systems would likely cause costs to be higher for these companies in the initial compliance period. We estimate that the number of registrants that are not financial companies and that are not smaller reporting companies, is approximately 7,640.

continues to be, the primary source of financial information on [bank holding companies] between on-site inspections. Financial information from these reports is used to detect emerging financial problems, to review performance and conduct pre-inspection analysis, to monitor and evaluate capital adequacy, to evaluate [bank holding company] mergers and acquisitions, and to analyze a [bank holding company's] overall financial condition to ensure safe and sound operations.").

[105] *See* D. Easley & M. O'Hara, *Information and the Cost of Capital,* 59 J. Fin. 1553 (2004) (arguing that the information composition between public and non-public information affects the cost of capital because investors demand a higher return from their investments when they face asymmetric information); R. Lambert *et al., Accounting Information, Disclosure, and the Cost of Capital,* 45 J. ACCT. RES. 385 (2007) (deriving conditions under which an increase in information quality leads to an unambiguous decline in the cost of capital).

[106] We estimate that all registrants who filed annual reports in 2009 would be required to provide the proposed disclosures.

For smaller reporting companies, the proposed requirements would also be newly applicable, and costs incurred would be similar to those applicable to large reporting companies, except that, as proposed, smaller reporting companies would only be required to provide two years of annual short-term borrowings information, rather than three years, and would not be required to provide quarterly disclosure on the same level of detail as annual disclosure. Accordingly, in addition to the costs to prepare and review the disclosure, smaller reporting companies that do not currently track the data needed to compile the short-term borrowings disclosure or that do not currently close their books on a monthly basis, would incur costs to implement or adjust data collection systems and disclosure controls and procedures. On the other hand, small entities without such systems would be more likely to engage in financing activities that are less complex, where the compilation and calculation of such data would not raise significant burdens. In addition, the cost estimates set forth in our PRA analysis may be lower for a small entity to the extent its costs for personnel and outside professionals are lower than our assumed amounts. As discussed elsewhere in this release, we estimate that there are approximately 1,240 smaller reporting companies.

In addition, registrants that are not smaller reporting companies could incur increased costs in connection with the preparation of their quarterly reports, as the amendments call for disclosure in quarterly reports at the same level of detail as in annual reports. To provide this increased level of detail, registrants may need to alter their existing disclosure controls and procedures for quarterly reporting. For purposes of our PRA analysis, we estimated that company personnel would spend approximately 18 additional hours per year to prepare, review and file the proposed disclosure in Form 10–Q. We estimate that approximately 8,200 registrants (based on our estimated number of annual report filers, less smaller reporting companies and foreign private issuers) would be subject to the requirement to provide quarterly disclosure at the same level of detail as in annual reports.

Companies may also be faced with indirect costs arising from the amendments. For example, companies may need to consider the impact of the amendments on their financing plans, to the extent the gathering of data and preparation of disclosure imposes significant time burdens. Specifically, companies could decide to delay registered offerings or conduct unregistered offerings if they are unable to gather data and prepare the new disclosures without significant time and expense. This indirect cost should decrease over time, as companies implement disclosure controls and procedures to comply with the new disclosures. In other cases, companies may alter their short-term borrowings activities in response to the proposed disclosure, in order to avoid incurring the cost of compliance, and in doing so could incur transaction costs or opportunity costs that they would not face without a mandatory disclosure requirement.

In certain cases, mandatory required disclosure requirements can have adverse effects for companies and their shareholders if the disclosures reveal confidential information and trade secrets of a company. In the case of the proposed short-term borrowings, however, such indirect costs should be minimal due to the non-proprietary nature of short-term borrowings. There is some possibility that a company's competitors could be able to *infer* proprietary or sensitive information about a company's business operations or strategy from disclosure about short-term borrowings arrangements. If this were the case, it could disproportionately impact companies that meet the proposed definition of "financial company," to the extent that amounts calculated based on daily balance information provide a more accurate basis for such inferences. We preliminarily believe that the likelihood of this impact is low.

