SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 230, 239, 240, and 249

[Release No. 33-10762; 34-88307; File No. S7-19-18]

RIN 3235-AM12

Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to the financial disclosure requirements for guarantors and issuers of guaranteed securities registered or being registered, and issuers' affiliates whose securities collateralize securities registered or being registered in Regulation S-X to improve those requirements for both investors and registrants. The changes are intended to provide investors with material information given the specific facts and circumstances, make the disclosures easier to understand, and reduce the costs and burdens to registrants. In addition, by reducing the costs and burdens of compliance, issuers may be encouraged to offer guaranteed or collateralized securities on a registered basis, thereby affording investors protection they may not be provided in offerings conducted on an unregistered basis. Finally, by making it less burdensome and less costly for issuers to include guarantees or pledges of affiliate securities as collateral when they structure debt offerings, the revisions may increase the number of registered offerings that include these credit enhancements, which could result in a lower cost of capital and an increased level of investor protection.

DATES: *Effective date*: The final rules are effective on January 4, 2021.

Compliance dates: See Section VI for further information on transitioning to the final rules.

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SUPPLEMENTARY INFORMATION: The Commission is amending

Commission Reference		**CFR Citation (17 CFR)**
Regulation S-X [17 CFR 210.1-01 through 210.13-02]		
	Rule 3-10	§ 210.3-10
	Rule 3-16	§ 210.3-16
	Rule 8-01	§ 210.8-01
	Rule 8-03	§ 210.8-03
	Rule 10-01	§ 210.10-01
	Rule 13-01	§ 210.13-01
	Rule 13-02	§ 210.13-02
Regulation S-K [17 CFR 229.10 through 229.1305]		
	Item 504	§ 229.504
	Item 601	§ 229.601
	Item 1100	§ 229.1100
	Item 1112	§ 229.1112
	Item 1114	§ 229.1114
	Item 1115	§ 229.1115
Securities Act of 1933 (Securities Act) [15 U.S.C. 77a *et seq*.]		
	Rule 257	§ 230.257
	Form F-1	§ 239.31
	Form F-3	§ 239.33
	Form 1-A	§ 239.90
	Form 1-K	§ 239.91
	Form 1-SA	§ 239.92

Securities Exchange Act of 1934 (Exchange Act) [15 U.S.C. 78a *et seq*.]		
	Rule 12h-5	§ 240.12h-5
	Form 20-F	§ 249.220f

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I. Introduction

A. Background

On July 24, 2018, the Commission proposed changes to the disclosure requirements in Rules 3-10 and 3-16 of Regulation S-X to better align those requirements with the needs of investors and to simplify and streamline the disclosure obligations of registrants.[1] Rule 3-10 requires financial statements to be filed for all issuers and guarantors of securities that are registered or being registered, but also provides several exceptions to that requirement. These exceptions are typically available for individual subsidiaries of a parent company[2] when the consolidated financial statements of that parent company are filed and certain conditions are met. Rule 3-16 requires a registrant to provide separate financial statements for each affiliate whose securities constitute a substantial portion of the collateral for any class of registered securities as if the affiliate were a separate registrant. The changes the Commission proposed included amending both rules and relocating part of Rule 3-10 and all of Rule 3-16 to new Rules 13-01 and 13-02 in Regulation S-X, respectively.[3] These proposed changes were intended to provide investors with the information that is material given the specific facts and circumstances, make the disclosures easier to understand, and reduce the costs and burdens to registrants. The proposal resulted from an ongoing, comprehensive evaluation of the Commission's disclosure

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1 *See Financial Disclosures About Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities*, Release No. 33-10526 (July 24, 2018) [83 FR 49630 (Oct. 2, 2018)] ("Proposing Release").

2 The identity of the parent company depends on the particular corporate structure. *See* Section II.C of the Proposing Release.

3 Proposed Rules 13-01 and 13-02 would contain financial and non-financial disclosure requirements for certain types of securities registered or being registered that, while material to investors, need not be included in the audited and unaudited financial statements in certain circumstances. *See* Sections III.C.2.c, "When Disclosure is Required" and V.E, "When Disclosure is Required," below.

requirements.[4]

We received over 30 comment letters in response to the proposed amendments.[5] In general, commenters supported the proposed amendments. In certain instances, commenters opposed the proposed revisions and suggested modifications to the proposals.

We have reviewed and considered all of the comments that we received on the proposed amendments. The final rules reflect changes made in response to many of these comments. We discuss our revisions with respect to each proposed rule and amendment in more detail throughout this release.

B. Scope of Proposals

The Commission proposed changes to the disclosure requirements contained in Rules 3-10 and 3-16. These rules represent a discrete, but important, subset of the Regulation S-X disclosure requirements. Both rules affect disclosures made in connection with registered debt

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[4] The staff, under its Disclosure Effectiveness Initiative, is reviewing the disclosure requirements in Regulations S-K and Regulation S-X and is considering ways to improve the disclosure regime for the benefit of both companies and investors. The goal is to comprehensively review the requirements and make recommendations on how to update them to facilitate timely, material disclosure by companies and shareholders' access to that information.

[5] *See, e.g.*, letters from American Bar Association, Federal Regulation of Securities Committee and the Law Accounting Committee of the Business Law Section ("ABA"); Association of the Bar of the City of New York, Securities Regulation Committee ("NYC Bar"); Ball Corporation ("Ball Corp."); BDO USA, LLP ("BDO"); Center for Audit Quality ("CAQ"); Comcast Corporation ("Comcast"); Council of Institutional Investors ("CII"); Cravath, Swaine & Moore LLP ("Cravath"); The Credit Roundtable ("Credit Roundtable"); Davis Polk & Wardwell LLP ("Davis Polk"); Debevoise & Plimpton LLP ("Debevoise"); Dell Technologies, Inc. ("Dell"); Deloitte & Touche LLP ("Deloitte"); Eaton Corporation plc ("Eaton Corp."); Edison Electric Institute and American Gas Association ("EEI / AGA"); Ernst & Young LLP ("EY"); FedEx Corporation ("FedEx"); Financial Executives International ("FEI"); Freeport-McMoRan Inc. ("Freeport"); Grant Thornton LLP ("Grant Thornton"); KPMG LLP ("KPMG"); Medtronic plc ("Medtronic"); Nareit ("Nareit"); PricewaterhouseCoopers LLP ("PWC"); Securities Industry and Financial Markets Association ("SIFMA"); Shearman & Sterling LLP ("Shearman"); Simpson Thacher & Bartlett LLP ("Simpson Thacher"); Sullivan & Cromwell LLP ("Sullivan & Cromwell"); T-Mobile US, Inc. ("T-Mobile"); Willis Towers Watson plc ("WTW"); Windstream Holdings, Inc. ("Windstream"); and XBRL US, Inc. The public comments we received are available on our web site at https://www.sec.gov/comments/s7-19-18/s71918.htm.

offerings[6] and subsequent periodic reporting.[7] In the Proposing Release, the Commission stated its belief that revising these rules would reduce the cost of compliance for registrants and encourage potential issuers to conduct registered debt offerings or private offerings with registration rights.[8] The proposed amendments were intended to benefit investors by simplifying and streamlining the disclosure provided to them about registered transactions and improving transparency in the market to the extent more offerings are registered.[9] In addition, the Commission noted that, if the proposed changes reduce the burden associated with providing guarantees or pledges of affiliate securities as collateral,[10] investors could benefit from access to more registered offerings that are structured to include such enhancements and, accordingly, the additional protections that come with Section 11 liability for disclosures made in those offerings.[11]

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[6] In practice, pledges of affiliate securities as collateral are almost always for debt securities. However, the requirements of Rule 3-16 are applicable to any security registered or being registered, whether or not in the form of debt.

[7] The proposed amendments would not have affected the presentation of registrants' consolidated financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles ("U.S. GAAP") or International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board in registration statements and Exchange Act periodic reports, such as Form 10-K. The proposed amendments were focused on the supplemental information about subsidiary issuers and guarantors as well as affiliates whose securities are pledged as collateral.

[8] *See* Section I of the Proposing Release.

[9] Based on analysis performed by staff from the Commission's Division of Economic and Risk Analysis, the registered debt market was approximately $1.1 trillion in 2018. In 2018, debt offerings under Securities Act Rule in 17 CFR 230.144A ("Rule 144A") raised approximately $658 billion, based on staff analysis of data from the Mergent database. The dollar volume of registered debt and Rule 144A offerings generally appears to be higher in recent years (i.e., 2016, 2017, 2018) than in earlier years (i.e., 2013, 2014, 2015). *See* Section VIII.B.2, "Market Conditions."

