Actions	Compliance	Procedures
(2) If, by checking the airplane logbook, you can positively determine that all the applicable modifications in paragraphs (d)(1)(i) and (d)(1)(ii) are incorporated, you must make an entry into the aircraft records that shows compliance with paragraphs (d)(1) and (d)(2) of this AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).	Not applicable	The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may check the airplane logbook.
(3) If, by checking the airplane logbook, you determine that all the applicable modifications in paragraphs (d)(1)(i) and (d)(1)(ii) are not incorporated, or you cannot positive show that they are incorporated.. (1) Incorporate each missing modification; and (ii) You must make an entry into the aircraft records that shows compliance with this portion of the AD in accordance with seciton 43.9 of the Federal Aviation Regulations (14 CFR 43.9)	Within the next 90 days after the effective date of this AD, unless already accomplished.	British Aerospace Aerostructures Limited has issued BAE Aircraft Technical News Sheet CT (C1) No. 200, Issue 1, dated March 1, 1997.
(4) Do not incorporate Modification H 197 unless Modification H 275 has also been incorporated.	As of the effective date of this AD	British Aerospace Aerostructures Limited has issued BA3 Aircraft Technical News Sheet CT (C1) No. 200, Issue 1, dated March 1, 1997.

Note 2: Although not required by this AD, FAA highly recommends you incorporate Modification H 282.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Atlanta Aircraft Certification Office (ACO), approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

Note 3: This AD applies to each airplane identified in paragraph (a) of this AD, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Cindy Lorenzen, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia; telephone: (770) 703–6078; facsimile: (770) 703–6097.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *How do I get copies of the documents referenced in this AD?* You may get copies of the documents referenced in this AD from DeHavilland Support Limited, Duxford Airfield, Bldg. 213, Cambridgeshire, CB2 4QR, United Kingdom, telephone: +44 1223 830090, facsimile: +44 1223 830085, e-mail: *info@dhsupport.com.* You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on October 31, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–28409 Filed 11–7–02; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229 and 249

[Release Nos. 33–8144; 34–46767, International Series Release No. 1264, File No. S7–42–02]

RIN 3235–AI70

Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: As directed by new section 13(j) of the Securities Exchange Act of 1934, added by section 401(a) of the Sarbanes-Oxley Act of 2002, we propose to require disclosure of off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of an issuer with unconsolidated entities or other persons that have, or may have, a material effect on financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources. The new disclosure would be located in the ''Management's Discussion and Analysis of Financial Condition and Results of Operations'' (''MD&A'') section in a company's disclosure documents. The proposals would require a registrant to provide, in a separately captioned subsection of MD&A, a comprehensive explanation of its off-balance sheet arrangements. The proposals also would require a registrant (other than small business issuers) to provide an overview of its aggregate contractual obligations in a tabular format and contingent liabilities and commitments in either a textual or tabular format.

DATES: Comments should be received by December 9, 2002.

ADDRESSES: You should send three copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. In the alternative, you may submit your comments electronically to the following address: *rule-comments@sec.gov.* To help us process and review your comments more efficiently, comments should be sent by hard copy or e-mail, but not by both methods. All comment letters should refer to File No. S7–42–02. This file number, along with the name of your organization, should be included in the subject line if you use electronic mail. Comment letters will be available for public inspection and copying at the

Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549–0102. We will post electronically-submitted comment letters on the Commission's Internet Web site *(http://www.sec.gov).* We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Questions about this release should be referred to Andrew Thorpe, Division of Corporation Finance (202–942–2910) or Jenifer Minke-Girard or Eric Schuppenhauer, Office of the Chief Accountant (202–942–4400), Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to item 303[1] of regulation S–K,[2] item 303[3] of regulation S–B,[4] item 5 of form 20–F[5] and general instruction B of form 40–F[6] under the Securities Exchange Act of 1934.[7]

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[1] 17 CFR 229.303.

[2] 17 CFR 229.10 *et seq.*

[3] 17 CFR 228.303.

[4] 17 CFR 228.10 *et seq.*

[5] 17 CFR 249.220f.

[6] 17 CFR 249.240f.

[7] 15 U.S.C. 78a *et seq.*

I. Background

On July 30, 2002, the Sarbanes-Oxley Act of 2002 was enacted.[8] Section 401(a) of the Sarbanes-Oxley Act, entitled ''Disclosures in Periodic Reports,'' adds section 13(j) to the Securities Exchange Act of 1934, which requires the Commission to adopt final rules by January 26, 2003 (180 days after the date of enactment) to require each annual and quarterly financial report required to be filed with the Commission, to disclose ''all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.''[9] That legislative mandate is wholly consistent with the series of rulemaking and other initiatives that we have undertaken to improve the transparency and quality of corporate disclosure. Furthermore, much of the language in section 401(a) (*e.g.*, ''financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources and significant components of revenues or expenses'') mirrors the language currently found in the MD&A rules. Moreover, much of the language and many of the concepts embodied in the legislation are consistent with the language and concepts embodied in the Commission's January 2002 statement, which discussed the desirability of enhanced disclosure in MD&A of off-balance sheet arrangements.[10] Accordingly, we are proposing to implement this provision of the Sarbanes-Oxley Act, and to simultaneously advance our initiatives to improve disclosure, by amending the current MD&A rules.[11]

The Commission has long recognized that there is a need for a narrative explanation of financial statements and accompanying footnotes and has developed MD&A over the years to fulfill this need.[12] The disclosure in MD&A is of paramount importance in increasing the transparency of a company's financial performance and providing investors with the disclosure necessary to evaluate a company and to make informed investment decisions. After the financial statements themselves, MD&A is generally the most important portion of a company's disclosure. This is so because MD&A is designed to achieve three interrelated purposes:

- To provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management;
- To improve overall financial disclosure and provide the context within which financial statements should be analyzed; and
- To provide information about the quality, 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.

MD&A disclosure should provide investors with an understanding of management's view of the financial performance and condition of the company, as well as an appreciation of what the financial statements show and do not show, important trends and risks that have shaped the past and trends and risks that are reasonably likely to shape the future.

The MD&A rules already require disclosure regarding off-balance sheet arrangements and other contingencies. The MD&A rules are designed to cover a wide range of corporate events, including events, variables and uncertainties not otherwise required to be disclosed under U.S. generally accepted accounting principles (''GAAP'').[13] For example, the current MD&A rules require disclosure of:

[8] Pub. L. 107–204, 116 Stat. 745 (2002).

[9] Pub. L. 107–204 sec. 401(a) [15 U.S.C. 78m(j)].

[10] *See* release no. 33–8056, FR–61 (Jan. 22, 2002) [67 FR 3746]. That statement was issued in response to a petition from Arthur Andersen LLP, Deloitte and Touche LLP, Ernst & Young LLP, KPMG LLP, and PricewaterhouseCoopers LLP, with the endorsement of the American Institute of Certified Public Accountants, for an interpretive release to facilitate enhanced MD&A disclosures. *See,* rulemaking petition No. 4–450 (Dec. 31, 2001).

[11] The Sarbanes-Oxley Act exempts from section 401 investment companies registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8). *See* Pub. L. 107–204 sec. 405 [15 U.S.C. 7263]. Therefore, registered investment companies are excluded from the scope of the proposals. The proposed rules would apply, however, to business development companies. Business development companies are defined in section 2(a)(48) of the Investment Company Act of 1940. *See* 15 U.S.C. 80a–2(a)(48). Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act, but file forms 10–K and 10–Q, and also include MD&A in their annual reports to shareholders.

[12] *See, e.g.*, Release No. 33–5443 (Dec. 12, 1973) [39 FR 829].

[13] In *In the Matter of Caterpillar Inc.,* Release No. 34–30532 (March 31, 1992), the Commission found that Caterpillar had violated section 13(a) of the Exchange Act [15 U.S.C. 78m(a)] by failing to have disclosed the magnitude of its Brazilian subsidiary's contribution to Caterpillar's overall earnings.

Continued

- Information necessary to an understanding of the registrant's financial condition, changes in financial condition and results of operations; [14]
- Any known trends, demands, commitments, events or uncertainties that will result in, or that are reasonably likely to result in, the registrant's liquidity increasing or decreasing in any material way; [15]
- The registrant's internal and external sources of liquidity, and any material unused sources of liquid assets; [16]
- The registrant's material commitments for capital expenditures as of the end of the latest fiscal period; [17]
- Any known material trends, favorable or unfavorable, in the registrant's capital resources, including any expected material changes in the mix and relative cost of capital resources, considering changes between debt, equity and any off-balance sheet financing arrangements.[18]
- Any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, the extent to which income was so affected.[19]
- Significant components of revenues or expenses that should, in the company's judgment, be described in order to understand the registrant's results of operations; [20]
- Known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.[21]
- Matters that will have an impact on future operations and have not had an impact in the past; [22] and
- Matters that have had an impact on reported operations and are not expected to have an impact upon future operations.[23]

The MD&A rules are intentionally flexible to elicit more meaningful disclosure and to avoid boilerplate discussions.[24] Therefore, while only one item in our current MD&A rules specifically identifies off-balance sheet arrangements,[25] the other requirements clearly require disclosure of off-balance sheet arrangements if necessary to an understanding of a registrant's financial condition, changes in financial condition and results of operations.

We have focused a great deal of our attention on enhancing MD&A disclosure in a continuing effort to improve transparency and restore investor confidence. In December 2001, we issued cautionary advice emphasizing the need for MD&A disclosure regarding a company's critical accounting policies.[26] In January 2002, we issued a statement focusing on the need for improved MD&A disclosure in the following three specific areas of concern: (1) Liquidity and capital resources, including off-balance sheet arrangements; (2) certain trading activities involving non-exchange traded contracts accounted for at fair value; and (3) relationships and transactions with persons or entities that derive benefits from their non-independent relationships with the registrant or the registrant's related parties.[27] In each of those releases, we stated our intention to consider disclosure rules that would codify our views as expressed in those releases. In May of this year, we began the codification process by proposing rules to mandate improved MD&A disclosure about a company's application of its critical accounting policies.[28] We also reiterated our intention to continue improving MD&A by proposing additional disclosure rules.[29] In keeping with those intentions, and in accordance with the mandates in the Sarbanes-Oxley Act, we now are proposing additional rules that would require companies to more effectively fulfill the purposes of MD&A.[30] As discussed below, the proposed rules would, under some circumstances, lower the threshold that triggers disclosure of off-balance sheet arrangements, require that disclosure relating to off-balance sheet arrangements must be set apart in a designated section of MD&A, and (except in the case of small business issuers) require disclosure of aggregate contractual obligations and contingent liabilities and commitments.[31]

II. Discussion of Proposed Rules

A. Objectives of the Proposed Rules

The proposals seek to improve transparency of a company's off-balance sheet arrangements and to provide an overview of aggregate contractual obligations and contingent liabilities and commitments. We believe that improvements in the quality of information in these areas is necessary for investors to better understand a company's current and future financial position and current and future sources of liquidity. Moreover, because management is in the best position to monitor and assess those aspects of its business, it also is in the best position to provide clear explanations and analysis to investors. Our objectives are:

- To implement the legislative mandate in section 401(a) of the Sarbanes-Oxley Act;
- To provide investors with the information and analysis necessary to gain a more comprehensive understanding of the implications of a company's obligations and contingencies from off-balance sheet arrangements that are neither readily

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Disclosure of the extent of that contribution was required under the MD&A disclosure requirements, even though disclosure was not required under GAAP, because the subsidiary's earnings materially affected Caterpillar's reported income from continuing operations. *See* item 303(a)(3)(i) of regulation S–K [17 CFR 229.303(a)(3)(i)]. Furthermore, Caterpillar's MD&A should have discussed various factors which contributed to the subsidiary's earnings, such as currency translation gains, export subsidies, interest income, and Brazilian tax loss carry-forwards, because such items were significant components of its revenues that should have been identified and addressed in order for a reader of the company's financial statements to understand Caterpillar's results of operations. *Id.*

[14] *See* item 303(a) of regulation S–K [17 CFR 229.303(a)].

[15] *See* item 303(a)(1) of regulation S–K [17 CFR 229.303(a)(1)].

[16] *Id.*

[17] *See* item 303(a)(2)(i) of regulation S–K [17 CFR 229.303(a)(2)(i)].

[18] *See* item 303(a)(2)(ii) of regulation S–K [17 CFR 229.303(a)(2)(ii)].

[19] *See* item 303(a)(3)(i) of regulation S–K [17 CFR 229.303(a)(3)(i)].

[20] *Id.*

[21] *See* item 303(a)(3)(iii) of regulation S–K [17 CFR 229.303(a)(3)(ii)].

[22] *See* instruction 3(A) to item 303(a) of regulation S–K [17 CFR 229.303(a)].

[23] *See* instruction 3(B) to item 303(a) of regulation S–K [17 CFR 229.303(a)].

[24] *See* Release No. 33–6711 (April 17, 1987) [52 FR 13715].

[25] *See* item 303(a)(2)(ii) of regulation S–K [17 CFR 229.303(a)(2)(ii)].

[26] *See* Release No. 33–8040, FR–60 (Dec. 12, 2001) [66 FR 65013].

[27] *See* Release No. 33–8056, FR–61 (Jan. 22, 2002) [67 FR 3746].

[28] *See* Release No. 33–8098 (May 10, 2002) [67 FR 35620].

[29] *Id.* at 35622. In a separate proposal, for example, we proposed rules to require current disclosure on form 8–K of the creation of a material direct or contingent financial obligation of a registrant and about events triggering a direct or contingent financial obligation of a registrant. *See* proposed items 2.03 and 2.04 of form 8–K [17 CFR 249.308], Release No. 33–8106 (June 17, 2002) [67 FR 42914]. While that disclosure would not be included in MD&A, it would provide investors with current disclosure of contingent obligations when they become material. The proposed periodic MD&A disclosure of off-balance sheet arrangements would provide more comprehensive information than the proposed current disclosure.

[30] While section 401(a) of the Sarbanes-Oxley Act requires us to adopt new disclosure requirements only for periodic reports, we propose to include Securities Act registration forms that require MD&A disclosure within the scope of the proposals because the policies underlying section 401(a) apply to such registration statements.

[31] *See* section II.B.

apparent nor easily understood from a reading of the financial statements alone; and

• To better inform investors of the aggregate impact of short- and long-term contractual obligations and contingent liabilities and commitments, from both on- and off-balance sheet activities, by presenting a total picture in a single location.

With a greater understanding of off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments, investors should be better able to understand how a company conducts significant aspects of its business (including financing), to assess the quality of earnings and to understand the risks that are not apparent on the face of the financial statements.

B. Off-Balance Sheet Arrangements

1. Background

Off-balance sheet arrangements often are used to provide financing, liquidity, market or credit risk support or to engage in leasing, hedging or research and development services. Some companies use off-balance sheet arrangements to obtain financing at a lower cost of capital than otherwise would be available to a company. Another common use of off-balance sheet arrangements is to allocate risks among third parties. Off-balance sheet arrangements may involve the use of complex structures, including structured finance or special purpose entities, to facilitate a company's transfer of, or access to, assets. In many cases, the transferor of assets has some continuing involvement with the transferred assets that may assume different forms, such as financial guarantees, retained interests, keepwell agreements [32] or other contingent arrangements designed to reduce risks to the special purpose entities or other third parties. The use of off-balance sheet arrangements may play a significant role in the continued availability of liquidity and capital resources for the transferor of assets. It also may be a source of potential risks to a company's future liquidity or results of operations.

One common off-balance sheet arrangement is used for selling financial assets through a process known as securitization.[33] For example, a company may have loans receivable or trade accounts receivable recorded on its books that it wishes to sell in order to generate liquidity, to transfer the risk of defaults to other parties or to protect itself against changes in interest rates. To securitize its receivables, a company sponsors the establishment of entities that are commonly known as special purpose entities. Once a special purpose entity has been established, it purchases the receivables from the company with cash proceeds received from issuing debt or equity securities, backed by the cash flows from the receivables, to interested investors. The company that sold the receivables to the special purpose entity may be required to provide financial support to the special purpose entity. For example, the company may agree to repurchase receivables from the special purpose entity if the receivables are in default, or the company may guarantee a specified level of cash flows on the receivables held by the special purpose entity. Alternatively, the sponsoring company may retain a subordinated interest in a pool of receivables, so that the senior interests have a cushion in the event that a portion of receivables are in default. Accordingly, the company that sold the receivables may continue to have certain obligations to the special purpose entity or a continuing interest in, and risk related to, the transferred assets. Depending on the nature of the obligations and the related accounting treatment under GAAP, the company's financial statements may not fully reflect the company's obligations in respect of the special purpose entity or its arrangements.