D. Request for Comment

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

VI. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act requires us,[107] when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b) of the Securities Act[108] and Section 3(f) of the Exchange Act[109] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposed amendments are intended to enhance disclosure in MD&A relating to registrants' liquidity profile in each reporting period by highlighting and expanding disclosure requirements for short-term borrowings. The proposed amendments to Form 8–K, which would conform the disclosure requirements in the Form to the proposed amendments to Regulation S–K, are intended to continue to provide real-time disclosure in connection with these topics.

The proposed amendments may increase the usefulness of MD&A. The ability of users of financial information to understand registrants' financial statements and to determine the existence of trends in borrowing and funding activity is expected to improve as a result of the disclosure of average and maximum short-term borrowings during each reporting period.

The proposed amendments also should increase the efficiency of U.S. capital markets by providing investors with additional and more timely information about registrants' borrowing and funding activities, including borrowing activities that are not apparent on the face of period-end financial statements and exposures to market and funding liquidity risks. This information could be used by investors in allocating capital across companies, and toward companies where the risk incentives appear better aligned with an investor's appetite for risk. Furthermore, these reductions in the asymmetry of information between registrants and investors could reduce registrants' cost of capital as investors may demand a lower risk premium when they have access to more information.[110]

In certain cases, mandatory required disclosure requirements can have adverse effects for companies and their shareholders if the disclosures reveal confidential information and trade secrets of a company. In the case of the proposed short-term borrowings,

[107] 15 U.S.C. 78w(a)(2).

[108] 15 U.S.C. 77b(b).

[109] 15 U.S.C. 78c(f).

[110] *See* D. Easley & M. O'Hara, *supra* note 98, and R. Lambert *et al., supra* note 98.

however, such indirect costs should be minimal due to the non-proprietary nature of short-term borrowings. There is some possibility that a company's competitors could be able to *infer* proprietary or sensitive information about a company's business operations or strategy from disclosure about short-term borrowings arrangements. If this were the case, it could disproportionately impact companies that meet the proposed definition of "financial company," to the extent that amounts calculated based on daily balance information provide a more accurate basis for such inferences. We preliminarily believe that the likelihood of this impact is low.

We request comment on whether the proposed amendments would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their view to the extent possible.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)[111] we solicit data to determine whether the proposed rule amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commentators should provide empirical data on (a) the potential annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VIII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act.[112] It relates to proposed revisions to the rules and forms under the Securities Act and Exchange Act to enhance disclosure that registrants provide in MD&A regarding short-term borrowings.

[111] Public Law 104–121, tit. II, 110 Stat. 857 (1996).

[112] 5 U.S.C. 603.

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments are intended to enhance disclosure in MD&A relating to registrants' liquidity profile by highlighting and expanding disclosure requirements for short-term borrowings. The proposed amendments to Form 8–K, which would conform the disclosure requirements in the Form to the proposed amendments to Regulation S–K, are intended to continue to provide real-time disclosure in connection with these topics. These amendments are being proposed to increase transparency in the presentation of registrants' borrowing and funding activities and exposure to liquidity risks in connection with that activity. This increased transparency in areas of increasing importance to investors is intended to maintain investor confidence in the full and fair disclosure required of all registrants.

B. Legal Basis

We are proposing the amendments pursuant to Sections 6, 7, 10, 19(a) and 28 of the Securities Act and Sections 12, 13, 14, 15(d), 23(a) and 36 of the Exchange Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments would affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction." [113] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157 [114] and Exchange Act Rule 0–10(a) [115] define a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,240 companies that may be considered small entities.[116] The proposed amendments would affect small entities that (i) have a class of securities that are registered under Section 12 of the Exchange Act, or are required to file reports under Section 15(d) of the Exchange Act and (ii) are required to provide MD&A disclosure under applicable rules and forms or disclosure under Items 2.03 and 2.04 of Form 8–K. In addition, the proposals also would affect small entities that file, or have filed, a registration statement (that is required to include MD&A disclosure under the applicable rules and forms) that has not yet become effective under the Securities Act and that has not been withdrawn.

