SEC Issues Concept Release on Business and Financial Disclosure Required by Regulation S-K

The SEC’s Division of Corporation Finance Seeks Comment on Modernizing Certain Regulation S-K Requirements as Part of Its Ongoing Review of Disclosure Effectiveness

On April 13, 2016, the SEC issued a concept release requesting comment on existing disclosure requirements in Regulation S-K relating to a public company’s business and financial information. The concept release is part of a comprehensive “Disclosure Effectiveness Initiative” led by the SEC’s Division of Corporation Finance to review the effectiveness of public company disclosure requirements and to consider ways to improve them for the benefit of registrants and investors. The comment period will end 90 days after the concept release is published in the Federal Register.

The Concept Release

The concept release explores the following principal issues:

- whether Regulation S-K’s business and financial information disclosure requirements continue to elicit information that is material to investment and voting decisions;
- the costs and benefits of the disclosure requirements to registrants and investors; and
- the optimal manner of presenting required disclosures to improve readability and investor access to the information.

The concept release addresses four categories of disclosure required by Regulation S-K:

- core company business information (Items 101 and 102);
- company performance, financial information and future prospects (Items 301, 302 and 303);
- risk and risk management (Items 305 and 503); and
- the registrant’s securities (Items 201, 202, 701 and 703).

The concept release also requests public comment on the following additional items:

- Industry Guides;

- disclosure of information relating to public policy and sustainability matters;
exhibits to periodic filings; and
scaled disclosure requirements applicable to certain registrants.

Finally, the concept release seeks comment on various alternatives to presenting and delivering information to investors, including through the use of cross-references, incorporation by reference, hyperlinks, standard formatting requirements and layered or structured disclosures.

The 341-page concept release sets forth 340 specific requests for comment. Several requests for comment apply to multiple business and financial disclosures required in periodic reports. These overarching questions are summarized below:

- Does the disclosure requirement continue to provide useful information to investors? How can it be improved?
- Should the SEC require additional or more specific information and, if so, what type? What would be the benefits and challenges of requiring additional disclosures?
- What are the administrative and compliance costs of providing the required disclosure and how would they change if the SEC were to revise its requirements as contemplated by the concept release? (The SEC asks respondents to provide quantified estimates where possible.)
- What type of investors are most likely to value the information required by the item? Is the information required by the item otherwise available? Would costs to investors increase if the item were eliminated?
- Would an alternative format or presentation of the information improve its value? Should the disclosure be required where it currently appears or elsewhere?

The attached Appendix includes a summary of more specific requests for comment on the Regulation S-K items and additional topics covered in the concept release.

The Disclosure Effectiveness Initiative

As mandated by Section 108 of the Jumpstart Our Business Startups Act of 2012 (JOBS Act), the Division of Corporation Finance issued a Report on Review of Disclosure Requirements in Regulation S-K in December 2013. Among other things, the report recommended a comprehensive review of disclosure requirements for all public companies with a view toward streamlining them based on the information’s materiality and usefulness to investors. Based on this report and at the request of SEC Chair Mary Jo White, the Division of Corporation Finance launched the Disclosure Effectiveness Initiative. The goal of the project is to review existing disclosure requirements to determine whether improvements can be made to reduce the costs and burdens on public companies while also promoting the disclosure of material information to investors and eliminating duplicative disclosures.

A spotlight page on the SEC’s website discusses the status of the Disclosure Effectiveness Initiative. In September 2015, the SEC published a Request for Comment on the form and content of financial statements required under Regulation S-X. A subsequent phase of the project will focus on the compensation and corporate governance information required in proxy statements. In her remarks relating to the concept release, SEC Chair
White announced that she has asked the Division of Corporation Finance to form an interdisciplinary working group dedicated to addressing issues relating to investors’ ability to access and navigate company information.

**Recommended Actions**

Registrants should review the concept release or the attached Appendix to determine whether they would like to provide input to the SEC on any of its requests for comment. As the Division proceeds with its Disclosure Effectiveness Initiative, registrants should consider evaluating their disclosures in periodic reports to look for areas for improvement. In particular, they should seek opportunities to (1) eliminate immaterial information, (2) reduce redundancies (e.g., by using cross-references) and (3) present disclosure in a clear and understandable way (e.g., by using summaries or graphs/charts). Registrants should also review the common disclosure deficiencies highlighted in the box below and revise their disclosures as necessary.
Common Disclosure Deficiencies Observed by the SEC

Throughout the concept release, the SEC noted various areas where the Division has observed that registrants often fail to fully comply with applicable disclosure requirements or related SEC guidance.

- **Duplicative Disclosure.** The SEC noted that registrants commonly repeat information within a single filing in response to different item requirements in Form 10-K (e.g., disclosure about a registrant’s business may be included in the business section, MD&A, risk factors and financial statement footnotes). The SEC is seeking comment on how to encourage registrants to eliminate repetition and may encourage greater use of cross-references to reduce duplicative disclosure. The SEC has also cautioned that an introduction or overview should highlight important information rather than merely duplicate a more detailed discussion that follows.

- **Generic Risk Factors.** Even though Item 503(c) instructs registrants not to present risks that could apply to any registrant, the SEC noted that registrants frequently disclose generic risks that are not tailored to their particular risk profile. The SEC provided the following examples of commonly disclosed generic risk factors: (1) the registrant’s failure to compete successfully, (2) the effect of general economic conditions on a registrant’s business, (3) changes in regulation and (4) dependence upon a registrant’s management team.

- **Lack of Detailed Analysis in MD&A.** Despite Item 303(a)’s instruction to the contrary, the SEC noted that many registrants simply recite the amounts of changes from year to year, which are readily computable from their financial statements. In particular, the SEC noted that discussions of liquidity and capital resources often recite various changes in line items from the statement of cash flows without a detailed analysis and with only limited disclosure of known trends and uncertainties affecting their future cash needs and availability. The SEC seeks more detailed analysis of material year-to-year changes and trends by encouraging registrants to provide additional explanation of the underlying reasons for, or implications of, material changes in financial statement line items. In addition, the SEC noted that registrants typically do not discuss or analyze significant trends beyond the three year timeframe of Item 303 even though Instruction 1 to Item 303(a) specifies that reference to Item 301’s five-year selected financial data may be necessary where trend information is relevant.