[10] Currently, registrants often structure debt agreements to release affiliate securities pledged as collateral if the disclosure requirements of Rule 3-16 would be triggered, thereby depriving investors of that collateral protection. *See* additional discussion in Section VI.B "Rule 3-16 Collateral Release Provisions" below. In the Proposing Release, the Commission observed that registrants may cease structuring offerings to release such collateral if disclosure burdens would be reduced by the proposed amendments, which would benefit investors. *See* Section I.B of the Proposing Release.

[11] 15 U.S.C. 77k.

II. Rule 3-10 of Regulation S-X

A. Background

A guarantee of a debt or debt-like security ("debt security")[12] is a separate security under the Securities Act[13] and, as a result, offers and sales of these guarantees[14] must be either registered or exempt from registration. If the offer and sale is registered, the issuer of the debt security and the guarantor[15] must each file its own audited annual and unaudited interim[16] financial statements required by Regulation S-X. Additionally, the offer and sale of the securities pursuant to a Securities Act registration statement causes the issuer and guarantor to become subject to reporting under Section 15(d) of the Exchange Act.[17] Reporting under Section 15(d), among other things, requires filing periodic reports that must include audited annual and unaudited interim financial statements, for at least the fiscal year in which the related Securities Act registration statement became effective.[18]

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[12] Rule 3-10 exceptions are available to issuers and guarantors of guaranteed securities that are "debt or debt-like." In connection with amendments to Rule 3-10 in 2000 the Commission stated "[t]he characteristics that identify a guaranteed security as debt or debt-like for this purpose are: the issuer has a contractual obligation to pay a fixed sum at a fixed time; and where the obligation to make such payments is cumulative, a set amount of interest must be paid." *Financial Statements and Periodic Reports for Related Issuers and Guarantors*, Release No. 33-7878 (Aug. 4, 2000) [65 FR 51691 (Aug. 24, 2000)] ("2000 Release") at Section III.A.4.b.i; *see also* Section II.H of the Proposing Release.

[13] *See* Section 2(a)(1) of the Securities Act.

[14] These securities, while separately identified in the Securities Act, are typically purchased by investors together with the related debt security and are held together while outstanding.

[15] The issuer and guarantor structures contemplated by Rule 3-10 can comprise multiple issuers and multiple guarantors. For example, a parent can co-issue a security with one of its subsidiaries that several of its other subsidiaries guarantee.

[16] A foreign private issuer need only provide interim period disclosure in certain registration statements.

[17] *See* 15 U.S.C. 78o(d).

[18] The duty to file under Section 15(d) is automatically suspended as to any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than 300 persons. *See* Section 15(d)(1) of the Exchange Act.

When the Commission amended Rule 3-10 in 2000, it recognized that "[t]here are circumstances, however, where full Securities Act and Exchange Act disclosure by both the issuer and the guarantors may not be useful to an investment decision and, therefore, may not be necessary."[19] Common examples are when: (1) a parent company offers its own securities that its subsidiary guarantees; and (2) a subsidiary offers securities that its parent company fully and unconditionally guarantees. In these and similar situations, in which a parent company and one or more of its subsidiaries serve as issuers and/or guarantors of guaranteed securities, we believe the disclosure requirements generally have been guided by an overarching principle: the consolidated financial statements of the parent company are the principal source of information for investors when evaluating the debt security and its guarantee together.[20] This principle is grounded in the idea that the investment is in the *consolidated* enterprise when: (1) the parent company is fully obligated as either issuer or full and unconditional guarantor of the security;[21] (2) the parent company controls each subsidiary issuer and guarantor, including having the ability to direct all debt-paying activities;[22] and (3) the financial information of each subsidiary issuer and guarantor is included as part of the consolidated financial statements of the parent

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[19] *See* Section I of the 2000 Release.

[20] Parent company consolidated financial statements must be filed in all instances where the omission of financial statements of subsidiary issuers and guarantors is permitted under existing Rule 3-10. *See* paragraph (4) in each of Rules 3-10(b) through (f).

[21] Typically, all of a parent company's subsidiaries support the parent company's debt-paying ability. However, in the event of default, the holders of a debt security issued by a parent company are disadvantaged as compared to the direct creditors of any subsidiary not providing a guarantee because the holders can only make claims for payment directly against the issuer and any guarantors. In addition, in a bankruptcy proceeding, the assets of non-guarantor subsidiaries that are not issuers typically would be accessible only by the holder indirectly through the parent's equity interest. In such a proceeding, without a direct guarantee, the claims of the holder would be structurally subordinate to the claims of other creditors, including trade creditors of those subsidiaries.

[22] Debt-paying activities typically include, but are not limited to, the use of the subsidiary issuer's and guarantor's assets and the timing and amount of distributions.

company.[23] In these circumstances, we believe full Securities Act and Exchange Act financial disclosures for each subsidiary issuer and guarantor are generally not material for an investor to make an informed investment decision about a guaranteed security. Instead, we believe information included in the consolidated disclosures about the parent company, as supplemented with details about the issuers and guarantors, is sufficient. These disclosures help an investor understand how the consolidated entities within the enterprise support the obligation.

B. Overview of the Existing Requirements

Rule 3-10(a) states the general rule that every issuer of a registered security that is guaranteed and every guarantor of a registered security must file the financial statements required for a registrant by Regulation S-X. The rule also sets forth five exceptions to this general rule.[24] Each exception specifies conditions that must be met, including, in each case, that the parent company provide certain disclosures ("Alternative Disclosures").[25] If the conditions are met, separate financial statements of each qualifying subsidiary issuer and guarantor may be omitted from the Securities Act registration statement and subsequent Exchange Act reports. Only one of the five exceptions can apply to any particular offering and the subsequent Exchange Act reporting.

Two primary conditions, included in each of the exceptions, must be satisfied for a subsidiary issuer or guarantor to be eligible to omit its separate financial statements:

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[23] A parent company that prepares its financial statements in accordance with U.S. GAAP, would apply Accounting Standards Codification ("ASC") 810, *Consolidation*, in determining whether to consolidate a subsidiary issuer or guarantor. A parent company that qualifies as a foreign private issuer and prepares its financial statements in accordance with IFRS would apply IFRS 10, *Consolidated Financial Statements*.

[24] *See* Rules 3-10(b) through (f) of Regulation S-X. *See* also Section II.F of the Proposing Release.

[25] The Alternative Disclosures must be provided in the footnotes to the parent company's consolidated financial statements.

- Each subsidiary issuer and guarantor must be "100%-owned" by the parent company;[26] and
- Each guarantee must be "full and unconditional."[27]

The form and content of the Alternative Disclosures are determined based on the facts and circumstances and can range from a brief narrative[28] to highly detailed condensed consolidating financial information ("Consolidating Information").[29] Subsidiary issuers and guarantors that are permitted to omit their separate financial statements under Rule 3-10 are also automatically exempt from Exchange Act reporting under Exchange Act Rule 12h-5. The parent company, however, must continue to provide the Alternative Disclosures for as long as the guaranteed securities are outstanding.[30]

Recently acquired subsidiary issuers and guarantors are addressed separately within Rule 3-10. Rule 3-10(g)[31] requires the Securities Act registration statement of a parent company filed in connection with issuing guaranteed debt securities to include one year of audited, and, if applicable, unaudited interim pre-acquisition financial statements for recently acquired subsidiary issuers and guarantors that are significant and have not been reflected in the parent company's audited results for at least nine months of the most recent fiscal year.

The requirements of existing Rule 3-10 are discussed in further detail in Section II of the Proposing Release.

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[26] *See* Section II.D of the Proposing Release.

[27] *See* Section II.E of the Proposing Release.

[28] *See* additional discussion of the brief narrative form of Alternative Disclosures in Section II.F of the Proposing Release.

[29] *See* additional discussion of Consolidating Information in Section II.G of the Proposing Release.

[30] *See* Section III.C.1 of the 2000 Release and additional discussion in Section II.J of the Proposing Release.

[31] Rule 3-10(g) of Regulation S-X. *See* additional discussion in Section II.I of the Proposing Release.