The data underlying the proposed short-term borrowing disclosures should be available from a company's books and records, although it may not currently be collected on month-end basis or daily basis, as proposed in the rule. As discussed in our PRA analysis, we believe that the collection and calculation of short-term borrowing data in the form proposed may have a cost impact on registrants, including small entities, that do not currently maintain information technology systems for the collection of the required data. On the other hand, small entities without such systems would be more likely to engage in financing activities that are less complex, where the compilation and calculation of such data would not raise significant burdens. In addition, the cost estimates set forth in our PRA analysis may be lower for a small entity to the extent its costs for personnel and outside professionals are lower than our assumed amounts.

We are proposing an accommodation for smaller reporting companies, such that expanded disclosures of short-term borrowings would not be required for interim periods and annual period data would only be required for two years rather than three years.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments are intended to enhance disclosure about short-term borrowings. These proposals would require a small entity to:

- Provide, in a separately captioned subsection of MD&A, a comprehensive explanation of its short-term borrowings, including both quantitative and qualitative information; and
- Use a revised definition of "direct financial obligation" for purposes of disclosure requirements in Items 2.03 and 2.04 of Form 8–K.

These proposed amendments largely would apply to both large and small entities equally, except that smaller reporting companies would benefit from the proposed exclusion from expanded interim reporting of short-term borrowings and would provide two

[113] 5 U.S.C. 601(6).

[114] 17 CFR 230.157.

[115] 17 CFR 240.0–10(a).

[116] This includes approximately 30 business development companies that are small entities. For purposes of the Regulatory Flexibility Act, an investment company (including a business development company) is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0–10(a).

years of annual data rather than three. As noted above, the proposed short-term borrowings disclosure should be available from a company's books and records and tracked with existing internal controls without a significant incremental burden imposed on small entities, except to the extent that it doesn't track the data on a monthly basis.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the proposed amendments would not duplicate, overlap, or conflict with other Federal rules. The proposed new requirements for short-term borrowings disclosures provide specific, additional information that would be complementary to existing MD&A requirements.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Currently, small entities are subject to the same MD&A requirements as larger registrants under Item 303 of Regulation S–K, except that smaller reporting companies are permitted to exclude information as to their contractual obligations.[117] The proposed amendments would not alter the exclusions applicable to smaller reporting companies, except, as discussed above, an additional exclusion would be provided for smaller reporting companies so that they would not need to provide the proposed expanded interim period disclosures of short-term borrowings and would be permitted to provide two years of annual data instead of three years. The remaining proposed disclosure requirements would apply to small entities to the same extent as larger registrants, and would require clear, straightforward disclosure about short-term borrowings.

Except for the exclusions noted above, we are not proposing to change existing alternative reporting requirements under Item 303 of Regulation S–K, or establish additional different compliance requirements or an exemption from coverage of the proposed amendments for small entities. The proposed amendments would provide investors with greater transparency into the liquidity profile of registrants, by highlighting short-term borrowings. With potentially fewer financing options available to small entities, information about critical funding risks and future commitments is important to investors in the context of small entities as it is in the context of larger entities. Therefore, we do not believe it is appropriate to develop separate requirements for small entities that would involve clarification, consolidation, or simplification of the proposed disclosure requirements, other than the proposed exclusions discussed above. We do not believe that these proposed disclosures would create a significant new burden for small entities, and, we believe that uniform, comparable disclosures across all companies would be beneficial for investors and the markets.

We have used design standards and performance standards in connection with the proposed amendments. We rely on design standards for two reasons. First, based on our past experience, we believe that the proposed requirements would result in disclosure that is more useful to investors than if there were specific, enumerated informational requirements. The proposed requirements are intended to elicit more comprehensive and clear disclosure, while still affording registrants the ability to tailor the disclosure to reflect their specific activities and to provide the information that is most important in the context of their specific business. Second, the proposed amendments would promote consistent disclosure among all companies, providing information that is increasingly important to investors. Our existing MD&A requirements are largely performance standards, designed to elicit disclosure unique to the particular company.