Transactions with special purpose entities commonly are structured so that the company that establishes or sponsors the special purpose entity and engages in transactions with it is not required to consolidate the special purpose entity into its financial statements under GAAP. The determination of whether or not to consolidate a special purpose entity begins with an analysis of whether the sponsor has a controlling financial interest in a special purpose entity.[34] Under GAAP, the usual condition for a controlling financial interest is the ownership of a majority voting interest.[35] The theory underlying consolidation is that ''boundaries between separate corporate entities must be ignored to report the business carried on by a group of affiliated corporations as the economic and financial whole that it actually is.''[36] Off-balance sheet arrangements, however, often are structured so that the sponsor does not have a controlling financial interest because the sponsor neither owns a majority voting interest, nor exercises control over the management of the special purpose entity. For example, a special purpose entity may be a legal entity, such as a trust, that does not issue voting stock. In addition, the activities and business decisions of the management of a special purpose entity may be subject to legally imposed limitations and therefore the control traditionally contemplated by GAAP may not exist.

Accounting standard setters in the U.S. are currently reevaluating the accounting guidance for consolidation of special purpose entities.[37] Regardless of current standards for consolidation and regardless of how those standards change as a result of the ongoing reevaluation, disclosure of off-balance sheet arrangements is vital to investor understanding.

2. Off-Balance Sheet Arrangements Covered Under the Proposals

In light of the increasing complexity of off-balance sheet arrangements and the plain language of section 401(a) of the Sarbanes-Oxley Act,[38] we believe that the proposed disclosure should address a wide variety of arrangements. Accordingly, the proposed rules define the term ''off-balance sheet arrangement'' as any transaction, agreement or other contractual arrangement to which an entity that is not consolidated with the registrant is a party, under which the registrant, whether or not a party to the arrangement, has, or in the future may have:

• Any obligation under a direct or indirect guarantee or similar arrangement;

• A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement;

• Derivatives, to the extent that the fair value thereof is not fully reflected as a liability or asset in the financial statements; or

• Any obligation or liability, including a contingent obligation or liability, to the extent that it is not fully

[32] A ''keepwell agreement'' includes any agreement or undertaking under which a company is, or would be, obligated to provide or arrange for the provision of funds or property to an affiliate or third party.

[33] The term ''securitization'' refers to the process of transforming financial assets into securities.

[34] *See* Accounting Research Bulletin No. 51, *Consolidated Financial Statements* (Aug. 1959), paragraph 1.

[35] *See* FASB SFAS No. 94, *Consolidation of all Majority-Owned Subsidiaries* (Oct. 1987), paragraph 13 (amending paragraph 2 of Accounting Research Bulletin No. 51).

[36] *Id.* at paragraph 30.

[37] *See* FASB Exposure Draft, *Proposed Interpretation, Consolidation of Certain Special-Purpose Entities* (June 2002).

[38] Pub. L. 107–204 sec. 401 [15 U.S.C. 78m(j)].

reflected in the financial statements (excluding the footnotes thereto).[39] This definition could encompass arrangements between a company and an entity conducting off-balance sheet activities, as well as arrangements between that entity and third parties and between the company and third parties.[40]

The proposed definition of off-balance sheet arrangements slightly diverges from the exact language of section 401(a) of the Sarbanes-Oxley Act. For example, the proposed definition refers to ''any obligation, including a contingent obligation, that is not fully reflected in the financial statements,'' whereas section 401(a) refers to ''obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons.'' The proposed definition is more focused than the language of section 401(a) in order to aid companies in disclosing off-balance sheet arrangements that warrant more focused and precise disclosure.[41] An overly broad definition could elicit unnecessarily voluminous and repetitive disclosure.[42]

Another aspect of the proposals that is not explicitly stated in the Sarbanes-Oxley Act is that the arrangements are contractual. We believe that the contemplated arrangements would be contractual and that it is appropriate to include them within our policy regarding MD&A disclosure of preliminary negotiations. Therefore, the proposals include an instruction that no obligation to make disclosure of an off-balance sheet arrangement shall arise until an unconditionally binding definitive agreement, subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.[43] That proposed instruction is consistent with the Commission policy set forth in an interpretive release in 1989 on disclosure of preliminary negotiations for the acquisition or disposition of assets not in the ordinary course of business.[44] In the 1989 Interpretive Release, the Commission stated that, ''where disclosure is not otherwise required, and has not otherwise been made, the MD&A need not contain a discussion of the impact of [preliminary negotiations for the acquisition and or disposition of assets not in the ordinary course of business] where, in the registrant's view, inclusion of such information would jeopardize completion of the transaction.''[45]

The proposed definition specifically identifies four characteristics of off-balance sheet arrangements. First, the proposed definition addresses any obligation under a direct or indirect guarantee or similar arrangement.[46] GAAP currently requires disclosure in the footnotes to the financial statements of the nature and amount of the guarantee even though the possibility of loss may be remote.[47] We believe that, with regard to off-balance sheet arrangements involving guarantees, MD&A disclosure is warranted in addition to footnote disclosure when the possibility of loss is higher than remote.[48] Second, the proposed definition includes off-balance sheet arrangements that involve a retained or contingent interest in assets transferred to an unconsolidated entity.[49] Those interests may be used to provide credit enhancement to a special purpose entity and can subsequently have a material effect on a registrant's results of operations or liquidity. Third, the proposed definition includes derivatives that are not fully reflected as liabilities or assets in the financial statements.[50] That item is designed to capture, for example, derivatives that are classified as stockholder's equity under GAAP.[51]

The proposed definition also includes any obligation or liability, including a contingent obligation or liability, to the extent that it is not ''fully reflected'' on the face of the financial statements.[52] This item is designed to include certain contingent liabilities that would not be classified as guarantees under GAAP and that are not recorded at fair value as of the date of the financial statements.[53] For purposes of the proposed definition, obligations or liabilities that are not considered to be fully reflected on the face of financial statements include:

- Obligations that are not classified as a liability according to GAAP;[54]
- Contingent liabilities which, as of the date of the financial statements, are not probable or, if probable, are not reasonably estimable;[55] or
- Liabilities as to which the amount recognized in the financial statements is

[39] *See* proposed item 303(c)(3) of regulation S–B [17 CFR 228.303(c)(3)]; proposed item 303(a)(4)(iii) of regulation S–K [17 CFR 229.303(a)(4)(iii)]; proposed item 5.E.3 of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(iii) of form 40–F [17 CFR 249.240f].

[40] For example, a loan agreement entered into by an entity unconsolidated with the registrant or third party that benefits from a pre-existing guarantee or keepwell agreement of the registrant would be included within the definition whether or not the registrant is a party to the loan agreement.

[41] Some arrangements that could be characterized as ''off-balance sheet'' are already subject to disclosure requirements. For example, we are proposing to exclude from the definition ''contingent liabilities arising out of litigation, arbitration or regulatory actions (not otherwise related to off-balance sheet arrangements).'' *See* proposed item 303(c)(3)(iv) of regulation S–B [17 CFR 228.303(c)(3)(iv)]; proposed item 303(a)(4)(iii)(D) of regulation S–K [17 CFR 229.303(a)(4)(iii)(D)]; proposed item 5.E.3(d) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(iii)(D) of form 40–F [17 CFR 249.240f].

[42] Generally accepted accounting principles address situations involving off-balance sheet arrangements in many differing contexts (*See, e.g.*, FASB SFAS No. 5, *Accounting for Contingencies* (Mar. 1975); FASB SFAS No. 13, *Accounting for Leases* (Nov. 1976); FASB SFAS No. 47, *Disclosure of Long-Term Obligations* (Mar. 1981); and FASB SFAS No. 129, *Disclosure of Information about Capital Structure* (Feb. 1997)). We do not intend for those generally accepted accounting principles to limit or modify the breadth of the proposed definition of ''off-balance sheet arrangement.''

[43] *See* proposed Instruction 1 to paragraph (c) of item 303 of regulation S–B [17 CFR 228.303(c)]; proposed instruction 13 to paragraph 303(a) of item 303 of regulation S–K [17 CFR 229.303(a)]; proposed instruction 1 to item 5.E. of form 20–F [17 CFR 249.220f], and proposed general instruction 7(iv) to form 40–F [17 CFR 249.240f].

[44] *See* Release No. 33–6835 (May 18, 1989) [54 FR 22427]. Hereinafter referred to as ''1989 Interpretive Release.''

[45] *Id.* at 22436.

[46] *See* proposed item 303(c)(3)(i) of regulation S–B [17 CFR 228.303(c)(3)(i)]; proposed item 303(a)(4)(iii)(A) of regulation S–K [17 CFR 229.303(a)(4)(iii)(A)]; proposed item 5.E.3(a) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(iii)(A) of form 40–F [17 CFR 249.240f]. In May 2002, the FASB proposed a new interpretation that would affect the accounting for guarantees. *See* FASB Exposure Draft, *Proposed Interpretation, Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (May 2002).

[47] *See* FASB SFAS No. 5, *Accounting for Contingencies* (Mar. 1975), paragraph 12.

[48] *See* section II.B.3.

[49] *See* proposed item 303(c)(3)(ii) of regulation S–B [17 CFR 228.303(c)(3)(ii)]; proposed item 303(a)(4)(iii)(B) of regulation S–K [17 CFR 229.303(a)(4)(iii)(B)]; proposed item 5.E.3(b) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(iii)(B) of form 40–F [17 CFR 249.240f].

[50] *See* proposed item 303(c)(3)(iii) of regulation S–B [17 CFR 228.303(c)(3)(iii)]; proposed item 303(a)(4)(iii)(C) of regulation S–K [17 CFR 229.303(a)(4)(iii)(C)]; proposed item 5.E.3(c) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(iii)(C) of form 40–F [17 CFR 249.240f]. The proposals are distinct from and are not intended to duplicate the disclosures required by item 305 of regulation S–K [17 CFR 229.305] or FASB SFAS No. 133, *Accounting for Derivative Instruments and Hedging Activities* (June 1998).

[51] *See* FASB Emerging Issues Task Force Issue No. 00–19 *Accounting for Derivative Financial Instruments Indexed to, and Potentially Settled in, a Company's Own Stock* (Jan. 2001).

[52] *See* proposed item 303(c)(3)(iv) of regulation S–B [17 CFR 228.303(c)(3)(iv)]; proposed item 303(a)(4)(iii)(D) of regulation S–K [17 CFR 229.303(a)(4)(iii)(D)]; proposed item 5.E.3(d) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(iii)(D) of form 40–F [17 CFR 249.240f].

[53] *See, e.g.*, FASB Exposure Draft, *Proposed Interpretation, Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (May 2002), paragraphs A8–A9.

[54] *See* FASB, Statement of Financial Accounting Concepts No. 6, *Elements of Financial Statements* (Dec. 1985), paragraphs 35–40.

[55] *See* FASB SFAS No. 5, *Accounting for Contingencies* (Mar. 1975), paragraph 8.

less than the reasonably possible maximum exposure to loss under the obligation as of the date of the financial statements.[56]

The last bullet point includes within the scope of the proposed definition of off-balance sheet arrangements contingent liabilities that are partially accrued according to GAAP, but excludes liabilities recorded at fair value as of the date of the financial statements. For example, GAAP requires an accrual for a loss if information available prior to issuance of the financial statements indicates that it is probable that a liability has been incurred and the amount of the loss can be reasonably estimated.[57] In some instances where a liability is probable, a company can reasonably estimate a range of losses. A company may determine that one amount within the range is more probable than any other amount within the range. FASB interpretation no. 14 states that in that situation, a company should accrue its best estimate within the range and disclose in the notes to the financial statements the additional exposure to loss if there is at least a reasonable possibility of loss in excess of the amount accrued.[58] In that case, the contingent obligation would fall within the scope of the proposed definition because the amount accrued reflects only the most probable estimate, but does not reflect other probabilities of losses as of the date of the financial statements.

In contrast, a liability is considered to be fully reflected in the financial statements, and therefore outside the scope of the proposed definition, if it is recorded at its fair value. The fair value of a liability represents the amount at which a liability could be incurred or settled in a current transaction between willing parties other than in a forced or liquidation sale.[59] To determine fair value of a liability, management often must make an estimate of the resources that a company will have to sacrifice to settle the liability.[60] That estimate is the expected present value of the liability, and accordingly reflects the present value of all probabilities of all possible outcomes within a range. Because contingent liabilities recorded at fair value reflect the present value of all probabilities of all possible outcomes, as opposed to the most probable estimate within a range, they are considered to be fully reflected in the financial statements. For example, in some circumstances a company is required to recognize certain liabilities, such as derivatives and recourse obligations, at fair value. Under the proposed definition of off-balance sheet arrangement, those liabilities would be considered to be fully reflected in the financial statements, and outside of the scope of the proposed definition, even though the fair value of those liabilities may substantially increase in the future in response to changing events or circumstances.[61]

3. Proposed Disclosure Threshold

The structure of an off-balance sheet arrangement is not as important as the effects that the off-balance sheet arrangement may have on a company. Consistent with the language in section 401(a) of the Sarbanes-Oxley Act, the threshold for disclosure of off-balance sheet arrangements falling within the proposed definition is whether they ''may have a current or future material effect on the company's financial condition, changes in financial condition, results of operations, revenues or expenses, liquidity, capital expenditures or capital resources.''[62] The proposed disclosure would be required if management determines either that an off-balance sheet arrangement is material in the current period or that it may become material in the future. Disclosure would not be required for off-balance sheet arrangements where the likelihood of either the occurrence of an event, or the materiality of its effect, is remote.[63]

In the 1989 interpretive release, the Commission stated that a registrant has a duty to disclose prospective information in its MD&A where a trend, demand, event, commitment or uncertainty is both presently known to management and reasonably likely to have future material effects on the registrant's financial condition or results of operations.[64] Therefore, ''reasonably likely'' is the existing disclosure threshold under which information that could have a material effect on financial condition, changes in financial condition or results of operations must be included in MD&A.[65] The Commission also stated that ''[r]egistrants preparing their MD&A disclosure should determine and carefully review what trends, demands, commitments, events or uncertainties are known to management.''[66] According to the 1989 interpretive release, if management were unable to determine the reasonable likelihood of the occurrence of a future event or the materiality of its effect, then disclosure would be required.[67]

The 1989 interpretive release also stated that the probability/magnitude test for materiality approved by the Supreme Court in *Basic* v. *Levinson*[68] is inapposite to MD&A disclosure.[69] In articulating the probability/magnitude test, the Supreme Court stated that the materiality of speculative or contingent information or events ''will depend at any given time upon the balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.''[70] In contrast, disclosure of prospective information in MD&A does not depend upon the balancing of probability and magnitude because the MD&A rules and

[56] *See* FASB Interpretation No. 14, *Reasonable Estimation of a Loss* (Sept. 1976), paragraph 3.

[57] *See* FASB SFAS No. 5, *Accounting for Contingencies* (Mar. 1975), paragraph 8.

[58] *See* FASB Interpretation No. 14, *Reasonable Estimation of a Loss* (Sept. 1976), paragraph 3.

[59] *See* FASB SFAS No. 107, *Disclosures about Fair Value of Financial Instruments* (Dec. 1991), paragraph 5.

[60] *See Id.* at paragraph 11.

[61] While not within the scope of the proposed definition of off-balance sheet arrangements, existing MD&A disclosure rules require disclosure of known trends, demands, commitments, events or uncertainties that are reasonably likely to have a material effect on the registrant's financial condition, changes in financial condition and results of operations. In addition, disclosure of assets and liabilities recorded at fair value currently is required with respect to a registrant's market risk. *See*, *e.g.*, item 305 of regulation S–K [17 CFR 229.305].

[62] *See* proposed item 303(c)(1) of regulation S–B [17 CFR 228.303(c)(1)]; proposed item 303(a)(4)(i) of regulation S–K [17 CFR 229. 303(a)(4)(i)]; proposed item 5.E.1 of form 20-F [17 CFR 249.220f]; and proposed general instruction 7.(i) of form 40–F [17 CFR 249.240f].

[63] *Id.* While this exclusion is not present in section 401(a) of the Sarbanes-Oxley Act, we believe that the exclusion is consistent with that legislative mandate and that it would aid companies in applying the rule to provide meaningful disclosure.

[64] *See* release no. 33–6835 (May 18, 1989) [54 FR 22427].