- **Inadequate Disclosure of Critical Accounting Estimates in MD&A.** The SEC noted that, despite its guidance in the 2003 MD&A interpretive release, many registrants repeat the discussion of significant accounting policies from the financial statement footnotes in their MD&A description of critical accounting estimates and provide limited additional discussion.

- **Failure to Discuss Stock Repurchases in MD&A.** The SEC observed that registrants often do not analyze the impact of stock repurchases in MD&A, even in instances where the amount used to repurchase shares exceeds a registrant’s net income or cash generated from operating activities.

- **Failure to Include Footnotes to the Contractual Obligations Table.** Despite the SEC’s recommendation to include footnotes to the contractual obligations table to promote greater understanding of the tabular data, the SEC noted that registrants typically do not supplement the table with narrative disclosure.
If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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Sidley Corporate Governance and Compliance Practice

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This Appendix highlights key questions on which the SEC specifically requests comment. It does not cover every question set forth in the concept release, including the more general requests for comment that are summarized in the body of this Sidley Update.

### DISCLOSURE FRAMEWORK

<table>
<thead>
<tr>
<th>Discussion and Requests for Comment</th>
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<td><strong>The SEC’s disclosure rules are intended to protect investors and facilitate capital formation and maintain fair, orderly and efficient markets. Under a “principles-based” approach, many of the rules rely on management to evaluate the significance of information in the context of the registrant’s overall business and financial circumstances and require disclosure only if the information would be material to an investor’s investment or voting decisions. Other rules are considered “prescriptive” and rely on objective, quantitative thresholds (rather than management’s judgment) to determine whether disclosure is required.</strong></td>
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<td><strong>Key requests for comment:</strong></td>
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<td>• Should the SEC consider including automatic sunset provisions in new disclosure requirements? Are there other ways the SEC’s disclosure requirements could be revised to adapt more easily to future market changes and technological advances?</td>
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<td>• Should the SEC retain its “principles-based” approach to disclosure and, if so, should it retain or replace the current materiality standard? Alternatively, should the SEC impose more quantitative or qualitative thresholds for disclosure and, if so, how should it define them?</td>
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<td>• Should registrants assume some level of investor sophistication when preparing their disclosures? How do investors and others use and access disclosure? Should the SEC’s disclosure requirements be revised to encourage disclosure that is targeted to a particular category of users based on sophistication level and informational needs?</td>
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<td>• Do current disclosure requirements appropriately consider the costs and benefits of disclosure to registrants and investors?</td>
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<td>• Other than scaled disclosure and confidential treatment, are there accommodations the SEC could make to reduce registrants’ compliance costs while still providing investors with useful information that is relevant to their investment and voting decisions?</td>
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### INFORMATION RELEVANT TO INVESTMENT AND VOTING DECISIONS

<table>
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<th>Core Company Business Information</th>
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<td><strong>General Development of Business (Item 101(a)(1))</strong></td>
<td>Item 101(a) requires a description of the general development of the business of the registrant during the past five years, or such shorter period as the registrant may have been engaged in the business.</td>
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<td><strong>Key requests for comment:</strong></td>
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<td>• Should the SEC require additional or more specific information and, if so, what type?</td>
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<td>• Is five years an appropriate timeframe for disclosure?</td>
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<td>• Should the SEC require disclosure of a registrant’s business strategy, either in the business section or in MD&amp;A?</td>
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<td>• Should this disclosure be required only in the initial filing with follow-up disclosure of any material changes in subsequent filings? Alternatively, should the SEC require a more detailed discussion of a registrant’s business only periodically (e.g., every three years) and otherwise require only summary disclosure? Should the ability to provide summary disclosure be conditioned on timely reporting or some other consideration?</td>
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<td><strong>Narrative Description of Business (Item 101(c))</strong></td>
<td>Item 101(c) requires a narrative description of a registrant’s business and disclosure of 13 specific line items, in some cases subject to materiality.</td>
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<td><strong>Key requests for comment:</strong></td>
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<td>• How can the SEC update this item to better reflect changes in the way businesses operate?</td>
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<td>• Should the SEC require disclosure of additional line-item categories? Do registrants view the 13 line-item disclosure requirements as a checklist that results in immaterial disclosure in</td>
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some cases?

- Should industry-specific disclosure be a separate requirement and, if so, should it be required in the business section or in MD&A?
- Should this disclosure be required only in the initial filing with follow-up disclosure of any material changes in subsequent filings? Should the ability to provide only follow-up disclosure be conditioned on timely reporting or some other consideration?
- Is there information currently required to be disclosed in the business section that should be presented in a different context, such as in MD&A or the risk factors?
- Should the SEC require disclosure of all 13 line items, regardless of materiality? Alternatively, should the SEC take a principles-based approach to disclosure about a registrant’s business and operations and allow registrants the flexibility to disclose only information they believe is most important to investors?

| Technology and IP Rights (Item 101(c)(1)(iv)) | Item 101(c)(1)(iv) currently requires disclosure of the importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held. Key requests for comment: |
| - Should the SEC expand the rule to include other types of IP, such as copyrights? Should it remove the individual categories and require disclosure of “intellectual property” generally? If so, how should it be defined? |
| - Should the SEC require more detailed disclosure about a registrant’s reliance on or use of technology and related IP rights, at least for the IP that is material to its business? |
| - Does aggregate disclosure of the total number of patents, trademarks and copyrights and a range of expiration dates provide investors with sufficient information? If not, what additional information do investors need about a registrant’s IP portfolio? |
| - Should this disclosure be limited to registrants in particular industries? |
| - What are the competitive costs of this disclosure? |