Finally, we believe that requiring additional short-term borrowings information in MD&A is the most effective way to elicit the disclosure both for small entities. MD&A's existing emphasis on liquidity and capital resources, as well as identification of significant uncertainties and events, makes the placement of the disclosure as part of MD&A an appropriate choice. Because the proposed disclosure of short-term borrowings is intended to supplement the discussions of liquidity and capital resources already required to be provided by smaller reporting companies under existing rules, we believe the inclusion of the proposed requirements in MD&A would reduce redundant disclosure requirements and promote investors' understanding of this important and, at times highly complex, information.

We seek comment on whether we should exempt small entities from any of the proposed amendments or scale the proposed disclosure requirements to reflect the characteristics of small entities and the needs of their investors.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

IX. Statutory Authority and Text of the Proposed Amendments

The amendments contained in this release are being proposed under the authority set forth in Sections 6, 7, 10, 19(a) and 28 of the Securities Act and Sections 12, 13, 14, 15(d), 23(a) and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to

[117] Item 303(d) of Regulation S–K provides an exclusion for smaller reporting companies from the requirements of Item 303(a)(5), and permits smaller reporting companies to provide, if they meet specified conditions, only two fiscal years of information on the impact of inflation and changing prices pursuant to Item 303(a)(3)(iv).

amend Title 17, Chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend Section 229.303 by:

a. Removing the phrase "paragraphs (a)(1) through (5) of this Item" and adding in its place "paragraphs (a)(1) through (a)(6) of this Item" in the second sentence of the introductory text of paragraph (a);

b. Revising paragraphs (a)(4)(ii)(A), (a)(4)(ii)(C) and (a)(4)(ii)(D), and (a)(5)(ii)(A), (a)(5)(ii)(B) and (a)(5)(ii)(C);

c. Redesignating the "Instructions to paragraph 303(a) (4)" to directly follow paragraph (a)(4)(ii)(D);

d. Adding a new paragraph (a)(6) directly above the "Instructions to paragraph 303(a)";

e. Revising the fourth sentence of Instruction 8 to paragraph 303(a);

f. Revising Instruction 9 to paragraph 303(a);

g. Adding the phrase ", except as provided in Instruction 8 to paragraph 303(b)" at the end of the first sentence of Instruction 3 of the Instructions to paragraph (b) of Item 303;

h. Adding Instruction 8 to the Instructions to paragraph (b) of Item 303; and

i. Revising paragraph (d).

The revisions and additions read as follows:

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

* * * * *

(a) * * *

(4) * * *

(ii) * * *

(A) Any obligation under a guarantee contract that has any of the characteristics identified in FASB ASC Topic 460, *Guarantees,* paragraph 460–10–15–4, as may be modified or supplemented, and that is not excluded from the initial recognition and measurement provisions of FASB ASC paragraphs 460–10–15–7, 460–10–25–1, and 460–10–30–1;

(B) * * *

(C) Any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument, except that it is both indexed to the registrant's own stock and classified in stockholders' equity in the registrant's statement of financial position, and therefore excluded from the scope of FASB ASC Topic 815, *Derivatives and Hedging,* pursuant to FASB ASC subparagraph 815–15–74(a), as may be modified or supplemented;

(D) Any obligation, including a contingent obligation, arising out of a variable interest (as defined in the FASB ASC Master Glossary, as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the registrant, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the registrant.

(5) * * *

(ii) * * *

(A) *Long-Term Debt Obligation* means a payment obligation under long-term borrowings referenced in FASB ASC Topic 470, *Debt,* paragraph 470–10–50–1, as may be modified or supplemented.

(B) *Capital Lease Obligation* means a payment obligation under a lease classified as a capital lease pursuant to FASB ASC Topic 840, *Leases,* as may be modified or supplemented.

(C) *Operating Lease Obligation* means a payment obligation under a lease classified as an operating lease and disclosed pursuant to FASB ASC Topic 840, as may be modified or supplemented.