[65] In the January 2002 Commission statement, we indicated our view that ''reasonably likely'' is a lower disclosure threshold than ''more likely than not.'' *See* release no. 33–8056, FR–61 (Jan. 22, 2002) [67 FR 3746].

[66] *See* release no. 33–6835 (May 18, 1989) [54 FR 22427].

[67] *Id.* at 22430. The Commission identified two assessments management must make where a trend, demand, commitment, event or uncertainty is known: (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required. (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur.

[68] 485 U.S. 224 (1988).

[69] *See* release no. 33–6835 (May 18, 1989) [54 FR 22427 at fn. 27].

[70] *Basic* at 238, (quoting *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833, 849 (2nd Cir. 1968)).

interpretive guidance specify the level of probability that would require disclosure of prospectively material information.

We read the legislative mandate in the Sarbanes-Oxley Act as suggesting a lower disclosure threshold for prospectively material information related to off-balance sheet arrangements. Instead of adopting the ''reasonably likely'' standard, it directs us to adopt a rule to require disclosure of items that ''may'' have a material current or future effect.[71] We believe that an appropriate interpretation of the disclosure threshold is best captured by the concept of ''remoteness.'' Accordingly, the proposals would require disclosure of off-balance sheet arrangements under circumstances where management concludes that the likelihood of the occurrence of a future event and its material effect is higher than remote.[72] In other words, an off-balance sheet arrangement ''may'' have a current or future material effect, and disclosure would be required, unless management determines that the occurrence of an event and the materiality of its effect is outside of the realm of reasonable possibility.[73]

To apply the proposed disclosure threshold, management must make assessments similar to those required for current MD&A disclosure of known trends, demands, commitments, events or uncertainties.[74] Under the proposed disclosure threshold, management first must identify and carefully review the registrant's direct or indirect guarantees, retained interests, equity-linked or -indexed derivatives and obligations (including contingent obligations) that are not fully reflected on the face of the financial statements. Second, management must 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 registrant to recognize an impairment. If management concludes that the likelihood of occurrence is remote, then no disclosure would be required under the proposed rules.[75] If management cannot make that determination, it would have to evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty on the assumption that it will come to fruition. Disclosure then would be required unless management concludes that likelihood of the event having a material effect is remote. Consistent with other disclosure threshold determinations that management must make in drafting MD&A, the assessment of remoteness must be objectively reasonable, viewed as of the time the determination is made.[76]

4. Proposed Disclosure About Off-Balance Sheet Arrangements

The proposals explicitly require a registrant to disclose the facts and circumstances that provide investors with a clear understanding of the registrant's business activities, financial arrangements and financial statements.[77] To filter out disclosure of insignificant details, the proposals require disclosure of enumerated items only to the extent necessary to an understanding of the effect of the off balance sheet arrangements on the registrant's financial condition, changes in financial condition, revenues and expenses, results of operations, liquidity, capital expenditures and capital resources.[78]

Under the proposals, a registrant would have to disclose the nature and business purpose of the off-balance sheet arrangements.[79] This disclosure should explain to investors why and how a registrant engages in off-balance sheet arrangements. For example, a registrant may indicate that the arrangements enable the company to lease certain facilities rather than acquire them, where the latter would require the registrant to recognize a liability for the financing. Other possible disclosure under this proposed requirement may indicate that the off-balance sheet arrangement enables the registrant to readily obtain cash through sales of groups of loans to a trust; to finance inventory, transportation or research and development costs without recognizing a liability; or to lower borrowing costs of affiliates by extending guarantees to their creditors.

In addition, a registrant would have to disclose, to the extent material to an understanding of the proposed disclosure, the significant terms and conditions of the arrangements.[80] This disclosure requirement may include disclosure of the terms of credit or liquidity enhancement provided by a registrant, leases, limitations on the activities or life of a special purpose entity, contracts between the registrant and a special purpose entity for goods or services or specific rights of third parties to participate in the management of a special purpose entity. This proposed disclosure requirement applies to arrangements to which a registrant is a party and to arrangements under which the registrant may have a direct or contingent obligation even though the company is not a party to the arrangement.[81] That disclosure should inform investors of the significant terms and conditions of any arrangements that may implicate a company's pre-existing guarantees, keepwell agreements or other arrangements. Terms and conditions that are not necessary to an understanding of the disclosure required under the proposals are not required to be disclosed.

The proposals would require a registrant to disclose the nature and amount of the total assets and total obligations and liabilities (including contingent obligations and liabilities) of an entity in which off-balance sheet activities are conducted.[82] This disclosure should provide the information that investors need to

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[71] Pub. L. 107–204 sec. 401(a) [15 U.S.C. 78m(j)].

[72] GAAP requires disclosure of some information about off-balance sheet arrangements in footnotes to the financial statements. *See, e.g.*, fn. 41. While parts of the proposed MD&A disclosure may overlap the disclosure presented in the footnotes to the financial statements, the proposed MD&A disclosure is designed to provide more comprehensive information and analysis than that which is provided in the footnotes. We believe this possible overlap to be warranted because it is consistent with our long-standing position that the financial statements and accompanying footnotes alone may be insufficient for an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance. *See* release no. 33–6711 (April 17, 1987) [52 FR 13715].

[73] ''Remote'' and ''reasonably possible'' are long-standing probability thresholds used in financial disclosure. *See* FASB SFAS No. 5, *Accounting for Contingencies* (Mar. 1975).

[74] While this proposal lowers the disclosure threshold for prospectively material information with respect to off-balance sheet arrangements, we are not proposing to lower the pre-existing ''reasonably likely'' threshold for other MD&A disclosure requirements.

[75] Even if management determines that the likelihood of the occurrence of an event is remote, disclosure may be required if the information is otherwise material under the probability/magnitude test. *See* Securities Act Rule 408 [17 CFR 230.408] and Exchange Act Rule 12b–20 [17 CFR 240.12b–20].

[76] *See* release no. 33–6835 (May 18, 1989) [54 FR 22427].

[77] *See* proposed item 303(c) of regulation S–B [17 CFR 228.303(c)]; proposed item 303(a)(4) of regulation S–K [17 CFR 229. 303(a)]; proposed item 5.E of form 20–F [17 CFR 249.220f]; and proposed general instruction 7 of form 40–F [17 CFR 249.240f].

[78] *Id.*

[79] *See* proposed item 303(c)(1)(i) of regulation S–B [17 CFR 228.303(c)(1)(i)]; proposed item 303(a)(4)(i)(A) of regulation S–K [17 CFR 229. 303(a)(4)(i)(A)]; proposed item 5.E.1(a) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i)(*A*) of form 40–F [17 CFR 249.240f].

[80] *Id.*

[81] *See supra* fn. 40.

[82] *See* proposed item 303(c)(1)(ii) of regulation S–B [17 CFR 228.303(c)(1)(ii)]; proposed item 303(a)(4)(i)(B) of regulation S–K [17 CFR 229.303(a)(4)(i)(B)]; proposed item 5.E.1(b) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i)(B) of form 40–F [17 CFR 249.240f].

understand the dynamics and business activities of a registrant's off-balance sheet arrangements. For example, a registrant would have to identify the total amount of assets that it transferred to the off-balance sheet entity, amounts receivable or payable and any debt obligations incurred by the entity. This information also should provide insight into an off-balance sheet entity's risk exposure, which in turn could expose the registrant to material risk.

The proposed disclosure would provide investors with insight into the overall magnitude of a company's off-balance sheet activities, the specific impact of the arrangements on a registrant and the circumstances that could cause material contingent obligations or liabilities to come to fruition. Specific disclosure would be required of:

- The amounts of revenues, expenses, and cash flows arising from the arrangements;
- The nature and total amount of any interests retained, securities issued and other indebtedness incurred; and
- The nature and amount of any other obligations or liabilities (including contingent obligations or liabilities) of the registrant arising from the arrangements that are, or may become, material and the triggering events or circumstances that could cause them to arise.[83]

For example, this disclosure includes identification of the class and amount of any debt or equity securities issued by the registrant, either to the entity or to third parties, amounts of any guarantees, lines of credit, standby letters of credit, take-or-pay contracts or throughput contracts. This proposed disclosure requirement also includes provisions in financial guarantees or commitments, debt or lease agreements or other arrangements that could trigger a requirement for an early payment, additional collateral support, changes in terms, acceleration of maturity or the creation of an additional financial obligation. In addition, the proposals require disclosure of the circumstances under which the registrant's obligations and liabilities (including contingencies) could arise, such as adverse changes in the registrant's credit rating, financial ratios, earnings, cash flows, or stock price, or changes in the value of underlying, linked or indexed assets.[84]

Under the proposals, a registrant would have to provide management's analysis of the material effects of the off-balance sheet arrangements and resulting obligations and liabilities on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures and capital resources.[85] Possible disclosure may include a discussion of the amounts of gains or losses that were derived from sales of assets to special purpose entities in current and past periods, including the reasons for changes from period to period. If necessary, a registrant also may be required to disclose changes in the amount of third-party at-risk equity of special purpose entities and the material consequences of those changes. To adequately inform investors of the effect an off-balance sheet arrangement on liquidity and capital resources, a registrant may have to disclose that an off-balance sheet arrangement requires the registrant to maintain a certain balance of liquid assets for an extended period of time. In that instance, the disclosure should include the amount and source of the assets required to be maintained and how that restriction on capital resources will affect ongoing operations. To inform investors of the material effects of the contingent obligations that arise from off-balance sheet arrangements, a registrant would be required to disclose the amount of assets that may be required to settle any contingent obligation, the potential sources of necessary funding and whether or not circumstances indicate that a contingency will come to fruition.

The proposed analytical disclosure should provide investors with management's insight into the impact and proximity of the potential risks that may arise from material off-balance sheet arrangements. In addition, to increase investor understanding of circumstances that would have common effects with respect to a number of off-balance sheet arrangements, the proposals require registrants to disclose managements' analyses in the aggregate.[86] For example, if particular triggering events or circumstances would either require a registrant to become directly obligated, or accelerate its obligations, under a number of off-balance sheet arrangements, and the overall obligations would be material, then the proposed rules would require an analysis of the circumstances and their aggregate effect to the extent it increases understanding.

Under the proposals, management would have to provide an analysis of the degree to which the registrant relies on off-balance sheet arrangements for its liquidity and capital resources or market risk or credit risk support or other benefits.[87] This disclosure should provide investors with an understanding of the importance of off-balance sheet arrangements to the continuing operations of a registrant's business. For example, if a registrant relies on off-balance sheet arrangements for its liquidity and capital resources, a registrant may be required to disclose how often it securitizes financial assets, to what degree its securitizations are a material source of liquidity, whether it has increased or decreased securitizations from past periods and to explain such increase or decrease. If the registrant relies on off-balance sheet arrangements for market risk or credit risk support, disclosure may be required of the extent to which a group of assets has been overcollateralized and the extent to which the registrant has continuing exposure to loss. Together with the other disclosure requirements, registrants should provide information sufficient for investors to assess the extent of the risks that have been transferred and retained as a result of the arrangements.

Management also would have to discuss the effects of a termination or material reduction in the benefits of off-balance sheet arrangements.[88] If under a contractual provision, or as a result of a known event, demand, commitment, trend or uncertainty, it is reasonably likely that an off-balance sheet arrangement that materially benefits the registrant will be terminated or the benefits of the arrangement will be materially reduced, disclosure would be required of the circumstances under which such termination or reduction may occur and the material effects.[89] Under the proposals a registrant would have to disclose any contractual provisions calling for the termination or material reduction of an off-balance sheet arrangement. The disclosure would also address factors that are reasonably likely to affect the registrant's ability to continue using off-

[83] *See* proposed item 303(c)(1)(iii) of regulation S–B [17 CFR 228.303(c)(1)(iii)]; proposed item 303(a)(4)(i)(C) of regulation S–K [17 CFR 229.303(a)(4)(i)(C)]; proposed item 5.E.1(c) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i)(*C*) of form 40–F [17 CFR 249.240f].

[84] *Id.*

[85] *See* proposed item 303(c)(1)(iv) of regulation S–B [17 CFR 228.303(c)(1)(iv)]; proposed item 303(a)(4)(i)(D) of regulation S–K [17 CFR 229.303(a)(4)(i)(D)]; proposed item 5.E.1(d) of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i)(D) of form 40–F [17 CFR 249.240f].

[86] *Id.*

[87] *Id.*

[88] *See* proposed item 303(c)(2) of regulation S–B [17 CFR 228.303(c)(2)]; proposed item 303(a)(4)(ii) of regulation S–K [17 CFR 229.303(a)(4)(ii)]; proposed item 5.E.2 of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(ii) of form 40–F [17 CFR 249.240f].

[89] *Id.*

balance sheet arrangements. For example, if a registrant's credit rating were to fall below a certain level, some off-balance sheet arrangements may require a registrant to purchase the assets or assume the liabilities of a special purpose entity. In addition, a change in a registrant's credit rating could either preclude or materially reduce the benefits to the registrant of engaging in off-balance sheet arrangements. In such cases, the registrant would have to disclose known circumstances that would be reasonably likely to cause its credit rating to fall to the specified level and discuss the material consequences.

Request for Comment

- Have we appropriately tailored the proposed definition of the term ''off-balance sheet arrangement'' and the proposed disclosure to filter out disclosure that is unimportant to investors? If not, how should we change the proposed definition or disclosure requirements?
- Is the proposed definition too narrow? If so, how should we change it to include other off-balance sheet arrangements that are significant to investors?
- Is the proposed definition of an ''off-balance sheet arrangement'' sufficiently clear to enable registrants to determine which derivative instruments are included in the proposed disclosure requirements and which are not?
- Is it appropriate to apply our existing policy of excluding preliminary negotiations from MD&A disclosure to off-balance sheet arrangements?
- Is the proposed ''remote'' disclosure threshold appropriate and consistent with the language in section 401(a) of the Sarbanes-Oxley Act? If not, how should we change it?
- Would it be appropriate under the language in section 401(a) of the Sarbanes-Oxley Act to apply the ''reasonably likely'' disclosure threshold applicable elsewhere in MD&A to disclosure about off-balance sheet arrangements? If so, should we adopt the ''reasonably likely'' standard for disclosure of off-balance sheet arrangements?
- Would the application of the disparate disclosure threshold proposed to apply to disclosure of off-balance arrangements, in comparison to the ''reasonably likely'' standard used elsewhere in MD&A, attribute undue prominence to information about off-balance sheet arrangements in relation to other significant information?
- Should we consider amending current MD&A rules to lower the existing ''reasonably likely'' disclosure threshold to be consistent with the threshold in the proposals?
- Would the proposed disclosure threshold for prospectively material information related to off-balance sheet arrangements yield comparable disclosures among registrants?
- Is there any basic information not required by the proposals that would be necessary to understand a registrant's off-balance sheet arrangements? If so, what additional disclosure should be required?
- Do the proposals provide enough flexibility to companies to fully and clearly describe their off-balance sheet arrangements? Would a more flexible approach, such as the current MD&A requirements for liquidity and capital resources, result in better disclosure?
- Would a registrant be able to monitor and provide disclosure about arrangements to which it is not a party, yet that may create direct or contingent liabilities or obligations for the registrant?
- Is there any management analysis not required by the proposals that would be necessary for an investor to gain an understanding of the magnitude and proximity of risk exposures and financial impact of a registrant's off-balance sheet arrangements? If so, what additional disclosure should be required?

C. Contractual Obligations and Contingent Liabilities and Commitments

Disclosure of contractual obligations and contingent liabilities and commitments currently is dispersed throughout various parts of a registrant's filings. While section 401(a) of the Sarbanes-Oxley Act does not direct us to adopt a disclosure requirement, we believe that aggregated information about contractual obligations and contingent liabilities and commitments in a single location would improve transparency of a registrant's short- and long-term liquidity and capital resource needs and demands. It also would provide appropriate context for investors to assess the relative role of off-balance sheet arrangements with respect to liquidity and capital resources. We therefore propose to require certain registrants to include tabular disclosure about contractual obligations, and either tabular or textual disclosure about contingent liabilities and commitments in the MD&A section.[90] The disclosure would include information about a registrant's known contractual obligations and contingent liabilities and commitments, encompassing both on- and off-balance sheet arrangements as of the latest balance sheet date.[91] We are not proposing that this requirement apply to small business issuers.[92]

1. Proposed Tabular Disclosure in MD&A

The proposed table requires disclosure of the amounts of contractual obligations, aggregated by type of contractual obligation, for at least the periods specified in the table below.[93] To provide flexibility for company-specific disclosure, a registrant may either use the categories of obligations specified in the proposed table or other categories suitable for its business.[94] The table should be accompanied by footnotes necessary to describe provisions that create, increase or accelerate obligations, or other pertinent data.

