

that conducts off-balance sheet activities;

- The amounts of revenues, expenses and cash flows, the nature and amount of any retained interests, securities issued or other indebtedness incurred, or 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 circumstances under which they could arise;

- Management's analysis of the material effects of the above items, including 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; and

- A reasonably likely termination or material reduction in the benefits of an off-balance sheet arrangement and any material effects.

We also proposed to require registrants to provide tabular disclosure of contractual obligations and either tabular or textual disclosure of contingent liabilities and commitments. With regard to the proposed table of contractual obligations, the proposed disclosure included amounts of a registrant's known contractual obligations, aggregated by type of obligation and by time period in which payments are due. The proposed disclosure of contingent liabilities and commitments required registrants to disclose, either in text or in tabular format, the expected amount, range of amounts or maximum amount of contingent liabilities and commitments, aggregated by type and by time period of the expiration of the commitment.

## B. Overview of Comments and Amendments

We received responses to our proposals from 48 commenters.<sup>29</sup>

<sup>29</sup> The commenters are as follows: *Accounting Firms*: BDO Seidman LLP ("BDO"); Deloitte & Touche LLP ("D&T"); Ernst & Young LLP ("E&Y"); KPMG LLP ("KPMG"); PricewaterhouseCoopers LLP ("PwC"). *Law Firms*: Cleary, Gottlieb, Steen & Hamilton ("Cleary"); Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank"); Sullivan & Cromwell ("S&C"); Troutman Sanders LLP ("Troutman"). *Associations*: American Bar Association ("ABA"); American Institute of Certified Public Accountants ("AICPA"); American Society of Corporate Secretaries ("ASCS"); America's Community Bankers ("ACB"); Association for Financial Professionals ("AFP"); Association of the Bar of the City of New York ("NY City Bar"); Edison Electric Institute ("EEI"); Financial Executives International ("FEI"); Interfaith Council on Corporate Accountability ("CANICCOR"); Investment Company Institute ("ICI"); Investment Counsel Association of America ("ICAA"); National Association of Real Estate Investment Trusts ("NAREIT"); New York County Lawyer's Association ("NYCLA"); New York State Bar

Generally, the major issues raised by the responses fell into four categories: (1) The scope of the proposed definition of "off-balance sheet arrangements;" (2) the proposed disclosure threshold; (3) the proposed disclosure requirements for off-balance sheet arrangements; and (4) the scope of the proposed disclosure of contractual obligations and contingent liabilities and commitments. The commentary provided useful perspective on the practical issues that registrants would face in applying the proposed rules.

### 1. Proposed Definition of "Off-Balance Sheet Arrangements"

While some commenters expressed general support for the proposed definition of "off-balance sheet arrangements,"<sup>30</sup> the majority expressed the view that the definition was too broad and in need of further clarification.<sup>31</sup> In particular, several commenters believed that the proposed definition included routine transactions that would not typically be considered to be "off-balance sheet arrangements" (e.g., executory contracts, employment agreements, consulting agreements, leases, licenses, royalty contracts, minimum purchase commitments, guarantees under customer contracts, and employee pension plan and postretirement benefit arrangements).<sup>32</sup> Eight commenters suggested that the definition should focus on the types of unconsolidated entities that are typically used to conduct off-balance sheet activities, such as structured finance entities or special purpose entities ("SPEs").<sup>33</sup> One commenter suggested that the definition should focus on off-balance sheet arrangements

Association ("NYBA"); Organization for International Investment ("OFII"); Rose Foundation for Communities & Environment ("Rose"); Securities Industry Association ("SIA"). *Corporations*: Boeing Company ("Boeing"); Centex Corporation ("Centex"); Compass Bancshares, Inc. ("Compass"); Computer Sciences Corporation ("CSC"); Constellation Energy Group ("CEG"); Eaton Corporation ("Eaton"); Eli Lilly and Company ("Lilly"); Emerson Electric Corporation ("Emerson"); First Tennessee National Corporation ("FTNC"); Ford Motor Company ("Ford"); IMC Global Inc. ("IMC"); Intel Corporation ("Intel"); Kellogg Company ("Kellogg"); Pfizer Inc. ("Pfizer"). *Individuals*: Barbara Barry ("Barry"); Robert Beard, C.P.A. ("Beard"); Kevin Bronner, Ph.D. ("Bronner"); Dave Henseler ("Henseler"); Timothy O'Keefe ("O'Keefe"); Ralph Saul ("Saul"). *Governmental Bodies*: European Commission ("EC").

<sup>30</sup> See, e.g., the letters of Compass, Emerson, Fried Frank, ICAA, IMC and PwC.

<sup>31</sup> See, e.g., the letters of ABA, ACB, AICPA, Boeing, CEG, CSC, D&T, Eaton, EEI, E&Y, FTNC, Kellogg, KPMG, Pfizer and S&C.

<sup>32</sup> See, e.g., the letters of ABA, ACB, AICPA, CEG, Centex, CSC, D&T, Eaton, EEI, E&Y, Kellogg, KPMG, NY City Bar and PwC.

<sup>33</sup> See, e.g., the letters of ABA, ACB, Centex, CSC, D&T, E&Y, KPMG and NY City Bar.

used as a financing, liquidity or risk-sharing technique.<sup>34</sup> Six commenters either were confused by, or opposed to, our proposal to include obligations or liabilities "not fully reflected in the financial statements."<sup>35</sup> Finally, eight commenters recommended that we should reconcile apparent discrepancies between the elements of the proposed definition and the corollary accounting concepts embodied in GAAP.<sup>36</sup>

At the commenters' suggestion, we are adopting a revised definition of "off-balance sheet arrangement" to clarify its scope. We agree that certain modifications of the proposed definition are necessary to eliminate disclosure of routine arrangements that could obscure more meaningful information. Accordingly, we have revised the definition to incorporate concepts from U.S. GAAP.<sup>37</sup> We believe that the inclusion of references in the definition to U.S. GAAP help narrow the scope of arrangements that require more transparent disclosure under the amendments. The same types of off-balance sheet arrangements covered by the definition must be discussed in the MD&A regardless of the particular GAAP under which a registrant presents its primary financial statements. We are not imposing U.S. GAAP on foreign private issuers with respect to the preparation of their primary financial statements.

### 2. Proposed Disclosure Threshold

The proposed rules would have required disclosure of off-balance sheet arrangements that "may have a material current or future effect." The proposed rules stated that disclosure of an arrangement was 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." We indicated that the proposed threshold of disclosure would have been lower than the current MD&A standard of "reasonably likely to have a material effect." We requested commentary on whether the proposed threshold was consistent under section 401(a) or whether a "reasonably likely" threshold was appropriate. Most commenters suggested that the final rule should incorporate the "reasonably likely" disclosure threshold that is currently found in MD&A rules,<sup>38</sup> while

<sup>34</sup> See the letter of ABA.

<sup>35</sup> See, e.g., the letters of BDO, Compass, D&T, FTNC, Intel and S&C.

<sup>36</sup> See, e.g., the letters of ACB, AICPA, Boeing, CEG, D&T, EEI, E&Y and Pfizer.

<sup>37</sup> See Discussion in Section III.A.

<sup>38</sup> See, e.g., the letters of ABA, ACB, AICPA, ASCS, Boeing, CEG, Cleary, Compass, CSC, D&T, Eaton, EEI, E&Y, Fried Frank, ICAA, IMC, Intel,