* * * * *

(6) *Short-term Borrowings.* (i) In tabular format, provide for each category of short-term borrowings specified in paragraph (a)(6)(iii) of this Item and for the periods specified in paragraph (a)(6)(v) of this Item:

(A) The average amount outstanding during each reported period and the weighted average interest rate thereon;

(B) The amount outstanding at the end of each reported period and the weighted average interest rate thereon;

(C) (*1*) For registrants that are financial companies, the maximum daily amount outstanding during each reported period or

(*2*) For registrants that are not financial companies, the maximum month-end amount outstanding during each reported period; and

(D) For any of the amounts referred to in paragraphs (a)(6)(i)(A), (B) or (C) of this Item, disaggregate the amounts in the table by currency, interest rate or other meaningful category, to the extent presentation of separate amounts is necessary to promote understanding or to prevent aggregate amounts from being misleading, and include a footnote to the table indicating the method of disaggregation and any other pertinent data relating to the calculation of the amounts presented, including, without limitation, the timing and exchange rates used for currency translations.

(ii) Discuss the registrant's short-term borrowings, including the items specified in paragraphs (a)(6)(ii)(A) through (D) of this Item to the extent necessary to an understanding of such borrowings and the current or future effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources:

(A) A general description of the short-term borrowings arrangements included in each category (including any key metrics or other factors that could reduce or impair the company's ability to borrow under any of such arrangements and whether there are any collateral posting arrangements) and the business purpose to the registrant of such short-term borrowings;

(B) The importance to the registrant of such short-term borrowings in respect of its liquidity, capital resources, market-risk support, credit-risk support or other benefits;

(C) The reasons for any material differences between average short-term borrowings and period-end borrowings; and

(D) The reasons for the maximum outstanding amounts in each reported period, including any non-recurring transactions or events, use of proceeds or other information that provides context for the maximum amount.

(iii) As used in this paragraph (a)(6), the term "*short-term borrowings*" includes amounts payable for short-term obligations that are:

(A) Federal funds purchased and securities sold under agreements to repurchase;

(B) Commercial paper;

(C) Borrowings from banks;

(D) Borrowings from factors or other financial institutions; and

(E) Any other short-term borrowings reflected on the registrant's balance sheet.

(iv) As used in this paragraph (a)(6), the term "*financial company*" means a registrant that, during the reported period, is engaged to a significant extent in the business of lending, deposit-taking, insurance underwriting or providing investment advice, or is a broker or dealer as defined in Section 3 of the Exchange Act (15 U.S.C. 78c), and includes, without limitation, an entity that is, or is the holding company of, a bank, a savings association, an insurance company, a broker, a dealer, a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), an investment adviser, a futures commission merchant, a commodity trading advisor, a commodity pool operator, or a mortgage real estate investment trust.

(v) Information required by this paragraph (a)(6) shall be presented for each of the three most recent fiscal years, and, in the case of annual reports filed on Form 10–K (referenced in § 249.310), information for the registrant's fourth fiscal quarter presented in accordance with the requirements for interim periods set forth in Instruction 8 to paragraph (b) of this Item 303; *provided* that a registrant that is a smaller reporting company may provide the information required for each of the two most recent fiscal years in accordance with paragraph (d) of this Item 303 and, in the case of annual reports filed on Form 10–K (referenced in § 249.310), is not required to include information for the fourth fiscal quarter.

Instruction 1 to Paragraph 303(a)(6): Where a registrant meets the definition of financial company, but also has operations that do not involve lending, deposit-taking, insurance underwriting, providing investment advice, or broker or dealer activities, it may present the information specified in Item 303(a)(6)(i) separately for such operations. In doing so, the registrant may disclose averages and maximum amounts for such operations using the rules and instructions applicable to registrants that are not financial companies, provided that it must disclose averages computed on a daily average basis and maximum daily amounts for its operations that fall within the definition of financial company. For purposes of making this segregation, the registrant should make the distinction assuming the business in question were itself a registrant. Additional information should be presented by footnote to enable readers to understand how the registrant's operations have been grouped for purposes of the disclosure.

Instruction 2 to Paragraph 303(a)(6): For registrants that are financial companies, averages called for by paragraph (a)(6) of this Item are averages computed on a daily average basis (which means the amount outstanding at the end of each day, averaged over the reporting period). For all other registrants, the basis used for calculating the averages must be identified, and the averaging period used must not exceed a month.