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]					

[90] *See* proposed item 303(a)(5) of regulation S–K [17 CFR 229.303(a)(5)]; proposed item 5.F of form 20–F [17 CFR 249.220f]; and proposed general instruction 8 of form 40–F [17 CFR 249.240f].

[91] *Id.*

[92] ''Small business issuer'' is defined to mean any entity that (1) has revenues of less than $25,000,000; (2) is a U.S. or Canadian issuer; (3) is not an investment company; and (4) if a majority-owned subsidiary, has a parent corporation that also is a small business issuer. An entity is not a small business issuer, however, if it has a public float (the aggregate market value of the outstanding equity securities held by non-affiliates) of $25,000,000 or more. *See* 17 CFR 228.10.

[93] *See* proposed item 303(a)(5)(i) of regulation S–K [17 CFR 229.303(a)(5)(i)]; proposed item 5.F.1 of form 20–F [17 CFR 249.220f]; and proposed general instruction 8(i) of form 40–F [17 CFR 249.240f].

[94] *Id.*

Contractual Obligations	Payments due by period				
	Total	Less than 1 year	1–3 years	3–5 years	More than 5 years
[Unconditional Purchase Obligations]					
[Other Long-Term Obligations]					
[Total Contractual Obligations]					

2. Proposed Disclosure of Contingent Liabilities or Commitments

Under the proposals, a registrant would have to disclose, either in tabular format or in text, the expected amount, range of amounts or maximum amount of contingent liabilities or commitments that are expected to expire in less than one year, from one to three years, from three to five years, and more than five years. The disclosure should indicate whether the amount disclosed is an expected amount or maximum amount if a range is not presented. The contingent liabilities or commitments must be aggregated by type in a manner that is suitable for the registrant's business. Examples of contingent liabilities or commitments that would be covered under the proposals are lines of credit, standby letters of credit, guarantees, and standby repurchase obligations. The disclosure should address, in footnotes to the table or in the text, provisions of contingent liabilities that create, increase or accelerate obligations, or other pertinent data.

As with other MD&A requirements, a registrant would have to disclose material changes to the amounts of contractual obligations and contingent liabilities and commitments.[95] The registrant would not be required to include the table or repeat the other proposed required textual disclosure in quarterly reports.[96] Instead, the registrant may disclose material changes by including a discussion of the relevant changes.

Request for Comment

- Should we require the proposed table to be accompanied by additional narrative disclosure regarding liquidity and capital resources above and beyond that which already exists in MD&A?
- Should we adopt definitions of ''contractual obligations'' and ''contingent liabilities or commitments'' If so, what should they be?
- To avoid potential abuses and to promote comparable disclosure among companies, should we include an instruction to the table that would limit the extent to which a registrant may adapt the table to its particular circumstances? If so, what limits should we impose?
- Should the proposed rules state that no disclosure is required with respect to the issuance of notes, drafts, acceptances, bills of exchange or other commercial instruments with a maturity of one year or less issued in the ordinary course of the registrant's business?

D. Presentation of Proposed Disclosure

1. Separate Disclosure Sections

The proposals would require a registrant to present the proposed disclosure about off-balance sheet arrangements set apart in a designated section of MD&A. In contrast, a registrant may place the tabular and textual disclosure of known contractual obligations and contingent liabilities and commitments in an MD&A location that it deems to be appropriate. While the proposed disclosure in the separate section may relate to other aspects of MD&A, such as the results of operations or liquidity and capital resources, a distinct presentation of the information would highlight it for readers of MD&A and enable investors to more easily compare disclosure of different companies. Investors will often find information relating to a particular matter more meaningful if it is disclosed in a single location, rather than presented in a fragmented manner throughout the MD&A. In addition, a distinct presentation of each section would layer the MD&A, which would enable investors with varying levels of interest and financial acumen to easily obtain desired information.

2. Language and Format

The proposed MD&A discussion should be presented in language and a format that is clear, concise and understandable. It should not be presented in such a manner that only an investor who is also an accountant or financial expert or an expert on a particular industry would be able to fully understand it. Boilerplate disclosures that do not specifically address the registrant's particular circumstances and operations also would not satisfy the proposed requirements. Under the proposals, a registrant should aggregate similar arrangements to the extent practicable, but the registrant must discuss important distinctions in terms and effects of the aggregated arrangements.[97] Disclosure that could easily be transferred from year to year, or from company to company, with no change would neither inform investors adequately nor reflect the independent thinking that must accompany the assessment by management that is intended under the proposal.

Request for Comment

- Should we require the proposed disclosure to be presented in a separate MD&A section or should it be integrated into other closely related MD&A discussions of financial condition, changes in financial condition, results of operations and liquidity and capital resources?
- To facilitate the layering of MD&A, should we amend the MD&A rules to require separate captions for the required discussions of results of operations, liquidity and capital resources?

E. Other MD&A Disclosure

While certain elements of the information required by these proposals are subsumed by existing MD&A requirements, financial statement disclosure requirements and materiality standards, we believe that more focused and specific disclosure requirements would best achieve our objectives and effectuate the will of Congress. The proposals are intended to complement and clarify the more general MD&A disclosure provisions that require a registrant to provide information about how known trends or uncertainties affect its liquidity, capital resources and results of operations, and other information necessary to an understanding of its financial condition, changes in financial condition and results of operations.[98] While that

[95] *See, e.g.*, item 303(b) of regulation S–K [17 CFR 229.303(b)].

[96] *See* proposed instruction 7 to paragraph (b) of item 303 of regulation S–K [17 CFR 229.303(b)].

[97] *See* proposed item 303(c)(1) of regulation S–B [17 CFR 228.303(c)(1)]; proposed item 303(a)(4)(i) of regulation S–K [17 CFR 229. 303(a)(4)(i)]; proposed item 5.E.1 of Form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i) of Form 40–F [17 CFR 249.240f].

[98] *See* item 303(a) of regulation S–K [17 CFR 229.303(a)].

disclosure mandate is general in nature, the responsive MD&A disclosures should be sufficiently detailed and tailored to the registrant's individual circumstances.[99]

In an effort to provide guidance to public companies, our January 2002 statement presents a number of factors that management should consider to identify the trends, demands, commitments, events and uncertainties that require disclosure with respect to liquidity and capital resources.[100] It also addresses MD&A disclosure of relationships and transactions with persons or entities that derive benefits from their non-independent relationships with the registrant or the registrant's related parties.[101] We believe that existing disclosure requirements, including the January 2002 Commission statement, address disclosure in those areas. Therefore, to avoid unnecessary duplication of disclosure we are only proposing to codify the positions in our January 2002 statement as they relate to off-balance sheet arrangements. We believe that the factors addressed in our January 2002 statement remain useful for management to consider in meeting its MD&A disclosure obligations of liquidity and capital resources and transactions with persons or entities that derive benefits from their non-independent relationships with the registrant or the registrant's related parties.

There are some transactions that, while referred to as ''off-balance sheet arrangements,'' may not fall within the scope of the proposals. For example, some off-balance sheet arrangements do not create contingent liabilities or obligations. A registrant may routinely securitize financial assets without providing any recourse or credit or liquidity support to a special purpose entity. Existing requirements may require a registrant to discuss those activities in its MD&A discussion of liquidity and capital resources.[102] If an off-balance sheet arrangement does not fall within the scope of the proposed disclosure requirements, yet disclosure would be required under the other provisions of MD&A, a registrant may choose whether or not to provide the disclosure in the separately-captioned section required by this proposal. We would encourage that any such disclosure in the MD&A be organized so that it is most useful and understandable to investors.

Request for Comment

- Should we further amend the MD&A rules to require more specific disclosure about liquidity and capital resources? If so, what specific disclosure items should we include?
- Should we further amend the MD&A rules to require more specific disclosure about relationships and transactions with persons or entities that derive benefits from their non-independent relationships with the registrant or the registrant's related parties? If so, what specific disclosure items should we include?
- Should we codify the factors that we identified in our January 2002 Commission statement for management's consideration in identifying the trends, demands, commitments, events and uncertainties that require disclosure with respect to liquidity and capital resources? Are there other factors that should be included in such a codification?

F. Application of the Proposals to Foreign Private Issuers

The proposed MD&A disclosure requirements would apply to foreign private issuers[103] that file annual reports on Form 20–F[104] or on Form 40–F.[105] Because section 401(a) of the Sarbanes-Oxley Act does not distinguish between foreign private issuers and U.S. companies, we interpret Congress' directive to the Commission to adopt rules requiring expanded disclosure about off-balance sheet transactions in annual reports filed with the Commission to apply equally to Form 20–F or 40–F annual reports filed by foreign private issuers as well as to Form 10–K or 10–KSB annual reports filed by domestic issuers.[106]

There are two additional reasons for applying the proposed rules to foreign private issuers' annual reports filed with the Commission. First, investors and others would enjoy the same benefits from expanded off-balance sheet disclosure in foreign private issuers' annual reports as they would from this disclosure in domestic issuers' annual reports. Second, for Form 20–F annual reports, the existing MD&A-equivalent requirements for foreign private issuers currently mirror the substantive MD&A requirements for U.S. companies. We believe this desirable policy should continue.[107]

The disclosure provided by Canadian issuers that file form 40–F is generally that required under Canadian law. We have, however, supplemented these disclosure requirements with specific required items of information.[108] We have proposed additional disclosure requirements under form 40–F as a result of the Sarbanes-Oxley Act.[109] Although an issuer prepares its MD&A discussion contained in a form 40–F registration statement or annual report in accordance with Canadian disclosure standards, we believe that requiring disclosure of off-balance sheet arrangements in accordance with SEC rules is not inconsistent with the principles of the MJDS, is consistent with the Sarbanes-Oxley Act, and, most importantly, will provide investors with useful information that is comparable to that provided by U.S. and other foreign

[99] In addition to the information specifically required, a company would be required to provide any other information necessary to keep its disclosure from being materially misleading. *See* Securities Act Rule 408 [17 CFR 230.408] and Exchange Act Rule 12b–20 [17 CFR 240.12b–20].

[100] *See* release No. 33–8056, FR–61 (Jan. 22, 2002) [67 FR 3746], section II.A.1.

[101] *Id.* at section II.C.

[102] *See* item 303(a)(2)(ii) of regulation S–K [17 CFR 229.303(a)(2)(ii)]. This section provides that the description of known material trends in capital resources must consider off-balance sheet financing arrangements.

[103] A foreign private issuer is a non-U.S. company except for a company that has more than 50% of its outstanding voting securities owned by U.S. investors and has a majority of its officers and directors residing in or being citizens of the U.S., has a majority of its assets located in the U.S., or has its business principally administered in the U.S. *See* Exchange Act Rule 3b–4 [17 CFR 240.3b–4].

[104] 17 CFR 249.220f.

[105] 17 CFR 249.240f. Form 40–F is the form used by qualified Canadian issuers to file their Exchange Act registration statements and annual reports with the Commission in accordance with Canadian disclosure requirements under the U.S.-Canadian Multijurisdictional Disclosure System (''MJDS'').

[106] Similarly, the Commission recently adopted rules pertaining to the certification requirements under section 302 of the Sarbanes-Oxley Act that apply to both Form 20–F and Form 40–F annual reports as well as to those filed on the domestic forms. *See* Release no. 33–8124 (August 29, 2002) [67 FR 57276].

[107] Although we revised the wording of the MD&A item in Form 20–F in 1999, the adopting release noted that we interpret that item as requiring the same disclosure as item 303 of regulation S–K. *See* Release No. 33–7745 (September 28, 1999) [64 FR 53900 at 59304]. In addition, instruction 1 to item 5 in Form 20–F provides that issuers should refer to the Commission's 1989 interpretive release on MD&A disclosure under item 303 of regulation S–K for guidance in preparing the discussion and analysis by management of the company's financial condition and results of operations required in Form 20–F. *See* Release No. 33–6835 (May 18, 1989) [54 FR 22427].

[108] For example, under general instruction C.2 of Form 40–F, the issuer must usually include financial information that is reconciled to U.S. generally accepted accounting principles.

[109] We have recently proposed to amend Form 40–F to require disclosure concerning whether the issuer has adopted a code of ethics applicable to certain officers and whether it has a financial expert on its audit committee. *See* Release No. 33–8138 (October 22, 2002) [67 FR 66208].

companies that file reports under the Exchange Act.

Section 401(a) of the Sarbanes-Oxley Act also requires the Commission to adopt off-balance sheet disclosure rules that apply to ''each quarterly financial report required to be filed with the Commission.''[110] Since foreign private issuers are not required to file ''quarterly'' reports with the Commission, the proposed rules would not apply to Form 6–K reports submitted by foreign private issuers to provide copies of materials required to be made public in their home jurisdictions.[111] Thus, unless a foreign private issuer files a Securities Act registration statement that must include interim period financial statements and related MD&A disclosure, it would not be required to update the proposed MD&A disclosure more frequently than annually.[112]

Request for Comment

- Should we apply the proposed rules to foreign private issuers' annual reports on Form 20–F or 40–F, as proposed? Or should we exempt these foreign private issuer annual reports from the scope of the proposed rules? If so, why?
- Should we exempt Form 40–F, the MJDS annual report filed by qualified Canadian issuers, from the scope of the proposed rules? If so, why?
- If we should require foreign private issuers to provide some expanded disclosure regarding off-balance sheet transactions and other similar items in their annual reports, should we adopt rules that apply different standards for foreign private issuers compared to the standards adopted for domestic issuers but that would be consistent with the Sarbanes-Oxley Act? If so, what standards would you substitute for the proposed rules?
- Should we exempt form 6–K reports from the scope of the proposed rules, as proposed? Or should we apply the proposed rules to form 6–K reports that include quarterly financial statements?

G. Proposed Safe Harbor for Forward-Looking Information

Some of the disclosure required by the proposals would require disclosure of forward-looking information.[113] To encourage the type of information and analysis necessary for investors to understand the impact of off-balance sheet arrangements, the proposals include a safe harbor for forward-looking information.[114] The proposed safe harbor explicitly applies the statutory safe harbor protections (sections 27A of the Securities Act and 21E of the Exchange Act) [115] to forward-looking information that would be required to be disclosed by the proposals.

The statutory safe harbors contain provisions to protect forward-looking statements against private legal actions that are based on allegations of a material misstatement or omission.[116] The statutory safe harbors provide three separate bases for a registrant to claim the protection against liability for forward-looking statements made in the registrant's MD&A. First, a forward-looking statement would fall within the safe harbors if it is identified as forward-looking and accompanied by meaningful cautionary statements that identify important factors that could cause actual results to differ materially from those in the forward-looking statement. Second, the safe harbors protect from private liability any forward-looking statement that is not material. Finally, the safe harbors preclude private liability if a plaintiff fails to prove that the forward-looking statement was made by or with the approval of an executive officer of the registrant who had actual knowledge that it was false or misleading. The statutory safe harbors cover statements by reporting companies, persons acting on their behalf, outside reviewers retained by them, and their underwriters (when using information from, or derived from, the companies).

Because we believe that it would promote more meaningful disclosure, we are invoking rulemaking authority under sections 27A and 21E to ensure the application of the statutory safe harbors to the forward-looking statements that would be required under the proposed rules.[117] The proposed safe harbors are designed to remove possible ambiguity about whether the statutory safe harbors would apply to some of the statements made in response to the proposed disclosure requirements. The proposed safe harbor specifies that, except for historical facts, some of the disclosure would be deemed to be a ''forward looking statement'' as that term is defined in the statutory safe harbors.[118] Under the proposed MD&A safe harbor, all of the conditions of the statutory safe harbors must be met. Accordingly, we urge companies preparing the proposed MD&A disclosure to consider the terms, conditions and scope of the statutory safe harbors in drafting their disclosure and to tailor the required cautionary language to the specific forward-looking statements being made.

Request for Comment

- Should the proposed safe harbor be expanded to apply to all forward-looking information in MD&A, regardless of whether the information

[110] Exchange Act section 13(j) [15 U.S.C. 78m(j)].

