

# 2011 SEC annual reports – Form 10-K

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# 1 Overview

We are pleased to present our 2011 *SEC Annual Reports*, which is a reference guide to help you prepare your financial and related information for annual reports on Form 10-K and annual shareholders' reports.

The Securities Exchange Act of 1934 (Exchange Act or 1934 Act) requires most publicly held companies to file an annual report with the Securities and Exchange Commission (SEC) on Form 10-K and to distribute an annual shareholders' report under the SEC's proxy rules. Both Form 10-K and the annual shareholders' report include financial statements and other data that involve a company's accounting personnel and its independent auditors.

The purpose of Form 10-K is to update information included in securities registration statements previously filed under the 1934 Act or the Securities Act of 1933 (Securities Act or 1933 Act). The SEC's integrated disclosure system is designed such that the instructions in the various forms under the 1933 and 1934 Acts refer to Regulation S-X for financial statement disclosures and Regulation S-K for the required nonfinancial statement disclosures. By standardizing disclosure items in SEC filings, companies can incorporate information included in one document into subsequently filed documents. For example, disclosures contained in the Annual Report to Shareholders (ARS) or definitive proxy statement can be incorporated into a Form 10-K, and the Form 10-K can be incorporated into 1933 Act filings such as Forms S-1, S-3, S-4 or S-8, subject to the eligibility requirements of these forms. Additionally, for continuous or delayed securities offerings, reporting documents filed under the 1934 Act subsequent to the initial effective date of a Form S-3 or S-8 are automatically incorporated by reference into these registration statements until the securities offering is terminated.

When preparing reports on Form 10-K and annual shareholders' reports, users of this publication should consider applicable changes to SEC reporting requirements adopted after 31 October 2011, except that the SEC's final rules on mine safety disclosures, which were effective 27 January 2012, are reflected in this publication. The final mine safety disclosure rules amended Form 10-K to add new Item 4, *Mine Safety Disclosures*. Previously, Item 4 had been "Removed and Reserved." As part of the final rules, the SEC also adopted new Item 104 of Regulation S-K and amended Item 601 of Regulation S-K to add a new exhibit to Form 10-K (Exhibit 95, *Mine Safety Disclosure Exhibit*).

## 1.1 Section highlights

The following is an overview of how information is organized by Section throughout this publication:

- ▶ Section 2 explains the general rules and requirements for preparing and filing Form 10-K.
- ▶ Sections 3, 4 and 5 discuss the requirements for Part I and Part II of Form 10-K, other than financial statements and schedules.
- ▶ Sections 6 and 7 discuss the requirements for financial statements and schedules.
- ▶ Section 8 covers non-timely filings.
- ▶ Section 9 discusses the requirements for "smaller reporting companies."
- ▶ Section 10 discusses the annual shareholders' report, the proxy statement and Part III of Form 10-K, and provides an example of Form 10-K.

## 1.2

### Ernst & Young publications and checklists

Ernst & Young has a number of publications that provide interpretive guidance for preparing various SEC forms and schedules. These publications are available from any Ernst & Young representative.

- ▶ *Standard Setter Update* is a quarterly publication that highlights significant new rules and rule proposals affecting financial accounting and reporting. This publication summarizes final, pending and proposed pronouncements of the Financial Accounting Standards Board (FASB), the Emerging Issues Task Force (EITF), the American Institute of Certified Public Accountants (AICPA), the Public Company Accounting Oversight Board (PCAOB), the AICPA Auditing Standards Board (ASB), the Governmental Accounting Standards Board (GASB) and the SEC.
- ▶ *SEC Comments & Trends* (Ernst & Young No. CC0334) discusses the SEC staff's comments on public company filings to provide insights on the SEC staff's concerns and areas of focus.
- ▶ *Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339) summarizes the requirements of Regulation 14A and Schedule 14A under the Exchange Act for soliciting annual meeting proxies. This publication includes an overview of the disclosure requirements regarding executive compensation, auditor fees and the audit, and compensation and nominating committees.
- ▶ *SEC quarterly reports –Form 10-Q* (Ernst & Young No. CC0338) summarizes the rules and practices that apply to quarterly financial accounting and reporting on Form 10-Q. It provides guidance for preparing quarterly reports to shareholders and Form 10-Q and includes an example Form 10-Q.
- ▶ *SEC in Focus* is a periodic newsletter summarizing current activities and regulatory developments at the SEC. The newsletter provides an update on activities and events relating to SEC matters, including Commission open meetings, final rules and rule proposals, SEC staff "hot buttons," SEC personnel changes and significant SEC enforcement actions.
- ▶ *SEC Market Risk Disclosures* (Ernst & Young No. BB0688) provides an overview and an in-depth analysis of the SEC's disclosure rules pertaining to derivatives and exposures to market risk that arise from derivative financial instruments, other financial instruments and certain derivative commodity instruments. These quantitative and qualitative market risk disclosures are required in Item 7A of Form 10-K and outside the financial statements in annual reports.

The following is a list of Ernst & Young checklists intended to assist registrants in preparing Form 10-K and annual shareholders' reports:

- ▶ *GAAP Disclosure Checklist* – assists in determining that the financial statement disclosure requirements of generally accepted accounting principles and Regulation S-X have been satisfied (Ernst & Young Form No. A13)
- ▶ *Form 10-K and registration statement checklist supplement to GAAP disclosure checklist* – Parts I and II of the checklist assist in determining that the Form 10-K requirements relating to financial statements and financial schedules have been satisfied (Ernst & Young Form No. A69)
- ▶ *SEC annual shareholders' report checklist* – assists in determining certain nonfinancial statement disclosures required for the annual shareholders' report, many of which are identical to those of Form 10-K, have been satisfied. Parts II and III of the checklist address the SEC's requirements for MD&A (Ernst & Young Form No. A150)
- ▶ *GAAP disclosure checklist supplement for health care organizations* – contains the disclosures required by ASC 954 (Ernst & Young Form No. A68)



- ▶ *GAAP and Regulation S-X checklist supplement for insurance companies* – includes the disclosures required by ASC 944 and Article 7 of Regulation S-X (Ernst & Young Form No. A69B)
- ▶ *GAAP and Regulation S-X disclosure checklist supplement for bank holding companies, banks, savings institutions, and credit unions* – includes disclosures required by ASC 942, ASC 948, Part 563c, *Accounting Requirements*, of the Office of Thrift Supervision Rules and Regulations, and Article 9 of Regulation S-X. It also summarizes the disclosure requirements of the SEC's Guide 3, *Statistical Disclosure by Bank Holding Companies* (Ernst & Young Form No. A69C)
- ▶ *GAAP, Regulation S-X and Regulation S-K checklist supplement for oil and gas producing companies* – includes the disclosures required by ASC 932 as well as financial statement and other disclosure requirements of Regulation S-X and Regulation S-K Subpart 1200, *Disclosure by Registrants Engaged in Oil and Gas Producing Activities* (Ernst & Young Form No. A69E)

### 1.3

### Other considerations in preparing Form 10-K

This publication is not a substitute for reading the Form 10-K Instructions and the referenced disclosure instructions in Regulations S-K and S-X. In addition, the views of the SEC and its staff should be considered, including those in Financial Reporting Releases (FRs), the related Codification of Financial Reporting Policies (FRC), Staff Accounting Bulletins (SABs), Staff Legal Bulletins (SLBs), the Division of Corporation Finance's Financial Reporting Manual (FRM), Compliance and Disclosure Interpretations (C&DIs), and Disclosure Guidance Topics, and the Center for Audit Quality (CAQ) SEC Regulations Committee meeting highlights.

- ▶ Regulation S-K contains standard instructions for nonfinancial statement disclosures required in annual shareholders' reports and various SEC filings, including Form 10-K.
- ▶ Regulation S-X provides the requirements for financial statements and schedules.
- ▶ SABs are written accounting interpretations and practices followed by the SEC's Division of Corporation Finance and Office of the Chief Accountant. They are not official SEC rules or regulations, but they do reflect the administrative positions the SEC staff expects registrants to follow.
- ▶ SLBs are written interpretations of the requirements of the federal securities laws or related rules and regulations published by the SEC's legal staff. Like SABs, SLBs are not rules, regulations or statements of the SEC, and the Commission neither approves nor disapproves of their content. Nonetheless, SEC registrants are expected to follow them.
- ▶ The Division of Corporation Finance FRM<sup>1</sup> was prepared by the staff of the Division of Corporation Finance. It is designed to be an internal reference document and to provide general guidance only to Division of Corporation Finance staff.
- ▶ The Division of Corporation Finance C&DIs are staff interpretations and positions on various rules and regulations including certain content required within the Form 10-K. They are published primarily by the Division's Office of Chief Counsel.

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<sup>1</sup> The FRM's front cover contains a disclaimer that "it is designed to be an internal reference document and to provide general guidance only to Division staff." However, because the information in the FRM has been useful to registrants and their auditors, the SEC staff has posted it to the SEC's website. The FRM can be found at the following link:  
<http://www.sec.gov/divisions/corpfina/cffinancialreportingmanual.shtml>.

- ▶ The Division of Corporation Finance Disclosure Guidance Topics (CF Disclosure Guidance Topics) provide observations and views of the staff of the Division of Corporation Finance about disclosures required by existing SEC rules and regulations. While the CF Disclosure Guidance Topics are not official SEC rules, regulations or statements of the SEC, the SEC staff expects registrants to follow this guidance.
- ▶ The SEC Regulations Committee meets periodically with the staff of the SEC to discuss emerging financial reporting issues relating to SEC rules and regulations. The purpose of the SEC Regulations Committee meeting highlights is to summarize the issues discussed at the meetings. Highlights can be found on the CAQ website. The highlights have not been considered and acted on by senior technical committees of the AICPA, or by the FASB, and do not represent an official position of either organization. In addition, the highlights are not authoritative positions or interpretations issued by the SEC or its staff. Accordingly, the highlights do not constitute an official statement of the views of the Commission or of the staff of the Commission. Nonetheless, SEC registrants should consider the views of the staff when preparing annual shareholders' reports and various SEC filings, including Form 10-K.
- ▶ Revisions to Regulations S-K and S-X are sometimes reported in FRs. FRC, the Codification of Financial Reporting Policies, contains the current interpretive guidance provided by the SEC relating to financial reporting as published in the Accounting Series Releases (ASRs), and more recently, in FRs.

The rules and regulations for financial reporting are complex. Any materially inaccurate or incomplete information in Form 10-K can expose a company and its directors, officers and independent auditors to liability under the federal securities laws. Additionally, as discussed in Section 2 of this publication, Section 906 of the Sarbanes-Oxley Act of 2002 (the Sarbanes-Oxley Act) requires the chief executive officer (CEO) and chief financial officer (CFO) to provide a certification accompanying each periodic report, stating, among other things, that the report "fully complies" with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934. Section 906 provides for criminal penalties for an officer who provides the certification "knowing" it to be untrue, of up to a \$1 million fine and imprisonment of 10 years (with harsher penalties for "willful" violations).

In certain situations, it may be appropriate to meet with the SEC staff to discuss a complex accounting or reporting issue. The SEC staff has expressed its willingness to discuss proposed accounting treatments with registrants and their auditors for novel and complex transactions, and for situations in which a registrant's reporting is based on an interpretation of established guidance or established guidance is unclear (SAB Topic 6.C). The SEC website ([www.sec.gov](http://www.sec.gov)) provides guidelines for consultations with the SEC staff, entitled "Guidance for Consulting with the Office of the Chief Accountant."<sup>2</sup>

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<sup>2</sup> This guidance can be found at the following link: <http://www.sec.gov/info/accountants/ocasubguidance.htm>.

## 2

# General rules

Three types of companies are required to file annual reports with the SEC pursuant to Sections 13(a) or 15(d) of the Exchange Act:

1. A company having any class of securities listed on a national securities exchange must register these securities on Form 8A or Form 10 pursuant to Section 12(b) of the Exchange Act and must file annual reports on Form 10-K as long as such registration continues in effect.
2. An unlisted company having over \$10 million of assets and 500 or more holders of any class of equity securities<sup>1</sup> must register these equity securities on Form 10 pursuant to Section 12(g) of the Exchange Act and must file annual reports on Form 10-K. Such annual reporting requirements continue until the SEC receives notification on Form 15 that (1) the number of holders of such registered securities has been reduced to fewer than 300 or (2) the number of security holders has been reduced to fewer than 500 and the company had less than \$10 million in assets on the last day of each of the three most recent years.
3. A company registering either equity or debt securities under the Securities Act is required by Section 15(d)<sup>2</sup> of the Exchange Act to file at least one annual report on Form 10-K.<sup>3</sup> Section 15(d) provides an automatic suspension of the periodic reporting obligation if the issuer has fewer than 300 security holders of record at the beginning of the fiscal year. A Form 15 should be filed to notify the SEC of such suspension, but the suspension is granted by statute and is not contingent on filing the Form 15. However, Rule 12h-3 of the Exchange Act permits a company to suspend its reporting obligations under Section 15(d) at any time during the year if the issuer has (1) fewer than 300 security holders or (2) less than 500 security holders and less than \$10 million in assets on the last day of each of the three most recent fiscal years. Rule 12h-3 requires the filing of Form 15 as a condition of the suspension.

Form 10-K is the primary form for these annual reports and is designed to update much of the information contained in the registrant's original registration statement. Therefore, Form 10-K provides continuing disclosure of material facts about the registrant. Because the securities regulations are complex, preparing Form 10-K requires cooperation among corporate officers, independent auditors, attorneys and the audit committee of the board of directors. Generally, the rules discussed in this Section also are applicable to smaller reporting companies that elect to provide reduced disclosures in their SEC annual report. The rules and requirements that are unique or inapplicable to smaller reporting companies are discussed in Section 9 of this publication.

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<sup>1</sup> A December 2007 SEC final rule, *Exemption of Compensatory Employee Stock Options From Registration Under Section 12(g) of the Securities Exchange Act of 1934* (SEC Release No. 34-56887), exempted non-reporting issuers from Exchange Act Section 12(g) registration for compensatory employee stock options issued under written stock option plans if certain conditions regarding permitted option holders, transferability restrictions and information requirements are met. The exemption does not cover the common stock or other securities underlying the options; companies must continue to apply the Exchange Act Section 12 registration requirements separately to the underlying class to determine if registration is required. As a result, a private company does not have to register using Form 10 just because it has more than 500 option holders, provided it meets certain conditions.

<sup>2</sup> Section 15(d) of the Exchange Act also requires the filing of an annual report by registrants that are asset-backed security issuers. General Instruction J to Form 10-K specifies the information asset-backed issuers must include in Form 10-K.

<sup>3</sup> Many indenture agreements require that companies with public debt outstanding continue to file Exchange Act reports with the SEC.

## 2.1 When the report is due

The SEC does not consider the Form 10-K filed until it receives the document. If the due date falls on a holiday or weekend, registrants have until the next business day to file. The rules require registrants to promptly notify the SEC if they cannot file all or any required portion of Form 10-K within the prescribed time period (see Section 8 – Notification of late filing). The deadlines for filing of the Form 10-K are determined by a company's filing status.

For purposes of determining accelerated filing status, a registrant must determine its public float, which is the aggregate worldwide market value of its voting and non-voting common equity held by non-affiliates. For this purpose, public float is calculated on the last business day of a company's most recent second fiscal quarter, which is intended to allow the company to determine well in advance when it must file its next Form 10-K. The cover page of Form 10-K requires disclosure of a company's public float as of the end of its most recent second fiscal quarter. In addition, the cover page of Form 10-K is required to indicate whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer (but not a smaller reporting company) or a smaller reporting company.

Unless a company is subject to the accelerated filing requirements, Form 10-K is due 90 days after the fiscal year-end. Smaller reporting companies, foreign private issuers and companies that have only registered debt or preferred securities are not subject to the accelerated filing requirements. However, foreign private issuers electing to file their annual reports on Form 10-K (rather than Form 20-F or Form 40-F) are subject to the accelerated filing requirements.

### 2.1.1 Large accelerated filer determination

Rule 12b-2 of the Exchange Act defines a "large accelerated filer" as a seasoned issuer with public float of \$700 million or more. Specifically, Rule 12b-2 defines a large accelerated filer as a public company that meets all of the following conditions as of the end of its fiscal year:

- ▶ Has a public float of \$700 million or more (measured as of the last business day of its most recent second fiscal quarter)
- ▶ Has been a public company for at least 12 months subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act
- ▶ Has previously filed at least one annual report
- ▶ Is not eligible to report as a smaller reporting company

When a company meets the definition of a large accelerated filer as of the end of its fiscal year, it must file its Form 10-K for that fiscal year within 60 days after its fiscal year-end. In the subsequent fiscal year, the company must file its quarterly reports on Form 10-Q within 40 days of each quarter-end. Once a company is a large accelerated filer, it remains so unless it satisfies the exit provisions discussed separately below.

### 2.1.2 Accelerated filer determination

Rule 12b-2 of the Exchange Act defines an "accelerated filer" as a seasoned issuer with a public float of \$75 million or more, but less than \$700 million. Specifically, Rule 12b-2 defines an accelerated filer as a public company that meets all of the following conditions as of the end of its fiscal year:

- ▶ Has a public float of \$75 million or more but less than \$700 million (measured as of the last business day of its most recent second fiscal quarter)
- ▶ Has been a public company for at least 12 months subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act

- ▶ Has previously filed at least one annual report
- ▶ Is not eligible to report as a smaller reporting company

When a company meets the definition of an accelerated filer as of the end of its fiscal year, it must file its Form 10-K for that fiscal year within 75 days after its fiscal year-end. In the subsequent fiscal year, the company must file its quarterly reports on Form 10-Q within 40 days of each quarter-end. Once a company is an accelerated filer, it remains so unless it satisfies the exit provisions discussed separately below.

**Subsidiaries of accelerated filers or large accelerated filers:** When a company that is or was a subsidiary of a company required to file on an accelerated basis (i.e., a large accelerated filer or an accelerated filer) must file separate periodic reports with the SEC (e.g., because it issues publicly traded equity or debt securities, or it is spun off), it does not automatically succeed to the filing status of its parent or former parent. Instead, the subsidiary or former subsidiary must make its own determination as to its filing status under Rule 12b-2 based on its specific facts and circumstances.

There are situations, however, in which a newly formed public company may elect to adopt the filing status of another company for purposes of filing a registration statement on Form S-3. For example, a spun-off entity may attempt to use its parent's reporting history or a newly formed holding company may seek to use its predecessor's reporting history.<sup>4</sup> The SEC staff has indicated that because of the inter-relationship between Form S-3 eligibility and accelerated filer status, if a newly formed public company seeks to use and is deemed eligible to use Form S-3 on the basis of another entity's reporting history, that company also would be an accelerated filer.<sup>5</sup>

**Change in year-end:** Upon a change in year-end, the end of the transition period (regardless of whether the transition report is filed on Form 10-K or Form 10-Q – see Transition report – Change in fiscal year later in this Section for further discussion of transition reports) is the new fiscal year-end for the company. A company would determine its filing status as of its new fiscal year-end, including a look back from its new fiscal year-end to determine whether it met the public float test of Rule 12b-2 as of the end of its second fiscal quarter of its new fiscal year.

**Subsequent to filing Form 15:** If a company goes private and files a Form 15 with the SEC suspending its reporting obligations under the Exchange Act, it does not automatically retain its prior status requiring accelerated filing if it re-enters the Exchange Act reporting system. Such a company would evaluate its status under Rule 12b-2 based on its specific facts and circumstances as of the end of its first fiscal year upon re-entering the Exchange Act reporting system.

### 2.1.3

#### Non-accelerated filer determination

The term “non-accelerated filer” is not defined in Rule 12b-2, or elsewhere in the SEC's rules. However, the SEC staff has indicated that the term is used to “refer to an Exchange Act reporting company that does not meet the Rule 12b-2 definition of either an ‘accelerated filer’ or a ‘large accelerated filer.’”<sup>6</sup> The cover page of Form 10-K is required to indicate whether the registrant is a non-accelerated filer. However, a non-accelerated filer would not check this box if it also qualifies as a “smaller reporting company.” The requirements for, and the definition of, a smaller reporting company are discussed in Section 9 of this publication. Most non-accelerated filers will meet the definition of a smaller reporting company. However, a smaller reporting company still would look to its status as a non-accelerated filer to determine its SEC reporting due dates.

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<sup>4</sup> SEC Staff Legal Bulletin No. 4, Question 9 dated 16 September 1997

<sup>5</sup> Footnote 76 to SEC Release No. 33-8760 dated 15 December 2006

<sup>6</sup> Footnote 15 to SEC Release Nos. 33-8731 and 34-54295 dated 9 August 2006

When a company is a non-accelerated filer as of the end of its fiscal year, it must file its Form 10-K for that fiscal year within 90 days after its fiscal year-end. A non-accelerated filer must file its quarterly reports on Form 10-Q within 45 days of each quarter-end. A non-accelerated filer must reassess its status each fiscal year.

#### **2.1.4 Exit provisions**

A large accelerated filer whose public float, as of the last business day of its most recently completed second fiscal quarter, is less than \$500 million would no longer be considered a large accelerated filer for that fiscal year. Such an issuer would determine its Form 10-K due date based on whether its public float was \$50 million or more, in which case it would be an accelerated filer with its Form 10-K due 75 days after year-end, or whether its public float is less than \$50 million, in which case it would be a non-accelerated filer with its Form 10-K due 90 days after year-end. Similarly, an accelerated filer whose public float falls below \$50 million as of the last business day of its second fiscal quarter would no longer be considered an accelerated filer for that fiscal year and its annual report would be due 90 days after year-end.

During the past year, many registrants have seen an increase in their public float as of their accelerated filer measurement date (i.e., 30 June 2011 for calendar-year companies). Therefore, some registrants might now have accelerated filings dates for their 2011 Form 10-K if they entered accelerated or large accelerated filer status as of year-end based upon their second quarter public float. In such cases, registrants should also consider the related effects on their compliance with Section 404(b) of the Sarbanes-Oxley Act of 2002 and the transition provisions pertaining to the use of Extensible Business Reporting Language (XBRL).

#### **2.1.5 Financial schedules**

Financial schedules (see Section 7 – Financial schedules) may be filed by amendment up to 30 days following the due date of Form 10-K. Thus, the financial schedules for a non-accelerated filer must be filed within 120 days of its fiscal year-end. For an accelerated filer, financial schedules must be filed within 105 days of its fiscal year-end. For a large accelerated filer, financial schedules must be filed within 90 days of its fiscal year-end.

#### **2.1.6 Part III information**

The information required in Part III of Form 10-K (e.g., information regarding directors and executive officers, executive compensation, security ownership) may be incorporated by reference from a proxy statement, or provided in an amended Form 10-K, within 120 days of the issuer's fiscal year-end. The 120-day period applies to all companies, notwithstanding their filer status.

#### **2.1.7 Financial statements of significant equity investees**

Financial statements of significant equity investees (see Section 6 – Financial statements and parent company information) may be filed in an amendment to the Form 10-K in certain circumstances. When the investee is a non-accelerated filer or is not a registrant, issuers can file a US investee's financial statements in an amended Form 10-K within 90 days of the issuer's or the investee's fiscal year-end, whichever is later. Otherwise, when the investee is a large accelerated filer or an accelerated filer, and its reporting deadline falls after the date the issuer files its Form 10-K, the issuer must file the investee's financial statements in an amended Form 10-K by the due date of the investee's Form 10-K.

If the investee is a foreign business, issuers can file the investee's financial statements in an amended Form 10-K within six months after the issuer's or the investee's fiscal year-end, whichever is later.<sup>7</sup>

## 2.2 Electronic filing using EDGAR

Virtually all submissions to the SEC, including Form 10-K, must be made electronically using the SEC's EDGAR system. The rules for electronic filings on the EDGAR system are included in Regulation S-T and the EDGAR Filer Manual. The EDGAR Filer Manual is an essential "how to" manual prepared by the SEC that describes the technical format and other requirements for an electronic submission. The EDGAR Filer Manual, which is updated periodically, can be downloaded from the SEC website ([www.sec.gov](http://www.sec.gov)). While electronic filing has become routine, the SEC has established a "Filer Support" line that registrants may call for assistance with unusual situations (1 202 551 8900).

Regulation S-T requires that, with a few exceptions, all filings and related correspondence with the SEC be submitted electronically. However, registrants may request a hardship exemption from electronic filing due to technical difficulties or undue burdens and expenses. The temporary hardship exemption is available automatically for unanticipated technical difficulties by filing Form TH, "Notification of Reliance on Temporary Hardship Exemption," within one business day of the required filing date. After filing on Form TH, registrants have six days to submit the filing on EDGAR without losing their timely-filer status. A continuing hardship exemption also may be granted by the SEC staff for a specific or indefinite period.

Exhibits filed prior to the registrant's transition to EDGAR reporting are not required to be refiled in electronic format. However, new exhibits must be filed electronically and amendments to previously filed paper exhibits require the amended exhibit to be electronically refiled in its entirety.

The EDGAR system provides the ability to include graphic and image files in documents, the ability to use hyperlinks, including links to previously filed documents on the SEC public website EDGAR database, and the ability to use the Internet to transmit filings to the EDGAR system. The SEC no longer accepts magnetic media (e.g., diskettes, tapes, cartridges). Filings should be submitted to EDGAR via the Internet or direct transmission. Filers may submit their filings in either ASCII or HTML format.

Manual signatures are no longer required. Instead, signatures in the electronic filing document should be typed. However, the registrant must maintain evidence of appropriate authorization (see Signatures and director involvement later in this Section for further discussion).

## 2.3 XBRL

### 2.3.1 Background

Over the past several years, the SEC has been actively working on an interactive data initiative to significantly increase the speed and accuracy of data retrieval and analysis. XBRL, the financial and operational business reporting offshoot of Extensible Markup Language (XML), is a freely licensable, open technology standard. Instead of treating financial information as a block of text – as in a standard internet page or a printed document – XBRL provides a computer readable identifying "tag" for each individual item of data. For example, "net profit" has its own unique tag. As a result of attaching

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<sup>7</sup> Effective 5 December 2008, the SEC's *Foreign Issuer Reporting Enhancements* (FIRE) rule (SEC Release Nos. 33-8959 and 34-58620) accelerates the reporting deadline for annual reports filed on Form 20-F by FPIs from six months to four months after their fiscal year-end, regardless of the size of issuer, after a three-year transition period. That is, a foreign private issuer must begin to comply with the requirement to file its Form 20-F annual report on an accelerated basis for its first fiscal year ending on or after 15 December 2011. However, the text of Rule 3-09 of Regulation S-X was not amended by the FIRE rule. Rule 3-09 continues to allow the financial statements of foreign business investees to be filed in the investor's Form 10-K up to six months after the registrant's or the investee's fiscal year-end, whichever is later.

identifying XBRL tags to individual pieces of data, a business-reporting document becomes “smart” (i.e., a computer can read the data in context, search for information or perform calculations).

The SEC instituted its XBRL Voluntary Financial Reporting Program (VFRP) in the spring of 2005 to allow registrants to furnish supplemental financial information using XBRL through EDGAR. Through the VFRP, the SEC assessed both the ability of registrants to tag their financial information using XBRL and the benefits of using XBRL tagged data for analysis.

## 2.3.2 SEC rulemaking

On 30 January 2009, the SEC published a final rule<sup>8</sup> that required the use of XBRL for SEC financial reporting beginning, for certain companies, with quarterly periods ending on or after 15 June 2009. Under the final rule, XBRL was phased in over three years. Interactive data is required for the entirety of the financial statements, although detailed tagging of the footnotes and schedules is phased in during a company’s second year of compliance. The SEC is not requiring tagging of MD&A or executive compensation disclosures.

The final rule applies to most SEC reporting companies. However, XBRL financial statement tagging does not apply to:

- ▶ An investment company registered under the Investment Company Act
- ▶ A “business development company,” as defined in Section 2(a)(48) of the Investment Company Act
- ▶ A foreign private issuer (FPI) that presents its financial statements without using either US GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB)

### 2.3.2.1 XBRL phase-in schedule

As previously stated, XBRL was phased in over three years beginning with the first Form 10-Q (or first Form 20-F or 40-F, if applicable) for the period ending after the applicable transition date, as follows:

- ▶ For fiscal periods ending on or after 15 June 2009, US public companies and foreign private issuers that (1) file financial statements with the SEC using US GAAP and (2) have a worldwide public float over \$5 billion
- ▶ For fiscal periods ending on or after 15 June 2010, all other large accelerated filers using US GAAP
- ▶ For fiscal periods ending on or after 15 June 2011, all other filers (including smaller reporting companies and all filers that use IFRS)

As previously stated, interactive data is required for the entire financial statements, although detailed tagging of the footnotes and schedules is phased in during a company’s second year of compliance. A company can voluntarily supply detailed tagged footnotes and schedules sooner than the second year of its compliance; however, voluntary interactive data submissions must comply with all aspects of the final rule.

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<sup>8</sup> Interactive Data to Improve Financial Reporting (Release Nos. 33-9002 and 34-59324)



### 2.3.2.2 XBRL exhibit requirements

XBRL-tagged financial information is submitted via EDGAR in addition to, but not as a replacement of, the plain text financial statements. XBRL-tagged financial information must be provided as an additional exhibit to annual and quarterly reports, transition reports and reports on Form 8-K and 6-K that contain updated financial statements of the registrant that were previously tagged in a periodic report, as well as non-IPO Securities Act registration statements.<sup>9</sup> The final rule also requires a company to post the XBRL information on its website for at least 12 months.

XBRL exhibits are due at the same time as the related EDGAR filing. However, the SEC will allow a one-time 30-day grace period to provide the XBRL Exhibit related to a company's first required XBRL submission. If a company uses the 30-day grace period, it must file the XBRL Exhibit as an amendment to the related SEC filing. In addition, if a company experiences unanticipated technical difficulties preventing it from preparing and submitting its XBRL exhibit in a timely manner, an extension for up to six business days is available under the temporary hardship exemption provided by Rule 201(c) of Regulation S-T.

Information required to be formatted in XBRL includes a company's primary financial statements, notes and financial statement schedules for all periods included in the financial statements. In its first year of compliance (i.e., for the filing of one Form 10-K and three Forms 10-Q), a company could tag entire notes and schedules in XBRL as blocks of text. However, in its second year of compliance (e.g., beginning with the fifth periodic Exchange Act report required to provide tagged data), a company will be required to provide XBRL tags for the numerical details within its notes and schedules. However, a registrant may but is not required to tag narrative portions of its notes and schedules.<sup>10</sup>

### 2.3.2.3 Exhibit previewer and SEC observations

The SEC has made available on its website an XBRL exhibit "previewer" that allows filers to see how an interactive data submission will appear on the SEC's website when submitted via EDGAR (i.e., how the submission will be "rendered"). After a filer submits a "test" filing and corrects any identified validation errors, any rendering issues may be checked using the SEC's previewer. The previewer is available at <https://datapreview.sec.gov/previewer>.

On 15 June 2011, the SEC staff addressed XBRL filing issues by publishing the third edition of Staff Observations from Review of Interactive Data Financial Statements.<sup>11</sup> The publication addresses observations after the largest issuers began detailed tagging their annual financial statements last year. The publication is available on the SEC's website at <http://www.sec.gov/spotlight/xbrl/staff-review-observations.shtml>.

The staff of the SEC Office of Interactive Disclosure periodically updates its interpretative responses to frequently asked questions related to XBRL: Staff Interpretations and FAQs Related to Interactive Data Disclosure, which is available at <http://www.sec.gov/spotlight/xbrl/staff-interps.shtml>.

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<sup>9</sup> For an SEC Reporting company subject to interactive data reporting, if its registration statement (e.g., Form S-3) incorporates the registrant's financial statements by reference, the filing may indicate that the XBRL exhibit was previously provided. Conversely, if the filing contains the registrant's financial statements (e.g., Form S-1), it must also provide an XBRL exhibit, but not until an offering price or price range has been determined.

<sup>10</sup> For further details regarding preparing and submitting XBRL exhibits refer to our To the Point publications, *Key insights for companies with new XBRL requirements* (Ernst & Young No. CC0321) and *SEC staff observations of common XBRL submission errors* (Ernst & Young No. CC0326).

<sup>11</sup> The SEC staff published its initial observations on 6 October 2009 following a limited review of initial XBRL exhibits in the second quarter of 2009 Form 10-Qs. The second edition of this publication was issued on 1 November 2010 following a limited review of the first group of detailed tagged interim financial statements. These staff observations are located on the SEC's website at <http://www.sec.gov/spotlight/xbrl/staff-review-observations.shtml>.

The SEC staff's C&DIs related to interactive data are also available at <http://www.sec.gov/divisions/corpfin/guidance/interactivedatainterp.htm>.

#### **2.3.2.4 Disclosure controls and procedures considerations**

An issuer should document the processes it follows and identify the controls and procedures that it uses and relies upon in creating its XBRL exhibits. An issuer also should consider establishing processes and documentation to provide evidence that those controls and procedures are performed and reviewed. For the purposes of evaluating the effectiveness of disclosure controls and procedures under Exchange Act Rules 13a-15 and 15d-15 and Item 307 of Regulation S-K, companies should:

- ▶ Identify the controls and procedures that ensure compliance with SEC reporting requirements for XBRL exhibits
- ▶ Assess whether the disclosure controls and procedures result in a timely, accurate and complete XBRL exhibit
- ▶ Assess whether the XBRL Exhibit presents the financial information accurately in all material respects

These assessments do not need to be as extensive as what's required to support management's reporting and the independent auditors' attestation of internal controls over financial reporting

#### **2.3.2.5 Internal control over financial reporting**

Although most issuers will not have XBRL controls that fall within the scope of internal control over financial reporting, the SEC observes that as technology associated with interactive data improves, the integration of such technology into the overall financial reporting process could cause the related controls and procedures to fall within the scope of internal control over financial reporting.

#### **2.3.2.6 Consequences of non-compliance**

If a company is delinquent in providing its XBRL exhibits to the SEC or in posting the interactive data to its company website, the company will be deemed not to be current in its Exchange Act reporting obligations. Consequently, the company could not use short-form registration statements on Forms S-3, F-3 or S-8, and it would not be considered to have adequate current public information for purposes of the resale exemption safe harbor under Rule 144 of the Securities Act. However, such a delinquent company will be considered to be current in its reporting obligations immediately upon filing the XBRL Exhibits.

#### **2.3.2.7 Liability considerations**

Following a company's initial 24-month XBRL reporting period, the interactive data file submitted to the SEC will be subject to the same liability as the traditional financial statements. An XBRL exhibit that a company submits within 24 months of its initial XBRL compliance date (or until 31 October 2014, whichever is earlier) will not be considered "filed" or part of a registration statement or prospectus for purposes of Sections 11 and 12 of the Securities Act or Section 18 of the Exchange Act. This 24-month period is not extended by an issuer's use of any applicable grace periods. This 24-month period expired in 2011 for filers in the first phase-in group (e.g., expiration was on 10 August 2011 for a calendar year-end company in the first phase-in group, as discussed in Section 2.3.2.1).

#### **2.3.2.8 SEC Form cover page requirements**

The SEC's final XBRL rule amended the cover page of the Form 10-K to require a company to indicate, by a Yes or No checkmark, whether it has submitted (and posted to its website) all required XBRL exhibits. A company should not check either box until it is required to submit an XBRL exhibit (i.e., it should leave both check boxes blank).

### 2.3.2.9 AICPA attestation guidance

Management is responsible for the completeness, accuracy and consistency of its XBRL data. The standards of the PCAOB and the rules and regulations of the SEC do not require that an independent auditor perform procedures related to the XBRL exhibit, or to the related viewable interactive data, as part of its audit services. In addition, unlike other information in documents containing the audited financial statements (e.g., MD&A), the independent auditor is not required to read the XBRL submission for material inconsistencies with the information or manner of its presentation appearing in the financial statements as part of its audit procedures.

Although the SEC does not require independent auditor assurance on the XBRL Exhibit, in April 2009, the AICPA issued Statement of Position 09-1, *Performing Agreed-Upon Procedures Engagements That Addresses the Completeness, Accuracy, or Consistency of XBRL-Tagged Data* (SOP 09-01). SOP 09-01 provides practitioner guidance for performing Agreed-Upon Procedures (AUP) on XBRL data. SOP 09-1 describes the components of an XBRL AUP engagement.

### 2.3.3 Transition issues<sup>12</sup>

The annual measurement of a company's worldwide public float could affect its membership in an XBRL phase-in group.

**Transition following an increase in public float:** An increase in a company's public float could require the registrant to accelerate its XBRL implementation (i.e., require that it join an earlier XBRL phase-in group). A company's worldwide public float must be measured annually, and such measurement determines the XBRL phase-in group to which the company belongs. This annual determination supersedes any previous conclusions and affects the company's periodic reporting prospectively. The SEC staff observed that this approach is consistent with how a registrant determines its accelerated filer status and subsequent reporting deadlines.

The SEC staff stated that when an increase in worldwide public float causes a company to join an earlier phase-in group, a company must begin detail tagging in its next SEC filing as if it had always been part of that phase-in group. For example, if the 2011 Form 10-K is the first SEC filing as a large accelerated filer, the calendar year registrant must detail tag the financial statement notes.

**Transition following a decrease in public float:** A decrease in a registrant's public float could result in the registrant joining a later XBRL phase-in group. If a company joins a later phase-in group, it may elect to begin following the timeline requirements for its XBRL exhibits (i.e., timeline requirements for detailed tagging) as outlined in Section 2.3.2.2. For example, if a calendar year registrant ceases to be a large accelerated filer on 31 December 2011, the financial statement notes in its 2011 Form 10-K are not required to be detail tagged.

### 2.3.4 Preparing XBRL exhibits

While some registrants self-prepare their XBRL exhibits, others outsource preparation to third party service providers. The XBRL software and services market continues to grow and change to meet the demands of all levels of SEC registrants, including different levels of service (e.g., full, partial, in-house).<sup>13</sup>

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<sup>12</sup> See *Hot Topic: Annual re-assessment of compliance with SEC XBRL phase-in* (Ernst & Young No. CC0300) for a further discussion of XBRL transition issues.

<sup>13</sup> For further information about XBRL service providers and software vendors, see our publication, *XBRL service providers and software vendors* (Ernst & Young No. BB2073).

### 2.3.4.1

#### Taxonomies

On 28 April 2008, XBRL US, a not-for-profit organization that focuses on the progress of XBRL in the US, completed, under a contract with the SEC, Version 1.0 of the US GAAP XBRL taxonomy (or a dictionary of standards tags) and accompanying Preparers' Guide. The Version 1.0 taxonomy was comprehensive, containing over 13,000 distinct elements. The Preparers' Guide outlines the process for creating public company financials in XBRL format and includes rules and preferred practices, as well as a detailed glossary of terms and case studies illustrating the process for public company preparers. Following the Version 1.0 taxonomy, the second and third versions of the US GAAP taxonomies were approved and made available for use in July 2009 (the 2009 US GAAP XBRL taxonomy) and February 2011 (the 2011 US GAAP XBRL taxonomy), respectively. The updated taxonomies incorporated comments received on earlier versions and updates for recent accounting standards.

On 1 September 2011, the Financial Accounting Foundation (FAF), the entity responsible for oversight of the FASB, released a draft of the 2012 US GAAP XBRL Financial Reporting Taxonomy for public comment. The draft 2012 taxonomy is available at the FASB website ([www.fasb.org](http://www.fasb.org)) and may be used for SEC XBRL exhibit submissions only after approval by the SEC. The taxonomy is expected to be finalized and published in early 2012. Until then, companies should continue to use the 2011 US GAAP taxonomy.<sup>14</sup>

The draft 2012 taxonomy includes new content related to recent accounting standards updates, tag definition updates, superseded tags and other changes to existing tags.

## 2.4

### Signatures and director involvement

The following persons, or persons performing similar functions, must sign the Form 10-K: the principal executive officer or officers, the principal financial officer, the controller or principal accounting officer and at least a majority of the board of directors or persons performing similar functions.<sup>15</sup> When an officer also signs as a director, the Form 10-K must indicate both capacities below the signature.

When adopting the requirement for directors' signatures, the SEC stated that its intention was to encourage directors to devote attention to reviewing the Form 10-K and "to seek the involvement of other professionals to the degree necessary to give themselves sufficient comfort."

Documents filed electronically necessarily include typed, rather than manual signatures. Registrants must maintain a manually signed signature page or other document authenticating and acknowledging the signatures included in all electronic filings. This document must be executed before or at the same time the filing is made and must be retained for five years. Accordingly, the filing of typed signatures does not relieve the registrant of its obligation to obtain manual signatures from the officers, directors and others (e.g., auditors) before the filing is submitted. On request, registrants must provide the SEC with documentation supporting typed signatures.

The requirement for directors to sign the Form 10-K may affect the timing of the preparation of Form 10-K. Management should develop procedures to obtain their signatures. This might be done by scheduling a meeting of the board of directors or its audit committee shortly before the Form 10-K is due so that directors may review the form, possibly with counsel and the independent auditors. Alternatively, the directors may sign a signature page in advance, or execute a power of attorney, and approve the use of their signatures after receiving a draft of the Form 10-K.

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<sup>14</sup> For further details, see our Technical Line publication, *Using the XBRL US GAAP taxonomy* (Ernst & Young No. CC0322).

<sup>15</sup> For asset-backed security issuers, the Form 10-K must be signed either (1) on behalf of the depositor by the senior officer in charge of securitization of the depositor or (2) on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer.

Regarding the signing of a report or other documentation through power of attorney, Item 601(b)(24) of Regulation S-K requires the following:

- ▶ If the name of any officer or director is signed pursuant to a power of attorney, signed copies of such power of attorney must be filed with the SEC.
- ▶ If the power of attorney is included elsewhere in the filing, a reference must be made in the index to the part of the filing containing the power of attorney.
- ▶ If the name of any officer signing on behalf of the registrant is signed by a power of attorney, certified copies of the board of directors' resolution authorizing such signature must be filed with the SEC.
- ▶ A power of attorney should relate only to a specific SEC filing or amendment. A power of attorney that confers general authority is not acceptable.

## 2.5 Section 906 management certifications

Section 906 of the Sarbanes-Oxley Act (Section 1350 of Chapter 63 of Title 18 of the United States Code) requires a separate certification by the CEO and CFO (or their equivalent)<sup>16</sup> to "accompany" each periodic report that includes financial statements. The contents of this certification are specified in Section 906(a) of the Sarbanes-Oxley Act, *Certifications of Periodic Financial Reports*, not in an SEC rule. The certification must state that the periodic report "fully complies" with the requirements of Exchange Act Section 13(a) and 15(d) and that "information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer." The certification can take the form of a single certification signed by both the company's CEO and CFO. Section 906 provides for criminal penalties for an officer who provides the certification "knowing" it to be untrue. They can be fined up to \$1 million and imprisoned for up to 10 years (with harsher penalties for "willful" violations). The Section 906 certification requirement applies to all registrants, except asset-backed security issuers.

The Section 906 certification is required to be "furnished" (versus filed) as Exhibit 32 to annual and quarterly SEC reports. As "furnished" information, the Section 906 certification is not subject to the civil liability provisions of Section 18 of the Exchange Act, and would not be incorporated by reference into Securities Act registration statements unless the issuer expressly specifies otherwise. An example of the Section 906 certification is included in Section 10 of this publication.

For signed documents filed electronically, SEC rules require issuers to retain the manually signed original of each Section 906 management certification for five years. In addition, the SEC has stated that an individual required to sign the Section 906 certification "may not have the certification signed on his or her behalf pursuant to a power of attorney or other form of confirming authority."

## 2.6 Transmittal letter

General instruction D(3) to Form 10-K requires registrants to discuss in a transmittal letter to the Form 10-K any changes in accounting principles or practices, or in the method of applying those principles or practices, from its last Form 10-K. This requirement is separate from the requirement to include, as an exhibit, a "preferability letter" from the independent auditors regarding a change in accounting principle.

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<sup>16</sup> The SEC certification rules refer to "each principal executive officer" and "each principal financial officer," which will be referred to as CEO and CFO for purposes of the discussion of certifications in this publication.

## 2.7 Content of the report

Instructions to Form 10-K, Regulations 12B, 13A, 15D and AB under the Exchange Act, and Regulations S-K and S-X include Form 10-K requirements. The form itself, which is divided into four parts, is merely a guide and, except for the facing page, should not be used as a blank form to be filled in. The report should include all required item numbers and captions (e.g., Item 1, *Business*). When required information is presented elsewhere, generally it is not necessary to repeat the information, provided that it is adequately cross-referenced. All information should be given as of the latest practicable date, except where it must be given for the fiscal year-end or as of a specified date.

Regulation S-K includes the nonfinancial statement disclosure requirements for Exchange Act periodic reports and Securities Act registration statements. With the notable exception of financial statements and schedules, which are governed by Regulation S-X, the instructions to Form 10-K generally refer to the disclosure requirements of Regulation S-K.

The following table shows the item number, caption and location of the disclosure instructions, which is noted parenthetically and refers to the items in Regulation S-K for the various items of Form 10-K.

### Form 10-K

Item No.	Disclosure Required
<b>Part I</b>	
Item 1	Business (Item 101)
Item 1A	Risk Factors (Item 503(c))
Item 1B	Unresolved Staff Comments (The disclosure requirements are included in the Instructions to Form 10-K.)
Item 2	Properties (Item 102)
Item 3	Legal Proceedings (Item 103)
Item 4	Mine Safety Disclosures (Item 104)
<b>Part II</b>	
Item 5	Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities (Items 201, 701 and 703)
Item 6	Selected Financial Data (Item 301)
Item 7	Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303)
Item 7A	Quantitative and Qualitative Disclosures About Market Risk (Item 305)
Item 8	Financial Statements and Supplementary Data (Item 302 – The financial statements are subject to the disclosure requirements of Regulation S-X.)
Item 9	Changes in and Disagreements with Accountants on Accounting and Financial Disclosure (Item 304(b))
Item 9A	Controls and Procedures (Items 307 and 308, or 308T, if applicable)
Item 9B	Other Information (The disclosure requirements refer to Form 8-K.)
<b>Part III</b>	
Item 10	Directors, Executive Officers and Corporate Governance (Items 401, 405, 406 and 407(c)(3), (d)(4) and (d)(5))
Item 11	Executive Compensation (Items 402 and 407(e)(4) and (e)(5))
Item 12	Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters (Items 201(d) and 403)
Item 13	Certain Relationships and Related Transactions, and Director Independence (Items 404 and 407(a))
Item 14	Principal Accountant Fees and Services (Item 9(e) of Schedule 14A)
<b>Part IV</b>	
Item 15	Exhibits, Financial Statement Schedules (Item 601 – The financial statements and financial schedules are subject to the provisions of Regulation S-X.)

Rule 12b-20 of the Exchange Act requires the registrant to disclose any material information, even if not specifically required, that may be necessary to keep the required information from being misleading.

Rule 12b-21 of the Exchange Act states that information required by any of the parts “need be given only insofar as it is known or reasonably available to the registrant.” Therefore, if obtaining the information involves unreasonable effort or expense, or it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted. When information is omitted, the registrant must:

- ▶ Give the information on the subject that it does possess or can acquire without unreasonable effort or expense, together with the sources thereof
- ▶ Include a statement either that an unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information

## 2.8

### Wholly owned subsidiaries

Wholly owned subsidiaries required to file an annual report on Form 10-K may furnish certain abbreviated disclosures if they meet *all* of the following conditions<sup>17</sup> as of the filing date:

- ▶ All of the registrant’s equity securities must be owned, directly or indirectly, by a single parent that is subject to the Exchange Act reporting requirements and has filed all applicable material pursuant to Sections 13, 14 or 15(d) of the Exchange Act.
- ▶ The registrant must name its parent in the description of its business.
- ▶ During the preceding 36 months and any subsequent period, there must not have been a material default in the payment of principal, interest, a sinking or purchase fund installment or any other material default not cured within 30 days, with respect to any indebtedness of the registrant or its subsidiaries or a material default in the payments of rentals under a long-term lease.
- ▶ The cover page of the Form 10-K must contain a statement that the registrant meets the conditions for filing the reduced disclosures.

Wholly owned subsidiaries that meet the conditions described above are not required to include any of the proxy disclosures otherwise required in Part III of Form 10-K. Further, only the following other items of Form 10-K are required:

Item 1	Business
Item 1A	Risk Factors
Item 1B	Unresolved Staff Comments
Item 2	Properties
Item 3	Legal Proceedings
Item 5	Market for the Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities (This item is required although it generally is not applicable to wholly owned subsidiaries.)
Item 7A	Quantitative and Qualitative Disclosures About Market Risk
Item 8	Financial Statements and Supplementary Data
Item 9	Changes in and Disagreements with Accountants on Accounting and Financial Disclosure
Item 9A	Controls and Procedures

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<sup>17</sup> Asset-backed issuers are not eligible for the abbreviated disclosures on Form 10-K.

Item 9B	Other Information
Item 14	Principal Accountant Fees and Services
Item 15	Exhibits, Financial Statement Schedules

In lieu of Item 6, *Selected Financial Data*, and Item 7, *Management's Discussion and Analysis of Financial Condition and Results of Operations*, the Form 10-K may include management's narrative analysis of the results of operations that explains the reasons for material changes in the amount of revenue and expense items between the most recent fiscal year presented and the immediately preceding fiscal year.

The responses to Item 1, *Business*, and Item 2, *Properties*, may be limited to a brief description of business done during the year and a brief description of material properties. The description of business should indicate the general nature and scope of the registrant's business, and material properties need be described only to the extent necessary to provide an understanding of the business. Exhibit 21 listing subsidiaries, otherwise called for by Item 15(c), also may be omitted.

Wholly owned subsidiaries are *not* exempt from the SEC requirements for the Section 302 and Section 906 management certifications, Item 307 disclosures about disclosure controls and procedures, and Item 308 reporting on internal control over financial reporting.

### 2.8.1 Wholly owned subsidiaries with guaranteed securities

Normally, if a 100%-owned subsidiary has publicly registered securities that are guaranteed by its parent, the parent's Form 10-K must include the audited consolidated financial statements of the subsidiary in order to comply with Rule 3-10 of Regulation S-X. Under Rule 3-10, the term "100%-owned" is defined as a subsidiary, all of whose outstanding voting shares and any outstanding securities convertible into its voting shares are owned, either directly or indirectly, by its parent company.

The SEC has provided an exception in certain circumstances to the financial statement requirements for a 100%-owned operating or finance<sup>18</sup> subsidiary that has publicly registered securities that are guaranteed by its parent. However, in all cases, the parent company should list as a registered security, on the cover of its Form 10-K, the guarantee of the subsidiary's security.

Rule 3-10 of Regulation S-X is complex and our *Form 10-K and registration statement checklist supplement to GAAP disclosure checklist* (Ernst & Young Form No. A69) should be reviewed when evaluating compliance with Rule 3-10.<sup>19</sup> However, the following summarizes the exceptions provided under Rule 3-10 for wholly owned subsidiaries with guaranteed securities.

**Parent-only guarantee:** If a 100%-owned operating subsidiary's registered securities are fully and unconditionally guaranteed by the parent only, the parent's Form 10-K may present "condensed consolidating financial information" in lieu of separate audited financial statements of the operating subsidiary. On the other hand, if a 100%-owned finance subsidiary's registered securities are fully and unconditionally guaranteed by the parent only, the parent's Form 10-K may include certain footnote disclosures rather than presenting "condensed consolidating financial information."

**Parent and subsidiary guarantees:** If the parent and one or more other subsidiaries of the parent guarantee the securities issued by the 100%-owned operating or finance subsidiary, generally "condensed consolidating financial information" will be required as long as (1) all of the guarantees are

<sup>18</sup> A "finance subsidiary" is defined as a subsidiary with no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the security being registered and any other securities guaranteed by its parent company.

<sup>19</sup> Rule 3-10 of Regulation S-X also applies when the parent issues securities that are guaranteed by its subsidiaries. See our *Form 10-K and registration statement checklist supplement to GAAP disclosure checklist* (Ernst & Young Form No. A69) when evaluating overall compliance with Rule 3-10.



full and unconditional and (2) all of the guarantor subsidiaries are 100%-owned by the parent.

**Condensed consolidating financial information:** Condensed consolidating financial information should be in sufficient detail to allow investors to determine the nature of the assets held by, and the operations and cash flows of, each of the categories within the consolidating group (the parent, the subsidiary issuer, any combined affiliate guarantors whose guarantees are joint and several, each affiliate guarantor whose guarantee is not joint and several, and combined non-guarantors (if not minor<sup>20</sup>)) and is presented for the same periods for which financial statements are presented for the parent (and audited for those periods for which audited financial statements of the parent are required). The condensed consolidating financial information should continue to be presented as long as the guaranteed debt or preferred stock is outstanding.

**Narrative disclosure only:** In addition to the situation described above, there are two other situations in which *no* separate financial information would be required when a 100%-owned subsidiary issues securities, as long as the parent company financial statements include specified narrative disclosure. These situations are:

1. The 100%-owned operating subsidiary issues securities fully and unconditionally guaranteed by the parent only, the parent company has no independent assets or operations<sup>21</sup> and any subsidiaries of the parent company other than the subsidiary issuer are minor.
2. A 100%-owned finance subsidiary issues securities and its parent company and all other subsidiaries of its parent company guarantee those securities (or any non-guarantor subsidiaries are minor), all of the guarantees are full and unconditional and joint and several, and the parent company has no independent assets or operations.

**Full financial statements:** In other circumstances (e.g., the issuer of the guaranteed security is not 100%-owned by the parent guarantor, the parent's guarantee is not full and unconditional), all financial statements required by Form 10-K, including the financial statements of the operating or finance subsidiary issuer, are required in the Form 10-K of the parent, and all other periodic Exchange Act reports.

## 2.9 Combined periodic reporting

The SEC staff has indicated that it would not object to the filing of a combined periodic report (i.e., Form 10-K or 10-Q) for parent and subsidiary registrants and multiple series registrants in certain situations.

### 2.9.1 Parent and subsidiary

Parent and subsidiary registrants may file a combined periodic report if all of the following conditions are met:

- ▶ The parent company owns substantially all of the subsidiary;
- ▶ There are no more than nominal differences between the financial statements of the parent and the subsidiary and the non-financial disclosures of the parent and subsidiary are substantially similar; and
- ▶ All of the following items are included in the combined periodic report:

<sup>20</sup> Rule 3-10(h) of Regulation S-X states a subsidiary is "minor" if its total assets, stockholders' equity, revenues, income from continuing operations before income taxes, and cash flows from operating activities are each less than 3% of the parent company's corresponding consolidated amounts.

<sup>21</sup> Rule 3-10(h) of Regulation S-X states a parent company has no independent assets or operations if each of its total assets, revenues, income from continuing operations before income taxes, and cash flows from operating activities (excluding amounts related to its investment in its consolidated subsidiaries) is less than 3% of the corresponding consolidated amount.

- ▶ Separate audit reports for each entity
- ▶ Separately reviewed interim financial statements for each entity
- ▶ Separate reports on disclosure controls and procedures and internal control over financial reporting for each entity
- ▶ Separate complete sets of annual and interim financial statements (e.g., balance sheet, statement of operations, statement of comprehensive income, statement of cash flows and statement of changes in stockholders equity, as applicable)
- ▶ Separate footnotes for areas that differ between the parent and the subsidiary
- ▶ Separate CEO/CFO Certifications for each entity

## 2.9.2 Multiple series registrants

A multiple series registrant is a trust or partnership that offers the sale of its investments in multiple series, on a single registration statement. Because multiple series registrants are formed as trusts or partnerships under state law, each series is established as both a legal entity and as an SEC issuer; however, the trust or partnership is considered the only entity with SEC reporting requirements (i.e., the legal registrant). Because an investor invests in an individual series of the trust or partnership, financial statements of each individual series of the trust or partnership still must be provided. The SEC staff will not object to the filing of a combined periodic report for the trust or partnership and each individual series as long as certain separate reporting continues to be applied at both the legal registrant and the series level. Specifically, to qualify to file a combined periodic report, there must be separate assessments of materiality for purposes of Regulations S-K and S-X for the legal registrant and for each series and all of the following items must be separately provided for the legal registrant and for each series in the combined periodic report:

- ▶ Separate annual financial statements and audit reports or separately reviewed interim financial statements
- ▶ Separate reports on disclosure controls and procedures and internal control over financial reporting

Multiple series registrants also should include in the “controls and procedures” disclosure of their periodic reports a statement that the CEO/CFO certifications are applicable to each of the series as well as to the trust (partnership).

## 2.10 Incorporation by reference

Most of the information required in Form 10-K is required in other SEC filings or in the annual shareholders’ report prescribed by the SEC’s proxy requirements. Instead of reproducing information in the Form 10-K that has already been included in a previous SEC filing or an annual shareholders’ report, a registrant may incorporate by reference that information into the Form 10-K. For example, in lieu of reproducing the same financial statements in response to Item 8 of Form 10-K, a registrant may incorporate by reference into the Form 10-K the sections of the annual shareholders’ report containing the audited financial statements. Rule 303 of Regulation S-T stipulates that registrants that incorporate by reference all or portions of their annual reports to shareholders must file the incorporated portions in electronic form as an exhibit (Exhibit 13) to the Form 10-K filing.

Occasionally, information provided in one section of Form 10-K (e.g., Item 1) may meet the disclosure requirements of another section (e.g., Item 8). For example, the note to the consolidated financial statements about operating segments might include the following statement: “Segment and geographic area data for the years ended 31 December 20Y1, 20Y0 and 20X9 included on pages XX and XX of this report are incorporated by reference into these financial statements.” However, more commonly,

Item 1 of Form 10-K will incorporate by reference the segment disclosures provided in the audited financial statements.

General Instruction G to Form 10-K provides that information called for by Parts I and II (Items 1 through 9A or any portion thereof) *may* be incorporated by reference from the registrant's annual shareholders' report. As a condition to the incorporation of any information from the annual shareholders' report, the entire report must comply with the requirements of Rule 14a-3(b) or 14c-3(a) – the SEC requirements for annual shareholders' reports in conjunction with proxy statements or information statements. Thus, a registrant filing Form 10-K pursuant to Section 15(d)<sup>22</sup> must conform its annual shareholders' report to the SEC's proxy requirements, even though it is not otherwise required to do so, to incorporate any portion of the report into Form 10-K.

General Instruction G also provides that information called for by Part III of Form 10-K (Items 10, 11, 12, 13 and 14) may be incorporated by reference from the registrant's definitive proxy or information statement *if* the proxy or information statement is filed with the SEC not later than 120 days after the fiscal year-end. However, if the information called for by these items cannot be incorporated by reference, then it must either be included within Form 10-K when filed, or included by amendment on Form 10-K/A no later than 120 days after the fiscal year-end. In addition, as discussed in Section 10 of this publication, the following four disclosures required by Part III of Form 10-K are not required to be included in the annual proxy statement, and may be included in the Form 10-K as filed, or by amendment: (1) executive officers, (2) audit committee financial experts, (3) code of ethics and (4) changes in shareholder nominating procedures.

In addition to the instructions to Form 10-K, several rules under Regulation 12B contain instructions for incorporation by reference that are applicable to all Exchange Act filings, including Form 10-K.

Financial statements may be incorporated by reference when they meet the requirements of Form 10-K (subject to General Instruction G of Form 10-K discussed above regarding incorporation by reference from annual shareholders' reports). Financial statements and data must be presented in comparative format. Rule 12b-23 provides that a registrant cannot incorporate this material by reference unless it includes the entire period for which the comparative data is required. Thus, it is not permissible to separately incorporate by reference a previous year's financial statements or data.

A Form 10-K may incorporate by reference financial statements filed under the Securities Act, such as from a registration statement. When this is done, Rule 12b-36 requires that an auditor's consent be filed with the Form 10-K.

Rule 12b-23 also requires that when information is incorporated by reference, copies of that information or of the pertinent pages of the documents, which include the information, must be filed as an exhibit. However, the proxy or information statement incorporated by reference into Part III of Form 10-K need not be filed as an exhibit because it is otherwise filed with the SEC.

Rule 12b-23 also requires that:

- ▶ The matter incorporated by reference must be clearly identified in the reference by page, paragraph, caption or otherwise.
- ▶ If only certain portions of a document are incorporated by reference and filed with the report, the document from which the material is taken must be clearly identified in the reference.
- ▶ An express statement that the specified matter is incorporated by reference must be made at the particular place in the report where the information is required.

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<sup>22</sup> Unlike Sections 12(b) and 12(g) registrants, Section 15(d) reporting companies are not subject to the SEC's proxy rules.

- ▶ Material must not be incorporated by reference in any case where such incorporation would render the report incomplete, unclear or confusing.

When financial statements or other information included in the published annual shareholders' report are incorporated by reference, registrants should specifically identify the information so incorporated. Failure to do so could imply that the entire annual report (including the "president's letter" and other subjective information) is incorporated by reference; the entire annual report then could be deemed a "filed document" under the Exchange Act. This could unnecessarily expose the registrant to additional liability. Examples of recommended wording for incorporating information by reference are included in Section 10 of this publication.

Rule 12b-32 provides that exhibits may be incorporated by reference from previous filings. Thus, some required exhibits to Form 10-K, such as the registrant's articles of incorporation, could be incorporated by reference in the list of exhibits by referring to the form in which the exhibit was originally filed. However, Item 10(d) of Regulation S-K generally limits documents from which material can be incorporated by reference to those filed within the past five years. If any modification has occurred in the text of any document incorporated by reference since its filing, a registrant should electronically refile the entire document on EDGAR, including the modification.

## 2.11 Integrated reports

The SEC permits the annual shareholders' report and Form 10-K to be filed as a combined report. A registrant must satisfy the following conditions when integrating the annual shareholders' report with Form 10-K:

- ▶ The report must contain all the information required by Form 10-K, including the cover page and required signatures. A cross-reference sheet should indicate the location of information required by the items of the form. When responses to certain items of the form are separated within the report, an appropriate cross-reference should be made.
- ▶ If the information required by Part III of Form 10-K (see General Instruction G) is omitted, a definitive proxy or information statement must be filed not later than 120 days after the end of the fiscal year covered by the Form 10-K.

Information contained in integrated annual reports, other than that required by the Form 10-K instructions, is not deemed "filed" for purposes of liability under Section 18 of the Exchange Act. Before electing to prepare an integrated report, certain factors should be considered. Cost may not be a significant factor because the savings of preparing only one document may be offset by its larger size and by additional printing and mailing costs.<sup>23</sup> Another consideration is the additional disclosures required by the SEC rules. All information required by the Form 10-K instructions must be included. Some commercial companies will have to include audited financial statements of unconsolidated subsidiaries, investees and affiliates, as well as financial schedules.