| Government Contracts and Regulation, including Environmental Laws (Items 101(c)(1)(ix) and (c)(1)(xii)) | Item 101(c)(1)(ix) requires disclosure of any material portion of a business that may be subject to renegotiation of profits or termination of contracts at the election of the government. Item 101(c)(1)(xii) requires disclosure of the material effects of compliance with environmental laws on the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, as well as upcoming material estimated capital expenditures for environmental control facilities. There is currently no separate line-item requirement to disclose governmental regulation that may be material to a registrant’s business. Key requests for comment: |
| - Is there additional information about a registrant’s contracts with the government that would be important to investors? |
| - Should the SEC require registrants to briefly describe all material contracts rather than focusing on government contracts? |
| - Should the SEC increase or reduce the required environmental disclosures or require registrants to present it in a specified format? |
| - Should the SEC require specific disclosure about the material effects that governmental regulations may have on a registrant’s capital expenditures, earnings and competitive position? |
| - Are specific line-item requirements to disclose material government regulations unnecessary given that many registrants already provide such disclosure under existing rules? |
| - Should the SEC require registrants to describe foreign regulations that affect their business? |

| Number of Employees (Item 101(c)(1)(xiii)) | Item 101(c)(1)(xiii) currently requires disclosure of the number of persons employed by the registrant. Key requests for comment: |
| - Should registrants be required to break out their total number of persons employed by category (e.g., full-time/part-time or seasonal, employees/independent contractors or domestic/foreign)? |
| - Should registrants be permitted to disclose a range of employees rather than a specific number? |
| - Should the SEC require all registrants to disclose any anticipated material changes in the number of employees in various departments (e.g., R&D, production, sales or administration) as it does for registrants that have not yet generated revenue? |
• Should the SEC require disclosure about a registrant’s employment practices (e.g., outsourcing or subcontracting arrangements)?

Description of Property (Item 102)

Item 102 requires disclosure of the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries.

Key requests for comment:
• Would additional information about a registrant’s properties be important to investors?
• Should this disclosure only be required of registrants in particular industries?
• Should the disclosure requirements focus instead on the risks to a registrant’s business resulting from the availability and cost of properties it needs for its operations?

Company Performance, Financial Information and Future Prospects

Selected Financial Data (Item 301)

Item 301 requires registrants to disclose in their annual reports selected financial data that highlight significant trends in the registrant’s financial condition and results of operation. The disclosure must be provided in comparative columnar format for each of the registrant’s last five fiscal years and any additional fiscal years if necessary to keep the information from being misleading. Instruction 2 to Item 301 specifies certain information that must be disclosed (e.g., total assets and income (loss) from continuing operations), but also permits registrants to include additional items they believe would enhance an investor’s understanding of, and would highlight other trends in, their financial condition and results of operations.

Key requests for comment:
• How can the SEC modify the current requirement to achieve the goals of highlighting significant trends in a registrant’s financial condition and results of operation and providing selected financial data in a convenient and readable format?
• Does selected financial data effectively highlight significant trends that are not described elsewhere (e.g., in MD&A)?
• Is five years an appropriate timeframe? Should the SEC only require the disclosure for the full five years in certain circumstances (e.g., when a registrant revises its financial statements or if information about the earliest two of the last five years is available without undue cost)?
• Should the SEC exempt all registrants from providing selected financial data for any period prior to the earliest audited period presented in connection with its first effective registration statement as it currently does for EGCs?
• Do registrants view the items listed in Instruction 2 as a checklist? Should additional items be added to the list?
• Should the SEC modify Instruction 2 to make it more prescriptive or provide a more flexible approach? If the latter, should it require registrants to disclose their reasons for including particular items?
• Should the SEC require auditor involvement (e.g., audit, review or specific procedures) on the reliability of this disclosure?
• Given that some of the Item 302(a) disclosure is available in prior quarterly reports (and tagged as XBRL data when provided in financial statement footnotes), do investors need and use this disclosure?

Supplementary Financial Information (Item 302)

Item 302 requires certain registrants to disclose quarterly financial data of selected operating results and variances in these results from amounts previously reported.

Key requests for comment:
• Is the information provided by this item that is not duplicative of previously provided disclosure (e.g., fourth quarter information, which is required by Item 302(a) but not in annual financial statements) sufficiently important to investors to merit retaining the item?
• Does this disclosure help investors understand the pattern of corporate activities throughout a fiscal period by disclosing trends over segments of time that are sufficiently short to reflect business turning points? If not, how can the SEC modify it to do so?
• Should the SEC require auditor involvement (e.g., audit, review or specific procedures) on the reliability of this disclosure?
• Given that some of the Item 302(a) disclosure is available in prior quarterly reports (and tagged as XBRL data when provided in financial statement footnotes), do investors need and use this disclosure?

Content and Focus of MD&A

Item 303 requires disclosure of information relevant to assessing a registrant’s financial condition, changes in financial condition and results of operations. Registrants must analyze three core components in their MD&A disclosures: (1) liquidity, (2) capital resources and (3)
results of operations. They must also disclose off-balance sheet arrangements and contractual obligations. In previous guidance the SEC has stressed the importance of materiality in MD&A disclosures and recommended a "layered" approach by which registrants present information in a manner that emphasizes the most important information and analysis.

Key requests for comment:

- Do current requirements result in disclosure that highlights the most significant aspects of the registrant’s financial condition and results of operations? Should the SEC require registrants (or those of a certain size) to provide an executive-level overview of MD&A? If so, should the SEC prescribe the content and what should it be (e.g., the most significant accounting estimates and judgments)?
- Should the SEC consider a qualitative or quantitative threshold other than materiality for requiring MD&A disclosure?
- Should the SEC consolidate its various guidance on MD&A disclosure into a single source?
- Are there new rules the SEC should consider that would result in more meaningful analysis in MD&A?
- Should the SEC require auditor involvement (e.g., audit, review or specified procedures) regarding the reliability of MD&A disclosure?
- Should the SEC require MD&A disclosure when a trend, event or uncertainty is more likely than not, probable or reasonably possible to occur rather than “reasonably likely” to occur?
- Should the SEC replace the current two-step test for identifying required forward-looking disclosure with a different standard (e.g., the probability/magnitude test from Basic v. Levinson)?
- Should the SEC specifically require registrants to quantify the material effects of known trends and uncertainties and the factors that contributed to them?
- Should the SEC require disclosure of industry-specific key performance indicators by registrants in certain industries? If so, how could the SEC identify which performance metrics should be standardized across an industry?