III. Amendments to Rule 3-10 and Partial Relocation to Rule 13-01

A. Overarching Principle

The Commission proposed amendments to address the challenges posed by the current rules while continuing to adhere to the overarching principle upon which existing Rule 3-10 is based, namely, that investors in guaranteed debt securities rely primarily on the consolidated financial statements of the parent company and supplemental details about the subsidiary issuers and guarantors when making investment decisions.[32] A number of commenters agreed with this overarching principle.[33] Of these commenters, one asserted that this principle is particularly true when the parent company is fully obligated as either issuer or full and unconditional guarantor of the security; the parent company controls each subsidiary issuer and guarantor, including having the ability to direct all debt paying activities; and the financial information of each subsidiary issuer and guarantor is included as part of the consolidated financial statements of the parent company.[34] Another of these commenters asserted investors in guaranteed securities rely primarily on the consolidated financial statements of the parent company when making investment decisions, and that these investors need only supplemental details about subsidiary issuers and guarantors.[35] Other commenters noted that in addition to relying on the consolidated financial statements of the parent company, the key disclosure for investors in guaranteed securities is disclosure that enables them to evaluate the extent of their structural subordination

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[32] *See* discussion in Section II.A, "Background."

[33] *See*, *e.g.*, letters from Ball Corp., Cravath, Davis Polk, Eaton Corp., EY, FEI, Freeport, Nareit, Shearman, and T-Mobile.

[34] *See* letter from Freeport.

[35] *See* letter from Eaton Corp.

risk.[36] According to these commenters, the principal value of subsidiary guarantees to investors is that the guarantees improve the investor's claim on the assets of the subsidiaries in the event of a default and therefore supplemental financial information for subsidiary guarantees should focus on factors impacting structural subordination, not the financial ability of any individual subsidiary guarantor to make payment under the guarantee.[37]

B. Overview of the Proposed and Final Amendments

Under the proposed amendments, the rules would continue to permit the omission of separate financial statements of subsidiary issuers and guarantors when certain conditions are met and the parent company provides supplemental financial and non-financial disclosure about the subsidiary issuers and/or guarantors and the guarantees ("Proposed Alternative Disclosures"). Proposed Rule 3-10 would provide the conditions that must be met in order to omit separate subsidiary issuer or guarantor financial statements. Proposed Rule 13-01 would specify the disclosure requirements for the accompanying Proposed Alternative Disclosures.[38] The proposed amendments would:

- Replace the condition that a subsidiary issuer or guarantor be 100%-owned by the parent company with a condition that it be consolidated in the parent company's consolidated financial statements;

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36 *See* letters from Cravath, Davis Polk and Shearman.

37 *See* id.

38 The disclosures specified in proposed Rule 13-01(a) would be required "[f]or each class of guaranteed security registered or being registered for which the registrant is the parent company (as that term is defined in § 210.3-10(b)(1))..." As a technical modification, final Rule 13-01(a) has been revised to require the disclosures specified therein "[f]or each guaranteed security subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, and for each guaranteed security the offer and sale of which is being registered under the Securities Act of 1933, for which the registrant is the parent company (as that term is defined in § 210.3-10(b)(1)) of one or more subsidiaries that issue or guarantee the guaranteed security…"

- Replace Consolidating Information with summarized financial information, as defined in 17 CFR 210.1-02(bb)(1)[39] ("Summarized Financial Information"), of the issuers and guarantors (together, "Obligor Group"), which may be presented on a combined basis, and reduce the number of periods presented;
- Expand the qualitative disclosures about the guarantees and the issuers and guarantors;
- Eliminate quantitative thresholds for disclosure and require disclosure of additional information that would be material to making an investment decision with respect to the guaranteed security;
- Permit the Proposed Alternative Disclosures to be provided outside the footnotes to the parent company's audited annual and unaudited interim consolidated financial statements in the registration statement covering the offer and sale of the subject securities and any related prospectus, and in certain Exchange Act reports filed thereafter;
- Require that the Proposed Alternative Disclosures be included in the footnotes to the parent company's consolidated financial statements for annual and quarterly reports beginning with the annual report for the fiscal year during which the first bona fide sale of the subject securities is completed;
- Eliminate the requirement to provide pre-acquisition financial statements of recently acquired subsidiary issuers and guarantors; and
- Require the Proposed Alternative Disclosures for as long as the issuers and

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[39] Rule 1-02(bb)(1) of Regulation S-X.

guarantors have an Exchange Act reporting obligation with respect to the guaranteed securities rather than for so long as the guaranteed securities are outstanding.

The proposed amendments were intended to simplify and streamline the rule structure in several ways. Most significantly, under the proposed amendments there would be only a single set of eligibility criteria that would apply to all issuer and guarantor structures instead of separate sets of criteria in each of the five exceptions in existing Rules 3-10(b) through (f). Similarly, the requirements for the Proposed Alternative Disclosures would be included in a single location within proposed Rule 13-01, rather than spread among the multiple paragraphs of existing Rule 3-10. In the Proposing Release, the Commission expressed its belief that these changes would simplify the rule structure and facilitate compliance.[40]

After considering public comments, we are adopting these amendments substantially as proposed with certain modifications. Specifically, the final rule:

- Modifies the proposed requirement to disclose additional information that would be material to holders of the guaranteed security to be more specific by requiring disclosure of additional information about each guarantor that would be material for investors to evaluate the sufficiency of the guarantee, consistent with existing Rule 3-10;
- Permits the amended supplemental financial and non-financial disclosure about the subsidiary issuers and/or guarantors and the guarantees ("Revised Alternative Disclosures") to be provided outside the footnotes to the parent company's audited annual and unaudited interim consolidated financial statements in all

[40] *See* Section III of the Proposing Release.

cases rather than only in the proposed circumstances;

- Eliminates the requirement to provide pre-acquisition financial statements of recently acquired subsidiary issuers and guarantors as proposed, but requires, in certain instances, pre-acquisition Summarized Financial Information about significant recently acquired subsidiary issuers and guarantors; and
- Reflects other modifications from the proposed amendments as described below.

The proposed and final amendments, along with our consideration of public comments, are discussed in detail below.

C. Conditions to Omit the Financial Statements of a Subsidiary Issuer or Guarantor

Under the proposed amendments, the financial statements of a subsidiary issuer or guarantor could be omitted if the eligibility conditions contained in proposed Rules 3-10(a) and 3-10(a)(1) are met and the Proposed Alternative Disclosures specified in proposed Rule 13-01 are provided in the filing, as required by proposed Rule 3-10(a)(2). As proposed, the eligibility conditions would be that:

- The consolidated financial statements of the parent company have been filed;
- The subsidiary issuer or guarantor is a consolidated subsidiary of the parent company;
- The guaranteed security is debt or debt-like; and
- One of the following eligible issuer and guarantor structures is applicable:
    - The parent company issues the security or co-issues the security, jointly and severally, with one or more of its consolidated subsidiaries; or
    - A consolidated subsidiary issues the security or co-issues the security with one or more other consolidated subsidiaries of the parent company, and

the security is guaranteed fully and unconditionally by the parent company.

The proposed amendments, comments received, and final amendments to the eligibility conditions are described below.

1. Eligibility Conditions

a. Parent Company Financial Statements Condition

i. Proposed Amendments

Proposed Rule 3-10 would continue to require the filing of the parent company's consolidated financial statements. Additionally, under the proposed amendments, "parent company" would be defined as in the 2000 Release, with one change. The first two conditions would continue to be that the entity is: (1) an issuer or guarantor of the securities; and (2) an Exchange Act reporting company, or will become one as a result of the subject Securities Act registration statement. However, the third condition, that the entity owns, directly or indirectly, 100% of each subsidiary issuer and guarantor, would no longer be required for an entity to be considered the parent company.[41] Instead, the third condition would be that the entity consolidates each subsidiary issuer and guarantor in its consolidated financial statements.[42] For clarity, the definition of "parent company" would be included in proposed Rule 3-10(b)(1), stating that the parent company is the entity that meets the three aforementioned conditions.

The note to existing Rule 3-10(a)(2) states that "the financial statements of an entity that is not an issuer or guarantor of the registered security cannot be substituted for those of the parent company." Because the definition of parent company was included in proposed Rule 3-

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[41] *See* Section III.A.6. of the 2000 Release.

[42] *See* discussion in Section III.C.1.b, "Consolidated Subsidiary."

10(b)(1), which states that the parent company must be an issuer or guarantor of the guaranteed security, the note to existing Rule 3-10(a)(2) was deemed unnecessary and excluded from the proposed rule.

ii. Comments on the Proposed Amendments

We received one comment on this aspect of the proposed amendments, which was supportive. The commenter specifically supported the proposed conforming revision to the definition of "parent company," stipulating that the entity must consolidate each subsidiary issuer and guarantor in its consolidated financial statements.[43]

iii. Final Amendments

We are adopting the amendments as proposed. The parent company's financial statements will continue to be required to be filed pursuant to amended Rule 3-10(a). Previously, a definition of "parent company" was set forth in the 2000 Release but was not included in existing Rule 3-10 itself. For clarity, and given the importance of appropriately identifying the issuer or guarantor that is the "parent company," the revised definition has been included in amended Rule 3-10(b)(1). Due to the inclusion of this definition, as proposed, we have eliminated the note to existing Rule 3-10(a)(2).

b. Consolidated Subsidiary Condition

i. Proposed Amendments

Proposed Rule 3-10(a) would require the subsidiary issuer or guarantor to be a consolidated subsidiary of the parent company pursuant to the relevant accounting standards already in use.[44] This proposed change would eliminate the distinction between subsidiaries in

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[43] *See* letter from FEI.