[111] A foreign private issuer must furnish under cover of Form 6–K material information that it makes public or is required to make public under its home country laws or the rules of its home country stock exchange or that it distributes to security holders. While foreign private issuers may submit interim financial information under cover of Form 6–K, they do so pursuant to their home country requirements and not because of a Commission requirement to submit updated financial information for specified periods and according to specified standards. Therefore, we do not believe that a Form 6–K constitutes a ''periodic'' or ''quarterly'' report analogous to a Form 10–Q or 10–QSB for which expanded disclosure is required. We similarly exempted Form 6–K reports from the recently adopted section 302 certification requirements. *See* Release No. 33–8124 at n. 50.

[112] Similar to our treatment of Securities Act registration statements filed by domestic issuers, we are including within the scope of the proposals Securities Act registration statements filed by foreign private issuers on Forms F–1, F–2, F–3 and F–4 [17 CFR 239.31–239.34]. Each of these registration statements references Form 20–F's disclosure requirements. The proposed rules would not apply to Securities Act registration statements filed by Canadian issuers under the MJDS because we believe them to be outside the scope of the directive in section 401(a) of the Sarbanes-Oxley Act, which addresses only periodic reports. These MJDS registration statements are based on Canadian disclosure requirements. We believe that extending the disclosure requirements to Securities Act registration statements filed under the MJDS would be contradictory to the policies underlying the MJDS.

[113] *See, e.g.*, proposed item 303(c)(1)(iv) of regulation S–B [17 CFR 228.303(c)(1)(iv)]; proposed item 303(a)(4)(i)(D) of regulation S–K [17 CFR 229. 303(a)(4)(i)(D)]; proposed item 5.E.1(d) of Form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i)(D) of Form 40–F [17 CFR 249.240f].

[114] *See* proposed item 303(d) of regulation S–B [17 CFR 228.303(d)]; proposed item 303(c) of regulation S–K [17 CFR 229. 303(c)]; proposed item 5.G of Form 20–F [17 CFR 249.220f]; and proposed general instruction 9 of Form 40–F [17 CFR 249.240f].

[115] *See* 15 U.S.C. 77z–2 and 78u–5.

[116] While the statutory safe harbors by their terms do not apply to forward-looking statements included in financial statements prepared in accordance with U.S. GAAP, they do cover MD&A disclosures. The statutory safe harbors would not apply, however, if the MD&A forward-looking statement were made in connection with: an initial public offering, a tender offer, an offering by a partnership or a limited liability company, a roll-up transaction, a going private transaction, an offering by a blank check company or a penny stock issuer, or an offering by an issuer convicted of specified securities violations or subject to certain injunctive or cease and desist actions. *See* 15 U.S.C. 77z–2(b) and 78u–5(b).

[117] *See* proposed item 303(d)(1) of regulation S–B [17 CFR 228.303(d)(1)]; proposed item 303(c)(i) of regulation S–K [17 CFR 229. 303(c)(i)]; proposed item 5.G.1 of form 20–F [17 CFR 249.220f]; and proposed general instruction 9(i) of form 40–F [17 CFR 249.240f].

[118] *See* proposed item 303(d)(2) of regulation S–B [17 CFR 228.303(d)(2)]; proposed item 303(c)(ii) of regulation S–K [17 CFR 229. 303(c)(ii)]; proposed item 5.G.2 of form 20–F [17 CFR 249.220f]; and proposed general instruction 9(ii) of form 40–F [17 CFR 249.240f].

relates to off-balance sheet arrangements?

• Is there any need for the proposed safe harbor, or would the statutory safe harbors afford sufficient protection to encourage the type of information and analysis necessary for investors to understand the impact of off-balance sheet arrangements?

H. Other Safe Harbors for Forward-Looking Information

Notwithstanding the proposed safe harbor for forward looking statements, the statutory safe harbor, by its terms, may be available for some of the disclosure required by the proposals. Companies preparing disclosure under the proposals that would constitute a forward-looking statement should consider the conditions under which several existing safe harbors apply. As defined in the relevant statutory provisions, a ''forward-looking statement'' generally is:

• A statement containing a projection of revenues, income (or loss), earnings (or loss) per share, capital expenditures, dividends, capital structure, or other financial items;

• A statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

• A statement of future economic performance, including any such statement contained in MD&A;

• Any statement of assumptions underlying or relating to any statement described in the three bullet points above; or

• Any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer.[119]

In addition, two Commission rules under those Acts that pre-date the adoption of the statutory safe harbors also provide protection for forward-looking statements. The Commission safe harbor rules that apply to forward-looking statements are Securities Act rule 175 and Exchange Act rule 3b–6.[120] Under those rules, a forward-looking statement made by or on behalf of a registrant is deemed not to be a fraudulent statement if it is made in good faith and made or reaffirmed with a reasonable basis. The rule-based safe harbors apply to a registrant if it is a reporting company at the time it makes the forward-looking statement. These safe harbors also apply to a registrant that is not a reporting company, but makes the statement in a Securities Act registration statement [121] or an Exchange Act registration statement. The safe harbors cover forward-looking statements in filed documents, in annual reports to shareholders [122] and in part 1 of forms 10–Q and 10–QSB.[123]

III. General Request for Comment

The Commission is proposing these amendments to the MD&A requirements to improve the quality and relevance of explanatory disclosure about a registrant's financial condition, changes in financial condition, results of operations and reasonably likely trends, demands, commitments, events and uncertainties affecting a registrant. We welcome your comments. We solicit comment, both specific and general, upon each component of the proposals. If you would like to submit written comments on the proposals, to suggest additional changes or to submit comments on other matters that might affect the proposals, we encourage you to do so.

Request for Comment

• Is the additional information elicited by the proposals useful to investors, other users of company disclosure and readers of a company's financial statements? If not, how can it be improved to achieve that goal?

• In addition to the requirements we propose, are there particular aspects of off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments that the proposals should specifically require companies to address? If so, what are they?

• If the proposed disclosure would involve competitive or other sensitive information, are there any mechanisms that would ensure full and accurate disclosure while reducing a company's risk of competitive harm?

• Are there aspects of the proposed disclosure that should be retained while other parts of the proposed disclosure are eliminated? We solicit comment on the desirability of adopting some sections of the proposed rules, but not all sections.

Any interested person wishing to submit written comments on any aspect of the proposals, as well as on other matters that might have an impact on the proposals, is requested to do so. In addition, we request comment on whether any further changes to our rules and forms are necessary or appropriate to implement the objectives of the proposals. Please submit three copies of your comment letter to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. You may also submit comments electronically to the following e-mail address: *rule-comments@sec.gov.*[124] To help us process and review your comments more efficiently, comments should be sent by hard copy or e-mail, but not by both methods. All comments should refer to file number S7–42–02. If you are commenting by e-mail, include this file number in the subject line, as well as the name of your organization. We will make comments available for public inspection and copying in the Commission's public reference room at 450 Fifth Street, NW., Washington, DC 20549–0102. In addition, we will post electronically submitted comments on our Internet website (*www.sec.gov*).

IV. Paperwork Reduction Act

A. Background

The proposed amendments to regulations S–B, S–K,[125] form 20–F and form 40–F contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[126] We are submitting the proposal to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[127]

[119] *See* 15 U.S.C. 77z–2 and 78u–5.

[120] See 17 CFR 230.175 and 17 CFR 240.3b–6.

[121] Thus, unlike the statutory safe harbors, the rule 175 safe harbor would protect MD&A forward-looking statements made in a registration statement or prospectus for an initial public offering.

[122] *See* Exchange Act rule 14a–3 [17 CFR 240.14a–3].

[123] The rule safe harbors also cover statements that reaffirm forward-looking statements made in those documents and forward-looking statements made prior to filing or submission of those documents that are reaffirmed in those documents. In addition to the statutory and rule safe harbors directed at forward-looking statements, companies preparing the proposed MD&A disclosure also could be protected by the ''bespeaks caution'' legal doctrine that has developed through case law and is recognized by most circuit courts of appeal. *See, e.g., Lilley* v. *Charren,* 2001 U.S. App. LEXIS 19430 (9th Cir. 2001); *EP Medsystems, Inc.* v. *Echocath Inc.,* 235 F.3d 865; (3d Cir. 2000); *Parnes* v. *Gateway 2000,* 122 F.3d 539 (8th Cir. 1997). The bespeaks caution doctrine recognizes that forecasts, projections and expectations must be read in context and that accompanying cautionary language can render a misstatement or omission immaterial or render a plaintiff's reliance on it unreasonable. For a forward-looking statement to be covered by the bespeaks caution doctrine, there must be adequate cautionary language that warns investors of the potential risks related to the forward-looking statement.

[124] For more information on how to submit comments electronically, *see www.sec.gov/rules/submitcomments.htm.*

[125] Although we are proposing amendments to regulations S–B and S–K, the burden is imposed through the forms that refer to the disclosure regulations. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate the burdens imposed by regulations S–B and S–K to be one hour.

[126] 44 U.S.C. 3501 *et seq.*

[127] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

titles for the collections of information are:

(1) ''Form S–1'' (OMB Control No. 3235–0065);

(2) ''Form F–1'' (OMB Control No. 3235–0258);

(3) ''Form SB–2'' (OMB Control No. 3235–0418);

(4) ''Form S–4'' (OMB Control No. 3235–0324);

(5) ''Form F–4'' (OMB Control No. 3235–0325);

(6) ''Form 10'' (OMB Control No. 3235–0064);

(7) ''Form 10–SB'' (OMB Control No. 3235–0419);

(8) ''Form 20–F'' (OMB Control No. 3235–0288);

(9) ''Form 40–F'' (OMB Control No. 3235–0381);

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

(11) ''Form 10–KSB'' (OMB Control No. 3235–0420);

(12) ''Proxy Statements—Regulation 14A (Commission Rules 14a–1 through 14a–15) and Schedule 14A'' (OMB Control No. 3235–0059);

(13) ''Information Statements—Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C)'' (OMB Control No. 3235–0057);

(14) ''Form 10–Q'' (OMB Control No. 3235–0070);

(15) ''Form 10–QSB'' (OMB Control No. 3235–0416);

(16) ''Regulation S–K'' (OMB Control No. 3235–0071); and

(17) ''Regulation S–B'' (OMB Control No. 3235–0417).

These regulations and forms were adopted pursuant to the Securities Act and the Exchange Act and set forth the disclosure requirements for annual and quarterly reports, registration statements and proxy and information statements filed by companies to ensure that investors are informed. The hours and costs associated with preparing, filing, and sending these forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Under the proposals, we would require public companies to include a discussion of material off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments in the MD&A section of their filings with the Commission. We are proposing these rules pursuant to the legislative mandate in section 401(a) of the Sarbanes-Oxley Act of 2002.[128] Compliance with the revised disclosure requirements would be mandatory. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements would not be kept confidential.

For purposes of the Paperwork Reduction Act, we estimate the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under our proposals to be approximately 366,337 hours of company personnel time and a cost of approximately $44,795,000 for the services of outside professionals.[129] That estimate includes the time and the cost of in-house preparers, reviews by executive officers, in-house counsel, outside counsel, independent auditors and members of the audit committee.[130]

B. Methodology

1. Initial Calculation of Preparation Time

We derived the above estimates first by estimating the total amount of time it would take to a company prepare each item of the proposed disclosure. We estimate that in the first year, the proposed off-balance sheet disclosure would take 14.5 hours for annual reports and proxy statements, 16 hours for registration statements and 10 hours for quarterly reports. We estimate that in the first year, the proposed disclosure of contractual obligations and contingent liabilities would take 7.5 hours for annual reports and proxy statements, 8.5 hours for registration statements and 3 hours for quarterly reports. Our estimates for the preparation time for all of the proposed disclosure items in the first year are 22 hours for annual reports and proxy statements, 24.5 hours for registration statements and 15.5 hours for quarterly reports.

Because the Paperwork Reduction Act estimates represent the average burden over a three-year period, we adjusted the first-year preparation time estimates to account for the fact that companies should become more efficient at preparing the proposed disclosure after the first year. Accordingly, to calculate an estimate of the amount of time it would take to prepare the proposed disclosure in year two, we assumed that the amount of time to prepare the proposed disclosure would be reduced by 20%. In year three, we assumed the amount of time to prepare the proposed disclosure would be reduced by 10%. After we averaged the estimated preparation times for the three-year period and rounded to the nearest whole-number, the estimates for the amount of time it would take companies to prepare the disclosure are 18 hours for annual reports and proxy statements, 21 hours for registration statements and 11 hours for quarterly reports.

2. Adjustments to Estimated Preparation Times

Since not all companies engage in off-balance sheet arrangements, we made adjustments to estimated preparation time. Based on a review of a random sample of filings, we estimate that 80% of public companies engage in off-balance sheet arrangements.[131] Therefore, we estimate that the same percentage of public companies would have to disclose off-balance sheet arrangements under the proposals. To reflect the fact that not all of the forms for which we estimate a burden would include the proposed new disclosure, we reduced the incremental burden hour estimates for the affected forms accordingly.

In addition, we recognize that some issuers may have to include an MD&A section in more than one filing covering the same period. To account for this, we estimate that 40% of the forms S–1, 65% of forms F–1, 38% of forms S–4, 34% of forms F–4 and 5% of schedules 14A and 14C would be required to carry the full burden of preparing entirely new MD&A disclosure about off-balance arrangements.[132] To reflect this, we further reduced the incremental burden hours for forms by the percentage of respondents who would not be required to carry the full burden of preparing new disclosure pursuant to the proposals. After making those adjustments for our estimate of preparation time for year one, we then derived a three-year average by reducing the preparation time by 20% and 10%

[128] Pub. L. 107–204 sec. 401(a) [15 U.S.C. 78m(j)].

[129] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number, and the estimated PRA cost burdens have been rounded to the nearest $1,000.

[130] In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the cost of outside professionals that assist companies in preparing these disclosures. For Securities Act registration statements, we also consider additional reviews of the disclosure by underwriter's counsel and underwriters.

[131] The sample consisted of approximately 175 firms listed on the NYSE and the Nasdaq that disclosed securitizations, guarantees, operating leases or other off-balance sheet arrangements.

[132] We derived these percentages from the proportion of new issuers to total issuers from our internal database. The adjustments to schedules 14A and 14C represent our best estimate based on our belief that the percentage of companies that would actually be required to carry the full burden of preparing the proposed disclosure would be minimal.

for years two and three, and averaging the sum.

C. Registration Statements

Table 1 below illustrates the total annual compliance burden of the proposed collection of information in hours and in cost for registration statements under the Securities Act and the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We have based our estimated number of annual responses on the actual number of filers during the 2002 fiscal year. To determine the average total number of hours each entity spends completing each form, we added the estimated hour increment to the current burden hour estimate for each form reported to OMB. For registration statements, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $300 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

The incremental cost of outside professionals for registration statements would be approximately $4,400,000 per year and the incremental company burden would be approximately 4,888 hours per year. For purposes of our submission to OMB under the PRA, the total cost of outside professionals for registration statements would be approximately $868,882,000 per year and the company burden would be approximately 965,425 hours per year.

TABLE 1.—REGISTRATION STATEMENTS

[Columns ''25% company'' and ''$300 prof. cost'' are the PRA burdens submitted to OMB]

	Annual responses (A)	Total hours/ form (B)	Total burden (C)=(A)*(B)	25% company (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300	Added hours/ form
S–1	433	1,749	757,317	189,329	567,987.75	$170,396,000	7
F–1	43	1,918	82,474	20,619	61,855.50	18,557,000	12
SB–2	650	593	385,450	96,363	289,087.50	86,726,000	11
S–4	631	3,980	2,511,380	627,845	1,883,535.00	565,061,000	7
F–4	61	1,329	81,069	20,267	60,801.75	18,241,000	6
10	71	144	10,224	2,556	7,668.00	2,300,000	18
10–SB	254	133	33,782	8,446	25,336.50	7,601,000	11
Total	.....	.....	.....	965,425	.....	868,882,000	

D. Annual Reports and Proxy/ Information Statements

Table 2 below illustrates the total annual compliance burden of the collection of information in hours and in cost for annual reports and proxy and information statements under the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We have based our estimated number of annual responses on the actual number of filers during the 2002 fiscal year. For Exchange Act reports and proxy and information statements, we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $300 per hour.[133] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

The incremental cost of outside professionals for annual reports and proxy/information statements would be approximately $18,436,000 per year and the incremental company burden would be approximately 141,864 hours per year. For purposes of our submission to OMB under the PRA the total cost of outside professionals for annual reports and proxy/information statements would be approximately $2,110,552,000 per year and the company burden would be approximately 15,878,892 hours per year.