Some registrants have followed a practice similar to integration – including the Form 10-K as a separate section in the annual shareholders' report. If the registrant wants to include the Form 10-K information in the annual shareholders' report, this approach may be more desirable than fully integrating the two reports. Registrants could continue to eliminate duplication through incorporation by reference.

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<sup>23</sup> Section 2 of our publication, *Proxy statements – An overview of the requirements* (Ernst & Young No. CC00339), discusses proxy delivery requirements, including the internet availability of proxy materials that also may reduce printing and mailing costs.

## 2.12 Summary annual reports

Some registrants have prepared “summary annual reports” in lieu of the traditional annual report most public companies provide to their shareholders. The summary annual report does not include all of the financial disclosures required by the SEC’s proxy rules, which require that audited consolidated financial statements, MD&A, selected financial data for five years and certain other information be included in an annual report to all shareholders when soliciting proxies for the annual meeting. Because the summary annual report is not used for compliance purposes, there are no specific rules on its content. The only restrictions on the information included in the summary annual report are (1) the general requirement that corporate communications by public companies must not include false or misleading information or fail to disclose material information that would make the communications not misleading (i.e., Rule 10b-5 of the Exchange Act) and (2) the provisions of Regulation G with respect to any non-GAAP financial measures presented. Registrants that use a summary annual report must continue to provide shareholders with the complete information required under the proxy rules, which may be included in an addendum to the annual meeting proxy statement. Because the use of a summary annual report does not reduce the amount of information that must be provided to shareholders, its use has been limited.

## 2.13 Amendments

Occasionally, a Form 10-K may be deficient because a registrant has omitted material information, or because the registrant has not prepared the financial statements in accordance with generally accepted accounting principles or Regulation S-X. In other cases, the registrant may choose to file the financial schedules (see Section 7 – Financial schedules) as an amendment to the Form 10-K no later than 30 days after the applicable due date of the Form 10-K. Alternatively, under particular circumstances, the registrant may have to file Part III information (regarding directors and executive officers and executive compensation and transactions) after the initial filing of Form 10-K but within 120 days of the fiscal year-end. Under these circumstances, an amendment to Form 10-K is required. Amendments should be filed only after review by legal counsel and the independent auditors.

All amendments to Exchange Act reports should be filed under cover of the form amended, marked with the letter “A” to designate the document as an amendment (e.g., Form 10-K/A). The amended report should indicate the reasons for the revisions included therein in an explanatory note. The amendment must include the entire item as amended, rather than just the amended or additional text (e.g., if the liquidity discussion within MD&A is amended, the entire Item 7, *Management’s Discussion and Analysis of Financial Condition and Results of Operations*, should be refiled). However, based on informal discussions with the SEC staff, a registrant is not required to refile the entire Item 8, *Financial Statements and Supplementary Data*, when filing the financial schedules as an amendment to a previously filed Form 10-K.

Amendments must be signed on behalf of the registrant by a duly authorized representative of the registrant (see Signatures and director involvement above for further discussion). In addition, each CEO and CFO must provide a new management certification. The CEO and CFO must furnish, as Exhibit 32, the complete Section 906 certification as illustrated in Section 10 of this publication. However, in lieu of the complete Section 302 certification as illustrated in Section 10 of this publication, the CEO and CFO may file, as Exhibit 31, a modified Section 302 certification (see Section 4 – Part II for further information about the Section 302 certification). The following example illustrates the modified Section 302 certification filed as Exhibit 31 to an amended annual report on Form 10-K/A.

**Illustration 2-1: Modified Section 302 certification in amendment****Exhibit 31.1****CERTIFICATION**

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 10-K/A of [identify registrant];
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report; and
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the [registrant] as of, and for, the periods presented in this report.

Date:

[Signature]

[Title]

**2.14****Forward-looking information**

In December 1995, Congress overrode President Clinton's veto and enacted the Private Securities Litigation Reform Act of 1995 (Litigation Reform Act). One of the most important aspects of the Litigation Reform Act is its amendment of the federal securities laws to add a "safe harbor" provision, which protects public companies from liability in private litigation with respect to forward-looking statements (e.g., estimates, projections) made by them and by others on their behalf. This protection is provided when a company includes appropriate cautionary language when making a forward-looking statement. The Litigation Reform Act's safe harbor (Section 27A of the Securities Act and Section 21E of the Exchange Act) is intended to promote disclosures about a company's future prospects by reducing the threat of abusive litigation when those predictions fail to materialize.

Rule 175 of the Securities Act and Rule 3b-6 of the Exchange Act (collectively, the SEC safe harbor) provide protection from liability under the federal securities laws for forward-looking statements made in filings with the SEC. To qualify for protection under the SEC safe harbor, a forward-looking statement has to be made in "good faith" and with a "reasonable basis." Critics believed the SEC safe harbor had been ineffective because its protection depends on the defendant's state of mind. As a result, courts had been reluctant to dismiss private lawsuits before allowing plaintiffs to complete discovery, which can be protracted and costly to the defendant. The risk of costly litigation led many registrants to avoid disclosing forward-looking information to the extent possible.<sup>24</sup>

The statutory safe harbor provided by the Litigation Reform Act provides protection only in private litigation. In cases brought by the SEC, the defendant only can rely on the SEC safe harbor, and the SEC can obtain injunctive or other relief, including a civil penalty, if it proves that the defendant deliberately or recklessly made a false or misleading forward-looking statement.

<sup>24</sup> In certain circumstances, forward-looking information is required to be disclosed, particularly in MD&A, which must include a discussion of certain "known trends and uncertainties." In addition, certain predictions must be disclosed in going-private transactions.

The purpose of the statutory safe harbor is to provide an objective legal standard, which does not involve the defendant's state of mind, against which courts can evaluate allegedly fraudulent forward-looking statements and dismiss cases where those statements were immaterial because they were made in a sufficiently cautionary manner. To qualify for protection under the statutory safe harbor, forward-looking statements must be (1) identified as forward-looking statements and (2) "accompanied by meaningful cautionary language identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." The Litigation Reform Act still allows courts to conclude that allegedly fraudulent forward-looking statements were immaterial, and thus not actionable, even though those statements were not made in this manner. However, when forward-looking statements are made in a manner to qualify for safe harbor protection, the Litigation Reform Act protects against any liability in private litigation related to those statements.

The Litigation Reform Act also raises the standard of liability with respect to forward-looking statements by requiring "actual knowledge" that the statement was false or misleading. Consequently, if a private lawsuit (i.e., one not brought by the SEC) involving an allegedly fraudulent forward-looking statement comes to trial, the plaintiff must prove that the person who made the statement knew (or, in the case of a statement made by a business, the executive officer who approved the statement knew) that the statement was false or misleading. However, if the statement in question was identified as a forward-looking statement and was accompanied by meaningful cautionary language, the courts can dismiss private lawsuits without allowing discovery and a trial to examine the defendant's state of mind.

Registrants should consult their legal counsel regarding protection of their forward-looking disclosures under the safe harbor. In evaluating whether to seek safe harbor protection, a company may wish to consider the degree of risk that actual results could differ materially from the forward-looking disclosure and the exposure that might result from any such material difference. When a company makes several forward-looking statements with common risk factors, it may wish to provide a cross-reference to a single presentation of cautionary language about those risk factors.

**Meaningful cautionary language:** The statutory safe harbor's requirement for meaningful cautionary language essentially adopted the judicial doctrine (known as "bespeaks caution") that had developed under case law. Under this doctrine, a number of federal courts determined that sufficient cautionary language renders an allegedly misleading forward-looking statement immaterial as a matter of law. To qualify as "meaningful," the cautionary language accompanying forward-looking statements must provide substantive information about risk factors that realistically could cause actual results to differ materially from those in the forward-looking statement. In addition, such cautionary language must be relevant to the particular projection and thus must be tailored to the circumstances. "Boilerplate" cautionary language is insufficient. Cautionary language should be prominently disclosed and communicate the degree of risk that results could differ from the forward-looking statement.

Whether the cautionary language that accompanies a forward-looking statement is "meaningful" ultimately will be determined in a court of law. However, companies seeking safe harbor protection for their forward-looking statements should disclose significant known risk factors that are most likely to affect results. As a basic premise, the cautionary language should set out all significant and relevant assumptions underlying the forward-looking statement. The cautionary language should then specifically identify factors that could cause those assumptions to be wrong. To the extent possible, the cautionary language should identify the relative effect those factors could have on whether the projection turns out to be wrong. Safe harbor protection does not depend on identifying the particular factor that causes the forward-looking statement not to come true. However, there may be situations where a company has a strong justification (e.g., the risk of significant competitive harm) for omitting an important known risk factor from its cautionary language.

**Forward-looking statements:** The Litigation Reform Act's definition of "forward-looking statement" is generally consistent with the corresponding definition under the SEC safe harbor. Forward-looking statements include: (1) a statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items; (2) a statement of the plans and objectives of management for future operations; (3) a statement of future economic performance, including such statements in MD&A; and (4) any statement of the assumptions underlying or relating to any forward-looking statement.

To eliminate any question as to the availability of the safe harbor for any forward-looking statements, FR-67, *Disclosure in Management's Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations*, extended the safe harbor to the information, other than historical facts, provided in MD&A in response to the disclosure requirements about off-balance sheet arrangements and aggregate contractual obligations. Moreover, FR-67 states that compliance with the specified disclosures about off-balance sheet arrangements constitutes meaningful cautionary language for purposes of qualifying for protection under the safe harbor. However, a company still would be advised to provide meaningful cautionary language with respect to forward-looking statements made as part of its MD&A disclosure of aggregate contractual obligations.

**Eligibility:** Under the Litigation Reform Act, only certain forward-looking statements are eligible for safe harbor protection. The safe harbor applies to forward-looking statements made by, among others, (1) an issuer subject to the reporting requirements of the Exchange Act and (2) persons acting on behalf of such an issuer (e.g., officer, director, employee).

The Litigation Reform Act excludes from safe harbor protection, statements made by or on behalf of certain issuers. Specifically, the safe harbor is not available for companies making their initial public offering, investment companies, partnerships, limited liability companies, direct participation investment programs, blank check companies or penny stock issuers. The safe harbor also is not available for an issuer that during the three years preceding such statement was found to have violated specified laws. Safe harbor protection would not be available to any person convicted of any felony or misdemeanor described in clauses (i) through (iv) of Section 15(b)(4)(B) of the Exchange Act, or who, as a result of a governmental action, received a judicial or administrative decree or order that addresses violations of the antifraud provisions of the securities laws. In addition, the Litigation Reform Act excludes from safe harbor protection statements made in connection with certain types of transactions or in certain documents. The safe harbor is not available for, among other things, financial statements prepared in accordance with generally accepted accounting principles. Even though the safe harbor excludes certain issuers, transactions and documents, in those circumstances an issuer still may conclude that it is appropriate and prudent to include cautionary language in connection with any forward-looking statements.

**Duty to update:** The Litigation Reform Act provides that there is no duty to update a forward-looking statement (i.e., a duty to update a statement that was true when made, but which became untrue through later events). However, the Litigation Reform Act is silent as to whether there is a duty to correct a forward-looking statement (i.e., a duty to correct a statement that was false when made). Case law implies that a duty to correct does exist. Because it is often difficult to distinguish between a duty to update and a duty to correct, issuers may conclude that updating previous forward-looking statements is a prudent policy in most circumstances, notwithstanding the Litigation Reform Act's provision that such updating is not required.



**Oral statements:** The Litigation Reform Act extended safe harbor protection to oral forward-looking statements, such as those made in conference calls to discuss quarterly and annual results. The safe harbor is available for oral statements made by officers, directors, employees and issuers that are otherwise eligible for the safe harbor (as long as those statements are not made in connection with transactions excluded from safe harbor protection). To qualify under the safe harbor, an oral statement must be identified as a forward-looking statement and must state that results could materially differ from the projection or estimate. However, the Litigation Reform Act does not require the speaker to identify the important factors that could cause results to differ materially from the projection. That is, the speaker is not required to state the meaningful cautionary language that would be necessary if the communication were in writing. Instead, the speaker may refer to “readily available” written documents (e.g., SEC filings) containing meaningful cautionary language that is appropriate to the circumstances.

A number of companies provide cautionary language in Forms 10-K and 10-Q, or in a Form 8-K report, which they can refer to when they make oral presentations that include forward-looking statements. In these circumstances, it is important that companies update the cautionary language periodically, as dictated by economic, industry and business developments, so that the statements remain meaningful and provide the desired safe harbor protection.

#### **Illustration 2-2: Cautionary language (risk factors)**

Forward-looking statements in this report, including without limitation, statements relating to the Company’s plans, strategies, objectives, expectations, intentions and adequacy of resources, are made pursuant to the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. The words “believe,” “expect,” “anticipate,” “intend,” “estimate” and similar expressions are intended to identify forward-looking statements. These statements are not guarantees of future performance and involve certain risks, uncertainties and assumptions that are difficult to predict. Therefore, actual outcomes and results could differ materially from what is expressed or forecasted in such forward-looking statements. These risks and uncertainties include, among others:

*Note: Registrant should insert here a meaningful description of the factors that could cause actual results to differ materially from those in the forward-looking statement(s).*

This list of important factors is not exclusive. The Company undertakes no obligation to publicly update or revise any forward-looking statement, whether as a result of new information, future events, changes in assumptions or otherwise.

*Note: The Safe Harbor disclosure above is for illustrative purposes only. Whether particular forward-looking statements (including cautionary language or the placement of disclosures) are within the meaning of Section 27A of the Securities Act and Section 21E of the Exchange Act would depend on relevant facts and applicable case law.*

## **2.15**

## **Non-GAAP financial measures**

### **2.15.1**

### **Definition**

FR-65, *Conditions for Use of Non-GAAP Financial Measures*, defines a “non-GAAP financial measure” as a numerical measure of a company’s historical or future financial performance, financial position or cash flows that excludes (includes) amounts, or is subject to adjustments that have the effect of excluding (including) amounts, that are included (excluded) in the most directly comparable measure calculated in accordance with GAAP. Thus, non-GAAP financial measures may be forward-looking. Examples of non-GAAP financial measures include EBITDA (earnings before interest, taxes, depreciation and amortization), “free cash flow” and operating income before “special items.”

The definition of non-GAAP financial measures specifically excludes measures that are required to be disclosed by GAAP, SEC rules or an applicable system of regulation imposed by a government, governmental authority or self-regulatory organization (e.g., capital or reserves calculated for regulatory purposes). In addition, non-GAAP financial measures do not include certain statistical and operating measures. For example, non-GAAP financial measures do not include unit sales, number of employees, number of subscribers, number of advertisers or any ratios or measures that are calculated using financial amounts calculated in accordance with GAAP. A ratio that includes a financial statistic that is a non-GAAP financial measure also is considered a non-GAAP financial measure. For example, if “same store sales” were not calculated using sales revenue determined under GAAP, the statistic would be considered a non-GAAP financial measure. Moreover, forward-looking information is not considered a non-GAAP financial measure as long as the information is determined using GAAP-based measurement principles. In addition, the definition of non-GAAP financial measures excludes measures for business segments that are disclosed under ASC 280.<sup>25</sup>

## 2.15.2 Conditions for presentation

Under Item 10 of Regulation S-K, when a company presents a non-GAAP financial measure in an SEC filing, including an earnings release furnished in Form 8-K, it must (1) present, with equal or greater prominence, the most directly comparable financial measure calculated and presented in accordance with GAAP and (2) numerically reconcile the non-GAAP financial measure, by schedule or other clearly understandable format, to the most directly comparable GAAP measure. If a company presents a forward-looking non-GAAP measure, similar disclosures are required. However, a reconciliation of the forward-looking non-GAAP financial measure to the corresponding forward-looking GAAP measure is not required if it would involve an “unreasonable effort.” In that case, FR-65 indicates that a company should provide any reconciling information that is available without an unreasonable effort, and disclose the nature and significance of any reconciling information that is unavailable.

A non-GAAP financial measure, taken together with accompanying information, may not misstate a material fact or omit a material fact necessary to make the presentation not misleading, in light of the circumstances in which the presentation is made. For example, FR-65 warns that the presentation of a non-GAAP financial measure might not satisfy the SEC rule if the measure appears to have been, but was not, calculated and presented consistently with prior presentations. Accordingly, issuers should consider disclosing any change in the methodology used to calculate a non-GAAP financial measure.

Notwithstanding the requirements to present, with equal or greater prominence, the most directly comparable GAAP financial measure and to provide a reconciliation of a non-GAAP financial measure to the most directly comparable GAAP measure, FR-65 notes that the SEC staff continues to hold the view that disclosures of non-GAAP financial measures also should be balanced with disclosures regarding the corresponding GAAP measure. For instance, the SEC staff expects non-GAAP cash flow and liquidity measures to be balanced with a discussion of cash flows from operating, investing and financing activities reported in the statement of cash flows. Similarly, the SEC staff expects non-GAAP performance measures to be balanced with a discussion of net income or income from continuing operations reported in the statement of operations.

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<sup>25</sup> ASC 280 requires that companies report certain measures for each reportable segment on a basis consistent with that used for internal management reporting purposes. ASC 280 requires segment revenues, assets, a measure of operating profit or loss, and any other significant segment measures to be reconciled to the corresponding GAAP measures, with significant reconciling items separately identified and described.

FR-65 reiterates the view expressed in FR-59, *Cautionary Advice Regarding the Use of “Pro Forma” Financial Information in Earnings Releases*, that the presentation of a non-GAAP financial measure could be misleading if it obscures the company’s GAAP results. As a result, compliance with the SEC rule does not necessarily insulate a company from a charge that it violated the SEC’s disclosure and antifraud rules.<sup>26</sup> While the failure of an issuer to comply with the SEC rule could lead to an SEC enforcement action, FR-65 notes that the failure to comply would not adversely affect an issuer’s eligibility to use Form S-3.

The following additional disclosure requirements apply to any disclosure of a non-GAAP financial measure in material provided to the SEC, such as a Form 10-K filing or an earnings release furnished in Form 8-K:

- ▶ The issuer must disclose the reasons why management believes the non-GAAP financial measure provides useful information to investors about the company’s financial condition and results of operations.<sup>27</sup>
- ▶ The issuer must disclose, to the extent material, any additional purposes for which management uses the non-GAAP financial measure.

The following restrictions apply to any disclosure of a non-GAAP financial measure in any SEC filing, such as Form 10-K:

- ▶ A non-GAAP liquidity measure other than EBIT (earnings before interest and taxes) or EBITDA (earnings before interest, taxes, depreciation and amortization) may not exclude charges or liabilities that required cash settlement, will require cash settlement or would have required cash settlement absent an ability to settle in another manner.
- ▶ A non-GAAP performance measure may not be adjusted to eliminate or smooth items identified as “nonrecurring, infrequent or unusual,” when (1) the nature of the charge or gain is such that it is reasonably likely to recur within two years or (2) there was a similar charge or gain within the prior two years.
- ▶ Non-GAAP financial measures may not be presented on the face of the company’s GAAP financial statements or in the accompanying notes (unless the measure is required or permitted to be presented in the financial statements by the standard setter responsible for establishing the accounting principles used in preparing that issuer’s financial statements).
- ▶ Non-GAAP financial measures may not be presented on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X.
- ▶ An issuer may not use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

### 2.15.3

#### Interpretive guidance

On 11 January 2010, the staff of the SEC Division of Corporation Finance published new Compliance and Disclosure Interpretations regarding the disclosure of non-GAAP financial measures (Non-GAAP C&DIs). The Non-GAAP C&DIs supersede the SEC staff’s 2003 publication, *Regarding the Use of Non-GAAP Financial Measures – Frequently Asked Questions* (Non-GAAP FAQs).

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<sup>26</sup> Exchange Act Rule 10b-5 states that it is unlawful for any person to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

<sup>27</sup> FR-65 states that the required disclosures should not be boilerplate. The disclosures should be specific to the non-GAAP financial measure, the manner in which management uses the measure given the registrant’s business and industry, and the manner in which investors might use the measure.

While the new Non-GAAP C&DIs carry forward much of the guidance from the former Non-GAAP FAQs, the SEC staff has significantly moderated several of its previous positions. These changes signal that the SEC staff will be less likely to object to the disclosure of non-GAAP financial measures in SEC filings.

The SEC staff has expressed concerns that its previous guidance and interpretations on non-GAAP financial measures might have been discouraging companies from providing meaningful information to investors. The SEC staff believes there should be consistency between the information communicated in a company's website, press releases, earnings calls and analyst presentations and the information disclosed in its SEC filings. While we do not expect the SEC staff to require that any non-GAAP measures reported publicly also be included in the SEC filings, we do expect the SEC staff to monitor the disclosure of non-GAAP financial measures outside a company's SEC filings and to ask a company why the SEC filing does not disclose similar measures.

**Recurring items:** The former Non-GAAP FAQs addressed whether it was ever appropriate for a non-GAAP financial performance measure to exclude recurring items. The Non-GAAP FAQs cautioned registrants never to use a non-GAAP financial measure in an attempt to smooth earnings. In addition, the acceptability of a non-GAAP financial measure that excluded a recurring item depended on the facts and circumstances, and was more likely permissible if management reasonably believed it probable that the financial effect of the excluded item would disappear or become immaterial within a short period of time. Further, when disclosing a non-GAAP financial measure that excluded a recurring item, the Non-GAAP FAQs indicated that the SEC staff expected the company to provide very detailed disclosures not required by the rule.

As a result, it had been difficult for a company to justify and defend the disclosure in its SEC filings of a non-GAAP financial measure that excludes a recurring item.

In a significant shift, new Non-GAAP C&DI 102.03 states:

“The prohibition [of Item 10(e) of Regulation S-K] is based on the description of the charge or gain that is being adjusted. It would not be appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the specified criteria. The fact that a registrant cannot describe a charge or gain as non-recurring, infrequent or unusual, however, does not mean that the registrant cannot adjust for that charge or gain. Registrants can make adjustments they believe are appropriate, subject to Regulation G and the other requirements of Item 10(e) of Regulation S-K.”

This new interpretation should remove much of the challenge and uncertainty in the presentation in SEC filings of many non-GAAP performance measures. As long as an adjustment is not inappropriately described as non-recurring, infrequent or unusual, a non-GAAP performance measure may exclude otherwise recurring items.<sup>28</sup>

In addition, when a company presents a non-GAAP performance measure that excludes a recurring item (e.g., income before stock-based compensation), the SEC staff no longer expects the company to provide the additional disclosures enumerated in the superseded Non-GAAP FAQs. Instead, the company would be required to provide only the basic disclosures specified in Item 10(e) of Regulation S-K that apply to any non-GAAP financial measure.

**Use by management:** Non-GAAP C&DI 102.04 addresses whether a company is required to use a non-GAAP financial measure in managing its business, or for other purposes, in order to be able to disclose it in an SEC filing. The C&DI points out that Item 10 of Regulation S-K states only that, “[t]o the extent material,” there should be a statement disclosing the additional purposes, “if any,” for which the

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<sup>28</sup> A non-GAAP financial measure, taken together with accompanying information, may not misstate a material fact or omit to state a material fact necessary to make the presentation not misleading, in light of the circumstances in which the presentation is made.

registrant's management uses the non-GAAP financial measure. The C&DI concludes that there is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business.

As a result, subject to the conditions and limitations of Item 10 of Regulation S-K, a company may disclose any non-GAAP financial measure in an SEC filing provided management believes the measure would provide useful information to investors, even if management does not use the non-GAAP financial measure for other purposes.

**Non-GAAP income statement:** Non-GAAP C&DI 102.10 expresses the SEC staff's view that it generally would be inappropriate to present a full non-GAAP income statement for purposes of reconciling non-GAAP measures to the most directly comparable GAAP measures. In the SEC staff's view, "presenting a full non-GAAP income statement may attach undue prominence to the non-GAAP information." In addition to this interpretation, the SEC staff may object to other situations in which the non-GAAP financial measures are given greater prominence than the GAAP measures, such as where the non-GAAP presentation precedes the GAAP presentation in order or where the volume of information regarding a non-GAAP measure is greater than that for the GAAP measure.

**Net of tax presentation:** Non-GAAP C&DI 102.11 identifies two acceptable methods for a company to present tax effects when reconciling a non-GAAP performance measure to the most directly comparable GAAP measure. One acceptable approach is to present each adjustment "net of tax" and disclose the tax effect of each reconciling item parenthetically or in a footnote to the reconciliation. Another acceptable approach is to present the tax effect in one line in the reconciliation. Under either approach, the SEC staff expects the company to disclose how it calculated the tax effect.

**Non-GAAP per share measures:** FR-65 states that per share measures that are specifically prohibited under GAAP or SEC rules continue to be prohibited in materials filed with, or furnished to, the SEC. This is consistent with ASC 230, which prohibits disclosing cash flow per share and ASR No. 142, *Reporting Cash Flow and Other Related Data*, which states that "per share data other than that relating to net income, net assets and dividends should be avoided in reporting." Otherwise, certain non-GAAP per share financial measures, including "funds from operations per share" (which is a prevalent measure in the real estate industry), are permitted provided they meet all of the conditions and restrictions of the SEC rule. The Non-GAAP C&DIs note that, as used in FR-65, the term "funds from operations per share" refers to the measure defined and clarified, as of 1 January 2000, by the National Association of Real Estate Investment Trusts.

In addition, FR-65 warns that it could be misleading to present a non-GAAP per share financial measure that is not computed consistently with the computation of diluted earnings per share under GAAP. In the Non-GAAP C&DIs, the SEC staff observed that presentations of non-GAAP per share performance measures should be reconciled to GAAP earnings per share noting that the denominators for the two measures may also need to be reconciled to the extent potential common shares are anti-dilutive for earnings per share but dilutive for the non-GAAP per share measure or vice versa. In addition, the Non-GAAP C&DIs note that per-share measures of liquidity continue to be prohibited.

**Non-GAAP debt covenants:** The Non-GAAP C&DIs note that a company's credit agreement could contain a material covenant based on a non-GAAP financial measure (e.g., Adjusted EBITDA). If a non-GAAP measure is included in a material debt covenant, it is not subject to the prohibitions in S-K Item 10(e)(1)(ii) if:

- ▶ The non-GAAP measure is calculated exactly in accordance with the debt covenants contained in the registrant's debt agreements.
- ▶ The debt agreement is a material agreement.

- ▶ The covenant is a material term of the debt agreement and the information about the covenant is material to an investor's understanding of the registrant's financial condition or liquidity, in which case the MD&A disclosures on liquidity should discuss the covenant and its implications.
- ▶ The amount or limit required for compliance with the covenants is disclosed.
- ▶ The actual or reasonably likely effects of compliance or non-compliance with the covenant on the registrant's financial condition and liquidity are disclosed.
- ▶ The disclosure clearly indicates how the covenant is calculated.

**Free cash flow:** "Free cash flow" is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP less capital expenditures. The Non-GAAP C&DIs note that "free cash flow" is a non-GAAP financial measure that would not ordinarily violate the restriction of Item 10 of Regulation S-K. However, the SEC staff warned that companies should be cautious when using such a measure, because "free cash flow" does not have a uniform definition and its title does not describe how it is calculated. Accordingly, the SEC staff believes that a clear description of its calculation, as well as the necessary reconciliation, should accompany the measure if it is used. Companies also should be careful to avoid inappropriate or potentially misleading inferences about the usefulness of "free cash flow," and all material limitations of the measure should be disclosed. For example, "free cash flow" should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other nondiscretionary expenditures that are not deducted from the measure.

**Segment-based measures:** For a more detailed discussion of the commentary in FR-65 about segment-based measures and the SEC staff's related interpretive guidance, see Segment analysis discussion in Section 5.

## 2.16

### Transition report – Change in fiscal year

Rules 13a-10 and 15d-10 of the Exchange Act provide the SEC's reporting and filing requirements when a registrant changes its fiscal year-end or a successor issuer has a different fiscal year-end than its predecessor. These rules designate as the "transition period" the short period that results when a registrant changes its fiscal year. Similarly, the reports required by Rules 13a-10 and 15d-10 are designated "transition reports." Under the accelerated reporting rules, the deadline for a transition report filed by a large accelerated filer or an accelerated filer mirrors the deadline for the respective Exchange Act form. Other rules, which are not addressed in this publication, provide the reporting and filing requirements for a change in fiscal year-end by foreign private issuers (Rules 13a-10(g) and 15d-10(g) of the Exchange Act) and registered investment companies (Rule 30b1-3 of the Investment Company Act of 1940).

### 2.16.1

#### Transition reporting on Forms 10-K and 10-Q

Transition reports are required for all transition periods in excess of one month. A transition report on Form 10-K, including audited financial statements, is required for transition periods of six or more months. For transition periods less than six months, a registrant has the option of filing its transition report on either Form 10-Q, including unaudited financial statements, or Form 10-K, including audited financial statements.

Transition periods of one month or less may be reported in conjunction with the first report on Form 10-Q or Form 10-K of the fiscal year following transition. A change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year-end of the same month, or vice versa, does not create a transition period.

### 2.16.2 Transition period of six months or more

The due date for a transition report on Form 10-K is computed based on the close of the transition period or the date of the determination to change the fiscal year, whichever is later. A transition report on Form 10-K must include audited financial statements for the transition period and specified financial information for the prior-year period comparable to the transition period. The comparable information may be unaudited and can be presented within the financial statements or in the notes thereto.

The comparable information must include revenue, gross profits, income taxes, income or loss from continuing operations (before extraordinary items and cumulative effect of a change in accounting principles), net income or loss and related per share amounts. In addition, the effects of discontinued operations or extraordinary items, if applicable, should be included. If it is not practicable or cannot be cost-justified to develop the information for comparable periods, the SEC staff might accept financial information for the prior-year period most nearly comparable to the transition period. In that case, the SEC staff would expect disclosures similar to those required in a Form 10-Q where comparable periods are not presented (see discussion below).

In addition to the transition period, a transition report on Form 10-K must include audited financial statements for fiscal years preceding transition as otherwise required by Form 10-K (i.e., three years). The SEC will accept, but does not require, restatement of prior-period financial statements on the basis of the newly adopted fiscal year. Pursuant to Rule 3-06 of Regulation S-X, a transition period of nine or more months will be considered a full year.

For example, if there is a nine-month transition period, the requirements of Form 10-K would be satisfied by providing audited balance sheets as of the close of the transition period and the preceding fiscal year-end, and audited statements of income and cash flows for the nine-month transition period and two preceding fiscal years. Conversely, if there is a six-month transition period, the transition report on Form 10-K would include audited balance sheets as of the close of the transition period and the two preceding fiscal years, and audited statements of income and cash flows for the six-month transition period and the three preceding fiscal years.

When the transition period is required to be included in subsequent reports, it is shown on the face of the statements. Financial information for the comparable period would be included either within comparative financial statements or in the notes thereto. The Form 10-K for the fiscal year following transition would include audited balance sheets as of the close of that fiscal year and the transition period. The periods for which audited statements of income and cash flows are required would be determined considering Rule 3-06 of Regulation S-X (i.e., at least 33 consecutive months of audited statements of income and cash flows must be presented).

### 2.16.3 Transition period less than six months

The due date for a transition report on Form 10-Q is computed based on the close of the transition period or the date of the determination to change the fiscal year, whichever is later. A transition report on Form 10-Q must include condensed unaudited financial statements for the transition period and financial information about the comparable period of the prior year. When a registrant files a transition report on Form 10-Q, separate audited statements of income and cash flows are required to be filed for the transition period in the Form 10-K for the full year following transition. Therefore, a registrant with a transition period of less than six months may elect to file a transition report on Form 10-K and include audited financial statements for the transition period. Registrants might want to choose this option to allow more time to prepare financial statements covering the transition period and to avoid the possibility of later having to revise previously published unaudited financial statements for the transition period.

When a registrant files a transition report on Form 10-Q, the Form 10-K for the full year following transition may include the audited balance sheet as of the end of the fiscal year preceding transition in

lieu of an audited balance sheet as of the close of the transition period. This option is in consideration of the fact that the transition period balance sheet filed on Form 10-Q was not required to be audited. Further, notes to the financial statements for the transition period included in the annual report may be integrated with the notes for the full fiscal year. While financial schedules are not required in a transition report on Form 10-Q, audited financial schedules (see Section 7 – Financial schedules) including the transition period are required to be filed in subsequent annual reports on Form 10-K.

For a transition period of one month or less, in lieu of a transition report on Form 10-K or Form 10-Q, a registrant may separately include the unaudited financial statements for the transition period in the Form 10-Q for the first quarter of the newly adopted fiscal year that ends after the determination date for the change in fiscal year. However, separate audited statements of income and cash flows still are required to be filed for the transition period in the Form 10-K of the full year following transition. If the registrant's first report is the Form 10-K for the full year following transition, the transition period of one month or less would be separately covered in that Form 10-K.

Where comparative information is required in a transition report on Form 10-Q or in a quarterly report based on the quarters of the newly adopted fiscal year, a registrant is not required to recast data for the comparable period, where recasting either is not practicable or cannot be cost-justified, if the registrant provides *all* of the following:

- ▶ Financial statements for the quarters reported on the old fiscal year basis most nearly comparable to the transition period or the interim period reported on the new fiscal year basis
- ▶ An adequate discussion of seasonal and other factors that could affect the comparability of information or trends reflected
- ▶ An assessment of the comparability of the data
- ▶ An explanation of why the statements have not been recast

## 2.16.4

### Reporting prior to the determination date

An issuer is required to file an annual report on Form 10-K for any fiscal year that ended before the date on which the determination was made to change its fiscal year. Similarly, a registrant is required to file a quarterly report for any quarter of the old fiscal year that ended before the date of the issuer's determination to change its year-end.

## 2.16.5

### Quarterly reporting during transition

During the transition period, registrants have the option of filing quarterly reports based on the quarters of either the old or newly adopted fiscal year, provided that once the quarterly reporting basis is changed to the new fiscal year, that basis must be followed consistently. For example, an issuer with a December 31 year-end that decides on 15 April 20Y0 to change its year-end to 30 November 20Y0 would have an option to file its next Form 10-Q based on the quarter ended 30 June 20Y0 (old fiscal year basis) or 31 August 20Y0 (new fiscal year basis). As noted below, Item 302 of Regulation S-K requires selected quarterly information to be subsequently reported on a new fiscal-year basis. Accordingly, this might provide an incentive to elect to report during the transition period on the basis of the new fiscal year.

If the length of the transition period is other than three, six or nine months, the quarter-ends of the new fiscal year will not correspond to those of the old fiscal year. Accordingly, the change in quarterly reporting from the old to the new fiscal year might result in a period that would not be covered in a separate report on Form 10-Q. Such a period would be covered by the next report on either Form 10-Q or Form 10-K, or in the transition report, depending on when the change occurred. Such a period would be reported separately in a quarterly report on Form 10-Q, or on a cumulative basis in the transition



report or the Form 10-K for the fiscal year following the transition.

In the above example, if the issuer filed its Form 10-Q for the quarter ended 31 August 20Y0, separate financial statements for the two-month period ended 31 May 20Y0 would be included in that Form 10-Q. On the other hand, if the issuer continued to file Forms 10-Q on the old fiscal-year basis, the two-month period ended 30 November 20Y0 would be included in the 11-month period ended 30 November 20Y0 in the transition report on Form 10-K.

Although the financial statements of the period created by the change in the basis of quarterly reporting (as well as a one-month transition period) must be provided separately from those of the current quarter when included in a quarterly Form 10-Q, the transition rules provide that other information required by Form 10-Q, such as MD&A, may be combined for those periods and the current quarter.

### **2.16.6 Quarterly reporting after transition**

The requirement to file quarterly reports on the new basis begins with the first quarter in the fiscal year following transition. However, the rules do not require an issuer to file new Forms 10-Q for any quarters of the fiscal year following transition that have already been reported on the old fiscal-year basis. For example, an issuer with a 31 December year-end might decide on 15 December 20Y0 to change its year-end to 30 April 20Y0. This registrant would have filed Forms 10-Q for the three quarters of its old fiscal year and would not be required to file Forms 10-Q for the quarters of its 20Y1 fiscal year that ended before its determination to change (i.e., the quarters ending 31 July 20Y0 and 31 October 20Y0). Such an issuer would file its next quarterly report for the quarter ending 31 January 20Y1, which would include separate financial statements for the one-month period ended 31 October 20Y0.

Registrants subject to Item 302 of Regulation S-K (see Section 4 – Part II) must provide supplementary selected quarterly financial data for each full quarter of the two most recent fiscal years in their annual reports on Form 10-K. The Form 10-K for the first full year following transition would be required to contain the selected quarterly information for the last eight quarters on the basis of the new fiscal year. For the example above, the issuer's Form 10-K as of 30 April 20Y1 would present quarterly data for quarters ended 31 July, 31 October, 31 January and 30 April for years ending 30 April 20Y1 and 20Y0. As a result of the fiscal-year focus of Item 302, quarterly information will not correspond to income statement presentations including a transition period, unless the issuer elects to restate prior-period financial statements on the basis of the newly adopted fiscal year.

### **2.16.7 Reporting fiscal year changes on Form 8-K**

A registrant is required to report, on Form 8-K, its decision to adopt a new fiscal year. This filing is due four business days after the date on which the registrant determines to change its fiscal year-end. Item 5.03 of Form 8-K requires a registrant to report both the date on which it decides to change its fiscal year and the date of its new fiscal year. In addition, the Form 8-K must state whether a Form 10-K or Form 10-Q will be filed to report financial information for the transition period.

### **2.16.8 Transition reporting for successor issuers**

In the situation where a successor issuer has a different fiscal year than its predecessor, the periods to be covered are different from those described above. The period to be included in the transition report by the successor issuer ends on the date of the succession, rather than on the day prior to the beginning of the newly adopted year. This ensures a transition period that reflects the predecessor's operations separately from those of the successor. In addition, the due date for the transition report always is measured from the date of succession (i.e., the end of the transition period). Examples of succession

include the leveraged buyout of a public company and the reverse acquisition of a public company by a nonpublic company (a backdoor registration).<sup>29</sup>

## 2.16.9 MD&A and selected financial data for transition periods

The length of the transition period will determine the extent of disclosures required under Item 303 of Regulation S-K, *Management's Discussion and Analysis of Financial Condition and Results of Operations*. For transition periods of nine or more months, information is required under Item 303(a) as if the transition period were a full fiscal year. For shorter transition periods, the information for interim periods under Item 303(b) is required. With respect to Item 301 of Regulation S-K, *Selected Financial Data*, transition periods of nine or more months should be shown in the table of selected financial data and are considered to represent one year. Selected financial data for shorter transition periods should be shown in either the table or a footnote to the table.

## 2.16.10 Examples of reporting requirements for changes in year-end

Although not intended to cover all circumstances, the examples on the following pages illustrate reporting requirements and alternatives, following a change in fiscal year-end. The actual reporting requirements and options will vary based on the length of the transition period and the date on which the determination was made to change the fiscal year-end. A registrant considering a change in fiscal year-end should consult with its independent auditors and legal counsel regarding its reporting obligations. Because the financial statements in annual shareholders' reports and Form 10-K should be identical under the uniform financial statement instructions, these illustrations apply to both unless otherwise discussed with the SEC staff.

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<sup>29</sup> If a backdoor registration is accomplished by taking a private company public by merger with a "shell company," as defined by Regulation C, additional reporting considerations might be applicable. For further information, see the July 2005 SEC Final Rule, *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies* (Release Nos. 33-8587 and 34-52038).

**Examples of reporting requirements for changes in year-end  
(Transition periods less than six months)**

<b>Reports filed prior to transition report (1)</b>	<b>Transition report</b>	<b>Reports filed for periods subsequent to transition report (4) (6)</b>
<b>Example 1: Change from 31 Dec 20Y0 to 28 Feb 20Y1 (Decision made 1 Mar 20Y1)</b>		
Form 8-K filed 4 business days after 1 Mar 20Y1	Form 10-Q filed 45 days after 1 Mar 20Y1:	Form 10-K: Audited statements of income and cash flows
Form 10-K filed 90 days after 31 Dec 20Y0:	Unaudited financial statements	from 1 Mar 20Y1 to 28 Feb 20Y2
Audited financial statements for the three years ended 31 Dec 20Y0	from 1 Jan 20Y1 to 28 Feb 20Y1 (2) from 1 Jan 20Y0 to 29 Feb 20Y0 (5)	from 1 Jan 20Y1 to 28 Feb 20Y1 from 1 Jan 20Y0 to 31 Dec 20Y0 from 1 Jan 20X9 to 31 Dec 20X9
	or	Unaudited statements of income and cash flows
	Form 10-K filed 90 days after 1 Mar 20Y1:	from 1 Jan 20Y0 to 29 Feb 20Y0(3)
	Audited statements of income and cash flows	Audited balance sheets as of
	from 1 Jan 20Y1 to 28 Feb 20Y1 and three years ended 31 Dec 20Y0 (6)	28 Feb 20Y2 and either 28 Feb 20Y1 or 31 Dec 20Y0
	Unaudited statements of income and cash flows	Form 10-Q: Unaudited financial statements (5)
	from 1 Jan 20Y0 to 29 Feb 20Y0 (3)	from 1 Mar 20Y1 to 31 May 20Y1 from 1 Jun 20Y1 to 31 Aug 20Y1 and six months ended 31 Aug 20Y1
	Audited balance sheets as of 28 Feb 20Y1; 31 Dec 20Y0 and 20X9	from 1 Sep 20Y1 to 30 Nov 20Y1 and nine months ended 30 Nov 20Y1

***Note: The above tables reflect reporting deadlines for issuers who are “non-accelerated filers.” For large accelerated filers and accelerated filers, the reporting deadline would correspond to the deadline applicable to the respective Form.***

See subsequent pages for footnote references.

**Examples of reporting requirements for changes in year-end  
(Transition periods less than six months)**

<b>Reports filed prior to transition report (1)</b>	<b>Transition report</b>	<b>Reports filed for periods subsequent to transition report (4) (6)</b>
<b>Example 2: Change from 31 Dec 20Y0 to 28 Feb 20Y1 (Decision made 1 Nov 20Y1)</b>		
Form 8-K filed 4 days business after 1 Nov 20Y1	Form 10-Q filed 45 days after 1 Nov 20Y1:	Form 10-Q: Unaudited financial statements (5)
Form 10-K filed 90 days after 31 Dec 20Y0:	Unaudited financial statements	from 1 Sep 20Y1 to 30 Nov 20Y1 (9)
Audited financial statements for the three years ended 31 Dec 20Y0	from 1 Jan 20Y1 to 28 Feb 20Y1 (2)	Form 10-K: Audited statements of income and cash flows
	from 1 Jan 20Y0 to 29 Feb 20Y0 (5)	from 1 Mar 20Y1 to 28 Feb 20Y2
		from 1 Jan 20Y1 to 28 Feb 20Y1
		from 1 Jan 20Y0 to 31 Dec 20Y0
	Or	from 1 Jan 20X9 to 31 Dec 20X9
Form 10-Q filed 45 days after 31 Mar 20Y1, 30 Jun 20Y1 and 30 Sep 20Y1:	Form 10-K filed 90 days after 1 Nov 20Y1:	Unaudited statements of income and cash flows
Unaudited financial statements	Audited statements of income and cash flows	from 1 Jan 20Y0 to 29 Feb 20Y0 (3)
from 1 Jan 20Y1 to 31 Mar 20Y1 with comparable prior-year period	from 1 Jan 20Y1 to 28 Feb 20Y1, and three years ended 31 Dec 20Y0 (6)	Audited balance sheets as of
from 1 Apr 20Y1 to 30 Jun 20Y1 and six months ended 30 Jun 20Y1, with comparable prior-year periods	Unaudited statements of income and cash flows	28 Feb 20Y2 and either 28 Feb 20Y1 or 31 Dec 20Y0
from 1 Jul 20Y1 to 30 Sep 20Y1 and nine months ended 30 Sep 20Y1, with comparable prior-year periods	from 1 Jan 20Y0 to 29 Feb 20Y0 (3)	
	Audited balance sheets as of	
	28 Feb 20Y1; 31 Dec 20Y0 and 20X9	

**Note:** The above tables reflect reporting deadlines for issuers who are “non-accelerated filers.” For large accelerated filers and accelerated filers, the reporting deadline would correspond to the deadline applicable to the respective Form.

See subsequent pages for footnote references.

**Examples of reporting requirements for changes in year-end  
(Transition periods more than six months)**

<b>Reports filed prior to transition report (1)</b>	<b>Transition report</b>	<b>Reports filed for periods subsequent to transition report (4) (6)</b>
<b>Example 3: Change from 31 Dec 20Y0 to 31 Oct 20Y1 (Decision made 1 Feb 20Y1)</b>		
Form 8-K filed 4 business days after 1 Feb 20Y1	Form 10-K filed 90 days after 31 Oct 20Y1:	Form 10-Q: Unaudited financial statements (5)
Form 10-K filed 90 days after 31 Dec 20Y0:	Audited statements of income and cash flows	from 1 Nov 20Y1 to 31 Jan 20Y2
Audited financial statements for the three years ended 31 Dec 20Y0	from 1 Jan 20Y1 to 31 Oct 20Y1 (7) and two years ended 31 Dec 20Y0 (6)	from 1 Feb 20Y2 to 30 Apr 20Y2 and six months ended 30 Apr 20Y2
Form 10-Q filed 45 days after 31 Mar 20Y1 and 30 Jun 20Y1 (8):	Unaudited statements of income and cash flows	from 1 May 20Y2 to 31 Jul 20Y2 and nine months ended 31 Jul 20Y2
Unaudited financial statements from 1 Jan 20Y1 to 31 Mar 20Y1 and comparable prior-year period	from 1 Jan 20Y0 to 31 Oct 20Y0 (3)	Form 10-K: Audited financial statements
from 1 Apr 20Y1 to 30 Jun 20Y1 and six months ended 30 June 20Y1, with comparable prior-year periods	Audited balance sheets as of 31 Oct 20Y1 and 31 Dec 20Y0	from 1 Nov 20Y1 to 31 Oct 20Y2
or		from 1 Jan 20Y1 to 31 Oct 20Y1 (7)
Form 10-Q filed 45 days after 30 Apr 20Y1 and 31 Jul 20Y1 (8):		from 1 Jan 20Y0 to 31 Dec 20Y0
Unaudited financial statements		Unaudited statements of income and cash flows
from 1 Jan 20Y1 to 31 Jan 20Y1 and from 1 Feb 20Y1 to 30 Apr 20Y1, with comparable prior-year periods (5)		from 1 Jan 20Y0 to 31 Oct 20Y0 (3)
from 1 May 20Y1 to 31 Jul 20Y1 and six months ended 31 Jul 20Y1, with comparable prior-year periods (5)		

**Note:** The above tables reflect reporting deadlines for issuers who are “non-accelerated filers.” For large accelerated filers and accelerated filers, the reporting deadline would correspond to the deadline applicable to the respective Form.

See subsequent pages for footnote references.

**Examples of reporting requirements for changes in year-end  
(Transition periods more than six months)**

<b>Reports filed prior to transition report (1)</b>	<b>Transition report</b>	<b>Reports filed for periods subsequent to transition report (4) (6) (10)</b>
<b>Example 4: Change from 31 Dec 20Y0 to 31 Oct 20Y1 (Decision made 15 Nov 20Y1)</b>		
Form 8-K filed 4 business days after 15 Nov 20Y1	Form 10-K filed 90 days after 15 Nov 20Y1:	Form 10-Q: Unaudited financial statements (5)
Form 10-K filed 90 days after 31 Dec 20Y0:	Audited statements of income and cash flows	from 1 Nov 20Y1 to 31 Jan 20Y2
Audited financial statements for the three years ended 31 Dec 20Y0	from 1 Jan 20Y1 to 31 Oct 20Y1 (7) and two years ended 31 Dec 20Y0 (6)	from 1 Feb 20Y2 to 30 Apr 20Y2 and six months ended 30 Apr 20Y2
Form 10-Q filed 45 days after 31 Mar 20Y1, 30 Jun 20Y1 and 30 Sep 20Y1:	Unaudited statements of income and cash flows	from 1 May 20Y2 to 31 Jul 20Y2 and nine months ended 31 Jul 20Y2
Unaudited financial statements	from 1 Jan 20Y0 to 31 Oct 20Y0 (3)	Form 10-K: Audited financial statements
from 1 Jan 20Y1 to 31 Mar 20Y1 with comparable prior- year period	Audited Balance Sheets as of 31 Oct 20Y1 and 31 Dec 20Y0	from 1 Nov 20Y1 to 31 Oct 20Y2
from 1 Apr 20Y1 to 30 Jun 20Y1 and six months ended 30 Jun 20Y1, with comparable prior-year periods		from 1 Jan 20Y1 to 31 Oct 20Y1 (7)
from 1 Jul 20Y1 to 30 Sep 20Y1 and nine months ended 30 Sep 20Y1, with comparable prior-year periods		from 1 Jan 20Y0 to 31 Dec 20Y0
		Unaudited statements of income and cash flows
		from 1 Jan 20Y0 to 31 Oct 20Y0 (3)

**Note:** The above tables reflect reporting deadlines for issuers who are “non-accelerated filers.” For large accelerated filers and accelerated filers, the reporting deadline would correspond to the deadline applicable to the respective Form.

See subsequent pages for footnote references.

The following note references correspond to the examples presented on the previous pages:

- (1) This column lists reporting requirements subsequent to the latest fiscal year-end to the date of the transition report.
- (2) Form 10-K covering the full year from 1 March 20Y1 to 28 February 20Y2 must include separate audited statements of income and cash flows covering the transition period from 1 January 20Y1 to 28 February 20Y1.
- (3) This information may be in a note to the financial statements and must include revenue, gross profits, income taxes, income or loss from continuing operations (before extraordinary items and cumulative effect of a change in accounting principles), net income or loss, and related per share amounts, as well as the effects of discontinued operations or extraordinary items, if applicable.
- (4) These reports would be based on the new fiscal year and filed subsequent to the transition period within the prescribed time period for the appropriate form.
- (5) Although the rules encourage registrants to recast prior-year financial information on a comparable basis with the transition period and new fiscal-year quarters, this is not required if it is not practicable or cannot be cost-justified, provided certain disclosures are made. However, when presenting supplemental quarterly financial information pursuant to Item 302 of Regulation S-K, registrants are required to present in their first Form 10-K following the transition report the prior-year quarterly financial information for the comparable period of the new fiscal year.
- (6) The rules also allow registrants to recast all prior years to correspond to the newly adopted fiscal year.
- (7) The 10-month period from 1 January 20Y1 to 31 October 20Y1 would be considered equivalent to a year for purposes of meeting the requirement to provide financial statements for three fiscal years. However, unaudited financial information for the comparable period of the preceding year must be provided.
- (8) As an alternative to transition period quarterly reporting consistent with the basis of either the old or the new fiscal year, a registrant may switch the basis of quarterly reporting during the transition period. In this example, the registrant may file the first Form 10-Q on the old fiscal-year basis (for the old quarter ended 31 March 20Y1 with unaudited financial statements from 1 January 20Y1 to 31 March 20Y1 and comparable prior-year period) and the second Form 10-Q on the new fiscal-year basis (for the new quarter ended 31 July 20Y1 with unaudited financial statements from 1 April 20Y1 to 30 April 20Y1 and from 1 May 20Y1 to 31 July 20Y1 and comparable prior-year periods).
- (9) A Form 10-Q must be filed for any quarter of the fiscal year following transition that ends after the issuer determined to change its year-end. When the determination to change the year-end is made after the close of the transition period, compliance with this requirement may result in an overlap in quarterly reporting. In this example, the month of September 20Y1 is reported in both the 30 September 20Y1 Form 10-Q (old fiscal-year basis) and the 30 November 20Y1 Form 10-Q (new fiscal-year basis).
- (10) The audited financial statements filed on Form 10-K must include at least 33 months of audited financial information, including the transition period. In this example, a total of 34 months are provided (two 12-month fiscal years plus the 10-month transition period). Had the transition period in this example been at least six months but less than nine months, an additional year of audited financial statements would have been required to present the minimum of 33 months of audited financial information.

# 3

## Part I

Regulation S-K contains most of the rules for disclosure of information required in Part I of Form 10-K, including:

Item	101	Description of Business
Item	102	Description of Property
Item	103	Legal Proceedings
Item	104	Mine Safety Disclosure

This Section is designed to assist management in preparing information required by the above items in Item 1 through 4 of Form 10-K.

### 3.1 Item 1. Business

Item 1 of Form 10-K, *Business*, calls for information specified in Item 101 of Regulation S-K, *Description of Business*, about: (1) the development of the registrant's business (limited by the Form 10-K to developments since the beginning of the most recent fiscal year presented); (2) a description of the business done and intended to be done by the registrant and each of its operating segments; and (3) financial information about the registrant's operating segments and geographic areas.

The SEC rules for segment reporting (Item 101 of Regulation S-K) closely conform to the requirements of generally accepted accounting principles in ASC 280. However, the SEC rules contain certain disclosures that go beyond those required by ASC 280, including:

- ▶ The principal markets and methods of distribution of each segment's principal products and services
- ▶ A description of risks attendant to foreign operations and any segment's dependence upon such foreign operations
- ▶ The identity of major customers

In addition, Item 101(c)(1)(i) of Regulation S-K contains quantitative thresholds for disclosing revenues by class of similar products or services, whereas ASC 280-10-50-40 requires such disclosure (unless impracticable) without providing materiality thresholds.

Segment information may be presented in either the description of business or the financial statements, and cross-referenced. Thus, registrants may elect to consolidate all segment disclosures in the description of business. However, more commonly, Item 1 of Form 10-K will incorporate by reference the segment disclosures provided in the audited financial statements, and provide the additional information solely required by Item 101 of Regulation S-K.

Certain information about the nature of organization required by ASC 275, should be included in the notes to the financial statements, and might be responsive to certain of the requirements of Item 101 of Regulation S-K. Among other things, ASC 275 requires disclosures about the risks and uncertainties existing as of the balance sheet date in the following areas: (1) nature of operations, (2) use of estimates in the preparation of the financial statements, (3) certain significant estimates and (4) current vulnerability due to certain concentrations.<sup>1</sup>

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<sup>1</sup> See Section 5 of this publication with respect to the ASC 275 financial statement requirements about significant estimates and vulnerabilities from concentrations, which also meet the MD&A disclosure requirements.



## 3.2 Segment and geographic area disclosures

Items 101(b) and (d) of Regulation S-K require operating segment and geographic area disclosures to cover the registrant's three most recent fiscal years, or shorter period depending on how long the registrant has been in existence. ASC 280 permits companies to include segment and geographic area data in the body of the financial statements, in the notes to financial statements or in a separate schedule that is clearly part of the financial statements or is referred to in the financial statements.

ASC 280 requires certain "first-level" disclosures (e.g., revenue by segment, a measure of profit or loss and assets by segment) for reportable operating segments and additional "enterprise-wide" disclosures (e.g., consolidated revenues analyzed by products and services and by geographic area) if such information is not disclosed in the first-level information. Enterprise-wide disclosures are required regardless of whether that information is used by the Chief Operating Decision Maker (CODM). The SEC requirements provide that, in lieu of presenting duplicative disclosures, segment and geographic area information may be cross-referenced to the financial statements from the description of business or, conversely, from the financial statements to the description of business. Therefore, registrants may provide the required disclosures in either location, with a cross-reference in the other location.

The disclosure requirements of ASC 280 are described in detail in our GAAP Disclosure Checklist (Ernst & Young Form No. A13) and in our Financial Reporting Developments publication, *Segment reporting – ASC 280* (Ernst & Young No. BB0698 (revised November 2009)).<sup>2</sup> Below is a discussion of the additional disclosures required by Item 101 of Regulation S-K.

### 3.2.1 Types or classes of products and services

For each reportable segment, the types of products and services from which each reportable segment derives its revenues must be disclosed under ASC 280. ASC 280 requires disclosure of the amount of revenues derived from transactions with external customers for each product or service, or each group of similar products or services (unless it is impracticable), if segments are not reported that way. Registrants that have only one reportable segment and that provide a range of products and services also would be required to disclose revenues from transactions with external customers for each product or service or each group of similar products or services.

Item 101(c)(1)(i) of Regulation S-K requires similar, but more extensive disclosures. For example, a description of the principal markets and methods of distribution for each reportable segment's principal products and services is required under Item 101. Also, the SEC imposes quantitative thresholds not included in ASC 280. Item 101 requires disclosure of the revenues for the most recent three years for "any class of similar products or services" that accounted for at least 10% of consolidated revenue in any of those years (15% for registrants with no more than \$50 million in total revenue for any of the last three fiscal years). Regulation S-K does not provide further guidance for determining when product classes are "similar."

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<sup>2</sup> The SEC staff continues to emphasize segment disclosures and the application of ASC 280 during its comment letter review process. The SEC staff comments generally focus on: (1) the identification of operating segments, (2) the aggregation or combination of operating segments, and (3) the effect of changes to operating segments on reporting units and the related assessment of goodwill for impairment. In some cases, restatements have been required.

### 3.2.2 Geographic information

For the consolidated enterprise, ASC 280 requires disclosure about revenues from external customers and certain long-lived assets for (1) the registrant's country of domicile, (2) individual foreign countries to which the respective assets are material<sup>3</sup> and (3) all foreign countries in total. Item 101(d)(3) of Regulation S-K also requires disclosure of "any risks attendant to the foreign operations and any dependence of one or more of the registrant's segments upon such foreign operations." Registrants can choose to either include these additional Item 101 disclosures in the financial statements (with appropriate cross-reference), or separately include the information under Item 101.

### 3.2.3 Major customers

When at least 10% of total revenue is derived from sales to any single external customer or group of customers under common control, ASC 280 requires registrants to disclose that fact, the amount of revenue derived from each such customer and the segment(s) making the sales. The federal government, any units of a state government under common control, any units of a local government (e.g., a county, a municipality) under common control and any foreign government are each considered to be a single customer for the purpose of this requirement.

Item 101(c)(1)(vii) of Regulation S-K requires disclosure of a major customer's name, and any relationship of the customer to the registrant or its subsidiaries, if sales to that customer equal or exceed 10% of the registrant's consolidated revenue and the loss of such customer would have a material adverse effect on the registrant and its subsidiaries taken as a whole. Registrants may provide the names of other customers unless that would be misleading. In addition, registrants must discuss the dependence of a segment on a customer or a few customers which, if lost, would have a material adverse effect on the segment. However, in this case, the customer(s) need not be named. The following summarizes these requirements:

Amount of sales to customer	In audited financial statements	In business description section of Form 10-K <sup>4</sup>
Sales significant to a segment, but less than 10% of total revenue	No disclosure	Disclose that fact and the affected segment <sup>5</sup>
Sales of at least 10% of total revenue	Disclose that fact, the amount of revenue, and the segment or segments making those sales	Disclose that fact, the customer name, and any relationship of the customer to the registrant and its subsidiaries <sup>6</sup>

<sup>3</sup> Materiality in connection with segment disclosures under ASC 280 is discussed in our Financial Reporting Developments publication, *Segment reporting – Accounting Standards Codification 280* (Ernst & Young No. BB0698 (revised November 2009)).

<sup>4</sup> These disclosures need not be included in the annual shareholders' report.

<sup>5</sup> These disclosures are not required if the loss of the customer, or a few customers, would not have a material adverse effect on the segment.

<sup>6</sup> These disclosures are not required if the loss of the customer would not have a material adverse effect on the company as a whole.

### 3.2.4 Determination of material information

The instructions to Item 101 of Regulation S-K provide guidance for determining what information about industry segments and geographic areas is material to understanding the registrant's business taken as a whole and should be disclosed. In making the determination of material information, both quantitative and qualitative factors should be considered. The following examples of qualitative factors are provided in Regulation S-K:

- ▶ Whether a matter with a relatively minor effect on the registrant's business is considered by management to be important to its future profitability
- ▶ Whether it affects or may affect numerous items in the segment information
- ▶ Whether it distorts the trends reflected in the segment information

Thus, there may be situations where information should be disclosed about a particular segment even though the information is not material in quantitative terms and may not otherwise appear significant to the registrant's business taken as a whole. Furthermore, copies of contracts or other agreements are required to be filed as exhibits to Form 10-K if they are specifically referred to in the registrant's discussion of segments.

These SEC guidelines are subjective and require careful consideration by management.

### 3.2.5 Other matters included in the description of business

In addition to segment, geographical area and major customer disclosures required by ASC 280, Item 101 of Regulation S-K requires the following matters be discussed under the description of business:

- ▶ General development of the business, including the effects of business combinations, material acquisitions and dispositions of assets, and material changes in the mode of conducting business
- ▶ Narrative description of the registrant's segments, including the following information where material:
  - ▶ Status of new products or business segments that have been publicly announced and will require a material investment
  - ▶ Sources and availability of raw materials
  - ▶ Importance to the segment and the duration of patents, trademarks, licenses, franchises and concessions
  - ▶ Extent to which the business of a segment is seasonal
  - ▶ Practices as to maintaining working capital
  - ▶ Amount of firm backlog orders as of a recent date and as of a comparable date in the preceding year, including the portion not reasonably expected to be filled in the current fiscal year
  - ▶ Description of any material portion of the business subject to renegotiation of profits or termination of contracts by the government
  - ▶ Competitive conditions, including the number of competitors, the principal methods of competition and the registrant's competitive position
  - ▶ Expenditures for research and development for each of the last three years
  - ▶ Effects of compliance with environmental laws (as more fully discussed below)
  - ▶ Number of employees

The SEC staff generally expects the above information to cover only the most recent fiscal year, but information must be disclosed for earlier periods if material to an understanding of the general development of the business. In the case of a new registrant (i.e., an initial public offering on Form S-1 or an initial Exchange Act registration on Form 10), the information on the general development of the business usually should include a discussion of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business.

### 3.2.6 Effect of environmental laws

Environmental disclosures required by Item 101(c)(1)(xii) of Regulation S-K, FR-36, *Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosure*, and SAB 92 (Topic 5.Y), *Accounting and Disclosures Relating to Loss Contingencies*, should encompass: (1) the effects of compliance with environmental laws on the registrant's business; (2) pending legal proceedings; and (3) environmental risks and contingencies.

Item 101(c)(1)(xii) requires registrants to disclose the material effects that compliance with federal, state and local provisions regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have on the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. Registrants must disclose any material estimated capital expenditures for environmental control facilities for the rest of its fiscal year and any succeeding periods.

These disclosures should be coordinated with related environmental disclosures under Item 103 of Regulation S-K, *Legal Proceedings* (see below), and Item 303 of Regulation S-K, *Management's Discussion and Analysis of Financial Condition and Results of Operations* (see Section 5 – Item 7. MD&A).