Instruction 3 to Paragraph 303(a)(6): As used in this Item 303(a)(6), the maximum daily amount outstanding during a reported period means the largest amount outstanding at the end of any day in the reported period, and the maximum month-end amount outstanding during a reported period means the largest amount outstanding at the end of the last day of any month in the reported period.

Instructions to Paragraph 303(a):

* * * * *

8. * * * However, registrants may elect to voluntarily disclose supplemental information on the effects of changing prices as provided for in FASB ASC Topic 255, *Changing Prices,* or through other supplemental disclosures. * * *

9. Registrants that elect to disclose supplementary information on the effects of changing prices as specified by FASB ASC Topic 255 may combine such explanations with the discussion and analysis required pursuant to this Item or may supply such information separately with appropriate cross-reference.

* * * * *

(b) * * *

Instructions to Paragraph 303(b):

* * * * *

8. Notwithstanding anything to the contrary in this Item 303, a registrant that is not a smaller reporting company must include the disclosure required pursuant to (a)(6) of this Item for each interim period for which financial statements are included or required to be included by Article 3 of Regulation S–X (17 CFR 210.3–01 to 3.18), and for the registrant's fourth fiscal quarter in the case of an annual report filed on Form 10–K (referenced in § 249.310), and must provide an updated discussion and analysis of the information presented. The discussion and analysis should also highlight any material changes from prior periods. For purposes of interim period disclosures of short-term borrowings required by paragraph (a)(6) of this Item, the term "*reported period*" used in paragraph (a)(6) of this Item means the most recent interim period presented or, in the case of an annual report filed on Form 10–K (referenced in § 249.310), the registrant's fourth fiscal quarter.

* * * * *

(d) *Smaller reporting companies.* A smaller reporting company, as defined in § 229.10(f)(1) of this Chapter, may provide the information required in paragraphs (a)(3)(iv) and (a)(6) of this Item for the last two most recent fiscal years of the registrant if it provides financial information on net sales and revenues and on income from continuing operations for only two years. For interim periods, a smaller reporting company is not required to follow Instruction 8 to paragraph 303(b) and, instead, must discuss material changes to the information specified in paragraphs (a)(4) and (a)(6) of this Item from the end of the preceding fiscal year (and, if included, from the corresponding interim balance sheet date of the preceding fiscal year) to the date of the most recent interim balance sheet provided. In the case of an annual report filed on Form 10–K (referenced in § 249.310), a smaller reporting company is not required to provide information for the fourth quarter of the most recent fiscal year.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Form 8–K (referenced in § 249.308) is amended by:

a. Revising paragraph (c)(4) of Item 2.03; and

b. Removing paragraph (e) of Item 2.03.

The revisions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant

* * * * *

(c)* * *

(4) A short-term borrowing, as defined in Item 303(a)(6)(iii) of Regulation S–K (17 CFR 229.303(a)(6)(iii)), that arises other than in the ordinary course of business.

* * * * *

5. Form 20–F (referenced in § 249.220f) Item 5 is amended by:

a. Revising paragraphs (a) and (d) of Item 5.E.2;

b. Adding Item 5.H; and

c. Adding Instructions to Item 5.H after the "Instructions to Item 5.F".

The revisions and additions read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Item 5. Operating and Financial Review and Prospects

* * * * *

E. Off-balance sheet arrangements.

* * * * *

2. * * *

(a) Any obligation under a guarantee contract that has any of the characteristics identified in FASB ASC Topic 460, Guarantees, paragraph 460–10–15–4, as may be modified or supplemented, excluding the types of guarantee contracts described in FASB ASC paragraphs 460–10–15–7, 460–10–25–1, and 460–10–30–1;

(b) * * *

(c) * * *

(d) Any obligation, including a contingent obligation, arising out of a variable interest (as defined in the FASB ASC Master Glossary, as may be modified or supplemented) in an unconsolidated entity that is held by, and material to, the company, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the company.

