

information and analysis necessary for investors to understand the impact of off-balance sheet arrangements and to reduce the burden of estimating the payments due under contractual obligations, the amendments include a safe harbor for forward-looking information.<sup>144</sup> The safe harbor explicitly applies the statutory safe harbor protections (sections 27A of the Securities Act and 21E of the Exchange Act)<sup>145</sup> to forward-looking information that is required to be disclosed.

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.<sup>146</sup> 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 will fall within the safe harbors if 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 create a

new safe harbor to ensure the application of the statutory safe harbors to the forward-looking statements required under the amendments. The safe harbor is designed to remove possible ambiguity about whether the statutory safe harbors would apply to the forward-looking statements made in response to the amendments. The safe harbor specifies that, except for historical facts, the disclosure would be deemed to be a "forward looking statement" as that term is defined in the statutory safe harbors.<sup>147</sup> In addition, with respect to the MD&A discussion of off-balance sheet arrangements, we are adopting a provision that the "meaningful cautionary statements" element of the statutory safe harbors will be satisfied if a registrant satisfies all of its off-balance sheet arrangements disclosure requirements.<sup>148</sup> Because the new MD&A safe harbor is closely linked to the statutory safe harbors, we urge companies preparing their disclosure to consider the terms, conditions and scope of the statutory safe harbors in drafting their disclosure.

#### IV. Paperwork Reduction Act

##### A. Background

The amendments to Regulations S-B, S-K,<sup>149</sup> Form 20-F and Form 40-F contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").<sup>150</sup> We published a notice requesting comment on the collection of information requirements in the Proposing Release, and we submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.<sup>151</sup> The 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);

<sup>147</sup> See, e.g., Item 303(c)(2)(i) of Regulation S-K [17 CFR 229.303(c)(2)(i)].

<sup>148</sup> See, e.g., Item 303(c)(2)(ii) of Regulation S-K [17 CFR 229.303(c)(2)(ii)]. Because this provision does not apply to the required table of contractual obligations, registrants should tailor the required cautionary language to the specific forward-looking statements being made.

<sup>149</sup> 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.

<sup>150</sup> 44 U.S.C. 3501 et seq.

<sup>151</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

(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.

The amendments require public companies to include a discussion of material off-balance sheet arrangements and a table of certain contractual obligations in the MD&A section of their filings with the Commission. We are adopting these rules pursuant to the legislative mandate in section 401(a) of the Sarbanes-Oxley Act of 2002.<sup>152</sup> Compliance with the revised disclosure requirements is mandatory. There is no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

##### B. Paperwork Burden Estimates

For purposes of the Paperwork Reduction Act, we estimated the annual

CFR 229.303]. Deleting that portion of the instructions does not in any way reduce the availability of any existing safe harbor for forward-looking information.

<sup>144</sup> See, e.g., Item 303(c) of Regulation S-K [17 CFR 229.303(c)].

<sup>145</sup> See 15 U.S.C. 77z-2 and 78u-5.

<sup>146</sup> 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).

<sup>152</sup> Pub. L. 107-204 Sec. 401(a) [15 U.S.C. 78m(j)].