TABLE 2.—ANNUAL REPORTS AND PROXY/INFORMATION STATEMENTS

[Columns ''75% company'' and ''$300 prof. cost'' are the PRA burdens submitted to OMB]

	Annual responses (A)	Total hours/ form (B)	Total burden (C)=(A)*(B)	75% company (D)=(C)*0.75	25% professional (E)=(C)*0.25	$300 prof. cost (F)=(E)*$300	Added hours/ form
20–F	1,194	2,185	2,608,890	652,223	1,956,667.50	$587,000,000	16
40–F	134	33	4,422	1,106	3,316.50	995,000	16
10–K	8,484	1,810	15,351,798	11,513,849	3,837,949.50	1,151,385,000	16
10–KSB	3,820	1,260	4,811,290	3,608,468	1,202,822.50	360,847,000	10
SCH 14A	7,661	17	130,237	97,678	32,559.25	9,768,000	1

[133] This allocation of the burden is a departure from our past PRA submissions for Exchange Act periodic reports and proxy and information statements, for which we estimated that the company carried 25% of the burden internally and 75% of the burden of preparation was carried by outside professionals retained by the company. We believe that this new allocation more accurately reflects current practice for annual and quarterly reports and proxy and information statements. We estimate, however, that the traditional 25% company and 75% outside professional allocation remains applicable for forms 20–F and 40–F because those forms are prepared by foreign private issuers who rely more heavily on outside counsel for their preparation.

TABLE 2.—ANNUAL REPORTS AND PROXY/INFORMATION STATEMENTS—Continued

[Columns ''75% company'' and ''$300 prof. cost'' are the PRA burdens submitted to OMB]

	Annual responses (A)	Total hours/ form (B)	Total burden (C)=(A)*(B)	75% company (D)=(C)*0.75	25% professional (E)=(C)*0.25	$300 prof. cost (F)=(E)*$300	Added hours/ form
SCH 14C	464	16	7,424	5,568	1,856.00	557,000	1
Total	.....	.....	.....	15,878,892	.....	2,110,552,000	

E. Quarterly Reports

Table 3 below illustrates the total annual compliance burden of the collection of information in hours and in cost for quarterly reports under the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We have based our estimated number of annual responses on the actual number of filers during the 2002 fiscal year. For quarterly reports, we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $300 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. Additionally, there would be no change to the estimated burden of the collection of information entitled ''Regulation S–B'' and ''Regulation S–K'' because the burdens are already reflected in our estimates for the forms.

The incremental cost of outside professionals for quarterly reports would be approximately $21,959,000 per year and the incremental company burden would be approximately 219,585 hours per year. For purposes of our submission to OMB under the PRA, the total cost of outside professionals for quarterly reports and Regulations S–K and S–B would be approximately $475,105,000 per year and the company burden would be 4,751,056 hours per year.

TABLE 3.—QUARTERLY REPORTS AND REGULATIONS S–K AND S–B

[Columns ''%75 company'' and ''$300 prof. cost'' are the PRA burdens submitted to OMB]

	Annual responses (A)	Total hours/ form (B)	Total burden (C)=(A)*(B)	75% company (D)=(C)*0.75	25% professional (E)=(C)*0.25	$300 prof. cost (F)=(E)*$300	Added hours/ form
10–Q	23,743	184	4,368,712	3,276,534	1,092,178.00	$327,653,000	9
10–QSB	11,299	174	1,966,026	1,474,520	491,506.50	147,452,000	7
Reg. S–K	0	1	1	1	0.00	0	0
Reg. S–B	0	1	1	1	0.00	0	0
Total	.....	.....	.....	4,751,056	.....	475,105,000	

F. Solicitation of Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we solicit comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of our estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–42–02. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–42–02, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Background

In accordance with the directive of section 401(a) of the Sarbanes-Oxley Act,[134] the Commission is proposing disclosure rules regarding a company's off-balance sheet arrangements. The proposals would require disclosure to improve investors' understanding of a company's overall financial condition, changes in financial condition and results of operations. The proposals would require companies that are reporting, raising capital in the registered public markets or asking shareholders for their votes to discuss certain aspects and effects of their off-balance sheet arrangements and to provide an aggregate overview of their known contractual obligations and contingent liabilities and commitments.

[134] Pub. L. 107–204 sec. 401(a) [15 U.S.C. 78m(j)].

B. Objectives of Proposed Disclosure

The proposals seek to improve transparency of a company's off-balance sheet arrangements and to improve an investor's understanding of the liquidity and capital resource needs and demands by requiring disclosure of aggregate contractual obligations and contingent liabilities and commitments. We believe that the quality of information in these areas could be improved. Our objectives are:

- To implement the legislative mandate in section 401(a) of the Sarbanes-Oxley Act;
- To provide investors with the information and analysis necessary to gain a more comprehensive understanding of the implications of a company's obligations and contingencies from off-balance sheet arrangements that cannot be easily understood from the financial statements alone; and
- To better inform investors of the aggregate impact of short- and long-term contractual obligations, contingent liabilities and commitments, from both on and off-balance sheet activities, by presenting a total picture in a single location.

With a greater understanding of a company's off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments, investors would be better able to understand how a company conducts significant aspects of its business and to assess the quality of a company's earnings and the risks that are not apparent on the face of the financial statements.

C. Regulatory Approach

Although the Sarbanes-Oxley Act requires that the Commission issue rules to require disclosure of off-balance sheet arrangements, we considered alternative regulatory approaches for achieving our goal to promote greater transparency of a company's off-balance sheet arrangements. As one possible approach, we considered proposing a general MD&A requirement that companies disclose information regarding off-balance sheet arrangements that they believe to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. In the alternative, we considered proposing more rigid disclosure requirements that would mandate the particular content of disclosure, regardless of whether it would be necessary to an understanding of the registrant's financial condition, changes in financial condition and results of operations. After due consideration of both approaches, we propose an approach somewhere in between these two alternatives as the most effective. Accordingly, the proposal enumerates specific disclosure items regarding off-balance sheet arrangements, but requires disclosure only to the extent necessary to an understanding of a registrant's off-balance sheet arrangements and their effect on financial condition, changes in financial condition and results of operations.

With regard to the proposed tabular disclosure of contractual obligations, we believe that a more specific approach is necessary to elicit disclosure that is comparable among firms. For example, the proposed table and/or textual disclosure of contractual obligations and contingent liabilities and commitments requires registrant to include specific time periods for payments due under contractual obligations.[135] We have, however, attempted to provide flexibility for registrants where doing so would yield more relevant disclosure and reduce the burden for registrants. For example, our proposals allow registrants to use either specified categories of obligations or other categories suitable to its business.[136] We have also provided flexibility with regard to the proposed disclosure of contingent liabilities and commitments. For example, the proposals allow registrants to disclose contingent liabilities and commitments either in text or in tabular format.[137] In addition, under the proposals a registrant may disclose either the expected amount, range of amounts or maximum amount of contingent liabilities or commitments.[138]

Current MD&A rules require disclosure of off-balance sheet arrangements that have a material effect on a company's liquidity and capital resources.[139] In addition, MD&A must include other information that management believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations.[140] These requirements provide companies with significant flexibility in drafting the MD&A disclosure. Although some public companies provide more detailed information in their financial statements about off-balance sheet arrangements, other companies provide arcane disclosure that may not be materially misleading in a legal sense, but it nevertheless does not provide investors with the information and analysis necessary to assess the impact of off-balance sheet arrangements. To stimulate higher quality disclosures regarding off-balance sheet arrangements, we are proposing more specific disclosure requirements in the MD&A.

The proposed disclosures are designed to result in a more focused and descriptive discussion of the registrant's material off-balance sheet arrangements. The proposals attempt to mitigate the possibility that investors would be overwhelmed with voluminous disclosure by requiring disclosure ''to the extent necessary to an understanding of the registrant's off-balance sheet arrangements and their effect on financial condition, changes in financial condition and results of operations.'' [141] This approach attempts to balance the need for registrants to have flexibility when drafting financial disclosure, with investors' needs for more transparency.

D. Potential Benefits of the Proposed Rules

The primary anticipated benefit of the proposed rules is to increase transparency of the financial condition, changes in financial condition and operating results of companies and possibly to reduce the information asymmetry between management and investors. Current market events have evidenced a need to provide investors with a clearer understanding of how a company's off-balance sheet arrangements materially affect the financial statements and company performance.[142] The proposed disclosure is intended to enhance the utility of the disclosure in the MD&A section by providing more information, including management's analysis, of off-balance sheet arrangements. In addition, the proposed tabular and/or textual disclosure of contractual obligations and contingent liabilities and commitments is designed to provide investors with an understanding of the liquidity and

[135] *See, e.g.*, proposed item 303(a)(5)(i) of regulation S–K [17 CFR 229.303(a)(5)(i)].

[136] *Id.*

[137] *See, e.g.*, proposed item 303(a)(5)(ii) of regulation S–K [17 CFR 229.303(a)(5)(ii)].

[138] *Id.*

[139] *See* item 303(a)(2)(ii) of regulation S–K [17 CFR 229.303(a)(2)(ii)].

[140] *See* item 303(a) of regulation S–K [17 CFR 229.303(a)].

[141] *See* proposed item 303(c)(1) of regulation S–B [17 CFR 228.303(c)(1)]; proposed item 303(a)(4)(i) of regulation S–K [17 CFR 229. 303(a)(4)(i)]; proposed item 5.E.1 of form 20–F [17 CFR 249.220f]; and proposed general instruction 7(i) of form 40–F [17 CFR 249.240f].

[142] *See, e.g.*, Paquita Y. Davis-Friday *et. al., The Value Relevance of Financial Statement Recognition vs. Disclosure: Evidence from SFAS No. 106,* 74 The Accounting Review 403 (Oct. 1999).

capital resource need and demands in short- and long-term time horizons.

By making information about off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments available and more understandable, the proposals would benefit investors both directly and indirectly through the financial analysts and the credit rating agencies whose analyses investors consider.[143] In addition, the proposed disclosures should benefit investors because the enumerated disclosure under the proposed rule would likely be more comparable across all firms and consistent over time. Greater transparency would thus enable investors to make more informed investment decisions and to allocate capital on a more efficient basis.

Request for Comment

- We solicit quantitative data to assist our assessment of the benefits of identifying off-balance sheet arrangements and analyzing their effects on the financial statements and preparing a table of contractual obligations and contingent liabilities.

E. Potential Costs of Proposed Rules

We estimate that proposed rules would impose a new disclosure requirement on approximately 9,850 public companies.[144] We estimate that the disclosure would involve multiple parties, including in-house preparers, senior management, in-house counsel, outside counsel, outside auditors, and audit committee members. For purposes of the Paperwork Reduction Act,[145] we estimated that company personnel would spend approximately 366,337 hours per year (37 hours per company) to prepare, review and file the proposed disclosure. Based on our estimated cost of in-house staff time, we estimated the PRA hour-burden would translate into an approximate cost of $45,792,000 ($5,000 per company).[146] We also estimated that companies would spend approximately $44,795,000 ($5,000 per company) on outside professionals to comply with the disclosure.[147] We also estimate that companies will incur some additional printing and dissemination costs, as the proposals may result in more detailed disclosure. We are unable to estimate the potential printing and dissemination costs because there is a wide possible range of paper and ink available and different companies will print a different number of reports depending on their shareholder base.

We believe our proposals would not substantially increase the costs to collect the information necessary to prepare the proposed disclosure. This information should largely be readily available from each company's books and records. Since management should be fully apprised of off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments in the ordinary course of managing the company, the proposed disclosure may not impose significant incremental costs for the collection and calculation of data.

Request for Comment

- What types of expenses would companies incur in order to comply with the proposed disclosure requirements?
- What would the average printing and dissemination costs be for each firm?
- We solicit quantitative data to assist our assessment of the compliance costs of identifying off-balance sheet arrangements and the table of contractual obligations and contingent liabilities and commitments in the manner proposed.

F. Foreign Private Issuers

We propose to apply to foreign private issuers the same MD&A disclosure requirements that would apply to U.S. companies. Foreign private issuers, however, are not required to file quarterly reports with the Commission. Thus, unless a foreign private issuer files a registration statement that must include interim period financial statements and related MD&A disclosure, it generally would not be required to update the proposed MD&A disclosure more frequently than annually. Therefore, the cost of compliance could be lower for foreign private issuers than for U.S. companies. It is possible, however, that foreign private issuers would incur greater expenses in connection with the required reconciliation to U.S. GAAP.

G. Small Business Issuers

We have proposed not to require that small businesses provide tabular and/or textual disclosure about the contractual obligations and contingent liabilities and commitments. This information is currently required to be disclosed in various locations in filings. While it would be useful to investors if this information were disclosed in a single location, we believe that excluding small business issuers from this requirement is consistent with the policies underlying the small business issuer disclosure system.

H. Request for Comments

To assist the Commission in its evaluation of the costs and benefits of the proposed disclosure discussed in this release, we request that commenters provide views and data relating to any costs and benefits associated with the proposed rules.

VI. Effects on Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[148] requires us, when adopting rules under the Exchange Act, to consider the anti-competitive effects. The proposed rules are intended to make information about off-balance sheet arrangements and their implications for the presentation of a public company's financial condition, changes in financial condition and operating results more understandable to investors. The proposed rules also would provide an overview of a company's known contractual obligations and contingent liabilities and commitments. We have identified one possible area where the proposed rules could potentially place a burden on competition. There is some possibility that a company's competitors could be able to infer proprietary or sensitive information from disclosure about off-balance sheet arrangements. To the extent that all companies make the proposed disclosure, that impact may diminish. We request comment regarding the degree to which our proposed disclosure requirements would create competitively harmful effects upon public companies, and how to minimize those effects. We also request comment on any disproportionate cross-sectional burdens among the firms affected by our proposals that could have anti-competitive effects.

[143] See, *e.g.*, Kent L. Womack, *Do Brokerage Analysts' Recommendations have Investment Value?* 51 Journal of Finance 137 (1996). *See also,* R. Mear and M. Firth, *Risk Perceptions of Financial Analysts and the Use of Market and Accounting Data,* 18 Accounting and Business Research 335 (1988).

[144] We estimate that about 80% of the number of registrants who filed annual reports last year would be required to provide the proposed disclosure.

[145] 44 U.S.C. 3501 *et seq.*

[146] We estimate the average hourly cost of in-house personnel to be $125. This cost estimate is based on data obtained from *The SIA Report on Management and Professional Earnings in the Securities Industry* (Oct. 2001).

[147] To derive our estimates for the Paperwork Reduction Act, we multiplied the number of filers for each form by the incremental hours per form. The portion of the product carried by the company is reflected in hours and the portion carried by outside professionals is reflected as a cost.

[148] 15 U.S.C. 78w(a)(2).

Section 2(b) of the Securities Act [149] and section 3(f) of the Exchange Act [150] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We believe the proposed disclosure may promote market efficiency by making information about off-balance sheet arrangements, and their impact on the presentation of the company's financial position, more understandable. As a result, we believe that investors may be able to make more informed investment decisions and capital may be allocated on a more efficient basis. The possibility of these effects, their magnitude if they were to occur and the extent to which they would be offset by the costs of the proposals are difficult to quantify. We request comment on these matters and how the proposed amendments, if adopted, would affect efficiency and capital formation. Commenters are requested to provide empirical data and other factual support to the extent possible.

VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to item 303 of regulation S–K,[151] item 303 of regulation S–B,[152] item 5 of form 20–F [153] and general instruction B of form 40–F.[154] The proposals require public companies to discuss off-balance sheet arrangements and to disclose aggregate contractual obligations and contingent liabilities and commitments. The new disclosure would be included in the MD&A section of a company's annual reports, quarterly reports, registration statements and proxy and information statements.

A. Reasons for the Proposed Action

On July 30, 2002, the Sarbanes-Oxley Act of 2002 was enacted.[155] Section 401 of the Sarbanes-Oxley Act, entitled ''Disclosures in Periodic Reports,'' requires the Commission to adopt final rules by January 26, 2003 (180 days after the date of enactment) that require a company, in each annual and quarterly financial report that it files with the Commission, to disclose ''all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.''[156] To implement that legislative mandate, the Commission is proposing rules that would improve the transparency of off-balance sheet arrangements. The potential consequences of not taking this action to require disclosure regarding the off-balance sheet arrangements are: (a) Less transparency in the presentation of companies' financial statements and, correspondingly, a lesser understanding of companies' financial condition, changes in financial condition and results of operations when making investment decisions; and (b) a potential decrease in investor confidence in the full and fair disclosure system that is the hallmark of the U.S. capital markets.