#### **Illustration 3-1: Environmental matters disclosure**

The Company is subject to various laws and government regulations concerning environmental matters and employee safety and health in the US and other countries. US federal environmental legislation that affects the Company include the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act and the Comprehensive Environmental Response, Compensation and Liability Act (also known as Superfund). The Company also is regulated by the Occupational Safety and Health Administration (OSHA) concerning employee safety and health matters. The Environmental Protection Agency (EPA), OSHA and other federal agencies have the authority to write regulations that have an effect on the Company's operations.

In addition to these federal activities, various states have authority under the federal statutes mentioned above. Many state and local governments have adopted environmental and employee safety and health laws and regulations, some of which are similar to federal requirements. State and federal authorities may seek fines and penalties for violating these laws and regulations. The Company has complied with such proceedings and orders without any materially adverse effect on its business.

The Company is committed to a long-term environmental protection program that reduces emissions of hazardous materials into the environment, as well as to the remediation of identified existing environmental concerns.

Expenditures in 20Y1 were approximately \$1.1 million for environmental capital projects and approximately \$600,000 for operating and maintaining environmental protection facilities. The Company estimates that, during 20Y2 and 20Y3, approximately \$1.5 million to \$2 million per year will be spent on additional capital projects for environmental protection.

### 3.2.7 Website access disclosure

FR-63, *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*, adopted rules that require a company that files on an accelerated basis to disclose in its Form 10-K whether it provides timely access to its SEC reports on its website.

Specifically, the Form 10-K of a company that files on an accelerated basis (e.g., issuers that meet the definition of a large accelerated filer or an accelerated filer) must include the following:

- ▶ The company's website address, if it has one
- ▶ Whether the issuer provides access to its SEC reports (i.e., Form 10-K, Form 10-Q and Form 8-K) and related amendments free of charge on or through the company's website as soon as reasonably practicable after the report is electronically filed with, or furnished to, the SEC
- ▶ If the issuer does not provide such website access, why it does not
- ▶ Whether the issuer will voluntarily provide electronic or paper copies of its SEC filings free of charge upon request

FR-63 interprets "as soon as reasonably practicable" to mean the same day as the SEC filing, barring unforeseen circumstances. Given that EDGAR filings are posted timely to the SEC's website, FR-63 notes that an issuer may provide free, real-time access to its reports by providing hyperlinks on the company's website directly to its EDGAR filings on the SEC's website.

FR-63 encourages companies to provide perpetual access to their SEC reports through their websites normally used for investor relations functions. At a minimum, the SEC suggests that website access be provided for reports covering the last 12 months. Access to older reports may be provided in an archived portion of the website. The SEC also encourages website access to be provided for all SEC filings, including registration statements and proxy materials.

FR-63 notes that disclosure of a company's website address in its Form 10-K will not, by itself, cause information on the website to be included or incorporated by reference into the SEC report, unless the company explicitly incorporates any such information by reference.<sup>7</sup>

#### **Illustration 3-2: Website access disclosure**

##### **Website access to company reports**

The Company's annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and all amendments to those reports are available free of charge on the Company's website at [www.XX.com](http://www.XX.com) as soon as reasonably practicable after such material is electronically filed with, or furnished to, the Securities and Exchange Commission.

In addition, copies of the Company's annual report will be made available, free of charge, upon written request.

<sup>7</sup> On 1 August 2008, the SEC issued an interpretive release, *Commission Guidance on the Use of Company Websites* (SEC Release No. 34-58288), that provides guidance regarding the use of company websites under the Exchange Act and the antifraud provisions of the federal securities laws. The guidance focuses on: (1) when information posted on a company website is "public" for purposes of the applicability of Regulation FD; (2) company liability for information on company websites – including previously posted information, hyperlinks to third-party information, summary information and the content of interactive websites; (3) the types of controls and procedures advisable with respect to such information; and (4) the format of information presented on a company website, with the focus on readability, not printability.

### 3.3

#### Item 1A. Risk factors

In their annual reports, issuers<sup>8</sup> must disclose risk factors, as specified in Item 503(c) of Regulation S-K, which are applicable to the registrant rather than a particular securities offering. The Form 10-K instructions require registrants to discuss risk factors in “plain English.” Item 503(c) requires the discussion of risk factors to be “concise and organized logically.” Item 503(c) also requires that each risk factor appear in a separate sub-caption that adequately describes the risk. Item 503(c) instructs registrants to not present risks that could apply to any issuer.

##### **Illustration 3-3: Risk factors**

The following list describes several risk factors that are unique to our company:

- ▶ We face significant competition, including from companies with significantly greater resources. We currently compete directly with more than 10 companies for the sales of our products and services. Many of these companies are larger than we are and have significantly more resources to invest in their businesses. In addition, we continue to see new entrants into our markets as a result of increasing demand by customers.
- ▶ We expect our growth rates to decline and anticipate downward pressure on our gross margin in the future.
- ▶ We have grown significantly in recent years, due largely to the introduction of new products and services. We do not expect to be able to sustain the same level of growth in future years, and anticipate that a slowing in the introduction of new products and services, combined with increasing competition for existing products and services, will put downward pressure on our sales revenues and our gross margin.
- ▶ Our intellectual property rights are valuable, and any inability to protect them could reduce the value of our products and services.
- ▶ We maintain an extensive patent, trademark and copyright portfolio, which represent important assets to our company. If we fail to adequately protect our intellectual property, our intellectual property rights may be misappropriated by others, invalidated or challenged, and our competitors could duplicate our technology or may otherwise limit any competitive technological advantage we may have. Due to the rapid pace of technological change, we believe our success is likely to depend on continued innovation, technical expertise, marketing skills and customer support and service rather than legal protection of our proprietary rights. However, we intend to aggressively assert our intellectual property rights when necessary.
- ▶ Rapid technological changes and short product life cycles in our industry could harm our business.
- ▶ The technology underlying our products is subject to rapid change including the potential introduction of new products and technologies, which may have a material adverse effect on our business, operating results and financial condition. We will need to maintain an ongoing research and development program to continue to develop new products and apply new technologies to our products.

<sup>8</sup> Issuers of asset-backed securities and smaller reporting companies are not required to disclose risk factors in their annual report.

### 3.4 Item 1B. Unresolved staff comments

Issuers that meet the definition of a large accelerated filer or an accelerated filer (see discussion on When the report is due in Section 2), as well as that of a “well-known seasoned issuer,”<sup>9</sup> must disclose in their Form 10-K the substance of any unresolved written comments received from the SEC staff. Disclosure is required only if the comments were received from the SEC staff more than 180 days before the issuer’s fiscal year-end covered by the annual report, the issuer believes the comments are material and the comments remain unresolved at the time of the Form 10-K filing. SEC staff comments that have been resolved, including those the issuer and the SEC staff have agreed will be addressed in future Exchange Act reports, are not required to be disclosed. In disclosing unresolved SEC staff comments, the issuer is allowed to provide other information, including its position, with respect to any such comment.

#### Illustration 3-4: Unresolved staff comments

We are engaged in ongoing discussions with the SEC staff concerning the presentation of our reportable segments in the footnotes to our audited financial statements included in our annual reports on Form 10-K. We presently disclose three reportable segments, the ABC reportable segment, the DEF reportable segment and the GHI reportable segment. The SEC staff has questioned how we meet all of the aggregation criteria specified in the applicable accounting standard in order to aggregate our separate X and Y businesses within our ABC reportable segment, rather than reporting each individually. We continue to believe that our X and Y businesses have similar economic characteristics and meet each of the applicable aggregation criteria, and that aggregation is consistent with the objectives and basic principles of the accounting standard for segment reporting.

### 3.5 Item 2. Properties

Item 102 of Regulation S-K requires a brief description of the location and general character of the “principal plants, mines and other materially important physical properties of the registrant and its subsidiaries” and the identity of the business segment(s) that use such properties. Item 102 also requires disclosure of how the property is held (if not in fee) and of any major encumbrance.

The disclosure under Item 2 of Form 10-K should be sufficient to reasonably inform investors as to the “suitability, adequacy, productive capacity and extent of utilization of the facilities by the registrant.”

### 3.6 Item 3. Legal proceedings

Item 103 of Regulation S-K requires a brief description of:

- ▶ Any material pending legal proceedings involving the registrant or its subsidiaries, or of which any of their property is the subject, other than “ordinary routine litigation incidental to the business” (e.g., actions for negligence or other claims of a kind normal to the issuer’s business)
- ▶ Any similar proceedings known to be contemplated by governmental authorities

<sup>9</sup> Securities Act Rule 405 defines a “well-known seasoned issuer” (or WKSJ) as an issuer, that as of the most recent determination date, was eligible to use Form S-3 or Form F-3, with either of the following attributes:

- ▶ Worldwide market value of \$700 million or more of outstanding voting and non-voting common equity held by non-affiliates of the registrant (i.e., “public float”)
- ▶ Issued at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in registered primary offerings for cash, not exchange, in the last three years

The WKSJ definition specifically excludes asset-backed issuers, registered investment companies, business development companies and ineligible issuers. (See *Summary of SEC Final Rule – Securities Offering Reform* (Ernst & Young No. CC0198) for further discussion of the WKSJ definition.)

- ▶ Any proceedings in which the adversary is any director, officer or affiliate of the registrant, any beneficial owner of more than 5% of any class of voting securities of the registrant or any associate of any of the foregoing persons, or in which any such persons have a material interest adverse to the registrant or any of its subsidiaries

However, no disclosure is required for any of these types of proceedings (or group of similar proceedings) involving primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10% of consolidated current assets.

Item 103 of Regulation S-K also requires a brief description of any material bankruptcy, receivership or similar proceeding involving the registrant or any of its significant subsidiaries.

Separately, Item 103 of Regulation S-K requires a brief description of any administrative or judicial proceeding (or group of similar proceedings) under any Federal, State or local environmental protection provisions that: (1) is material to the business or financial condition of the registrant; (2) involves claims for damages (or potential monetary sanctions, capital expenditures, current or deferred charges to income) greater than 10% of consolidated current assets, exclusive of interest and costs; or (3) involves a governmental authority as a party and potential monetary sanctions (unless the registrant reasonably believes that aggregate monetary sanctions, exclusive of interest and costs, will not exceed \$100,000).

For any of the proceedings subject to disclosure under Item 103 of Regulation S-K, the description should include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties involved, the allegations and the relief sought.

### 3.6.1 Disclosure of certain tax penalties

The American Jobs Creation Act of 2004 (AJCA) requires SEC registrants to disclose in their SEC reports whether they have been required to pay certain penalties for failing to disclose to the Internal Revenue Service (IRS) their participation in listed transactions. For tax understatements or valuation misstatements attributable to reportable avoidance transactions, the AJCA also requires that SEC registrants disclose certain associated penalties. The disclosure requirement is one of several provisions in the AJCA designed to crack down on tax avoidance transactions.

The AJCA added Section 6707A, *Penalty for Failure to Include Reportable Transaction Information with Return*, to the Internal Revenue Code (the Code). Section 6707A(e) of the Code requires a person that files periodic reports with the SEC, or is consolidated with another person for purposes of those reports, to disclose in those reports the requirement to pay the penalties set forth in Section 6707A(e)(2). The IRS, but not the SEC, issued guidance on the new disclosure requirement through the publication of Revenue Procedure 2005-51 (the Revenue Procedure) in August 2005. The new disclosure requirements are effective for the specified penalties relating to tax returns due after 22 October 2004.

**Required Form 10-K disclosure:** The Revenue Procedure provides that any person or company that files a Form 10-K with the SEC, either separately or consolidated with another company, must disclose in Item 3 of Form 10-K, *Legal Proceedings*, the requirement to pay any of the penalties set forth in Section 6707A(e)(2) of the Code (see listing below).

The Revenue Procedure requires the following disclosures in Item 3 of Form 10-K:

- ▶ The amount of the penalty
- ▶ Whether the penalty has been paid in full
- ▶ The Code section and subparagraph under which the penalty was determined
- ▶ A description of the penalty, using language prescribed by the Revenue Procedure



Disclosure of the requirement to pay a specified tax penalty is required in the Form 10-K that relates to the fiscal year in which the IRS sends the company notice and demand for payment of the penalty. If the penalty is paid in full prior to the IRS sending notice and demand for payment, disclosure of the requirement to pay such penalty is required in the Form 10-K that relates to the fiscal year in which the penalty is paid.

If a company fails to make the required disclosures in Form 10-K, the disclosures must be made in the next Form 10-K filed with the SEC. The Form 10-K disclosure obligation continues in each successive Form 10-K filing until the company discloses its requirement to pay any of the specified penalties. Each failure to disclose the requirement to pay the specified penalties in Form 10-K will be treated as a “failure to disclose a listed transaction,” subject to an additional \$200,000 penalty. The Revenue Procedure does not indicate that filing an amendment to a Form 10-K would relieve the registrant of the requirement to make the disclosures in its next Form 10-K.

**Tax penalties subject to Form 10-K disclosures:** Section 6707A(e)(2) of the Code requires an SEC registrant to disclose the requirement to pay any of the following types of penalties:

- ▶ The penalty imposed by Section 6707A(a) of the Code in the amount determined under Section 6707A(b)(2) of the Code for failure to disclose a listed transaction
- ▶ The accuracy-related penalty imposed by Section 6662A(a) of the Code at the 30% rate determined under Section 6662A(c) of the Code for a reportable transaction understatement for which the relevant facts affecting the tax treatment of the item were not adequately disclosed in accordance with the Section 6011 regulations
- ▶ The 40% accuracy-related penalty imposed by Section 6662(h) for a gross valuation misstatement, if the company would (but for the exclusionary rule of Section 6662A(e)(2)(C)(ii)) have been subject to the accuracy-related penalty under Section 6662A(a) at the 30% rate determined under Section 6662A(c)
- ▶ The penalty imposed by Section 6707A(e) for failure to disclose any of the penalties described above in periodic reports required under Section 13 or 15(d) of the Exchange Act

An SEC registrant must disclose the requirement to pay the 40% accuracy-related penalty under Section 6662(h) if any of the following are true:

- ▶ It consented to the assessment of the 40% penalty without the issuance of a statutory notice of deficiency if the IRS proposed the 30% penalty determined under Section 6662A(c) in the alternative in a notice of proposed deficiency (30-day letter).
- ▶ It consented to the assessment of the 40% penalty or did not timely petition the Tax Court if the IRS included the 30% penalty determined under Section 6662A(c) in the alternative in a statutory notice of deficiency.
- ▶ The government raised the 30% accuracy-related penalty under Section 6662A(c) in the alternative in any pleading in a judicial proceeding challenging the applicability of the 40% penalty and the court expressly determined that the 30% penalty applied in the alternative to the 40% penalty.
- ▶ It expressly acknowledged the applicability of the 30% accuracy-related penalty under Section 6662A(c) in the alternative to the 40% accuracy-related penalty under Section 6662(h) in a written settlement agreement with the government.

### 3.7 Item 4. Mine safety disclosures

Effective 27 January 2012, Form 10-K was amended to add new Item 4, *Mine Safety Disclosures*. Previously, Item 4 had been “Removed and Reserved.”

Item 4 of Form 10-K now requires registrants to include a brief statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act is included in Exhibit 95 to the Form 10-K. In the final mine-safety disclosure rules,<sup>10</sup> the SEC adopted new Item 104 of Regulation S-K and amended Item 601 of Regulation S-K to add a new exhibit to Forms 10-K and 10-Q (Exhibit 95, *Mine Safety Disclosure Exhibit*). Exhibit 95 must be filed to provide the information required by Item 104 of Regulation S-K.

Item 104 of Regulation S-K requires a registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine in the US to provide the information specified below for the time period covered by the report (i.e., for the fiscal year):

- ▶ For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:
  - ▶ The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Federal Mine Safety and Health Act of 1977 (Act) for which the operator received a citation from the Mine Safety and Health Administration (MSHA).
  - ▶ The total number of orders issued under Section 104(b) of such Act.
  - ▶ The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under Section 104(d) of such Act.
  - ▶ The total number of “flagrant” violations under Section 110(b)(2) of such Act.
  - ▶ The total number of imminent danger orders issued under Section 107(a) of such Act.
  - ▶ The total dollar value of proposed assessments from MSHA under such Act. Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.
  - ▶ The total number of mining-related fatalities at mines subject to such Act. Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.
- ▶ A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from MSHA of:
  - ▶ A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of such Act; or
  - ▶ The potential to have such a pattern.
- ▶ Any pending legal action before the Federal Mine Safety and Health Review Commission (FMSHRC) involving such coal or other mine. In doing so, the registrant must report the total number of legal actions that were pending before FMSHRC by mine as of the last day of the time period covered by the report categorized according to the type of proceeding, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period.

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<sup>10</sup> The final mine safety disclosure rules are available at: <http://sec.gov/rules/final/2011/33-9286.pdf>.

# 4

## Part II

Regulation S-K contains the rules for disclosure of information required in Part II of Form 10-K, including:

Item 201	Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters
Item 301	Selected Financial Data
Item 302	Supplementary Financial Information
Item 303	Management's Discussion and Analysis of Financial Condition and Results of Operations
Item 304	Changes in and Disagreements with Accountants on Accounting and Financial Disclosure
Item 305	Quantitative and Qualitative Disclosures About Market Risk
Item 307	Disclosure Controls and Procedures
Item 308	Internal Control Over Financial Reporting
Item 701	Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities
Item 703	Purchases of Equity Securities by the Issuer and Affiliated Purchasers

Regulation S-X provides the financial statement requirements of the registrant and its subsidiaries for Item 8 of Part II of Form 10-K. Section 6 – Financial statements and parent company information discusses the Form 10-K financial statement requirements of Regulation S-X in detail. This Section is designed to help management prepare information required by the above Regulation S-K items, except for Regulation S-K Item 303, *Management's Discussion and Analysis of Financial Condition and Results of Operations*, which is discussed in Section 5 of this publication.

### 4.1

#### **Item 5. Market for registrant's common equity, related stockholder matters and issuer purchases of equity securities**

Items 201(a), (b) and (c) of Regulation S-K require disclosure of certain information about each class of the registrant's common stock. Briefly, a registrant is required to disclose the following information:

- ▶ Principal US markets on which the registrant's common stock is traded and all US securities exchanges on which the common stock is listed (when there is no established trading market, a statement to that effect should be made)<sup>1</sup>
- ▶ If the principal market is an exchange, high and low sales prices for each quarter during the last two years (high and low bid quotations, if the market is not an exchange)
- ▶ Approximate number of shareholders as of the latest practicable date (identifying the method of computation – e.g., number of record holders)
- ▶ Frequency and amount of cash dividends, if any, declared on each class of equity during the previous two fiscal years
- ▶ Restrictions, if any, on the registrant's present or future ability to pay dividends

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<sup>1</sup> Foreign registrants are required to identify the principal established foreign public trading market, if any. If a foreign registrant identifies a principal established foreign trading market, market price information (stated in the currency in which it is quoted) should be presented, to the extent practicable, comparable to what is required for the principal US market, including the source of such information. The registrant may translate a price into US currency at the exchange rate in effect on the date the price was reported on the foreign exchange. If the primary US market for the registrant's common equity trades using American Depositary Receipts, the US prices disclosed should be on that basis.

Registrants must disclose, and quantify where appropriate, restrictions that currently, or that are reasonably expected to, materially limit the amount of dividends paid. These could include restrictions on the transfer of funds to the registrant through dividends, loans or advances from its subsidiaries. Registrants may satisfy this requirement by cross-referencing the discussion of such restrictions in MD&A and the notes to the financial statements that disclose the restriction.

Registrants that have earnings, but have not paid dividends, are encouraged to indicate whether they intend to pay dividends in the foreseeable future. Registrants that have paid dividends are encouraged to indicate whether they expect to continue paying dividends in the future.

Registrants must adjust the market price and dividend data to give retroactive effect to material changes resulting from stock dividends, stock splits and reverse stock splits.

#### **Illustration 4-1: Common stock market prices and dividends**

The Company's common stock is traded on the New York Stock Exchange (ticker symbol ABC). The approximate number of record holders of the Company's common stock at 15 February 20Y2 was 3,100.

High and low stock prices and cash dividends declared for the last two fiscal years were:

Quarter Ended	20Y1			20Y0		
	Sales Price		Cash Dividends Declared	Sales Price		Cash Dividends Declared
	High	Low		High	Low	
March 31	\$ 21-1/4	\$ 17-1/2	\$ .20	\$ 20-1/4	\$ 16-3/4	\$ .20
June 30	22-1/2	18-3/4	.20	21-1/2	16-1/2	.20
September 30	23	19-1/4	.20	21-3/4	17	.20
December 31	24-3/4	18-1/4	.40	22-1/2	17-1/4	.40

The Company expects to continue its policy of paying regular cash dividends, although there is no assurance as to future dividends because they depend on future earnings, capital requirements and financial condition. In addition, the payment of dividends is subject to the restrictions described in Note 7 to the financial statements and discussed in MD&A.

## **4.2 Securities authorized for issuance under equity compensation plans**

Item 201(d) of Regulation S-K requires registrants to provide in their Form 10-K, tabular information for all equity compensation plans and individual compensation arrangements in effect as of the end of the latest fiscal year. The disclosures summarize the potential dilution that could occur from past and future equity grants for all plans and arrangements, whether or not approved by security holders.

Even though the Form 10-K instructions indicate that the disclosures required under Item 201(d) of Regulation S-K must be provided in response to both Item 5 and Item 12 of Form 10-K, the SEC staff has indicated that those disclosures should be included only in response to Item 12 of Part III of Form 10-K. That is, Item 5 of Part II of Form 10-K should include the disclosures required under Items 201(a), (b), and (c) of Regulation S-K, which are discussed above.

If the registrant is submitting a compensation plan for shareholder action, the registrant must provide the information required under Item 201(d) in response to Item 10 of Schedule 14A (the proxy statement). Even if the registrant does not submit a compensation plan for shareholder action, the registrant may provide the information required under Item 201(d) in its proxy statement. In either case, the registrant may incorporate the proxy statement disclosure by reference into Item 12 of Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end. See *Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339) for a further discussion of the requirements of Item 201(d) of Regulation S-K.

### 4.2.1 Stock performance graph

Item 201(e) of Regulation S-K requires registrants to provide a performance graph that compares the registrant's cumulative total shareholder return during the previous five years with a performance indicator of the overall stock market (i.e., a broad-based index), and the registrant's peer group. Instruction 7 to Item 201(e) states the disclosure is required only in a registrant's annual shareholders' report that precedes or accompanies a proxy or information statement relating to an annual meeting of security holders for the election of directors. Accordingly, the performance graph is not required in Item 5 of Part II of Form 10-K and is discussed further in Section 10 of this publication.

### 4.2.2 Recent sales of unregistered securities; use of proceeds from registered securities

Item 701 of Regulation S-K requires disclosure of information about all securities of the registrant sold by the registrant within the past three years that were not registered under the Securities Act (including sales of reacquired securities, new issues, securities issued in exchange for property, services or other securities and new securities resulting from the modification of outstanding securities). Item 5(a) of Part II of Form 10-K indicates that Item 701 of Regulation S-K information need not be disclosed in the Form 10-K if such information previously has been included in a Quarterly Report on Form 10-Q, or in a Current Report on Form 8-K.<sup>2</sup> Therefore, Form 10-K disclosure would be limited to any sales of unregistered securities during the fourth fiscal quarter that were not previously reported in an Item 3.02 Form 8-K.

Item 701 requires disclosure of the following information:

- ▶ Date of sale, the amount and the title of securities sold
- ▶ Names of the principal underwriters, if any, and for any securities not publicly offered, the name of the person or class of persons to whom the securities were sold
- ▶ For securities sold for cash, the aggregate offering price and aggregate underwriting discounts or commissions
- ▶ For any securities sold other than for cash, the nature of the transaction and the nature and aggregate amount of consideration received by the registrant
- ▶ The section of the Securities Act or SEC rule under which exemption from registration was claimed and a brief description of the facts relied upon to claim such exemption

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<sup>2</sup> Item 3.02 of Form 8-K requires reporting when the aggregate amount of previously undisclosed unregistered sales of equity securities exceeds 1% of the number of shares outstanding of the respective class. Form 10-Q and Form 10-K continue to require the registrant to report unregistered sales of equity securities during the most recent fiscal quarter that did not meet the disclosure threshold and were not reported in any Item 3.02 Form 8-K.

- ▶ If the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, the terms of conversion or exercise for the securities

Following the effective date of the registrant's first registration statement filed under the Securities Act, Item 701(f) of Regulation S-K requires disclosure in periodic reports (Form 10-K or Form 10-Q) of certain information about the use of proceeds. Such disclosures are required until the later of disclosure of the application of all of the offering proceeds or disclosure of the termination of the offering.

**Illustration 4-2: Use of proceeds**

On XX November 20Y1, the Company sold 7,475,000 shares of common stock in an initial public offering at a price of \$17.00 per share pursuant to a Registration Statement on Form S-1 (Registration No. 333-XXXXX), which was declared effective by the Securities and Exchange Commission on XX October 20Y1. The aggregate proceeds to the Company from the offering were approximately \$116.8 million reflecting gross proceeds of \$127.0 million, net of underwriting fees of approximately \$8.9 million and other offering costs of approximately \$1.3 million. During the period from the offering through 31 December 20Y1, the Company used the proceeds from the initial public offering as follows: approximately \$59.3 million to fund operations, approximately \$13.3 million for the purchase of property and equipment and approximately \$13.2 million for the acquisition of ABC, Inc.

### 4.2.3

#### Purchases of equity securities by the issuer and affiliated purchasers

Item 703 of Regulation S-K requires disclosure of all repurchases (i.e., both open market and private transactions) of any of the issuer's "equity securities" registered under Section 12 of the Exchange Act, by or on behalf of the issuer or any "affiliated purchaser" (as defined in Exchange Act Rule 10b-18).

Disclosure of the following information must be provided, aggregated on a monthly basis and in a tabular format, about all issuer repurchases for its last fiscal quarter (i.e., the fourth quarter for purposes of disclosure in Form 10-K):

- ▶ The total number of shares (or units) purchased (with disclosure, in a brief footnote to the table, of the nature of transactions other than through a publicly announced repurchase plan or program)
- ▶ The average price paid per share (or unit)
- ▶ The total number of shares (or units) purchased as part of publicly announced repurchase plans or programs (with disclosure in a footnote to the table of the principal terms of each such plan or program)
- ▶ The maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs

**Illustration 4-3: Disclosure of repurchases**

The following information describes the Company's stock repurchases during the fourth quarter of the fiscal year ended 31 December 20Y1.

Period	Total number of shares (or units) purchased	Average price paid per share (or unit)	Total number of shares (or units) purchased as part of publicly announced plans or programs	Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
1 October – 31 October 20Y1	3,000	38.75	3,000	60,000
1 November – 30 November 20Y1	–	–	–	60,000
1 December – 31 December 20Y1	<u>10,000</u>	38.85	<u>10,000</u>	<u>50,000</u>
Total	<u>13,000</u>		<u>13,000</u>	<u>50,000</u>

**4.3****Item 6. Selected financial data**

Item 301 of Regulation S-K requires a summary of selected financial data for at least the most recent five fiscal years (or for the life of the registrant and its predecessors, if less). The summary is required only on a consolidated basis and is not required to be audited.

The purpose of the selected financial data, as defined in Regulation S-K, is “to supply in a convenient and readable format selected financial data which highlight certain significant trends in the registrant's financial condition and results of operations.”

Although the summary is required for five years, data also should be provided for any earlier year(s) that may be “necessary to keep the information from being misleading.” For example, if a registrant in the construction industry has a pattern of having an exceptionally good year or two every four or five years because of certain major contracts, presentation of an eight- or ten-year summary might provide the reader with a better understanding of trends in the registrant's operations and financial condition.

**4.3.1****Format of the summary of selected financial data**

The summary should be presented as a table, in a comparative columnar format. As a practical matter, the sequence of years in the summary should be consistent with the financial statements, tables, notes to the financial statements and other data in the Form 10-K (e.g., the most recent period in the left column). Its contents, as specified in Item 301 of Regulation S-K, are “subject to appropriate variation to conform to the nature of the registrant's business,” and should include:

- ▶ Net sales or operating revenues
- ▶ Income (loss) from continuing operations<sup>3</sup>

<sup>3</sup> ASC 810 requires that consolidated net income be attributed to the controlling and noncontrolling interests on the face of the income statement. However, Item 301 of Regulation S-K requires disclosure of income (loss) from continuing operations as a line item in the table. While the SEC staff might not object if a registrant were to present only the captions required by Item 301, the registrant should clearly discuss, either parenthetically or in a note to the table, the existence of a significant noncontrolling interest that affects the amount of income allocable to the registrant's common shareholders.

- ▶ Income (loss) from continuing operations per common share
- ▶ Total assets
- ▶ Long-term obligations and redeemable preferred stock (including long-term debt, capital leases and redeemable preferred stock as defined in Rule 5-02.27(a) of Regulation S-X)
- ▶ Cash dividends declared per common share

Item 301 of Regulation S-K is silent on whether the presentation of income (loss) from continuing operations should reflect the basic or diluted per share calculation. Many registrants present both earnings per share amounts, when applicable, but if only one earnings per share amount is disclosed in the table, it is typically the diluted per-share amount.

Although long-term obligations and redeemable preferred stock are combined under one caption in the Instructions to Item 301 of Regulation S-K, the SEC staff has not objected to a separate presentation in the summary of selected financial data. Redeemable preferred stock includes all issues – whether convertible or not – whose redemption is outside the control of the issuer. Consistent with the views of the SEC staff as expressed in ASC 480, “redeemable preferred stock” presented in the table also should include other equity securities having redemption features, such as a class of common stock that is redeemable at the option of the holder (e.g., common stock subject to a “put” under which the owner may require the registrant to repurchase) (ASC 480-10-S99).

### 4.3.2

### Presentation of additional financial information

In addition to the items required in the summary, registrants are permitted to include data that they believe “would enhance an understanding of and would highlight trends in their financial condition and results of operations.” For example, registrants might choose to include cost of sales, gross profit, extraordinary items, total shareholders’ equity, working capital (or other measure of liquidity) or various financial ratios in the summary. However, the SEC cautions that other financial information provided in addition to that required should not “unnecessarily emphasize” one component of financial condition or results of operations (e.g., income, revenues) over another.

As indicated in Section 2 of this publication, ASC 230 and ASR No. 142, *Reporting Cash Flow and Other Related Data*, continue to prohibit the presentation of cash flow per share, as well as any other per share measures of liquidity. However, registrants may present the net amount of cash flows from operating activities in the summary of selected financial data or text of the annual shareholders’ report without SEC objection, provided it is not presented in a manner that gives it greater authority or prominence than net income. The lack of SEC objection is contingent upon the manner in which cash flow from operating activities is presented. Presentation or discussion of net income should precede presentation or discussion of cash flow from operating activities to avoid a prominence problem. If cash flow from operating activities is presented in the summary of selected financial data, cash flows from investing activities and financing activities also should be presented.

If a company elects to disclose non-GAAP financial measures (as defined) in selected financial data, it should consider FR-65 and the Non-GAAP C&DIs. For a more detailed discussion, see Non-GAAP financial measures discussion in Section 2.



### 4.3.3 Comparability among years

Because the five-year summary of selected financial data is intended to highlight trends in financial condition and results of operations, registrants should identify and disclose items that might affect comparability among the years. Registrants must disclose in a note to the table of selected financial data, or in a cross-referenced discussion, any matters that materially affect the comparability of the information (e.g., accounting changes, business combinations, disposition of business operations), and any material uncertainties that might cause the data not to be indicative of the registrant's future financial condition or results of operations. Most registrants satisfy this requirement with a cross-reference to applicable notes to the financial statements.

ASC 250 requires, among other things, retrospective application of voluntary changes in accounting principles, unless impracticable.<sup>4</sup> Accordingly, ASC 250 addresses the comparability concerns when presenting financial information in historical summaries, such as the summary of selected financial data.

*Retrospective accounting changes* – If an entity reports a change in accounting principle,<sup>5</sup> the financial statements should reflect the new accounting principle for all prior periods presented, as well as for the additional periods presented in the summary of selected financial data, unless it is impracticable to do so. Retrospective application requires the cumulative effect of the change to the new accounting principle on periods before those presented be reflected in the carrying amounts of assets and liabilities as of the beginning of the first period presented with an offsetting adjustment, if any, made to the opening balance of retained earnings for that period.

*Restatement for corrections of errors* – An entity that discovers a material error in previously issued financial statements must restate those prior period financial statements, as well as the additional periods presented in the summary of selected financial data, and reflect the cumulative effect of the error in the carrying amounts of assets and liabilities as of the beginning of the first period presented with an offsetting adjustment, if any, to the opening balance of retained earnings.

*Cumulative effect accounting changes* – Cumulative effects of applying a change in accounting principle should be reported only when it is impracticable to determine the period-specific effects of that change on all prior periods presented, including periods presented in the summary of selected financial data. In this case, the cumulative effect of the accounting change should be made as of the beginning of the earliest period to which the new accounting principle can be applied.

*Prospective accounting changes* – For prospective accounting changes, no adjustment to amounts previously reported is required to be made in the summary of selected financial data, but a description of the change and its effect on income and related per-share amounts should be disclosed for the year in which the change occurs.

Discontinued operations can pose a comparability problem in the summary, and often can have implications important to evaluating the trend of income from continuing operations or assessing the likelihood of future cash flows. If financial statements are restated to segregate the results of discontinued operations, the prior-year information in the summary of selected financial data also should

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<sup>4</sup> While ASC 250 requires retrospective application of voluntary changes in accounting principles, most Accounting Standard Codification updates are expected to contain specific transition provisions that should be followed instead of ASC 250.

<sup>5</sup> The Accounting Standards Codification defines a change in accounting principle as “a change from one generally accepted accounting principle to another generally accepted accounting principle when there are two or more generally accepted accounting principles that apply or when the accounting principle formerly used is no longer generally accepted. A change in the method of applying an accounting principle also is considered a change in accounting principle.” Pursuant to ASC 250, a change in accounting principle should be reported only if the change is required by a newly issued Accounting Standard Codification update, or if the entity can justify the use of an allowable alternative accounting principle on the basis that it is preferable.

be adjusted to present comparable amounts attributable to continuing operations. Registrants with significant discontinued operations, or a history of discontinued operations, should consider presenting the results of discontinued operations in the summary of selected financial data, or referring to the appropriate disclosure in the financial statements.

**Illustration 4-4: Selected financial data**

	Year ended 31 December <sup>(1)</sup>				
	20Y1 <sup>(2)</sup>	20Y0 <sup>(3)</sup>	20X9	20X8	20X7
<i>(In thousands, except per share data)</i>					
Statement of operations data:					
Net sales	\$ 197,000	\$ 181,000	\$ 165,000	\$ 133,000	\$ 122,000
Gross profit	29,550	34,390	34,650	26,600	26,840
Net income	8,700	9,000	8,240	5,000	6,500
Depreciation and amortization	1,764	1,698	1,512	1,810	1,798
Balance sheet data (end of year):					
Cash and cash equivalents	55,212	48,374	42,164	32,854	34,726
Total assets	210,790	192,765	176,810	143,500	130,000
Long-term debt and capital lease obligations, less current portion	52,250	50,300	49,500	35,900	39,450
Per common share data:					
Basic EPS	2.95	3.10	2.79	1.72	2.24
Diluted EPS <sup>(4)</sup>	2.83	3.02	2.65	1.64	2.13
Cash dividends declared	1.00	1.00	1.00	1.00	.80
<sup>(1)</sup> All per common share information presented in the above five-year summary have been adjusted to reflect the 2-for-1 stock split of the common shares which was distributed on 24 October 20Y0 to shareholders of record on 17 October 20Y0. <sup>(2)</sup> Effective 1 January 20Y1, the Company adopted new guidance on revenue recognition. The Company elected to adopt the accounting change using the prospective method. See Note X to the Company's 20Y1 financial statements. <sup>(3)</sup> Effective 1 January 20Y0, the Company adopted new guidance on accounting for variable interest entities, which did not have a significant effect on the Company's financial position and results of operations. <sup>(4)</sup> The computation of diluted EPS did not assume the conversion of the 7% convertible securities because their inclusion would have been antidilutive for all periods presented.					

## 4.4 Item 7A. Quantitative and qualitative disclosures about market risk

Item 305 of Regulation S-K, which does not apply to smaller reporting companies,<sup>6</sup> requires quantitative and qualitative market risk disclosures about all financial instruments to be presented outside the financial statements in both annual reports on Form 10-K and in registration statements. Market risk is a broad term referring to economic losses due to adverse changes in the fair value of a financial instrument. Item 305 affects most registrants as nearly all have financial instruments that expose them to market risk.

<sup>6</sup> Smaller reporting companies are not required to provide the disclosures specified in Item 305 of Regulation S-K. However, if a smaller reporting company chooses to voluntarily provide this information, it must comply with all of the disclosure requirements of Item 305.

The quantitative disclosures are intended to provide an investor with a greater ability to assess the registrant's exposure to market risk (e.g., interest rate risk, foreign currency exchange rate risk, commodity price risk, equity price risk) and must be disclosed in one of three ways: (1) a comprehensive table (i.e., tabular presentation) that schedules cash flow amounts by maturity dates for all instruments that are sensitive to future changes in interest rates, currency exchange rates, commodity prices, or other market factors, (2) a sensitivity or "shock" analysis that quantifies the effect of at least one hypothetical move in market conditions relating to each market risk factor, or (3) specified "value at risk" disclosures (the most complex of the three options) that measure the potential exposure to adverse market movements over a specified time period with a selected likelihood of occurrence.

Registrants are required to disclose various elements of the modeling techniques used to derive the quantitative disclosures as well as relevant assumptions or limitations of the amounts. In addition, Item 305 requires disclosure of the reasons for material changes in the amount of reported market risk when compared to the information reported in the prior year.

The qualitative disclosures include discussion of a company's primary risk exposures, its objectives for managing those exposures and actual or expected material changes in the primary market risk exposures. The qualitative disclosures should provide a context for the required quantitative disclosures.

The disclosures are required only when the exposure to market risk is material. Under the SEC's rules, a materiality assessment must be made for each market risk exposure category (e.g., interest rate risk, foreign currency exchange rate risk) in the trading and other-than-trading portfolios. Materiality assessments are based on the fair value of market risk sensitive instruments as of the end of the reporting period, as well as the materiality of the potential loss in future earnings, fair values or cash flows from reasonably possible near-term market movements. The SEC's rules provide the following guidelines for evaluating whether a potential loss is material: the magnitude of past market movements, expectations about the magnitude of reasonably possible future market movements and potential losses that could arise from leverage, option or multiplier features.

The SEC staff has stated that it usually is most appropriate to present the market risk information in a single location outside the financial statements. A separate section in Form 10-K for the market risk disclosures is common, but not necessary. The SEC staff has indicated that management instead may elect to integrate the market risk disclosures with MD&A and the description of business sections.

Item 303 of Regulation S-K requires discussion in MD&A of known events, trends or uncertainties that are reasonably likely to materially affect the registrant. If a known market risk materially affected reported trends or financial condition in the period presented, or is reasonably likely to materially affect future reported results or liquidity, discussion of the market risk and its effects is necessary in MD&A. The quantitative and qualitative market risk disclosure rules require more information than Item 303 because Item 305 requires specific descriptive and quantitative disclosures about losses from market risk sensitive instruments that could result from reasonably possible market changes. For example, a sensitivity analysis responsive to Item 305 presents quantitative information about possible future losses from reasonably possible near-term changes in market rates and prices. This information need not be repeated in MD&A, but cross-references may be necessary to make a particular disclosure complete.

For additional information about the SEC's market risk disclosure rules, including additional examples of the disclosure requirements, refer to our Financial Reporting Developments publication, *SEC Market Risk Disclosures* (Ernst & Young No. BB0688). See also our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150).

## 4.5 Item 8. Financial statements and supplementary data

See Section 6 – Financial statements and parent company information for financial statement requirements.

Item 302 of Regulation S-K requires disclosure of certain interim financial information and additional disclosures about oil and gas producing activities. The required information may be disclosed outside the financial statements as supplementary financial information.

### 4.5.1 Interim financial information

Selected quarterly financial data, in accordance with Item 302 of Regulation S-K, is required to be presented by all companies that have securities registered under Sections 12(b) (except mutual life insurance companies) or 12(g) of the Exchange Act, except smaller reporting companies and foreign private issuers. If required, selected quarterly financial data for the most recent two years must be disclosed outside the financial statements as supplementary information (or in an unaudited note to the financial statements, if so desired) in annual shareholders' reports and in SEC filings, such as Form 10-K.

**Data to be disclosed:** Quarterly financial data may be designated “unaudited” and must include the following:

- ▶ Net sales
- ▶ Gross profit
- ▶ Income (loss) before extraordinary items and cumulative effect of a change in accounting
- ▶ Net income (loss)
- ▶ Net income (loss) attributable to the registrant
- ▶ Earnings per share data (basic and, when applicable, diluted)

Quarterly financial data are required for each full quarter within the two most recent fiscal years. The SEC does not require selected quarterly financial data in an IPO registration statement or Exchange Act registration statement (i.e., Form 10). However, the first periodic or transactional filing that includes audited financial statements after the effective date of such a registration statement should include the two years of information required by Item 302 of Regulation S-K.

Item 302 of Regulation S-K requires disclosure of gross profit, which is defined as “net sales less costs and expenses associated directly with or allocated to products sold or services rendered.” As an alternative, if a company desires to present its quarterly disclosures in a manner consistent with its annual presentation, SAB Topic 6.G allows disclosure of the cost of sales instead of gross profit. However, users must be able to compute gross profit from the information provided. Registrants in specialized industries (e.g., banks and insurance companies), which customarily do not compute gross profit, should present summarized financial data that is most meaningful in their particular circumstances.

**Other required disclosures:** Item 302 of Regulation S-K requires a description of the effect of any disposals of segments of a business,<sup>7</sup> and extraordinary, unusual or infrequently occurring items recognized in each quarter. The aggregate effect and the nature of year-end or other adjustments material to the results for each quarter presented also must be disclosed. Further, if quarterly data being

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<sup>7</sup> “Segments of a business” is not defined in Item 302(a)(3) of Regulation S-K. However, SAB Topic 6.G provides interpretative guidance that “segments of a business” is intended to mean “components of an entity,” as that term is defined in the Accounting Standards Codification.

presented differs from amounts previously reported on a prior Form 10-Q report, the amounts presented must be reconciled with those previously reported, with a description of the reasons for such differences. In addition, the prior-period comparative information presented in subsequent Forms 10-Q should be adjusted to conform to the amounts disclosed in the annual shareholders' report.

**Quarterly data of subsidiaries and investees:** Quarterly financial data are not required to be included in supplemental financial statements for unconsolidated subsidiaries and equity investees unless the financial statements are for a company that is itself a registrant required to provide disclosures under Item 302 of Regulation S-K.

#### **Illustration 4-5: Quarterly results of operations**

The following is a summary of the quarterly results of operations for the years ended 31 December 20Y1 and 20Y0:

	<b>31 Mar</b>	<b>30 Jun</b>	<b>30 Sep</b>	<b>31 Dec</b>
	<i>(In thousands, except per share data)</i>			
20Y1				
Net sales	\$ 56,500	\$ 41,500	\$ 51,500	\$ 47,500
Cost of products sold	43,750	31,810	38,220	35,520
Net income	2,750	1,690	2,280	1,980
Net income attributable to the registrant				
Net income per common share:	2,150	1,340	1,980	1,530
- Basic	.93	.57	.76	.69
- Diluted (1)	.89	.53	.74	.67
20Y0				
Net sales	\$ 39,000	\$ 51,500	\$ 47,500	\$ 43,000
Cost of products sold	29,275	39,000	35,200	32,800
Net income	2,000	2,500	2,300	2,200
Net income attributable to the registrant	1,850	2,150	2,125	1,930
Net income per common share:				
- Basic	.69	.86	.79	.76
- Diluted (1)	.68	.83	.77	.74

<sup>(1)</sup> The computation of diluted EPS did not assume the conversion of the 7% convertible securities because their inclusion would have been antidilutive for all periods presented.

## 4.5.2

### **Information about oil and gas producing activities**

Item 302(b) of Regulation S-K requires registrants engaged in "significant" oil and gas producing activities to present, as supplementary information, disclosures pursuant to ASC 932 (specifically ASC 932-235-50).<sup>8</sup> The oil and gas activities are significant if one or more of the tests in the definition of significant oil and gas activities in ASC 932-235-20 are met. Disclosures that relate to annual periods and disclosures required as of the beginning of an annual period are presented for each year for which an income statement is required. Disclosures as of the end of an annual period are presented as of the date of each required audited balance sheet. These disclosures are summarized in our *GAAP, Regulation S-X and Regulation S-K checklist supplement for oil and gas producing companies* (Ernst & Young Form No. A69E).

<sup>8</sup> A registrant engaged in oil and gas producing activities also is subject to the financial reporting and disclosure requirements included in Item 102 of Regulation S-K and Rule 4-10 of Regulation S-X.

Securities Act Rule 175 and Exchange Act Rule 3b-6 provide a safe harbor from the liability provisions of the securities laws for disclosures about the value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves, as set forth in ASC 932-235-50-29 through 50-33).

## 4.6

### **Item 9. Changes in and disagreements with accountants on accounting and financial disclosure**

If during the registrant's two most recent fiscal years, or any subsequent interim period, the registrant's principal auditor, or an independent auditor on whom the principal auditor expressed reliance in its report, resigned, declined to stand for re-election or was dismissed, the registrant is subject to additional disclosure requirements pursuant to Item 304 of Regulation S-K.

When a change in auditors occurs, the registrant is required to report the event within four business days in a Form 8-K under Item 4.01, and provide the disclosures required by Item 304(a) of Regulation S-K.<sup>9</sup> These disclosures include:

- ▶ Whether the auditor resigned, declined to stand for re-election or was dismissed and the date the change occurred
- ▶ Whether the principal auditor's report on the financial statements for either of the past two years contained an adverse opinion or disclaimer of opinion, or was qualified as to uncertainty (e.g., a going concern uncertainty), audit scope or accounting principles and the nature of any opinion modification or qualification
- ▶ Whether the decision to change auditors was recommended or approved by the audit or similar committee of the board of directors.
- ▶ Whether there were any disagreements with the auditor during the two most recent fiscal years and any interim period preceding a resignation, declination or dismissal. If this is the case, certain additional disclosures are required.
- ▶ Whether during the two most recent fiscal years and any subsequent interim period<sup>10</sup> before such resignation, declination or dismissal there were any reportable events (e.g., auditor communication about a lack of sufficient internal controls, including an adverse opinion on the effectiveness of ICFR, inability of the auditor to rely on management's representations, need for the auditor to expand significantly the scope of the audit), in which case, certain additional disclosures are required.

Once these disclosures have been filed in a Form 8-K, a later Form 10-K is not required to repeat them. However, proxy statements relating to the annual election of directors or the election, approval or ratification of the principal auditor are required to contain all disclosures required by Item 304(a) of Regulation S-K, notwithstanding any previous disclosure. These disclosures may be made in the annual shareholders' report or in the proxy statement itself.

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<sup>9</sup> A merger of accounting firms always results in a change in accountants if there is a change in legal entity of the firm that performs the audit. An Item 4.01 Form 8-K must be filed no later than four business days after the merger. In addition, a change to an accountant that is related in some manner to the former accountant (e.g., the firms are affiliates or are members of the same network) would require an Item 4.01 Form 8-K to be filed no later than four business days after the change in accountant if the new and former accountants are separate legal entities and are separately registered with the PCAOB.

<sup>10</sup> This SEC staff interprets this to mean through the dismissal or termination date.

Following a change in auditors, Form 10-K and the annual report to shareholders are required to include the disclosures specified in Item 304(b) of Regulation S-K if they apply. Disclosure is required if there were disagreements (or reportable events) involving the former auditor *and* the financial statements include transactions or events that are accounted for, or disclosed, in a manner with which the former auditor would have taken exception. The required disclosures include the existence and nature of the disagreement or reportable event, and the effect on the financial statements of applying the accounting method that would have been required by the former auditors. These disclosures are not required if the method asserted by the former auditors has been superseded by subsequently issued accounting standards updates and is no longer generally accepted.

## 4.7 **Item 9A. Controls and procedures**

### 4.7.1 **Item 307 Disclosure controls and procedures**

**Definition:** Exchange Act Rules 13a-15(a) and 15d-15(a) require registrants to maintain “disclosure controls and procedures.” Exchange Act Rules 13a-15(e) and 15d-15(e) define the term “disclosure controls and procedures” as:

“Controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the [Exchange] Act is recorded, processed, summarized and reported, within the time periods specified in the Commission’s rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the [Exchange] Act is accumulated and communicated to the issuer’s management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.”

**Evaluation and disclosure:** Exchange Act Rules 13a-15(b) and 15d-15(b) require each issuer’s management to evaluate, with the participation of the issuer’s principal executive and principal financial officers, or persons performing similar functions, the effectiveness of the issuer’s disclosure controls and procedures as of the end of each fiscal quarter. Based on that evaluation, Item 307 of Regulation S-K requires each Form 10-Q and, with respect to the fourth quarter, the Form 10-K, to disclose the conclusions of the registrant’s principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the registrant’s disclosure controls and procedures as of the end of the period covered by the report.

In providing the disclosures under Item 307 of Regulation S-K, some companies have indicated that disclosure controls and procedures are designed only to provide “reasonable assurance” that they will meet their objectives. While not objecting to such language, the SEC staff has required these companies to disclose management’s conclusion about whether the company’s disclosure controls and procedures are effective at the “reasonable assurance” level. In providing the disclosures under Item 307 of Regulation S-K, other companies have disclosed that there is “no assurance” that disclosure controls and procedures will operate effectively under all circumstances. In these cases, the SEC staff has requested that the companies clarify that their disclosure controls and procedures are designed to provide “reasonable assurance,” subject to the conditions discussed above.

The SEC staff reminds registrants that management’s conclusions about the effectiveness of the registrant’s disclosure controls and procedures in interim and annual reports under Item 307 of Regulation S-K must include an explicit statement about whether disclosure controls and procedures are either “effective” or “ineffective.” In addition, management’s conclusion must consider disclosure controls and procedures “in their totality.” The SEC staff will require a registrant to amend its filing if it discloses inappropriate expressions of management’s conclusions, such as conclusions that disclosure controls and procedures are “adequate,” “effective, except for,” or “effective except as disclosed below.”

Section 10 of this publication contains an example of the disclosures required by Item 307 of Regulation S-K.

**Relationship between “disclosure controls and procedures” and “internal control over financial reporting”:** In its commentary,<sup>11</sup> the SEC expresses its view that there is “substantial overlap” between a company’s disclosure controls and procedures and its internal control over financial reporting (discussed below). However, there are some elements of disclosure controls and procedures that are beyond the scope of internal control over financial reporting, and there are some (albeit very few) elements of internal control over financial reporting that may fall outside the scope of a registrant’s disclosure controls and procedures. In the SEC’s view, the elements of internal control over financial reporting that provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles would always be included in a company’s disclosure controls and procedures. Aside from those elements, the SEC indicated that companies can be expected to make judgments about the processes and controls on which management relies to meet applicable Exchange Act disclosure requirements. Additionally, any registrant amending a filing for a material deficiency (as discussed in Section 2 of this publication) should consider the effect on prior conclusions about the effectiveness of disclosure controls and procedures.

The SEC staff has indicated<sup>12</sup> that a registrant may exclude a business it acquired during the year from its assessment of internal control over financial reporting. In light of the overlap between a company’s disclosure controls and procedures and its internal control over financial reporting, the registrant also may exclude these controls from its evaluation of disclosure controls and procedures. In these situations, the registrant should indicate the significance of the acquired business to the registrant’s consolidated financial statements.

## 4.7.2 Item 308 (a) & (b) Internal control over financial reporting

**Transition – Domestic issuers:** For domestic “large accelerated filers” (i.e., seasoned issuers with public equity float of \$700 million or more) and “accelerated filers” (i.e., seasoned issuers with public equity float of \$75 million or more but less than \$700 million), management and auditor reporting on internal control over financial reporting (Section 404) became effective for fiscal years ended on or after 15 November 2004.

Under the Sarbanes-Oxley Act of 2002, domestic “non-accelerated filers” (i.e., issuers with public equity float of less than \$75 million) are required to provide a report by management assessing the effectiveness of the company’s internal control over financial reporting, as required by Section 404(a), for fiscal year ended on or after 15 December 2007 unless they qualify as a newly public company.<sup>13</sup>

During 2010, the Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank Act) was signed into law. The Dodd-Frank Act exempts non-accelerated filers from the auditor attestation requirement of Section 404(b) of the Sarbanes-Oxley Act. The Dodd-Frank Act did not modify management reporting on internal control over financial reporting for non-accelerated filers pursuant to the SEC’s rules implementing Section 404(a). However, under SEC rules, management reports on ICFR now are considered “filed” rather than “furnished.”

<sup>11</sup> SEC Release No. 33-8238, *Management’s Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, issued 5 June 2003.

<sup>12</sup> Regulation S-K C&DI 214.01, *Item 307 – Disclosure Controls and Procedures*. The SEC staff Regulation S-K C&DIs can be found at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

<sup>13</sup> Section 404 reporting commences with the second annual report of any newly public company. The surviving issuer in a reverse acquisition is not considered a newly public company. The SEC staff has published Regulation S-K C&DI 215.02 for companies to consider in such reverse acquisition situations (<http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>).



**Transition when there is a change in fiscal year-end:** A registrant that changes its fiscal year is required to provide a management report on internal control over financial reporting, and the related auditor attestation report, when filing a transition report on Form 10-K.<sup>14</sup> This is because transition reports filed on Form 10-K must contain audited financial statements and, accordingly, also must include management's report on internal control, subject to the transition provisions described above.

If the transition report is filed on Form 10-Q, a registrant would be required to provide only a management assessment as of its new fiscal year-end in connection with the registrant's first Form 10-K filed following a change in fiscal year. For example, assume on 1 April 20Y2 an accelerated filer changes its fiscal year from 31 December to 31 March and elects to file its transition report on Form 10-Q for the transition period 1 January 20Y2 to 31 March 20Y2. Such accelerated filer's transition report on Form 10-Q for the period ended 31 March 20Y2 is not required to include internal control reports. The registrant would include only a management report on internal control over financial reporting, and related auditor attestation report, in the registrant's next annual report on Form 10-K for the fiscal year ending 31 March 20Y3. Therefore, the registrant would not be required to perform an assessment of, and file a report on, its internal control over financial reporting as of the end of the 31 March 20Y2 transition period, unless it elected to file its transition report on Form 10-K rather than Form 10-Q.

**Definition:** Exchange Act Rules 13a-15(a) and 15d-15(a) require registrants to maintain "internal control over financial reporting." Exchange Act Rules 13a-15(f) and 15d-15(f) define the term "internal control over financial reporting" as:

"a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
- (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles,<sup>15</sup> and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
- (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements."

This definition is consistent with the definition of internal accounting controls in Section 13 of the Exchange Act, which was added by the Foreign Corrupt Practices Act of 1977. This definition also encompasses the subset of internal controls addressed in the Committee of Sponsoring Organizations of the Treadway Commission's (COSO) *Internal Control – Integrated Framework* (COSO Report) pertaining to financial reporting objectives. Thus, "internal control over financial reporting" does not extend to the

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<sup>14</sup> Question 8 of the SEC staff's document, *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports: Frequently Asked Questions* (revised 24 September 2007) (Section 404 FAQ).

<sup>15</sup> As discussed in the section *Relationship between "disclosure controls and procedures" and "internal control over financial reporting"* above, the elements of internal control over financial reporting that address this objective also would represent an element of the company's disclosure controls and procedures.

other elements of internal control identified in the COSO Report relating to the effectiveness and efficiency of a company's operations and a company's compliance with applicable laws and regulations (with the exception of compliance with the applicable laws and regulations directly related to the preparation of financial statements, such as compliance with SEC regulations).

**Management report:** Exchange Act Rules 13a-15(c) and 15d-15(c) require each issuer's management to evaluate, with the participation of the issuer's principal executive and principal financial officers, or persons performing similar functions, the effectiveness, as of the end of each fiscal year, of the issuer's internal control over financial reporting.<sup>16</sup> Item 308(a) of Regulation S-K requires each Form 10-K to include a report of management on the company's internal control over financial reporting,<sup>17</sup> which must, at a minimum, include the following:

- ▶ A statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the registrant
- ▶ A statement identifying the framework used by management to evaluate the effectiveness of the registrant's internal control over financial reporting
- ▶ Management's assessment of the effectiveness of the registrant's internal control over financial reporting as of the end of the registrant's most recent fiscal year, including a statement about whether internal control over financial reporting is effective<sup>18</sup>
- ▶ A statement that the registered public accounting firm that audited the financial statements included in the annual report has issued an attestation report on the registrant's internal control over financial reporting (accelerated filers and large accelerated filers only)

While Item 308(a) of Regulation S-K clarifies the information required in management's report on internal control over financial reporting, it does not specify the exact format or content of the management report. If that management's report indicates that internal control over financial reporting is designed to provide only "reasonable assurance" that it will meet its objectives, the SEC has stated that "the discussion must be presented in a manner that neither makes the disclosure in the report confusing nor renders management's assessment concerning the effectiveness of the company's internal control over financial reporting unclear."

Exchange Act Rules 13a-15(c) and 15d-15(c) provide that management must base its evaluation of the effectiveness of its internal control over financial reporting on a "suitable, recognized control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment." The SEC further indicated that, in its view, a suitable framework must be free from bias; permit reasonably consistent qualitative and quantitative

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<sup>16</sup> If a subsidiary issuer or subsidiary guarantor is exempt from Exchange Act reporting under Rule 12h-5, the SEC staff has indicated that Form 10-K is required to include only a Section 404 report for the consolidated parent company. Also in this situation, the information required to be furnished by Item 9A of Form 10-K applies only to the consolidated parent company and, accordingly, a separate Section 404 report is not required for such subsidiary issuer or subsidiary guarantor.

<sup>17</sup> While the SEC's final Section 404 rule does not mandate the location of management's annual report on internal control over financial reporting, the Commission has indicated that it is important for the report to be in close proximity to the corresponding audit report on internal control over financial reporting issued by the company's independent registered public accounting firm. Further, the SEC staff stated its expectation that companies will choose to place the internal control reports together near their MD&A disclosure or in a portion of the document immediately preceding the financial statements. We believe that including both management's Section 404(a) report and the auditor's Section 404(b) report in Item 9A on Form 10-K satisfies those expectations. Because Exchange Act Rule 14a-3 was not amended to require the information specified in Items 307 and 308 of Regulation S-K, internal control reports are not required in "glossy" annual reports.

<sup>18</sup> Negative assurance (i.e., a statement that nothing has come to management's attention to suggest that the company's internal control over financial reporting is not effective) will not satisfy this requirement.

measurements of a company's internal control; be sufficiently complete so that relevant factors that would alter a conclusion about the effectiveness of a company's internal control are not omitted; and be relevant to an evaluation of internal control over financial reporting. The SEC cited the COSO Report as a suitable, recognized internal control framework meeting the requirements of Exchange Act Rules 13a-15(c) and 15d-15(c).<sup>19</sup>

**Scope of management's assessment:** Because the process of evaluating internal control over financial reporting will vary from company to company, SEC rules do not specify the methods or procedures to be performed in an evaluation.<sup>20</sup> The SEC's interpretive guidance, *Commission Guidance Regarding Management's Report on Internal Control over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934*, states that the methods and procedures for identifying financial reporting risks will vary based on characteristics of the company such as its size, complexity, organizational structure and its processes and financial reporting environment, as well as the control framework used by management. However, an instruction to Item 308 of Regulation S-K states, "the registrant must maintain evidential matter, including documentation, to provide reasonable support for management's assessment of the effectiveness of the registrant's internal control over financial reporting."

In adopting its Section 404 reporting rules in 2003, the SEC stated:

"The assessment of a company's internal control over financial reporting must be based on procedures sufficient both to evaluate its design and to test its operating effectiveness. Controls subject to such assessment include, but are not limited to: controls over initiating, recording, processing and reconciling account balances, classes of transactions and disclosure and related assertions included in the financial statements; controls related to the initiation and processing of non-routine and non-systematic transactions; controls related to the selection and application of appropriate accounting policies; and controls related to the prevention, identification, and detection of fraud. The nature of a company's testing activities will largely depend on the circumstances of the company and the significance of the control. However, inquiry alone generally will not provide an adequate basis for management's assessment.

An assessment of the effectiveness of internal control over financial reporting must be supported by evidential matter, including documentation, regarding both the design of internal controls and the testing processes. This evidential matter should provide reasonable support: for the evaluation of whether the control is designed to prevent or detect material misstatements or omissions; for the conclusion that the tests were appropriately planned and performed; and that the results of the tests were appropriately considered."

The SEC staff also stated in the Section 404 FAQs its views on the scope of management's assessment as it relates to consolidated entities (i.e., variable interest entities or VIEs and acquired businesses). The SEC staff indicated that management's report on internal control over financial reporting typically should include controls at all consolidated entities, regardless of the basis for consolidation. For instance, the SEC staff indicated that the internal controls of an entity consolidated by virtue of variable interest entity accounting should be covered in management's report on internal control over financial reporting if the registrant's initial involvement with the VIE occurred after 15 December 2003.

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<sup>19</sup> The *Guidance on Assessing Control*, published by the Canadian Institute of Chartered Accountants, and the *Turnbull Report*, published by the Institute of Chartered Accountants in England & Wales, also are identified by the SEC as suitable frameworks.

<sup>20</sup> In June 2007, the SEC published interpretive guidance, *Commission Guidance Regarding Management's Report on Internal Control over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934* (SEC Release Nos. 33-8810 and 34-55929, FR-77), for management of all public companies subject to Section 404 regarding their evaluations of internal control over financial reporting. The SEC also amended Exchange Act Rules 13a-15(c) and 15d-15(c) to provide for a non-exclusive safe-harbor such that a company that performs an evaluation of internal control in accordance with the interpretive guidance satisfies the annual evaluation required by those Exchange Act Rules.