Item 303(a)(3) requires a discussion and analysis of a registrant’s results of operations and specifies four areas of disclosure. The discussion and analysis must cover the three-year period covered by the financial statements and use year-to-year comparisons or any other format that in the registrant’s judgment would enhance a reader’s understanding. A registrant need not recite the amounts of period-to-period changes that are readily computable from the financial statements.

Key requests for comment:

- Should the SEC retain, eliminate or modify the period-to-period comparisons provided in MD&A?
- Would additional disclosure about a registrant’s results of operations be important to investors?
- Does the three-year comparison provide material information about trends or uncertainties that would not be reflected in prior filings? Should registrants be permitted to eliminate the earliest of the two periods discussed if it does not provide information that is important to investors or so long as they cross-reference or hyperlink to the prior periods discussion in a previous filing?
- Would formats or presentations other than period-to-period comparisons (e.g., a standardized tabular format) enhance investors’ understanding of results of operations or encourage greater analysis of the income statement?
- Would additional information about registrants that have not yet generated revenue be useful to investors (e.g., a description of their plans of operations)?

Items 303(a)(1) and (2) generally require registrants to include in MD&A a discussion and analysis of liquidity and capital resources.

Key requests for comment:

- How could the SEC revise this item to elicit more meaningful analysis of a registrant’s liquidity and capital resources?
- Would requiring separate disclosure of liquidity and capital resources (rather than permitting them to be combined) encourage greater disclosure of trends, events and uncertainties affecting them?
| Off-Balance Sheet Arrangements (Item 303(a)(4)) | Item 303(a)(4) generally requires registrants to include in a separately-captioned section of MD&A disclosure of their off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on a registrant’s financial condition that is material to investors. The SEC acknowledges in the concept release that there is some overlap between this item and disclosure required in the financial statements under U.S. GAAP.  
**Key requests for comment:**  
- If the SEC were to eliminate this requirement, could investors find adequate information about off-balance sheet arrangements elsewhere in the registrant’s SEC filings (e.g., in the financial statements or other sections of MD&A)?  
- Should the SEC require additional disclosure on this item (e.g., a requirement to analyze the risks associated with its off-balance sheet arrangements)?  
- Should the SEC require additional disclosure of off-balance sheet arrangements that occurred during a reporting period (e.g., an exhibit identifying such arrangements during the past quarter)? |
| Contractual Obligations (Item 303(a)(5)) | Item 303(a)(5) requires tabular disclosure of a registrant’s known contractual obligations for long-term debt, capital leases, operating leases, purchase obligations and other long-term liabilities reflected on the registrant’s balance sheet under U.S. GAAP.  
**Key requests for comment:**  
- Does the table provide a meaningful snapshot of a registrant’s cash requirements for contractual obligations?  
- Should the SEC require narrative disclosure to accompany the table (e.g., a discussion of how a registrant plans to meet current or future obligations disclosed in the table)?  
- Should the SEC expand the rule to require disclosure of categories of contractual obligations beyond the five categories currently specified in the rule?  
- Would registrants benefit from additional guidance on how to treat certain types of obligations (e.g., interest payments, repurchase agreements or tax liabilities)?  
- Should the SEC require registrants to separate amounts in the table into contractual obligations reflected on the balance sheet versus those arising from off-balance sheet arrangements? |
| Critical Accounting Estimates | U.S. GAAP requires financial statement footnote disclosure about accounting policies, but Item 303 does not specifically address critical accounting estimates when requiring disclosure of trends, events or uncertainties known to management that could materially affect reported financial information. In a 2003 interpretive release, the SEC set forth the circumstances under which registrants should provide disclosure about critical accounting estimates or assumptions in MD&A.  
**Key requests for comment:**  
- Should the SEC require MD&A disclosure about critical accounting estimates? Should previous SEC guidance regarding disclosure of critical accounting estimates be incorporated into Regulation S-K?  
- Should the SEC define “critical accounting estimates” and, if so, how?  
- How can the SEC encourage registrants to eliminate repetition in MD&A of the discussion of accounting policies provided in the financial statement footnotes? |
- Should the SEC adopt prescriptive requirements relating to critical accounting estimates to elicit more comparable disclosure among registrants? If so, are there any accounting estimates common to a particular industry that are "critical" to all industry participants?
- Should the SEC require registrants to disclose management’s judgments and estimates that form the basis for MD&A disclosure (e.g., the quantitative or qualitative factors management used to assess materiality)?
- Should the SEC require management to disclose the nature of its assessment of errors that it did not correct because it deemed them immaterial?
- Should the SEC require disclosure of other critical accounting estimates such as those that impact other metrics or measures (e.g., the number of new customers or the number of subscribers)?

### Risk and Risk Management

**Risk Factors (Item 503(c))**  
Item 503(c) requires a concise and logically organized discussion of the most significant factors that make an investment in a registrant’s securities speculative or risky. The rule is principles-based, but the SEC provides five specific examples of factors that may make an offering speculative or risky. The SEC discourages disclosure of boilerplate risk factors that could apply to any registrant and directs registrants to explain how each disclosed risk may affect an investment in a particular registrant.  

**Key requests for comment:**
- Should the SEC require that each risk factor be accompanied by a specific discussion of how the registrant is addressing the risk?
- Should the SEC require registrants to describe their assessment of risks (e.g., the probability of occurrence and the effect on performance for each risk factor)?
- How can the SEC modify its rules to require or encourage registrants to describe risks with greater specificity and context? Should the SEC require registrants to disclose the specific facts and circumstances that make a given risk material to the registrant?
- Should the SEC specify generic risks that registrants are not required to disclose?
- Should the SEC retain or eliminate the five examples of risks provided in Item 503(c) or include additional or different examples?
- Should registrants be required to present their risk factors in order of management’s perception of the magnitude of the risk or by order of importance to management?
- Should the SEC require registrants to disclose in order their ten most significant risk factors without limiting the total number of risk factors disclosed? Alternatively, should registrants be required to provide a risk factors summary highlighting their most significant risks?
- How should the SEC revise Item 503(c) to make it more effective in capturing emerging risks (e.g., risks associated with cybersecurity, climate change and arctic drilling)?