[44] *See supra* note 23.

corporate form and those in other than corporate form, applying a consistent eligibility condition across entities. Also, certain subsidiary issuers and guarantors that are currently not eligible to omit their financial statements under existing Rule 3-10, such as consolidated subsidiary issuers or guarantors that have issued securities convertible into their own voting shares, would be eligible to omit their financial statements. The proposed amendments would instead require the parent company to provide disclosures that address the material risks, if any, associated with non-controlling interests in the subsidiary issuer or guarantor, including any risks arising from securities issued by the subsidiary that may be convertible into voting shares and may cause the percentage of non-controlling interest to increase, and to separately provide Summarized Financial Information attributable to those subsidiaries.

Specifically, proposed Rule 13-01(a)(3) would require a description of any factors that may affect payments to holders of the guaranteed security, such as the rights of a non-controlling interest holder.[45] In addition, proposed Rule 13-01(a)(4) would require separate disclosure of Summarized Financial Information for subsidiary issuers and guarantors affected by those factors.[46] For example, if, through its ability to exercise significant influence[47] over a subsidiary guarantor, a non-controlling interest holder could materially affect payments to holders of the guaranteed security, the parent company would be required to disclose those factors and the Summarized Financial Information attributable to that subsidiary guarantor.

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45 *See* discussion in Section III.C.2.b, "Non-Financial Disclosures."

46 *See* discussion in Section III.C.2.a.ii, "Presentation on a Combined Basis."

47 *See* ASC 323, *Investments – Equity Method and Joint Ventures*. Representation on the board of directors, participation in policy-making processes, and extent of ownership by an investor in relation to the concentration of other shareholdings are among the ways listed in ASC 323-10-15-6 that may indicate the ability to exercise significant influence over operating and financial policies of an investee.

ii. Comments on the Proposed Amendments

Comments were supportive of these proposals. Many commenters supported the proposed revisions to Rule 3-10 to require the subsidiary issuer or guarantor to be a consolidated subsidiary of the parent company pursuant to the relevant accounting standards already in use.[48] One commenter indicated that the proposed requirement to describe any factors that may affect payments to holders of the guaranteed security would elicit the necessary material disclosures for a consolidated subsidiary issuer or guarantor that is less than 100%-owned.[49]

Several commenters asserted that the existing rule's 100%-owned requirement was overly restrictive[50] or burdensome.[51] One commenter indicated that the proposed condition that each issuer and guarantor be a consolidated subsidiary of the parent company would provide more flexibility to issuers.[52] Several commenters asserted that there is no practical difference between whether a subsidiary is 100%-owned or is consolidated when making an evaluation of the subsidiary's creditworthiness[53] and noted that, in either case, the minority equity interests are subordinated to the subsidiary's debt obligation.[54]

iii. Final Amendments

We are adopting the amendments as proposed. Amended Rule 3-10(a) requires the subsidiary issuer or guarantor to be a consolidated subsidiary of the parent company as one

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48 *See*, *e.g.*, letters from Comcast, Cravath, Davis Polk, EEI / AGA, FedEx, FEI, Nareit, NYC Bar, and Sullivan & Cromwell.

49 *See* letter from NYC Bar.

50 *See* letters from Comcast, Cravath, and Davis Polk.

51 *See* letter from Nareit.

52 *See* letter from NYC Bar.

53 *See* letters from Comcast, Cravath, Davis Polk, and FEI.

54 *See* letters from Cravath, Davis Polk, and Nareit.

condition of eligibility that must be met to omit the subsidiary issuer's or guarantor's financial statements. Additionally, a description of any factors that may affect payments to holders of the guaranteed security, such as the rights of a non-controlling interest holder, is required by Rule 13-01(a)(3),[55] and separate disclosure of Summarized Financial Information for the issuers and guarantors to which those factors apply is required by Rule 13-01(a)(4)(iv).[56]

Under the existing rule, we understand that a parent company with a consolidated but less than 100%-owned subsidiary generally would avoid designating that subsidiary as a guarantor of the debt in a registered offering, would issue registered debt without subsidiary guarantees, or would avoid registering the offering altogether due to the requirement to provide that subsidiary's separate financial statements. These choices may lead to a higher cost of capital and less protection for investors than if the subsidiary were designated as a guarantor.[57]

Consistent with the view expressed in the Proposing Release, we note that the existence of non-controlling interest holders generally does not alter the fundamental nature of the investment such that it should be evaluated similar to multiple investments in different issuers.[58] Specifically, we believe that where a parent company is obligated as an issuer or a full and unconditional guarantor of a guaranteed security and it controls and includes the subsidiary issuer(s) and guarantor(s) in its consolidated financial statements, there is sufficient financial unity between the parent company and the related subsidiary with respect to the guaranteed debt

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[55] *See* discussion in Section III.C.2.b, "Non-Financial Disclosures."

[56] *See* discussion in Section III.C.2.a.ii, "Presentation on a Combined Basis." As described therein, in limited circumstances, a brief narrative is permitted in lieu of separate Summarized Financial Information of the affected issuers and guarantors.

[57] For example, if an offering of guaranteed debt securities was conducted on a registered basis but the subsidiary was not added as a guarantor, the claims of a holder against the non-guarantor subsidiary may be structurally subordinate to the claims of other creditors. *See supra* note 21.

[58] *See* Section III.C.1.b of the Proposing Release.

security such that the consolidated financial statements of that parent company and the Revised Alternative Disclosures would enable investors to evaluate and sufficiently assess the risks associated with an investment in such guaranteed debt security. We expect this change will cause more subsidiary issuers and guarantors to be eligible to omit their financial statements, while continuing to provide the information about subsidiary issuers and guarantors that investors need to make informed investment decisions. This change may also result in parent companies no longer omitting consolidated but less than 100%-owned subsidiaries as guarantors in registered offerings, possibly reducing the cost of capital.

We also note that the final amendments will require specific disclosure about any material factors that may affect payments to holders, including the rights of a non-controlling interest holder. This disclosure should more directly provide insight into any competing common equity interest in the assets or revenues of a subsidiary, in contrast to the indirect disclosure in the form of separate financial statements of the consolidated subsidiary issuer or guarantor that an investor receives under the existing rule. We also expect this change will reduce costs and burdens for consolidated but less than 100%-owned subsidiary issuers and guarantors, which are currently required to provide separate financial statements.

c. Debt or Debt-Like Securities Condition

i. Proposed Amendments

The exceptions in existing Rules 3-10(b) through (f) are available only to issuers and guarantors of debt securities.[59] Similarly, the proposed rule would be available only for issuers and guarantors of guaranteed debt and guaranteed preferred securities that have payment terms that are substantially the same as debt. In order to provide clarity, proposed Rule 3-10(a)(1)

[59] *See* Section II.H of the Proposing Release.

would state explicitly that the guaranteed security must be "debt or debt-like."

For additional clarity, proposed Rule 3-10(b)(2) would specify when a guaranteed security would be considered "debt or debt-like." Consistent with the guidance provided in the 2000 Release,[60] a guaranteed security would be considered "debt or debt-like" under the proposed rule if:

- The issuer has a contractual obligation to pay a fixed sum at a fixed time; and
- Where the obligation to make such payments is cumulative, a set amount of interest must be paid.

As is currently the case, the substance of the security's obligation would determine the availability of relief under Rule 3-10 rather than the form or title of the security. Accordingly, the proposed rule would clarify, consistent with the 2000 Release,[61] that:

- Neither the form of the security nor its title will determine whether a security is debt or debt-like. Instead, the substance of the obligation created by the security will be determinative; and
- The phrase "set amount of interest" is not intended to mean "fixed amount of interest." Floating and adjustable rate securities, as well as indexed securities, may meet the criteria specified in paragraph (b)(2)(ii) as long as the payment obligation is set in the debt instrument and can be determined from objective indices or other factors that are outside the discretion of the obligor.

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[60] *See* Section III.A.4 of the 2000 Release.