The SEC staff acknowledged that it might not always be possible to assess an acquired business's internal control over financial reporting in the period between the consummation date and the date of management's assessment.<sup>21</sup> In such instances, the SEC staff would not object to management referring in its internal control report to a discussion in the registrant's Form 10-K regarding the scope of management's assessment and to such disclosure noting that management excluded the acquired business from management's report on internal control over financial reporting. If such a reference is made, however, management must identify the excluded acquired business and indicate the significance of the business to the registrant's consolidated financial statements.<sup>22</sup> Notwithstanding management's exclusion of an acquired business's internal controls from its annual assessment, a registrant must disclose any material change to its internal control over financial reporting due to the acquisition pursuant to Exchange Act Rule 13a-15(d) or 15d-15(d), whichever applies. In addition, the period during which management may omit an assessment of an acquired business's internal control over financial reporting from its assessment of the registrant's internal control may not extend beyond one year from the date of acquisition, nor may such assessment be omitted from more than one annual management report on internal control over financial reporting.

As for the timing of the evaluation and testing, the adopting release states the SEC view that "management of each company should perform evaluations of the design and operation of the company's entire system of internal control over financial reporting over a period of time that is adequate for it to determine whether, as of the end of the company's fiscal year, the design and operation of the company's internal control over financial reporting are effective." Such an approach makes practical sense recognizing that some controls operate continuously while others operate only at certain times, such as the end of the fiscal year. Thus, the SEC recognizes that, while the evaluation date is as of the end of the fiscal year, for practical purposes, the testing of many internal controls must be performed at interim dates with appropriate roll-forward procedures. In addition, the adopting release acknowledges that, while "management" is ultimately responsible for the assessment of internal control over financial reporting, the necessary activities to evaluate the design and operating effectiveness of the company's internal control over financial reporting may be conducted by non-management personnel acting under the supervision of management.

**Effects of material weaknesses and significant deficiencies:** If a "material weakness" exists at the end of the fiscal year, it must be disclosed in management's internal control report, and the presence of a material weakness would preclude management from concluding that internal control over financial reporting is effective.<sup>23</sup>

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<sup>21</sup> The term "business" includes those acquisitions that would constitute a business based upon the facts and circumstances as outlined in Article 11-01(d) of Regulation S-X. While in some instances an acquisition may not meet the definition of a business in ASC 805 and would not be accounted for as a business combination, it nevertheless may be a business under the definition in Article 11 used for SEC reporting purposes. This guidance applies irrespective of whether the acquisition is significant under Rule 1-02(w) of Regulation S-X.

<sup>22</sup> The SEC staff has addressed the effect on management's assessment of internal control over financial reporting resulting from the consolidation of a variable interest entity (VIE) in accordance with ASC 810, as amended by Accounting Standard Update 2009-17, *Consolidations (Topic 810) – Improvements to Financial Reporting by Enterprises Involved with Variable Interest Entities* (which codifies FASB Statement No. 167, *Amendments to FASB Interpretation No. 46(R)*). The SEC staff stated that Questions 1 and 3 of its frequently asked questions regarding management's report on internal control over financial reporting do not apply upon the adoption of FASB Statement No. 167. The SEC staff previously permitted registrants to exclude from the scope of their internal control evaluation certain entities that were consolidated upon the adoption of FASB Interpretation No. 46(R), *Consolidation of Variable Interest Entities an interpretation of ARB No. 51*. The SEC staff stated that a registrant that consolidates a VIE as a result of the adoption of FASB Statement No. 167 likely has the right or authority to assess the ICFR of that VIE. The SEC staff also stated the consolidation of a VIE under the transition provisions of FASB Statement No. 167 does not constitute a business combination for purposes of determining whether the newly consolidated entity may be excluded from the scope of management's assessment of internal control over financial reporting.

<sup>23</sup> When management concludes that the company's internal control over financial reporting is ineffective, the SEC staff indicated that the company should consider including in their disclosures: (1) the nature of any material weakness; (2) its effect on financial reporting and the control environment; and (3) management's current plans, if any, for remediating the weakness.

Management's certification called for by Section 302 of the Sarbanes-Oxley Act requires the certifying officers to disclose to the registrant's auditors and the audit committee all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting.<sup>24</sup> In PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with an Audit of Financial Statements* (AS 5), a "significant deficiency" is defined as "a deficiency, or a combination of deficiencies, in internal control over financial reporting that is less severe than a material weakness, yet important enough to merit attention by those responsible for oversight of the company's financial reporting." AS 5 defines the term "material weakness" as "a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis." AS 5 indicates that the "reasonable possibility" of an event, included in the definition of a material weakness, has the same meaning as the terms "reasonably possible" or "probable" as defined in the Accounting Standards Codification. An aggregation of significant deficiencies in internal control over financial reporting could constitute a material weakness and also preclude management from determining that a company's internal control over financial reporting is effective.

While not addressed in the SEC rules, we believe that a material weakness in internal control that was identified and corrected during the fiscal year would not preclude management from concluding that internal control over financial reporting was effective as of the end of the fiscal year. In those circumstances, management's internal control report would not be required to disclose the existence and correction of a material weakness earlier in the company's fiscal year. However, under Item 308(c) of Regulation S-K (discussed below), a change during a fiscal year necessary to correct a material weakness in internal control would need to be disclosed in the periodic SEC report covering the respective fiscal quarter.

**Auditor attestation:** Rules 1-02 and 2-02 of Regulation S-X require the issuer's registered public accounting firm to attest to, and report on whether the registrant maintained, in all material respects, effective internal control over financial reporting. Item 308(b) of Regulation S-K requires each Form 10-K of an accelerated or a large accelerated filer to include the attestation report from the issuer's registered public accounting firm on the registrant's internal control over financial reporting, issued pursuant to auditing standards adopted by the PCAOB.

### 4.7.3

## Item 308 (c) Changes in internal control over financial reporting

The SEC staff clarified that it would not object if a registrant does not disclose changes or improvements to controls made in preparation of the registrant's first Section 404 report (e.g., between its IPO and second Form 10-K report date). However, if the registrant were to identify a material weakness in advance of its Section 404 compliance date, the SEC staff stated that the registrant "should carefully consider whether that fact should be disclosed, as well as changes made in response to the material weakness."<sup>25</sup>

After the registrant's first Section 404 report, Item 9A of Form 10-K requires the issuer to disclose any change in internal control over financial reporting that occurred during the fourth quarter of the fiscal year that has "materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting." The SEC staff clarified that this would encompass disclosing a change (including an improvement) to internal control over financial reporting that was not necessarily in response to an identified significant deficiency or material weakness (i.e., the implementation of a new

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<sup>24</sup> The SEC expects that the certifying officers also would make the auditors and audit committee aware of any significant deficiencies, material weaknesses or fraud requiring disclosure of which they become aware outside, or subsequent to, the formal evaluation process.

<sup>25</sup> Question 9 of the SEC staff's Section 404 FAQ.

information system) if it materially affected the registrant's internal control over financial reporting.<sup>26</sup> Read literally, Item 308(c) of Regulation S-K and the form of management's Section 302 (of the Sarbanes-Oxley Act) certification require only disclosure of material changes in internal control over financial reporting that occurred during a fiscal quarter, not the underlying reasons for such changes (e.g., significant deficiency, material weakness, business acquisition, change in the design of internal controls to increase their effectiveness and efficiency). However, the SEC has stated, "a company will have to determine, on a facts and circumstances basis, whether the reasons for the change, or other information about the circumstances surrounding the change, constitute material information necessary to make the disclosure about the change not misleading."

#### 4.7.3.1 **Exhibit 31 Management's Section 302 certification**

The management certification called for by Section 302 of the Sarbanes-Oxley Act must be filed as Exhibit 31 to the Form 10-K. As "filed" information, Section 302 certifications remain subject to the civil liability provisions of Section 18 of the Exchange Act, and may be incorporated by reference into registration statements filed under the Securities Act where they would become subject to the liability provisions of Section 11 of the Securities Act.

The specified form of the Section 302 certification is included in Item 601, *Exhibits*, of Regulation S-K. The certifications must be filed in the exact form specified by the SEC rules, as illustrated in Section 10 of this publication.<sup>27</sup> Separate certifications are required to be filed by the CEO and CFO.

### 4.8 **Item 9B. Other information**

Item 9B of Form 10-K requires disclosure of any reportable events not reported on Form 8-K as required during the fourth quarter of the year covered by the Form 10-K, whether or not otherwise required to be disclosed by the Form 10-K. If disclosure of the required delinquent information is made in Item 9B, such disclosure is not required to be repeated in a report on Form 8-K.

Certain Form 8-K items qualify for a limited safe harbor from public and private claims under Exchange Act Section 10(b) and Rule 10b-5 for failure to file a timely Form 8-K regarding certain items. Under the limited safe harbor, a failure to file a report on Form 8-K for the specified events will not be deemed to be a violation of Section 10(b) and Rule 10b-5 under the Exchange Act. This safe harbor applies only to a failure to file; material misstatements or omissions in a Form 8-K continue to be subject to Section 10(b) and Rule 10b-5 liability. In addition, the safe harbor does not provide protection from Section 10(b) or Rule 10b-5 liability that might arise from the registrant's failure to satisfy any other separate duties to disclose the information (e.g., in a registration statement under the Securities Act). The limited safe harbor extends only until the due date of the registrant's next periodic report for the period during which the Form 8-K was not timely filed.

For additional information about the SEC's Form 8-K disclosure rules, refer to our publication *Summary of SEC Final Rule – Additional Form 8-K Disclosure Requirements and Acceleration of Form 8-K Filing Date* (Ernst & Young No. CC0183).

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<sup>26</sup> Question 9 of the SEC staff's Section 404 FAQ.

<sup>27</sup> In SEC Release No. 33-8238, *Asset-Backed Securities*, the Commission amended Item 601 of Regulation S-K to add the specific form and content of the required Section 302 certification to the exhibit filing requirements for asset-backed issuers. The requirements relating to the asset-backed issuer Section 302 certification are specified in paragraph (d) of Exchange Act Rules 13a-14 and 15d-14.

## Item 7. Management's discussion and analysis (MD&A)

Due to the volatile business and economic environment, financial statement users and regulators have sought more transparency in companies' disclosures regarding risks, liquidity, capital resources, critical accounting estimates, fair value accounting and off-balance sheet arrangements – all required components of MD&A that are discussed in this Section.<sup>1</sup> In the upcoming reporting season, companies should take a fresh look at their MD&A to challenge how each component should be updated to reflect current conditions.

Upon issuing FR-72, *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, William Donaldson, former Chairman of the SEC, observed "the SEC is urging corporate America's management to bring its unique perspective to the forefront of MD&A, to avoid boilerplate, and to embrace meaningful disclosure." This Section is designed to help management prepare the information required by Item 303 of Regulation S-K, *Management's Discussion and Analysis of Financial Condition and Results of Operations*. Our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150) provides a helpful reference when preparing MD&A.

MD&A is required in annual shareholders' reports, as well as in Form 10-K. Because the requirements are the same for both documents, the text of MD&A in the annual shareholders' report should be consistent with that in Form 10-K if the registrant elects not to incorporate by reference. Management may use its discretion on the form and location of the discussion in the annual shareholders' report.

In 1989, the SEC issued FR-36, *Amendments to Management's Discussion and Analysis of Financial Condition and Results of Operations* (FRC Section 501), which provided interpretive guidance about preparing MD&A. The release emphasizes the need for registrants to explain with greater specificity the factors that have affected a registrant's earnings and financial condition and that are reasonably likely to have a significant effect on future earnings and financial condition.

In January 1999, the SEC issued FR-54, *Segment Reporting*, which provides the SEC's views when the MD&A discussion of segments uses measures disclosed under ASC 280 that were determined on the basis of internal management reporting rather than the GAAP measurement principles otherwise used in the consolidated financial statements. In this circumstance, the SEC also expects MD&A to discuss the reconciling items applicable to the respective segment measures. Further, the SEC expects MD&A to explain the effect of management's use of non-GAAP segment measures in a balanced and informative manner with a discussion of how the segment's performance has affected the company's GAAP financial statements.

In December 2001, the SEC issued FR-60, *Cautionary Advice Regarding Disclosure About Critical Accounting Policies*, which alerts public companies that they need to improve disclosures about critical accounting policies in MD&A. The SEC believes that MD&A should make investors aware of the sensitivity of financial statements to the methods, assumptions and estimates underlying the financial statements.

In January 2002, the SEC issued FR-61, *Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations*, which focuses on MD&A disclosure about

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<sup>1</sup> The SEC staff frequently comments about MD&A. See our October 2011 edition of *SEC Comments and Trends* (Ernst & Young No. CC0334) for common areas of focus by the SEC staff.

liquidity and capital resources, contingent commercial commitments, trading activities that include non-exchange traded commodity contracts accounted for at fair value, and the effects of transactions with related and certain other parties.

In January 2003, the SEC issued FR-67, *Disclosure in Management's Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations*, which implements Section 401(a) of the Sarbanes-Oxley Act and requires all public companies to provide disclosure, in a separately captioned subsection of MD&A, of material off-balance sheet arrangements (as defined). FR-67 also amended MD&A to require a tabular presentation of aggregate contractual obligations, which had been recommended in FR-61.

In December 2003, the SEC issued FR-72, *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, which provides interpretive guidance concerning the preparation, format and content of MD&A. FR-72 encourages the early involvement of top-level management in identifying the key disclosure themes and items that should be included in MD&A, and provides guidance regarding: (1) the overall presentation of MD&A, (2) the focus and content of MD&A, (3) liquidity and capital resources and (4) critical accounting estimates.

In September 2010, the SEC issued FR-83, *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis*, which aims to facilitate investor understanding of a registrant's liquidity and funding risks. FR-83 focuses on liquidity, leverage ratios and the contractual obligations table disclosures.

Issuers that elect to disclose non-GAAP financial measures in MD&A must comply with Item 10 of Regulation S-K, which imposes conditions and restrictions on the use of non-GAAP financial measures in SEC filings and requires reconciliation to the most comparable GAAP measure. Refer to the discussion, Non-GAAP financial measures, in Section 2 of this publication for more details.

## 5.1 Overview

Management must discuss the registrant's financial condition, changes in financial condition and results of operations in MD&A. The purpose of the discussion is:

"to provide investors and other users information relevant to an assessment of the financial condition and results of operations of the registrant as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources."

Generally, discussion is required of:

- ▶ Specific information about the registrant's liquidity, capital resources, off-balance sheet arrangements, aggregate contractual obligations and results of operations
- ▶ Known material trends, events and uncertainties that may make historical financial information not indicative of future operations or financial condition
- ▶ The cause of material changes in line items of the consolidated financial statements from prior-period amounts
- ▶ Any other information the registrant believes necessary for an investor to understand its financial condition, changes in financial condition and results of operations<sup>2</sup>

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<sup>2</sup> In addition to the MD&A rules and interpretive SEC guidance detailed in this Section, companies must provide other material information that is necessary to make the required statements, in light of the circumstances in which they are made, not misleading (Exchange Act Rules 10b-5 and 12b-20).



FR-72 articulates three principal objectives of MD&A:

- ▶ To provide a narrative explanation of the company's financial statements that enables investors to see the company through the eyes of management
- ▶ To enhance overall financial disclosure and provide the context for analysis of financial information
- ▶ To provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance

FR-72 states, "MD&A should be a discussion and analysis of a company's business as seen through the eyes of those who manage that business. Management has a unique perspective on its business that only it can present. As such, MD&A should not be a recitation of financial statements in narrative form or an otherwise uninformative series of technical responses to MD&A requirements, neither of which provides this important management perspective."

The discussion generally should cover the most recent three fiscal years (i.e., the same period covered by the financial statements). The instructions suggest traditional year-to-year comparisons (e.g., 20Y1 vs. 20Y0 and 20Y0 vs. 20X9), but other formats may be used if the registrant believes they would aid reader understanding. When trend information is relevant, it may be necessary for the discussion to refer to the five-year table of selected financial data.

## 5.2

### Overall presentation of MD&A

FR-72 encourages each company and its management to take a fresh look at MD&A each period, with a view to enhancing its quality. As the expectations of investors and regulators have increased the scope and content of MD&A over time, FR-72 observes, "Unfortunately, the presentation of the MD&A of too many companies also may have become unnecessarily lengthy, difficult to understand and confusing." FR-72 continues, "Efforts by companies to provide clearer and better organized presentations of MD&A can result in more understandable disclosure that does not sacrifice the appropriate level of complexity or nuance."

As to the overall presentation of MD&A, FR-72 states that companies should:

- ▶ Focus on material information, eliminate immaterial information and avoid unnecessary duplicative disclosure
- ▶ Present their disclosure so that the most important material information is most prominent (e.g., using a "layered" approach)
- ▶ Consider starting MD&A with an executive-level overview that provides context for the remainder of the discussion
- ▶ Provide not only disclosure of MD&A requirements, but also an analysis that explains management's view of the implications and significance of that information

### 5.2.1

#### Executive-level overview

Under existing MD&A rules, a company has the flexibility to present MD&A in a manner that it believes is most meaningful for investors. FR-72 strongly encourages companies to consider using an executive-level overview to provide the context for the MD&A presentation. An executive-level overview should include the most important matters on which the company's executives focus in evaluating its financial condition and operating performance. However, the SEC believes that an executive-level overview should not merely repeat the more detailed discussion and analysis that follows.

The SEC staff expects that a good executive-level overview would:

- ▶ Include economic or industry-wide factors relevant to the company
- ▶ Inform the reader about how the company earns revenue and generates cash
- ▶ If necessary or useful, discuss the company's lines of business, location(s) of operations and principal products and services (but not merely duplicate the disclosure in the Description of Business section of the filing)
- ▶ Provide insight into material opportunities, challenges and risks (e.g., those presented by known material trends and uncertainties), on which the company's executives are most focused for both the short- and long-term, as well as the actions they are taking to address these opportunities, challenges and risks

As with the balance of MD&A, the SEC expects the executive-level overview to be dynamic and evolve over time. In addition, the SEC recommends that companies avoid including boilerplate disclaimers or other generic language that would detract from the executive-level overview.

Recognizing that some contend an executive-level overview might create additional legal exposure, FR-72 emphasizes that the failure to disclose all material information in an executive-level overview should not create any liability under the "buried facts" doctrine, under which a court could consider disclosure to be false and misleading if its overall significance is obscured because material information is "buried," such as in a footnote or appendix. Because an executive-level overview is only an introduction, it would not be expected to include disclosure of all material matters required by the SEC's MD&A rules.

## 5.2.2

### Clarity, understandability and organization

FR-72 recommends that companies present MD&A in clear and understandable language. In addition, FR-72 suggests that companies structure their MD&A to prominently present the most relevant information. Accordingly, FR-72 encourages companies to consider the following when preparing MD&A:

- ▶ Using tabular presentations of relevant financial or other information (e.g., a tabular comparison of dollar changes, percentage changes or other pertinent information followed by a discussion and analysis of the more significant relevant changes)
- ▶ Using headings to help readers follow the flow of MD&A and to promote a better understanding of MD&A
- ▶ Using a "layered" approach to emphasize the most important information and analysis (e.g., beginning a section with a statement of the principal factors, trends or other matters that are the main subjects of the section, before providing more detailed analysis of period-to-period information)

## 5.2.3

### Emphasis of material information

FR-72 suggests that companies should focus on and emphasize the most important information in MD&A, while striving to omit immaterial information. In addition to providing material information in response to specific MD&A rules, companies must provide other material information that is necessary to make the required statements, in light of the circumstances in which they are made, not misleading. As to what is material for disclosure in MD&A, FR-72 states, "Companies must determine, based on their own particular facts and circumstances, whether disclosure of a particular matter is required in MD&A. However, the effectiveness of MD&A decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information. Companies should view this guidance as an opportunity to evaluate whether there is information in their MD&A that is no longer material or useful, and therefore should be deleted, for example where there has been a change in their business or the information has become stale."

The SEC cautions companies that, if material information (historical or forward-looking) is disclosed publicly other than in an SEC filing (e.g., earnings release, conference call with analysts, website posting), the company should evaluate the information to determine whether it is required to be included in MD&A. The SEC stated, "We are not seeking to sweep into MD&A all the information that a company communicates." Instead, the SEC expects each company to consider whether elements of such communications are required to be included in MD&A, or consider whether their inclusion would enhance the presentation of MD&A.

FR-72 also states that companies should focus on an analysis of the consolidated financial statements, with segment data provided where necessary to avoid an incomplete or misleading picture. However, the SEC suggests any segment discussion and analysis should avoid unnecessary duplication and immaterial detail.

## 5.2.4 Key indicators of financial condition and operating performance

To allow investors to view the company through the eyes of management, FR-72 suggests that companies should identify key performance indicators, whether financial or nonfinancial, that management uses to manage the business. Such key indicators could relate to external or macro-economic matters (e.g., interest rates and economic growth rates and their anticipated trends).

Other key indicators might be specific to an industry, but FR-72 warns that common standards for such measures also are important. If a company discloses nonfinancial data, such as industry metrics, and there is no commonly accepted calculation methodology, the company should explain the basis of its calculation.

Other key indicators might be specific to a company. Examples include: manufacturing plant capacity and utilization, backlog, trends in bookings, employee turnover rates, information based on units or volume, customer satisfaction, time-to-market, interest rates, product development, service offerings, throughput capacity, affiliations/joint undertakings, market demand, customer/vendor relations, employee retention, business strategy, changes in managerial approach or structure and regulatory actions or regulatory environment. Since these measures are nonfinancial, the SEC believes that the disclosure of such information would fall outside the scope of the requirements of Item 10 of Regulation S-K regarding non-GAAP financial measures.

In FR-72 the SEC stated, "To satisfy the objectives of MD&A, companies also should provide a balanced view of the underlying dynamics of the business, including not only a description of a company's successes, but also of instances when it failed to realize goals, if material."

## 5.2.5 Segment analysis

**Requirements:** The SEC's requirements for management's discussion of business segments are designed to be flexible so that registrants may discuss their business in the manner most appropriate to individual circumstances. The MD&A rules require registrants to discuss each relevant, reportable segment or other subdivision of the business to the extent appropriate, in the registrant's judgment, to provide an understanding of the business as a whole. However, in FR-36, the SEC indicates that a segment analysis should be included when a segment contributes in a disproportionate way to a registrant's revenue, profits or capital needs, or where disclosure on a consolidated basis would be incomplete or misleading.

**ASC 280 measures:** If a registrant determines segment profitability on a basis that differs from GAAP on a consolidated basis (as allowed by ASC 280), and discloses any such ASC 280 measure of a segment's operating performance in MD&A, FR-54 indicates that MD&A should include a discussion of the reconciling items (as disclosed in the aggregate under ASC 280, between GAAP income and the sum of all reportable segments' operating profit or loss) that are applicable to that segment. However, in these

circumstances, the SEC does not expect a numerical reconciliation of the ASC 280 segment measure to the corresponding GAAP measure. Instead, the disclosure may be limited to a narrative discussion in MD&A of items that affect the GAAP operating results of a segment, but that are not included in segment operating profit defined by management. Nevertheless, companies may want to consider providing a numerical reconciliation, which might be useful in facilitating the discussion of the reconciling items.

For example, the SEC would expect discussion in MD&A if a registrant's measure of segment operating profit or loss excludes the effects of revenues or expenses attributable to a segment. If a reconciling item (e.g., a material restructuring or impairment charge) relates to a specific segment, but is not included in the ASC 280 measure of the segment's operating profit or loss disclosed in MD&A, the registrant is expected to disclose the nature of the excluded item, the "applicable portion" of the charge attributable to the reportable segment, and the circumstances that lead to incurring the charge.

In all cases, disclosures about segment profitability determined under ASC 280 should be explained in a balanced and informative manner to include how the segment's performance affects the GAAP consolidated financial statements.

**Non-GAAP financial measures:** The SEC's definition of non-GAAP financial measures specifically excludes measures of profit or loss and total assets for each segment that are required to be disclosed under ASC 280. We understand that the SEC staff also agrees that other segment measures included in the ASC 280 footnote also would not be considered non-GAAP financial measures. The SEC staff's Non-GAAP C&DIs state, "Because [ASC 280] requires or expressly permits the footnotes to the company's consolidated financial statements to include specific additional financial information for each segment, that information also would be excluded from the definition of non-GAAP financial measures."

The SEC staff's Non-GAAP C&DIs provide the following SEC staff's views (among others) on the applicability of Item 10 of Regulation S-K to the disclosure of other information on a business segment basis:

- ▶ MD&A can explain how changes in exchange rates between periods affect the changes in various financial statement line items by presenting the historical amounts and the current amounts in constant currency. Additionally, a description of the process of calculating the constant currency amounts and the basis of presentation is required.
- ▶ Segment measures that are adjusted to include amounts excluded from, or to exclude amounts included in, the measure reported to the CODM for purposes of making decisions about allocating resources to the segment and assessing its performance do not comply with ASC 280. Such measures are, therefore, non-GAAP financial measures.
- ▶ The ASC 280 note reconciling the segment measures to the consolidated financial statements may total the profit or loss for the individual segments; however, the presentation of such a "consolidated" segment profit or loss measure in any context other than the ASC 280-required reconciliation in the note would be the presentation of a non-GAAP financial measure.

## 5.2.6 Analysis of material matters

FR-72 suggests that MD&A should provide better analysis of the implications and significance of matters disclosed. For matters identified in MD&A, FR-72 states, "Companies should consider including, and may be required to include, an analysis explaining the underlying reasons or implications, interrelationships between constituent elements, or the relative significance of those matters." Whether favorable or unfavorable conditions are discussed, FR-72 indicates "the analysis should consist of material

substantive information and present a balanced view of the underlying dynamics of the business.”<sup>3</sup> If there is a reasonable likelihood that reported financial information may not be indicative of future financial performance, FR-72 states that “appropriate disclosure in MD&A should be considered and may be required.”

### 5.2.7 Material changes

The causes of material changes in financial statement items must be described to the extent necessary for users to understand the business as a whole. If a material change is a result of multiple factors, each factor should be described and quantified to the extent practicable. The requirement to disclose material changes applies to all financial statements – not just the income statement. Determining which changes are material is left to the registrant.

In FR-72, the SEC encourages companies to present a tabular comparison of the results in different periods, with percentage changes, followed by a narrative discussion and analysis of the reasons for material changes and their implications.

Recent SEC staff comment letters have asked registrants to provide a more meaningful and detailed explanation of material period-to-period changes. The SEC staff typically requests that registrants provide more granular quantification and discussion about the specific factors, and the underlying reasons, that contributed to material period-to-period changes. For example, when MD&A cites two or more qualitative reasons that contributed to a material period-to-period change in a financial statement line item, the SEC staff requests that each reason be quantified and analyzed to provide more meaningful disclosure. The SEC staff also requests that MD&A disclose whether the reasons contributing to material changes represent trends that are expected to have material future effects.

While MD&A requires companies to discuss material changes in financial statement line items from period to period, FR-72 observes that many companies provide excessive duplicate disclosures and disclose immaterial information. MD&A rules do not require a discussion of every line item and its changes without regard to materiality, and “registrants need not recite the amounts of changes from year to year which are readily computable from the financial statements.” In addition, if the causes for a change in one item also relate to other items, repeating the discussion is not required.

## 5.3 Results of operations

In discussing the results of operations, management should:

- ▶ Describe any unusual or infrequent events or transactions or any significant economic changes that materially affect income from continuing operations and the extent to which income was affected
- ▶ Describe any other significant components of revenue or expense necessary to understand the results of operations
- ▶ Describe any known trends, events or uncertainties that have had, or are expected to have, a material effect on sales, revenue or income from continuing operations

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<sup>3</sup> For example, FR-72 states, “If a company’s financial statements reflect materially lower revenues resulting from a decline in the volume of products sold when compared to a prior-period, MD&A should not only identify the decline in sales volume, but also analyze the reasons underlying the decline in sales when the reasons are also material and determinable. The analysis should reveal underlying material causes of the matters described, including for example, if applicable, difficulties in the manufacturing process, a decline in the quality of a product, loss in competitive position and market share, or a combination of conditions.” As another example, FR-72 states, “Where a company’s financial statements reflect material restructuring or impairment charges, or a decline in the profitability of a plant or other business activity, MD&A should also, where material, analyze the reasons underlying these matters, such as an inability to realize previously projected economies of scale, a failure to renew or secure key customer contracts, or a failure to keep downtime at acceptable levels due to aging equipment.”

- ▶ Disclose any future changes in the relationship between costs and revenue if events are known that will cause a material change, such as known future increases in labor or materials costs or prices
- ▶ Discuss the extent to which material increases in net sales or revenue are due to increased sales volume, introduction of new products or services or increased sales prices<sup>4</sup>
- ▶ Discuss current-year changes in idle facilities when such changes materially affect the results of operations

A registrant need not necessarily present information on a specific component business if it does not meet the definition of a segment. However, the SEC warned in an enforcement release that if there has been a change in operations of the business that has materially affected or is expected to materially affect the results of the registrant and the change is not apparent because the results of the business are not separately disclosed, MD&A should address the effect of the change.

SAB Topic 13.B, *Revenue Recognition*, indicates that changes in revenue should be evaluated, including an analysis of the reasons and factors contributing to the increase or decrease, such as:

- ▶ Shipments of product at the end of a reporting period that significantly reduce customer backlog (as well as any reasonable possibility that lower shipments will materially affect revenue in the next period)
- ▶ Granting of extended payment terms (as well as any reasonable possibility that a longer collection period for accounts receivable, regardless of whether revenue has been recognized, and slower cash inflows from operations will materially affect liquidity and capital resources)
- ▶ Changing trends in shipments into, and sales from, a sales channel or separate class of customer (as well as any reasonable possibility of a material effect on future sales or sales returns)
- ▶ An increasing trend toward sales to a different class of customer, such as a reseller distribution channel that has a lower gross profit margin than existing sales that are principally made to end users, or increasing service revenue that has a different profit margin than product sales
- ▶ Seasonal trends or variations in sales

FR-72 states that “appropriate disclosure in MD&A should be considered and may be required” in the following circumstances:

- ▶ When material unusual or nonrecurring items, aberrations or other significant fluctuations are reflected in a company's financial statements, disclosure may be needed to ascertain the likelihood that past performance will be indicative of future performance, after “considering the extent of variability in earnings and cash flows.”
- ▶ If the economic characteristics of any business arrangements, or the methods used to account for them, materially affect results of operations or liquidity “in a structured or unusual fashion,” disclosure may be needed to understand those effects.

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<sup>4</sup> Although not specifically covered in the rules, material decreases in sales volume or prices, or the discontinuance of a product line, also should be discussed.

### 5.3.1 Effect of inflation and changing prices

Item 303 of Regulation S-K requires a discussion of the effect of inflation on net revenue and income from continuing operations, to the extent material. FR-30, *Disclosure of the Effects of Inflation and Other Changes in Prices*, emphasizes that an assessment as to whether the effect of inflation is material is not based solely on the current-year effect, but considers its cumulative effect from the date the assets were acquired or liabilities assumed.

The MD&A instructions require only a brief textual presentation of management's views, and the discussion may be presented in whatever manner appears appropriate. This requirement calls for a narrative discussion, not a numeric quantification, of the effect of inflation. Any inflation information supplied in accordance with Item 303 of Regulation S-K, or presented voluntarily, is covered by the SEC's safe harbor rules.

#### **Illustration 5-1: MD&A: Effect of inflation**

Although inflation has slowed in recent years, it is still a factor in our economy and the Company continues to seek ways to mitigate its effect. To the extent permitted by competition, the Company passes increased costs on to its customers by increasing sales prices over time. Sales reported in the Company's financial statements have increased in the last two years due to increases in selling prices and increased sales volume. Approximately 75% of the increase in 20Y0 reported sales and 40% of the 20Y1 increase resulted from increased selling prices. The introduction of a new product line, flexible metal hose, in the last half of 20Y0 is primarily responsible for increased sales volume in 20Y1 and 20Y0. Although the Company has been able to pass most cost increases through to its customers, the costs of a new labor contract in 20Y0 have been primarily responsible for the reductions in operating margins.

The Company uses the LIFO method of accounting for its domestic inventories and the FIFO method for all other inventories. Under the LIFO method, the cost of products sold reported in the financial statements approximates current costs and thus provides a closer matching of revenue and expenses in periods of increasing costs. The charges to operations for depreciation represent the allocation of historical costs incurred over past years and are significantly less than if they were based on the current cost of productive capacity being consumed.

Approximately 67% of the Company's properties have been acquired over the past five years and have a remaining useful life ranging from five years for equipment to 25 years for buildings. Assets acquired in prior years will, of course, be replaced at higher costs but this will take place over many years. See page XX for a discussion of capital commitments. Again, these new assets will result in higher depreciation charges; but in many cases, due to technological improvements, there will be operating cost savings as well. The Company considers these matters in setting its pricing policies.

### 5.3.2 Climate change

In February 2010, the SEC published interpretive guidance<sup>5</sup> (the Guidance) regarding how its current disclosure requirements apply to climate change matters. The Guidance identifies several MD&A results of operations considerations when assessing whether climate change disclosure is needed, including:

- ▶ Legislation and regulation
- ▶ International accords

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<sup>5</sup> FR-82 (SEC Release No. 33-9106), *Commission Guidance Regarding Disclosure Related to Climate Change*.

- ▶ Indirect consequences of regulation or business trends
- ▶ Physical effects of climate change

**Legislation and regulation:** Significant developments in federal and state legislation and regulation regarding climate change could trigger disclosure obligations under Item 303 of Regulation S-K. Item 303 requires a company to assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on its financial condition or results of operations. In the case of a known uncertainty, such as proposed legislation or regulation, the Guidance indicates that assessing potential MD&A disclosure requirements consists of two steps. First, management must evaluate whether the proposed legislation or regulation is reasonably likely to be enacted. Unless management determines that it is not reasonably likely to be enacted, management must proceed on the assumption that the legislation or regulation will be enacted. Second, management must determine whether the legislation or regulation, if enacted, is reasonably likely to have a material effect on the company's business. Unless management determines that a material effect is not reasonably likely, disclosure is required in MD&A regarding the legislation.

In addition to disclosing the potential effect of proposed legislation or regulation, the company also would have to consider disclosure, if material, of the difficulties involved in assessing the timing and effect of the proposed legislation or regulation.

The Guidance states that a company should not limit its disclosure of the reasonably likely effects of a proposed law to potential negative consequences. The Guidance observes that changes in laws or in business practices of some companies in response to those changes may provide new opportunities.

The Guidance identifies several examples of possible consequences of proposed legislation and regulation related to climate change, including:

- ▶ Costs to purchase, or profits from sales of, allowances or credits under a "cap and trade" system
- ▶ Costs required to improve facilities and equipment to reduce emissions to comply with regulatory limits or to mitigate the financial consequences of a "cap and trade" regime
- ▶ Changes to operating profitability arising from increased or decreased demand for goods and services produced by the company arising directly from legislation or regulation, and indirectly from changes in costs of goods sold

**International accords:** The Guidance indicates that, if material, companies should disclose the effect on their business of treaties or international accords relating to climate change. The Guidance suggests that companies reasonably likely to be affected by such agreements should monitor the progress of any potential agreements and consider the potential effects.

**Indirect consequences:** Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. The Guidance identifies the following potential indirect consequences or opportunities:

- ▶ Decreased demand for goods that produce significant greenhouse gas emissions
- ▶ Increased demand for goods with lower emissions than competing products
- ▶ Increased competition to develop innovative products
- ▶ Increased demand for generation and transmission of energy from alternative sources
- ▶ Decreased demand for services related to carbon-based energy sources, such as drilling services or equipment maintenance services



These business trends or risks may require disclosure in MD&A.

**Physical effects:** The Guidance indicates that significant physical effects of climate change, such as the severity of weather (e.g., floods or hurricanes), sea levels, the arability of farmland and water availability and quality have the potential to affect a company's operations and results. For example, severe weather can cause catastrophic damage to physical plants and facilities and can disrupt manufacturing and distribution processes.

For additional information on The Guidance, see our To the Point publication, *SEC staff issues guidance on climate change disclosures* (Ernst & Young CC0293).

### 5.3.3

### Cybersecurity

In October 2011, the Division of Corporation Finance published CF Disclosure Guidance Topic No. 2, *Cybersecurity*, which provides the SEC staff's views regarding disclosure obligations relating to cybersecurity risks and cyber incidents. This guidance clarifies existing disclosure requirements and states explicitly that registrants should consider the risks associated with cyber attacks and breaches (i.e., cyber incidents) when disclosing material matters. Cyber attacks include gaining unauthorized access, corrupting data, disrupting the operations of the registrant or its business partners and denial-of-service attacks on websites.

While there are no specific SEC disclosure rules that refer to cybersecurity risks or cyber incidents, the SEC staff summarized the applicability of existing Regulation S-K requirements to cybersecurity risks and incidents that could have a material effect on a registrant's financial statements. The guidance also notes that material cybersecurity risks or cyber incidents must be disclosed when necessary to make other required disclosures, in light of the circumstances, not misleading.

The SEC staff said registrants should consider the direct and indirect effects of cyber incidents such as costs for remediation, protection and litigation, as well as implications of possible theft of intellectual property, customer information or other sensitive data, and the related reputational damage with customers and investors. Registrants also should consider the potential for lost revenues.

Registrants should address cybersecurity risks and cyber incidents in their MD&A if the costs or other consequences associated with one or more known incidents or the risk of potential incidents represent a material event, trend or uncertainty that is reasonably likely to have a material effect on the registrant's results of operations, liquidity or financial condition or would cause reported financial information not to necessarily be indicative of future operating results or financial condition as described in Item 303 of Regulation S-K. For example, if material intellectual property is stolen in a cyber attack, and the effects of the theft are reasonably likely to be material, the registrant should describe the property that was stolen and the effect of the attack on its results of operations, liquidity and financial condition and whether the attack would cause reported financial information not to be indicative of future operating results or financial condition. If it is reasonably likely that the attack will lead to reduced revenues, an increase in cybersecurity protection costs, including litigation, the registrant should discuss these possible outcomes, including the amount and duration of the expected costs, if material. Alternatively, if the attack did not result in the loss of intellectual property, but it prompted the registrant to materially increase its cybersecurity protection expenditures, the registrant should note those increased expenditures.

In addition to MD&A, registrants should also consider the need to address cybersecurity risks and cyber incidents in their risk factor disclosures (Item 503(c) of Regulation S-K as discussed in Section 3 of this publication), description of a business (Item 101 of Regulation S-K as discussed in Section 3 of this publication), legal proceedings disclosures (Item 103 of Regulation S-K as discussed in Section 3 of this publication), financial statement disclosures and management's assessment of the effectiveness of disclosure controls and procedures (Item 307 of Regulation S-K as discussed in Chapter 4 of this publication).

For additional information on cybersecurity disclosures, see our To the Point publication, *SEC staff issues guidance on cybersecurity disclosures* (Ernst & Young CC0340).

## 5.4 Liquidity and capital resources

The SEC Division of Corporation Finance staff continues to focus on the Liquidity and Capital Resources (L&CR) section of MD&A. The objectives of the L&CR section include providing “a clear picture of the company’s ability to generate cash and to meet existing and known or reasonably likely future cash requirements”<sup>6</sup> and giving “investors an opportunity to look at the registrant through the eyes of management by providing a historical and prospective analysis of the registrant’s financial condition and results of operations, with particular emphasis on the registrant’s prospects for the future.”<sup>7</sup>

Based on these objectives, the SEC staff identified the following considerations for preparing the L&CR disclosures:

- ▶ *Provide better analysis of the sources and uses of cash* – The introductory L&CR disclosures should provide investors with an overview of the liquidity and capital resource concerns of a company. The SEC staff believes companies should consider providing better analysis of the sources and uses of cash. Specifically, a company should strive to answer the questions, “What are our bills and how are we going to pay for them? Why will cash from our customers be sufficient to pay our bills, or will we need to obtain cash from banks or other sources? How different are our expectations regarding the sources and uses of cash from our historical experience?”
- ▶ *Discuss changes in cash received from customers and other sources and cash paid to suppliers, employees, etc.* – The operating activities discussion should provide information on changes in cash received from customers and other sources and cash paid to suppliers, employees and others. Instead of providing a summary of the statement of cash flows prepared using the indirect method, a company might consider discussing increases in supplier costs and the extent to which it passed those costs along to customers.
- ▶ *Discuss any known trends and uncertainties that are reasonably expected to have material effects on the separate sources and uses of cash* – The operating activities discussion also should discuss any known trends and uncertainties that are reasonably expected to have material effects on the separate sources and uses of cash. Examples mentioned by the SEC staff included new product releases, pricing changes, maturing product lines, rising costs and changes in credit terms.
- ▶ *Evaluate capital expenditures on a discretionary and non-discretionary basis (e.g., new capacity expansion versus maintenance of existing capacity) and discuss anticipated funding sources (e.g., the extent that cash received from customers will be available)* – The SEC staff observed that companies typically disclose the quantity of historical and anticipated capital expenditures in the investing activities discussion. Companies should consider separately disclosing capital expenditures that are discretionary and those that are nondiscretionary and discuss any anticipated funding sources. In addition, if a company believes it is reasonably likely that it will be required to reduce or delay capital expenditures, it could describe the effect of these reductions and delays to cash flows from customers.
- ▶ *Discuss the sufficiency of the unused availability under a short-term credit arrangement (or the estimated utilization), the anticipated circumstances requiring its use (e.g., seasonality of operations), any uncertainty surrounding the ability to access funds when needed, and any*

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<sup>6</sup> FR-72, *Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations*.

<sup>7</sup> FR-36, *Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*.

*implications from not being able to access the funds* – The financing activities discussion should include an explanation of the importance of a credit facility to the company. A company could discuss uncertainties about its ability to access a credit facility and the implications.

- ▶ *Discuss the factors that might materially influence credit ratings, the potential implications of known or reasonably likely changes in credit ratings or credit rating outlook and management's expectations about credit rating prospects* – The simple disclosure of a company's credit ratings from each of the major credit rating agencies provides limited value to investors. If a company does not expect a ratings downgrade, a company could disclose its basis for that conclusion. If a company anticipates that a ratings downgrade might occur in the foreseeable future, the company could consider disclosing the reasonably likely expected changes in borrowing costs, costs of capital and the future operating prospects of the company.<sup>8</sup>
- ▶ *Discuss any uncertainty or trends surrounding future compliance with financial covenants and the material implications of a breach. When the filing provides actual ratios under the agreement, also consider providing the company-specific calculations* – The SEC staff recommended that companies explain the basis for conclusions about compliance with debt covenants. For example, the financial covenants discussion also might include disclosures about a company's expectation of meeting debt covenant requirements in the short-term and long-term. If a breach of financial covenants is reasonably likely, a company might discuss whether it can avoid or cure the breach, as well as the effect of the breach on the company's liquidity (refer to FR-72). In addition, a company should consider disclosing any reasonably likely ratings downgrades and the effect on financial covenants.
- ▶ *Discuss the capacity for additional borrowing under the most restrictive covenant, whether there is otherwise an ability to raise these funds and whether this amount would be sufficient or insufficient for current and long-term needs* – Disclosures stating that financial covenants limit a company's ability to incur additional debt might not provide enough information for investors. If management believes that it is reasonably likely that the most restrictive covenant will affect liquidity, the company should consider disclosing the sources of cash that are available, the company's cash needs and the implications of any shortfalls.
- ▶ *Discuss any uncertainties and reasonably likely implications related to loan facilities from banks and other lending institutions, the commercial paper market, cash and securities held at banks and other financial institutions, illiquid investments, future pension funding, share repurchase programs and dividend payments* – Current market conditions call for complete disclosures about a company's liquidity and capital resources. Companies could provide insight into the possible material implications of any inability to access sources of funding that have been available in the past. The SEC staff believes that a company should discuss uncertainties about the future amounts of pension funding, as well as its ability to pay those amounts. Similarly, a company should discuss any uncertainties regarding its intentions to continue share repurchase and dividend payment programs.
- ▶ Prepare a user friendly L&CR section that:
  - ▶ Can be read on a standalone basis
  - ▶ Prominently displays the most critical information
  - ▶ Is meaningful without supplemental investor calculations

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<sup>8</sup> In its 7 October 2009 proposal, *Credit Ratings Disclosure*, the SEC reiterated the need for MD&A disclosure of the material effects of any change in a credit rating.

- ▶ Excludes superfluous information
- ▶ Avoids boilerplate language
- ▶ Includes management insight

Generally, it is difficult to separate the discussions of capital resources and liquidity. Registrants may find it difficult to discuss the long-term aspects of liquidity without discussing capital resources. The rules permit these topics to be combined in the discussion when the two topics are interrelated.

FR-72 observes, “Merely stating that a company has adequate resources to meet its short-term and/or long-term cash requirements is insufficient unless no additional more detailed or nuanced information is material. In particular, such a statement would be insufficient if there are any known material trends or uncertainties related to cash flow, capital resources, capital requirements, or liquidity.” As in other areas, FR-72 encourages companies to avoid immaterial matters, boilerplate and generic disclosures when addressing their liquidity and capital resources.

FR-72 summarizes the existing MD&A disclosure requirements in this area as requiring the following information, to the extent material:

- ▶ Historical information regarding sources of cash and capital expenditures
- ▶ An evaluation of the amounts and certainty of cash flows
- ▶ The existence and timing of commitments for capital expenditures and other known and reasonably likely cash requirements
- ▶ Discussion and analysis of known trends and uncertainties
- ▶ A description of expected changes in the mix and relative cost of capital resources
- ▶ Indications of which balance sheet or income or cash flow items should be considered in assessing liquidity
- ▶ A discussion of prospective information regarding the sources of and needs for capital, except where otherwise clear from the discussion

Item 303 of Regulation S-K defines liquidity as the registrant's ability to generate adequate amounts of cash to meet both current and future needs. “Needs” encompass the registrant's need to pay obligations as they mature, to maintain capacity and to provide for planned growth. The registrant must examine its circumstances and identify balance sheet, income and cash flow items that indicate its liquidity. Examples of liquidity indicators include unused credit lines, debt-equity ratios, bond ratings and restrictions under existing debt agreements.

Item 303 of Regulation S-K provides that issuers should identify any known trends, demands, commitments, events or uncertainties that are reasonably likely to result in liquidity increasing or decreasing in any material way.

If a reasonably likely “material deficiency” in liquidity is identified, the company must disclose the course of action that it has taken, or proposes to take, to remedy the deficiency. Thus, a company must consider the likelihood of a material deficiency in liquidity in both the short-term and long-term.

The discussion of short-term liquidity should focus on cash needs and sources of funds (e.g., operating cash flows, lines of credit, commercial paper, securitization of receivables, other assets) to meet day-to-day operating expenses and material commitments up to twelve months in the future. The discussion of

long-term liquidity should address material capital expenditures, significant balloon or other payments due on long-term obligations, and other demands and commitments (including any off-balance sheet items) to be incurred beyond the next twelve months. This discussion also should include proposed sources of funding to satisfy these obligations.

Item 303 of Regulation S-K requires the discussion of liquidity in MD&A to include:

- ▶ The identity of the balance sheet conditions or income or cash flow items that are indicators of the company's liquidity (e.g., unused credit lines, debt-equity ratios, bond ratings and restrictions under existing debt agreements) unless they are otherwise clear from the discussion
- ▶ The company's ability to generate adequate cash flows on both a long-term and short-term basis
- ▶ Known trends, demands, commitments, events, changes in circumstances or uncertainties that will result in, or are reasonably likely to result in, material increases or decreases in liquidity
- ▶ The effect of restrictions on subsidiaries to transfer funds to the parent in the form of cash dividends, loans and advances
- ▶ Plans to remedy any identified material deficiency in short or long-term liquidity (or disclosure that a remedy has not been determined or cannot be addressed currently)
- ▶ Internal and external sources of liquidity, and any material unused sources

Regulation S-K does not define the term "capital resources," but mentions equity, debt and off-balance sheet financing arrangements as examples. The MD&A discussion of capital resources is required to include:

- ▶ Material commitments for capital expenditures as of the latest year-end, the general purpose of the commitments and the anticipated source of funds
- ▶ Material trends, favorable or unfavorable, in the registrant's sources of capital, including any expected material changes in the mix and relative cost of capital resources (e.g., changes among equity, debt, off-balance sheet financing arrangements)

A company should consider disclosing, or could be required to disclose, the potential effect on its liquidity of (1) financing arrangements that are reasonably likely to be available to the company, (2) financing arrangements that the company would like to use but are no longer available or are reasonably likely to become unavailable, (3) difficulties accessing the debt markets, (4) reliance on commercial paper or other short-term financing arrangements, (5) maturity mismatches between borrowing sources and the assets funded by those sources and (6) changes in borrowing terms requested by counterparties and changes in the valuation of collateral and counterparty risk.

Narrative disclosure should be considered, and may be required, if the company's financial statements do not adequately convey the registrant's financing arrangements during the period, or the effect of those arrangements on liquidity. For example, if borrowings during the period are materially different from the period-end amounts recorded in the financial statements, FR-83 states that MD&A must disclose the intra-period variations to facilitate investors' understanding of the company's liquidity position.

For companies that have relied heavily on mortgage securitization and commercial paper markets, current market conditions could indicate unfavorable trends in sources of capital. Thus, a discussion of the availability of these financing arrangements might be warranted.

For companies with repurchase agreements, the MD&A discussion of liquidity should consider whether obligations to repurchase assets are reasonably likely to result in the use of a material amount of cash or other liquid assets. Even if the repurchase obligation involves a transaction accounted for as a sale under

applicable accounting standards, FR-83 states that disclosures about the repurchase obligation may be required in the MD&A discussion of liquidity, particularly if the repurchase obligation is not included in the contractual obligations table or the company's disclosure of its off-balance sheet arrangements.

Given market conditions, registrants should give specific consideration to disclosures regarding, among other relationships, their receivable positions with derivative counterparties and any financial guarantors (e.g., monoline insurers). In addition, registrants should disclose that funds from investments designated as held to maturity are not available for immediate use.

For companies that receive an opinion on their financial statements containing an explanatory paragraph about a going concern uncertainty, the SEC has mandated specific disclosures.<sup>9</sup> In these situations, FRC Section 607.02 requires companies not only to provide disclosure in the notes to the financial statements of their financial difficulties and plans to overcome them, but also to present a detailed management discussion of cash flow covering the 12-month period following the date of the financial statements. Such a discussion would be updated quarterly, as appropriate.

Whether in MD&A or elsewhere, if a registrant presents a non-GAAP liquidity measure, as stated in the Non-GAAP C&DIs, the SEC staff expects registrants, in addition to prominently presenting, and reconciling to, the most directly comparable GAAP financial measure, to present the three major categories of the statement of cash flows (i.e., cash flows from operating activities, investing activities and financing activities). See Non-GAAP financial measures discussion in Section 2 for further information.

### 5.4.1 Cash requirements

MD&A rules require a company to discuss its ability to meet its cash requirements on both a short-term (12 months or less) and long-term (more than 12 months) basis. The SEC has indicated that a company's short-term liquidity discussion should focus on cash needs and sources of funds to meet day-to-day operating expenses and material commitments up to 12 months in the future. FR-61 suggests that registrants describe specific sources of short-term funding (e.g., operating cash flows, lines of credit, commercial paper, securitization of receivables or other assets).

FR-72 notes that the relevant period over which to discuss long-term liquidity depends on the timing of the cash requirements of a company, as well as the period over which cash flows are managed. FR-72 states that "a vague reference to periods in excess of 12 months may not be sufficient." The discussion of long-term liquidity should address material capital expenditures (including R&D), significant balloon or other payments due on long-term obligations and other demands or commitments (including any off-balance sheet items) to be incurred beyond the next 12 months. This discussion also should include proposed sources of funding required to satisfy these obligations.

FR-72 encourages companies to consider whether the following information would have a material effect on liquidity:

- ▶ Funds necessary to maintain current operations, complete projects underway and achieve stated objectives or plans
- ▶ Commitments for capital or other expenditures
- ▶ The reasonably likely exposure to future cash requirements associated with known trends or uncertainties, and an indication of the time periods in which resolution of the uncertainties is anticipated

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<sup>9</sup> Statement on Auditing Standards (SAS) No. 59, *The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern*, provides for an explanatory paragraph in the auditors' report in situations in which substantial doubt exists concerning the ability of a company to continue in existence.

The SEC indicated that a company's discussion and analysis of its cash requirements could begin with the company's tabular disclosure of contractual obligations (see "Contractual obligations" later in this Section), supplemented with additional information that is material to understanding the company's cash requirements (e.g., a discussion, if material, of items such as taxes or amounts to be funded to cover pension and OPEB benefits, which might not be included in the table of contractual obligations).

The SEC expects MD&A to discuss the cash needs of significant industry segments (or other subdivisions, including issues related to foreign subsidiaries) to the extent any segment contributes in a materially disproportionate way to consolidated cash needs, or if discussion on a consolidated basis would present an incomplete and misleading picture. When the financial statements include disclosure of restrictions on the transfer of funds from subsidiaries to the parent in the form of cash dividends, loans or advances (the tests to determine if these disclosures are required are discussed in Section 6 of this publication), MD&A must address the nature and extent of these restrictions and their effect on the parent's ability to meet its cash obligations. In addition, FR-72 states that "a company also should discuss the effect of an inability to access the cash flow and financial assets of any consolidated entities."<sup>10</sup>

If a company has incurred a material amount of debt, FR-72 suggests the company explain the reason for incurring the debt, the use of the proceeds and how incurring the debt achieves the company's business objectives.<sup>11</sup> On the other hand, if debt was incurred for general working capital purposes, FR-72 states that companies should disclose the anticipated amount and timing of material working capital needs.<sup>12</sup>

FR-72 suggests that, when material, companies provide specific and informative disclosures about the difficulties involved in assessing the amount and timing of uncertain events (e.g., loss contingencies) on cash requirements and liquidity. Due to these uncertainties, FR-72 states that companies should consider repeating or updating such disclosure in their quarterly and annual reports.

Although not required by the SEC's rules or interpretive releases, registrants should consider available internal cash flow projections in analyzing liquidity. Such projections likely would be helpful in identifying any expected material changes in liquidity. Further, as discussed in a 1994 enforcement release, identification of a future material liquidity deficiency based on internal cash flow projections likely would be considered by the SEC to be a "known trend" that would require discussion in MD&A.

## 5.4.2 Sources and uses of cash

FR-72 suggests that companies should consider providing enhanced analysis and explanation of their sources and uses of cash. FR-72 suggests that a company explain how the cash requirements identified in MD&A fit into its overall business plan, and discuss the resources available to satisfy those cash requirements. The SEC also expects a company to discuss the reasons underlying any material variability in historical cash flows, as well as their reasonably likely effect on future cash flows and cash management decisions. Even if cash flows from operating, investing and financing activities remain consistent from period to period, if the underlying sources of those cash flows have varied materially, the SEC expects companies to provide an analysis in MD&A of that variability. The SEC also encourages registrants to include a description of any anticipated cash resources such as potential cash flows from expanded levels of operations, additional external financing or sale of nonoperating assets.

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<sup>10</sup> FR-72 provides as an example: "An entity may be consolidated but, because the company lacks sufficient voting interests or the assets are legally isolated, the company may be unable to utilize the entity's cash flow, cash on hand, or other assets to satisfy its own liquidity needs."

<sup>11</sup> For example, if debt were issued to fund the construction of a new plant that will allow the company to expand its operations into a new geographic area, the SEC would expect the company to disclose the reason for incurring the debt, as well as the expected commencement date of the plant operations.

<sup>12</sup> FR-72 also reminds companies of the requirement in Item 5 of Form 10-K and Item 701(f) of Regulation S-K to disclose the use of proceeds from offerings of registered securities.

The SEC expects a company's discussion and analysis of liquidity to focus on material changes in the operating, investing and financing cash flows depicted in its statement of cash flows and to present a balanced discussion dealing with cash flows from investing and financing activities, as well as from operations. However, the discussion should not be merely a recitation of the items in the cash flow statements. FR-72 provides the following additional guidance about MD&A disclosures of a company's cash flows from operating activities and financing activities.

**Operating activities:** In December 2003, the SEC Chief Accountant encouraged companies to consider using the direct method of preparing the statement of cash flows.<sup>13</sup> For companies that continue to use the indirect method in presenting cash flows from operating activities, FR-72 warns that their MD&A discussion of cash flows from operating activities should not be limited to discussing changes in the line items that reconcile net income to operating cash flows. Instead, the SEC expects all companies to address material changes in the underlying drivers of operating cash flows (e.g., cash receipts from the sale of goods and services and cash payments to acquire materials for manufacture or goods for resale),<sup>14</sup> regardless of the method they use to present their statements of cash flows.

If a company reports negative cash flows from operations, the SEC expects MD&A to highlight this condition, discuss the operational reasons for the condition if material, and explain how the company intends to meet its cash requirements and maintain operations. In such a situation, if the company plans to rely on external financing to meet its cash requirements, FR-72 states that "disclosure of that fact and the company's assessment of whether this financing will continue to be available, and on what terms, should be considered and may be required."

**Financing:** To the extent material, the SEC expects a company to discuss and analyze its historical financing arrangements, their importance to cash flows and information that is not included in the financial statements, such as its:

- ▶ External debt financing
- ▶ Use of off-balance sheet financing arrangements
- ▶ Issuance or purchase of derivative instruments linked to its stock
- ▶ Use of stock as a form of liquidity

In addition, FR-72 suggests a company provide MD&A disclosure of any potential material effect of known or reasonably likely changes in its credit ratings, ratings outlook, or any inability to achieve an improved credit rating. The SEC believes that a company also should consider disclosing, or may be required to disclose, the potential effect on its liquidity of (1) financing arrangements that are reasonably likely to be available to the company and (2) financing arrangements that the company would like to use but are no longer available or are reasonably likely to become unavailable.<sup>15</sup>

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<sup>13</sup> The joint FASB and International Accounting Standards Board (IASB) project on financial presentation proposes direct method presentation of all cash flows including operating cash flows.

<sup>14</sup> For example, if a decrease in operating cash flows was caused by a revised credit policy resulting in extended payment terms, the SEC would expect the company to disclose this in MD&A, to the extent material, as well as the amount of the associated decrease in operating cash flow if not otherwise apparent. In addition, the SEC would expect the company to disclose the expected future implications of a new credit policy to liquidity.

<sup>15</sup> For example, if a company has decided or seeks to raise material external debt or equity financing, or if it is reasonably likely to do so in the future, the SEC expects the company to discuss and analyze the amounts or ranges involved, the nature and the terms of the financing, other features of the financing and plans, and the effect on the company's cash position and liquidity (and results of operations with regard to financing costs).



### 5.4.3 Cash management

FR-72 suggests that companies should disclose in MD&A any known material trends or uncertainties relating to their determinations of when and how they use cash resources to satisfy obligations and make other capital expenditures. For example, a decision by a company in a highly capital intensive business to significantly reduce its capital expenditures may have long-term ramifications (e.g., a higher cash balance, lower interest payments and lower depreciation expense, but higher future repair and maintenance costs or a higher cost base than the company would have had otherwise), which the SEC believes should be disclosed if material.

FR-83 notes that companies should consider disclosing cash management and risk management policies relevant to an assessment of financial condition. Banks should consider discussing their policies and practices in meeting applicable banking agency guidance on funding and liquidity risk management, or any policies or practices that differ from the guidance of the applicable agency. A company with a portfolio of cash and other investments that provides a material source of liquidity should consider disclosing (1) the nature and composition of the portfolio, including any related market risk, settlement risk or other risk exposures and (2) any limits or restrictions, and their related effects, on the company's ability to use or access the assets. For example, the SEC staff expects registrants to consider the effect on consolidated liquidity when they assert their intention to indefinitely reinvest foreign earnings under ASC 740. The SEC staff requests disclosure of the amount of cash and short-term investments held by foreign subsidiaries that are not available to fund domestic operations unless the funds are repatriated and the potential income tax payments that would be required upon repatriation. This can be an important disclosure to understand the liquidity of the registrant because while a registrant may appear to have significant liquid assets, a large portion of those assets may not be generally available for use without tax implications.

### 5.4.4 Cash flows from discontinued operations

Recognizing that acceptable alternatives exist in the presentation of cash flows from discontinued operations in the statement of cash flows, the SEC staff emphasizes the importance of disclosures by registrants concerning the cash flows from discontinued operations on the liquidity and capital resources of the entity, including:

- ▶ A description of how cash flows from discontinued operations are reported in the statement of cash flows
- ▶ A quantification, where material, of the cash flows from discontinued operations if not separately disclosed in the statement of cash flows
- ▶ A description of how the absence of cash flows from discontinued operations, whether positive or negative, is expected to affect future liquidity and capital resources

### 5.4.5 Prospective information

MD&A rules require disclosure of known trends, demands, commitments, events or uncertainties that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. This discussion should include matters that have materially affected the most recent period but which are not expected to have short- or long-term implications and matters that have not yet had a material effect but are expected to materially affect future periods.

In assessing whether known trends, demands, commitments, events or uncertainties are reasonably likely, FR-61 points out that "reasonably likely" is a lower disclosure threshold than "more likely than not." FR-61 notes that events and circumstances that could affect liquidity and capital resources include

adverse changes in a company's credit rating, stock price, collateral value, cash flows, earnings or other financial ratios. In assessing whether such adverse changes are "reasonably likely," FR-61 advises registrants that market price changes, economic downturns, defaults on guaranteed obligations or contractions of operations can occur under conditions that are not solely within their control.

To identify known trends, demands, commitments, events and uncertainties requiring disclosure, FR-61 suggests that registrants consider the following:

- ▶ The provisions of guarantees, commitments, lease and debt agreements and other agreements (e.g., standby agreements) that could trigger a requirement for early payment, additional collateral, acceleration of maturity or other changes in terms, which provisions could include adverse changes in the registrant's credit rating, stock price, various financial measures or the value of underlying, linked or indexed assets
- ▶ Circumstances that could impair the registrant's ability to continue to engage in critical transactions, such as the inability to maintain a specified investment grade credit rating, or specified level of earnings, earnings per share, EBIT or EBITDA, market price per share or collateral
- ▶ Factors that the registrant understands, based on information obtained from rating agencies or other expert sources, are given significant weight in the determination of the registrant's credit rating or otherwise affect its ability to raise short-term and long-term financing
- ▶ Guarantees of debt or other commitments to third parties
- ▶ Written options on nonfinancial assets (e.g., real estate puts)

## 5.5 Off-balance sheet arrangements

In January 2003, the SEC adopted FR-67 to implement Section 401(a) of the Sarbanes-Oxley Act related to disclosure of material off-balance sheet arrangements (as defined), which requires disclosure in a separately captioned subsection of MD&A of material off-balance sheet arrangements.