**Quantitative and Qualitative Disclosures about Market Risk (Item 305)**  
Item 305 requires quantitative and qualitative disclosure about market risk sensitive instruments that affect a registrant’s financial condition. The quantitative disclosure must be provided using one or more of three specified disclosure alternatives: tabular disclosure, sensitivity analysis or value at risk (VaR) disclosure.  

**Key requests for comment:**
- Does this item result in information that permits investors to effectively assess: (1) a registrant’s aggregate market risk exposure and (2) the impact of market risk sensitive instruments on a registrant’s results of operations and financial condition?
- Do the disclosure alternatives elicit adequate quantitative disclosure about market risk? Do the current requirements discourage registrants from fully evaluating and disclosing their market risk exposures, such as in a sensitivity analysis? Should the rules be more prescriptive?
- Should the SEC require disclosure about other types of risk (e.g., credit risk, liquidity and funding risk and operational risk)?
- Should the SEC limit the quantitative disclosure requirement to certain types of registrants (e.g., those engaged in financial services)?
- Should the SEC provide for new or additional disclosure alternatives to reflect the evolution of standard risk management practices and methods of reporting market risk since this item was adopted in 1997?
- What revisions should the SEC consider to better link disclosure that identifies, quantifies
and analyzes a registrant’s material market risks to: (1) market risk sensitive instruments, (2) financial statements, (3) capital adequacy and (4) any other metrics important to an understanding of market risk exposures?

- Rather that specifying disclosure alternatives, should the SEC require a “management approach” to disclosure whereby registrants would be permitted to disclose the information and methods that management actually uses internally to assess market risk? Alternatively, should the SEC require more standardized disclosure to enhance comparability among registrants?
- Do investors benefit from disclosure about market risk exposure outside of the audited financial statements or is this disclosure unnecessary because it is repetitive of the disclosure about market risk required by U.S. GAAP and Rule 4-08 of Regulation S-X?

### Disclosure of Approach to Risk Management and Risk Management Process

Item 503(c) requires disclosure of significant risks but currently does not address disclosure of the registrant’s strategy for managing risk. Item 305(b) requires disclosure about a registrant’s primary market risks and how they are managed. The SEC has historically discouraged registrants from including mitigating language in their risk factor disclosure because it may suggest to investors that the registrant’s risk exposure is not significant.

**Key requests for comment:**
- Should the SEC require registrants to describe their risk management processes and/or their assessment of any such process?
- Should registrants with complex risk management processes be permitted to provide only an enterprise-level description or, alternatively, be required to provide a more granular description?
- Should registrants be required to disclose when risk tolerance limits are waived, including any assumptions or relevant changes in business strategy that underlies the new limits?
- Should the SEC require registrants to identify any material “primary risk exposures” not already disclosed and discuss actions taken to manage such risks?
- Should the SEC require registrants to disclose management’s view of how material risk exposures are related and how risk mitigation actions are connected?
- Should registrants be required to disclose their efforts to manage or mitigate each risk factor disclosed as is currently required with respect to market risk?
- Would additional disclosure about risk mitigation inhibit investors’ ability to fully appreciate the significance of the risk? Would it cause registrants to avoid disclosing insignificant risks or, alternatively, cause them to provide boilerplate disclosure about how they addresses less meaningful risks resulting in even longer risk factor disclosure?
- Should the SEC require registrants to disclose known uncertainties about their risk management and related policies and how that might affect them?

### Consolidating Risk-Related Disclosure

Currently a number of items in Regulation S-K elicit risk-related disclosures, including risk factors, material litigation and environmental proceedings, risk related to foreign operations, material trends, uncertainties or events and board oversight of risk.

**Key request for comment:**
- Should the SEC consolidate the various risk-related disclosures (including legal proceedings) into a single section within a filing? If so, what information should be included and how should it be presented?

### Securities of the Registrant

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<th>Related Stockholder Matters – Number of Equity Holders (Item 201(b))</th>
<th>Item 201(b)(1) requires disclosure of the approximate number of holders of each class of a registrant’s common equity as of the latest practicable date.</th>
<th><strong>Key requests for comment:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Is disclosure about the number of record holders still important now that the vast majority of investors hold their shares in street name?</td>
<td>Should the SEC require registrants to disclose the amount of each class of equity securities held in street name or the number of beneficial owners?</td>
</tr>
</tbody>
</table>

**Description of Capital Stock (Item 202)**: Item 202 requires a brief description of the terms and conditions of securities that are being registered.
<table>
<thead>
<tr>
<th>Key requests for comment:</th>
<th>Recent Sales of Unregistered Securities (Item 701(a)-(e))</th>
</tr>
</thead>
<tbody>
<tr>
<td>How do investors in the secondary market access information about the terms and conditions of a registrant’s securities (e.g., by relying on the charter and bylaws filed as Form 10-K exhibits)?</td>
<td></td>
</tr>
<tr>
<td>In addition to registration statements and proxy statements, should this disclosure (or information about changes made to the terms and conditions of the registrant’s securities during the reporting period) be required in periodic reports?</td>
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</table>

| Item 701 requires disclosure in periodic reports of all sales of unregistered securities sold by the registrant within the past three years other than those previously reported on Form 8-K. Item 3.02 of Form 8-K requires more timely disclosure of issuances that equal or exceed 1% of the number of shares outstanding of the class of equity securities sold. |