[61] *See* Section III.A.4.b.i of the 2000 Release.

ii. Comments on the Proposed Amendments

We received one comment supporting this aspect of the proposed amendments. The commenter supported the "debt or debt-like" condition in proposed Rule 3-10, stating that the proposed revision would be a useful modification to Rule 3-10.[62]

iii. Final Amendments

We are adopting the amendments as proposed. Amended Rule 3-10(a)(1) requires that the guaranteed security must be "debt or debt-like," and amended Rule 3-10(b)(2) specifies when a guaranteed security would be considered "debt or debt-like" as proposed.

d. Eligible Issuer and Guarantor Structures Condition

i. Proposed Amendments

The proposed amendments would simplify and streamline the existing rule by replacing the specific issuer and guarantor structures permitted under the five exceptions in existing Rules 3-10(b) through (f) with a broader two-category framework. Under this framework, an issuer and guarantor structure would be eligible if:

- The parent company issues the security or co-issues the security, jointly and severally, with one or more of its consolidated subsidiaries;[63] or
- A consolidated subsidiary issues the security, or co-issues it with one or more other consolidated subsidiaries of the parent company, and the security is guaranteed fully and unconditionally by the parent company.[64]

Under the proposed amendments, the ability to provide the Proposed Alternative

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[62] *See* letter from Sullivan & Cromwell.

[63] Proposed Rule 3-10(a)(1)(i).

[64] Proposed Rule 3-10(a)(1)(ii).

Disclosures in lieu of separate subsidiary issuer and guarantor financial statements would only be available when the parent company's obligation is full and unconditional. Accordingly, under the proposed rule, the parent company's role as issuer,[65] co-issuer,[66] or full and unconditional guarantor with respect to the guaranteed security[67] would determine whether the issuer and guarantor structure is eligible.[68] In a change from the existing exceptions, the status of subsidiary guarantors would not be specified in the proposed categories of eligible issuer and guarantor structures,[69] and subsidiary guarantees would no longer be required to be full and unconditional as a condition of eligibility.[70] Although one or more other subsidiaries of the

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65 When acting as the sole issuer, the parent company would be fully and unconditionally obligated for the full amount of any scheduled payments when they come due.

66 When acting as a co-issuer with one or more of its consolidated subsidiaries, all co-issuers would be required to be jointly and severally liable under the security. This would obligate each of the parent company and its subsidiary co-issuers to all legal responsibilities of an issuer, including making scheduled payments on the security in full when they come due. The parent company would control each consolidated co-issuer, the financial information of the subsidiary co-issuer(s) would be reflected in the consolidated financial statements of the parent company, and the parent company would be fully and unconditionally obligated to make payments in full when due under the security.

67 Whether the parent company's guarantee is "full and unconditional" would be determined in the same manner as in existing Rule 3-10(h)(2) and section III.A.1.b of the 2000 Release, and would be included in proposed Rule 3-10(b)(3). The parent company would control each consolidated subsidiary issuer, the financial information of the subsidiary issuer(s) would be reflected in the consolidated financial statements of the parent company, and the parent company would be fully and unconditionally obligated to make payments in full when due under the guaranteed security.

68 Because the proposed amendments to Rule 3-10 do not focus on the role and nature of the subsidiary as a condition to eligibility, the proposed amendments would no longer require a subsidiary issuer or guarantor to be designated as a "finance subsidiary" in any particular circumstances. Likewise, the proposed amendments would remove the definition of "finance subsidiary" from the existing rule, since it is not otherwise used in Regulation S-X. Existing Rule 3-10(h)(8) defines an "operating subsidiary" to differentiate it from a "finance subsidiary." Since the proposed amendments would remove the "finance subsidiary" distinction and definition, proposed Rule 3-10 likewise would no longer need to refer to or define "operating subsidiary."

69 While not specified in the proposed eligible categories of issuer and guarantor structures, the role of subsidiary guarantors and their guarantees would, however, affect the required disclosure under the proposed rule. For example, the subsidiary guarantors would be required to be identified pursuant to proposed Rule 13-01(a)(1), and if factors exist that may affect payments to holders, such as factors affecting guarantee enforceability, disclosure of the factors would be required by proposed Rule 13-01(a)(3), to the extent material. Furthermore, proposed Rule 13-01(a)(4) would require separate disclosure of Summarized Financial Information applicable to subsidiary guarantors to which such factors apply, to the extent material.

70 One of the conditions a subsidiary guarantor must meet under the existing rule is that its guarantee must be full and unconditional. A subsidiary's guarantee may have the characteristics of a full and unconditional guarantee

parent company may, and the Commission expected often would, guarantee the security, in the Proposing Release, the Commission stated its belief that the eligibility of an issuer and guarantor structure should depend on the role of the parent company.[71] Accordingly, under the proposed amendments separate financial statements of consolidated subsidiary guarantors may be omitted for each eligible issuer and guarantor structure if the other conditions of proposed Rule 3-10 are met.

ii. Comments on the Proposed Amendments

Comments on the proposals were generally supportive. Commenters generally supported the simplified and streamlined approach of the proposed amendments that replaced the specific issuer and guarantor structures permitted under the five exceptions in existing Rules 3-10(b) through (f) with a broader two-category framework of eligible issuer and guarantor structures.[72] One commenter suggested that an exemption to the required financial disclosures about guarantors should be permitted if the issuer of the debt is the parent company.[73] This commenter stated that, for registrants that issue securities only from the parent entity, the relevant financial information could be derived from the parent's consolidated financial statements.

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at its inception except that there may be contractual provisions permitting the subsidiary to be released from that guarantee under certain circumstances. Such release provisions could cause the subsidiary's guarantee to fail to meet the requirement that the guarantee be full and unconditional because the potential elimination of the guarantee is a condition beyond the issuer's failure to pay. Because the nature of the guarantee of a subsidiary guarantor does not affect whether the issuer and guarantor structure is eligible under the proposed rule, a subsidiary guarantee would no longer be required to be full and unconditional. As such, the existence of subsidiary guarantee release provisions would not prevent that subsidiary guarantor from omitting its financial statements. However, to the extent material, such release provisions would be required to be disclosed pursuant to proposed Rule 13-01(a)(2) and separate disclosure of Summarized Financial Information applicable to that subsidiary guarantor would be required by proposed Rule 13-01(a)(4).

[71] *See* Section III.C.1.d of the Proposing Release.

[72] *See*, *e.g.*, letters from FEI and NYC Bar.

[73] *See* letter from Ball Corp.

Two commenters supported the proposed requirement that only the parent company's guarantee need be full and unconditional,[74] of which one stated that "disclosure of the limitations on the scope of the guarantee is more important to investors than providing separate financial statements of the issuer of a limited guarantee."[75] This same commenter indicated that local law requirements in many foreign jurisdictions preclude the issuance of a guarantee that satisfies the Commission's definition of "full and unconditional," and that historically, it was rare for foreign subsidiaries to guarantee debt of domestic registrants due to potentially adverse tax consequences.[76] Another commenter asserted that the proposed amendments contemplate changing the definition of "full and unconditional" and recommended that, if such changes were adopted, the Commission provide guidance around the definition akin to what was provided in the 2000 Release.[77]

iii. Final Amendments

We are adopting the amendments substantially as proposed. Consistent with the proposal, the specific issuer and guarantor structures permitted under the five exceptions in existing Rules 3-10(b) through (f) will be replaced with the proposed two-category framework.

As shown in the table below, issuer and guarantor structures that currently fall under existing Rules 3-10(b), (c), or (d) align with the eligible categories in amended Rules 3-10(a)(1)(i) or (ii), depending on the role of the parent company as either co-issuer or full and unconditional guarantor of the guaranteed security. Issuer and guarantor structures that currently

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[74] *See* letters from Cravath and FEI.

[75] *See* letter from Cravath.

[76] *See* letter from Cravath.

[77] *See* letter from Debevoise. The Proposing Release requested comment on the definition of "full and unconditional," but the proposed rules would not change the definition. The Proposing Release states, "[f]or purposes of the proposed rule, whether the parent company's guarantee is 'full and unconditional' would be determined in the same manner as in existing Rule 3-10(h)(2) and the 2000 Release."

fall under existing Rules 3-10(e) or (f), wherein the parent company is the sole issuer of the guaranteed security, align with the first category in amended Rule 3-10(a)(1)(i).

Existing Rule	Amended Rule
Rules 3-10(b), 3-10(c), and 3-10(d)	Rule 3-10(a)(1)(i), if the subsidiary co-issued the security, jointly and severally, with its parent
	Rule 3-10(a)(1)(ii), if the subsidiary issued the security that is fully and unconditionally guaranteed by its parent
Rules 3-10(e) and 3-10(f)	Rule 3-10(a)(1)(i)

Under the amended rules, the ability to provide the Revised Alternative Disclosures in lieu of separate subsidiary issuer and guarantor financial statements is only available when the parent company's obligation is full and unconditional.