**Definition:** Item 303(a)(4) of Regulation S-K defines the term "off-balance sheet arrangement" to include any transaction, agreement or other contractual arrangement involving an unconsolidated entity (other than contingent liabilities arising from litigation, arbitration or regulatory actions), under which the company has:

- ▶ Guarantee contracts required to be initially recorded at fair value under ASC 460
- ▶ Retained or contingent interests in transferred assets
- ▶ Any obligation under derivative instruments classified as equity
- ▶ Any obligation arising out of a material variable interest in an unconsolidated entity that provides financing, liquidity, market risk or credit risk support to the company or that engages in leasing, hedging or research and development arrangements with the company

In defining off-balance sheet arrangements subject to the separate MD&A disclosure requirements, the SEC wanted to identify transactions, agreements and arrangements where the risk of loss is not fully transparent to an investor. These off-balance sheet arrangements are not limited to those involving "special purpose entities," or even just "variable interest entities." As discussed further below, off-balance sheet arrangements also might include contracts, transactions and agreements with customers, vendors, financial institutions, lessors, asset purchasers, affiliates, investees, counterparties to derivatives and other commercial companies.

Item 303 of Regulation S-K refers to aspects of US GAAP to define the off-balance sheet arrangements within its scope. However, the rule's disclosures are required whether or not the company presents its primary financial statements in accordance with US GAAP. For foreign issuers that present their primary financial statements using local accounting principles or IFRS, the SEC rule does not impose US GAAP with regard to their accounting or financial statement disclosures of off-balance sheet arrangements. However, those issuers must determine which off-balance sheet arrangements they must separately discuss in MD&A by reference to certain elements of the US GAAP literature.

The specific types of off-balance sheet arrangements that fall within the scope of the separate MD&A disclosure requirements are discussed further below.

**Guarantee Contracts:** Guarantee contracts to which the initial recognition and measurement provisions of ASC 460 apply:

- ▶ **Financial guarantees:** ASC 460 defines financial guarantees as contracts that contingently require the guarantor to make payments to the guaranteed party based on changes in an "underlying" (e.g., specified interest rate, security price, commodity price, foreign exchange rate, index of prices or rates, or other variable) that is related to an asset, liability or an equity security of the guaranteed party. Financial guarantees would include: (1) a financial standby letter of credit, which is an irrevocable guarantee of the payment of a specified financial obligation, (2) a market value or market price guarantee of either a financial asset (e.g., a debt or equity security) or a nonfinancial asset (e.g., real estate) owned by the guaranteed party, (3) a guarantee of the market price of the common stock of the guaranteed party, (4) a guarantee of the collection of the scheduled contractual cash flows from a loan and (5) a guarantee granted to a business or its owner(s) that the revenue of the business (or a specific portion of the business) will be at least a specified amount for a specified period of time.
- ▶ **Performance guarantees:** ASC 460 defines performance guarantees as contracts that contingently require the guarantor to make payments to the guaranteed party based on another entity's failure to perform under an obligating agreement. Performance guarantees would include: (1) a performance standby letter of credit, which is an irrevocable undertaking by a guarantor to make payment in the event a specified third-party fails to perform under a nonfinancial contractual obligation, and (2) a construction completion guarantee.
- ▶ **Indemnifications:** ASC 460 defines indemnifications as agreements that contingently require the guarantor to make payments to an indemnified party based on changes in an underlying that is related to an asset, liability or an equity security of the indemnified party. Indemnifications would include agreements that require payments in the event of (1) an adverse judgment in a lawsuit, or (2) the imposition of additional taxes due to either a change in the tax law or an adverse interpretation of the tax law.
- ▶ **Indirect guarantees of the indebtedness of others:** ASC 460 defines indirect debt guarantees as agreements between the debtor and the guarantor requiring the guarantor to transfer funds to the debtor upon the occurrence of specified events, under conditions whereby (1) funds become available to creditors of the guaranteed party and (2) those creditors may enforce the debtor's claim against the guarantor. Indirect debt guarantees would include a keepwell agreement, which is an agreement or undertaking to provide funds or property, or arrange the provision of funds or property, to an affiliate or third-party in the event of deterioration in its net income or fixed charge coverage.

ASC 460 includes two groups of specific exceptions to its scope. The first group is exempt from ASC 460 in its entirety while the second group is subject to only the disclosure requirements of ASC 460. Both groups of exceptions, all of which are listed below, are excluded from the definition of off-balance sheet arrangements for purposes of the separate MD&A disclosure requirements. Of course, even though these

items do not meet the rule's definition of an off-balance sheet arrangement, a company still should consider whether or not the item meets the requirements for discussion elsewhere within MD&A.

- ▶ Deferred compensation contracts and stock issued to employees
- ▶ A lessee's residual value guarantee in a capital lease (however, a lessee's residual value guarantee in an operating lease would represent a financial guarantee that meets the rule's definition of an off-balance sheet arrangement)
- ▶ Guarantees issued by insurance and reinsurance companies and accounted for under specialized GAAP for those businesses (i.e., ASC 944)
- ▶ Guarantees accounted for as contingent rent
- ▶ Guarantees that constitute vendor rebates
- ▶ Guarantees whose existence prevents the guarantor from recognizing a sale or earnings from a sale (e.g., a guarantee of the performance of sold real estate that precludes profit recognition under ASC 360 (specifically ASC 360-20-40))
- ▶ A registration payment arrangement within the scope of ASC 825 (specifically ASC 825-20)
- ▶ Guarantees that are accounted for as derivative instruments at fair value under ASC 815
- ▶ Guarantees for which the underlying is related to the functional performance (not changes in price or value) of nonfinancial assets that are owned by the guaranteed party (e.g., product warranties)
- ▶ Contingent consideration in a business combination
- ▶ Guarantees for which the guarantor's obligation would be reported as an equity item, rather than a liability, under US GAAP (e.g., certain guarantees that can be settled in the guarantor's own equity shares)
- ▶ A guarantee by an original lessee that is relieved from being the principal debtor for the original lease payments and has become secondarily liable under a new lease as discussed in ASC 840
- ▶ Intercompany guarantees: (1) a guarantee issued either between parents and their subsidiaries or between entities under common control, (2) a parent's guarantee of its subsidiary's debt to a third-party and (3) a subsidiary's guarantee of the debt owed to a third-party by either its parent or another subsidiary of that parent

**Retained or contingent interests:** Off-balance sheet arrangements subject to the separate MD&A disclosure requirements also include (1) any retained or contingent interest in assets transferred to an unconsolidated entity or (2) any similar arrangement that serves as credit, liquidity or market risk support to such an unconsolidated entity for transferred assets.

**Certain derivative instruments:** The only derivatives that are subject to the separate MD&A disclosure requirements involve obligations, including contingent obligations, under derivative instruments that are indexed to the company's own stock and classified as equity. Such derivatives lack transparency because they are not reported as assets or liabilities, nor do changes in their value affect net income. The derivatives within the scope of the separate MD&A disclosure requirements are excluded from the scope of ASC 815.

For many of these types of contracts (e.g., forward sale contracts, written call options or warrants, purchased put options), following the initial recognition and measurement of the contract at fair value, there often is no subsequent accounting, or subsequent accounting only when the contract is settled. In other cases, the contract might be classified as temporary equity based on the amount of the potential cash redemption obligation. MD&A disclosure of the "risk of loss" from these types of contracts is required in all cases, notwithstanding whether the contract is classified as temporary or permanent equity, or whether the expected form of settlement is physical, net share or net cash. MD&A should address the implications to liquidity, capital resources and equity dilution of the reasonably likely settlement alternatives for equity derivatives.

**Variable interests:**<sup>16</sup> Off-balance sheet arrangements subject to the separate MD&A disclosure requirements also include obligations arising out of a material variable interest in an unconsolidated entity that (1) provides financing, liquidity, market risk or credit risk support to the company or (2) engages in leasing, hedging or research and development services with the company. Under ASC 810, "variable interests" are contractual, ownership or other pecuniary interests in an entity that change with changes in the fair value of the entity's net asset value exclusive of variable interests.<sup>17</sup>

The scope of the SEC rule is not limited to variable interests in an unconsolidated "variable interest entity," as defined in ASC 810. Rather, the scope of the MD&A rule includes obligations arising out of variable interests held in any entity engaged in the specified activities, even an entity that is not subject to the consolidation guidance provided by ASC 810. That is, the scope of the SEC rule can include obligations arising out of variable interests in an entity in which the equity investors exercise control through voting rights and have a sufficient equity investment at risk such that the entity does not require subordinated financial support (i.e., a voting interest entity).

With respect to unconsolidated entities engaged in the specified activities (i.e., financing, liquidity, market risk or credit risk support to the company; leasing; hedging; research and development services), MD&A disclosure is required of any obligation, including a contingent obligation, that is held by, and material to, the registrant and arises from a variable interest, as defined in the Accounting Standards Codification. ASC 810-10-55-16 through 55-41 provide examples of such variable interests, which include, but are not limited to:

- ▶ Equity investments
- ▶ Investments in subordinated beneficial interests<sup>18</sup> or subordinated debt instruments
- ▶ Written put options on the assets of the entity, or similar obligations that protect holders of senior interests from suffering losses

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<sup>16</sup> For fiscal years beginning after 15 November 2009, ASC 810, as amended by Accounting Standard Update 2009-17, *Consolidations (Topic 810) – Improvements to Financial Reporting by Enterprises Involved with Variable Interest Entities*, is the applicable accounting guidance related to variable interests. The revised guidance, among other things, significantly changed the criteria for identifying the primary beneficiary that must consolidate the variable interest entity. See our Financial Reporting Developments publication, *Consolidation of variable interest entities* (Ernst & Young No. BB1905), for additional information.

<sup>17</sup> The determination of whether an enterprise holds a variable interest in an entity requires an economic analysis of the rights and obligations of the instrument or contract held by the enterprise. Variable interests are generally interests in the entity that are designed to absorb or receive the variability created by the entity's assets, liabilities or other contracts. That is, interests in a VIE that introduce risk into the entity are generally not variable interests in the entity, while interests in a VIE that absorb risk generally are variable interests in the entity.

<sup>18</sup> The Accounting Standards Codification defines beneficial interests as "rights to receive all or portions of specified cash inflows received by a trust or other entity, including, but not limited to all of the following: (a) senior and subordinated shares of interest, principal, or other cash inflows to be passed-through or paid-through, (b) premiums due to guarantors, (c) commercial paper obligations and (d) residual interests, whether in the form of debt or equity." (The definition is from ASU 2009-16, which was effective at the start of a reporting entity's first fiscal year beginning after 15 November 2009.)

- ▶ Total return swaps and similar arrangements used to transfer substantially all of the risk related to certain assets without actually transferring the assets
- ▶ Contracts for services (e.g., management contracts) if the contracted compensation (whether fixed or variable) is designed to be different from the market value of the services provided

**Disclosure threshold:** MD&A disclosure is required for off-balance sheet arrangements (as defined) that have a material current effect, or that are reasonably likely<sup>19</sup> to have a material future effect, on the company's "financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources."

To determine whether MD&A disclosure is required for a particular off-balance sheet arrangement within the definition discussed above, management should assess the likelihood of the occurrence of any known trend, demand, commitment, event or uncertainty that could either require performance of a guarantee or other obligation, or require the company to recognize an impairment or other loss. If management objectively and reasonably concludes that the likelihood of occurrence is not reasonably likely, then no disclosure is required, even if the consequences of an occurrence could be material. However, if a registrant does not have any off-balance sheet arrangements subject to MD&A disclosure requirements, the SEC staff suggests that the registrant disclose that fact under the required caption in MD&A. If management cannot objectively and reasonably determine that such an occurrence is not reasonably likely, management then must evaluate the consequences assuming occurrence. Disclosure is required unless management determines that it is not reasonably likely that the effects would be material to the company's financial condition (including changes therein), results of operations (including revenues or expenses), liquidity, or capital resources (including capital expenditures).

Instruction 1 to Item 303(a)(4) of Regulation S-K provides that disclosure of an off-balance sheet arrangement is not required until an unconditionally binding definitive agreement exists or is subject to only customary closing conditions. In the absence of such agreement, disclosure is not required until settlement of the transaction occurs. Thus, disclosure is not required of off-balance sheet arrangements that still are being negotiated. However, if settlement of an arrangement occurs after the balance sheet date, but before the date of the SEC filing, the company should consider whether any related disclosures would be required in MD&A, notwithstanding any separate Form 8-K report related to the contract or transaction.

**Disclosures:** If an off-balance sheet arrangement meets the disclosure threshold, the MD&A rule requires each of the following items to be disclosed in a separately captioned section of MD&A, generally covering the most recent fiscal year (however, the discussion should address changes from the previous year to the extent necessary to an understanding of the disclosure):

- ▶ **Nature and business purpose.** A company must disclose the nature and business purpose of the arrangement. FR-67 states that a company should explain why it engages in the off-balance sheet arrangement and provide investors the information needed to understand the business activities advanced through the arrangement.
- ▶ **Financial importance.** A company must disclose the importance of the arrangement to liquidity, capital resources, market risk support, credit risk support or other benefits. FR-67 states that a company should provide investors the information needed to assess the extent to which risks have been transferred and retained as a result of the arrangement.

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<sup>19</sup> As the SEC stated in FR-61, "reasonably likely" is a lower disclosure threshold than "more likely than not."

- ▶ **Financial effect and exposure to risk.** A company must disclose:
  - ▶ Amounts of revenues, expenses and cash flows arising from the arrangement
  - ▶ The nature and amount of any interests retained, securities issued and other indebtedness incurred by the company in connection with the arrangement
  - ▶ The nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) of the company arising from the arrangement that are, or are reasonably likely to become, material and the triggering events or circumstances that could cause them to arise
- ▶ **Contingencies involving continued availability.** A company must disclose:
  - ▶ Any known event, demand, commitment, trend or uncertainty that will, or is reasonably likely to, result in the termination or material reduction in availability of an arrangement that provides material benefits
  - ▶ The course of action that the company has taken, or proposes to take, in response to any such circumstances

FR-67 provides examples of contingencies that could result in the termination or limitation of an off-balance sheet arrangement, such as adverse changes in the company's credit rating, financial performance or ratios, stock price and the value of underlying or indexed assets.

The MD&A rule also requires a company to provide any other information that it believes is necessary for the understanding of the arrangement. FR-67 provides as an example management's insight into the effect and proximity of reasonably likely, material risks under an arrangement. In addition, under general MD&A disclosure requirements, management must discuss any material current effects of an off-balance sheet arrangement on the company's financial statements, liquidity or capital resources. Moreover, management must discuss any known event, demand, commitment, trend or uncertainty involving an off-balance sheet arrangement that is reasonably likely to have a material future effect on the company's financial statements, liquidity or capital resources.

The MD&A rule allows for the aggregation of similar off-balance sheet arrangements for disclosure purposes to provide information in an efficient and understandable manner, and to avoid repetition and immaterial information. Aggregation may increase an investor's understanding of the disclosures to the extent that there are common or similar effects among a number of off-balance sheet arrangements (e.g., a particular triggering event would materially obligate the company under several arrangements). However, the MD&A rule requires separate discussion if distinctions in arrangements and their effects are material.

FR-67 states that the MD&A discussion should be presented in language and a format that is clear, concise and understandable. The SEC does not intend the MD&A rule to elicit boilerplate disclosures that are not specific to a particular company's off-balance sheet arrangements or that have not been updated to reflect current circumstances. To eliminate repetition, a company's MD&A discussion of off-balance sheet arrangements is allowed to cross-reference information disclosed in the notes to its financial statements, provided that specific, relevant information in those notes is clearly identified. If a company chooses to cross-reference its financial statement disclosures, its MD&A discussion still must integrate the substance of those disclosures and inform investors of the significant information included in the notes to the financial statements. FR-67 warns that cross-referencing financial statement disclosures should not diminish the overall quality of the MD&A discussion.

**Safe Harbor:** To eliminate any question as to the availability of the safe harbor for forward-looking statements (see Forward-looking information discussion in Section 2 of this publication), FR-67 explicitly extends the safe harbor to the information, other than historical facts, provided in MD&A in response to

the disclosure requirements about off-balance sheet arrangements and aggregate contractual obligations. Moreover, the MD&A rule states that compliance with the specified disclosures about off-balance sheet arrangements constitutes meaningful cautionary language for purposes of qualifying for protection under the safe harbor. However, a company still would be advised to provide meaningful cautionary language with respect to forward-looking statements made as part of its MD&A disclosure of aggregate contractual obligations.

Notwithstanding these provisions, the safe harbor would not be available for any disclosures, including those in response to FR-67, in certain circumstances. For example, the safe harbor is not available for companies making their initial public offering, partnerships, limited liability companies, direct participation investment programs, blank check companies or penny stock issuers. The safe harbor also is not available for an issuer that, during the three years preceding such statement, was found to have violated specified laws.<sup>20</sup> In addition, the safe harbor is not available in connection with roll-up transactions, tender offers and going-private transactions.

**December 2007 SEC staff letter:** As discussed above, Item 303 of Regulation S-K specifies MD&A disclosure requirements for off-balance sheet arrangements that are reasonably likely to have a material current or future effect on a registrant. The SEC staff suggests the following additional disclosures<sup>21</sup> for registrants with a material exposure to commercial paper conduits, structured investment vehicles (SIVs), collateralized debt obligations (CDOs) or similar entities:

- ▶ Categories and rating of assets the off-balance sheet entity holds
- ▶ Weighted-average life of assets the off-balance sheet entity holds
- ▶ Forms of funding (commercial paper, medium-term notes, etc.) and weighted-average life of the funding the off-balance sheet entity utilizes
- ▶ Any material difficulties the off-balance sheet entity has experienced in issuing its commercial paper or other financing during the period
- ▶ Any material write-downs or downgrades of assets the off-balance sheet entity holds
- ▶ Maximum limit of the losses to be borne by any first loss note holders
- ▶ Types of variable interests the registrant holds in the off-balance sheet entity
- ▶ Detailed disclosure regarding the registrant's obligations under the liquidity facilities. For example:
  - ▶ Whether there are triggers associated with its obligations to fund
  - ▶ Whether there are any terms that would limit its obligation to perform
  - ▶ Any obligations under the facilities (e.g., to purchase the off-balance sheet entity's assets or commercial paper), and their material terms
  - ▶ Whether there are any other liquidity providers, and if so, how the registrant's obligation ranks with the other liquidity providers

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<sup>20</sup> Safe harbor protection would not be available to any person convicted of any felony or misdemeanor described in clauses (i) through (iv) of Section 15(b)(4)(B) of the 1934 Act, or who, as a result of a governmental action, received a judicial or administrative decree or order that addresses violations of the antifraud provisions of the securities laws.

<sup>21</sup> These disclosures are outlined in an illustrative letter, based on actual letters sent to several public companies, which can be obtained on the SEC's website at <http://www.sec.gov/divisions/corpfin/guidance/cfoffbalanceltr1207.htm>.



- ▶ Whether the registrant purchased commercial paper or other securities issued by any off-balance sheet entities that it manages, and whether any agreement required it to make these purchases, or otherwise, the reasons for such purchase
- ▶ Whether the registrant provided or assisted the off-balance sheet entity in obtaining any other type of support, or whether it has a current intention to do so
- ▶ Potential effect on debt covenants, capital ratios, credit ratings or dividends, should the registrant be required to consolidate the entity or incur significant losses associated with the entity

As a general matter, the SEC staff encourages a registrant to disclose, to the extent material in light of the particular facts and circumstances, the amount of any material loss it expects to realize as a result of its involvement with any material off-balance sheet entity.

The SEC staff believes these recommended disclosures will provide useful insights for investors into the quality of the assets held in the off-balance sheet entity. Significant judgment will be required in determining the level of disclosure. That is, the more material the exposure, the more likely additional disclosure could be beneficial.

Regarding VIEs, the SEC staff urges registrants to be more specific about how the registrant computes the maximum exposure to loss, events that would have to occur to realize the maximum loss, and the amount of the maximum loss for each significant unconsolidated VIE. In addition, if a registrant states that the maximum loss exposure does not bear any relation to anticipated losses, the SEC staff expects the registrant to consider disclosing the amount of such anticipated losses. In addition, to the extent that the registrant identifies consolidation and accounting for variable interest entities as a critical accounting policy, the SEC staff recommends that a registrant consider disclosing:

- ▶ The scenarios that would require it to consolidate a VIE
- ▶ The likelihood of such an event
- ▶ The frequency and events that require the registrant to reconsider whether it is the primary beneficiary of a VIE

## 5.6

### Contractual obligations

As amended by FR-67, Item 303(a)(5) of Regulation S-K requires companies (other than smaller reporting companies, issuers of asset-backed securities and registered investment companies) to provide a tabular presentation of known contractual obligations as of the end of the most recent fiscal year. A company is required to provide the future payments due, aggregated by type of contractual obligation, in any MD&A location deemed appropriate using substantially the following format:

Contractual obligations	Payments due by period				
	Total	Less than 1 year	1-3 years	3-5 years	More than 5 years
[Long-Term Debt]					
[Capital Lease Obligations]					
[Operating Leases]					
[Purchase Obligations]					
[Other Long-Term Liabilities Reflected on the Registrant's Balance Sheet under GAAP]					
Total					

Except for the rule's definition of "purchase obligations," Item 303(a)(5) of Regulation S-K instructs companies to provide a tabular disclosure of contractual obligations using classifications that are consistent with the accounting principles used to present their primary financial statements. Accordingly, US issuers will refer to US GAAP to define the types of contractual obligations that must be included in the tabular disclosure. Similarly, foreign issuers will refer to the accounting principles used to prepare their primary financial statements (i.e., local accounting principles, IFRS or US GAAP). For example, in the absence of a distinction in such accounting principles between capital or financing leases and operating leases, the table should present all leases in the aggregate.

A company may disaggregate the specified categories of contractual obligations using other categories suitable to its business, provided the presentation includes all of the obligations falling within the categories specified in the table. The tabular presentation also may be accompanied by footnotes that describe provisions that create, increase or accelerate obligations or other pertinent data to the extent necessary to understand the timing and amount of the specified contractual obligations.

FR-83 notes that the goal of the contractual obligations table is to present a meaningful snapshot of cash requirements arising from contractual payment obligations. The MD&A rules permit flexibility so that the presentation can reflect company-specific information in a way that is suitable to a registrant's business. FR-83 encourages companies to develop a presentation that is clear, understandable and appropriately reflects the categories of obligations that are meaningful in light of its capital structure and business.

The SEC staff has observed divergent practices in presenting the table of contractual obligations and recommends that uncertainties about what to include in the table, and how to allocate amounts to the required periods, be resolved consistent with the purpose of the disclosure. Registrants should consider providing narrative disclosure, in addition to the table and related footnotes, to promote an understanding of the tabular data. FR-83 also suggests that a registrant consider segregating off-balance sheet arrangements from balance sheet obligations in the table, particularly if it helps to tie the information to the financial statements and other MD&A disclosures.

The types of contractual obligations requiring disclosure include:

**Long-term debt:** This category corresponds to the long-term borrowings for which ASC 470 requires disclosure of maturities and sinking fund requirements for each of the succeeding five years (ASC 470-10-50-1). Item 303(a)(5) of Regulation S-K requires disclosure of the related "payment obligation," which we believe encompasses both principal and interest. If its debt carries a fixed interest rate, determining the amount of associated interest that a company should include in the table is straightforward. If its debt carries a variable interest rate, a company may elect to include interest in the table based on the indexed rate in effect at the balance sheet date (or another reasonable assumption, such as rates extrapolated from the yield curve at the balance sheet date), with a footnote to the table describing the amount of the debt subject to the variable rate, the basis of the rate and the rate assumed for purposes of the tabular presentation. Alternatively, FR-72 states that, if the cash requirements for interest are not included in the tabular disclosure, they should be discussed if material.

**Capital lease obligations:** This category corresponds to obligations recognized as capital leases by a lessee under ASC 840, which requires disclosure of future minimum lease payments for each of the succeeding five years. For purposes of this disclosure, future minimum lease payments would include both the imputed interest and any executory costs (including associated profit to the lessor), which together reduce the aggregate future minimum lease payments to the present value of the capital lease. Under US GAAP, minimum lease payments assumed for purposes of the recognition and measurement of a capital lease obligation may include the amount of any bargain purchase options and residual value guarantees, which represent economic or contingent obligations, as opposed to contractual payment obligations. When such amounts are included in the table, a company should consider providing a

footnote to that effect. If lease rentals are based on an index, US GAAP requires a company to determine its future minimum lease payments based on the index in effect at the inception of the lease, with the effects of subsequent changes in the index treated as contingent rent. Most companies include amounts in the table that correspond to their financial statement note disclosure of future minimum lease payments, such that the table excludes contingent rentals that are excluded from the determination of minimum lease payments under ASC 840. Similarly, the amounts in the table would not be reduced to the extent of any expected rental income under noncancelable subleases. We believe companies should consider a footnote to the table to provide information about these amounts.

**Operating leases:** This category corresponds to obligations recognized as operating leases by a lessee under ASC 840. For operating leases with initial or remaining noncancelable lease terms over one year, ASC 840 requires disclosure of future "minimum lease payments" for each of the succeeding five years. For purposes of this financial statement note disclosure, minimum lease payments would include the amount of any probable obligation under a residual value guarantee. (However, a contingent obligation under a residual value guarantee that is not yet probable represents a financial guarantee, which is subject to separate MD&A disclosure requirements about off-balance sheet arrangements). Nevertheless, as with capital leases, most companies include amounts in the table that correspond to the financial statement note disclosure of future minimum lease payments. However, companies may elect to include the contractual payment obligation with respect to all operating leases (i.e., including leases with initial or remaining terms of one year or less). In either case, the amounts in the MD&A table would include portions of the minimum rental payments associated with executory costs and an interest factor. Similar to the tabular disclosure for capital lease obligations, the amounts disclosed in the MD&A table for operating leases would exclude both contingent rentals and any expected rental income under noncancelable subleases.

**Purchase obligations:** Item 303(a)(5) of Regulation S-K defines this category as obligations under agreements to purchase goods or services that are enforceable and legally binding on the company, and that specify all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions and the approximate timing of the transaction. FR-67 also states that footnotes to the table should discuss any material termination or renewal provisions necessary to understand the timing and amount of payments under purchase obligations. Based on the rule's definition, this category would include unconditional purchase obligations associated with a supplier's financing arrangements (i.e., take-or-pay contracts or throughput contracts) that are not recorded in the balance sheet (for which ASC 440 requires disclosure of the amount of the fixed and determinable portion of the obligation for each of the succeeding five years (ASC 440-10-50-4). However, the rule's definition is clearly broader and could include executory contracts, even those with initial or remaining noncancelable terms less than one year. FR-67 states that the category was designed (presumably only in part) to capture a company's capital expenditures over the five-year period. However, FR-67 does not provide additional guidance as to the scope of contractual purchase obligations other than to imply that the disclosure should not exclude purchase obligations entered in the ordinary course of business.

The SEC staff believes that companies must undertake reasonable efforts and expense to identify and aggregate outstanding purchase obligations. However, if after making these efforts, companies are still unable to fully disclose the amounts of outstanding purchase obligations, companies must (1) assess whether the inability to aggregate this information represents a deficiency in its disclosure controls and procedures (which the SEC staff would not necessarily presume), (2) disclose in a footnote to the table the nature and extent of information that has been excluded and the reason why it has been excluded and (3) consider disclosing additional information about the significance of the omitted information (e.g., if open purchase orders executed in the normal course of business cannot be aggregated, the SEC staff would expect companies to disclose information such as the amount of historical open purchase orders, the amount of forecasted open purchase orders, the materiality threshold by which the company excluded open purchase orders or the maximum dollar amount employees are authorized to spend).

**Other long-term liabilities:** To the extent that a company has other contractual obligations that are reflected as long-term liabilities on its balance sheet, it should include additional captions within the table to present the associated payment obligation. FR-67 does not provide additional guidance as to the types of other long-term liabilities expected to be disclosed in the table.

For example, Item 303(a)(5) of Regulation S-K is not specific as to whether the table of contractual obligations should include obligations to redeem capital stock. ASC 505 currently requires disclosure of the amount of redemption requirements for each of the succeeding five years to the extent such redemption requirements are at fixed or determinable prices on fixed or determinable dates (ASC 505-10-50-11). In addition, ASC 480-10-25-4 requires mandatorily redeemable stock to be classified as a liability. Accordingly, we believe that companies should include payment obligations related to mandatorily redeemable capital stock in the table of contractual obligations. As with the presentation of long-term debt obligations, we believe that the table should include the entire payment obligation, including any required dividends.

As another example, Item 303(a)(5) of Regulation S-K is not specific as to whether the table should include obligations under pension and OPEB plans. The SEC staff believes that the treatment of pension and OPEB obligations in the table requires judgment, but if a company has a material funding obligation, that amount should be reflected in the table or discussed elsewhere in MD&A. FR-72 states that cash requirements for “amounts to be funded to cover post-employment (including retirement) benefits may not be included in the tabular disclosure, but should be discussed if material.” If a company elects to include obligations under pension and OPEB plans in the table, to the extent that the related benefit payments will be made under a funded plan and will not require company contributions or payments within the five-year period, it would appear that such benefit payments could be excluded.

However, if a benefit plan is unfunded, or has insufficient funding, such that the company will pay the benefits directly or indirectly, it would appear that such payments should be included in the table. For example, irrespective of the funding status of a company's pension plan, companies must evaluate whether any minimum funding contributions under ERISA would meet the definition of a contractual obligation under FR-67, and if so, companies must then determine whether to reflect these minimum funding contributions in the table, if material. If a company decides to include in the table the minimum funding contributions under ERISA, the company should add a footnote to the table to describe the actuarial assumptions used in determining the amounts disclosed.

Further, the SEC staff believes that a registrant should consider liabilities for uncertain income tax positions for inclusion in the contractual obligations table in MD&A. Under ASC 740, a liability is created (or the amount of a net operating loss carryforward or amount refundable is reduced) for any unrecognized tax benefits. The SEC staff believes that a registrant should include uncertain income tax position liabilities in the contractual obligations table if it can make reasonably reliable estimates about the demands on its liquidity. For example, if any uncertain income tax position liabilities are classified as a current liability in the registrant's balance sheet, the SEC staff expects such amounts to be presented in the “Less than 1 year” column of its contractual obligations table. Similarly, the contractual obligations table should include any noncurrent uncertain tax position liabilities for which the registrant can make a reasonably reliable estimate of the period of future payments (e.g., uncertain tax positions subject to an ongoing examination by the respective taxing authority for which settlement is expected to occur beyond the next operating cycle).

However, the SEC staff acknowledges that there is a high degree of uncertainty regarding the timing of future cash outflows associated with some uncertain tax position liabilities, and, in those cases, a registrant might be unable to make reasonably reliable estimates of the period of cash settlement with the respective taxing authority (e.g., unrecognized tax benefits for which the statute of limitations might expire without examination by the respective taxing authority). In those circumstances, the SEC staff

agreed that a registrant could exclude uncertain income tax position liabilities from the table, or disclose such amounts in an "other" column added to the table. If any uncertain tax position liabilities are excluded from the contractual obligations table because the registrant cannot make a reasonably reliable estimate of the period of cash settlement with the respective taxing authority, the SEC staff believes a footnote to the table should disclose the amount excluded.

## 5.7 **Known trends, events, demands, commitments and uncertainties**

One of the most difficult judgments management makes in MD&A relates to presently known "trends, events and uncertainties" that might affect future earnings or other measures of performance. FR-36 focuses on improving the discussion of known trends, events and uncertainties.

Item 303 of Regulation S-K indicates that registrants should describe any known trends or uncertainties that have had, or that the registrant reasonably expects will have, a material favorable or unfavorable effect on financial results.

The discussion should highlight known material trends, events and uncertainties that would cause the reported financial information not to be indicative of future operations or financial condition. This includes discussion of both (1) matters that would have an effect on future operations and have not had an effect in the past and (2) matters that have had an effect on reported operations and are not expected to have an effect upon future operations.

FR-36 indicates that a discussion of known trends, events and uncertainties is required unless management determines that (1) the known trend, event or uncertainty "is not reasonably likely to occur" or (2) assuming that the known trend, event or uncertainty comes to fruition, that its consequences would not be reasonably likely to have a material effect on financial condition or results of operations. FR-61 points out that "reasonably likely" is a lower disclosure threshold than "more likely than not."

Adding to the difficulty of judging the potential effect of known events is the SEC's acknowledgment that it has, and will continue to use, the benefit of hindsight in evaluating filings. However, any forward-looking information supplied in MD&A might be covered by either (1) the SEC's safe harbor rules (Securities Act Rule 175 and Exchange Act Rule 3b-6), as long as the necessary conditions are met (i.e., the forward-looking information was prepared on a reasonable basis and disclosed in good faith) or (2) the statutory safe harbor for forward-looking information (see Forward-looking information in Section 2 of this publication). The SEC also provides its views on important factors to be considered in formulating and disclosing projections in Item 10(b) of Regulation S-K, such as the appropriate basis and format for projections, and how to facilitate investor understanding of projections, and in particular, their limitations. As part of their disclosure controls and procedures (Exchange Act Rules 13a-15 and 15d-15), registrants should consider all known trends, events and uncertainties as part of the MD&A preparation process and consider documenting the reasons for disclosure or nondisclosure.

To identify known trends and uncertainties, FR-72 suggests that a company consider financial, operational and other information (including nonfinancial information) known to the company. FR-72 also suggests that companies consider whether or not the available information itself is material and should be disclosed. FR-72 states, "This information, over time, may reveal a trend or general pattern in activity, a departure or isolated variance from an established trend, an uncertainty, or a reasonable likelihood of the occurrence of such an event that should be disclosed." FR-72 adds that quantification of the material effects of known material trends and uncertainties "should be considered and may be required to the extent material if quantitative information is reasonably available."

In addition, ASC 275-10-50-16 requires disclosures in the notes to the financial statements about vulnerability from concentrations when all three of the following conditions are met:

- ▶ The concentration of risk exists at the date of the financial statements
- ▶ The concentration makes the enterprise vulnerable to the risk of a near-term "severe impact"<sup>22</sup>
- ▶ It is at least reasonably possible that the events that could cause the severe impact will occur in the near-term

Companies should consider whether they have concentrations in volume of business transacted with a particular customer, supplier or lender; revenue from particular products or services; available sources of supply materials, labor or services; or market or geographical area in which it conducts its operations that might meet the three criteria above.

## 5.8

### Critical accounting policies and estimates

FR-60 alerts public companies to the need for improved disclosures about "critical accounting policies," defined as those most important to the financial statement presentation and that require the most difficult, subjective and complex judgments. The SEC expects public companies to provide disclosures responsive to FR-60 in MD&A.

The SEC believes that MD&A should make investors aware of the sensitivity of financial statements to the methods, assumptions and estimates underlying the financial statements. Specifically, FR-60 states, "We encourage public companies to include in their MD&A full explanations, in plain English, of their 'critical accounting policies,' the judgments and uncertainties affecting the application of those policies, and the likelihood that materially different amounts would be reported under different conditions or using different assumptions." FR-60 also suggests that MD&A would be enhanced by an explanation of the interplay of identified uncertainties with accounting measurements in the financial statements. In making disclosures under FR-60, registrants need not repeat information that is included in the financial statements or elsewhere in the company's MD&A.

FR-72 emphasizes that companies should consider providing enhanced disclosure and analysis of critical accounting estimates and assumptions in MD&A. FR-72 notes that "such disclosure should supplement, not duplicate, the description of accounting policies that are already disclosed in the notes to the financial statements. The disclosure should provide greater insight into the quality and variability of information regarding financial condition and operating performance. While accounting policy notes in the financial statements generally describe the method used to apply an accounting principle, the discussion in MD&A should present a company's analysis of the uncertainties involved in applying a principle at a given time or that variability is reasonably likely to result from its application over time."

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<sup>22</sup> The Accounting Standards Codification defines "severe impact" as "a significant financially disruptive effect on the normal functioning of the entity. Severe impact is a higher threshold than material. Matters that are important enough to influence a user's decisions are deemed to be material, yet they may not be so significant as to disrupt the normal functioning of the entity. Some events are material to an investor because they might affect the price of an entity's capital stock or its debt securities, but they would not necessarily have a severe impact on (disrupt) the enterprise itself. The concept of severe impact, however, includes matters that are less than catastrophic."

FR-72 reminds companies that current MD&A rules would require disclosure of a critical accounting estimate or assumption when:

- ▶ The nature of the estimates or assumptions is material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change
- ▶ The effect of the estimates and assumptions on financial condition or operating performance is material

In these cases, the SEC expects companies to provide analysis of the uncertainties involved in applying a principle at a given time and the variability that is reasonably likely to result from its application over time. Specifically, the SEC indicates that the MD&A disclosure should (1) address why the accounting estimate or assumption bears the risk of change and (2) include an analysis to the extent material of the following:

- ▶ How the company arrived at the estimate
- ▶ How accurate the estimate/assumption has been in the past
- ▶ How much the estimate/assumption has changed in the past
- ▶ Whether the estimate/assumption is reasonably likely to change in the future

Because critical accounting estimates and assumptions are based on matters that are highly uncertain, the SEC believes that companies should analyze their specific sensitivity to change based on other outcomes that are reasonably likely to occur and would have a material effect. The SEC believes that companies should provide a quantitative, as well as qualitative disclosure, when quantitative information is reasonably available and would provide material information.<sup>23</sup>

In particular, the SEC staff has noted that registrants' disclosures about critical accounting policies and estimates often are too general and should be expanded to include a description of the significant estimates and assumptions made by management. Some of the areas that the SEC staff has commented on include allowance for loan losses, contingencies, derivatives, goodwill and other asset impairments, inventory, pensions and other postretirement benefit costs and obligations, recognition of intangible assets as part of a business combination, revenue recognition and share-based payments.

#### **Illustration 5-2: MD&A: Critical accounting policies & estimates**

The Company's accounting policies are more fully described in Note 1 of the Consolidated Financial Statements. As disclosed in Note 1, the preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions about future events that affect the amounts reported in the financial statements and accompanying notes. Actual results could differ significantly from those estimates. The Company believes that the following discussion addresses the Company's most critical accounting policies, which are those that are most important to the portrayal of the Company's financial condition and results of operations and require management's most difficult, subjective and complex judgments.

<sup>23</sup> For example, if reasonably likely changes in the long-term rate of return used in accounting for a company's pension plan would have a material effect on the company's financial condition or results of operations, the SEC believes that the company should disclose and quantify the effect that could result given the range of reasonably likely outcomes.

*Allowance for doubtful accounts*

Allowances for doubtful accounts are estimated at the individual operating companies based on estimates of losses related to customer receivable balances. In establishing the appropriate provisions for customer receivable balances, the Company makes assumptions with respect to their future collectibility. The Company's assumptions are based on an individual assessment of a customer's credit quality as well as subjective factors and trends, including the aging of receivable balances. Generally, these individual credit assessments occur prior to the inception of the credit exposure and at regular reviews during the life of the exposure and consider (a) a customer's ability to meet and sustain its financial commitments; (b) a customer's current and projected financial condition; (c) the positive or negative effects of the current and projected industry outlook; and (d) the economy in general. Once the Company considers all of these factors, a determination is made as to the probability of default. An appropriate provision is made, which takes into account the severity of the likely loss on the outstanding receivable balance based on the Company's experience in collecting these amounts. In addition to these individual assessments, in general, outstanding customer receivable amounts that are greater than 365 days are fully provided for and amounts greater than 180 days are 50% provided for. The Company's level of reserves for its customer accounts receivable fluctuates depending upon all of the factors mentioned above.

*Pension and other postretirement benefits*

The Company and its subsidiaries sponsor multiple defined benefit pension plans and other postretirement benefit plans that cover substantially all of our non-union employees, including certain employees in foreign countries. Several statistical and other factors, which attempt to anticipate future events, are used in calculating the expense and liability related to the plans. Key factors include assumptions about the expected rates of return on plan assets, discount rates, and health care cost trend rates, as determined by the Company, within certain guidelines. The Company considers market conditions, including changes in investment returns and interest rates, in making these assumptions.

The Company determines the expected long-term rate of return on plan assets based on the building block method, which consists of aggregating the expected rates of return for each component of the plan's asset mix. Plan assets are comprised primarily of common stocks, bonds, debentures, secured mortgages and property. The Company uses historic plan asset returns combined with current market conditions to estimate the rate of return. The expected rate of return on plan assets is a long-term assumption and generally does not change annually. The discount rate reflects the market rate for high-quality fixed income debt instruments on the Company's annual measurement date (December 31) and is subject to change each year. Holding all other assumptions constant, a 1% increase or decrease in the assumed rate of return on plan assets would decrease or increase, respectively, 20Y2 net periodic pension expense by approximately \$0.3 million. Likewise, a 0.25% increase or decrease in the discount rate would decrease or increase, respectively 20Y2 net periodic pension expense by approximately \$1.9 million.

Unrecognized actuarial gains and losses are being recognized over approximately a 10-year period, which represents the expected remaining service life of the employee group. Unrecognized actuarial gains and losses arise from several factors including experience and assumption changes in the obligations and from the difference between expected returns and actual returns on plan assets. The Company has recorded unrecognized actuarial gains and losses within accumulated other comprehensive income, net of tax. These unrecognized losses will be systematically recognized from accumulated other comprehensive income as an increase in future net periodic pension expense. Similarly, actuarial gains and losses that arise in the future, which have not yet been recognized as a component of net periodic benefit cost will be recognized as increases or decreases in other comprehensive income, net of tax, in the period they arise.



Key assumptions used in determining the amount of the obligation and expense recorded for postretirement benefits other than pensions (OPEB) include the assumed discount rate and the assumed rate of increases in future health care costs. The discount rate used to determine the obligation for these benefits has matched the discount rate used in determining our pension obligations in each year presented. In estimating the health care cost trend rate, the Company considers its actual health care cost experience, future benefit structures, industry trends and advice from its third-party actuaries. The Company assumes that the relative increase in health care costs will generally trend downward over the next several years, reflecting assumed increases in efficiency in the health care system and industry-wide cost containment initiatives. At 31 December 20Y1, the expected rate of increase in future health care costs was 9% for 20Y2, declining to 6% in 20Y6 and thereafter. If the Company had assumed a .25% increase or decrease in the discount rate for all of its OPEB plans as of December 20Y1, the 20Y1 OPEB expense would be expected to decrease or increase by approximately \$2.1 million. Similarly, if the assumed future health care cost trend rate had been increased or decreased by 1%, the Company's accumulated OPEB obligations as of 20Y1 would have increased or decreased by approximately \$0.1 million.

The actuarial assumptions used by the Company in determining its pension and OPEB retirement benefits may differ materially from actual results due to changing market and economic conditions, higher or lower withdrawal rates or longer or shorter life spans of participants. While the Company believes that the assumptions used are appropriate, differences in actual experience or changes in assumptions might materially affect the Company's financial position or results of operations.

In addition, ASC 275-10-50-8 requires disclosures in the notes to the financial statements about certain significant estimates when information that is known to management prior to the issuance of financial statements meets both of the following criteria: (1) it is at least reasonably possible (as defined in the Accounting Standards Codification) that management's estimate of the effect on the financial statements of a condition, situation or set of circumstances existing at the date of the financial statements will change in the near-term as a result of one or more future confirming events and (2) the effect of the change would be material to the financial statements. The disclosure should indicate the nature of the uncertainty and an indication that it is at least reasonably possible that a change in the estimate will occur in the near-term. Disclosure of the factors that cause the estimate to be sensitive to change also is encouraged.

### 5.8.1 Fair value estimates

In 2008, the SEC staff issued two illustrative letters to registrants identifying a number of fair value related disclosures that companies should consider making in their MD&A. The letters were sent to companies that reported a significant amount of asset-backed securities, loans carried at fair value or the lower of cost or market and derivative assets and liabilities in the financial statements. Although the letters were sent primarily to financial institutions, the suggestions are applicable to any registrant.

It is our understanding that nothing in these letters is intended to change the existing fair value accounting guidance. Instead, both letters highlight additional MD&A disclosures that companies should consider to enhance the transparency of the determination and effects on their financial statements of the measurement of the instruments at fair value.

The SEC staff's first letter,<sup>24</sup> issued in March 2008, emphasizes disclosures surrounding the determination of the fair value of assets and liabilities in market conditions that may require the use of unobservable inputs to determine fair value (i.e., Level 3 measurements). Regardless of how a company has classified its assets and liabilities in the fair value hierarchy, the March 2008 letter identifies the following disclosures for consideration in the MD&A section of Form 10-K:

- ▶ A general description of the valuation techniques or models used to value material assets or liabilities
- ▶ A description of any material changes to valuation techniques or models, why the changes were made and, to the extent possible, the quantitative effect of those changes
- ▶ If material, a discussion of the extent to which, and how, the company considered relevant market indices in applying the techniques or models that were used to value material assets or liabilities, as well as any material adjustments made during the reporting period to the fair values of assets or liabilities based on market indices and the reasons for making those adjustments
- ▶ A discussion of how the techniques or models used were validated (e.g., frequency of model calibration or back-testing)
- ▶ A discussion of how sensitive the fair value estimates of material assets or liabilities are to the significant inputs used by the technique or model (e.g., a company could consider providing a range of values around the fair value amount arrived at to provide a sense of how the fair value estimate could potentially change as the significant inputs vary, in which case it should discuss why it believes the range is appropriate, identify the key drivers of variability and discuss how it developed the inputs used in determining the range)
- ▶ If material, a discussion of how increases and decreases in the aggregate fair value of assets and liabilities might affect the company's liquidity and capital resources

The March 2008 letter also recommends that, when the use of unobservable inputs is material, a company should disclose in its MD&A how the inputs were determined and how the resulting fair value of assets and liabilities, and possible changes to those values, affected or could affect the results of operations, liquidity and capital resources. The letter suggests the following disclosure and discussion points be considered when preparing MD&A:

- ▶ The amount of assets and liabilities measured using significant unobservable inputs (Level 3 assets and liabilities) as a percentage of the total assets and liabilities measured at fair value
- ▶ The amount and reason for any material increase or decrease in Level 3 assets and liabilities resulting from the transfer of assets and liabilities from, or into, Level 1 or Level 2
- ▶ If a material amount of assets or liabilities were transferred into Level 3 during the period, a discussion of:
  - ▶ The significant inputs that are no longer considered to be observable
  - ▶ Any material gain or loss recognized on those assets or liabilities during the period and, to the extent that amount was excluded from the realized/unrealized gains (losses) line item in the Level 3 reconciliation, the amount excluded

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<sup>24</sup> The SEC staff's March 2008 illustrative letter can be accessed at <http://www.sec.gov/divisions/corpfin/guidance/fairvalueltr0308.htm>.

- ▶ For Level 3 assets or liabilities, a discussion of, to the extent material:
  - ▶ Whether realized and unrealized gains (losses) affected the results of operations, liquidity or capital resources during the period, and, if so, how
  - ▶ The reason for any material decline or increase in the fair values
  - ▶ Whether the company believes the fair values diverge materially from the amounts currently anticipated to be realized on settlement or maturity, including the basis for this view
- ▶ The nature and type of assets underlying any asset-backed securities, for example, the types of loans (subprime, Alt-A, or home equity lines of credit) and the years of issuance, as well as information about the credit ratings of the securities, including changes or potential changes to those ratings

The SEC staff's second letter,<sup>25</sup> issued in September 2008, re-emphasizes the fair value considerations highlighted in the March 2008 letter and recommends that registrants continue to evaluate whether they can provide clearer, more transparent disclosures about the judgments and assumptions underlying their fair value measurements, the sensitivity of those measurements to the assumptions made and details about the methodology and inputs used. In addition, the September 2008 letter identifies new disclosure considerations associated with the fair value measurement of financial instruments.

To the extent material to a registrant's own facts and circumstances, the September 2008 letter identifies the following disclosures for consideration in the MD&A section of SEC filings:

- ▶ The significant judgments made in classifying a particular financial instrument in the fair value hierarchy
- ▶ An explanation of how credit risk is incorporated and considered in the valuation of assets or liabilities – whether measured at fair value under the fair value option provided by ASC 825 or other applicable standards
- ▶ If material, the gains or losses on financial instruments that are required to be carried at fair value,<sup>26</sup> with an explanation<sup>27</sup> of:
  - ▶ How the registrant's credit risk affected the valuation of derivative liabilities and the resulting gain or loss that is included in earnings relating to the changes in that credit risk
  - ▶ How counterparty credit risk affected the valuation of derivative assets and the resulting gain or loss that is included in earnings relating to the changes in that credit risk
  - ▶ How deterioration in the counterparty's credit and the registrant's ability to collect on a derivative asset would affect the financial statements

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<sup>25</sup> The SEC staff's September 2008 illustrative letter can be accessed at <http://www.sec.gov/divisions/corpfin/guidance/fairvalueItr0908.htm>.

<sup>26</sup> ASC 825 requires disclosure about the gain/loss on items that were elected to be carried at fair value, but not on those items that are required to be carried at fair value – such as derivative instruments accounted for under ASC 815.

<sup>27</sup> In providing this disclosure, the September 2008 letter also recommends that a registrant may want to discuss the implications of items elected to be carried at fair value along with the items that are required to be carried at fair value to further facilitate an investor's understanding.

- ▶ The criteria used by the registrant to determine whether the market for a financial instrument is active or inactive (i.e., illiquid)
- ▶ A discussion of which financial instruments are affected by the lack of market liquidity (i.e., inactivity), how the lack of liquidity affected the valuation technique used, how illiquidity was factored into the fair value determination of those financial instruments (e.g., to the extent a discounted cash flow approach was used to determine the fair value of a financial instrument (such as auction rate securities, loans held for sale, mortgage-backed securities backed by subprime or Alt-A collateral), discuss the specific change in the discount rate or any other analysis performed to account for the lack of liquidity), and any change in assumptions from prior periods
- ▶ If a registrant discloses that it uses brokers or pricing services to assist in fair value determinations, the extent to which, and how, the information is obtained and used in developing the fair value measurements in the consolidated financial statements

While the nature and form of this information may vary, the September 2008 letter suggests this discussion might include the following:

- ▶ The nature and amounts of assets valued using broker quotes or prices obtained from pricing services, along with their classification in the fair value hierarchy
- ▶ The number of quotes or prices generally obtained per instrument. If multiple quotes or prices were obtained, registrants should disclose how the ultimate value was determined
- ▶ Whether, and if so, how and why, quotes and prices obtained from brokers or pricing services were adjusted
- ▶ The extent to which the brokers or pricing services are gathering observable market information, as opposed to using unobservable inputs or proprietary models in making valuation judgments and determinations
- ▶ Whether the broker quotes are binding or non-binding
- ▶ The procedures performed by the registrant to validate that the prices obtained were consistent with the determination of fair value in accordance with [ASC 820] and the related classification within the fair value hierarchy

## 5.8.2 Impairment, intangibles and goodwill

The SEC staff has commented that MD&A disclosures regarding asset impairments often are too general and should instead include:

- ▶ Description of the indicators evaluated by management that led to the need to evaluate the assets for impairment
- ▶ Assumptions with regard to how the amount of the impairment was determined
- ▶ Discussion of the recoverability of any remaining assets that were not impaired
- ▶ Description of the steps performed in assessing the impairment including a description of the main assumptions used in the analysis

The FRM outlines the SEC staff's expectations for MD&A disclosures about the possible future impairment of goodwill. For each reporting unit with a material amount of goodwill that is "at risk" (i.e., it is reasonably likely that the reporting unit might fail a future Step 1 impairment test under ASC 350), the SEC staff expects the registrant's MD&A to disclose:

- ▶ The percentage by which the fair value of the reporting unit exceeds its carrying value at the date of the last impairment test
- ▶ The amount of goodwill allocated to the reporting unit
- ▶ A qualitative discussion of key assumptions that drive the fair value of the reporting unit
- ▶ Any uncertainties surrounding those key valuation assumptions
- ▶ Events that could have negative effect on the fair value of the reporting unit

The SEC staff acknowledged that the need for these disclosures increases as the amount by which the fair value of a reporting unit exceeds its carrying amount decreases. However, the SEC staff stated that no bright lines exist and registrants must apply judgment to determine whether a reporting unit's goodwill is considered "at risk." If a registrant concludes that it does not have any reporting units that are at risk of failing the "Step 1" goodwill impairment test, the SEC staff expects the registrant to disclose that fact in MD&A.

The SEC staff has asked whether any undiscounted cash flow analyses resulted in amounts that were close to the carrying amount of the definite-lived intangible asset and if so, has requested an explanation of the consideration given to providing investors with an understanding of the risk associated with a potential impairment.

In addition to disclosure of key assumptions used in the development of company-determined estimates of cash flow projections used for assessing and measuring impairment of goodwill, intangible assets and long-lived assets, the SEC staff expects discussion in MD&A of the implications of the assumptions used (e.g., whether the projections indicate that the company is likely to violate debt covenants in the future). The SEC staff believes that cash flow projections used in the impairment analysis must be both internally consistent with the company's other projections and externally consistent with financial statement and other public disclosures. At times, the SEC staff also has requested a copy or summary of a company's impairment analysis with a sensitivity analysis of each assumption.

When a registrant has recognized an impairment of goodwill, the SEC staff expects MD&A to supplement the financial statement disclosures under ASC 350, such as the reasonably likely effects on operations, financial condition and liquidity of the circumstances that led to recognition of a goodwill impairment. The SEC staff expects other MD&A disclosures to be consistent with the events or circumstances that resulted in the impairment of goodwill. When a material goodwill impairment has occurred in a reporting unit, MD&A should provide balanced disclosure about the prospects for the related business segment that is consistent with the negative factors and developments that gave rise to the recognition of the material loss.

### 5.8.3 Income taxes

The SEC expects registrants to provide in MD&A certain disclosures relating to income taxes. These disclosures, which are discussed in greater detail in our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150), include the effect of new tax legislation and uncertain tax positions.

Discussed below are some types of disclosures registrants should consider:

*Realizability of deferred tax assets* – MD&A disclosure requirements relating to the realizability of deferred tax assets are contained in various SEC rules and include the following:

- ▶ A discussion of the basis by which management determined that it was more likely than not the deferred tax asset would be realized
- ▶ Disclosure of the types of uncertainties that might affect the ultimate realization of deferred tax assets
- ▶ In instances in which the implementation of tax planning strategies is the basis for not recognizing a valuation allowance for all or some portion of the deferred tax asset, the uncertainties that might affect the realization of deferred tax assets, as well as the factors that led management to conclude that it was more likely than not the deferred tax asset would be realized
- ▶ If a material deferred tax asset's realization depends on improvements over present levels of consolidated pre-tax income, changes in the present relationship between income reported for financial and tax purposes, or asset sales or other non-routine transactions, a description of these assumed future events, quantified to the extent practicable
- ▶ The amount of future taxable income required to realize the deferred tax assets
- ▶ If significant negative evidence indicates uncertainty regarding realization of the deferred tax asset, the countervailing positive evidence relied on by management in its decision not to establish a full allowance against the asset
- ▶ The effect of a future change in the valuation allowance on the entity's compliance with debt covenants and liquidity

*Deferred income tax classification* – Deferred income taxes generally are classified in the balance sheet as current or noncurrent based on the related asset or liability rather than the period in which the income tax item will be settled. Therefore, if the expected timing of a material settlement of a deferred income tax item differs from the timing suggested by the balance sheet classification, the SEC staff expects MD&A to discuss when settlement is expected to occur and the related implications to liquidity and cash flows.

*Effective tax rate* – The income tax rate reconciliation in the notes to the financial statements identifies and quantifies differences between the reported tax expense and the amount of income tax expense if statutory rates were applied. The SEC staff believes this tabular disclosure provides a great source of information for MD&A to describe the risks and challenges a registrant's business faces and how its income tax assets and liabilities could be affected in the future. The SEC staff often questions perceived inconsistencies between the income tax reconciliation and other disclosures in the filing.

## 5.8.4

### Investments (including high-yield, highly leveraged transactions)

The financial and credit crises focused attention on accounting for, and disclosure of, other-than-temporary impairments (OTTI) of investments. The SEC staff expects MD&A to describe the specific factors used to determine whether unrealized losses are considered to be temporary and when they are considered other-than-temporary.

An OTTI assessment is inherently judgmental and dependent on several factors. There is no "bright line" or "safe harbor" in either the duration or severity of an impairment to indicate if it is other-than-temporary. As declines in fair value become more severe and persistent, a registrant must do more analysis and find objective evidence to support an assertion regarding the anticipated recovery in fair value and its intent and ability to hold the investment until such recovery. During recent market

conditions, it has become more difficult to obtain observable evidence to support the valuation of investments. As a result, particular attention should be given and detailed disclosures should be made regarding the models and related assumptions used in valuing illiquid or complex investments.

Management should evaluate the effect of current market conditions on a company's liquidity and capital resources and its intent and ability to hold underwater securities until they recover or reach maturity. Sales of underwater securities at a loss should be carefully considered to determine whether such sales are consistent with management's prior assertion to hold underwater securities to maturity or anticipated full recovery. To support previous conclusions that impairments were temporary, when changes to management's intent occur, management should prepare contemporaneous documentation and disclose, in MD&A, the significant, unanticipated changes in circumstances that caused management to change its intent. Sales at a loss that are not based on significant, unanticipated changes in circumstances could indicate that management's past and current assertions are insufficient to conclude that declines in other investments are temporary.

The SEC believes that any material effect on historical liquidity and operations, or future risk due to significant exposure as a result of repurchase or reverse repurchase agreements, should be discussed in MD&A.

FR-36 highlights the need for registrants to consider including additional MD&A discussion of the risks attendant to participation in high-yield financing or highly leveraged transactions. FR-36 did not define those types of transactions. However, the SEC did refer to criteria set forth in a Federal Reserve Board 1989 release that issued bank examination guidelines regarding highly leveraged transactions. In those guidelines, criteria to define a highly leveraged financing include identification of borrowers whose debt to total assets ratio exceeds 75%. Registrants may refer to this guidance in defining highly leveraged transactions. In any event, registrants should indicate how highly leveraged transactions are defined for MD&A purposes.

Discussion of the potentially greater returns, and potentially greater risks, due to the registrant's involvement in high-yield or highly leveraged transactions and non-investment-grade loans and investments may be included in the business discussion, or other appropriate location of the Form 10-K, but the effects resulting from participation should be analyzed in MD&A.

The SEC indicated that registrants should consider disclosing:

- ▶ Relevant lending and investing policies
- ▶ The amount of holdings and potential risks inherent in such holdings
- ▶ Information regarding the level of activity
- ▶ Amounts of holdings, if any, giving rise to significantly greater risks
- ▶ An analysis of the actual and reasonably likely material effects of the above matters on income and operations

These disclosures are discussed in greater detail in our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150).

### 5.8.5 Loan losses

In SAB No. 102 (Topic 6.L), *Selected Loan Loss Allowance Methodology and Documentation Issues* (SAB 102), the SEC staff expressed views on the development, documentation and application of a systematic methodology, as required by FR-28, *Accounting for Loan Losses by Registrants Engaged in Lending*

*Activities*, for determining allowances for loan and lease losses in accordance with GAAP. In particular, the guidance focuses on the documentation the SEC staff normally would expect registrants to prepare and maintain in support of their allowances for loan losses. The SEC staff expects a registrant to maintain allowance for loan loss documentation that indicates (1) that a systematic methodology was employed each period in determining the amount of loan losses to be reported and (2) the rationale supporting each period's determination that the amounts reported were adequate.

The SEC staff also focused on how new credit problems have affected a registrant's allowance accounts and reserve methodology. The analysis should take into account management's current judgments about portfolio credit quality, including all significant qualitative factors that affect collectibility. SEC guidance applicable to loan loss allowances (FR-28, FRC 401.09.b, SAB 102) requires registrants to determine the allowance in a systematic manner that demonstrates procedural discipline. The SEC staff indicated that the methodology should include self-correcting policies that adjust loss estimation methods to reduce differences between estimated and actual observed losses.

The SEC staff expects registrants to disclose their accounting policies for determining the amount of loan loss allowances in a level of detail sufficient to explain and describe the systematic analysis and procedural discipline applied. The disclosures should explain the policy and methodology for segmentation and grading of loan portfolios, and how the allowance for specific loans, as well as the allowance for unspecified loans (i.e., general or unallocated reserve component), is determined. If the historical factors used as a basis for determining the amount of the general allowance are modified for considerations other than historical trends, the basis for the modification should be disclosed. The SEC staff also expects registrants with significant lending activities to disclose the procedures they use to compare actual experience with previous estimates, as well as the self-correcting mechanisms that periodically update loss factors based on actual experience.

For registrants that are required to provide Industry Guide 3, *Statistical Disclosure by Bank Holding Companies*, information, the SEC staff expects the following disclosures:

- ▶ How amounts allocated to specific loan categories were determined and what they include
- ▶ Explanation of the basis for determining the amount of the allowance that is unallocated, and the reasons why such amounts are necessary
- ▶ For registrants that do not allocate the allowance but rather disclose the estimated annual charge-offs for each category of loans during the next 12 months, how the estimated amounts were determined

Further, MD&A should explain:

- ▶ Period-to-period changes in estimates for specific elements of the allowance for loan losses (i.e., even if the total allowance did not change by a material amount, if the underlying components of the allowance for loan losses change significantly, each of the underlying components should be quantified and discussed)
- ▶ The extent to which actual experience has differed from original estimates
- ▶ The reasons for changes in management's estimates, quantified to the extent practicable, together with an explanation of the evidence management relied upon to determine that the revised estimates were more appropriate and how those revised estimates were determined (e.g., if loan loss allowances are reallocated to or from domestic and international loans, the reallocation should be disclosed, together with an explanation of why the allowance is no longer necessary for one component, but is needed for the other)



- ▶ How the changes in asset quality disclosed in accordance with Industry Guide 3 have affected the allowance and provision for loan losses disclosed in the annual report
- ▶ If historical experience appears favorable relative to the level of the allowance at the latest balance sheet date, an explanation of the reasons for maintaining loan loss reserve levels that exceed historical loss experience
- ▶ The effects of any changes in methodology, and why the new methodology is more appropriate in the circumstances

In August 2009, the SEC staff issued an illustrative letter<sup>28</sup> to registrants identifying a number of disclosures regarding provisions and allowances for loan losses that registrants may wish to consider in preparing MD&A. While the letter was sent primarily to financial institutions, it should be considered by all registrants to which the disclosures are relevant and material. The letter primarily focused on MD&A disclosures related to:

- ▶ Higher risk loans - Because certain types of loans (e.g., option ARM, interest only, subprime) have a greater risk of non-collection, the SEC staff has identified certain disclosures to consider to provide an investor with a better understanding of the risks associated with the registrant's loan portfolio, including:
  - ▶ The carrying value of higher-risk loans by type
  - ▶ Current loan-to-value ratios by higher-risk loan type and geographic location, to the extent the loans are concentrated in any areas
  - ▶ The amount and percentage of refinanced or modified loans by higher-risk loan type
  - ▶ Asset quality information and measurements
  - ▶ Policy for placing loans on non-accrual status when a loan's terms allow for a minimum monthly payment that is less than interest accrued on the loan
  - ▶ The expected timing of adjustment of option ARM loans and the effect of the adjustment on future cash flows and liquidity
  - ▶ The amount and percentage of customers making the minimum payment on the option ARM loans
- ▶ Changes in practices - Changes in the way a registrant determines its allowance for loan losses can affect not only the amount of the allowance, but an investor's understanding of the credit quality information presented. Accordingly, the SEC has indicated certain disclosures to consider when a registrant changes its practices for determining its allowance for loan losses, including:
  - ▶ The historical loss data used as a starting point for estimating current losses
  - ▶ How incorporated economic factors affect loan quality in the allowance estimate
  - ▶ The level of specificity used to group loans for estimating losses
  - ▶ Non-accrual and charge-off policies
  - ▶ Application of loss factors to graded loans
  - ▶ Any other estimation methods and assumptions used

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<sup>28</sup> The SEC staff's August 2009 illustrative letter can be accessed at <http://www.sec.gov/divisions/corpfin/guidance/loanlossesltr0809.htm>.