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<th>Key requests for comment:</th>
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<tr>
<td>Does the disclosure provide important information that is not available elsewhere (e.g., in MD&amp;A or the financial statements)?</td>
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<tr>
<td>Is 1% the appropriate threshold for prompt disclosure of larger issuances?</td>
</tr>
<tr>
<td>Should registrants be required to disclose all unregistered sales of securities during the reporting period, including those already reported on Form 8-K, or be required to include a cross-reference or hyperlink to such disclosure in a previously filed Form 8-K?</td>
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<tr>
<td>Should the disclosure only be required in Form 8-Ks and not in periodic reports, or vice-versa?</td>
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<tr>
<th>Use of Proceeds from Registered Securities (Item 701(f))</th>
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<tbody>
<tr>
<td>Item 701(f) requires disclosure of the use of proceeds from a registrant’s first registered offerings of securities in the first Exchange Act periodic report after effectiveness of the Securities Act registration statement.</td>
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<th>Key requests for comment:</th>
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<tr>
<td>Should the SEC expand this requirement to require disclosure about the use of offering proceeds from offerings other than a registrant’s first registered offering?</td>
</tr>
<tr>
<td>Should the SEC only require disclosure if the actual use of proceeds differs materially from the description of the offering?</td>
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<tr>
<th>Purchases of Equity Securities by the Issuer and Affiliated Purchasers (Item 703)</th>
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<tbody>
<tr>
<td>Item 703 requires tabular disclosure of purchases of registered equity securities by the registrant or any affiliated purchaser for each month included in the period covered by the report.</td>
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<thead>
<tr>
<th>Key requests for comment:</th>
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<tbody>
<tr>
<td>In light of the significant increase in stock repurchases in recent years, should the SEC require more frequent or granular disclosure about repurchases (e.g., incurrence of debt to fund repurchases or the impact repurchases had on performance measures such as EPS)?</td>
</tr>
<tr>
<td>Should the SEC adopt a general materiality standard or specify a monetary threshold for Item 703 disclosure in periodic reports? Should registrants be required to report repurchases that exceed a certain threshold on Form 8-K?</td>
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<tr>
<th>Industry Guides</th>
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<tr>
<td>The SEC has published five Industry Guides addressing disclosures by: (1) bank holding companies, (2) oil and gas programs, (3) real estate limited partnerships, (4) property-casualty insurance underwriters and (5) mining companies.¹</td>
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<th>Key requests for comment:</th>
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<tbody>
<tr>
<td>Should the SEC include industry-specific disclosure requirements in Regulation S-K by codifying all or portions of the Industry Guides?</td>
</tr>
<tr>
<td>Should the Industry Guides be updated or should additional Industry Guides be developed?</td>
</tr>
<tr>
<td>Are the Industry Guides still necessary to advise registrants and their advisors in preparing disclosure now that the SEC publicly releases comment letters?</td>
</tr>
</tbody>
</table>

¹ In a footnote to the concept release, the SEC welcomes comments on specific revisions to any of the Industry Guides and notes that the SEC Staff is currently considering recommendations for Industry Guides 3 (bank holding companies) and 7 (mining companies) as part of its Disclosure Effectiveness Initiative.
### Disclosure of Information Relating to Public Policy and Sustainability Matters

**Discussion and Requests for Comment**

The SEC has received numerous comment letters and other public pressure urging it to adopt rules requiring new or enhanced disclosures relating to corporate sustainability and various public policy matters (e.g., political spending and climate change).

**Key requests for comment:**

- Which, if any, sustainability or public policy issues are important to informed investment and voting decisions? Are there sustainability or public policy issues for which line-item disclosure would be consistent with the SEC’s rulemaking authority and mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation?
- Would line-item requirements for disclosure about sustainability or public policy issues cause registrants to disclose immaterial information?
- Is the sustainability information some registrants choose to provide outside of their SEC filings sufficient to address investor needs? Should registrants be permitted to use information on their websites to satisfy any ESG disclosure requirements?
- If the SEC proposes line-item disclosure requirements on sustainability and public policy issues, which, if any, of the published sustainability reporting frameworks should the SEC refer to in developing such requirements (e.g., the Global Reporting Initiative reporting framework)?
- Should certain categories of registrants be exempt from any sustainability or public policy disclosure requirements or should any such requirements be scaled for certain categories of registrants?
- Are existing disclosure requirements relating to climate change, including the SEC’s 2010 interpretive release, sufficient to elicit the information that would permit investors to evaluate material climate change risk?

### Exhibits

**Exhibits Generally (Item 601)**

Item 601 specifies, by form type, the exhibits that registrants must file with Securities Act and Exchange Act forms.

**Key requests for comment:**

- Should the SEC add any new exhibit requirements to Item 601 or modify or eliminate any of the current exhibit requirements?
- Should the SEC change the presentation or format of the exhibits?
- Should registrants be required to provide exhibits in tagged or searchable format?

**Schedules and Attachments to Exhibits**

Registrants are generally required to file exhibits as complete documents, including any schedules or attachments.

**Key requests for comment:**

- Should the SEC continue to allow registrants to omit schedules and attachments for certain exhibits (e.g., plans of acquisition) filed under Item 601(b)(2)?
- Should registrants be permitted to omit immaterial schedules and attachments from all of their filed exhibits or at least their material contracts? If so, should the SEC provide examples or other guidance (e.g., quantitative thresholds or qualitative factors) on how registrants could assess materiality for these purposes? Should a registrant be required to disclose how it assessed materiality if it omits schedules and attachments as immaterial?
- If registrants are permitted to omit immaterial schedules and attachments, should the SEC require them to include a list briefly identifying the contents of the omitted schedule as well as a commitment to provide a supplemental copy of the omitted schedule to the SEC upon request (as currently applies when schedules and attachments are omitted from exhibits filed under Item 601(b)(2))?
- Should the SEC codify its current staff practice and permit registrants to omit personally identified information from exhibit filings or the schedules and attachments thereto without making a formal request under Exchange Act Rule 24b-2?

**Amendments to Exhibits**

Item 601(a)(4) requires registrants to file as exhibits all amendments or modifications to exhibits that were previously filed with Forms 10-Q or 10-K.
Key requests for comment:

- Should the SEC permit registrants to exclude amendments to previously filed exhibits if they are immaterial or based on some different standard? If so, should it provide guidance as to how to determine whether an amendment is material?
- Should the requirement to file a complete, amended and restated agreement each time an exhibit is modified that is currently applicable to charters and bylaws apply to all types of exhibits? If so, should registrants be required to flag the changes made by underlining or highlighting them?