B. Objectives

The proposals seek to improve transparency of a company's off-balance sheet arrangements, aggregate contractual obligations and contingent liabilities and commitments. We believe that improvements in the quality of information in these areas would promote investor understanding of a company's current and future financial position. Our objectives are:

- To implement the legislative mandate in section 401(a) of the Sarbanes-Oxley Act;
- To provide investors with the information and analysis necessary to gain an understanding of the financial implications of a company's obligations and contingencies that cannot be easily understood from the financial statements alone; and
- To better inform investors of the aggregate impact of a company's contractual obligations, contingent liabilities and commitments by presenting a total picture in a single location.

With a greater understanding of a company's off-balance sheet arrangements, contractual obligations and contingent liabilities and commitments, investors would be better able to understand how a company conducts significant aspects of its business and to assess the quality of a company's earnings and the risks that are not apparent on the face of the financial statements.

C. Legal Basis

We are proposing the amendments under the authority set forth in sections 7, 10, 19, 27A and 28 of Securities Act of 1933 and sections 12, 13, 14, 21E, 23 and 36 of the Securities Exchange Act of 1934. We are also proposing the amendments pursuant to sections 3(a) and 401(a) of the Sarbanes-Oxley Act of 2002.

D. Small Entities Subject to the Proposed Regulation and Rules

The proposals would affect companies that are small entities. Securities Act rule 157 [157] and Exchange Act rule 0–10(a) [158] define a company, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there were approximately 2,500 companies, other than investment companies, that may be considered small entities. The proposed disclosure requirements would apply to any small entity that fulfills its disclosure obligations by complying with our standard disclosure requirements [159] or in our optional disclosure system available only to small businesses.[160]

We believe that the off-balance sheet arrangements involving small entities would most likely be operating leases. In our Paperwork Reduction Act analysis, we estimated that the cost of in-house staff time would translate into an approximate cost of $4,000 per company.[161] This figure may be lower for a small entity if its average hourly cost for its personnel were lower than $125. We also estimated that companies would spend approximately $5,000 per company on outside professionals to comply with the disclosure.[162] This figure may be lower for a small entity if its average hourly cost of outside professionals was lower than $300. While we believe that the costs of compliance with the proposals may be

[149] 15 U.S.C. 77b(b).

[150] 15 U.S.C. 78c(f).

[151] 17 CFR 229.303.

[152] 17 CFR 228.303.

[153] 17 CFR 249.220f.

[154] 17 CFR 249.240f.

[155] Pub. L. 107–204, 116 stat. 745 (2002).

[156] Pub. L. 107–204 sec. 401 [15 U.S.C. 78m(j)].

[157] 17 CFR 230.157.

[158] 17 CFR 270.0–10(a).

[159] Regulation S–K, 17 CFR 229.10–229.1016.

[160] Regulation S–B, 17 CFR 228.10–228.701.

[161] We estimate the average hourly cost of in-house personnel to be $125. This cost estimate is based on data obtained from *The SIA Report on Management and Professional Earnings in the Securities Industry* (Oct. 2001).

[162] To derive our estimates for the Paperwork Reduction Act, we multiplied the number of filers for each form by the incremental hours per form. The portion of the product carried by the company is reflected in hours and the portion carried by outside professionals is reflected as a cost.

lower for small entities, we are unable to quantify that number.

We request comment on the number of small entities that would not be required to comply with our proposals because they do not engage in off-balance sheet arrangements and whether the relative costs of company personnel and outside professionals for small entities would be lower than for larger entities.

E. Reporting, Recordkeeping and Other Compliance Requirements

Small entities would either utilize existing personnel or hire an outside professional to provide the proposed disclosure. This would impose incremental costs on small entities in connection with drafting, reviewing, filing, printing and disseminating additional disclosure in annual reports, registration statements, proxy and information statements and quarterly reports. The data underlying the proposed disclosure should be readily available from a company's books and records. Since management should be fully apprised of material off-balance sheet arrangements through its internal controls, the proposed disclosure may not impose significant incremental costs for the collection and calculation of data.

To further ease the regulatory burden on small entities, we are excluding small business issuers from the proposed tabular and/or textual disclosure about the contractual obligations and contingent liabilities and commitments. This information is currently required to be disclosed in various locations in filings. While it may be useful to investors if this information were disclosed in a single location, we believe that excluding small business issuers from this requirement is consistent with the policies underlying the small business issuer disclosure system.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or completely duplicate the proposed rules. There is a partial overlap with financial statement requirements requiring disclosures about off-balance sheet arrangements and risks and uncertainties that could materially affect the financial statements. There also is a partial overlap with existing MD&A requirements that may require some discussion of off-balance sheet arrangements that are essential to an understanding of a company's financial condition, changes in financial condition or results of operations. However, those requirements do not include much of the information specifically targeted for inclusion in the proposed rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

(a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(b) The clarification, consolidation, or simplification of disclosure for small entities;

(c) The use of performance rather than design standards; and

(d) An exemption for small entities from coverage under the proposals.

We have drafted the proposed disclosure rules to require clear and straightforward disclosure of off-balance sheet arrangements in MD&A. Separate disclosure requirements regarding off-balance sheet arrangements for small entities would not yield the disclosure that we believe to be necessary to achieve our objectives. In addition, the informational needs of investors in small entities are typically as great as the needs of investors in larger companies. Therefore, it does not seem appropriate to develop separate requirements with regard to off-balance sheet arrangements for small entities involving clarification, consolidation or simplification of the proposed disclosure. We have, however, excluded small business issuers from the proposals that require tabular and/or textual disclosure of contractual obligations and contingent liabilities and commitments.

We have used design rather than performance standards in connection with the proposals for three reasons. First, we believe the proposed disclosure would be more useful to investors if there were enumerated informational requirements. The proposed mandated disclosures may be likely to result in a more focused and comprehensive discussion of the company's off-balance sheet arrangements. Second, mandated disclosures regarding off-balance sheet arrangements may benefit investors in small entities because the enumerated disclosure under the proposed rule would likely be more comparable across all firms and consistent over time. Third, a mandated discussion of a company's off-balance sheet arrangements is uniquely suited to the MD&A disclosure in light of MD&A's emphasis on the identification of significant uncertainties and events and favorable or unfavorable trends. Therefore, adding a disclosure requirement to the existing MD&A appears to be the most effective method of eliciting the disclosure.

H. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding: (i) The number of small entities that may be affected by the proposals; (ii) the existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and (iii) how to quantify the impact of the proposed revisions. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[163] a rule is ''major'' if it has resulted, or is likely to result in:

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

We request comment on whether our proposals would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on: (a) The potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

IX. Codification Update

The Commission proposes to amend the ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982):

By adding section 501.12, captioned ''Off-balance Sheet Arrangements'' to include the text in the adopting release

[163] Pub. L. No. 104–121, title II, 110 stat. 857 (1996).

that discusses the final rules, which, if the proposed rules are adopted, would be substantially similar to section II of this release.

The Codification is a separate publication of the Commission. It will not be published in the Code of Federal Regulations.

Statutory Bases and Text of Proposed Amendments

We are proposing amendments to Commission's existing rules under the authority set forth in sections 7, 10, 19, 27A and 28 of the Securities Act and sections 12, 13, 14, 21E, 23 and 36 of the Exchange Act. We are also proposing the amendments pursuant to sections 3(a) and 401(a) of the Sarbanes-Oxley Act of 2002.

List of Subjects in 17 CFR Parts 228, 229 and 249

Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for part 228 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37 and 80b–11.

Section 228.303 is also issued under secs. 3(a) and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

* * * * *

2. Section 228.303 is amended by:

a. Removing the phrase ''paragraph (a)'' and adding, in its place, the phrase ''paragraphs (a) and (c)'' in the first sentence of the introductory text;

b. Removing the phrase ''paragraph (b)'' and adding, in its place, the phrase ''paragraphs (b) and (c)'' in the second sentence of the introductory text; and

c. Adding paragraphs (c) and (d) and an instruction to paragraph (c) of item 303 before instructions to item 303.

The additions read as follows:

§ 228.303 (Item 303) Management's Discussion and Analysis or Plan of Operation.

* * * * *

(c) *Off-balance sheet arrangements.* (1) For the periods set forth in paragraphs (a) and (b) of this item, include a separately-captioned section discussing the small business issuer's off-balance sheet arrangements that may have a current or future material effect on the small business issuer's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources. Disclosure under this paragraph (c) of an arrangement is not necessary if the likelihood of either the occurrence of an event implicating an off-balance sheet arrangement, or the materiality of its effect, is remote. Disclosure regarding similar arrangements should be aggregated to the extent practicable, but important distinctions in terms and effects must be discussed. Disclose the following items to the extent necessary to an understanding of the effect of the off-balance sheet arrangements on the small business issuer's financial condition, changes in financial condition, revenues and expenses, results of operations, liquidity, capital expenditures and capital resources:

(i) The nature and business purpose of the small business issuer's off-balance sheet arrangements and, to the extent necessary to an understanding of the disclosures under this paragraph (c), the significant terms and conditions of the arrangements, including those between the small business issuer and any entity in which off-balance sheet activities are conducted and between the small business issuer or that entity and other persons;

(ii) With respect to an entity in which off-balance sheet activities are conducted, the nature and amount of the total assets and of the total obligations and liabilities (including contingent obligations and liabilities) of that entity;

(iii)The amounts of revenues, expenses and cash flows of the small business issuer arising from the arrangements; the nature and amount of any interests retained, securities issued and other indebtedness incurred by the small business issuer; and any other obligations or liabilities (including contingent obligations or liabilities) of the small business issuer arising from the arrangements that are or may become material and the triggering events or circumstances that could cause them to arise; and

(iv) Management's analysis of the material effects of any of the items identified in paragraphs (c)(1)(i), (ii) and (iii) of this item on the small business issuer's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures and capital resources. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. An analysis of the degree to which the small business issuer relies on off-balance sheet arrangements for its liquidity and capital resources or market risk or credit risk support or other benefits also must be disclosed.

(2) If under a contractual provision or as a result of a known event, demand, commitment, trend or uncertainty, an off-balance sheet arrangement that materially benefits the small business issuer will be terminated or the benefits thereof to the small business issuer will be materially reduced, or it is reasonably likely that such a termination or reduction will occur, describe the circumstances under which such termination or reduction may occur and discuss any material effects thereof.

(3) As used in this paragraph (c), the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the small business issuer is a party, under which the small business issuer, whether or not a party to the arrangement, has, or in the future may have:

(i) Any obligation under a direct or indirect guarantee or similar arrangement;

(ii) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement;

(iii) Derivatives to the extent that the fair value thereof is not fully reflected as a liability or asset in the financial statements; or

(iv) Any obligation or liability, including a contingent obligation or liability, to the extent that it is not fully reflected in the financial statements (excluding the footnotes thereto). Obligations or liabilities that are not fully reflected in the financial statements (excluding the footnotes thereto) include, without limitation: obligations that are not classified as a liability according to generally accepted accounting principles; contingent liabilities as to which, as of the date of the financial statements, it is not probable that a loss has been incurred or, if probable, is not reasonably estimable; or liabilities as to which the amount recognized in the financial statements is less than the reasonably possible maximum exposure to loss under the obligation as of the date of the

financial statements. Contingent liabilities arising out of litigation, arbitration or regulatory actions (not otherwise related to off-balance sheet arrangements) are not off-balance sheet arrangements.

Instruction to paragraph (c): No obligation to make disclosure under paragraph (c) of this item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditional or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

(d) *Safe harbor.* (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u–5) (''statutory safe harbors'') shall apply to forward-looking information provided pursuant to paragraph (c) of this item, provided that the disclosure is made by: An issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of this paragraph (d) only, all information required by paragraphs (c)(1)(iv) and (c)(2) of this item is deemed to be a ''forward looking statement'' as that term is defined in the statutory safe harbors, except for historical facts.

* * * * *

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

3. The authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78ll(d), 78mm, 79e, 79j, 79n, 79t, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39 and 80b–11, unless otherwise noted.

Section 229.303 is also issued under secs. 3(a) and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

Section 229.307 is also issued under secs. 3(a), 302 and 404, Pub. L. No. 107–204, 116 Stat. 745.

4. Section 229.303 is amended by:

a. Removing the authority citation following § 229.303;

b. Removing the phrase ''paragraphs (a)(1), (2) and (3)'' and adding, in its place, the phrase ''paragraphs (a)(1), (2), (3) and (4) of this section'' in the second sentence of the introductory text of paragraph (a);

c. Removing the phrase ''or for those fiscal years beginning after December 25, 1979,'' in paragraph (a)(3)(iv);

d. Adding paragraphs (a)(4) and (a)(5) before the ''Instructions to Paragraph 303(a)'';

e. Adding instruction 13 to ''Instructions to Paragraph 303(a)'';

f. Adding instruction 7 to ''Instructions to Paragraph (b) of Item 303''; and

g. Adding paragraph (c).

The additions read as follows:

§ 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

(a) * * *

(4) *Off-balance sheet arrangements.* (i) In a separately-captioned section, discuss the registrant's off-balance sheet arrangements that may have a current or future material effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources. Disclosure under this paragraph (a)(4) of an arrangement is not necessary if the likelihood of either the occurrence of an event implicating an off-balance sheet arrangement, or the materiality of its effect, is remote. Disclosure regarding similar arrangements should be aggregated to the extent practicable, but important distinctions in terms and effects must be discussed. Disclose the following items to the extent necessary to an understanding of the effect of the off-balance sheet arrangements on the registrant's financial condition, changes in financial condition, revenues and expenses, results of operations, liquidity, capital expenditures and capital resources:

(A) The nature and business purpose of the registrant's off-balance sheet arrangements and, to the extent necessary to an understanding of the disclosures under this paragraph (a)(4), the significant terms and conditions of the arrangements, including those between the registrant and any entity in which off-balance sheet activities are conducted and between the registrant or that entity and other persons;

(B) With respect to an entity in which off-balance sheet activities are conducted, the nature and amount of the total assets and of the total obligations and liabilities (including contingent obligations and liabilities) of that entity;

(C) The amounts of revenues, expenses and cash flows of the registrant arising from the arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the registrant; and any other obligations or liabilities (including contingent obligations or liabilities) of the registrant arising from the arrangements that are or may become material and the triggering events or circumstances that could cause them to arise; and

(D) Management's analysis of the material effects of any of the items identified in paragraphs (a)(4)(i)(A), (B) and (C) of this item on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures and capital resources. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent the aggregation increases understanding. An analysis of the degree to which the registrant relies on off-balance sheet arrangements for its liquidity and capital resources or market risk or credit risk support or other benefits also must be disclosed.

(ii) If under a contractual provision or as a result of a known event, demand, commitment, trend or uncertainty, an off-balance sheet arrangement that materially benefits the registrant will be terminated or the benefits thereof to the registrant will be materially reduced, or it is reasonably likely that such a termination or reduction will occur, describe the circumstances under which such termination or reduction may occur and discuss any material effects thereof.

(iii) As used in this paragraph (a)(4), the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant, whether or not a party to the arrangement, has, or in the future may have:

(A) Any obligation under a direct or indirect guarantee or similar arrangement;

(B) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement;

(C) Derivatives to the extent that the fair value thereof is not fully reflected as a liability or asset in the financial statements; or

(D) Any obligation or liability, including a contingent obligation or liability, to the extent that it is not fully reflected in the financial statements (excluding the footnotes thereto). Obligations or liabilities that are not fully reflected in the financial statements (excluding the footnotes

thereto) include, without limitation: obligations that are not classified as a liability according to generally accepted accounting principles; contingent liabilities as to which, as of the date of the financial statements, it is not probable that a loss has been incurred or, if probable, is not reasonably estimable; or liabilities as to which the amount recognized in the financial statements is less than the reasonably possible maximum exposure to loss under the obligation as of the date of the financial statements. Contingent liabilities arising out of litigation, arbitration or regulatory actions (not otherwise related to off-balance sheet arrangements) are not off-balance sheet arrangements.

(5) *Tabular disclosure of contractual obligations.* (i) In a tabular format, provide the information specified in this paragraph (a)(5) with respect to the registrant's known contractual obligations as of the latest balance sheet date. The tabular presentation should include at least the periods set forth in the columns in the table following this paragraph (a)(5)(i). The registrant shall provide amounts, aggregated by type of contractual obligation, and may use the categories of obligations specified in the table or other categories suitable to its business. A presentation of total contractual obligations for at least the periods specified shall be included. The tabular presentation may be accompanied by footnotes to describe provisions that create, increase or accelerate obligations, or other pertinent data.