We are not adopting one commenter's suggestion to permit the omission of the required financial disclosures about guarantors if the issuer of the debt is the parent company.[78] Consistent with the rationale cited in our discussion of the overarching principle and overview of the amendments above,[79] we believe the financial information about the Obligor Group included in the Revised Alternative Disclosures is an important supplement to the consolidated financial statements of the parent company for investors when making investment decisions about guaranteed debt securities. Therefore, providing the Revised Alternative Disclosures is a condition that must be met to permit the omission of a subsidiary issuer's or guarantor's financial statements.

Consistent with the proposed rule, the status of subsidiary guarantors is not specified in the categories of eligible issuer and guarantor structures in the final rule. Although one or more

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[78] *See* letter from Ball.

[79] *See* discussion in Sections III.A "Overarching Principle" and "III.B, "Overview of the Proposed and Final Amendments."

other subsidiaries of the parent company may, and we expect often would, guarantee the security, the eligibility of an issuer and guarantor structure depends on the role of the parent company as issuer, co-issuer, or full and unconditional guarantor with respect to the guaranteed security. Separate financial statements of consolidated subsidiary guarantors may be omitted for each issuer and guarantor structure that is eligible if the other conditions of amended Rule 3-10 are met. Despite not affecting whether that issuer and guarantor structure is eligible, the role of subsidiary guarantors in an issuer and guarantor structure and their guarantees do affect what disclosure is required. In this regard, the subsidiary guarantors are required to be identified pursuant to Rule 13-01(a)(1), and disclosure of the terms and conditions of the guarantees is required by Rule 13-01(a)(2),[80] which includes but is not limited to any limitations and conditions of a subsidiary's guarantee, whether the guarantee is joint and several with other guarantees, and any guarantee release provisions. Further, separate disclosure of Summarized Financial Information applicable to subsidiary guarantors to which such disclosures apply is required by Rule 13-01(a)(4)(iv).[81]

As was proposed, an issuer and guarantor structure involving a finance subsidiary[82] used to issue a debt security guaranteed by the parent company[83] will be addressed by amended Rule 3-10(a)(1)(ii) or, if the security were to be co-issued, jointly and severally, with its parent, amended Rule 3-10(a)(1)(i) will apply. Also as proposed, the final rule will no longer require a

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80 *See* discussion in Section III.C.2.b, "Non-Financial Disclosures."

81 *See* discussion in Section III.C.2.ii, "Presentation on a Combined Basis." In limited circumstances, a brief narrative is permitted in lieu of separate Summarized Financial Information of the affected guarantors.

82 Under existing Rule 3-10(h)(7) of Regulation S-X, "[a] subsidiary is a finance subsidiary if it has no assets, operations, revenues or cash flows other than those related to the issuance, administration and repayment of the security being registered and any other securities guaranteed by its parent company."

83 This issuer and guarantor structure is included in the exception in existing Rule 3-10(b) of Regulation S-X. *See* Section II.F of the Proposing Release.

subsidiary issuer or guarantor to be designated as a "finance subsidiary" for purposes of determining whether the issuer and guarantor structure is eligible.[84] Consistent with the proposed amendments, the final rule also eliminates the "operating subsidiary" definition in existing Rule 3-10(h)(8).

2. Disclosure Requirements

Under existing Rule 3-10, one of the conditions to omitting separate financial statements of a subsidiary issuer or guarantor is providing the Alternative Disclosures in the footnotes to the parent company's consolidated financial statements. The Commission proposed to retain the requirement to provide Alternative Disclosures, with modifications, as it believed the disclosures are an important supplement to the consolidated parent company disclosures. If the eligibility conditions in proposed Rule 3-10(a) introductory text and (a)(1) are satisfied, a parent company would be required to include the Proposed Alternative Disclosures specified in proposed Rule 13-01 in the relevant filing, but could omit the separate financial statements of subsidiary issuers and guarantors.[85] The proposed amendments would streamline and simplify the rule by including the Proposed Alternative Disclosures in a single location within proposed Rule 13-01 rather than having such requirements in multiple paragraphs. The proposed amendments, comments received, and final amendments to the disclosure requirements are described below.

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[84] As proposed, the "finance subsidiary" definition at existing Rule 3-10(h)(7) would have been eliminated. However, as described below, the final rule specifies certain circumstances involving a "finance subsidiary" when we believe the required supplemental financial information is not material to an investment decision and may be omitted. As part of this change, an amended definition of "finance subsidiary" has been incorporated in the note to new Rule 13-01(a)(4)(vi)(C) and (D). *See* Section III.C.2.c, "When Disclosure is Required."

[85] This requirement would be specified in proposed Rule 3-10(a)(2).

a. Financial Disclosures

As discussed below,[86] the financial disclosure requirements in proposed Rule 13-01 were tailored to the type of material information, in addition to the parent company's consolidated financial statements, that the Commission believed investors in registered offerings need to make informed investment decisions about guaranteed debt securities. Under the proposed revisions, registrants would:

- Be required to provide Summarized Financial Information rather than Consolidating Information;
- Be required to provide disclosure about the Obligor Group without financial information of non-obligated entities (financial information of each issuer and guarantor could generally be combined into a single column); and
- Be permitted to reduce the number of periods presented.

As a result of the proposed revisions, the instructions for preparing Consolidating Information in existing Rule 3-10(i) would be eliminated.[87]

i. Level of Detail

(A) Proposed Amendments

Unless a brief narrative is permitted, existing Rule 3-10 requires Consolidating Information, which includes all major captions of the balance sheet, income statement, and cash flow statement that Article 10 (Rule 10-01) of Regulation S-X[88] requires to be shown separately in interim financial statements. The proposed amendments were based on requiring

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[86] *See* discussion in Section III.C.2.a.i, "Level of Detail."

[87] As a result of the adoption of the proposed financial disclosures as described below, which replace Consolidating Information, the final rule eliminates the instructions in existing Rule 3-10(i).

[88] 17 CFR 210.10-01.

supplemental financial information about issuers and guarantors that would be focused on the information that the Commission believed is most likely to be material to an investment decision. Proposed Rule 13-01(a)(4) would therefore require Summarized Financial Information, which would include select balance sheet and income statement line items. Disclosure of additional line items of financial information beyond what is specified in proposed Rule 13-01(a)(4) would have been required by proposed Rule 13-01(a)(5), to the extent they are material to an investment decision.

While investors are provided cash flow information at the parent company consolidated level, supplemental cash flow information about subsidiary issuers and guarantors would not be a required disclosure under the proposed rule.

(B) Comments on the Proposed Amendments

Comments on the proposed amendments were generally supportive. Many commenters supported the proposal to replace Consolidating Information with Summarized Financial Information, as defined in Rule 1-02(bb)(1) of Regulation S-X.[89] Some commenters asserted that providing Summarized Financial Information rather than Consolidating Information would reduce disclosure burdens[90] while continuing to provide investors with material information to make an informed investment decision.[91]

Some commenters noted that many issuers' information systems are not normally designed to provide the level of detail currently required by Rule 3-10, which, according to these

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[89] *See, e.g.*, letters from Ball Corp., Comcast, Davis Polk, Dell, Eaton Corp., EEI / AGA, EY, FedEx, FEI, Freeport, KPMG, Medtronic, Nareit, NYC Bar, Sullivan & Cromwell, T-Mobile, and WTW.

[90] *See, e.g.*, letters from Ball Corp., Eaton Corp., EY, FEI, Freeport, KPMG, NYC Bar, Sullivan & Cromwell, and T-Mobile.

[91] *See, e.g.*, letters from Ball Corp., EY, FedEx, FEI, Freeport, and Sullivan & Cromwell.

commenters, makes complying with the rule burdensome.[92] Some commenters stated that investors have expressed little interest in the detailed disclosures required by existing Rule 3-10.[93]

A number of commenters stated that the proposal to require only Summarized Financial Information rather than Consolidating Information was an improvement, but recommended that the final rules should permit registrants to provide even less disclosure.[94] In this regard, a few commenters noted that Rule 144A offerings[95] may include less disclosure than what is required in Summarized Financial Information.[96] Some commenters suggested that registrants should be allowed to provide only balance sheet information because balance sheet information should be sufficient disclosure for investors to make an informed investment decision.[97] One commenter contended that guarantor revenues, guarantor operating income (or a similar metric), and assets and liabilities of the issuer and guarantors were the most useful disclosures for making an investment decision and stated that these disclosures are what typically is provided in Rule 144A offerings.[98]

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[92] *See* letters from Dell, FEI, and Freeport.