- ▶ Declines in collateral value – A decline in the value of assets serving as collateral for a registrant's loans may affect their collectability. The SEC staff has identified certain disclosures to consider with respect to underlying collateral values, including:
  - ▶ The approximate amount (or percentage) of residential mortgage loans as of the end of the reporting period with loan-to-value ratios above 100%
  - ▶ How the registrant considered housing price depreciation, and the homeowners' loss of equity in the collateral, in the allowance for loan losses for residential mortgages
  - ▶ Timing and frequency of appraisals and identification of the sources of the appraisals for collateral-dependent loans

For additional guidance, refer to our *GAAP Disclosure Checklist* (Ernst & Young Form No. A13) and *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150).

## 5.8.6

### Pensions

The SEC staff expects the discussion of employee benefit plans in MD&A to provide readers with information regarding the following, to the extent material: the nature of the plans; the character of deferred gains and losses; the degree to which important assumptions have coincided with actual experience; and the timing and amounts of future funding requirements.

The accounting for employee benefit plans typically involves many assumptions and estimates. The SEC staff believes MD&A should identify material assumptions underlying the accounting for benefit plans (and discuss the frequency of changes in the specific assumptions), including those concerning:

- ▶ The long-term rates of return on plan assets
- ▶ Discount rates used for projecting benefit obligations
- ▶ Methods of deriving market-related value
- ▶ Average remaining service period
- ▶ Average remaining life expectancy
- ▶ Methods of amortizing gains and losses if the method was selected from available alternatives

The SEC staff also expects registrants to disclose in MD&A the effects of reasonably likely changes in assumptions (the discount rate and assumed rate of return in particular) on future operating results and financial condition. For example, if reasonably likely changes in the long-term rate of return used in accounting for a company's pension plan would have a material effect on the financial condition or operating performance of the company, the effect that could result given the range of reasonably likely outcomes should be disclosed and, because of the nature of estimates of long-term rates of return, quantified. A sensitivity analysis likely is the most effective method of providing this disclosure. For example, the SEC staff has requested that registrants disclose a sensitivity analysis of a plus or minus 1% change in key assumptions (e.g., estimated discount rate, expected return on plan assets, estimated future compensation increases).

Further, the SEC staff expects disclosure of any material deviations between results based on assumptions and actual plan performance. For example, if material deviations between the actual and expected long-term rates of return on plan assets arise, those amounts should be disclosed, as should any material deferred gains or losses that result. Under these circumstances, a registrant should quantify the amounts, and indicate the periods in which these accumulated deferred gains or losses will be

reflected in the results of operations. Further, if deferred gains and losses are material, a registrant should discuss the amortization periods, while differentiating between gains and losses that are subject to amortization and those that are not.

When addressing the expected and actual long-term rates of return on plan assets, registrants should disclose, where material:

- ▶ The various categories of investments held as plan assets
- ▶ The relative asset allocations or holdings in each category
- ▶ Any reasonably likely changes in the allocation of plan assets

If there are material funding obligations, a registrant should quantify or address:

- ▶ The amounts of the funding obligations
- ▶ Material known trends or uncertainties relating to paying such amounts (e.g., if the registrant expects to pay them over a specified period of time, or if there are known material uncertainties concerning payment)
- ▶ The material effect of future payments on future cash flows
- ▶ Any material uncertainty in the funding obligation itself (e.g., uncertainty introduced by significant differences between the duration of debt instruments included in plan assets, changing demographics in the workforce and the expected timing of future benefit payments)

Registrants that are experiencing financial difficulty may conclude that there is significant uncertainty surrounding future funding of pension obligations, primarily due to the possibility of the registrant's bankruptcy which, in turn, could result in the termination of the pension plan. Registrants whose future funding is uncertain due to financial difficulty should disclose the nature of the uncertainty and a range of reasonably possible future funding, which might include disclosure of the statutory termination obligation.

The SEC staff might challenge the rates used to estimate the expected rate of return on plan assets and to discount pension obligations. The SEC staff has stated that it expects registrants to disclose the source of return data and the method used (e.g., arithmetic/simple or geometric/compound averaging) to calculate the expected return assumption. In volatile markets, dramatic changes in the market value of assets held by pension plans to fund related pension obligations could have a material effect on a registrant's pension expense and cash flows, now and into the future, by way of amortization of excess cumulative deferred gains and losses on pension assets. The SEC staff expects registrants to disclose the amount of current unrecognized losses on pension assets and the estimated effect of those losses on future pension expense. In addition, registrants should consider those changes in plan assets when it discusses its future funding obligations discussed above.

The SEC staff also expects registrants with material defined benefit plans to include clear disclosure of how they determine their assumed discount rate, either in the notes to the financial statements or in the critical accounting policies section of MD&A. That disclosure should include the specific source data used to support the discount rate. If the registrant bases its assumption on published long-term bond indices, it should explain how it determined that the timing and amount of cash outflows of the bonds included in the indices matches its estimated defined benefit payments. If there are differences between the terms of the bonds and the terms of the defined benefit obligations (e.g., if the bonds are callable), the registrant should explain how it adjusts for the difference. Adjustments to the benchmark rates should not be made unless the registrant has detailed analysis that supports the specific amount of the adjustment.

Some registrants have made significant changes to their benefit plans. If a registrant has made a significant change to its pension plan, such as a conversion from a traditional defined benefit to a cash balance pension plan, and such change has had or is reasonably likely to have a material effect on the registrant's liquidity, capital resources or results of operations, the registrant should discuss the change and the related effect in its MD&A.

These disclosures are summarized in our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150).

## 5.9 Other disclosures

### 5.9.1 Accounting estimate and policy changes (including pending adoption of new accounting standards)

FR-72 states that "appropriate disclosure in MD&A should be considered and may be required" if a change in an accounting estimate causes a material improvement in earnings. FR-72 adds that "the change and the underlying reasons for the change should be disclosed so that readers do not incorrectly attribute the effect to operational improvements." MD&A also should discuss the expected effect on financial information to be reported in the future of changes in accounting estimates that have not been fully recognized in the statement of operations, if material (e.g., a change in the amortization period for intangibles, a change in the pension or OPEB discount rate or expected return on plan assets).

The SEC staff indicated in SAB No. 74 (Topic 11.M), *Disclosure of the Impact that Recently Issued Accounting Standards Will Have on the Financial Statements of the Registrant When Adopted in a Future Period* (SAB 74), that registrants should discuss the effect of yet-to-be-adopted accounting standards that, when adopted, are expected to materially affect financial condition or results of operations. SAB 74 requirements include:

- ▶ A brief description of the new standard, the date by which adoption is required, and the date on which the registrant plans to adopt, if earlier.
- ▶ A discussion of the methods of adoption allowed by the standard and the method expected to be utilized by the registrant, if determined.
- ▶ A discussion of the effect that adoption of the standard is expected to have on the financial statements of the registrant, unless not known or reasonably estimable. In that case, a statement to that effect may be made. If a pending accounting standard update will affect the preparation of the financial statements, but not have a material effect, companies are encouraged to disclose that a standard has been issued and that its adoption will not have a material effect on its financial position or results of operations.
- ▶ Disclosure of the potential effect of other significant matters that the registrant believes might result from the adoption of the standard (such as technical violations of debt covenant agreements, planned or intended changes in business practices, etc.).

The objectives of the disclosure should be to (1) provide notification that a standard has been issued that the registrant will be required to adopt in the future, and (2) assist investors in assessing the significance of the effect that the standard will have on the financial statements of the registrant when adopted. The requirements of SAB 74 do not extend to Exposure Drafts of proposed accounting standards updates.

The SEC staff has reminded registrants that the objectives of SAB 74 and the purpose of financial statement disclosures are not necessarily consistent. MD&A should discuss known information about the expected effect of a new accounting standard on *future* periods, while the financial statement notes should disclose the anticipated effect of a new standard on *historical* financial statements. By distinguishing these objectives, a preparer can avoid redundancy in its disclosures.

SAB 74 does not require a company to quantify the effects of a new accounting standard. However, the SEC staff does expect companies to disclose the expected effects on the financial statements of adopting a pending standard to the extent those effects are known. If the effects of adopting a new accounting standard are not known, companies should disclose that fact. It might be appropriate to disclose a range of possible effects if an approximate amount is not known. The SEC staff has indicated that qualitative disclosures should be included if quantitative information is not available.

## 5.9.2 Business combinations

Individually material business combinations, as well as individually immaterial business combinations that are collectively material, should be discussed in MD&A. While the ultimate conclusion on materiality of a business combination is a matter of judgment that rests with the acquiring entity, we believe both quantitative and qualitative factors should be considered in the evaluation. A business combination could be considered material due to qualitative factors even though it does not meet an entity's quantitative materiality threshold. For example, disclosure of a business combination in an entity's press release, website or letter to shareholders suggests that the business combination might be material.

Through SABs, FRs, and comments of the SEC Observer at meetings of the EITF, the SEC and its staff have communicated MD&A disclosure requirements relating to business combinations and dispositions. Those requirements, which are described in greater detail in our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150), include discussions of:<sup>29</sup>

- ▶ Unrecognized preacquisition contingencies
- ▶ Effects of the allocation of purchase price to assets to be sold
- ▶ Material exit and employee termination costs of an acquired business
- ▶ Purchased in-process research and development

Preliminary merger negotiations could be viewed as a required MD&A disclosure because these negotiations represent a known event or uncertainty reasonably likely to have material effects in the future. However, the SEC believes that the information needs of investors must be balanced against the risk of premature disclosure that could jeopardize completion of the transaction. Accordingly, if disclosure is not otherwise required, registrants are not required to disclose the existence and related reasonably likely effects of preliminary merger negotiations, provided public disclosure has not otherwise been made and the board of directors determines that disclosure of such information might jeopardize completion of the transaction.

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<sup>29</sup> Note that the accounting in a business combination for exit and termination costs and purchased in-process research and development changed upon the adoption amendments to ASC 805. For further details, see our Financial Reporting Developments publication, *Business combinations* (Ernst & Young No. BB1616 (Revised September 2011)).

### 5.9.3 Commercial commitments

In the MD&A disclosure of liquidity and capital resources, FR-61 recommends that information about contingent commercial commitments be provided in a single location, preferably in a tabular form by due date and by expiration date. Commercial commitments are funding commitments that could potentially require registrant performance in the event of demands by third parties or contingent events, such as under lines of credit extended or under guarantees of debt (see Off-balance sheet arrangements earlier in Section 5 for further discussion of these and other financial guarantees). An example of such tabular disclosure, which could be adapted to the registrant's particular facts and circumstances, follows:

Other commercial commitments	Total amounts committed	Amount of commitment expiration per period			
		Less than 1 year	1-3 years	4-5 years	Over 5 years
Lines of credit					
Standby letters of credit					
Guarantees					
Standby repurchase obligations					
Other commercial commitments					
Total commercial commitments					

### 5.9.4 Debt instruments, guarantees and related covenants

The SEC believes that a company should consider discussing and analyzing material covenants of its debt obligations (or those that it guarantees)<sup>30</sup> in either of the following circumstances:

- ▶ The company (or primary obligor) is, or is reasonably likely to be, in breach of the covenant, in which case FR-72 suggests that the company disclose that fact and analyze the effect, including the following, to the extent material:<sup>31</sup>
  - ▶ The steps that the company is taking to avoid the breach
  - ▶ The steps that the company intends to take to cure, obtain a waiver of or otherwise address the breach
  - ▶ The effect or reasonably likely effect of the breach (including the effects of any cross-default or cross-acceleration or similar provisions) on financial condition or operating performance
  - ▶ Alternate sources of funding to pay off resulting obligations or replace funding
- ▶ The covenant affects the company's ability to incur additional debt or equity financing to a material extent<sup>32</sup> in which case FR-72 suggests that the company disclose that fact as well as:
  - ▶ The consequences of those limitations on the company's financial condition and operating performance

<sup>30</sup> In these circumstances, registrants should disclose the required ratios or amounts, as well as the actual ratios or amounts as of each reporting date, in order to allow investors to understand the amount of "cushion" available. The SEC staff has also asked registrants to consider showing the specific computations used to arrive at the actual ratios or amounts (with corresponding reconciliations to US GAAP amounts, if necessary).

<sup>31</sup> FR-72 indicates that similar disclosure expectations would apply to mandatory prepayment provisions, "put" rights and other similar provisions.

<sup>32</sup> FR-72 indicates that examples of these covenants include, but are not limited to, debt incurrence restrictions, limitations on interest payments, restrictions on dividend payments and various debt-ratio limits.

- ▶ Alternate sources of funding and, to the extent material, the consequences (e.g., costs) of accessing those alternatives

If a company has incurred debt in material amounts, FR-72 also suggests that the company, in MD&A, explain the reasons for incurring that debt, the use of the proceeds and analyze how the incurrence of that debt fits into the overall business plan. If debt has been incurred for general working capital purposes, the anticipated amount and timing of working capital needs should be discussed, to the extent material.

## 5.9.5 Discontinued operations

SAB No. 93 (Topic 5.Z), *Accounting and Disclosures Relating to Discontinued Operations*, provides interpretive guidance on disclosures about discontinued operations required in MD&A. Registrants should discuss known trends, events and uncertainties involving discontinued operations that might materially affect the registrant's liquidity, financial condition and results of operations (including net income) in MD&A for periods "between the date when a component of an entity is classified as discontinued and the date when the risks of those operations will be transferred or otherwise terminated." This discussion should include changes in the plan of disposal or changes in circumstances related to the plan.

The potential effect on the registrant's reported results or liquidity of any material contingent liability, such as product or environmental liabilities or litigation that might remain with the registrant despite disposal of the underlying business, also should be discussed.

If a registrant had decided to discontinue a component of the business and subsequently decides to retain it, the SEC staff expects MD&A to discuss any material effect on results of operations, liquidity and capital resources, and the reasonably likely effects of known trends, commitments or contingencies.

## 5.9.6 Foreign operations

Although FRC Section 501.09 discusses disclosures about foreign operations, it does not mandate any specific disclosures. The Section uses such terms as "encourages" and "should consider" in discussing information that registrants might disclose to enhance readers' understanding of the financial statements. These supplemental disclosures generally would be included in MD&A.

The discussion of disclosures in FRC Section 501.09 is general and, except for the considerations noted below, contains no guidelines or indication of the SEC's expectations. Thus, registrants have considerable latitude in deciding what, if any, supplemental disclosures would help users better understand the effect of foreign operations and translation on the financial statements. Each registrant should evaluate its own situation and make disclosures that it considers meaningful.

Discussed below are several types of disclosures registrants should consider:

**Effective tax rates:** If a disproportionate amount of a registrant's profit is attributable to countries with a low tax rate, such as Ireland, registrants should consider including quantified disclosure of such amounts (e.g., \$1 billion of our foreign profits were earned in Ireland, which has an effective tax rate of 10%).

**Effect of rate changes:** Registrants are encouraged to present an analysis and discussion of the effects of exchange rate changes on the reported results of operations and the nature and extent of currency risks to which the registrant is exposed, including the reasonably likely future effects of changes in exchange rates on operations. The purpose of these disclosures is to assist financial statement users in understanding the implications of rate changes, comparing recent results with those of prior periods and anticipating future effects of rate changes. Examples include: quantification of the effect on sales and operating results of a weakening (strengthening) foreign currency; discussion of foreign operating results as reflected in the local currency, with the effects of translation noted; and the effects of

exchange rate changes on backlog, interest expense, wages, cost of raw material purchased from the parent, transactions between subsidiaries, inventory levels, debt-to-equity ratio, working capital, effective tax rate and cost of sales.

Registrants that make such disclosures should take care that they are not misleading. For example, reported dollar sales of foreign operations might decline because of a change in exchange rates, but that change also might affect selling prices, sales volume and cost structures. In that situation, it might not be sufficient to discuss only the effects of translation on reported sales. Registrants that quantify the effects of translation at different exchange rates should evaluate the need to clearly explain that disclosure. In addition, when preparing these disclosures, registrants should consider the SEC rules on presenting non-GAAP financial measures (see Non-GAAP financial measures in Section 2 of this publication).

Registrants also are encouraged to identify material unhedged monetary assets, liabilities or commitments denominated in currencies other than the operation's functional currency, as well as management's strategies to manage the currency risks associated with such exposures.

**Cash flow implications of functional currencies:** Under ASC 830, one of the functional currency indicators is cash flow (ASC 830-10-55-5). That indicator points to a foreign functional currency when cash flows related to the foreign operation's individual assets and liabilities are primarily in the foreign currency and do not directly affect the parent's cash flows. Conversely, that indicator points to the parent's currency (e.g., the US dollar) when cash flows related to the foreign operation's individual assets and liabilities directly affect the parent's cash flows on a current basis and are generally available for remittance to the parent. The SEC believes that financial statement users might presume cash is available from foreign operations with a US dollar functional currency, but not from those with a foreign functional currency. Thus, Section 501.09 suggests that a discussion of the availability of cash flows from foreign operations may be appropriate in certain circumstances such as:

- ▶ **Foreign functional currency:** If the foreign operations' cash flows are not available to meet the needs of other operations, registrants should consider discussing those operations in a disaggregated manner, because it may be more meaningful than a discussion of liquidity and capital resources for the registrant as a whole. On the other hand, if cash flows of foreign operations are generally available to meet the parent's cash needs, registrants should consider discussing the basis for using the foreign functional currency (i.e., that the choice was made because of the significance of functional currency indicators other than the direct effect of the foreign operation's cash flows on the parent's cash flows). The SEC believes that such discussion would facilitate an understanding of the registrant's operations.
- ▶ **US dollar functional currency:** There may be foreign operations where the US dollar is the functional currency (e.g., significant foreign operations in highly inflationary economies) even though cash remittances to the parent are not likely. In such situations, the SEC believes that discussion of only consolidated liquidity and capital resources might not be sufficient. Discussing those operations in a disaggregated manner might be more meaningful.

The SEC has suggested it would like to see registrants display net investments by major functional currency and present an analysis of the translation component of equity either by significant functional currency or by geographical areas used for segment disclosure purposes.

## 5.9.7

### Loss contingencies (including environmental and product liabilities)

The discussion requirements for environmental and other loss contingencies are included in Regulation S-K, FR-36, and SAB 92 (Topic 5.Y), *Accounting and Disclosures Relating to Loss Contingencies* (SAB 92). Those requirements address: (1) the effects of compliance with environmental laws on the registrant's business, (2) pending legal proceedings and (3) environmental risks and contingencies.



SAB 92 provides the SEC staff's interpretation of the appropriate accounting and disclosure requirements relating to loss contingencies with emphasis on environmental and product liability loss contingencies.

The requirements for environmental contingencies are outlined below:

- ▶ The effect of potential environmental liabilities, quantified to the extent reasonably practicable
- ▶ The aggregate potential cleanup costs in light of joint and several liability, including a discussion of the extent of recovery from insurance and potential sources of contribution or indemnification that may be factored into the determination of whether a material future effect is not reasonably likely to occur
- ▶ Historical and anticipated environmental expenditures (e.g., recurring costs, capital expenditures, mandated expenditures, other infrequent or nonrecurring cleanup expenditures)

The disclosure requirements for product liability contingencies provided in SAB 92 include a discussion of the following: (1) the nature of personal injury or property damages alleged by claimants, (2) the aggregate settlement costs by type of claim and (3) the related costs of administering and litigating claims.

The SEC staff expects environmental and product liability disclosures to be disaggregated to provide investors with a full understanding of the contingencies. The SEC staff's positions regarding disaggregation of these contingencies are discussed in our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150).

## 5.9.8

### Commodity contracts accounted for at fair value

Registrants that trade commodity contracts over the counter (i.e., non-exchange traded contracts) and mark them to fair value through earnings, or engage in analogous trading activities (e.g., non-derivative trading contracts on weather, energy, pulp, bandwidth, newsprint) are encouraged in FR-61 to consider providing statistical and other information about these transactions in MD&A, beyond the specific financial statement disclosures required by the applicable accounting standards.

The recommended disclosures include:<sup>33</sup>

- ▶ Information about modeling methodologies, assumptions, variables and inputs used in determining fair value
- ▶ Explanation of the different outcomes reasonably likely under different circumstances or measurement methods
- ▶ The amount of change in fair value recognized through earnings, distinguishing between realized and unrealized changes
- ▶ The change in fair value attributable to changes in valuation techniques
- ▶ Fair values of contracts disaggregated based on whether the fair value was determined from quoted prices, external sources or internal modeling
- ▶ Maturities of contracts at the latest balance sheet date
- ▶ The fair value of net claims against counterparties (i.e., assets) segregated by credit quality of the counterparty (e.g., investment grade, non-investment grade, not rated)

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<sup>33</sup> These disclosures are somewhat duplicative of the fair value disclosures required by GAAP, but the SEC has not rescinded the numerical disclosures recommended by FR-61.

FR-61 also recommends that some of this information be presented in tabular format for ease of understanding, such as the following:

A.	Fair value of contracts outstanding at the beginning of the period	\$	xxx
B.	Contracts realized or otherwise settled during the period		(xxx)
C.	Fair value of new contracts when entered into during the period		xxx
D.	Changes in fair value values attributable to changes in valuation techniques and assumptions		xxx
E.	Other changes in fair values		xxx
F.	Fair value of contracts outstanding at the end of the period	\$	xxx

	Fair value of contracts at period-end				
Source of fair value	Maturity less than 1 year	Maturity 1-3 years	Maturity 4-5 years	Maturity in excess of 5 years	Total fair value
Prices actively quoted					
Prices provided by other external sources					
Prices based on models and other valuation methods					

### 5.9.9

### Potential risks and costs associated with mortgage and foreclosure

In October 2010 and in light of concerns about potential risks and costs associated with mortgages and foreclosure-related activities or exposure, the SEC staff reminded registrants about disclosure obligations in an illustrative letter.<sup>34</sup> The SEC staff suggested disclosures for registrants to consider and provided reminders about existing US GAAP and Regulation S-X requirements, including:

- ▶ Providing clear and transparent disclosures on the impact of various representations and warranties (regarding mortgages) made to purchasers of the mortgages
- ▶ Disclosing any known trends, demands, commitments, events or uncertainties that the registrant reasonably expects to have a material impact on the company (e.g., suspending foreclosures pending further review)
- ▶ Accruing for litigation and other contingencies under US GAAP (i.e., when probable and reasonably estimable)
- ▶ Disclosing litigation and other contingencies (including an estimate of loss or potential loss range) under US GAAP and Regulation S-X (including for interim financial statements)
- ▶ Providing a rollforward, if applicable, of the activity in a registrant's reserve relating to representations and warranties attributable to sold loans

<sup>34</sup> The SEC staff's October 2010 illustrative letter can be accessed at <http://www.sec.gov/divisions/corpfin/guidance/cforeclosure1010.htm>.

### 5.9.10 Restructuring charges

The recent economic and market conditions might give rise to more companies taking restructuring actions. ASC 420 addresses financial accounting and disclosure related to exit or disposal activities. The SEC staff expects MD&A to supplement the financial statement disclosures required by ASC 420 for material restructuring activities by, for example, including the following:

- ▶ A discussion of the events and decisions that gave rise to the restructuring costs and restructuring plan, and the likely effects of management's plans on financial position, future operating results and liquidity, to the extent material (e.g., an inability to realize previously projected economies of scale, a failure to renew or secure key customer contracts or a failure to keep downtime at acceptable levels due to aging equipment)
- ▶ Anticipated effects of the restructuring plan on future operating results, and the periods in which those effects are expected to be realized including whether cost savings from the plan are expected to be offset by anticipated increases in other expenses or reduced revenues
- ▶ The periods in which material cash outlays are anticipated and the expected source of funding
- ▶ To the extent necessary for the readers' understanding, separate disclosure and explanation of discretionary or decision-dependent costs such as exit costs

For restructuring charges recognized in prior periods, the SEC staff believes the following items should be discussed in MD&A:

- ▶ Material changes in the accrued balances of each significant component of the charge, either as a result of cash expenditures associated with the plan's implementation or from revisions to the plan or changes in estimates, with particular emphasis on the amounts and reasons for reversals of reserves established in prior periods and their effect on current-period income
- ▶ The progress achieved during the year in implementing the restructuring plan, including qualitative and quantitative discussion of the extent to which the objectives of the major components of the restructuring plan have been accomplished
- ▶ If savings anticipated by the restructuring plan are not achieved as expected (either as to amount or timing), the related reasons for this circumstance and the likely effects on future operating results and liquidity

In the event a company recognizes liabilities for exit costs and involuntary employee termination benefits relating to multiple exit plans, it should present separate information for each individual exit plan that has a material effect on the balance sheet, results of operations or cash flows.

If management anticipates that future restructuring actions are likely to occur in a subsequent period and such actions are likely to result in charges that could have a material effect on the results of operations or financial position of the company, the SEC staff expects such actions to be discussed in MD&A.

The SEC staff has noted that economic or other events that cause a registrant to consider or adopt an exit plan, or that impair the carrying amount of assets, generally occur over time. Accordingly, the SEC staff believes that as those events and the resulting trends and uncertainties evolve, they often will meet the requirement for disclosure in MD&A prior to the period in which the exit costs and liabilities are recognized under GAAP.

Our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150) provides additional information about the SEC staff's expectations concerning the discussion of restructuring charges.

### 5.9.11 Transactions with related and certain other parties

FR-61 observes that both GAAP and the SEC's rules require disclosure about transactions with related parties, but certain other parties are not within the definition of "related parties," such as parties that are able to negotiate transactions on terms that would not be available from more clearly independent third parties on an arm's-length basis. For example, former senior management would not meet the definition of a related party under GAAP, but they might be able to negotiate terms that are more favorable than those available to clearly independent third parties. FR-61 suggests that further MD&A discussion might be needed to explain the importance of relationships and transactions with related and certain other parties, where material. Disclosures suggested by FR-61 include:

- ▶ A description of the elements of the transactions necessary to understand their business purpose and economic substance, their effects on the financial statements and any related special risks or contingencies
- ▶ Identification of the related and certain other parties transacting business with the registrant
- ▶ How the parties determined prices
- ▶ Terms or other aspects of transactions and arrangements that differ from those that would likely be negotiated with clearly independent parties
- ▶ A description of the evaluation made to support any assertion of fairness of the transactions
- ▶ Any ongoing contractual or other commitments

### 5.9.12 Miscellaneous

**Federal financial assistance:** For financial institutions that receive material federal financial assistance, the SEC expects registrants to discuss the nature, amount and effect of the assistance on financial condition or results of operations. This would include financial institutions that are participating in the Troubled Asset Relief Program (TARP) authorized by the Emergency Economic Stabilization Act of 2008.

**Treasury stock transactions:** MD&A should contain an explanation of material changes in earnings per share resulting from a change in the number of shares outstanding, such as that resulting from a large purchase of treasury stock. The SEC staff has indicated that MD&A should address the effect of such transactions as they affect balance sheet and income statement captions, including earnings per share. Although some repurchases of outstanding stock might not have a material effect on other financial statement captions, discussion might be required to explain the effect on the trend of earnings per share.

**Government inquiries:** The SEC issued FR-32, *Disclosure Obligations of Companies Affected by the Government; Defense Contract Procurement Inquiry and Related Issues*, to remind defense contractors, as well as other registrants, of their obligation to disclose any reasonably likely material effects on the financial statements associated with the government's investigation into illegal or unethical activity in the procurement of defense contracts. The disclosures required by this interpretive release are described in our *SEC annual shareholders' report checklist* (Ernst & Young Form No. A150).

Based upon the nature of the government's inquiry, disclosure also might be required in Form 10-K under "Description of Business" and "Legal Proceedings," as well as financial statement disclosure of loss contingencies.

# 6 Financial statements and parent company information

## 6.1 General

Item 8 of Form 10-K, *Financial Statements and Supplementary Data*, requires financial statements meeting the requirements of Regulation S-X, except that Form 10-K is not required to include audited financial statements of significant acquired businesses or real estate operations (Rules 3-05 and 3-14 of Regulation S-X) or pro forma financial information (Article 11 of Regulation S-X).

Form 10-K might be required to include audited financial statements beyond those of the registrant. This Section provides guidance for determining whether the following additional financial information and separate financial statements are required:

- ▶ Disclosure of the restricted net assets of subsidiaries in the notes to the consolidated financial statements
- ▶ A schedule of condensed parent company financial statement information (Schedule I, Rule 5-04(c) of Regulation S-X)
- ▶ Financial statements of unconsolidated subsidiaries and investees accounted for by the equity method (Rule 3-09 of Regulation S-X)<sup>1</sup>
- ▶ Disclosures of summarized financial information of unconsolidated subsidiaries and investees in the notes to the consolidated financial statements (Rule 4-08(g) of Regulation S-X)
- ▶ Financial statements of affiliates whose securities are pledged as collateral (Rule 3-16 of Regulation S-X) or who guarantee securities of the registrant (Rule 3-10 of Regulation S-X)

Consolidated financial statements must be included in Item 8 of Form 10-K, or incorporated by reference therein. Other financial statements required by Regulation S-X may be included in Item 8 or Item 15, *Exhibits, Financial Statement Schedules*, of Form 10-K.

The SEC also may require, by informal written notice, financial statements in addition to, or in substitution for, those listed above (Rule 3-13 of Regulation S-X). Alternatively, when requested by the registrant, the SEC may permit the omission of one or more of the required financial statements. Omission, addition or substitution of financial statements may occur if the SEC believes it is consistent with the protection of investors.

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<sup>1</sup> The terms “investees” and “equity investees” used in this Section mean investments accounted for by the equity method. In addition, the SEC staff has expressed its view that if an investee is required to be accounted for using the equity method under ASC 323, separate financial statements of the investee are required if the investee is significant under Rule 1-02(w) of Regulation S-X. ASC 323-10 requires an investor that has the ability to exercise significant influence over the operating and financial policies of the investee to apply the equity method of accounting only when it has an investment(s) in common stock or an investment that is in-substance common stock. In-substance common stock is an investment in an entity that has risk and reward characteristics that are substantially similar to that entity’s common stock. In other words, the requirements for financial statements of equity-method investments apply regardless of whether the investment is in the form of common stock.

Regulation S-X governs the form and content of and the requirements for financial statements, including the notes to financial statements and financial schedules. The proxy rules also require that the consolidated financial statements comply with Regulation S-X.

## 6.2 Consolidated financial statements

Form 10-K must include audited balance sheets for two years (Rule 3-01 of Regulation S-X) and statements of income and cash flows for three years (Rule 3-02 of Regulation S-X) of the registrant and its predecessors. Form 10-K also must include disclosure of changes in shareholders' equity and noncontrolling interests for each period an income statement is required (Rule 3-04 of Regulation S-X), which may be included as a financial statement or in the notes.

In addition, ASC 220 requires disclosures about comprehensive income and its components. Comprehensive income disclosures may be displayed either below the total for net income in the income statement for each year presented, in a separate statement of comprehensive income or in the statement of changes in shareholders' equity and noncontrolling interests (ASC 220-10-45). Most companies have elected to present information about comprehensive income and its components for each year in the statement of changes in shareholders' equity and noncontrolling interests.<sup>2</sup>

As noted earlier, registrants subject to the SEC's proxy rules must present consolidated financial statements in accordance with Regulation S-X. The SEC staff expects the consolidated financial statements presented in annual shareholders' reports and Form 10-K to be identical. Generally, the registrant's financial statements will be incorporated by reference from the ARS.

Financial schedules are required in Form 10-K (but not annual shareholders' reports) to provide detailed information in support of certain financial statement captions. See Section 7 of this publication for a discussion and illustrative examples of these schedules.

Article 3A of Regulation S-X (as supplemented by the definitions of "control" and "subsidiary" in Article 1 of Regulation S-X) governs the presentation of consolidated financial statements. It states that when consolidating subsidiaries, a registrant should follow principles of inclusion or exclusion that clearly exhibit the financial position and results of operations of the registrant and its subsidiaries. The determination of those entities to be included in the consolidated financial statements generally will be made by reference to generally accepted accounting principles.

ASC 810 requires enterprises that are the primary beneficiary of a VIE, as defined, to consolidate the VIE. ASC 810 also requires consolidation of all majority-owned subsidiaries that are voting interest entities, except where control does not rest with the majority owner. Consequently, unconsolidated majority-owned subsidiaries will exist in limited circumstances (e.g., when a subsidiary is in legal reorganization, bankruptcy, under severe restrictions imposed by a foreign government, when minority owners have substantive participating rights in a voting interest entity (see ASC 810-10-25-2 through 25-14), or when a subsidiary is a VIE and the majority owner is not the primary beneficiary).

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<sup>2</sup> Effective for fiscal years beginning after 15 December 2011 (i.e., fiscal year 2012 for calendar year companies), Accounting Standards Update (ASU) 2011-05, *Comprehensive Income (Topic 220)*, will require companies to present items of net income, items of other comprehensive income and total comprehensive income in one continuous statement or two separate but consecutive statements for each reporting period. Companies will no longer be allowed to present items of other comprehensive income in the statement of stockholders' equity or in the footnotes. Companies should consider ASU 2011-05 and any amendments (e.g., proposed amendment issued in November 2011) when completing their financial statements for fiscal years beginning after 15 December 2011, or earlier as earlier adoption of this standard is permitted. See our *GAAP Disclosure Checklist* (Ernst & Young Form No. A13) for a summary of these disclosures.

## 6.3 Parent company information

The SEC requires that the notes to consolidated financial statements disclose restrictions on the transfer of assets from subsidiaries to the parent. In addition, Schedule I in Form 10-K, if required, calls for condensed financial statements of the parent company.

### 6.3.1 Disclosure in the notes to the financial statements

Annual shareholders' reports and Form 10-K must include certain disclosures in the notes to the financial statements when (1) the parent's share of consolidated and unconsolidated subsidiaries' net assets restricted from being transferred to the parent plus (2) the parent's equity in the undistributed earnings of equity investees<sup>3</sup> exceeds 25 percent of consolidated net assets as of the end of the most recent fiscal year. The disclosure must describe restrictions on the transfer of funds (by loans, advances or dividends), from both consolidated and unconsolidated subsidiaries, to the parent as of the latest fiscal year-end. For example, a registrant must disclose restrictions caused by debt covenants, regulatory restraints or foreign government regulations. Registrants also must disclose the amount of consolidated net assets that are restricted.<sup>4</sup>

Disclosure of the following are required regardless of whether the disclosures described in the preceding paragraph are required:

- ▶ Restrictions on dividend payments by the parent
- ▶ The amount of consolidated retained earnings or net income restricted, or free of restrictions, as to dividend payments
- ▶ The amount of consolidated retained earnings that represents the undistributed earnings of equity-method investees

### 6.3.2 Condensed parent company financial statements

The condensed parent company financial statements in Schedule I, if required, must be for the same periods as the consolidated financial statements – generally balance sheets for two years and other statements for three years. Registrants may condense the parent company financial statements using the same rules for combining financial statement captions used for preparing condensed interim financial statements in Article 10 of Regulation S-X.<sup>5</sup> The notes to the condensed financial statements must disclose material contingencies, guarantees, long-term obligations (including maturities for the next five years), and mandatory dividend and redemption requirements of redeemable stock. Other notes to the financial statements may be omitted. Schedule I also must disclose cash dividends paid to the parent by consolidated subsidiaries, unconsolidated subsidiaries and investees for each of the last three years. An example of Schedule I is included in Section 7 of this publication.

The test for determining when Schedule I is required is similar to that for the financial statement note disclosure of restrictions on subsidiaries' net assets described above. The difference is that this test only focuses on restrictions on loans, advances or cash dividends from *consolidated* subsidiaries to the

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<sup>3</sup> The SEC staff has stated that this is the same as the amount required to be disclosed by Rule 4-08(e)(2) of Regulation S-X (amount of equity method investee's undistributed earnings that is included in consolidated retained earnings) (SAB Topic 6.K, *Accounting Series Release 302—Separate Financial Statements Required by Regulation S-X*).

<sup>4</sup> When these restrictions are disclosed in the notes to the financial statements, the MD&A discussion of liquidity must describe their nature and the extent of their effect on the parent's ability to meet its cash obligations (see Section 5 of this publication).

<sup>5</sup> Our publication, *SEC quarterly reports – Form 10-Q* (Ernst & Young No. CC0338), illustrates the preparation of condensed financial statements in Form 10-Q.

parent. It does not include restricted net assets of unconsolidated subsidiaries or the equity in investees' undistributed earnings. Therefore, registrants must include the schedule when the parent's share of the "restricted" net assets of consolidated subsidiaries exceeds 25% of consolidated net assets.

### 6.3.3 Summary of disclosures and tests

Disclosure	Test
Disclosure of (1) restrictions on dividend payments by the parent, (2) the amount of consolidated retained earnings or net income restricted, or free of restrictions, as to dividend payments and (3) the amount of consolidated retained earnings that represents the undistributed earnings of investees	Always required when material
Disclosure of (1) the nature of the restrictions on consolidated and unconsolidated subsidiaries' abilities to transfer funds to the parent and (2) separate disclosure of the amount of consolidated and unconsolidated subsidiaries' restricted net assets	When the restricted net assets of consolidated and unconsolidated subsidiaries plus the parent's equity in undistributed earnings of investees exceed 25% of consolidated net assets
Schedule I in Form 10-K – condensed parent company financial statements with notes	When the restricted net assets of consolidated subsidiaries exceed 25% of consolidated net assets

### 6.3.4 Guidance for applying the tests

**Restricted net assets:** The SEC defines restricted net assets of subsidiaries as the parent's "proportionate share of net assets (after intercompany eliminations) reflected in the balance sheets of its consolidated and unconsolidated subsidiaries as of the end of the most recent fiscal year that may not be transferred to the parent company in the form of loans, advances, or cash dividends by the subsidiaries without the consent of a third-party (e.g., lender, regulatory agency, foreign government)."

The tests should consider only third-party restrictions on the subsidiary's ability to transfer net assets through loans, advances or payment of cash dividends. Limitations on the transfer of specific assets or practical limitations, such as a subsidiary's illiquidity, are not considered in the test for restricted net assets. For example, assets pledged as collateral under a subsidiary's debt agreement should not be included in the computation. In addition, the illiquid nature of a subsidiary's noncurrent assets is not relevant to the tests; thus, it should be assumed that all assets of the subsidiary are available for loan, advance or dividend to the parent unless third-party agreements would restrict the payment of such dividends, advances or loans to the parent. However, loan provisions requiring a minimum level of working capital, net tangible assets or net assets also need to be considered. A loan agreement that requires the subsidiary to reinvest all earnings also should be considered.

A registrant's disclosure that it intends to permanently reinvest the undistributed earnings of a subsidiary (and as a result of meeting the criteria of ASC 740, does not provide income taxes on those earnings) generally would not indicate restricted net assets because no third-party restriction is involved.

Many loan agreements contain restrictions limiting cash dividends, loans and advances. If only one provision exists, the restricted amount may be easy to compute. However, some agreements may contain several provisions that restrict the flow of funds to the parent. In these circumstances, it is necessary to consider each provision in computing the maximum amount the subsidiary can transfer to the parent and still comply with all the provisions. Examples are provided later in this Section.

Restrictions on foreign subsidiaries' net assets might exist in several ways. Currency exchange controls might restrict loans and dividends to the parent. Foreign government incentives, such as "tax holidays" or grants, might require registrants to reinvest earnings or otherwise limit dividends. However, foreign withholding taxes on dividend payments generally would not be restrictions on net assets because the



withheld amounts reduce a tax liability. Additionally, the existence of a limited market for foreign currency, thereby making it not economically feasible to transfer funds, would not be considered a restriction of net assets.

Bank subsidiaries have restricted net assets because of restrictions of the Federal Reserve Act (Section 23A) on loans to affiliates. Further, the Office of the Comptroller of the Currency (a bureau of the US Department of Treasury) restricts dividends of national banks. Some state regulatory agencies also restrict state banks from paying dividends or making loans and advances to their parent. Such restrictions should be considered in determining the extent of restricted net assets of subsidiaries.

Insurance company subsidiaries have restricted net assets primarily because statutory regulations might prohibit or restrict the amount of loans or dividends to the parent company. As a result, for most insurance registrants, restricted net assets will include their insurance subsidiaries' statutory surplus requirements, such as the minimum legal capital requirements of the states in which insurance subsidiaries operate. Other considerations in determining the amount of restricted net assets might include statutory operating ratios or administrative guidelines or rules that result in statutory capital requirements that exceed minimum legal requirements or that otherwise limit the amount of loans or dividends to the parent company.

The computation of restricted net assets should be based on the subsidiary's actual year-end balance sheet as determined in accordance with generally accepted accounting principles, including "push-down" accounting if appropriate. Management may not include in the calculation of restricted net assets the effects of transactions or events that have not occurred, even if the transactions could be easily accomplished.

A registrant with a consolidated shareholders' deficit is considered to have a net asset base of zero for the purpose of computing its proportionate share of the restricted net assets of consolidated subsidiaries. As a result, any restrictions placed on the net assets of subsidiaries with positive equity would result in the 25% threshold being met and a corresponding requirement to provide parent company financial information. This is viewed by the SEC staff as consistent with the guidance in SAB Topic 6K2.b (Question 3), which states that a subsidiary with an excess of liabilities over assets has no restricted assets. Anomalous results can be discussed with the SEC staff.

For purposes of computing restricted net assets of foreign subsidiaries, the SEC staff expects the percentage tests to be based on assets as determined under US GAAP. The US GAAP restricted assets of the foreign subsidiary generally must be measured using the principles of ASC 830.

## 6.3.5 Computing the restricted net assets of subsidiaries

First, a registrant should determine the restricted net assets for each subsidiary. It then should add these amounts together for use in the test. The following steps summarize how to determine the restricted net assets of a subsidiary:

Step 1: Determine net assets of the subsidiary – The subsidiary's shareholders' equity excluding its redeemable stock and noncontrolling interest reflected in its balance sheet.<sup>6</sup>

Step 2: Adjust subsidiaries for intercompany eliminations – Add amounts due to (or subtract amounts due from) the parent and other consolidated subsidiaries. Intercompany profits that are eliminated in consolidation also are adjustments. (This step identifies the subsidiary's net assets reflected in the consolidated financial statements).

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<sup>6</sup> While noncontrolling interests that are not redeemable are classified as equity, amounts attributable to noncontrolling interests are not available to the consolidated parent's shareholders and therefore are excluded from the calculation of net assets.

Step 3: Determine the parent's proportionate share of the subsidiary's net assets – Multiply the results in 2 above by the parent's proportionate share (generally its ownership percentage).

Step 4: Determine the amount of restricted net assets – Note that (1) there are no restricted net assets for a subsidiary if its net assets after intercompany eliminations are negative; (2) a subsidiary has no restricted net assets if it can transfer by loan, advance or dividend, or any combination thereof, without the consent of a third-party, an amount equal to or greater than the parent's proportionate share of net assets and (3) computed restricted net assets for a subsidiary cannot be greater than the parent's proportionate share of the subsidiary's net assets.

Rule 4-08(e)(3) of Regulation S-X states: "Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary should be used." The purpose of this provision is to exclude from the restricted net assets computation any limitations on loans or advances to the parent when the transfer of funds could be accomplished by paying dividends, and any limitations on dividends when the transfer of funds could be accomplished by a loan or advance.

### 6.3.6

### Examples of computing restricted net assets

**Example 1** – Restrictive covenants of a 100%-owned subsidiary's debt agreement are as follows:

- ▶ Net tangible assets, excluding intercompany accounts, cannot be less than \$10
- ▶ Eighty percent of accumulated earnings must be maintained and cannot be paid out as dividends
- ▶ Current ratio of 2:1 is required

The balance sheet of the subsidiary at 31 December 20Y1 is:

Current assets	\$ 25	Current liabilities	\$ 11
Noncurrent tangible assets	30	Long-term debt	<u>19</u>
		Total liabilities	30
		Common stock	10
		Retained earnings	<u>15</u>
		Total shareholders' equity	<u>25</u>
	<u>\$ 55</u>		<u>\$ 55</u>

There are no intercompany balances. Net assets are \$25. The loan covenants restrict net assets as follows:

	<b>Computed restrictions</b>
<i>Net tangible assets</i>	
Currently \$25, cannot be less than \$10; therefore	\$10
<i>Dividends</i>	
80% of retained earnings cannot be paid out; therefore	\$12 (80% of \$15)
<i>Current ratio</i>	
Current ratio must be at least 2:1. Therefore \$22 of current assets is restricted (current assets required of \$22 given current liabilities of \$11).	\$22

**Conclusion – Restricted net assets for purposes of the test are \$10.** The amount computed from the dividend restriction (\$12) is not used because transfer to the parent could be accomplished by loan or advance. The amount computed from the current ratio requirement (\$22) is not used because noncurrent assets could be transferred to the parent. In this example, the subsidiary could transfer \$15 to the parent without violating any of the covenants by (1) a dividend or loan of current assets of \$3 and (2) a loan of noncurrent assets<sup>7</sup> of \$12.

**Example 2 – Restrictive covenants of a 100%-owned subsidiary's debt agreement are as follows:**

- ▶ Net tangible assets, excluding intercompany accounts, cannot be less than \$10
- ▶ Sixty percent of accumulated earnings must be maintained and cannot be paid out as dividends

At 31 December 20Y1, the balance sheet of the subsidiary is:

Current assets	\$ 40	Current liabilities	\$ 10
Noncurrent tangible assets	15	Long-term debt	<u>20</u>
		Total liabilities	30
		Common stock	10
		Retained earnings	<u>15</u>
		Total shareholders' equity	<u>25</u>
	<u>\$ 55</u>		<u>\$ 55</u>

There are no intercompany balances. Net assets are \$25. The computation of restricted net assets is as follows:

	<b>Computed restrictions</b>
<i>Net tangible assets</i>	
Currently \$25, cannot be less than \$10; therefore	\$10
<i>Dividends</i>	
60% of retained earnings cannot be paid out; therefore	\$ 9 (60% of \$15)

**Conclusion – Restricted net assets for purposes of the test are \$10.** The maximum amount that can be loaned or advanced to the parent without being in violation of the net tangible asset covenant is \$15 (\$25-\$10). If the registrant were to pay a dividend of \$6 (\$15-\$9), the maximum amount of a dividend that could be paid without violating the dividend covenant, it also could loan or advance \$9 without violating the net tangible asset covenant. In either situation, the amount unrestricted from transfer to the parent is \$15; therefore, restricted net assets are \$10 (\$25-\$15).

**Example 3 – Assume the same balance sheet and covenants as Example 2, except that the debt agreement also requires the subsidiary to maintain a current ratio (after intercompany accounts) of not less than 3:1.**

<sup>7</sup> Although the subsidiary's noncurrent assets are not in a form that is readily transferable to the parent company, the nonmonetary or illiquid nature of the assets is not relevant for purposes of the parent company tests. The objective of the tests is to require parent company disclosures when the parent company does not have control of its subsidiaries' funds because it does not have unrestricted access to their net assets.

**Conclusion – Restricted net assets for purposes of the test are \$10.** Restricted current assets resulting from the current ratio covenant are \$30. This is the amount that must be maintained in current assets to meet the required 3-to-1 ratio requirement given current liabilities of \$10. However, \$15 can be paid in dividends, loaned or advanced (in combination) to the parent, without violating any covenant if no more than \$6 represented a dividend and at least \$5 of the transferred amount consisted of noncurrent assets. (A transfer of current assets greater than \$10 would reduce current assets and result in a violation of the 3:1 minimum current ratio.) Thus \$10 is restricted. Restricted net assets for use in the test are the amount least restrictive to the subsidiary, which in this case is \$10.

**Example 4 –** The rules require that the parent's proportionate share of net assets of subsidiary companies be computed after intercompany eliminations. To illustrate, assume the same facts as Example 2, except that \$10 of the \$40 of current assets represents an intercompany receivable.

Net assets	\$ 25
Intercompany receivable	<u>(10)</u>
Adjusted net assets	<u>\$ 15</u>

**Conclusion – Restricted net assets for purposes of the test are \$10.** Because \$5 still could be loaned or advanced or paid in dividends to the parent without violating a covenant, restricted net assets are \$10 in these circumstances, as they were in Example 2.

**Example 5 –** Assume the same facts as Example 2, except that the subsidiary is 80%-owned.

Net assets	\$ 25
Ownership percent	<u>80%</u>
Parent's share of net assets	<u>\$ 20</u>

**Conclusion – Restricted net assets for purposes of the test are \$5.** Since \$15 could be loaned or advanced to the parent without violating any of the covenants in Example 2, restricted net assets for purposes of the test would be \$5 (\$20-\$15).

**Example 6 –** Company A owns 70% of Subsidiary B, which owns 90% of Subsidiary C. Subsidiary B may not pay any dividends or make any affiliate loans or advances. Therefore, all of B's net assets are restricted. C has net assets of \$100 and unrestricted net assets of \$45. How should Company A compute its share of restricted net assets of Subsidiary C for purposes of the test?

**Conclusion – Restricted net assets for purposes of the test are \$18.** Since all of B's net assets are restricted, any dividend, loan or advance from C to B would cause those assets also to be restricted. However, C can make loans directly to A of up to \$45, even though it is a subsidiary of B. Therefore, A's share of C's net assets for purposes of the test would be computed as follows:

C's net assets	\$ 100
A's ownership percent (70% x 90%)	<u>63%</u>
A's share of net assets	<u>\$ 63</u>

Because C's unrestricted net assets of \$45 could be loaned to A, restricted net assets for purposes of the test would be \$18 (\$63-\$45).

### 6.3.7 Parent's equity in undistributed earnings of equity investees

The test for the financial statement note disclosure of restrictions on subsidiaries' net assets also considers the amount of the parent's equity in undistributed earnings of equity investees. The SEC has stated that the amount to be included in the test should be the same as the amount of consolidated retained earnings disclosed in the notes to the financial statements that represents the undistributed earnings of investees (Rule 4-08(e)(2) of Regulation S-X). This disclosure is the amount of the investee's earnings that has been recognized by the investor, less dividends received and adjusted for consolidation entries (e.g., amortization of equity-method basis differences).

An example of computing this amount follows:

- ▶ Investee Co. has shareholders' equity of \$100,000 on 1 January 20Y1 (\$90,000 retained earnings; \$10,000 common stock and additional paid-in capital)
- ▶ Investor Corp. buys a 20% interest of Investee Co. on 1 January 20Y1 for \$24,000
- ▶ The excess of cost over net assets of Investee Co. of \$4,000 [ $\$24,000 - (20\% \text{ of } \$100,000)$ ] is related to unrecognized intangible assets with an economic life of 40 years (\$100 amortization per year)
- ▶ Investee Co. earns \$10,000 during 20Y1. Investor Corp. records its share, \$2,000 ( $20\% \times \$10,000$ ) and provides income taxes of \$150 ( $7.5\% \times \$2,000$ )
- ▶ Investee Co. pays \$5,000 in dividends. Investor Corp. receives \$1,000 ( $20\% \times \$5,000$ )

The amount to be included in the test and disclosed in the footnote is \$825 (\$2,000 earnings recognized by the parent, less \$100 amortization of the equity-method basis difference, less \$1,000 of dividends received, and less the portion of income taxes provided applicable to undistributed earnings, \$75 [ $(\$2,000 - \$1,000) \times 7.5\%$ ]). The amount is not computed by multiplying retained earnings of the investee by the ownership percentage, as may be inferred from the instructions for the test.

### 6.3.8 Disclosure in the notes to the financial statements

Restricted net assets of subsidiaries computed under these SEC rules do not necessarily result in dividend restrictions on the consolidated entity. In some instances, the limitation that results in subsidiaries' restricted net assets is a dividend restriction (e.g., restrictions by regulators on banks and insurance subsidiaries), and in others (e.g., some subsidiary debt covenants), it does not restrict the ability of the parent to pay dividends. In many cases, the point will be moot because the subsidiary's restricted net assets will be less than other restrictions on the parent paying dividends.

Depending on the nature and possible interrelationship of restrictions on the transfer of funds to the parent and restrictions on payment of dividends by the parent, the disclosures relating to these matters might be included in the following notes to the financial statements:

- ▶ Long-term debt (e.g., when the more important information relates to restrictions arising from debt covenants)
- ▶ Shareholders' equity (e.g., when dividends are significantly restricted)
- ▶ Investment in affiliates (e.g., when the disclosure of restrictions on the transfer of funds to the parent arises primarily because of restrictions existing at affiliated companies, such as investees)

The following is an example of the disclosures in the notes to the financial statements required by these rules (Regulation S-X Rule 4-08(e)(2) and (3)):

**Illustration 6-1: Disclosure of long-term debt and dividend restrictions**

The Company's long-term debt agreement requires minimum current ratio and net tangible asset levels and otherwise restricts the payment of cash dividends. Certain of its consolidated subsidiaries are subject to debt agreements that limit cash dividends and loans to the Company. At 31 December 20Y1, restricted net assets of the consolidated subsidiaries were \$12,000. Under the most restrictive covenants, consolidated retained earnings in the amount of \$40,000 were free of limitations on the payment of dividends at 31 December 20Y1.

## 6.4 Equity method investees

Separate financial statements are required in Form 10-K, but not the annual shareholders' report, for equity method investees that individually exceed 20% significance for any of the three years presented (significance is based on the asset, investment or income tests as described later in this Section). The significance of any lower-tier equity investees and unconsolidated subsidiaries should be measured against their contribution to the consolidated financial statements. For example, separate financial statements of an equity method investee of a consolidated subsidiary or unconsolidated investment would be required if it met the significant subsidiary test at the 20% threshold compared with the consolidated financial statements.

In addition, US GAAP requires summarized financial information, or separate financial statements, for material unconsolidated subsidiaries and investees. The SEC requires this information when equity method investees exceed 10% significance in the aggregate (Rule 4-08(g) of Regulation S-X). In addition, ASC 323-10-50 requires certain other disclosures for material investments, including the percentage of the investee owned, the accounting method for the investment, any difference between the carrying amount and the underlying equity in net assets and the market value, if available.

SAB No. 54 (Topic 5.J), *Push Down Basis of Accounting Required in Certain Limited Circumstances* (SAB 54), and SAB No. 55 (Topic 1.B), *Allocation of Expenses and Related Disclosure in Financial Statements of Subsidiaries, Divisions or Lesser Business Components of Another Entity; Cheap Stock* (SAB 55), provide further preparation guidance for both separate financial statements of subsidiaries and summarized financial information included in the parent's Form 10-K. For further details, see "Preparing separate financial information of subsidiaries" later in this Section.

### 6.4.1 Separate financial statements

Rule 3-09 of Regulation S-X requires that Form 10-K, but not the annual shareholders' report, contain separate financial statements, prepared in accordance with Regulation S-X (including financial schedules), for equity method investees accounted for by the equity method when such entities are individually significant.<sup>8</sup> The Regulation S-X significant subsidiary tests are described later in this Section under the heading "Significant Subsidiary Definition." The separate financial statements are only

<sup>8</sup> ASC 810 requires consolidation of all majority-owned subsidiaries except if control does not rest with the majority owner. Consequently, unconsolidated majority-owned subsidiaries will exist in limited circumstances (e.g., when a subsidiary is in legal reorganization, bankruptcy, under severe restrictions imposed by a foreign government, when minority owners have substantive participating rights (see ASC 810-10-25-2 through 25-14), or when a subsidiary is a VIE and the majority owner is not the primary beneficiary).

required to be audited<sup>9</sup> for those fiscal years in which the entity is individually significant at the 20% level applying the income test and investment test.<sup>10</sup> Rule 3-09 applies to all equity method investees, regardless of whether the investment is held by the registrant, a subsidiary or another investee. Accordingly, separate financial statements are required for any lower-tier investee in which the registrant's proportionate share of such investee meets the 20% test relative to consolidated financial statements of the registrant.

Financial statements of two or more equity method investees may be combined if they are under common management or common control as permitted by ASC 810-10-55-1B.

Insofar as practicable, these separate financial statements should be as of the same dates, and for the same periods, as the audited consolidated financial statements. If it is not practicable to provide separate financial statements at the same dates and for the same periods as the audited consolidated financial statements, the financial statements required by Rule 3-09 of Regulation S-X can be presented at a different date (e.g., the investee's fiscal year-end). The filing in Form 10-K of the financial statements required by Rule 3-09 of Regulation S-X can become complicated if the fiscal years of the registrant and the investee differ, or if either the registrant or the investee is a large accelerated filer or an accelerated filer (see When the report is due discussion in Section 2).

## 6.4.2 Summarized financial information

Rule 4-08(g) of Regulation S-X requires consolidated financial statements in annual shareholders' reports and Form 10-K to include disclosure in the notes to the financial statements of summarized financial information about equity method investees if, individually or in the aggregate, they exceed 10% significance under any one of the three significant subsidiary tests. Registrants must present summarized financial information for the same periods as consolidated financial statements. Thus, registrants must present the summarized balance sheet information for the most recent two fiscal years and the summarized income statement information for the most recent three years.

In addition, the SEC staff generally believes that Rule 4-08(g) permits the aggregation of all equity investees, whether individually significant (i.e., greater than 10%) or not. However, in situations in which aggregation can be misleading or suppress important information, the SEC staff may request separate information. For example, the SEC staff might request that investees in different businesses be aggregated separately. The SEC staff also might request separate information for individual investees that are very significant quantitatively or qualitatively.

The SEC requires at least the following detail in the summarized financial information:

- ▶ Current assets
- ▶ Noncurrent assets
- ▶ Current liabilities
- ▶ Noncurrent liabilities

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<sup>9</sup> The SEC staff has indicated that the audit of a non-issuer's financial statements that are filed with the SEC in order to comply with Rule 3-09 of Regulation S-X and are not referred to in the auditors' report need not be performed by an auditor registered with the PCAOB, and the auditor's report need not indicate the audit was performed in accordance with PCAOB standards (in which case the audit may be performed in accordance with, and refer to, the auditing standards of the AICPA).

<sup>10</sup> However, if the prior year(s) are audited, for audits conducted in accordance with either AICPA or PCAOB standards, SAS No. 58, *Reports on Audited Financial Statements* (SAS 58), requires that the auditors also report on the prior year(s).

- ▶ Redeemable preferred stock
- ▶ Noncontrolling interests
- ▶ Net sales or gross revenue
- ▶ Gross profit (or costs and expenses applicable to net sales or gross revenue)
- ▶ Income or loss from continuing operations before extraordinary items and cumulative effect of a change in accounting principle
- ▶ Net income or loss
- ▶ Net income or loss attributable to the entity

No explanatory notes need accompany the summarized information.

In industries that usually do not present classified balance sheets, Rule 1-02(bb) of Regulation S-X states that “information shall be provided as to the nature and amount of the major components of assets and liabilities.” However, long-term liabilities and redeemable stock must be disclosed whether or not a classified balance sheet is presented.

Registrants in specialized industries may substitute other information if that will make their presentation more meaningful. For example, a finance company would disclose net loans receivable when that item is one of its largest assets. A bank could present total interest income, total interest expense, provision for loan losses, and security gains or losses. An insurance company could present net premiums earned, net investment income, underwriting costs and expenses and realized gains or losses on investments.

Separate audited financial statements for equity method investees may be included in the annual shareholders’ report and SEC filings in lieu of the summarized financial information required in the notes to the financial statements by Rule 4-08(g) of Regulation S-X, provided that the financial statements are prepared in accordance with US GAAP, IFRS as issued by the IASB, or are reconciled to US GAAP. This is consistent with ASC 323-10-50-3, which allows either the presentation of separate financial statements or summarized information in the reporting entity’s notes to the financial statements. When separate financial statements are presented for the most significant equity method investee, summarized information for the remaining entities is still required.

For example, if the annual shareholders’ report includes the separate audited financial statements of an equity investee otherwise required in Form 10-K by Rule 3-09 of Regulation S-X, the registrant’s financial statement notes need not include summarized financial information for the investee. However, if the investee is a foreign business, and its financial statements are presented on the basis of a GAAP other than US GAAP or IFRS as issued by the IASB and are not reconciled to US GAAP [because the investee is less than 30% significant (Item 17(c)(2)(vi)) of Form 20-F], the disclosures required by Rule 4-08(g) still must be provided and presented in accordance with US GAAP.

The SEC has emphasized that the information should be complete and that “requests for permission to omit some entities from the summarized financial information will not be granted in a routine manner” (FRC 213.03.b). However, it is not necessary to include information that is not practicable to furnish for entities that, individually and in the aggregate, are immaterial.



### 6.4.3 Example of the summarized financial information

The following example is an excerpt from a note to the consolidated financial statements in an annual shareholders' report. It illustrates the presentation of summarized financial information and assumes there are no noncontrolling interests in consolidated subsidiaries of any of the affiliates.

<b>Illustration 6-2: Summarized financial information</b>			
Summary financial information for affiliated companies (20% to 50%-owned) accounted for by the equity method is as follows:			
	<b>Affiliated companies</b>		
	<b>20Y1</b>	<b>20Y0</b>	<b>20X9</b>
	(in thousands)		
Current assets	\$ 1,700	\$ 1,900	
Property, plant, equipment and other assets	1,330	1,100	
Current liabilities	700	900	
Long-term debt	1,130	1,200	
Net sales	11,000	9,000	\$ 7,500
Gross profit	3,000	2,800	2,200
Net income and net income attributable to the entity	1,500	1,000	800

When there are a number of affiliated companies, it is often helpful to readers to disclose the registrant's share of the net assets and net income of these entities.