* * * * *

H. Short-Term Borrowings

1. In tabular format, provide for each category of short-term borrowings specified in Item 5.H.3 of this Form and for the periods specified in Item 5.H.5 of this Form:

(a) The average amount outstanding during each reported period and the weighted average interest rate thereon;

(b) The amount outstanding at the end of each reported period and the weighted average interest rate thereon;

(c)(*i*) For companies that are financial companies, the maximum daily amount outstanding during each reported period or

(*ii*) For companies that are not financial companies, the maximum month-end amount outstanding during each reported period; and

(d) For any of the amounts referred to in (a), (b) or (c) of this Item 5.H.1, disaggregate the amounts in the table by currency, interest rate or other meaningful category, to the extent presentation of separate amounts is necessary to promote understanding or to prevent aggregate amounts from being misleading, and include a footnote to the table indicating the method of disaggregation and any other pertinent data relating to the calculation of the amounts presented, including, without limitation, the timing and exchange rates used for currency translations.

2. Provide a discussion of the company's short-term borrowings, including the items specified in paragraphs (a) through (d) of this Item 5.H.2 to the extent necessary to an understanding of such borrowings and the current or future effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources:

(a) A general description of the short-term borrowings included in each category (including any key metrics or other factors that could reduce or impair the company's ability to borrow under any of such arrangements and whether there are any collateral posting arrangements) and the business purpose to the company of such short-term borrowings;

(b) The importance to the company of such short-term borrowings in respect of its liquidity, capital resources, market-risk support, credit-risk support or other benefits;

(c) The reasons for any material differences between average short-term borrowings and period-end borrowings; and

(d) The reasons for the maximum outstanding amounts in each reported period, including any non-recurring transactions or events, use of proceeds or other information that provides context for the maximum amount.

3. As used in this Item 5.H, the term "*short-term borrowings*" means amounts payable for short-term obligations that are:

(a) Federal funds purchased and securities sold under agreements to repurchase;

(b) Commercial paper;

(c) Borrowings from banks;

(d) Borrowings from factors or other financial institutions; and

(e) Any other short-term borrowings reflected in the company's balance sheet.

4. As used in this Item 5.H, the term "*financial company*" means a company that, during the reported period, is engaged to a significant extent in the business of lending, deposit-taking, insurance underwriting or providing investment advice, or is a broker or dealer as defined in Section 3 of the Exchange Act (15 U.S.C. 78c), and includes, without limitation, an entity that is or is the holding company of, a bank, a savings association, an insurance company, a broker, a dealer, a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), an investment adviser, a futures commission merchant, a commodity trading advisor, a commodity pool operator, or a mortgage real estate investment trust.

5. Information required by this Item 5.H shall be presented for each of the three most recent fiscal years.

* * * * *

Instructions to Item 5.H:

1. Notwithstanding Item 5.H.3, the categories of short-term borrowings disclosed pursuant to Item 5.H of this Form may be based on the classifications for such types of short-term borrowings used under the comprehensive set of accounting principles that the company uses to prepare its primary financial statements, so long as the disclosure is provided at a level of detail that satisfies the objective of this Item 5.H disclosure requirement.

2. Where a company meets the definition of financial company, but also has operations that do not involve lending, deposit-taking, insurance underwriting, providing investment advice, or broker or dealer activities, it may present the information specified in Item 5.H.1 of this Form separately for such operations. In doing so, the company may disclose averages and maximum amounts for such operations using the rules and instructions applicable to companies that are not financial companies, provided that it must disclose averages computed on a daily average basis and maximum daily amounts for its operations that fall within the definition of financial company. For purposes of making this segregation, the company should make the distinction assuming the business in question were itself a registrant. Additional information should be presented by footnote to enable readers to understand how the company's operations have been grouped for purposes of the disclosure.

3. For companies that are financial companies, averages called for by this Item 5.H are averages computed on a daily average basis (which means the amount outstanding at the end of each day, averaged over the reporting period). For all other companies, the basis used for calculating the averages must be identified, and the averaging period used must not exceed a month.

4. As used in this Item 5.H, the maximum daily amount outstanding during a reported period means the largest amount outstanding at the end of any day in the reported period, and the maximum month-end amount

outstanding during a reported period means the largest amount outstanding at the end of the last day of any month in the reported period.

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Dated: September 17, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–23743 Filed 9–27–10; 8:45 am]

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