[93] *See, e.g.*, letters from Ball Corp., Freeport, Windstream, and WTW.

[94] *See, e.g.*, letters from Comcast, Davis Polk, Eaton Corp., FEI, Medtronic, and NYC Bar.

[95] The majority of private debt offerings are conducted using Rule 144A, and 99% of Rule 144A offerings are debt offerings. Additionally, although most Regulation D offerings are equity offerings, a significant number include debt securities. *See* U.S. Sec. & Exch. Comm'n, Div. of Econ. & Risk Analysis, *Access to Capital and Market Liquidity* 96 (Aug. 2017) ("*Access to Capital and Market Liquidity Report*"), available at https://www.sec.gov/files/access-to-capital-and-market-liquidity-study-2017.pdf, at p. 38; Scott Bauguess *et al.*, U.S. Sec. & Exch. Comm'n, Div. of Econ. & Risk Analysis, *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2014* (Oct. 2015), available at https://www.sec.gov/dera/staff-papers/white-papers/30oct15_white_unregistered_offering.html.

[96] *See, e.g.*, letters from Davis Polk, Eaton Corp., and NYC Bar.

[97] *See, e.g.*, letters from Comcast, Eaton Corp., FEI, and Medtronic.

[98] *See* letter from T-Mobile.

Several commenters recommended other modifications to the proposed amendments. One commenter suggested that Summarized Financial Information may be too condensed and asserted that users of financial statements would be better informed if balance sheet and income statement information similar to the level of detail specified in Rule 10-01 of Regulation S-X were provided.[99] Another commenter recommended requiring disclosure of investments held by the Obligor Group in non-obligated subsidiaries; intercompany or related-party transactions between the obligated and non-obligated groups; and whether the obligated group includes variable interest entities, which should cross-reference the relevant disclosures in the consolidated financial statements.[100] Another commenter stated that "related party transactions with [other subsidiaries] is an example of additional information that may be material to investor decisions, and thus may require disclosure."[101] This commenter also stated that it would be even more meaningful to simply exclude such balances and transactions altogether. One commenter suggested that the Commission should consider whether requiring separate disclosure of the amounts in each caption of the combined Summarized Financial Information related to the non-obligated entities would enhance the usefulness of the information.[102] This commenter also suggested that the Commission consider whether using different measures, such as operating income, instead of, or in addition to, net income would provide valuable information to investors.

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[99] *See* letter from PWC.

[100] *See* letter from EY.

[101] *See* letter from FEI.

[102] *See* letter from Deloitte.

A few commenters suggested requiring certain financial information of the non-guarantor subsidiaries,[103] stating that such disclosures would be consistent with information provided in Rule 144A offerings or high yield Rule 144A offerings.[104] One of these commenters suggested requiring disclosure of debt and other liabilities of the non-guarantor subsidiaries and that any profitability metrics about the obligated entities (or non-obligated subsidiaries) should be capital-structure neutral by excluding interest expense.[105] Another commenter suggested only requiring disclosure of revenue, operating income, assets and liabilities of the non-guarantors as a group.[106] This commenter suggested permitting the financial disclosures to be of the non-guarantors as a group, rather than requiring such disclosure of the Obligor Group. Yet another commenter suggested that the Commission require disclosure of a metric of earnings of the non-guarantors, which the issuer should be able to choose, as well as the assets and liabilities of the non-guarantors as a single group.[107] One commenter recommended that the Commission consider requiring registrants to evaluate and disclose information in their Management Discussion and Analysis ("MD&A") section with respect to known trends and uncertainties that have had or are reasonably expected to have a material impact on the results and operations or

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[103] *See* in Section III.C.2.a.ii, "Presentation on a Combined Basis" regarding presentation of non-guarantor information.

[104] *See* letters from Davis Polk, NYC Bar, and Shearman. Two of these commenters stated that their recommendations for required disclosures were based on the information they believe allows investors to evaluate structural subordination. *See* letters from Davis Polk and Shearman.

[105] *See* letter from Shearman. This commenter asserted that, in default, the levered equity value of the obligors is irrelevant because the capital structure will be readjusted through a reorganization or liquidation, and that where profitability metrics are included in Rule 144A offering documents, they generally consist of operating income or earnings before interest, taxes, depreciation, and amortization ("EBITDA"), each excluding interest expense. This commenter further stated that in contrast with these measures, the proposed Summarized Financial Information would consist of income from continuing operations and net income, both of which include interest expense allocated within the corporate group under the pre-default capital structure.

[106] *See* letter from NYC Bar.

[107] *See* letter from Davis Polk.

capital resources of the Obligor Group and other issuers and guarantors whose information is required to be presented separately.[108]

One commenter contended that holders of debt securities are expected to be interested in debt service and may need cash flow information for the Obligor Group and recommended that the Commission consider input from investors with respect to the need for summarized cash flow information.[109] Other commenters, however, stated that supplemental cash flow information should not be required.[110] Some of these commenters asserted such information would not be meaningful information as investors look primarily to the parent company's consolidated cash flow[111] and that preparing this disclosure would be costly.[112]

One commenter advocated that the Commission consider replacing the parent company-only condensed financial statements required by 17 CFR 210.5-04 ("Rule 5-04 of Regulation S-X") and 210.12-04 ("Rule 12-04 of Regulation S-X") with parent-only summarized financial information when there is a specified level of restriction on an issuer's subsidiaries' ability to transfer funds to the parent.[113]

(C) Final Amendments

We are adopting the amendments in substantially the form proposed, but with modifications in response to comments received. As adopted, Rule 13-01(a)(4) will require disclosure of Summarized Financial Information for each issuer and guarantor. As described

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[108] *See* letter from Grant Thornton.

[109] *See* letter from Grant Thornton.

[110] *See, e.g.*, letters from Eaton Corp., Sullivan & Cromwell, T-Mobile, and Windstream.

[111] *See* letters from Sullivan & Cromwell and T-Mobile.

[112] *See* letter from Eaton Corp.

[113] *See* letter from BDO. This recommendation would affect situations beyond disclosures about issuers and guarantors of guaranteed securities and is beyond the scope of the amendments considered herein.

above, some commenters suggested requiring different or more limited information than what is required by Summarized Financial Information, or balance sheet only information, whereas one commenter recommended more detailed information. However, many other commenters supported the use of Summarized Financial Information, and we believe the select balance sheet and income statement line items it requires are focused on the information that is most likely to be material to an investment decision. Under the final amendments, disclosure of additional line items of financial information beyond the line items specified in Summarized Financial Information is required if necessary to comply with Rule 13-01(a)(6) and (7).[114] For example, if substantially all of the obligated entities' non-current assets consisted of goodwill, separate presentation of goodwill from non-current assets would be required if the parent company concludes such disclosure would be material for investors to evaluate the sufficiency of the guarantee. We agree with several commenters that requiring Summarized Financial Information would simplify compliance and reduce costs for preparers, while providing investors with more streamlined and easier to understand financial information that is material to an investment decision. We recognize that some of this information may go beyond what some commenters assert is typically provided in Rule 144A debt offerings, but we believe this is appropriate in light of the broader range of potential investors that may participate in a registered offering.

The Proposing Release included an example of when incremental disclosure of related

[114] Proposed Rule 13-01(a)(1) through (4) set forth proposed requirements to disclose specific financial and non-financial information. Proposed Rule 13-01(a)(5), which would have required disclosure of "any other quantitative or qualitative information that would be material to making an investment decision with respect to the guaranteed security," was included to require disclosure about the obligated entities and the guarantees that would be material but was not otherwise already required by the specified proposed financial and non-financial disclosures. Instead of proposed Rule 13-01(a)(5), the final amendments include Rules 13-01(a)(6) and (7), which require disclosure of "[a]ny financial and narrative information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee," and "[s]ufficient information so as to make the financial and non-financial information presented not misleading," respectively. *See* discussion in Section III.C.2.c, "When Disclosure is Required."

party revenues would be required under the proposed rule.[115] Specifically, if a material amount of reported revenues of the obligated entities were derived from transactions with related parties, such as non-issuer and non-guarantor subsidiaries of the parent company, separate disclosure of those amounts would be necessary. Instead of including this as an example of when disclosure would be required under Rule 13-01(a)(6) and (7), we agree with those commenters that recommended including a requirement to separately disclose an issuer's or guarantor's balance sheet and income statement amounts related to non-obligated subsidiaries.[116] Accordingly, as adopted, Rule 13-01(a)(4)(iii) requires an issuer's or guarantor's amounts due from, amounts due to, and transactions with non-obligated subsidiaries and related parties to be presented in separate line items, to the extent material.[117] We believe that clearly establishing this expectation as a stated requirement will assist in the preparation of the disclosures and provide material information to investors, and agree with one commenter that such separate disclosure enhances the transparency of the Summarized Financial Information presented.[118]

Unlike Consolidating Information, Summarized Financial Information does not include cash flow statement information. As described above, of the commenters that specifically discussed supplemental cash flow information, several supported not requiring such

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115 *See* Section III.C.2.a.i of the Proposing Release. Such disclosure would have been required by proposed Rule 13-01(a)(5).