### 6.4.4 Significant subsidiary definition

The significance of a subsidiary or investee is based on the "significant subsidiary" tests specified in Rule 1-02(w) of Regulation S-X (described in the following paragraphs). If any of the three significance tests are met at the 10% level for equity method investees, individually or in the aggregate, summarized financial information is required in a note to the consolidated financial statements in annual shareholders' reports and Form 10-K.<sup>11</sup> If either the investment test or the income test is individually met by an equity method investee at the 20% level, separate financial statements of the investee are required in Form 10-K.

**Asset test:** The registrant's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary or investee compared to consolidated total assets

**Investment test:** The registrant's and its other subsidiaries' investments in and advances to the subsidiary or investee compared to consolidated total assets

<sup>11</sup> These tests are based on the financial statements that the subsidiary or investee would file if it were a registrant (i.e., consolidated financial statements prepared in conformity with GAAP, including "push-down" accounting, if appropriate).

**Income test:** The registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle of the subsidiary or investee exclusive of amounts attributable to any noncontrolling interests compared to such income on a consolidated basis<sup>12</sup>

For purposes of the significance of foreign companies (either as the investor, unconsolidated subsidiary or investee), the significance tests must be computed using the investor's basis of accounting in both the numerator and denominator (e.g., US GAAP).

If the registrant's consolidated income or the absolute value of its loss from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle exclusive of amounts attributable to any noncontrolling interests for the most recent year is at least 10% less than the average of the last five fiscal years (including zero for any loss years in the numerator, but still using five as the denominator), the average should be substituted as the denominator in the income test. In applying the five-year average, registrants only should substitute this average for the parent and its consolidated subsidiaries (the denominator of the significance calculation), not for the subsidiary or investee being tested (the numerator of the significance calculation).

Rule 1-02(w) of Regulation S-X further provides that when a loss has been incurred in the current-year on a consolidated basis, or by the subsidiary or investee being tested (but not both), the equity in the income or loss of the tested subsidiary or investee should be excluded from consolidated income or loss in the test. For example:

	Situation 1	Situation 2
Income (loss) of tested subsidiary	\$ (1,000)	\$ 1,000
Income (loss) of parent and its subsidiaries	\$ 10,000	\$ (10,000)

*Computation (for both Situation 1 and Situation 2):* Income (loss) of parent and its subsidiaries excluding loss (income) of tested subsidiary: (\$10,000 + \$1,000 = \$11,000); 1,000/11,000 = 9% (subsidiary would not be significant)

In addition, Rule 1-02(w) of Regulation S-X provides that when evaluating the aggregate significance of individually insignificant entities, the income test should be performed separately for profitable and loss entities (i.e., losses should not be offset against earnings). Aggregate losses of entities with losses and aggregate earnings of entities with earnings should be separately compared to the registrant's consolidated earnings or loss subject to the adjustment illustrated above.

As a general policy, the SEC staff does not allow alternative measures to determine significance; however, strict application of the above guidance could produce anomalous results in some circumstances. For example, if a registrant that has historically incurred significant losses reports a marginal profit for the most recent year, the rules would require that the marginal profit be used in applying the significant subsidiary income test. However, an averaging of the losses of the prior years may produce a better indication of the significance of the subsidiary or investee. In addition, the SEC staff will consider novel circumstances that clearly demonstrate the investee is insignificant.

<sup>12</sup> Rule 3-09 of Regulations S-X still applies to investments accounted for using the fair value option in ASC 825 that otherwise would be accounted for using the equity method in ASC 323. In the FRM and at the 11 October 2007 and 29 March 2011 meetings of the CAQ SEC Regulations Committee, the SEC staff stated that for such investments accounted for using the fair value option under ASC 825, the income test of significance should be calculated using the change in fair value recorded in the income statement. The SEC staff believes that the amount recorded in the income statement is the best indication of the effect of the investment on the company's financial statements and is consistent with the historical method of using amounts actually reflected in the income statement to measure significance.

**Illustration 6-3: Five-year averaging calculation for income test under Rule 1-02(w)**

- ▶ Investee income (loss) below represents the Registrant's proportionate share of Investee earnings
- ▶ Assume investment test under Rule 1-02(w) does not exceed 20% in any year presented
- ▶ Income (loss) from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle exclusive of amounts attributable to any noncontrolling interests:

	Registrant	Investee
20Y1	\$ 300	\$ 130
20Y0	\$ (300)	\$ 180
20X9	\$ (400)	\$ (20)
20X8	\$ 1,850	n/a
20X7	\$ 1,350	n/a
20X6	\$ 1,000	n/a

**Computation:** Registrant five-year average income (loss) from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle exclusive of amounts attributable to noncontrolling interests:  $\$300 + \$0 + \$0 + \$1,850 + \$1,350 = \$3,500/5 = \$700$

**Conclusion:** Registrant should use the five-year average of \$700 as the denominator in computing significance of Investee for the income test because 20Y1 income is at least 10% less than the average (in this case, 20Y1 income of \$300 is 57% less than the average of \$700). For 20Y1, separate audited financial statements of Investee are not required because Investee income of \$130 is only 18.6% of the five-year average income of Registrant of \$700. However, summarized financial information would be required.

**Illustration 6-4: Calculating 20Y0 significance for income test under Rule 1-02(w)**

**Computation:** Registrant five-year average income (loss) from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle exclusive of amounts attributable to noncontrolling interests:  $\$0 + \$0 + \$1,850 + \$1,350 + \$1,000 = \$4,200/5 = \$840$

**Conclusion:** Registrant should use the five-year average of \$840 for 20Y0 as the denominator in computing significance of Investee for the income test because 20Y0 income is at least 10% less than the average (in this case, \$300 (absolute value of 20Y0 loss of \$(300)) is 64% less than the average of \$840). For 20Y0, separate audited financial statements of Investee are required because Investee income of \$180 is 21.4% of the five-year average income of Registrant of \$840.

Because the Investee was significant in any one of the three years, the Investee's financial statements must be presented for all three years. However, separate audited financial statements of Investee only are required for 20Y0 because 20Y0 is the only year for which the income test is met at the 20% or greater level. The Investee's financial statements for 20Y1 and 20X9 may be unaudited. However, if the 20X9 financial statements had been audited in accordance with either AICPA or PCAOB standards, SAS 58 requires that the auditor also report on the 20X9 financial statements.

#### 6.4.4.1

#### Rule 3-09 considerations

**Applying the income test to Rule 3-09:** The numerator is calculated based on the registrant's proportionate share of the pre-tax income from continuing operations reflected in the separate financial statements of the investee for the period in which the registrant recognizes income or loss from the investee under the equity method, adjusted for any basis differences. In determining the basis differences, the registrant should consider ASC 323-10-35-34 and 35-32A. While not an exclusive list, items affecting net income of the registrant that should be excluded from the test are: impairment charges at the investor level, gains/losses from stock sales by the registrant; dilution gains/losses from stock sales by the investee and preferred dividends.

Furthermore, the SEC staff expressed its view that the denominator of the income test should reflect the amounts included in the registrant's income statement as income from continuing operations, after adjustment to place the denominator on a basis that is consistent with the numerator. Accordingly, adjustments should be made as necessary to reported pretax income to (1) adjust for noncontrolling interests in income of consolidated subsidiaries and (2) adjust equity in earnings of all equity method investees to exclude the effects of income tax accounting by those investees and the investor, as well as any extraordinary items, discontinued operations or cumulative effects of accounting changes reported by those investees. That is, adjustments should be made to the denominator for all items similar to those in the numerator to achieve an "apples to apples" calculation.

**Rule 3-09 financial statements in the year in which an investee is acquired, disposed of, or changes status:** In the year a registrant acquires a significant investee, the Form 10-K should include separate financial statements of the investee for the period of ownership. If the registrant determines that audited investee financial statements from the date of acquisition (or application of the equity method) cannot be obtained without undue difficulty or cost, the SEC staff indicated that it will favorably consider pre-filing requests to include investee financial statements for the entire year in lieu of financial statements from the date of acquisition (or application of the equity method). In addition, Rule 3-05 of Regulation S-X may require audited financial statements in registration statements or proxy statements for additional periods.

When a company disposes of an equity-method investment during the year (i.e., the registrant sells its entire interest or the interest is now eligible for cost-method accounting), the SEC staff expects the Form 10-K to include an income statement of the investee through the date of disposal if the investee otherwise met the income test at the 20% significance level, not including any gain or loss on disposal. However, if the registrant determines that audited investee financial statements through the date of disposal cannot be obtained without undue difficulty or cost, the SEC staff indicated that it will favorably consider a pre-filing request for (1) the presentation of summarized financial information pursuant to Rule 4-08(g) of Regulation S-X in lieu of full audited financial statements of the investee in the year of disposition or (2) the inclusion of investee financial statements for the entire year in lieu of financial statements through the date of disposition.

However, if the investee is sold near the end of the most recent fiscal year, the SEC staff may be more reluctant to waive the requirement if the investee is very significant, quantitatively or qualitatively, during that year. In this circumstance, the SEC staff will consider, among other things, the significance of the registrant's participation in the investee's business, whether similar investments comprise a significant part of the registrant's business, and whether significant intercompany transactions have occurred. However, the SEC staff also has indicated that it will not grant relief from Rule 3-09 of Regulation S-X if the investment is disposed after year-end and is otherwise significant to the most recent fiscal year.

When a formerly consolidated wholly-owned or majority-owned subsidiary becomes an equity-method investee, the SEC staff has expressed its view that the income test under Rule 1-02(w) of Regulation S-X in the year of change should include the registrant's equity in the investee's pre-tax earnings for the period of the fiscal year for which the equity method of accounting was applied to such investee.

**Calculating significance of equity investees following the registrant's discontinued operation:** The SEC staff believes that, following a discontinued operation in the current fiscal year, the registrant should not remeasure significance using the restated financial statements in any registration statement or proxy statement filed during the current fiscal year (even if the restated financial statements of prior fiscal periods are required to be included in such filings). However, for purposes of determining whether the Rule 3-09 financial statements should be included in the current fiscal year Form 10-K, the registrant should use the restated financial statements (for all periods presented), which reflect the discontinued operation, to determine whether the equity investee was significant for any period presented. Registrants should make the calculation at the end of each fiscal year based on the primary financial statements of the registrant presented in the annual report. As a result, previously insignificant equity-method investees (i.e., below 20% significance level) might now become significant and the current fiscal year Form 10-K might require separate financial statements of such equity-method investees for all periods presented, audited in the periods in which significant. Registrants are encouraged to contact the SEC staff if this application results in an impracticable answer based on the registrant's particular facts and circumstances.

In addition, the SEC staff indicated that in a scenario in which an equity investee was disposed of before the event that required discontinued operations presentation, and the equity investee was not previously significant under Rule 3-09 of Regulation S-X, but became significant in the current period solely as a result of restatement due to discontinued operation presentation, financial statements of that equity investee would not be required.

Similarly, if a registrant's financial statements are retroactively restated in accordance with ASC 323 to reflect equity-method accounting for an investment previously accounted for under the cost method, Rule 3-09 financial statements and summarized financial information may be required for periods in which the cost method was previously used if the significance tests are met.

**Applying Rule 3-09 when a registrant and its equity investee have different year-ends:** When a registrant and its equity investee have different year-ends, the registrant may or may not record its equity in earnings on a lag basis. Therefore, depending on the registrant's particular accounting treatment, questions arise as to how and when the significance tests should be performed. Generally, significance tests should be determined using the investee's financial results used by the registrant to calculate the registrant's equity in the income or loss of the investee presented in the registrant's financial statements, not amounts derived from the investee's financial statements required to be filed under S-X 3-09. Illustration 6-5 illustrates the application of Rule 3-09 of Regulation S-X when the registrant records equity in earnings on a lag basis, and Illustration 6-6 illustrates the application of Rule 3-09 of Regulation S-X when the registrant does not record equity in earnings on a lag basis.

**Illustration 6-5: Equity in earnings is recorded on a lag basis**

- ▶ Registrant has a 31 December year-end
- ▶ Equity investee has a 30 September year-end and is not a foreign business
- ▶ Registrant records equity income on a three-month lag basis (i.e., the registrant records its equity in the investee's income for the fiscal year ended 30 September 20Y1 in its 31 December 20Y1 financial statements)

The SEC staff believes that the significance tests should be performed using the 30 September 20Y1 financial statements of the equity investee and the 31 December 20Y1 financial statements of the registrant.

**Illustration 6-6: Equity in earnings is not recorded on a lag basis**

- ▶ Registrant has a 31 December year-end
- ▶ Equity investee has a 30 June year-end and is not a foreign business
- ▶ The registrant's 31 December 20Y1 financial statements include its equity in the investee's income for the 12 months ended 31 December 20Y1 (i.e., there is no lag in reporting)

The SEC staff believes that the significance tests should be based on a period consistent with the amounts recognized in the registrant's financial statements. That is, the significance calculations should be based on the equity investee's adjusted 31 December 20Y1 results compared with the registrant's 31 December 20Y1 results. In addition, the equity investee's financial statements for its fiscal year ended 30 June 20Y1 would meet the requirements of Rule 3-09 of Regulation S-X. However, the SEC staff would not object if the registrant filed audited equity investee financial statements that are more current than 30 June 20Y1 to satisfy Rule 3-09.

## 6.4.5 Intercompany eliminations

Because an equity method investee is not consolidated, intercompany transactions should **not** be eliminated when measuring significance of an equity method investee.

## 6.4.6 Example

The following example illustrates how to apply these tests to establish whether a registrant must file separate financial statements or summarized financial information of equity method investees.

**Example 1** – Illustrates some of the disclosure combinations that can result under the rules. To limit the length of the example, only the income test is illustrated.

Company	Registrant's and its consolidated subsidiaries' share of pretax income (After intercompany eliminations)		
	Situation 1	Situation 2	Situation 3
<i>Investees</i>			
Company A	41,000	4,000	102,000
Company B	18,000	3,000	1,000
Company C	11,000	2,000	1,000
	70,000	9,000	104,000

*Assume:* Consolidated pretax income of \$500,000. Therefore, 10% equals \$50,000 and 20% equals \$100,000.

The minimum requirements for financial data are:

	<b>Form 10-K</b>	<b>Annual Shareholders' Reports and Form 10-K</b>
	<b>Complete financial statements</b>	<b>Summarized financial information in notes to consolidated financial statements</b>
Situation 1	None	Presented for Companies A, B and C in the aggregate
Situation 2	None	None
Situation 3	Company A	None

The rule requires summarized financial information “for all such subsidiaries and persons.” FRC Section 213.03b (ASR No. 302, *Separate Financial Statements Required By Regulation S-X*) emphasizes that the information should be complete and that “requests for permission to omit some entities from the summarized financial information will not be granted in a routine manner.” However, summarized financial information for entities that are clearly immaterial may be omitted.

For example, in Situation 2 above, the investees represent less than 2% of consolidated income. If the investment test and other measures of materiality also resulted in immaterial amounts, the summarized information for the investees could be omitted.

Similarly, in Situation 3 above, investees B and C are clearly immaterial individually and in the aggregate. If other tests also resulted in immaterial amounts, summarized information for only Company A need be presented.

## 6.5 Preparing separate financial information of subsidiaries

The SEC staff issued its views on “push-down” accounting and allocation of expenses in the financial statements of subsidiaries in SABs 54 and 55, respectively. While the primary orientation of these SABs is toward subsidiaries’ financial statements included in their own filings with the SEC, the provisions also pertain to subsidiary financial information included in the parent’s Form 10-K.

### 6.5.1 Push-down accounting

SAB 54 generally requires that “push-down” accounting be applied whenever separate financial information is presented in a filing for a “substantially wholly-owned” acquired subsidiary. This would include a separate filing made by the subsidiary or the parent’s filing where subsidiary financial information is presented.

Push-down accounting reflects the new basis of accounting recorded by the parent upon acquisition. In other words, the parent’s basis is reflected as the historical cost basis of assets and liabilities reflected in the subsidiary’s financial statements and summarized financial information. ASC 805-50-S99-2 expresses the SEC staff’s belief that the views in SAB 54 also should be followed in the context of a company that becomes substantially wholly-owned as a result of a series of related and anticipated transactions.

Push-down accounting rules are typically triggered by a business combination; however, the requirement to push down needs to be continually assessed and could be triggered by subsequent ownership changes or changes in the subsidiary’s debt.

In determining whether a company has become substantially wholly-owned, the SEC staff has stated that push-down accounting would be required if 95% or more of the company has been acquired (unless the company has outstanding public debt or preferred stock that may affect the acquirer’s ability to control the form of ownership of the company), permitted if 80% to 95% has been acquired, and prohibited if less than 80% of the company is acquired.

As an example, if a parent company acquires all the outstanding noncontrolling interest of a majority-owned subsidiary (which has no public debt outstanding) in a series of related and anticipated transactions that includes the subsequent issuance of subsidiary shares to new investors, the SEC staff believes that push-down accounting would be required to be applied in the subsidiary's financial statements, regardless of the size of the noncontrolling interest sold to new investors. The SEC staff believes that push-down accounting would be required even though the subsidiary became wholly-owned for only a short time and there was a plan for the subsidiary to issue shares subsequent to becoming wholly-owned.

The guidance in ASC 805-50-S99-2 indicates that for purposes of determining whether a company has become "substantially wholly-owned" as the result of a single transaction, or a series of related and anticipated transactions, in which investors acquire ownership interests, the SEC staff believes that it is appropriate to aggregate the holdings of those investors who both "mutually promote" the acquisition and "collaborate" on the subsequent control of the investee company (the collaborative group). That is, the SEC staff believes that push-down accounting is required if a company becomes substantially wholly-owned by a group of investors who act together as effectively one investor and are able to control the form of ownership of the investee.

The SEC staff believes that under a "mutual promotion and subsequent collaboration" model, a member of a collaborative group would be any investor that helps to consummate the acquisition and works, or cooperates, with the subsequent control of the acquired company. For purposes of assessing whether an investor is part of a collaborative group, the SEC staff believes that a rebuttable presumption exists that any investor investing at the same time as, or in reasonable proximity to the time, others invest in the investee is part of the collaborative group with the other investor(s). Determination of whether such a presumption is rebutted necessarily will involve the consideration of all pertinent facts and circumstances. Among the factors considered by the SEC staff that would be indicative of an investor not being part of a collaborative group include, but are not limited to (refer to ASC 805-50-S99-2 for a comprehensive list of all factors):

- ▶ Independence (e.g., the investor is independent of, and unaffiliated with, all other investors)
- ▶ Risk of ownership (e.g., investor invests funds from its own resources)
- ▶ Promotion (e.g., the investor did not solicit other parties to invest in the investee)
- ▶ Subsequent collaboration (e.g., the investor is free to exercise its voting rights in any and all shareholder votes)

ASC 805-50-S99-2 includes an example in which the SEC staff concluded that push-down accounting should be applied in a transaction in which financial investors, acting together effectively as one investor (i.e., as a collaborative group), acquire ownership interests in a company. In this example, the investee company experienced a significant change in ownership, but no single financial investor obtained substantially all of the ownership interest in the company (e.g., Investors A, B and C acquired 40%, 40% and 20%, respectively, of the outstanding common stock of Company D for cash).

In situations in which the substantially wholly owned subsidiary was a registrant at the time of acquisition as a result of having publicly held debt or preferred stock, the SEC staff believes it is reasonable and consistent with the general principles in SAB 54 to consider the significance of the publicly held debt or preferred stock in assessing the applicability of push-down accounting. If the registered securities are neither quantitatively nor qualitatively significant, the SEC staff believes the parent is required to apply push-down accounting. Otherwise, the staff encourages the use of push-down accounting but generally does not insist on its use. The SEC staff also does not require push-down accounting when there is a significant noncontrolling interest (i.e., a continuing noncontrolling interest that exceeds five percent and is held by substantive third-party investors that are not part of the collaborative group).



In addition, SAB No. 73 (Topic 5.J), *Push Down Basis of Accounting-Required in Certain Limited Circumstances*, requires that parent company debt (or mandatorily redeemable preferred stock), related interest expense, and debt issue costs be reflected in the subsidiary's financial statements if (1) the subsidiary is to assume the debt of its parent, (2) the proceeds of the subsidiary's offering will be used to retire all or a part of its parent's debt or (3) the subsidiary guarantees or pledges its assets as collateral for its parent's debt. The SEC staff also believes that this guidance applies in situations involving the acquisition of more than one subsidiary. The SEC staff believes a registrant could apply any of several reasonable approaches to push down acquisition-related debt to the individual subsidiaries when it acquires more than one subsidiary.

The evaluation of push-down accounting requires professional judgment based on the particular facts and circumstances. See our Financial Reporting Developments publication, *Business combinations* (Ernst & Young No. BB1616 (Revised September 2011)), for a more complete discussion related to the application of push-down accounting.<sup>13</sup>

## 6.5.2 Allocation of expenses

SAB 55 discusses the SEC staff's approach to the allocation of expenses and related disclosure in the separate financial statements of subsidiaries, divisions or other components of a business when these financial statements are included in filings with the SEC. Because many of the costs of operating the components of a business are incurred by the parent company (e.g., income taxes, interest, advertising, accounting, legal), the SEC staff believes it is essential that the separate entity's financial statements include its allocable share of these costs. SAB 55 provides specific guidance on allocating expenses, as well as the related disclosure requirements, and should be referred to when these separate financial statements are being prepared.

For annual reporting purposes, the primary thrust of SAB 55 is directed at the financial statements included in the Form 10-K of a registrant that has public securities and that also is a subsidiary of another entity (which incurs common costs on behalf of the subsidiary registrant).

The provisions of SAB 55 also are applicable to the separate financial statements (pursuant to S-X Rule 3-09) or summarized financial information (pursuant to S-X Rule 4-08(g)) included in the parent's Form 10-K for unconsolidated subsidiaries. Generally, the financial statements of a significant unconsolidated subsidiary that is itself a registrant would be incorporated by reference from the unconsolidated subsidiaries' Form 10-K, and therefore, already would reflect the provisions of SAB 55.

## 6.6 Guarantors of the registrant's securities

Under Rule 3-10 of Regulation S-X, a registrant must include in its Form 10-K the separate financial statements of a guarantor of any class of the registrant's securities.

Rule 3-10 of Regulation S-X provides relief from the general requirement of full separate reporting by subsidiary issuers if the parent guarantees the subsidiary's debt, and by subsidiary-guarantors of public debt issued by the parent. The general rule is that separate financial statements of the subsidiary would be required in the parent's Form 10-K (and quarterly reports and registration statements involving guaranteed securities), but if certain conditions are met, no financial statements or modified financial information could be presented. The primary conditions for the presentation of modified financial information are that the guarantees are full and unconditional and that the guarantor subsidiary(ies) is 100%-owned. See Wholly-owned subsidiaries discussion in Section 2 and our *Form 10-K and registration statement checklist* –

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<sup>13</sup> Refer to Appendix B: *A summary of accounting considerations for push-down accounting and other basis issues* of the Financial Reporting Developments publication.

*supplement to GAAP disclosure checklist* (Ernst & Young Form No. A69) for additional information on the alternative modified financial information disclosures that might be applicable to guarantors.

If required, the separate financial statements filed for such guarantors should be as of the same dates, for the same periods and on the same basis (e.g., GAAP, Regulation S-X, consolidated) as the registrant's financial statements. Those annual financial statements must be audited for three years, even if the guarantee was not in effect in earlier periods. In Form 10-K, such statements also should include (as applicable) the financial schedules and separate financial statements of significant unconsolidated subsidiaries and investees.

## 6.7 **Affiliates whose securities collateralize the registrant's securities**

Under Rule 3-16 of Regulation S-X, a registrant must include in its Form 10-K (and quarterly reports and registration statements involving collateralized securities) the separate financial statements of any affiliate whose securities constitute a substantial portion of the collateral of a class of securities registered.

An affiliate's securities are considered to constitute a substantial portion of collateral if the aggregate principal amount, par value or book value as shown by the registrant's books, or market value, whichever is greatest, of such securities equals 20% or more of the principal amount of the class secured thereby. This test should be reperformed at each fiscal year-end. Accordingly, financial statements might be required under Rule 3-16 of Regulation S-X in a Form 10-K when such financial statements were not required in the original registration statement or previous Form 10-K filings. For example, an affiliate's securities might become substantial collateral based on an increase in the fair value of the affiliate or a decrease in the principal amount of the class of collateralized securities (e.g., as a result of serial maturities or early retirements).

If required, the affiliate's financial statements would need to comply with Article 10, Article 11, and Rules 3-05 and 3-14 of Regulation S-X (interim financial statements, pro forma financial information, and financial statements of acquired businesses and real estate operations) in a registration statement involving collateralized securities, and with Article 12 and Rule 3-09 of Regulation S-X (financial schedules and separate financial statements of significant unconsolidated subsidiaries and investees) in an annual report or registration statement involving collateralized securities. In addition, the financial statements filed for such affiliates should be as of the same dates, for the same periods, and on the same basis (e.g., GAAP, Regulation S-X, consolidated) as the registrant's financial statements. Those annual financial statements must be audited for three years, even if the affiliate's securities did not constitute a substantial portion of the collateral in earlier periods.

See our *Form 10-K and registration statement checklist – supplement to GAAP disclosure checklist* (Ernst & Young Form No. A69) for additional disclosures that might be applicable.

# 7

## Financial schedules

This Section includes the Regulation S-X rules for financial schedules, along with an example of each schedule. While the financial schedules will be required only in certain limited circumstances, it is important to recognize when each schedule is required and how to prepare it properly. For commercial and industrial companies, Rule 5-04 of Regulation S-X specifies which schedules are to be filed. The form and content of schedules is specified by Article 12 of Regulation S-X.

Schedules should be filed in support of each set of financial statements required by Article 3 of Regulation S-X. For example, if financial statements are filed for equity method investees under Rule 3-09 of Regulation S-X, schedules supporting those financial statements are required. However, the required schedule information may be presented in a single schedule with the information shown separately for each set of financial statements filed.

Schedules may be omitted when they are not applicable or the amounts are immaterial (as defined by specific materiality standards for each schedule and the general materiality standard of Rule 4-02 of Regulation S-X). Further, if the information required by any schedule is shown in the related financial statements or the notes thereto, the schedule may be omitted. When a schedule has been omitted, the reason for omission should be stated in Form 10-K. Usually this is set forth under Exhibits, Financial Statement Schedules required by Item 15(a) and (c) of Form 10-K (see example in Section 10 of this publication).

Schedules are required to be audited if the related financial statements are required to be audited.

Some schedules are filed for the most recent balance sheet (e.g., 31 December 20 Y1), whereas other schedules are filed for each period for which an income statement is required (e.g., for each of the three years in the period ended 31 December 20Y1). The following table indicates the requirements for each schedule.

### 7.1

### Filing requirements

Title		Filed for last balance sheet	Filed for each income statement
I	Condensed financial information of registrant	*	*
II	Valuation and qualifying accounts		X
III	Real estate and accumulated depreciation	X	
IV	Mortgage loans on real estate	X	
V	Supplemental information concerning property-casualty insurance operations	*	*

\* The information required by this schedule must be provided as of the same dates and for the same periods as the audited consolidated financial statements.

**Note:** The schedules on the following pages represent different situations and are not interrelated.

## 7.2 Schedule I – Condensed financial information of registrant

The schedule prescribed by Rule 12-04 of Regulation S-X should be filed when the restricted net assets (Rule 4-08(e)(3) of Regulation S-X) of consolidated subsidiaries exceed 25% of consolidated net assets as of the end of the most recently completed fiscal year.<sup>1</sup> For purposes of the above test, restricted net assets of consolidated subsidiaries means that amount of the registrant's proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent fiscal year may not be transferred to the parent company by subsidiaries in the form of loans, advances or cash dividends without the consent of a third party (e.g., lender, regulatory agency, foreign government). If restrictions on the amount of funds that may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary should be used. Redeemable preferred stocks (Rule 5-02.27 of Regulation S-X) and noncontrolling interests should be deducted in computing net assets for purposes of this test.

### Rule 12-04. Condensed financial information of registrant

- (a) Provide condensed financial information about financial position, cash flows and results of operations of the registrant as of the same dates and for the same periods for which audited consolidated financial statements are required. The financial information required need not be presented in greater detail than is required for condensed statements by Rule 10-01(a)(2), (3) and (4) of Regulation S-X. Detailed footnote disclosure which would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations and guarantees. Descriptions of significant provisions of the registrant's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks and guarantees of the registrant shall be provided along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements and guarantees of the registrant have been separately disclosed in the consolidated statements, they need not be repeated in this schedule.
- (b) Separately disclose the amounts of cash dividends paid to the registrant for each of the last three fiscal years by consolidated subsidiaries, unconsolidated subsidiaries and 50%-or-less owned persons accounted for by the equity method, respectively.

The following example shows how condensed financial statements might be presented. This example is not intended to illustrate rigid presentation guidelines. Rule 10-01 of Regulation S-X allows flexibility in the level of detail presented in condensed financial statements.

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<sup>1</sup> Section 6 of this publication provides guidance for determining restricted net assets.

**Illustration 7-1: Schedule 1**

Assume that restricted net assets of consolidated subsidiaries exceed 25% of consolidated net assets at 31 December 20Y1.

**Schedule I – Condensed financial information of registrant – ABC, Inc.***Condensed balance sheets*

	December 31	
	20Y1	20Y0
	(In thousands)	
Assets		
Current assets		
Cash	\$ 5,000	\$ 2,500
Accounts receivable (including \$125,000 and \$167,000 due from subsidiaries in 20Y1 and 20Y0, respectively), less allowances – \$150,000 in 20Y1 and 20Y0	7,500	8,000
Inventories	3,500	2,500
Prepaid expenses	<u>250</u>	<u>300</u>
Total current assets	16,250	13,300
Property, plant and equipment	25,000	17,500
Less accumulated depreciation	<u>(10,000)</u>	<u>(8,500)</u>
	15,000	9,000
Other assets (principally investment in and amounts due from wholly owned subsidiaries)	<u>95,250</u>	<u>79,700</u>
	<u>\$126,500</u>	<u>\$102,000</u>
Liabilities and shareholders' equity		
Current liabilities	\$ 11,500	\$ 10,050
Long-term debt	28,000	14,000
Other noncurrent liabilities	7,300	7,000
Shareholders' equity		
Common stock	3,000	2,900
Other shareholders' equity	75,000	69,050
Accumulated other comprehensive income (loss)	<u>1,700</u>	<u>(1,000)</u>
	<u>79,700</u>	<u>70,950</u>
	<u>\$126,500</u>	<u>\$102,000</u>

See accompanying notes to condensed financial statements.

**Schedule I – Condensed financial information of registrant – ABC, Inc. – Continued****Condensed statements of income**

	Year ended December 31		
	20Y1	20Y0	20X9
	(In thousands)		
Net sales and gross revenue	\$ 17,500	\$ 15,000	\$ 16,000
Management fees from wholly-owned subsidiaries	<u>1,500</u>	<u>2,000</u>	<u>2,500</u>
	19,000	17,000	18,500
Costs and expenses:			
Cost of products sold	7,490	6,060	6,450
Selling and administrative expenses	3,400	4,400	2,100
Interest expense	<u>3,610</u>	<u>2,040</u>	<u>2,550</u>
	<u>14,500</u>	<u>12,500</u>	<u>11,100</u>
Income before income taxes and equity in net income of subsidiaries	4,500	4,500	7,400
Federal and state income tax	<u>(2,250)</u>	<u>(2,250)</u>	<u>(3,200)</u>
Income before equity in net income of subsidiaries	2,250	2,250	4,200
Equity in net income of subsidiaries	<u>5,990</u>	<u>2,750</u>	<u>2,300</u>
Net income	<u>\$ 8,240</u>	<u>\$ 5,000</u>	<u>\$ 6,500</u>

See accompanying notes to condensed financial statements.

**Condensed statements of cash flows**

	Year ended December 31		
	20Y1	20Y0	20X9
	(In thousands)		
Net cash from operating activities	\$ 11,200	\$ 7,500	\$ 8,350
Investing activities:			
Acquisition of Future Corp.	(10,000)	–	–
Purchases of property, plant and equipment	(7,900)	(1,950)	(1,550)
Other	<u>500</u>	<u>–</u>	<u>200</u>
	(17,400)	(1,950)	(1,350)
Financing activities:			
Proceeds from issuing debentures	15,000	–	–
Proceeds from sale of common stock	1,000	–	–
Dividends paid	(2,950)	(2,900)	(2,320)
Payments on long-term obligations	(1,350)	(1,160)	(1,240)
Net decrease in short-term borrowings	<u>(3,000)</u>	<u>(1,000)</u>	<u>(2,500)</u>
	<u>8,700</u>	<u>(5,060)</u>	<u>(6,060)</u>
Increase in cash	<u>\$ 2,500</u>	<u>\$ 490</u>	<u>\$ 940</u>

See accompanying notes to condensed financial statements.

**Schedule I – Condensed financial information of registrant – ABC, Inc. – Continued****Notes to Condensed Financial Statements**  
**(In Thousands)****Note A – Basis of presentation**

In the parent-company-only financial statements, the Company's investment in subsidiaries is stated at cost plus equity in undistributed earnings of subsidiaries since the date of acquisition. The Company's share of net income of its unconsolidated subsidiaries is included in consolidated income using the equity method. The parent-company-only financial statements should be read in conjunction with the Company's consolidated financial statements.

**Note B – Long-term debt<sup>2</sup>**

Long-term debt consisted of the following at December 31:

	<u>20Y1</u>	<u>20Y0</u>
	<i>(In thousands)</i>	
7% convertible sinking fund debentures due through 20Y4	\$ 14,000	\$ 15,000
10% debentures due through 20Z2	<u>15,000</u>	<u>–</u>
	29,000	15,000
Less current portion	<u>1,000</u>	<u>1,000</u>
	<u>\$ 28,000</u>	<u>\$ 14,000</u>

Maturities of long-term debt for the five years succeeding 31 December 20Y1 are \$1,000 in 20Y2, \$2,500 in 20Y3, \$13,500 in 20Y4, \$1,500 in 20Y5, \$1,500 in 20Y6, and \$9,000 thereafter.

Through 30 June 20Y4, the 7% debentures are convertible into shares of common stock at the rate of one share for each \$40 face amount. The 7% convertible sinking fund debentures are secured by accounts receivable, inventory and other general current assets of the Company.

In 20Y1, the Company sold \$15,000 in 10% debentures to finance the purchase of Future Corp. and partially finance the construction of the Company's new plant. The debt is collateralized by the new plant with a carrying amount at 31 December 20Y1 of \$11,200. The debenture matures in annual principal installments of \$1,500 beginning in 20Y3. The indentures for both issues of debentures include, among other things, provisions relative to additional borrowings, maintenance of working capital and restrictions on the amount of retained earnings available for the payment of dividends. Under the most restrictive of these covenants, retained earnings in the amount of \$32,000 were free of such limitations at 31 December 20Y1.

**Note C – Guarantee<sup>2</sup>**

UVW Corp., a subsidiary of the Company, has \$7,000 of long-term debt outstanding. Under the terms of the debt agreement, the Company has guaranteed the payment of all principal and interest. In the event of a default under the debt agreement, the Company will be directly liable to the debt holders. The debt matures at various times between 20Y3 and 20Y5. The maximum potential amount that the Company could be liable for under the guarantee is approximately \$10,200.

<sup>2</sup> If in the consolidated financial statements these items were identified as relating to the parent, Notes B and C could be omitted from the schedule.

**Schedule I – Condensed financial information of registrant – ABC, Inc. – Continued****Note D – Dividends from subsidiaries and investees**

Cash dividends paid to ABC, Inc. from the Company's consolidated subsidiaries and investees accounted for by the equity method are summarized as follows:

	Year ended December 31		
	20Y1	20Y0	20X9
	<i>(In thousands)</i>		
Consolidated subsidiaries	\$ 750	\$ 800	\$ 700
Investees	50	50	40
	<u>\$ 800</u>	<u>\$ 850</u>	<u>\$ 740</u>

**7.3****Schedule II – Valuation and qualifying accounts**

The schedule prescribed by Rule 12-09 of Regulation S-X is required to be filed in support of valuation and qualifying accounts included in each balance sheet. Many registrants comply with this requirement by including the required information in the notes to the financial statements. (Also see Rule 4-02 of Regulation S-X regarding omission of immaterial items and combination of insignificant amounts).

**Rule 12-09. Valuation and qualifying accounts**

COL. A	COL. B	COL. C		COL. D	COL. E
Description <sup>1</sup>	Balance at beginning of period	Additions		Deductions – describe	Balance at end of period
		(1) Charged to costs and expenses	(2) Charged to other accounts – describe		

<sup>1</sup> List, by major classes, all valuation and qualifying accounts and reserves not included in specific schedules. Identify each class of valuation and qualifying accounts and reserves by descriptive title. Group (a) those valuation and qualifying accounts which are deducted in the balance sheet from the assets to which they apply and (b) those reserves which support the balance sheet caption, Reserves. Valuation and qualifying accounts and reserves as to which the additions, deductions and balances were not individually significant may be grouped in one total and in such case the information called for under columns C & D need not be given.

**Comment**

This schedule is required for each period for which an income statement is required and the valuation or qualifying account was material. Note that the instructions to the schedule require disclosures only about accounts deducted from assets and balance sheet captions that include "reserve" in the caption title. The schedule is required to display material account activity for the year even if the balance at the end of the period is zero.

**Illustration 7-2: Schedule II**

Assume:	Year ended December 31		
	20Y1	20Y0	20X9
	<i>(In thousands)</i>		
Allowance for doubtful accounts	\$ 850	\$ 775	\$ 600
Reserve for cash discounts	600	525	500
Investments, advances and other assets (reserve for uncollectible advances)	400	–	–
Totals	<u>\$ 1,850</u>	<u>\$ 1,300</u>	<u>\$ 1,100</u>



Schedule II – Valuation and qualifying accounts  
ABC, Inc. and subsidiaries  
31 December 20Y1  
(In Thousands)

COL. A	COL. B	COL. C		COL. D.	COL. E
		Charged to costs and expenses	Charged to other accounts – describe		
Description	Balance at beginning of period			Deductions – describe	Balance at end of period
Year Ended 31 December 20Y1:					
Deducted from assets accounts:					
Allowance for doubtful accounts	\$ 775	\$ 675		\$ 600 <sup>(1)</sup>	\$ 850
Reserve for cash discounts	525	2,075		2,000 <sup>(2)</sup>	600
Investments, advances, and other assets	–	400		–	400
Total	\$ 1,300	\$ 3,150		\$ 2,600	\$ 1,850
Year Ended 31 December 20Y0:					
Deducted from asset accounts:					
Allowance for doubtful accounts	\$ 600	\$ 675		\$ 500 <sup>(1)</sup>	\$ 775
Reserve for cash discounts	500	2,000		1,975 <sup>(2)</sup>	525
Total	\$ 1,100	\$ 2,675		\$ 2,475	\$ 1,300
Year Ended 31 December 20X9:					
Deducted from asset accounts:					
Allowance for doubtful accounts	\$ 550	\$ 350		\$ 300 <sup>(1)</sup>	\$ 600
Reserve for cash discounts	650	1,450		1,600 <sup>(2)</sup>	500
Total	\$ 1,200	\$ 1,800		\$ 1,900	\$ 1,100

<sup>(1)</sup> Uncollectible accounts written off, net of recoveries.

<sup>(2)</sup> Discounts taken by customers during year.

Note: The instructions require that those accounts that are deducted from asset accounts be stated separately from those which support the balance sheet caption, "Reserves."

## 7.4 Schedule III – Real estate and accumulated depreciation

The schedule prescribed by Rule 12-28 of Regulation S-X should be filed for real estate (and the related accumulated depreciation) held by persons a substantial portion of whose business is that of acquiring and holding for investment real estate or interests in real estate, or interests in other persons a substantial portion of whose business is that of acquiring and holding real estate or interests in real estate for investment. Real estate used in the business should be excluded from the schedule.

### Rule 12-28. Real estate and accumulated depreciation<sup>1</sup>

#### (For certain real estate companies)

COL. A	COL. B	COL. C		COL. D		COL. E			COL. F	COL. G	COL. H	COL. I
Description <sup>2</sup>	Encumbrances	Initial Cost to Company		Cost Capitalized Subsequent to Acquisition		Gross Amount at Which Carried at Close of Period <sup>3, 4, 5, 6, 7</sup>			Accumulated Depreciation	Date of Construction	Date Acquired	Life on Which Depreciation in Latest Income Statements is Computed
		Land	Buildings and Improvements	Improvements	Carrying Costs	Land	Buildings and Improvements	Total				

- <sup>1</sup> All money columns shall be totaled.
- <sup>2</sup> The description for each property should include type of property (e.g., unimproved land, shopping center, garden apartments, etc.) and the geographical location.
- <sup>3</sup> The required information is to be given as to each individual investment included in column E except that an amount not exceeding five percent of the total of column E may be listed in one amount as "miscellaneous investments."
- <sup>4</sup> In a note to this schedule, furnish a reconciliation, in the following form, of the total amount at which real estate was carried at the beginning of each period for which income statements are required, with the total amount shown in column E.

Balance at beginning of period .....	\$.....
Additions during period:	
Acquisitions through foreclosure.....	\$ .....
Other acquisitions .....	.....
Improvements, etc. ....	.....
Other (describe).....	.....
.....	.....
Deductions during period:	
Cost of real estate sold.....	\$ .....
Other (describe).....	.....
Balance at close of period .....	\$.....

If additions, except acquisitions through foreclosure, represent other than cash expenditures, explain. If any of the changes during the period result from transactions, directly or indirectly with affiliates, explain the bases of such transactions and state the amounts involved. A similar reconciliation shall be furnished for the accumulated depreciation.

- <sup>5</sup> If any item of real estate in investments has been written down or reserved against, describe the item and explain the basis for the write-down or reserve.
- <sup>6</sup> State in a note to column E the aggregate cost for Federal income tax purposes.
- <sup>7</sup> The amount of all intercompany profits included in the total of column E shall be stated, if material.

### Comment

Schedule III is required only for certain real estate companies as described by Rule 5-04 of Regulation S-X. Real estate used in the business should be excluded from the schedule.

This schedule is required only to support the most recent balance sheet required. However, reconciliations of the changes in real estate and accumulated depreciation (Note 4 of Rule 12-28 of Regulation S-X) are required in support of each income statement required, as shown in the example. As with the other schedules, this schedule is not required to be separately presented if all of the required information is included in the financial statements or notes thereto.

#### **Illustration 7-3: Schedule III**

The illustrative Schedule III presented on the following page assumes that ABC Real Estate Corp. and subsidiaries is required to file this schedule.

## Schedule III – Real estate and accumulated depreciation

## ABC Real Estate Corp. and subsidiaries

31 December 20Y1

(In Thousands)

COL. A	COL. B	COL. C		COL. D		COL. E			COL. F	COL. G	COL. H	COL. I
Description	Encumbrances	Initial Cost to Company		Cost Capitalized Subsequent to Acquisition		Gross Amount at Which Carried at Close of Period			Accumulated Depreciation	Date of Construction	Date Acquired	Life on Which Depreciation In Latest Income Statements is Computed
		Land	Buildings and Improvements	Improvements	Carrying Costs	Land	Buildings and Improvements	Total				
Office Buildings:												
ABC Bldg. (Ashtabula, Ohio)		\$ 200	\$3,000	\$ 250		\$ 200	\$3,250	\$3,450	\$ 275	1-X0	3-X0	40 yrs. <sup>(1)</sup> 10 yrs. <sup>(2)</sup>
XYZ Bldg. (San Leandro, California)	\$1,000	100	2,000	100		100	2,100	2,200	30	5-X3	8-X3	40 yrs. <sup>(1)</sup> 10 yrs. <sup>(2)</sup>
Motels:												
ABC Inn (Springfield, Missouri)		50	1,200	80	\$ 62	50	1,342	1,392	50	2-X0	2-X0	20 yrs. <sup>(1)</sup> 10 yrs. <sup>(2)</sup>
XYZ Motel (Johnstown, Pennsylvania)	500	18	1,000	40		18	1,040	1,058	148	9-X3	9-X3	20 yrs. <sup>(1)</sup> 10 yrs. <sup>(2)</sup>
Miscellaneous Investments	100	10	400			10	400	410	140	Various	Various	Various
Totals	\$1,600	\$ 378	\$7,600	\$ 470	\$ 62	\$ 378	\$8,132	\$8,510 <sup>(3,4)</sup>	\$ 643 <sup>(4)</sup>			

<sup>(1)</sup> Estimated useful life for buildings<sup>(2)</sup> Estimated useful life for furniture and fixtures<sup>(3)</sup> Represents aggregate cost for federal income tax purposes.<sup>(4)</sup> Reconciliation of "Real Estate and Accumulated Depreciation"

Year Ended December 31 (In Thousands)

	20Y1	20Y0	20X9
--	------	------	------

## Investment in real estate:

Balance at beginning of year	\$ 4,918	\$ 4,918	\$ 500
Additions through cash expenditures	3,412	-	4,318
Improvements	180	-	100
Balance at end of year	\$ 8,510	\$ 4,918	\$ 4,918

## Accumulated Depreciation:

Balance at beginning of year	\$ 376	\$ 197	\$ 160
Additions charged to costs and expenses	267	179	37
Balance at end of year	\$ 643	\$ 376	\$ 197

## 7.5

**Schedule IV – Mortgage loans on real estate**

The schedule prescribed by Rule 12-29 of Regulation S-X should be filed by persons specified under Schedule III for investments in mortgage loans on real estate.

**Rule 12-29. Mortgage loans on real estate<sup>1</sup>**

**(For certain real estate companies)**

COL. A	COL. B	COL. C	COL. D	COL. E	COL. F	COL. G	COL. H
Description 2, 3, 4	Interest Rate	Final Maturity Date	Periodic Payment Terms <sup>5</sup>	Prior Liens	Face Amount of Mortgages	Carrying Amount of Mortgages 3, 6, 7, 8, 9	Principal Amount of Loans Subject to Delinquent Principal or Interest <sup>10</sup>

<sup>1</sup> All money columns shall be totaled.

<sup>2</sup> The required information is to be given for each individual mortgage loan which exceeds three percent of the total of column G.

<sup>3</sup> If the portfolio includes large numbers of mortgages most of which are less than three percent of column G, the mortgages not required to be reported separately should be grouped by classifications that will indicate the dispersion of the portfolio, i.e., for a portfolio of mortgages on single family residential housing. The description should also include number of loans by original loan amounts (e.g., over \$100,000, \$50,000-\$99,999, \$20,000-\$49,999, under \$20,000) and type loan (e.g., VA, FHA, Conventional). Interest rates and maturity dates may be stated in terms of ranges. Data required by columns D, E and F may be omitted for mortgages not required to be reported individually.

<sup>4</sup> Loans should be grouped by categories, e.g., first mortgage, second mortgage, construction loans, etc., and for each loan the type of property, e.g., shopping center, high-rise apartments, etc., and its geographic location should be stated.

<sup>5</sup> State whether principal and interest is payable at level amount over life to maturity or at varying amounts over life to maturity. State amount of balloon payment at maturity, if any. Also state prepayment penalty terms, if any.

- <sup>6</sup> In a note to this schedule, furnish a reconciliation, in the following form, of the carrying amount of mortgage loans at the beginning of each period for which income statements are required, with the total amount shown in column G.

Balance at beginning of period.....		\$.....
Additions during period:		
New mortgage loans .....	\$ .....	
Other (describe).....	.....	
.....	.....	.....
.....	.....	\$.....
Deductions during period:		
Collection of principal.....	\$ .....	
Foreclosures.....		
Cost of mortgages sold.....		
Amortization of premium.....		
Other (describe).....	.....	.....
Balance at close of period.....		\$.....

If additions represent other than cash expenditures, explain. If any of the changes during the period result from transactions, directly or indirectly, with affiliates, explain the bases of such transactions, and state the amounts involved. State the aggregate mortgages (a) renewed and (b) extended. If the carrying amount of new mortgages is in excess of the unpaid amount of the extended mortgages, explain.

- <sup>7</sup> If any item of mortgage loans on real estate investments has been written down or reserved against, describe the item and explain the basis for the write-down or reserve.
- <sup>8</sup> State in a note to column G the aggregate cost for Federal income tax purposes.
- <sup>9</sup> The amount of all intercompany profits included in the total of column G shall be stated, if material.
- <sup>10</sup> (a) Interest in arrears for less than three months may be disregarded in computing the total amount of principal subject to delinquent interest.
- (b) Of the total principal amount, state the amount acquired from controlled and other affiliates.

### Comments

Schedule IV is required only for certain real estate companies as described by Rule 5-04 of Regulation S-X. This schedule is required only in support of the most recent balance sheet required. However, reconciliations of the changes in mortgage loans (see Note 6 of Rule 12-29 of Regulation S-X) are required to support each income statement required, as shown in the example.

#### Illustration 7-4: Schedule IV

The illustrative Schedule IV presented on the following page assumes that ABC Real Estate Corp. and subsidiaries is required to file this schedule.

Schedule IV – Mortgage loans on real estate  
ABC Real Estate and subsidiaries

31 December 20Y1  
(In Thousands)

COL. A	COL. B	COL. C	COL. D	COL. E	COL. F	COL. G	COL. H
Description	Interest Rate	Final Maturity Date	Periodic Payment Terms	Prior Liens	Face Amount of Mortgages	Carrying Amount of Mortgages	Principal Amount of Loans Subject to Delinquent Principal or Interest
Short-term construction loan: Billings, Montana Garden Apartments	Prime + 3%	20XX	Principal payable in full at maturity		\$ 4,000	\$ 3,500	(3)
Long-term first mortgage loan: Springfield, Ohio Sports Coliseum	10 1/2%	20XX	Payable in semi-annual installments of \$175,000 plus interest		7,000	7,000	
Long-term junior mortgage loans: For loans, each having a carrying amount less than 3% of total carrying amount	10 1/2%	20XX-20XX	Various	\$ 1,000 <sup>(2)</sup>	300	300	
			Totals	\$ 1,000	\$ 11,300	\$ 10,800 <sup>(1)</sup>	

See accompanying notes to this schedule on the following page.

- (1) For Federal income tax purposes, the aggregate cost of investments in mortgage loans on real estate is the carrying amount, as disclosed in the schedule.
- (2) The first mortgage loans on these properties are not held by the Company. Accordingly, the amounts of the prior liens at 31 December 20Y1 are estimated.
- (3) No mortgage loans are delinquent with respect to principal or interest.
- (4) Loans included in the schedule which were extended or renewed during the year aggregated approximately \$210,000.
- (5) Reconciliation of "Mortgage Loans on Real Estate:"

	Year ended December 31		
	20Y1	20Y0	20X9
	<i>(In Thousands)</i>		
Balance at beginning of year	\$ 7,000	\$ 4,550	\$ 2,650
Additions during year:			
New mortgage loans and additional advances on existing loans	4,200	2,800	2,000
Interest income added to principal	300	300	300
Amortization of discount	200	—	—
	<u>11,700</u>	<u>7,650</u>	<u>4,950</u>
Deductions during year:			
Collection of principal	800	650	400
Foreclosure	100	—	—
Balance at end of year	<u>\$ 10,800</u>	<u>\$ 7,000</u>	<u>\$ 4,550</u>

## 7.6

### Schedule V – Supplemental information concerning property-casualty insurance operations

The schedule prescribed by Rule 12-18 of Regulation S-X should be filed when a registrant, its subsidiaries or 50%-or-less-owned equity basis investees have liabilities for property-casualty (P/C) insurance claims. The required information should be presented as of the same dates and for the same periods for which the information is reflected in the audited consolidated financial statements required by Rules 3-01 and 3-02 of Regulation S-X. The schedule may be omitted if reserves for unpaid P/C claims and claims adjustment expenses of the registrant and its consolidated subsidiaries, its unconsolidated subsidiaries and its 50%-or-less-owned equity basis investees did not, in the aggregate, exceed one half of common stockholders' equity of the registrant and its consolidated subsidiaries as of the beginning of the fiscal year. For purposes of this test, only the proportionate share of the registrant and its other subsidiaries in the reserves for unpaid claims and claim adjustment expenses of 50%-or-less-owned equity basis investees taken in the aggregate after intercompany eliminations should be taken into account.



**Rule 12-18. Supplemental information (for property-casualty insurance underwriters)<sup>1</sup>**

COL. A	COL. B	COL. C	COL. D	COL. E	COL. F	COL. G	COL. H		COL. I	COL. J	COL. K
Affiliation with registrant	Deferred policy acquisition costs	Reserves for unpaid claims and claim adjustment expenses	Discount, if any, deducted in Column C <sup>4</sup>	Unearned premiums	Earned premiums	Net investment income	Claims and claim adjustment expenses incurred related to		Amortization of deferred policy acquisition costs	Paid claims and claim adjustment expenses	Premiums written
							(1) Current year	(2) Prior year			

(a) Consolidated property-casualty entities<sup>2</sup>

(b) Unconsolidated property-casualty subsidiaries<sup>2,3</sup>

(c) Proportionate share of registrant and its subsidiaries' 50%-or-less owned property casualty equity investees<sup>2,3</sup>

<sup>1</sup> Information included in audited financial statements, including other schedules, need not be repeated in this schedule. Columns B, C, D and E are as of the balance sheet dates, columns F, G, H, I, J and K are for the same periods for which income statements are presented in the registrant's audited consolidated financial statements.

<sup>2</sup> Present combined or consolidated amounts, as appropriate for each category, after intercompany eliminations.

<sup>3</sup> Information is not required here for 50%-or-less owned equity investees that file similar information with the Commission as registrants in their own right, if that fact and the name of the affiliated registrant are stated. If ending reserves in any category (a), (b) or (c) above is less than 5% of total reserves otherwise required to be reported in this schedule, that category may be omitted and that fact so noted. If the amount of the reserves attributable to 50%-or-less owned equity investees that file this information as registrants in their own right exceeds 95% of the total category (c) reserves, information for the other 50%-or-less owned equity investees need not be provided.

<sup>4</sup> Disclose in a footnote to this schedule the rate, or range of rates, estimated if necessary, at which the discount was computed for each category.

**Illustration 7-5: Schedule V**

The illustrative Schedule V presented on the following page assumes that ABC Holdings, Inc. and subsidiaries is required to file this schedule.

## Schedule V – Supplemental information concerning property-casualty insurance operations

ABC Holdings, Inc. and subsidiaries

31 December 20Y1

*(In Thousands)*

COL. A	COL. B	December 31			Year ended December 31						
		COL. C	COL. D	COL. E	COL. F	COL. G	COL. H		COL. I	COL. J	COL. K
		Reserves for Unpaid Claims and Claim Adjustment Expenses	Discount, if any, Deducted in Column C <sup>1</sup>	Unearned Premiums	Earned Premiums	Net Investment Income	Claims and Claim Adjustment Expenses Incurred Related to		Amortization of Deferred Policy Acquisition Costs	Paid Claims and Claim Adjustment Expenses	Premiums Written
Affiliation with Registrant	Deferred Policy Acquisition Costs						(1)	(2)			
							Current Year	Prior Year			
Registrant and consolidated subsidiaries:											
20Y1	\$ 99,692	\$ 2,586,048	\$ 6,277	\$ 551,626	\$ 1,221,127	\$ 294,568	\$ 1,042,431	\$ 73,643	\$ 243,004	\$ 952,771	\$ 1,284,024
20Y0	96,380	2,378,310	8,249	485,419	1,095,504	235,100	902,811	40,194	224,578	901,384	1,097,148
20X9	101,091	2,063,944	7,318	459,504	1,073,434	239,976	897,922	42,133	236,890	737,531	1,101,697

<sup>1</sup> Certain long-term disability payments for workers' compensation are discounted at rates ranging from 5% to 8%.

# 8 Notification of late filing

SEC rules adopted in August 2002, and amended in December 2005, accelerated the deadlines for filing annual and quarterly reports (see When the report is due discussion in Section 2). As a result of these amendments, filing on a timely basis has become a greater challenge for many registrants.

A registrant must notify the SEC when it is not able to file all or any portion of Form 10-K when due. The SEC will not grant extensions beyond the prescribed due date. However, if a registrant meets certain conditions under a specific relief provision, the SEC may deem its Form 10-K to have been filed timely even if it actually was filed up to 15 days late. The 15-day relief applies to all companies, including those that are large accelerated filers or accelerated filers.

This Section explains the requirements of Rule 12b-25 of Regulation 12B, *Registration and Reporting*, and related Form 12b-25, for notifying the SEC of late filings. The following discussion focuses on Form 10-K, but the requirements of Rule 12b-25 also apply to late filings on Forms 10-Q, 11-K, 20-F, 10-D, N-SAR, N-CSR and transition reports on Forms 10-K and 10-Q (see When the report is due discussion in Section 2).

This Section does not discuss the requirements of electronic filers unable to file a report solely due to electronic difficulties, including submission or posting of an Interactive Data File. Registrants should refer to Rule 201 or Rule 202 of Regulation S-T regarding late electronic postings.

## 8.1 Importance of timely filing

Late filing of Form 10-K is a serious matter. In announcing the current rules, a 1980 SEC Release (No. 33-6203) stated:

“It should be emphasized that the new notification and relief procedures should not be taken as an excuse for non-timely reporting. Failure by public companies to observe the periodic reporting requirements presents an obstacle to the maintenance of fair and informed trading markets in the securities of publicly-held companies. The pricing mechanism of the market is dependent on timely information and, thus, late reporting may adversely affect the quality of this process. In this regard, the Commission will, of course, continue to consider enforcement actions in connection with delinquent reporting.”

In subsequent releases, the SEC has commented on the need for greater diligence by registrants to achieve timely and complete filing of reports. If a registrant does not file Form 10-K by its due date, or does not comply with conditions for the 15-day relief period, the registrant has violated the applicable provisions of the Exchange Act. In such a case, the registrant would be subject to a potential enforcement proceeding by the SEC and a possible suspension in trading in addition to a number of other consequences discussed below.

## 8.2 Other possible consequences of late filing

There are a number of other possible consequences of late filing. For example, as long as a registrant fails to file any report required under the Exchange Act, the SEC will not permit any of its Securities Act registration statements to become effective.<sup>1</sup> In addition, to use Form S-3, an issuer must have complied in all respects, including timeliness, with the reporting requirements of the Exchange Act for the last 12 months. Companies that otherwise meet the definition of a well-known seasoned issuer (see Section 3 of this publication) would not be eligible to file an automatic shelf registration statement because timely filing for the last 12 months is a Form S-3 eligibility requirement.

For certain shareholders to sell restricted securities (and for affiliates to sell any securities) pursuant to Securities Act Rule 144, the registrant must have filed the reports required by the Exchange Act during the 12 months preceding the sale. Therefore, as long as a required report remains unfiled, the issuer's stock may not be sold by these individuals pursuant to Rule 144.

## 8.3 Rule 12b-25 and Form 12b-25

If it cannot file all or any required portion of Form 10-K within the prescribed time period, the registrant must notify the SEC on Form 12b-25.<sup>2</sup> The Form 12b-25 is intended to serve as a disclosure mechanism and is broadly available via EDGAR. Thus, disclosure is available to the public regarding the reasons that a periodic report or portion thereof has not been filed on time.

In certain circumstances, a registrant may file Form 10-K up to 15 days late and still not suffer the potential consequences of a late filing. A specific relief provision of Rule 12b-25 provides that the SEC will deem a late Form 10-K to have been filed timely if *all* of the following conditions are met:

- ▶ A properly filed notification on Form 12b-25 discloses that filing timely would have caused unreasonable effort or expense and the registrant undertakes that the Form 10-K, or the delinquent portion thereof, will be filed no later than the fifteenth calendar day following the original due date (fifth calendar day for Form 10-Q).
- ▶ The registrant attaches, where applicable, a statement from any person other than the registrant (e.g., actuary, engineer, independent auditor) whose inability to furnish a required opinion, report or certification, was the reason that the Form 10-K could not be filed on time.
- ▶ The Form 10-K, or the delinquent portion thereof, is then filed within the represented time period (see above).

The SEC staff has expressed concern that some companies may be using Form 12b-25 to delay disclosing financial difficulties. To deter such actions, the SEC staff has established a system to examine Forms 12b-25 as they are filed and review the registrant's related reports.

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<sup>1</sup> SEC Release No. 33-5196 dated 27 September 1971.

<sup>2</sup> In EDGAR, Form 12b-25 related to a Form 10-K filing is designated as the form type "NT 10-K."

Form 12b-25 is reproduced at the end of this Section. In addition to the requirements for the relief provision described above, the instructions for the form are summarized as follows:

- ▶ The form must be filed by registrants who are unable to file in a timely fashion: (1) all or any portion of an annual report, a quarterly report, transition report or distribution report required by Sections 13 or 15(d) of the Exchange Act or (2) all or any portion of an annual report, semi-annual report or transition report on Form N-SAR or N-CSR required by Sections 13 or 15(d) of the Exchange Act or Section 30 of the Investment Company Act of 1940.
- ▶ The form must be filed no later than one business day after the due date of the periodic report in question.
- ▶ The registrant must explain why it cannot file the report within the time required.<sup>3</sup>
- ▶ If the form is being filed for a portion of a report and the balance of the report was filed by the original due date, the registrant must disclose the portion(s) omitted. When the registrant amends the report to include the information previously omitted, the registrant must state in the upper right corner of the amendment: "The following items were the subject of a Form 12b-25 and are included herein." Then it must list the item numbers.

Like other Exchange Act filings, Form 12b-25 is subject to Exchange Act Rule 12b-20. That is, in addition to the required information, the report must contain any additional information necessary in the circumstances to make the required information not misleading. For example, at the 3 April 2009 CAQ SEC Regulations Committee meeting, the SEC staff stated that Form 12b-25 also might need to disclose any internal control issues that led to the inability to file the Form 10-K on time.

## 8.4

### Portions of Form 10-K due following the filing date

Rule 12b-25 specifically excludes: (1) schedules required by Article 12 of Regulation S-X that may be filed by amendment up to 30 days after the due date of the registrant's annual report on Form 10-K and (2) financial statements of significant unconsolidated subsidiaries and equity investees.<sup>4</sup> In addition, information called for in Part III of Form 10-K (Item 10, *Directors, Executive Officers and Corporate Governance*; Item 11, *Executive Compensation*; Item 12, *Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters*; Item 13, *Certain Relationships and Related Transactions, and Director Independence*; and Item 14, *Principal Accountant Fees and Services*) may be incorporated by reference from the registrant's definitive proxy statement filed within 120 days subsequent to year-end. If the proxy statement is not filed within the 120-day period, the information must be filed as part of Form 10-K, or as an amendment to Form 10-K not later than the end of the 120-day period.

