

accordance with GAAP.¹²⁰ Because purchase obligations may have a significant effect on the registrant's liquidity, they are included in the table. The amendments provide a definition of "purchase obligations." A "purchase obligation" is defined as an agreement to purchase goods or services that is enforceable and legally binding on the registrant and that specifies all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the approximate timing of the transaction.¹²¹ If the purchase obligations are subject to variable price provisions, then the registrant must provide estimates of the payments due. In that case, the table should include footnotes to inform investors of the payments that are subject to market risk, if that information is material to investors. In addition, the footnotes should discuss any material termination or renewal provisions to the extent necessary for an understanding of the timing and amount of the registrant's payments under its purchase obligations.

E. Presentation of Disclosure

1. Separate Disclosure Sections

The amendments require a registrant to present the disclosure about off-balance sheet arrangements in a separately-captioned section of MD&A. In contrast, a registrant may place the tabular disclosure of known contractual obligations in an MD&A location that it deems to be appropriate. In response to the request for comments in the Proposing Release, five commenters suggested that the issuer should be able to determine the placement of the off-balance sheet disclosures within the MD&A,¹²² and two commenters supported a separate disclosure section for off-balance sheet disclosures.¹²³ After evaluating the comments, we are adopting a requirement for a separate section for two reasons. First, a distinct presentation of the information will highlight it for readers and enable investors to more easily compare disclosure of different companies. Second, a distinct presentation will layer the MD&A, and thereby enable investors with varying levels of interest and financial acumen to easily obtain desired information.

2. Language and Format

The MD&A discussion should be presented in language and a format that is clear, concise and understandable. For example, a registrant may choose to include the financial impact of its off-balance sheet arrangements (*e.g.*, revenues, expenses, gains or losses) aggregated by type of arrangement in a tabular format. The information should not be presented in such a manner that only an accountant or financial analyst 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 will not satisfy the MD&A requirements. Disclosure that can easily be transferred from year to year, or from company to company, with no change will neither inform investors adequately nor reflect the independent thinking that must precede the assessment by management that is intended for MD&A disclosure.

3. Cross-Referencing to the Financial Statements

In response to the Proposing Release, eight commenters noted that some of the disclosures appear to be redundant with GAAP disclosure requirements.¹²⁴ To eliminate unnecessary repetition, the amendments allow a registrant to include within its MD&A section a cross-reference to information in the footnotes to the financial statements.¹²⁵ The cross-reference must clearly identify specific information in the footnotes and must integrate the substance of the footnotes into the MD&A discussion in a manner designed to inform readers of the significance of the information that is not included within the body of the MD&A. Registrants should ensure that the quality of the discussion of off-balance sheet arrangements has not diminished as a result of including a cross-reference. In addition, the disclosure in the referenced footnotes should comply with the language and format requirements discussed above.

F. Effect of Amendments on Commission Statement

In an effort to provide guidance to public companies, our January 2002 Commission Statement presented a number of factors that management should consider regarding the MD&A disclosure requirements for liquidity and capital resources, off-balance sheet arrangements, certain trading activities

that include non-exchange traded contracts accounted for at fair value, and transactions with persons or entities that derive benefits from their non-independent relationships with the registrant or the registrant's related parties.¹²⁶ The amendments relating to disclosures that are the subject of this release will supersede the guidance in the Commission Statement on disclosure of off-balance sheet arrangements¹²⁷ as of the Compliance Date for the amendments. On the Compliance Date for the amendments relating to disclosure of the table of contractual obligations, the guidance in the Commission Statement on disclosure of the table of contractual obligations¹²⁸ also will be superseded by the amendments. All other guidance issued in the Commission Statement will remain in effect. While the Compliance Dates for the amendments applies to annual reports, registration statements and proxy or information statements that are required to include financial statements for the fiscal years ending on or after June 15, 2003 for disclosure about off-balance sheet arrangements and December 15, 2003 for the table of contractual obligations, we assume that registrants with fiscal years ending before the Compliance Dates will continue to follow the guidance in the Commission Statement. Registrants may voluntarily comply with the new disclosure requirements before the Compliance Dates.

G. Application to Foreign Private Issuers

The amendments apply to foreign private issuers that file annual reports on Form 20-F¹²⁹ or on Form 40-F.¹³⁰ Because section 401(a) of the Sarbanes-Oxley Act does not distinguish between foreign private issuers¹³¹ 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

¹²⁶ See Commission Statement, Release No. 33-8056, FR-61 (Jan. 22, 2002)[67 FR 3746].

¹²⁷ See Commission Statement, Section II.A.2.

¹²⁸ See Commission Statement, Section II.A.3.

¹²⁹ 17 CFR 249.220f.

¹³⁰ 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").

¹³¹ 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].

¹²⁰ See FASB, Statement of Financial Accounting Concepts No. 6, *Elements of Financial Statements* (Dec. 1985), paragraphs 35-40.

¹²¹ See, *e.g.*, Item 303(a)(5)(ii)(D) of Regulation S-K [17 CFR 229.303(a)(5)(ii)(D)].

¹²² See, *e.g.*, the letters of ACB, CSC, D&T, IMC and Pfizer.

¹²³ See, *e.g.*, the letters of Beard and PwC.

¹²⁴ See, *e.g.*, the letters of ACB, Boeing, Eaton, E&Y, Ford, KPMG, NAREIT and NY City Bar.

¹²⁵ See, *e.g.*, Instruction 5 to paragraph 303(a)(4) of Regulation S-K [17 CFR 229.303(a)(4)].