Change to Exhibits (Instruction 1 to Item 601)

Instruction 1 to Item 601 provides that a registrant need not file an amendment to an exhibit to a registration statement filed in preliminary form if it has been changed only (1) to insert pricing and certain other information that appears elsewhere in an amendment to the registration statement or prospectus filed with the SEC or (2) to correct typographical errors, insert signatures or make other similar immaterial changes.

Key requests for comment:

- Should the SEC (1) eliminate Instruction 1, (2) expand its applicability to filings beyond registration statements or (3) expand the type of changes that can be made without triggering the requirement to file an amendment to the exhibit?
- Should the SEC eliminate the current limitation whereby any incomplete exhibit may not be incorporated by reference in any subsequent filing?

Material Contracts (Item 601(b)(10))

Item 601(b)(10) requires registrants to file material contracts that fall into one of three specified categories: (1) contracts not made in the ordinary course of business that are material to the registrant (and are either to be performed in whole or part after the filing of the report or entered into not more than two years before such filing), (2) contracts made in the ordinary course of business of a specified type (e.g., contracts to which directors and officers are parties, contracts upon which the registrant’s business is substantially dependent, contracts calling for the acquisition or sale of property, plant or equipment for consideration exceeding 15% of fixed assets, or material leases) except where immaterial in amount or significance and (3) management contracts and compensatory plans in which a director, named executive officer or other executive officer of the registrant participates.

Key requests for comment:

- Should the SEC provide quantitative or qualitative thresholds for determining when a contract is material to the registrant?
- Does “not made in the ordinary course of business” provide a clear standard or should a different standard apply? Should the SEC define the types of contracts not made in the ordinary course of business that registrants must file as exhibits?
- Should the SEC require registrants to file material contracts regardless of when they were entered into, as long as such agreement remains material to the registrant? Alternatively, should the disclosure requirement for material contracts entered into not more than two years before the filing only apply to newly reporting registrants? Under what circumstances could a contract remain material if it has been fully performed in a prior period?
- Should the SEC reduce or expand the list of the types of contracts that must be filed even though made in the ordinary course of business? Should the SEC revise this rule to require registrants to file all contracts that are material to an understanding of the registrant or its business, whether or not entered in the ordinary course of business?
- Should the SEC revise its overall approach to this disclosure item (e.g., by requiring registrants to file all ordinary course contracts entered into since the beginning of last year that exceed a percentage of some measure such as revenue or net income and where the registrant has a direct or indirect material interest)? If so, what should be the applicable time frame, percentage threshold and measures?
- Should the SEC provide guidance on the meaning of the phrase “immaterial in amount or significance” or revise the item to exclude only contracts that are immaterial in amount and significance?
- Should the SEC require registrants to file as exhibits all contracts involving related party transactions disclosed pursuant to Item 404(a) even if such a related party contract would not be required to be filed under existing rules if the registrant deemed it to be “immaterial in amount or significance”?
- Should the SEC define certain phrases used in the rule (e.g., “substantial dependence,”
| Preferability Letter (Item 601(b)(18)) | When a registrant makes a voluntary change in accounting principles or practices, Item 601(b)(18) requires it to file a letter from its independent accountant indicating whether, in the accountant’s judgment, the change is preferable under the circumstances. U.S. GAAP requires disclosure in the notes to the financial statements about the nature of and reason for a change in accounting principle, including an explanation of why the newly adopted principle is preferable. Key requests for comment:  
- Should the SEC eliminate this exhibit requirement in light of the significant overlap with existing accounting requirements under U.S. GAAP and PCAOB auditing standards?  
- If the SEC retains the requirement to file preferability letters, should it specify the language that must be included in such a letter?  
- Should the accountant’s statement with respect to preferability be required in the auditor’s report rather than in a separate letter? |
| Subsidiaries (Item 601(b)(21)) and Legal Entity Identifiers | With certain exceptions for subsidiaries that are not significant, Item 601(b)(21) requires registrants to list all of their subsidiaries, their states of organization and the names under which they do business. The SEC recently adopted rules requiring disclosure in certain circumstances of legal entity identifiers (LEIs), which are 20-character, alpha-numeric codes that connect to key reference information that allows for unique identification of entities engaged in financial transactions. LEI disclosure is not currently required in periodic reports. Key requests for comment:  
- Should the SEC require registrants to disclose all of their subsidiaries without exceptions for insignificant subsidiaries? Should the SEC revise its test for what subsidiaries may be omitted?  
- Should the SEC require additional disclosure about a registrant’s subsidiaries?  
- Should the SEC require registrants to include within their annual reports or as exhibits thereto an organization or corporate structure chart depicting their subsidiaries and their basis of control?  
- Should all registrants (or those in certain industries) be required to disclose their LEIs and the LEIs of their subsidiaries in their lists of significant subsidiaries?  
- Should SEC rules encourage registrants (or those in certain industries or of a certain size (e.g., large accelerated filers or WKSIs)) to obtain LEIs? |
| Scaled Requirements | Currently registrants are eligible for scaled disclosure if they qualify as a smaller reporting company (SRC) or an emerging growth company (EGC). Key requests for comment:  
- Should the SEC exclude certain types of registrants from the use of scaled disclosure and, if so, based on what criteria (e.g., failure to timely file, subject to an enforcement action for disclosure violations or fraud, being an “ineligible issuer” under Securities Act Rule 405) and for what time period?  
- Should the SEC tie eligibility for scaled disclosure to a certain proportion of companies (e.g., companies in the lowest 1% or 6% of total U.S. market cap)?  
- Should the SEC permit any category of larger issuers (e.g., with a longer reporting history or more readily available public information) to benefit from scaled disclosure requirements? |

2 The FAST Act requires the SEC to revise Regulation S-K to further scale or eliminate disclosure requirements to reduce the burden on a variety of smaller issuers, including SRCs, EGCs and accelerated filers, while still providing all material information to investors. In the concept release, the SEC indicates that the existing criteria to qualify as a SRC is not being addressed in this release but that the Division is currently evaluating the criteria, among other things, and expects to make recommendations to the SEC in response to the FAST Act mandate.
| Scaled Disclosure Requirements for Eligible Registrants | As summarized in a table in the concept release, SRCs and EGCs are allowed to provide less detailed disclosure about their business operations and financial condition and to provide disclosure for fewer periods (e.g., an SRC may provide audited financial statements and related MD&A disclosure for two rather than three years and limit the description of the development of its business to three rather than five years).