The SEC staff expects registrants to comply with Rule 12b-25 when they are not able to file financial schedules, Part III information or financial statements of unconsolidated subsidiaries and equity investees within the applicable prescribed time period. In these cases, the 15-day relief provision of Rule 12b-25 is available when its conditions are met.

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<sup>3</sup> The SEC staff has expressed concerns with the quality of explanations provided. It often finds the explanations provided by registrants to be boilerplate.

<sup>4</sup> See Section 2 of this publication for a discussion of the filing deadlines for financial statements required under Rule 3-09 of Regulation S-X.

## 8.5 Involvement of independent auditors

Rule 12b-25(c) discusses the possible involvement of independent auditors with Form 12b-25:

“If paragraph (b) of this [rule] is applicable and the reason the subject report/portion thereof cannot be filed timely without unreasonable effort or expense relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the Form 12b-25 shall have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.”

It is important to distinguish between the responsibilities of the registrant and its independent auditors. The registrant must explain why the report cannot be filed; the independent auditors must explain why the audit cannot be completed *only* if that is the reason for the registrant's inability to make a timely filing. The following are examples of situations that a registrant would be required to explain in Form 12b-25, but which should *not* require a letter from the registrant's independent auditors:

- ▶ The preliminary results of the year-end physical inventory indicate a substantial shortage that is under investigation by the registrant.
- ▶ Year-end financial information for material foreign subsidiaries or branches has not been received.
- ▶ Certain accounting records were destroyed in a fire and are in the process of being reconstructed.

If a registrant is not able to complete its financial statements for any reason, the independent auditors obviously will not be able to complete their audit. In a Form 12b-25 filed under such circumstances, the registrant should explain the reasons for its inability to complete the financial statements. In most cases, it should not be necessary for the independent auditors to submit a statement because it is the registrant's inability to complete its financial statements, rather than the independent auditors' inability to complete the audit, that results in the late filing and requires Form 12b-25 to be filed. However, if the independent auditors' statement is given, it should explain that the audit could not be completed because of the registrant's inability to complete its financial statements including, if known, the registrant's reasons.

## 8.6 Complete and accurate statements

It is important that any notifications filed by the registrant and supporting statements by any other persons, including the registrant's independent auditors, be complete and accurate. Filing false or misleading information, including the reason(s) cited for the filing delay, would constitute a violation of Section 18 of the Exchange Act and could subject the registrant or such other person to civil liabilities, as well as criminal or administrative sanctions.

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**  
**WASHINGTON, D.C. 20549**  
**FORM 12b-25**

SEC File Number \_\_\_\_\_

**Notification Of Late Filing**

(Check One): ☐ Form 10-K ☐ Form 20-F ☐ Form 11-K  
☐ Form 10-Q ☐ Form 10-D ☐ Form N-SAR ☐ Form N-CSR  
 For Period Ended: \_\_\_\_\_

☐ Transition Report on Form 10-K ☐ Transition Report on Form 10-Q  
☐ Transition Report on Form 20-F ☐ Transition Report on Form N-SAR  
☐ Transition Report on Form 11-K  
 For the Transition Period Ended: \_\_\_\_\_

*Read instruction (on back page) before preparing form. Please print or type.*

**Nothing in this form shall be construed to imply that the Commission has verified any information contained herein.**

If the notification relates to a portion of the filing checked above, identify the Item(s) to which the notification relates: \_\_\_\_\_

**Part I – Registrant Information**

\_\_\_\_\_  
 Full Name of Registrant

\_\_\_\_\_  
 Former Name if Applicable

\_\_\_\_\_  
 Address of Principal Executive Office (Street and number)

\_\_\_\_\_  
 City, State and Zip Code

**Part II – Rules 12b-25 (b) and (c)**

If the subject report could not be filed without unreasonable effort or expense and the registrant seeks relief pursuant to Rule 12b-25(b), the following should be completed. (Check box if appropriate)

- |                          |   |
|--------------------------|---|
| <input type="checkbox"/> | <p>(a) The reason described in reasonable detail in Part III of this form could not be eliminated without unreasonable effort or expense</p> <p>(b) The subject annual report, semi-annual report, transition report on Form 10-K, Form 20-F, Form 11-K, Form N-SAR, or Form N-CSR, or portion thereof, will be filed on or before fifteenth calendar day following the prescribed due date; or the subject quarterly report or transition report on Form 10-Q or subject distribution report on Form 10-D, or portion thereof, will be filed on or before the fifth calendar day following the prescribed due date; and</p> <p>(c) The accountant's statement or other exhibit required by Rule 12b-25(c) has been attached if applicable.</p> |
|--------------------------|---|

**Part III – Narrative**

State below in reasonable detail the reasons why Forms 10-K, 20-F, 11-K, 10-Q, 10-D, N-SAR, N-CSR, or the transition report or portion thereof, could not be filed within the prescribed time period. (Attach extra Sheets if Needed.)

**Part IV – Other Information**

(1) Name and telephone number of person to contact in regard to this notification

(Name)

(Area code) (Telephone number)

(2) Have all other periodic reports required under Section 13 or 15(d) of the Securities Exchange Act of 1934 or Section 30 of the Investment Company Act of 1940 during the preceding 12 months or for such shorter period that the registrant was required to file such report(s) been filed? If the answer is no, identify report(s).

[ ] Yes [ ] No

(3) Is it anticipated that any significant change in results of operations from the corresponding period for the last fiscal year will be reflected by the earnings statements to be included in the subject report or portion thereof?

[ ] Yes [ ] No

If so, attach an explanation of the anticipated change, both narratively and quantitatively, and, if appropriate, state the reasons why a reasonable estimate of the results cannot be made.

(Name of Registrant as Specified in Charter)

has caused this notification to be signed on its behalf by the undersigned hereunto duly authorized.

Date \_\_\_\_\_ By \_\_\_\_\_

INSTRUCTION: The form may be signed by an executive officer of the registrant or by any other duly authorized representative. The name and title of the person signing the form shall be typed or printed beneath the signature. If the statement is signed on behalf of the registrant by an authorized representative (other than an executive officer), evidence of the representative's authority to sign on behalf of the registrant shall be filed with the form.

**ATTENTION**

Intentional misstatements or omissions of fact constitute Federal Criminal Violations  
(see 18 U.S.C. 1001).

**GENERAL INSTRUCTIONS**

1. This form is required by Rule 12b-25 (17 CFR 240.12b-25) of the General Rules and Regulations under the Securities Exchange Act of 1934.
2. One signed original and four conformed copies of this form and amendments thereto must be completed and filed with the Securities and Exchange Commission, Washington, D.C. 20549, in accordance with Rule 0-3 of the General Rules and Regulations under the Act. The information contained in or filed with the form will be made a matter of the public record in the Commission files.
3. A manually signed copy of the form and amendments thereto shall be filed with each national securities exchange on which any class of securities of the registrant is registered.
4. Amendments to the notifications must also be filed on Form 12b-25 but need not restate information that has been correctly furnished. The form shall be clearly identified as an amended notification.
5. *Electronic Filers:* This form shall not be used by electronic filers unable to timely file a report solely due to electronic difficulties. Filers unable to submit reports within the time period prescribed due to difficulties in electronic filing should comply with either Rule 201 or Rule 202 of Regulation S-T (§ 232.201 or § 232.202 of this chapter) or apply for an adjustment in filing date pursuant to Rule 13(b) of Regulation S-T (§ 232.13(b) of this chapter).
6. *Interactive data submissions.* This form shall not be used by electronic filers with respect to the submission or posting of an Interactive Data File (§232.11 of this chapter). Electronic filers unable to submit or post an Interactive Data File within the time period prescribed should comply with either Rule 201 or 202 of Regulation S-T (§232.201 and §232.202 of this chapter).



# 9 Smaller reporting companies

## 9.1 Smaller reporting company rules

In December 2007, the SEC published its final rule, *Smaller Reporting Company Regulatory Relief and Simplification*, which allows a “smaller reporting company,” an issuer with public float of less than \$75 million (or less than \$50 million in revenue in the case of companies without publicly traded equity), to use the scaled (generally reduced) disclosure and reporting requirements previously set forth in Regulation S-B, which have been integrated into Regulation S-K. The final rule eliminated the special registration and reporting forms for small businesses. Smaller reporting companies must file their annual report using Form 10-K.

A smaller reporting company may choose, on an item-by-item basis within any filing, whether to apply Regulation S-K’s scaled disclosure requirements or its more rigorous disclosure requirements otherwise applicable to larger public companies. Nevertheless, the SEC stressed in the adopting release the importance of consistent disclosures that allow investors to make period-to-period comparisons, whether quarterly or annually.

## 9.2 Definition of a “smaller reporting company”

As defined in Regulation S-K [Item 10(f)(1)], a smaller reporting company is an issuer, excluding an investment company, an asset-backed issuer, or a majority-owned subsidiary whose parent is not a smaller reporting company, that meets the applicable condition:

- ▶ For an SEC reporting company, less than \$75 million of worldwide public float as of the last business day of its most recently completed second fiscal quarter (i.e., the amount disclosed on the cover page of Form 10-K that also is used to determine whether the issuer is an accelerated filer)
- ▶ For an issuer filing its IPO of common equity, less than \$75 million of worldwide public float (calculated within 30 days of its filing using the estimated IPO price and the aggregate number of shares held by non-affiliates and the number of shares being offered)
- ▶ For an issuer without publicly traded equity and hence no public float (e.g., a company with only public debt or preferred stock), annual revenues of less than \$50 million during its most recently completed fiscal year for which audited financial statements are available

An issuer must check a box on the cover page of its SEC filings indicating whether it meets the definition of a smaller reporting company and whether it chooses to apply the scaled disclosure standards.

Any foreign private issuer (FPI) is eligible to qualify as a smaller reporting company. However, to take advantage of the disclosure relief as a smaller reporting company, an FPI must use domestic forms (e.g., Form 10-K, not Form 20-F), and it must file financial statements prepared using US GAAP.

An issuer must determine whether it is a smaller reporting company on an annual basis as of the beginning of its fiscal year, subject to the following:

## 9.2.1 Exit provisions

- ▶ An issuer with publicly traded equity must cease providing smaller reporting company scaled disclosure in the first quarter **following** a fiscal year in which its public float exceeds \$75 million as of the end of its second fiscal quarter.
- ▶ An issuer without publicly traded equity should cease providing smaller reporting company scaled disclosure in the fiscal year **following** a fiscal year in which its annual revenue exceeds \$50 million.

## 9.2.2 Entry provisions

- ▶ An issuer with publicly traded equity would **immediately** qualify for smaller reporting company disclosure when its public float is less than \$50 million as of the end of its second fiscal quarter (i.e., the second quarter Form 10-Q).
- ▶ An issuer without publicly traded equity will qualify for smaller reporting company disclosure in the fiscal year **following** a fiscal year in which its annual revenue falls below \$40 million.

## 9.3 Form 10-K filing by a smaller reporting company

The Form 10-K of a smaller reporting company is due 90 days after the end of its fiscal year. All smaller reporting companies are non-accelerated filers.

### 9.3.1 Content

The following table shows the item number, caption and location of the disclosure instructions for the various items of a Form 10-K filed by a smaller reporting company. Items that are not applicable in their entirety are noted parenthetically as “Not applicable.” Otherwise, the parenthetical notations refer to the source of the disclosure instructions. Asterisks denote disclosure requirements that are different for a smaller reporting company.

Item No.	Disclosure Required
<b>Part I</b>	
Item 1	Business (Item 101)*
Item 1A	Risk Factors (Not applicable)
Item 1B	Unresolved Staff Comments (Not applicable)
Item 2	Properties (Item 102)
Item 3	Legal Proceedings (Item 103)
Item 4	Mine Safety Disclosures (Item 104)
<b>Part II</b>	
Item 5	Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities (Items 201, 701 and 703)*†
Item 6	Selected Financial Data (Not applicable)
Item 7	Management’s Discussion and Analysis of Financial Condition and Results of Operations (Item 303)*
Item 7A	Quantitative and Qualitative Disclosures About Market Risk (Not applicable)
Item 8	Financial Statements and Supplementary Data (Item 302 – The financial statements are subject to Article 8 of Regulation S-X)*
Item 9	Changes in and Disagreements with Accountants on Accounting and Financial Disclosure (Item 304(b))
Item 9A	Controls and Procedures (Items 307 and 308)
Item 9B	Other Information (The disclosure requirements refer to Form 8-K)

Item No.	Disclosure Required
<b>Part III</b>	
Item 10	Directors, Executive Officers and Corporate Governance (Items 401, 405, 406 and 407(c)(3), (d)(4) and (d)(5))*
Item 11	Executive Compensation (Items 402 and 407(e)(4) and (e)(5))*
Item 12	Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters (Items 201(d) and 403)†
Item 13	Certain Relationships and Related Transactions, and Director Independence (Items 404 and 407(a))*
Item 14	Principal Accountant Fees and Services (Item 9(e) of Schedule 14A)
<b>Part IV</b>	
Item 15	Exhibits, Financial Statement Schedules (Item 601 – The financial statements are subject to the provisions of Article 8 of Regulation S-X; Financial schedules are not required)*

\* Disclosure requirement is different for a smaller reporting company.

† The SEC staff has indicated that the requirements under Item 201(d) of Regulation S-K to provide a tabular presentation of securities authorized for issuance under equity compensation plans only should be included in response to Item 12 of Part III of Form 10-K.

The following is a list of the item requirements in Regulation S-K and Regulation S-X for which there are different disclosure requirements for smaller reporting companies:

## 9.3.2

### Item 101. Description of business

Item 101(h) of Regulation S-K describes the disclosure requirements for a smaller reporting company. In Form 10-K, a smaller reporting company is required to describe only business developments during the most recent year covered by the report.<sup>1</sup>

This business development description must include:

- ▶ Form and year of organization
- ▶ Any bankruptcy, receivership or similar proceeding
- ▶ Any material reclassification, merger, consolidation or purchase or sale of a significant amount of assets not in the ordinary course of business

A smaller reporting company also must briefly describe its business, including the following to the extent material to an understanding of its business:

- ▶ Principal products or services and their markets
- ▶ Distribution methods of the products or services
- ▶ Status of any publicly announced new product or service
- ▶ Competitive business conditions, its competitive position in the industry and methods of competition
- ▶ Sources and availability of raw materials, and the names of principal suppliers
- ▶ Dependence on one or a few major customers

<sup>1</sup> In a registration statement, a smaller reporting company is required to describe the development of its business only during the last three years. Other issuers are required to describe the development of their business during the last five years.

- ▶ Patents, trademarks, licenses, franchises, concessions, royalty agreements or labor contracts (including their duration)
- ▶ Need for any government approval of principal products or services, and if pending, the status of the government approval process
- ▶ Effect of existing or probable governmental regulations
- ▶ Estimate of the amount spent during each of the last two fiscal years on research and development activities, and the extent to which those costs are borne directly by customers
- ▶ Costs and effects of compliance with environmental laws (federal, state and local)
- ▶ Number of total employees and number of full-time employees

Although Item 101(h) of Regulation S-K does not specifically require any supplemental disclosures about reportable segments, a smaller reporting company still must provide the disclosures required by ASC 280 for the two years of financial statements presented.

An FPI complying with the smaller reporting company disclosures must provide disclosure about enforceability of civil liability against foreign persons (as set forth in Item 101(g) of Regulation S-K).

### 9.3.3 **Item 201. Common equity and related stockholder matters**

A smaller reporting company is not required to furnish a stock performance graph (Item 201(e) of Regulation S-K, which is discussed further in Section 4 of this publication).

### 9.3.4 **Item 301. Selected financial data**

A smaller reporting company is not required to file selected financial data (otherwise required as discussed further in Section 4 of this publication).

### 9.3.5 **Item 302. Supplementary financial information**

A smaller reporting company is not required to file selected quarterly financial data (otherwise required as discussed further in Section 4 of this publication).

Although S-K Item 302 exempts a smaller reporting company from its requirements for additional disclosures about oil and gas producing activities, a smaller reporting company engaged in oil and gas producing activities still must provide the disclosures required by Regulation S-K Subpart 1200, *Disclosure by Registrants Engaged in Oil and Gas Producing Activities*, under instruction of S-K Item 102, and under S-X 8-01, it must follow the accounting and reporting standards specified in S-X 4-10. Thus, a smaller reporting company still must provide the disclosures otherwise required by ASC 932.

### 9.3.6 **Item 303. MD&A**

The MD&A requirements discussed further in Section 5 of this publication also apply to a smaller reporting company, except:

- ▶ A smaller reporting company must provide only two years of analysis if it presents only two years of financial statements.
- ▶ A smaller reporting company is not required to provide tabular disclosure of contractual obligations.

Unlike former Regulation S-B, Item 303 of Regulation S-K does not provide for the discussion of a “Plan of Operation” in lieu of MD&A, if an issuer has not had revenue from operations in each of the last two fiscal years. The SEC staff noted in Question 110.01 of its Regulation S-K Compliance and Disclosure Implications (C&DIs)<sup>2</sup> that while a smaller reporting company can no longer provide a “Plan of Operation,” MD&A disclosure of a company without recent revenues is likely similar to the disclosure previously required of a small business issuer under Item 303(a) of former Regulation S-B.

### 9.3.7 **Item 305. Market risk disclosures**

A smaller reporting company is not required to file the quantitative and qualitative disclosures about market risk (otherwise required as discussed further in Section 5 of this publication).

### 9.3.8 **Item 402. Executive compensation**

Items 402(l) through 402(r) of Regulation S-K set forth the disclosure requirements applicable to a smaller reporting company. In addition, Item 402(s) was effective 28 February 2010 for narrative disclosure of a registrant’s compensation policies and practices as they relate to the registrant’s risk management.

A smaller reporting company must provide only the following compensation-related tables along with related narrative disclosures (with requirements virtually identical to those for larger issuers, but with slightly modified reporting thresholds in some cases):

- ▶ The Summary Compensation table (SCT)
- ▶ The Outstanding Equity Awards at Fiscal Year-End table
- ▶ The Director Compensation table (DCT)

Note that a smaller reporting company’s SCT is required to provide information only for the last two fiscal years (compared with three years for larger issuers), and requires disclosure for only the Principal Executive Officer (PEO) and the two most highly compensated executive officers other than the PEO (compared with the PEO, the Principal Financial Officer and the other three most highly compensated executive officers for larger issuers. See our publication, *Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339), for further discussion of these requirements).

Item 402(q) of Regulation S-K also requires a narrative description of (1) the material terms of each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement and (2) the material terms of each contract, agreement, plan or arrangement that provides for payments to a named executive officer (NEO) at or following the resignation, retirement or other termination of the NEO, or a change in control of the registrant or a change in the NEO’s responsibilities following a change in control.

Smaller reporting companies are *not* required to provide several of the elements of the executive compensation disclosures required of larger issuers including: the Compensation Committee Report (CCR), Compensation Discussion and Analysis (CD&A), the Grants of Plan-Based Awards table, the Option Exercises and Stock Vested table, the Pension Benefits table and the Nonqualified Deferred Compensation table.

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<sup>2</sup> The SEC staff Regulation S-K C&DI’s can be found at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

### 9.3.9 Item 404. Transactions with related persons

Item 404(d) of Regulation S-K sets forth the disclosure requirements applicable to a smaller reporting company. Item 404 is currently the only instance where Regulation S-K specifies more rigorous disclosures for a smaller reporting company than for a larger issuer. In these circumstances, a smaller reporting company must comply with the more rigorous smaller reporting company disclosure requirement. See our publication, *Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339), for a more complete discussion of the disclosure requirements of Item 404 of Regulation S-K.

The following summarizes the requirements of Item 404 of Regulation S-K for a smaller reporting company:

- ▶ Item 404(a): A smaller reporting company must disclose transactions with related persons that exceed the lesser of \$120,000 or 1% of its average of total assets for the last two completed fiscal years (compared with a single \$120,000 disclosure threshold for larger issuers).
- ▶ Item 404(b): A smaller reporting company is not required to disclose policies and procedures for reviewing related person transactions, which is required of larger issuers.
- ▶ Item 404(c): Any issuer, including a smaller reporting company, must provide specified disclosures about promoters and certain control persons when filing a Form S-1 or Form 10.
- ▶ Item 404(d): A smaller reporting company must provide specific information about underwriting discounts and commissions, and corporate parents, which is not otherwise required of larger issuers.

### 9.3.10 Item 407. Corporate governance

Item 407(g) of Regulation S-K describes the scaled disclosure requirements for a smaller reporting company. See our publication, *Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339), for a more complete discussion of the disclosure requirements of Item 407 of Regulation S-K.

Item 407(g) of Regulation S-K provides the following disclosure relief to a smaller reporting company:

- ▶ A smaller reporting company is not required to provide disclosure about “Compensation Committee Interlocks and Insider Participation.”
- ▶ A smaller reporting company is not required to provide a Compensation Committee Report.
- ▶ A smaller reporting company is not required to provide disclosure about whether it has an audit committee financial expert until its first annual report after the effective date of its initial registration statement.

### 9.3.11 Item 503. Risk factors and ratio of earnings to fixed charges

The instructions to Item 1A of Form 10-K specifically exempt smaller reporting companies from the requirement to disclose risk factors as discussed in Item 503(c) of Regulation S-K.

In addition, a smaller reporting company is not required to disclose a ratio of earnings (and preference dividends) to fixed charges in connection with the registration of debt (or preferred stock).

### 9.3.12 Article 8 of Regulation S-X – Financial statements of smaller reporting companies

Article 8 of Regulation S-X describes the financial statement requirements for smaller reporting companies. Article 8 requires an audited balance sheet as of the end of the two most recent fiscal years (versus one balance sheet formerly required under Regulation S-B) and audited statements of income, comprehensive income, if applicable, cash flows and changes in stockholders' equity and noncontrolling interests for the two most recent fiscal years (versus three fiscal years for larger issuers). The financial statements of a smaller reporting company must be prepared in accordance with US GAAP.

Otherwise, the remainder of Regulation S-X, *Form and Content of and Requirements for Financial Statements*, does not apply to the financial statements of smaller reporting companies, except that a smaller reporting company must comply with:

- ▶ Article 2 regarding the report and qualifications of the independent auditor
- ▶ Rule 4-08(n) regarding the disclosure of accounting policies for certain derivative instruments
- ▶ Rule 4-10 regarding the accounting and reporting for oil and gas producing activities
- ▶ Rule 3-10 regarding guarantor financial statements (except that any required disclosures are limited to two years)
- ▶ Rule 3-16 regarding financial statements of affiliates whose securities collateralize the registrant's securities (except that any required audited financial statements are limited to two years)

Thus, smaller reporting companies are not required to provide separate financial statements of significant equity method investees. However, if the registrant concludes that such information is material to investors, equity method investee financial statements should be provided.

In addition, smaller reporting companies are also not required to provide financial statement schedules. As outlined above, smaller reporting companies are not subject to the reporting requirements of Rule 5-04 of Regulation S-X (regarding the requirement to provide Schedule I) or the related disclosure requirements in Rule 4-08(e) of Regulation S-X. However, when the restricted net assets of a smaller reporting company's consolidated subsidiaries represent a significant portion of consolidated net assets as of the company's year-end, in order to ensure an understanding of the smaller reporting company's liquidity position, the smaller reporting company should consider including disclosures within MD&A similar to the parent company condensed financial information specified by Rules 5-04 and 4-08(e) of Regulation S-X (e.g., the amount and a description of the nature of the restrictions on the net assets of the consolidated subsidiaries).

# 10 Annual shareholders' report, Part III and proxy statement, and example Form 10-K

## 10.1 Annual shareholders' report

The SEC encourages, but does not require, the incorporation by reference of portions of the annual shareholders' report into Form 10-K. Regulation S-K contains the uniform requirements for most of the information other than financial statements required in various SEC forms and annual shareholders' reports. Some Regulation S-K items, or portions thereof, are required in both the annual shareholders' report and Form 10-K. In addition, financial statements for both documents must comply with Regulation S-X.

Annual shareholders' reports of companies registered under Sections 12(b) or 12(g) of the Exchange Act are required to comply with the SEC proxy rules (Rule 14a-3 of the Exchange Act) and must include the following:<sup>1</sup>

- ▶ Consolidated financial statements – Audited balance sheets for each of the two most recent fiscal years and statements of income, comprehensive income (if applicable) and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S-X. Financial schedules, exhibits and separate financial statements (e.g., significant investees) may be omitted from the annual shareholders' report.
- ▶ Supplementary financial information – Item 302 of Regulation S-K – two years of quarterly information and information about oil and gas producing activities
- ▶ Changes in and disagreements with accountants on accounting and financial disclosure – Item 304(b) of Regulation S-K (if applicable, the required disclosures are the same as for Form 10-K – see Section 4 of this publication)
- ▶ Selected financial data – Item 301 of Regulation S-K
- ▶ MD&A of financial condition and results of operations – Item 303 of Regulation S-K.
- ▶ Quantitative and qualitative disclosures about market risk – Item 305 of Regulation S-K
- ▶ A brief description of the general nature and scope of the business done by the registrant and its subsidiaries for the latest fiscal year
- ▶ Segment information – Item 101 of Regulation S-K, paragraphs (b), (c)(1)(i) and (d). (These disclosures generally are satisfied by the ASC 280 segment disclosures in the notes to the financial statements. However, the rules also require disclosure about (1) the principal markets or methods of distribution of each segment's principal products and services, (2) the risks attendant to foreign operations and any segment's dependence on foreign operations and (3) quantitative disclosure of revenues from classes of "similar products or services.")

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<sup>1</sup> Companies reporting under Section 15(d) of the 1934 Act are required to file on Form 10-K but are not required to file an annual shareholders' report that complies with the SEC's proxy rules. See Section 2 of this publication for further discussion.



- ▶ Director and executive officer information – Name, principal occupation or employment and name of employer and its principal business
- ▶ Market price of and dividends on the issuer's common equity and related stockholder matters – Item 201(a), (b) & (c) of Regulation S-K (Note: The annual shareholders' report is not required to include the disclosures under Item 201(d) of securities authorized for issuance under equity compensation plans, which is required in Form 10-K.)
- ▶ Stock performance graph – Item 201(e) of Regulation S-K

The requirements in annual shareholders' reports for financial statements (except financial schedules, exhibits and separate financial statements), supplementary information, selected financial data, MD&A, market risk, market price of (and dividends on) common equity and related stockholder matters, and disagreements with prior independent auditors are identical to the related Form 10-K requirements. In addition, Form 10-K requirements for the description of business, including segment data, and the director and officer information include the related annual shareholders' report requirements.

A registrant is not required to incorporate portions of its annual shareholders' report into its Form 10-K. If the financial statements in the annual shareholders' report are not incorporated by reference into Form 10-K, the SEC expects the financial statements in Form 10-K and the annual shareholders' report to be *identical*. Further, if there is no incorporation by reference, the other disclosures provided in those documents (market price of and dividends on common equity and related stockholder matters, supplementary financial information, selected financial data, MD&A, market risk disclosures, and disagreements with prior independent auditors) must be similar.

Section 404 reports are not required in annual shareholders' reports. However, if internal control over financial reporting is ineffective or the auditor has issued an adverse opinion on internal control over financial reporting (i.e., there are material weaknesses in internal control), the SEC staff has suggested that the issuer should consider whether the annual shareholders' report should include the Section 404 reports in order to avoid a misleading presentation.

### 10.1.1

#### Stock performance graph

Item 201(e) of Regulation S-K requires registrants to provide a performance graph that compares the registrant's cumulative total shareholder return during the previous five years with a performance indicator of the overall stock market (i.e., a broad-based index), and the registrant's peer group. The disclosure is required only in a registrant's annual shareholders' report that precedes or accompanies a proxy or information statement relating to an annual meeting of security holders for the election of directors and will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant decides to specifically incorporate it by reference. The performance graph has the same legal status as the annual report to shareholders and is not deemed to constitute soliciting material or a "filed" document. Smaller reporting companies (see Section 9 – Smaller reporting companies) are not required to disclose a performance graph.

The peer group index should be either of the following:

- ▶ A published industry or line of business index
- ▶ Peer issuer(s) selected in good faith

If the registrant does not use a published industry or line of business index, and does not believe that it can reasonably identify industry peer issuers, it may use issuer(s) with similar market capitalization(s). If a registrant elects to construct its own peer group, the identity of the issuer(s) and the basis for its (their) selection must be disclosed. In addition, the returns of the component issuers making up the index must

be weighted according to their market capitalization. Cumulative total shareholder return is measured by dividing the change in the market value of the registrant's share price plus the cumulative amount of dividends, assuming dividend reinvestment, by the share price at the beginning of the measurement period. An index prepared by a trade group is considered an index prepared by an affiliate of the registrant. Under the rule, an index prepared by an affiliate of the registrant may be treated as a published index only if it is "widely recognized and used." Even if the index is made "accessible to the registrant's security holders," it may not meet this requirement. In most cases reviewed by the SEC staff, trade group indices did not satisfy this requirement, so constituent registrants had to be identified.

A registrant that is part of the Standard and Poor's 500 Index (S&P 500) must use that index as its broad-based equity market index. Registrants not part of the S&P 500 may use a different broad-based equity market index that includes companies that trade on the same stock exchanges or are of comparable market capitalization. Examples of other indices include the AMEX Composite, Russell 2000 and the Dow Jones Wilshire 5000 Total Stock Market Index. Certain published indices may be based solely on price, not total shareholder return (i.e., the index may not reflect the assumed reinvestment of dividends); therefore, such indices would require adjustments, which may be difficult, to comply with the SEC's requirement.

The total shareholder returns must be shown for a five-year period measured from a fixed point (measurement point) assuming a fixed investment. The measurement point is defined at the close of trading on the last trading date preceding the first day of the fifth preceding fiscal year. The registrant may present a graph that exceeds five years; however, the measurement point remains the same.

The SEC staff has responded to a number of implementation questions concerning the performance graph. The interpretive guidance follows:

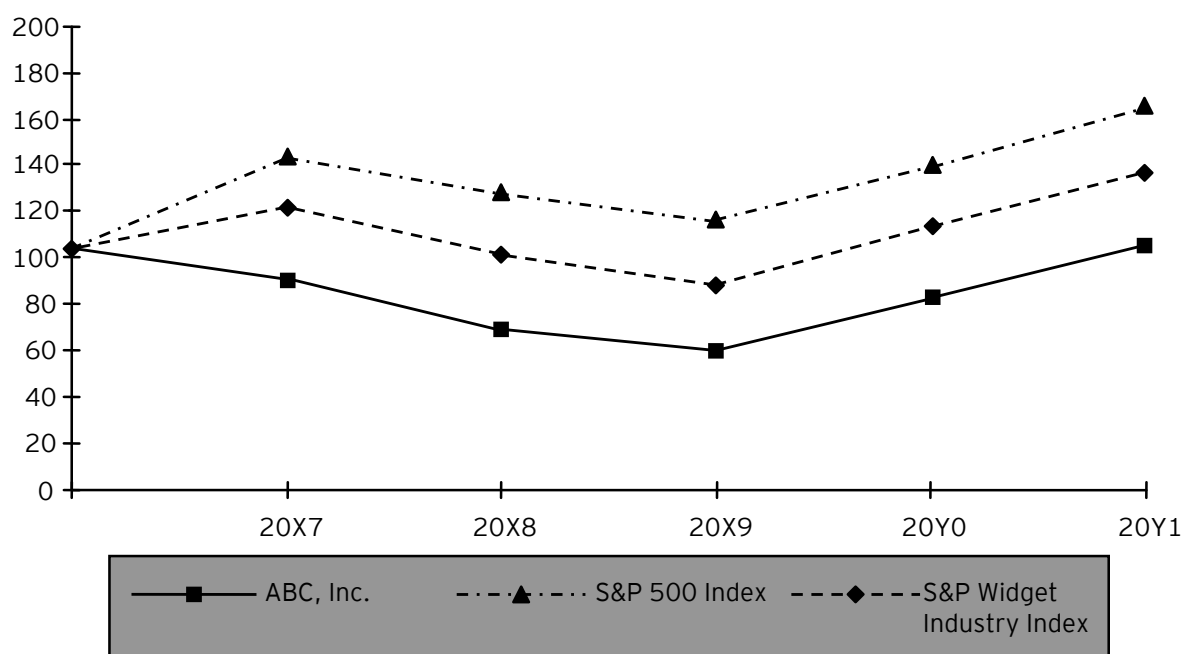
- ▶ A registrant may plot monthly or quarterly returns provided that each return is plotted at the same interval, and the annual changes in cumulative total return must be reflected clearly.
- ▶ In calculating the measurement point, a registrant should weight the stock prices of the issuers in a self-constructed peer or market capitalization index in accordance with the market capitalization for such issuers as of that date. The returns of the component issuers should be weighted according to their market capitalization as of the beginning of each period for which a return is indicated.
- ▶ A change to a self-constructed peer or market capitalization index generally is equivalent to a change in the index used, which requires disclosure of the reason for the change along with presentation (in the year of the change) of both the old and new indices. Presentation on the old basis is not required if the information omitted is the result of application of pre-established objective criteria to the composition of the index or, in the case of a self-constructed peer index, the registrant is no longer in the same industry or line of business. In these cases, a specific description of, and the bases for, the change must be disclosed, including the name of the entity or entities removed from the index.
- ▶ A self-constructed peer or market capitalization index may, but is not required to, exclude the registrant.
- ▶ In place of data for the last trading day of a given fiscal year, a registrant may use data for the last day in that year made available by a third-party index provider.
- ▶ A registrant created by a spin off may begin its performance graph presentation on the effective date of the registration of its common stock under Section 12 of the Exchange Act. Similarly, following an initial public offering, a registrant may begin its performance graph as of that date.
- ▶ A registrant that spins off a portion of its business should treat that transaction as a special dividend, make the appropriate adjustments to its shareholder return data and disclose the occurrence of the transaction and resultant adjustments. However, the SEC staff has not provided any additional guidance regarding what would be considered "appropriate adjustments."

- ▶ The presentation of the registrant's performance graph does not change as a result of a merger or other acquisition involving the registrant, if the registrant remains in existence and its common stock remains outstanding.
- ▶ A registrant with several distinct lines of business may construct a composite peer group index composed of registrants from different industry groups, representing each of the registrant's lines of business (with the component registrants weighted by revenues or assets of the reporting company's lines of business). Alternatively, the registrant may plot a separate peer index line for each of its lines of business. In both instances, the basis and the relative importance given to each line of business should be disclosed.

Registrants that are considering constructing a peer group index should consider the complexities involved. In addition to the difficulties of selecting an appropriate group of peer issuers, registrants might be subject to greater SEC scrutiny than if a published industry index were used. Further, it might be difficult to evaluate whether the selected group of peer issuers will continue to provide an appropriate comparison in future years, which might result in the need to make adjustments to the issuers included in the peer group. Such adjustments would require disclosure in addition to presentation on the basis of both the old and new indices.

#### Illustration 10-1: Performance graph

The following graph sets forth the cumulative total shareholder return (assuming reinvestment of dividends) to ABC, Inc.'s shareholders during the five-year period ended 31 December 20Y1, as well as the corresponding returns on an overall stock market index (S&P 500 Index) and ABC Inc.'s peer group index (S&P Widget Industry Index):



The stock performance graph assumes \$100 was invested on 31 December 20X6.

## 10.2 Part III of Form 10-K

Regulation S-K contains the rules for disclosure of information required in Part III of Form 10-K, including:

Item 201(d)	Securities Authorized for Issuance under Equity Compensation Plans
Item 401	Directors, Executive Officers, Promoters and Control Persons
Item 402	Executive Compensation
Item 403	Security Ownership of Certain Beneficial Owners and Management
Item 404	Transactions with Related Persons, Promoters and Certain Control Persons
Item 405	Compliance With Section 16(a) of the Exchange Act
Item 406	Code of Ethics
Item 407	Corporate Governance

In addition, Item 14, *Principal Accountant Fees and Services*, in Part III of Form 10-K requires disclosure identical to that required by Item 9(e) of Schedule 14A (the proxy statement).

## 10.3 Incorporation by reference of proxy material

General Instruction G provides that information called for by Part III of Form 10-K (Items 10, 11, 12, 13 and 14) may be incorporated by reference from the registrant's definitive proxy or information statement *if* the proxy or information statement is filed with the SEC no later than 120 days after the fiscal year-end. However, if the information called for by these items cannot be incorporated by reference, it must be included within Form 10-K when filed or included by amendment on Form 10-K/A no later than 120 days after the fiscal year-end.

*Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339) summarizes the requirements of Regulation 14A and Schedule 14A under the Exchange Act for soliciting annual meeting proxies. This publication includes an overview of many of the disclosures required in Part III of Form 10-K.

There are four exceptions to the general rule that Part III Item 10 information will be identical to, and generally incorporated by reference from, the annual meeting proxy statement. These exceptions are discussed further below.

### 10.3.1 Item 10. Executive officers

General Instruction G(3) provides that information required by Item 10 of Form 10-K (Item 401 of Regulation S-K) for *executive officers* may be included in Part I of Form 10-K under an appropriate caption. If this is done, this information need not be included in the proxy or information statement.

### 10.3.2 Item 10. Audit committee financial experts

The disclosures about audit committee financial experts (Item 407(d)(5) of Regulation S-K) must be provided in response to Item 10 of Form 10-K, but an instruction to Item 407(d)(5) specifically states that the disclosures may be omitted from the proxy or information statement. Nevertheless, if the company elects to provide the disclosures about audit committee financial experts in its proxy statement, it also may incorporate them by reference into the Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end. Otherwise, the disclosures about audit committee financial experts must be included in the Form 10-K.

Item 407(d)(5) requires a public company to disclose whether its board of directors has determined that the company has at least one financial expert (as defined) on its audit committee. If so, the company also must disclose the name of its audit committee financial expert and whether that person is independent. If

the audit committee does not have such an expert, the company is required to explain why not. If the company has more than one audit committee financial expert, it may, but is not required to, disclose the names of any additional audit committee financial experts and whether the person(s) is (are) independent.

If the board of directors determines that a person qualifies as an audit committee expert because of "other relevant experience," the company must briefly describe that person's relevant experience. The SEC staff believes "other relevant experience" cannot be satisfied merely by education.

For a more detailed discussion of the SEC definition of an "audit committee financial expert," see our publication, *SEC Issues Final Disclosure Rules: Code of Ethics & Audit Committee Financial Experts* (Ernst & Young No. CC0170).

### 10.3.3

## Item 10. Code of ethics

The disclosures about the issuer's code of ethics (Item 406 of Regulation S-K) must be provided in response to Item 10 of Form 10-K, but the proxy or information statement is not required to provide those disclosures. Nevertheless, if the company elects to provide the disclosures about its code of ethics in its proxy statement, it also may incorporate them by reference into the Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end. Otherwise, the disclosures about the code of ethics must be included in the Form 10-K.

Item 406 of Regulation S-K requires an issuer to disclose whether it has adopted a code of ethics (as defined) that covers its principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions. If so, the issuer must make its code of ethics publicly available by one of the following means: filing the code of ethics as an exhibit to its Form 10-K, posting the code of ethics on its website, provided the Form 10-K disclosed that intention and the website address or by providing disclosure in its Form 10-K that a copy of the code is available without charge upon written request. If the issuer has not adopted a code of ethics, it is required to disclose why it has not done so.

Once a company files its first annual report with the required disclosures, it is required to file Form 8-K to report significant amendments to its code of ethics, or any waivers, affecting the specified officers.

#### **Illustration 10-2: Code of ethics (included under Item 10 of Form 10-K)**

The Company has adopted a code of ethics that applies to all of its directors, officers (including its chief executive officer, chief financial officer, chief accounting officer, controller and any person performing similar functions) and employees. The Company has filed a copy of this Code of Ethics as Exhibit XX to this Form 10-K. The Company also has made the Code of Ethics available on its website at [www.companyethicsexample.com](http://www.companyethicsexample.com).

For a more detailed discussion of the SEC definition of a "code of ethics," see our publication, *SEC Issues Final Disclosure Rules: Code of Ethics & Audit Committee Financial Experts* (Ernst & Young No. CC0170).

### 10.3.4 **Item 10. Shareholder nominating procedures**

The disclosures about material changes, during the fourth fiscal quarter, to the procedures disclosed in the most recent proxy statement for security holders to recommend a director candidate (Item 407(c)(3) of Regulation S-K) must be provided in response to Item 10 of Form 10-K, but Item 407(c)(3) specifically states that the disclosures may be omitted from the proxy or information statement. Nevertheless, if the company elects to provide the disclosures about such changes in its proxy statement, it also may incorporate them by reference into the Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end. Otherwise, the disclosures about such changes must be included in the Form 10-K.

Item 407(c)(3) requires a public company to disclose any material changes to the procedures disclosed in the most recent proxy statement for security holders to recommend a director candidate. A company is required to report any material change in its periodic Exchange Act report for the period that the material change occurs (i.e., the company's quarterly report on Form 10-Q or, for changes that occur during the fourth fiscal quarter, the company's annual report on Form 10-K). A material change requiring disclosure would include the adoption of procedures by which security holders may recommend a nominee if the company disclosed in its last proxy statement that it did not have any such procedures.

### 10.3.5 **Item 12. Authorized equity compensation**

In addition to the four exceptions to Item 10 discussed above, the information required by Item 201(d) of Regulation S-K in response to Item 12 of Form 10-K is not required to be included in a proxy or information statement in all cases. The proxy or information statement is not required to provide this disclosure unless the registrant is submitting a compensation plan for shareholder action. Nevertheless, even if the registrant does not submit a compensation plan for shareholder action, a registrant that provides the information required under Item 201(d) in its proxy statement may incorporate the disclosure by reference into Item 12 of Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end. Otherwise, the Form 10-K must include the disclosure upon filing or by amendment within 120 days of the fiscal year-end.

The Form 10-K instructions indicate that the disclosures required under Item 201(d) of Regulation S-K must be provided in response to both Item 5 and Item 12. However, the SEC staff has indicated that the disclosures required under Item 201(d) only should be included in response to Item 12 of Part III of Form 10-K. See our publication, *Proxy statements – An overview of the requirements* (Ernst & Young No. CC0339), for a further discussion of the requirements of Item 201(d) of Regulation S-K.

## 10.4 **Example Form 10-K**

The following Section provides an example Form 10-K in which segment information, common stock market prices and dividends, selected financial data, MD&A (including market risk disclosures), consolidated financial statements and quarterly results of operations have been incorporated by reference from the annual shareholders' report. In addition, director and executive officer information (including code of ethics, audit committee and audit committee financial experts), executive compensation, security ownership of certain beneficial owners and management, certain relationships and related transactions and principal accountant fees and services have been incorporated by reference from the Proxy Statement. Rule 12b-23, *Incorporation by Reference*, is discussed in Section 2 of this publication. It should be read in connection with preparing a Form 10-K that incorporates information by reference.

Shading is used in the following example to highlight explanatory comments.

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**FORM 10-K**

**[X] Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

For the fiscal year ended December 31, 20Y1

or

**[ ] Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

For the transition period from \_\_\_\_ to \_\_\_\_

Commission file number 0-0000

ABC, INC.

(Exact name of registrant as specified in its charter)

State

(State or other jurisdiction of incorporation or organization)

00-0000000

(I.R.S. Employer Identification No.)

ABC Building

(Address of principal executive offices)

00000

(Zip Code)

Registrant's telephone number, including area code 000-000-0000

Securities registered pursuant to Section 12(b) of the Act:

Title of each class

Name of each exchange on which registered:

Common Stock, \$1 Par Value

New York Stock Exchange

Securities registered pursuant to section 12(g) of the Act:

7% Convertible Sinking Fund Debentures due 20Y4

(Title of class)

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

Yes ☐ No ☒.

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.

Yes ☐ No ☒.

**Note** – Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Exchange Act from their obligations under those Sections.

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes ☒ No ☐.

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files).<sup>2</sup>

Yes ☐ No ☐.

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☐ Accelerated filer ☒

Non-accelerated filer (Do not check if a smaller reporting company) ☐ Smaller reporting company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act).

Yes ☐ No ☒

The aggregate market value of voting and non-voting common stock held by non-affiliates of the registrant as of June 30, 20Y1 was \$267,500,000. As of February 15, 20Y2, there were 3,000,000 shares of the Company's common stock (\$1 par value) outstanding.<sup>3</sup>

#### DOCUMENTS INCORPORATED BY REFERENCE

Portions of the annual shareholders' report for the year ended December 31, 20Y1 are incorporated by reference into Parts I and II. Portions of the proxy statement for the annual shareholders' meeting to be held April 15, 20Y2 are incorporated by reference into Part III.

<sup>2</sup> A company should not check either box until it is required to submit an XBRL exhibit (i.e., it should leave both check boxes blank).

<sup>3</sup> The number of shares of voting and nonvoting common stock held by nonaffiliates is to be provided as of the latest practicable date. If it takes unreasonable effort and expense to determine affiliate status, the registrant may make reasonable assumptions if it discloses those assumptions.



## 10.4.1

## Part I

## Item 1 Business

"Business – Industry Segment Data" on pages XX and XX of the annual shareholders' report for the year ended 31 December 20Y1 is incorporated herein by reference.

*Note:* Examples of the other disclosures required by Regulation S-K Item 101 are not presented. See Section 3 – Item 1. Business for a discussion of the requirements for the Description of Business.

## Item 1A Risk Factors

*Note:* Example disclosures are presented in Section 3 – Item 1A. Risk factors of this publication.

## Item 1B Unresolved Staff Comments

*Note:* Example disclosures are presented in Section 3 – Item 1B. Unresolved staff comments of this publication.

## Item 2 Properties

*Note:* Example disclosures are not presented.

## Item 3 Legal Proceedings

*Note:* Example disclosures are not presented.

## Item 4 Mine Safety Disclosures

The information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in Exhibit 95 to the annual report.

*Note:* If a registrant does not have matters to report, the response to Item 4 should be "not applicable."

## 10.4.2

## Part II

## Item 5 Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities

Common Stock Market Prices and Dividends on page XX of the annual shareholders' report for the year ended 31 December 20Y1 are incorporated herein by reference.

*Note:* Example disclosures are presented in Section 4 – Item 5 of this publication regarding (1) common stock market prices and dividends, (2) use of proceeds and (3) disclosure of repurchases. Examples of the other disclosures required by Item 5 are not presented. As indicated in Section 4 of this publication, notwithstanding the Form 10-K instructions, the SEC staff has indicated that the information required under Item 201(d) of Regulation S-K regarding securities authorized for issuance under equity compensation plans only should be provided in response to Item 12 of Part III, and not in response to Item 5. In addition, see Section 4 of this publication for a discussion of the requirements under Item 701 of Regulation S-K regarding recent sales of unregistered securities and, if applicable, use of proceeds from registered securities, and Item 703 of Regulation S-K regarding purchases of equity securities by the issuer and affiliated purchasers.

## Item 6 Selected Financial Data

Selected Financial Data on page XX of the annual shareholders' report for the year ended 31 December 20Y1 is incorporated herein by reference.

*Note:* Example disclosures are presented in Section 4 – Item 6. Selected financial data of this publication.

## Item 7 Management's Discussion and Analysis of Financial Condition and Results of Operations

Management's Discussion and Analysis of Financial Condition and Results of Operations on pages XX through XX of the annual shareholders' report for the year ended 31 December 20Y1 is incorporated herein by reference.

## Item 7A Quantitative and Qualitative Disclosures About Market Risk

Information appearing under the caption "Market Risk and Risk Management Policies" appearing on page XX of the annual shareholders' report for the year ended 31 December 20Y1 is incorporated herein by reference.

*Note:* Example disclosures are presented in our publication, *The SEC's market risk disclosures* (Ernst & Young No. BB0688).

Item 8 Financial Statements and Supplementary Data

The report of independent registered public accounting firm and the Company's consolidated financial statements included on pages XX through XX of the annual shareholders' report for the year ended 31 December 20Y1 are incorporated herein by reference. Quarterly Results of Operations on page XX of the annual shareholders' report for the year ended 31 December 20Y1 is incorporated herein by reference.

*Note:* Example quarterly results of operations are presented in Section 4 – Item 8. Financial statements and supplementary data of this publication.

Item 9 Changes in and Disagreements with Accountants on Accounting and Financial Disclosure

Not applicable.

Item 9A Controls and Procedures

(a) Evaluation of Disclosure Controls and Procedures

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures, as defined in Rules 13a-15(e) and 15d-15(e) of the Securities Exchange Act of 1934, as of 31 December 20Y1. Based on that evaluation, the Company's Chief Executive Officer and Chief Financial Officer concluded that the Company's disclosure controls and procedures were effective as of 31 December 20Y1.

(b) Management's Report on Internal Control over Financial Reporting

(c) Attestation Report of Independent Registered Public Accounting Firm

*Note:* Example management and auditor reports on internal control over financial reporting are not presented.

(d) Changes in Internal Control over Financial Reporting

There were no changes in the Company's internal control over financial reporting during the fourth quarter of 20Y1 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting.

*Note:* The above is an example of the disclosures that might be provided in the simple case where internal control over financial reporting and the disclosure controls and procedures were evaluated as effective and there were no material changes in internal controls during the fourth quarter.

While not explicitly required under the SEC's rules, the SEC encourages issuers to include both management's report on the effectiveness of the company's internal control over financial reporting (Item 308(a) of Regulation S-K) and the related auditor attestation report (Item 308(b) of Regulation S-K) in the issuer's annual report to shareholders. If such reports are included in the annual report to shareholders, they may be incorporated by reference in Item 9A.

Item 9B Other Information

Not applicable.

## 10.4.3

## Part III

## Item 10 Directors, Executive Officers and Corporate Governance

The information contained on pages XX and XX of ABC, Inc.'s Proxy Statement dated XX March 20Y2, with respect to directors, executive officers, code of ethics, audit committee and audit committee financial experts of the Company and Section 16(a) beneficial ownership reporting compliance, is incorporated herein by reference.

*Note:* General Instruction G(3) provides that the information required by Item 10 (Item 401 of Regulation S-K) for executive officers may be included in Part I of Form 10-K under an appropriate caption. If this is done, this information need not be included in the proxy or information statement. However, this exception does not apply to the information required by Item 10 for directors of the registrant.

In addition, Item 10 requires disclosure about audit committee financial experts, code of ethics, and material changes in shareholder nominating procedures that the proxy or information statement is not required to provide. If the company elects to provide these disclosures in its proxy statement, it also may incorporate them by reference into the Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end.

## Item 11 Executive Compensation

The information contained on pages XX and XX of ABC, Inc.'s Proxy Statement dated XX March 20Y2, with respect to executive compensation and transactions, is incorporated herein by reference.

## Item 12 Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters

The information contained on pages XX and XX of ABC, Inc.'s Proxy Statement dated XX March 20Y2, with respect to security ownership of certain beneficial owners and management and securities authorized for issuance under equity compensation plans, is incorporated herein by reference.

*Note:* Even if the registrant does not submit a compensation plan for shareholder action, the registrant may provide the information required under Item 201(d) of Regulation S-K in its proxy statement and incorporate the disclosure by reference into Item 12 of Form 10-K if the proxy statement is filed no later than 120 days after the company's fiscal year-end.

## Item 13 Certain Relationships and Related Transactions, and Director Independence

The information contained on pages XX and XX of ABC, Inc.'s Proxy Statement dated XX March 20Y2, with respect to certain relationships and related transactions and director independence, is incorporated herein by reference.

## Item 14 Principal Accountant Fees and Services

The information contained on pages XX and XX of ABC, Inc.'s proxy statement dated XX March 20Y2, with respect to principal accountant fees and services, is incorporated by reference.

*Note:* Part III information may be incorporated by reference from the annual proxy statement if it is filed within 120 days after year-end. If the items cannot be incorporated by reference from the proxy statement, these items must be either in the Form 10-K when filed or included in an amendment filed up to 120 days after year-end.

## 10.4.4

## Part IV

## Item 15 Exhibits, Financial Statement Schedules

(a) The following documents are filed as part of this report:

1. Financial statements from the ABC, Inc. 20Y1 Annual Report to Shareholders which are incorporated herein by reference:

*Note:* When the consolidated financial statements are included in Form 10-K instead of being incorporated by reference from the annual shareholders' report, the above paragraph would read – "The following consolidated financial statements of ABC, Inc. and subsidiaries are filed as part of this report under Item 8 – Financial Statements and Supplementary Data:"

Consolidated balance sheets – 31 December 20Y1 and 20XY0 (page XX)

Consolidated statements of income – Years ended 31 December 20Y1, 20Y0 and 20X9 (page XX)

Consolidated statements of shareholders' equity and noncontrolling interests – Years ended 31 December 20Y1, 20Y0 and 20X9 (page XX)

Consolidated statements of cash flows – Years ended 31 December 20Y1, 20Y0 and 20X9 (page XX)

Notes to consolidated financial statements – 31 December 20Y1 (pages XX to XX)

2. Financial schedules required to be filed by Item 8 of this form, and by Item 15(d) below:

Schedule II	Valuation and qualifying accounts
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All other financial schedules are not required under the related instructions, or are inapplicable and therefore have been omitted.

*Note:* Financial statements and financial schedules required by Regulation S-X are required to be filed by Item 15(c) of Form 10-K. They could be presented in response to Item 15 or following the signature section. For purposes of this example, Schedule II Valuation and Qualifying Accounts, has not been provided. See Section 7 – Financial schedules for an example of this schedule.

3. Exhibits required to be filed by Item 601 of Regulation S-K, and by Item 15(b) below:

*Note:* Item 15(a)(3) requires a list of all exhibits required to be filed by Item 15(b) of Form 10-K and as required by Item 601 of Regulation S-K. Additional exhibits may be required in Form 10-K other than those listed below. For illustrative purposes, only Exhibits 31.1 and 32 are presented in this example following the signature section.

Exhibit 3.1	Articles of incorporation of ABC, Inc.
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Exhibit 3.2	By-laws of ABC, Inc.
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Exhibit 10	Employment agreement
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*Note:* Any compensatory plan, contract or arrangement, involving any awards of equity and adopted without the approval of security holders, must be filed as an exhibit.

Exhibit 11	Statement re: Computation of per share earnings
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*Note:* As a result of ASC 260, substantially all of the information called for in Exhibit 11 should be included in the notes to financial statements. Therefore, in most cases, Exhibit 11 will not be required in Form 10-K.

Exhibit 12	Statement re: Computation of ratio of earnings to fixed charges
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*Note:* Exhibit 12 presenting the computation of the ratio of earnings to fixed charges is usually presented only in registration statements that register debt or preferred equity securities, but registrants also may present the exhibit in other SEC filings (such as Form 10-K) if they wish. Registrants with active shelf registrations of debt or preferred equity securities might want to consider including Exhibit 12 in their ongoing Form 10-K filings as these are automatically incorporated by reference into the active shelf registration statements.

Exhibit 13      Annual report to shareholders

*Note:* If any portion of the annual report to shareholders is incorporated by reference into the Form 10-K filed electronically via EDGAR, all the portions of the annual report to shareholders incorporated by reference must be filed electronically as Exhibit 13.

Exhibit 14      Code of ethics

*Note:* The issuer must make its code of ethics publicly available by one of the following means: filing the code of ethics as Exhibit 14 to its Form 10-K; posting the code of ethics on its website, provided the Form 10-K disclosed that intention and the website address; or by providing disclosure in its Form 10-K that a copy of the code is available without charge upon written request.

Exhibit 18      Letter re: Change in accounting principles

*Note:* Item 601 of Regulation S-K requires that a letter from the independent auditors be filed as an exhibit in the first periodic report (Form 10-K or Form 10-Q) filed subsequent to any accounting change, other than changes in response to new accounting standards. The letter would indicate whether the change is preferable under the circumstances and is required regardless of the materiality of the change. The SEC staff has taken the position that a preferability letter is needed for each situation in which a registrant discloses an accounting change, even though the auditors may consider the change to not be material and not include a consistency paragraph in their report.

Exhibit 21      Subsidiaries of the registrant

*Note:* Item 601 of Regulation S-K requires a list of all subsidiaries of the registrant. The list must identify each subsidiary by the name under which it does business and the state or other jurisdiction of its incorporation or organization. Subsidiaries may be omitted to the extent, considered in the aggregate, the unnamed subsidiaries would not constitute a "significant subsidiary" as of the end of the latest fiscal year (i.e., greater than 10% of consolidated assets or pretax income).

Exhibit 23      Consent of independent auditors

*Note:* The auditors' consent should be filed as Exhibit 23 if the auditors' report is incorporated by reference (e.g., from the annual report to shareholders). The auditors' consent also is required to be filed as Exhibit 23 if the company has an effective Form S-3, S-4, or S-8, which automatically incorporates by reference any subsequent Form 10-K.

Exhibit 24      Power of attorney

*Note:* If the name of any officer or director is signed in the Form 10-K pursuant to power of attorney, a signed copy of such power of attorney must be filed as Exhibit 24. In addition, for any such officer signing on behalf of the registrant, certified copies of a resolution of the registrant's board of directors authorizing such signature also must be filed. The power of attorney must relate to the specific Form 10-K or amendment. A power of attorney that confers general authority is not acceptable. In addition, the principal executive officer and principal financial officer may not sign the Section 302 or 906 (of the Sarbanes-Oxley Act) certifications pursuant to a power of attorney.

- Exhibit 31.1      Certification of Chief Executive Officer pursuant to Rule 13a-14(a) and Rule 15d-14(a) of the Securities Exchange Act, as amended
- Exhibit 31.2      Certification of Chief Financial Officer pursuant to Rule 13a-14(a) and Rule 15d-14(a) of the Securities Exchange Act, as amended
- Exhibit 32      Certification of Chief Executive Officer and Chief Financial Officer Pursuant to 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002
- Exhibit 95      Mine Safety Disclosure Exhibit

*Note:* Item 104 of Regulation S-K requires disclosure about citations, notices and orders from MSHA, mining-related fatalities and pending legal actions before FMSHRC.

## 10.4.5

## Signatures

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

\_\_\_\_\_  
ABC, INC.  
(Registrant)

\_\_\_\_\_  
(Signature and date)  
(Name and Title)

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

_____ (Signature and date) (Name and Title)	_____ (Signature and date) (Name and Title)
_____ (Signature and date) (Name and Title)	_____ (Signature and date) (Name and Title)
_____ (Signature and date) (Name and Title)	_____ (Signature and date) (Name and Title)
_____ (Signature and date) (Name and Title)	_____ (Signature and date) (Name and Title)

**Notes:**

- ▶ Form 10-K is required to be signed on behalf of the registrant by its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and by at least a majority of the board of directors or persons performing similar functions. Any person who signs in more than one capacity (e.g., specified officer and director) should indicate each capacity in which he or she signs the report.
- ▶ See discussion of signatures in Section 2 of this publication.

**Exhibit 31.1<sup>4</sup>****CERTIFICATION**

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 10-K of [identify registrant];
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the [registrant/small business issuer] as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f), for the registrant and have:
  - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected or is reasonably likely to materially affect the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls over financial reporting.

Dated:

Name:

Title:

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<sup>4</sup> In Release No. 33-8238, *Asset-Backed Securities*, the Commission amended Item 601 of Regulation S-K to add the specific form and content of the required Section 302 certification to the exhibit filing requirements for asset-backed issuers. The requirements relating to the asset-backed security Section 302 certification are specified in paragraph (d) of Exchange Act Rules 13a-14 and 15d-14.

*Note:* Separate certifications are required to be filed by the CEO and CFO. The certifications must be filed as an exhibit of the Form 10-K in the exact form specified by the SEC rules. The EDGAR version of the filing will necessarily contain typed signatures. Regulation S-T provides guidance on the requirements for retaining original signature pages. At least one copy should be filed with each stock exchange on which any class of the registrant's securities is listed.

## Exhibit 32

### CERTIFICATION

I, [identify certifying individual], [identify title of certifying individual] of [identify registrant] (the "Company"), certify, pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. Section 1350, that:

1. The Annual Report on Form 10-K of the Company for the annual period ended 31 December 20Y1 (the "Report") fully complies with the requirements of Section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m); and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Dated:

Name:

Title:

A signed original of this written statement required by Section 906 has been provided to the Company and will be retained by the Company and furnished to the Securities and Exchange Commission or its staff upon request.

*Note:* Unlike the Section 302 certifications, the Section 906 certifications may take the form of a single certification signed by both the company's chief executive officer and chief financial officer.



# A

## ASC Abbreviations

Abbreviation	FASB Accounting Standards Codification
ASC 220	FASB ASC Topic 220, <i>Comprehensive Income</i>
ASC 230	FASB ASC Topic 230, <i>Statement of Cash Flows</i>
ASC 250	FASB ASC Topic 250, <i>Accounting Changes and Error Corrections</i>
ASC 260	FASB ASC Topic 260, <i>Earnings Per Share</i>
ASC 275	FASB ASC Topic 275, <i>Risks and Uncertainties</i>
ASC 280	FASB ASC Topic 280, <i>Segment Reporting</i>
ASC 323	FASB ASC Topic 323, <i>Investments–Equity Method and Joint Ventures</i>
ASC 350	FASB ASC Topic 350, <i>Intangibles–Goodwill and Other</i>
ASC 360	FASB ASC Topic 360, <i>Property, Plant, and Equipment</i>
ASC 420	FASB ASC Topic 420, <i>Exit or Disposal Cost Obligations</i>
ASC 440	FASB ASC Topic 440, <i>Commitments</i>
ASC 460	FASB ASC Topic 460, <i>Guarantees</i>
ASC 470	FASB ASC Topic 470, <i>Debt</i>
ASC 480	FASB ASC Topic 480, <i>Distinguishing Liabilities from Equity</i>
ASC 505	FASB ASC Topic 505, <i>Equity</i>
ASC 740	FASB ASC Topic 740, <i>Income Taxes</i>
ASC 805	FASB ASC Topic 805, <i>Business Combinations</i>
ASC 810	FASB ASC Topic 810, <i>Consolidation</i>
ASC 815	FASB ASC Topic 815, <i>Derivatives and Hedging</i>
ASC 820	FASB ASC Topic 820, <i>Fair Value Measurement</i>
ASC 825	FASB ASC Topic 825, <i>Financial Instruments</i>
ASC 830	FASB ASC Topic 830, <i>Foreign Currency Matters</i>
ASC 840	FASB ASC Topic 840, <i>Leases</i>
ASC 932	FASB ASC Topic 932, <i>Extractive Activities–Oil and Gas</i>
ASC 942	FASB ASC Topic 942, <i>Financial Services–Depository and Lending</i>
ASC 944	FASB ASC Topic 944, <i>Financial Services–Insurance</i>
ASC 948	FASB ASC Topic 948, <i>Financial Services–Mortgage Banking</i>
ASC 954	FASB ASC Topic 954, <i>Health Care Entities</i>

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