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]					
[Unconditional Purchase Obligations]					
[Other Long-Term Obligations]					
Total Contractual Obligations					

(ii) *Contingent liabilities and commitments.* Disclose, either in text or in a tabular format, the expected amount, range of amounts or maximum amount of contingent liabilities or commitments, aggregated by type in a manner that is suitable for the registrant's business, that are expected to expire in less than one year, in one to three years, in three to five years, and more than five years. Unless a range of amounts is disclosed, specify whether the amount disclosed is the expected or maximum amount.

Instructions to Paragraph 303(a)

* * * * *

13. No obligation to make disclosure under paragraph (a)(4) of this item shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditional or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

(b) * * *

Instructions to Paragraph (b) of Item 303:

* * * * *

7. The registrant is not required to include the table required by paragraph (a)(5) of this item in a quarterly report on form 10–Q (§ 249.308a of this chapter). Instead, the registrant may disclose material changes by including a discussion of the relevant changes.

(c) *Safe harbor.* (1) The safe harbor provided in section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2) and section 21E of the Securities Exchange Act of 1934 (15 U.S.C. 78u–5) (''statutory safe harbors'') shall apply to forward-looking information provided pursuant to paragraph (a)(4) of this item, provided that the disclosure is made by: An issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(2) For purposes of paragraph (c) of this item only, all information required by paragraphs (a)(4)(i)(D) and (a)(4)(ii) of this item is deemed to be a ''forward looking statement'' as that term is defined in the statutory safe harbors, except for historical facts.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 249 is amended by revising the sectional authority for 249.220f and 249.240f to read as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

Section 249.220f is also issued under secs. 3(a), 302, and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

Section 249.240f is also issued under secs. 3(a), 302, and 401(a), Pub. L. No. 107–204, 116 Stat. 745.

* * * * *

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

a. Adding items 5.E. through 5.G.; and

b. Adding an instruction to 5.F. to read as follows:

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

Form 20–F

* * * * *

Item 5—Operating and Financial Review and—Prospects

* * * * *

E. Off-balance sheet arrangements

1. In a separately-captioned section, discuss the company's off-balance sheet arrangements that may have a current or future material effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources. Disclosure under this item 5.E. of an arrangement is not necessary if the likelihood of either the occurrence of an event implicating an off-balance sheet arrangement, or the materiality of its effect, is remote. Disclosure regarding similar arrangements should be aggregated to the extent practicable, but important distinctions in terms and effects must be discussed. Disclose the following items to the extent necessary to an understanding of the effect of the off-balance sheet arrangements on the company's financial condition, changes in financial condition, revenues and expenses, results of operations, liquidity, capital expenditures and capital resources:

(a) The nature and business purpose of the company's off-balance sheet arrangements and, to the extent necessary to an understanding of the disclosures under this item 5.E, the significant terms and conditions of the arrangements, including those between the company and any entity in which off-balance sheet activities are conducted and between the company or that entity and other persons;

(b) With respect to an entity in which off-balance sheet activities are conducted, the nature and amount of the total assets and of the total obligations and liabilities (including

contingent obligations and liabilities) of that entity;

(c) The amounts of revenues, expenses and cash flows of the company arising from the arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred by the company; and any other obligations or liabilities (including contingent obligations or liabilities) of the company arising from the arrangements that are or may become material and the triggering events or circumstances that could cause them to arise; and

(d) Management's analysis of the material effects of any of the items identified in paragraphs (a), (b) or (c) of this item on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures and capital resources. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent it increases understanding. An analysis of the degree to which the company relies on off-balance sheet arrangements for its liquidity and capital resources or market risk or credit risk support or other benefits also must be disclosed.

2. If under a contractual provision or as a result of a known event, demand, commitment, trend or uncertainty, an off-balance sheet arrangement that materially benefits the company will be terminated or the benefits thereof to the company will be materially reduced, or it is reasonably likely that such a termination or reduction will occur, describe the circumstances under which such termination or reduction may occur and discuss any material effects thereof.

3. As used in this item 5.E., the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the company is a party, under which the company, whether or not a party to the arrangement, has, or in the future may have:

(a) Any obligation under a direct or indirect guarantee or similar arrangement;

(b) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement;

(c) Derivatives to the extent that the fair value thereof is not fully reflected as a liability or asset in the financial statements; or

(d) Any obligation or liability, including a contingent obligation or liability, to the extent that it is not fully reflected in the financial statements (excluding the footnotes thereto). Obligations or liabilities that are not fully reflected in the financial statements (excluding the footnotes thereto) include, without limitation: obligations that are not classified as a liability according to generally accepted accounting principles; contingent liabilities as to which, as of the date of the financial statements, it is not probable that a loss has been incurred or, if probable, is not reasonably estimable; or liabilities as to which the amount recognized in the financial statements is less than the reasonably possible maximum exposure to loss under the obligation as of the date of the financial statements. Contingent liabilities arising out of litigation, arbitration or regulatory actions (not otherwise related to off-balance sheet arrangements) are not off-balance sheet arrangements.

F. Tabular disclosure of contractual obligations

1. In a tabular format, provide the information specified in this item 5.F.1. with respect to the company's known contractual obligations as of the latest balance sheet date. The tabular presentation should include at least the periods set forth in the columns in the table below. The company shall provide amounts, aggregated by type of contractual obligation, and may use the categories of obligations specified in the table below or other categories suitable to its business. A presentation of total contractual obligations for at least the periods specified shall be included. The tabular presentation may be accompanied by footnotes to describe provisions that create, increase or accelerate obligations, or other pertinent data.

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]					
[Unconditional Purchase Obligations]					
[Other Long-Term Obligations]					
Total Contractual Obligations					

2. *Contingent liabilities and commitments.* Disclose, either in text or in a tabular format, the expected amount, range of amounts or maximum amount of contingent liabilities or commitments, aggregated by type in a manner that is suitable for the company's business, that are expected to expire in less than one year, in one to three years, in three to five years, and more than five years. Unless a range of amounts is disclosed, specify whether the amount disclosed is the expected or maximum amount.

G. Safe harbor

1. The safe harbor provided in section 27A of the Securities Act and section 21E of the Exchange Act (''statutory safe harbors'') shall apply to forward-looking information provided pursuant to item 5.E., provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

2. For purposes of paragraph 5.G.1. of this item only, all information required by paragraphs 5.E.1(d) and 5.E.2 of this item is deemed to be a ''forward looking statement'' as that term is defined in the statutory safe harbors, except for historical facts.

* * * * *

Instruction to item 5.A:

* * * * *

Instruction to Item 5.F.: 1. The company is not required to include the table required by paragraph 5.F.1. of this item for interim periods. Instead, the company may disclose material changes in the table by including a discussion of the relevant changes.

* * * * *

7. Form 40–F (referenced in § 249.240f) is amended by adding paragraphs 7 through 9 to General Instruction B to read as follows;

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 40–F

* * * * *

General Instructions

* * * * *

B. Information To Be Filed on This Form.

* * * * *

7. *Off-balance sheet arrangements.* (i) In a separately-captioned section, discuss the registrant's off-balance sheet arrangements that may have a current or future material effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources. Disclosure under this general instruction B.7. of an arrangement is not necessary if the likelihood of either the occurrence of an event implicating an off-balance sheet arrangement, or the materiality of its effect, is remote. Disclosure regarding similar arrangements should be aggregated to the extent practicable, but important distinctions in terms and effects must be discussed. Disclose the following items to the extent necessary to an understanding of the effect of the off-

balance sheet arrangements on the registrant's financial condition, changes in financial condition, revenues and expenses, results of operations, liquidity, capital expenditures and capital resources:

(A) The nature and business purpose of the registrant's off-balance sheet arrangements and, to the extent necessary to an understanding of the disclosures under this general instruction B.7., the significant terms and conditions of the arrangements, including those between the registrant and any entity in which off-balance sheet activities are conducted and between the registrant or that entity and other persons;

(B) With respect to an entity in which off-balance sheet activities are conducted, the nature and amount of the total assets and of the total obligations and liabilities (including contingent obligations and liabilities) of that entity;

(C) The amounts of revenues, expenses and cash flows of the registrant arising from the arrangements; the nature and amount of any interests retained, securities issued and other indebtedness incurred by the registrant; and any other obligations or liabilities (including contingent obligations or liabilities) of the registrant arising from the arrangements that are or may become material and the triggering events or circumstances that could cause them to arise; and

(D) Management's analysis of the material effects of any of the items identified in paragraphs (A), (B) and (C) of this general instruction on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures and capital resources. Effects that are common or similar with respect to a number of off-balance sheet arrangements must be analyzed in the aggregate to the extent it increases understanding. An analysis of the degree to which the registrant relies on off-balance sheet arrangements for its liquidity and capital resources or market risk or credit risk support or other benefits also must be disclosed.

(ii) If under a contractual provision or as a result of a known event, demand, commitment, trend or uncertainty, an off-balance sheet arrangement that materially benefits the registrant will be terminated or the benefits thereof to the registrant will be materially reduced, or it is reasonably likely that such a termination or reduction will occur, describe the circumstances under which such termination or reduction may occur and discuss any material effects thereof.

(iii)As used in this general instruction B.7., the term *off-balance sheet arrangement* means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the registrant is a party, under which the registrant, whether or not a party to the arrangement, has, or in the future may have:

(A) Any obligation under a direct or indirect guarantee or similar arrangement;

(B) A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement;

(C) Derivatives to the extent that the fair value thereof is not fully reflected as a liability or asset in the financial statements; or

(D) Any obligation or liability, including a contingent obligation or liability, to the extent that it is not fully reflected in the financial statements (excluding the footnotes thereto). Obligations or liabilities that are not fully reflected in the financial statements (excluding the footnotes thereto) include, without limitation: obligations that are not classified as a liability according to generally accepted accounting principles; contingent liabilities as to which, as of the date of the financial statements, it is not probable that a loss has been incurred or, if probable, is not reasonably estimable; or liabilities as to which the amount recognized in the financial statements is less than the reasonably possible maximum exposure to loss under the obligation as of the date of the financial statements. Contingent liabilities arising out of litigation, arbitration or regulatory actions (not otherwise related to off-balance sheet arrangements) are not off-balance sheet arrangements.

(iv) No obligation to make disclosure under this general instruction B.7. shall arise in respect of an off-balance sheet arrangement until a definitive agreement that is unconditional or subject only to customary closing conditions exists or, if there is no such agreement, when settlement of the transaction occurs.

8. *Tabular disclosure of contractual obligations.* (i) In a tabular format, provide the information specified in this general instruction B.8. with respect to the registrant's known contractual obligations as of the latest balance sheet date. The tabular presentation should include at least the periods set forth in the columns in the table below. The registrant shall provide amounts, aggregated by type of contractual obligation, and may use the categories of obligations specified in the table below or other categories suitable to its business. A presentation of total contractual obligations for at least the periods specified shall be included. The tabular presentation may be accompanied by footnotes to describe provisions that create, increase or accelerate obligations, or other pertinent data.

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]					
[Unconditional Purchase Obligations]					
[Other Long-Term Obligations]					
Total Contractual Obligations					

(ii) *Contingent liabilities and commitments.* Disclose, either in text or in a tabular format, the expected amount, range of amounts or maximum amount of contingent liabilities or commitments, aggregated by type in a manner that is suitable for the registrant's business, that are expected to expire in less than one year, in one to three years, in three to five years, and more than five years. Unless a range of amounts is disclosed, specify whether the amount disclosed is the expected or maximum amount.

9. *Safe Harbor.* (i) The safe harbor provided in section 27A of the Securities Act and section 21E of the Exchange Act (''statutory safe harbors'') shall apply to forward-looking information provided pursuant to general instruction B.7. of this form 40–F, provided that the disclosure is made by: an issuer; a person acting on behalf of the issuer; an outside reviewer retained by the issuer making a statement on behalf of the issuer; or an underwriter, with respect to information provided by the issuer or information derived from information provided by the issuer.

(ii) For purposes of paragraph (i) of this general instruction B.9. only, all information required by general instruction B.7.(i)(D) and B.7.(ii) of this form 40–F is deemed to be a ''forward looking statement'' as that term is defined in the statutory safe harbors, except for historical facts.

* * * * *

Dated: November 4, 2002.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 02–28431 Filed 11–7–02; 8:45 am]

BILLING CODE 8010–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[FRL–7406–2]

Withdrawal of Federal Human Health and Aquatic Life Water Quality Criteria for Toxic Pollutants Applicable to Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the Federal regulations to withdraw water quality criteria applicable to Michigan.

In the ''Rules and Regulations'' section of this **Federal Register**, EPA is promulgating a direct final rule withdrawing the Federal water quality criteria applicable to Michigan because EPA views this as a noncontroversial action and anticipates no adverse comment. EPA has explained our reasons for this action in the preamble to the direct final rule. If EPA receives no adverse comments, the Agency will not take further action on this proposed rule. If EPA receives adverse comment, the Agency will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

DATES: EPA will accept public comments on its proposed withdrawal of these criteria until December 9, 2002. Comments postmarked after this date may not be considered.

ADDRESSES: Please send an original and three copies of comments and enclosures (including references) to W–01–15, WQCR Comment Clerk; Water Docket, U.S. EPA, 1200 Pennsylvania Ave NW, MC–4101T, Washington, DC 20460. Alternatively, comments may be submitted electronically in ASCII or Word Perfect 5.1, 5.2, 6.1, or 8.0 formats avoiding the use of special characters and any form of encryption to *OW-Docket@epa.gov.* Identify electronic comments by the docket number W–01–15. Submit hand delivered comments to W–01–15, EPA's Water Docket, U.S. EPA, EPA West, 1301 Constitution Ave NW, Room B135, Washington DC 20460. No facsimiles (faxes) will be accepted. Comments will be available at the Water Docket, 202–566–2426, Monday through Friday, excluding legal holidays, during normal business hours of 8:30 am to 4:30 p.m.

The supporting record for this rulemaking may be inspected at EPA Region 5, Office of Water, 77 West Jackson Boulevard, 16th Floor, Chicago, IL 60604–3507, Monday through Friday, excluding legal holidays, during normal business hours of 9 a.m. to 5 p.m. Please contact Dave Pfeifer, as listed in the **FOR FURTHER INFORMATION CONTACT** section, before arriving.

A copy of Michigan's water quality standards may be obtained electronically from EPA's Water Quality Standards Repository, at *http://www.epa.gov/waterscience/standards/wqslibrary/mi/mi.html*.

FOR FURTHER INFORMATION CONTACT: Manjali Gupta Vlcan at EPA Headquarters, Office of Water (4305T), 1200 Pennsylvania Ave NW., Washington, DC, 20460 (tel: 202–566–0373, fax 202–566–0409) or email at *vlcan.manjali@epa.gov*, or Dave Pfeifer in EPA's Region 5 at 312–353–9024 or e-mail at *pfeifer.david@epa.gov*.

SUPPLEMENTARY INFORMATION: This action concerns EPA's withdrawing of the Federal water quality criteria applicable to Michigan from 40 CFR 31.36 (the NTR). For further information, including the various statutes and executive orders that require findings for rulemakings, please see the information provided in the direct final rule titled ''Withdrawal of Federal Human Health and Aquatic Life Water Quality Criteria for Toxic Pollutants Applicable to Michigan'' located in the ''Rules and Regulations'' section of this **Federal Register** Publication.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians—land, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: November 1, 2002.

Christine Todd Whitman,

Administrator.

[FR Doc. 02–28498 Filed 11–7–02; 8:45 am]

BILLING CODE 6560–50–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 27 and 90

[WT Docket No. 96–86; FCC 02–272]

The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) proposes various technical and operational rules and policies regarding emission limitations in the narrowband portion of the 764–776 MHz and 794–806 MHz bands. This action follows recommendations proposed by the Private Radio Section (PRS) of the Telecommunication Industry Association (TIA). These Commission actions will facilitate public safety capabilities in the 700 MHz Band.

DATES: Comments are due on or before December 9, 2002, and reply comments are due on or before December 23, 2002.

ADDRESSES: Federal Communications Commission 445 12th Street, SW., TW–A325, Washington, DC 20554. *See* **SUPPLEMENTARY INFORMATION** for filing instructions.

FOR FURTHER INFORMATION CONTACT: Roberto Mussenden, Esq., *rmussend@fcc.gov,* Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, at (202) 418–0680, or TTY (202) 418–7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Sixth Notice of Proposed Rulemaking*, FCC