Key requests for comment:
- Are there any disclosure requirements for which scaling is not appropriate?
- Are there disclosure requirements that are particularly beneficial for investors in smaller registrants?
- Are there additional item requirements that the SEC should consider scaling for SRCs or requirements that should be scaled further or eliminated entirely?
- Should the SEC permit EGCs to take advantage of the scaled disclosure requirements currently available only to SRCs (e.g., less extensive requirements for the business description, no need to provide a contractual obligations table)?
- Should the SEC reorganize Regulation S-K to group the requirements applicable exclusively to SRCs under a separate heading?
- Should the SEC eliminate or reduce the XBRL tagging requirements for SRCs?
- Should the SEC permit SRCs to exclude some or all required disclosure from their periodic reports if the information is not material? |

| Frequency of Interim Reporting | The SEC adopted quarterly reporting with the purpose of ensuring meaningful disclosure to investors on a continuous basis. Quarterly financial reporting has been the subject of debate recently due to increased concerns about “short-termism” (e.g., that quarterly reporting may cause management to focus on short-term results to meet or beat earnings rather than on long-term strategic goals).

Key requests for comment:
- Do investors, registrants and the markets benefit from quarterly reporting?
- Does quarterly reporting help or hinder long-term decision making or influence management’s strategic goals and timelines?
- Should certain categories of registrants be permitted to file periodic reports on a less frequent basis (e.g., permitting SRCs to file semi-annually rather than quarterly) or be required to file on a more frequent basis (e.g., monthly)? If so, which categories and what disclosure should be required?
- Should the SEC reduce the level of disclosure required in quarterly reports for the first and third quarters? |

| PRESENTATION AND DELIVERY OF IMPORTANT INFORMATION |

In the concept release, the SEC seeks input on various presentation and delivery approaches that could improve investors’ ability to access and use corporate disclosures. In some cases, the SEC specifically asks how certain requirements may impact large-scale processing and analyses of SEC filings.

| Cross-Referencing | To reduce duplicative disclosure, current SEC rules generally permit registrants to cross-reference information in one section of a document to satisfy a disclosure requirement in another section of a document (including financial statements or related notes).

Key requests for comment:
- Should the SEC should specifically encourage the use of cross-references for particular items or topics to reduce repetitive disclosure and provide investors with a more complete picture by directing them to a more comprehensive discussion?
- Does cross-referencing disadvantage investors by making it more difficult to locate certain information across filings and registrants?
- Should cross-referencing be prohibited with respect to certain items or topics so as not to detract from the readability or completeness of the disclosure? |
| **Incorporation by Reference**  
Exchange Act Rule 12b-23, Item 10(d) of Regulation S-K | Exchange Act Rule 12b-23 generally permits a registrant to incorporate by reference information in any part of a registration statement or report in answer (or partial answer) to any other item required in the filing.  
**Key requests for comment:**  
- Should the SEC expand or limit registrants’ ability to incorporate by reference? Should particular filings or disclosure items remain direct sources of information rather than permitting incorporation by reference?  
- Should the SEC structure its requirements to elicit disclosure that highlights changes from a registrant’s last report and provides a comprehensive discussion in a single location?  
- Should incorporation by reference be reserved for certain categories of registrants (e.g., depending on size, reporting history, etc.)?  
- Should registrants be permitted to incorporate by reference historical information from prior filings in lieu of presenting prior years’ information in the Form 10-K? |
| Layered Disclosure | The SEC has repeatedly encouraged “layered” disclosure and the use of summaries in recognition of the fact that investors have various sophistication levels and informational needs. In doing so, the SEC has cautioned that an introduction or overview should emphasize the most important information rather than serve as a duplicative layer of disclosure that merely repeats a more detailed discussion that follows. \(^3\)

**Key request for comment:**

- Are there approaches to layered disclosure other than a summary page that the SEC should consider for business and financial information in periodic reports and what are the benefits and challenges of such approaches?

| Structured Disclosures | Current SEC rules require several categories of registrants to provide certain information in XBRL format, and specified filers must provide certain information in XML or other machine-readable format. \(^4\) Providing disclosure in structured data format makes it easier for investors and other market participants to access, analyze and compare data across reporting periods, registrants and industries.

**Key requests for comment:**

- Are there changes to the EDGAR system that the SEC should make to render the structured disclosures filed by registrants more useful?
- Are company-specific custom extensions (e.g., element or axis extensions) useful to investors or other users of structured data?
- Would any required disclosures be more effective if registrants had to provide them in structured data format?
- If the SEC were to extend structured data requirements to disclosure in periodic reports, what level of structured data requirements would be appropriate (e.g., require registrants to identify sections or topics with “block text” labels or to structure numeric elements and tables individually)?
- Are there other methods of structuring data or other technologies that the SEC should incorporate into its disclosure requirements?
- To what extent do investors and others rely on structured data provided by registrants in their periodic reports and which specific content is most useful to them? Is such data readily available through other sources such as third-party data aggregators?
- Should certain categories of registrants be exempt from some or all structured data requirements?
- Are there ways to minimize the costs of providing structured disclosures, particularly over time?

\(^3\) The FAST Act contemplates that the SEC would adopt rules permitting registrants to include a summary page in their filings only if each item on the summary page includes a cross-reference (by hyperlink or otherwise) to the related material within the filing.

\(^4\) The SEC noted in the concept release that it is separately considering whether to amend the current XBRL tagging requirements to require the use of “Inline XBRL” for financial statements, which would allow registrants to file the required information and data tags in one document rather than a separate exhibit for the interactive data.