116 In recommending separate disclosure of these amounts, one commenter cited enhancement of the transparency of Summarized Financial Information related to the Obligor Group (*See* letter from EY), and another cited enhanced usefulness (*See* letter from Deloitte). Given that a guarantor's transactions with a related party may not be conducted on an arm's length basis, we agree it could be useful to highlight such transactions for investors by requiring presentation of such information in a separate line item.

117 One commenter suggested flexibility to provide these disclosures as either explanatory notes or separate line items. *See* letter from EY. Based on the nature of these items, and to drive consistency in the disclosures between parent companies, Rule 13-01(a)(4)(iii) requires the amounts to be in separate line items.

118 *See* letter from EY.

information,[119] while one suggested considering input from investors.[120] Similar to some commenters, we believe investors in a registered offering look primarily to a parent company's consolidated cash flow information to assess creditworthiness where the parent is the primary obligor or its guarantor obligation is full and unconditional,[121] and we heard no feedback from investors suggesting otherwise. As such, final Rule 13-01 does not require supplemental cash flow information of the obligated entities.

Lastly, certain of the proposed amendments would have each required additional disclosure regarding their basis of presentation.[122] Rather than including multiple separate requirements to explain the basis of presentation for individual disclosure requirements, final Rule 13-01(a)(4) includes a requirement to briefly describe the basis of presentation applicable to each of the required financial disclosures therein. In addition to simplifying the final rule, we believe this requirement will better inform users about the form and content of the disclosures provided pursuant to final Rule 13-01(a)(4).[123] We believe such disclosure enhances the understandability of the financial information provided.

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[119] *See, e.g.*, letters from Eaton, Sullivan, T-Mobile, Willis, and Windstream.

[120] *See* letter from Grant. No investor commenters provided feedback specific to supplemental cash flow information.

[121] *See, e.g.*, letters from Eaton and T-Mobile.

[122] For example, proposed Rule 13-01(a)(4) would have required disclosure of "[t]he method selected to present investments in subsidiaries that are not issuers or guarantors…" to inform investors about the basis of presentation of the financial information of the Obligor Group. Two commenters supported this disclosure requirement. *See* letters from CAQ and Deloitte. Instead of this proposed requirement, final Rule 13-01(a)(4)(iii) requires the financial information of non-issuer and non-guarantor subsidiaries to be completely excluded. *See* discussion in Section III.2.a.ii.(C), "Presentation on a Combined Basis," below. Rather than including a separate requirement within final Rule 13-01(a)(4)(iii) to disclose that financial information of non-issuer and non-guarantor subsidiaries was excluded, such disclosure will be required pursuant to the new requirement to describe the basis of presentation of the financial information presented under final Rule 13-01(a)(4).

[123] Such disclosure could state, for example, that the financial information presented is that of the issuers and guarantors of the guaranteed security, and that the financial information of non-issuer and non-guarantor subsidiaries has been excluded. If applicable, the disclosure could also state, for example: that the financial

ii. Presentation on a Combined Basis

(A) Proposed Amendments

The proposed rule would permit the parent company to present the Summarized Financial Information of the parent company issuer or guarantor, each consolidated subsidiary issuer, and each consolidated subsidiary guarantor, on a combined basis. Proposed Rule 13-01(a)(4) would require intercompany transactions between issuers and guarantors presented on a combined basis to be eliminated.

The proposed rule took into consideration that there may be circumstances in which separate financial information about certain issuers and guarantors is material to an investment decision. Accordingly, when information provided in response to proposed Rule 13-01 is applicable to one or more, but not all, issuers and guarantors, proposed Rule 13-01(a)(4) would require, to the extent it is material, separate disclosure of Summarized Financial Information for the issuers and guarantors to which the information applies. For example, if a subsidiary's guarantee were limited to a particular dollar amount, disclosure of that limitation would be required by proposed Rule 13-01(a)(2). In that case, separate disclosure of the Summarized Financial Information specified in proposed Rule 13-01(a)(4) would be required for that subsidiary guarantor.

The proposed rule would no longer require separate disclosure of the financial information of non-guarantor subsidiaries. Because non-guarantor subsidiaries are not obligated to make payments as either issuer or guarantor, the proposed rule assumed separate supplemental

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information of issuers and guarantors is presented on a combined basis; intercompany balances and transactions between issuers and guarantors have been eliminated; that the issuer's or guarantor's amounts due from, amounts due to, and transactions with non-issuer and non-guarantor subsidiaries and related parties have been presented in separate line items; and that financial information of certain identified subsidiary issuers and guarantors has been presented separately due to disclosed facts and circumstances applicable to those subsidiaries (as required by Rule 13-01(a)(4)(iv)).

disclosure of their financial information as required under the existing rule is not likely to be material to an investment decision.

In order to present the assets, liabilities, and operations of the Obligor Group accurately, it is necessary to exclude the financial information of subsidiaries not obligated under the guaranteed security. Proposed Rule 13-01(a)(4) would continue to exclude the financial information of non-issuer and non-guarantor subsidiaries from the Summarized Financial Information of the Obligor Group, even if those non-issuer and non-guarantor subsidiaries would be consolidated by an issuer or guarantor. However, the proposed rule would have allowed the parent company to determine which method best meets the objective of excluding the financial information of non-issuer and non-guarantor subsidiaries from the Proposed Alternative Disclosures, so long as the selected method was disclosed and was used for all non-issuer and non-guarantor subsidiaries for all classes of guaranteed securities for which the disclosure was required, and was reasonable in the circumstances.[124] For example, the parent company could have excluded the assets, liabilities, and operations of non-issuer and non-guarantor subsidiaries by using the equity method of accounting for those subsidiaries.

(B) Comments on the Proposed Amendments

Comments were supportive of this aspect of the proposal. Many commenters generally supported permitting Summarized Financial Information of each issuer and guarantor that is

[124] This proposed amendment might have resulted in decreased comparability in the combined Summarized Financial Information of the Obligor Group between parent companies that elect to use different methods of excluding the financial information of their non-issuer and non-guarantor subsidiaries. In proposing this change, the Commission considered the costs to the parent company of requiring the use of a specific method of accounting for non-issuer and non-guarantor subsidiaries to remove their financial information from the combined Obligor Group, particularly if that parent company's systems are not designed to readily produce such information. The Commission expected any decrease of comparability to be limited, as most line items required to be disclosed in Summarized Financial Information would be unaffected by the use of different methods for this purpose (*e.g.*, current assets, current liabilities, net sales or gross revenues and gross profit).

consolidated in the parent company's consolidated financial statements to be presented on a combined basis with the parent company's Summarized Financial Information.[125] Some of these commenters indicated that providing this information on a combined basis would continue to provide investors with material information for making an informed investment decision,[126] while also reducing a burdensome requirement for issuers.[127] One commenter supported streamlining the disclosures, but asserted that the proposed amendments would likely only benefit a small number of issuers.[128] This commenter noted that the proposed amendments could lead to complexities and unintended consequences in presenting the Summarized Financial Information as proposed, regardless of the method of accounting selected.[129] Another commenter noted that, although such a combined presentation might provide some useful information when the guarantors are single-tiered operating companies with no subsidiaries, the accounting presentation becomes less meaningful when the guarantors are holding companies.[130]

A few commenters recommended requiring disclosure only of the non-guarantor subsidiaries,[131] and another commenter recommended requiring certain balance sheet information about the non-guarantor subsidiaries and profitability metrics about the Obligor

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[125] *See, e.g.*, letters from ABA, Davis Polk, Dell, Eaton Corp., FedEx, FEI, KPMG, Medtronic, Nareit, NYC Bar, PWC, and Sullivan & Cromwell.

[126] *See* letters from Dell, FedEx, and Sullivan & Cromwell.

[127] *See* letters from Davis Polk, KPMG, and Sullivan & Cromwell.

[128] *See* letter from KPMG.

[129] *See* letter from KPMG. This commenter stated, as an example, that registrants may not experience a reduction in burdens in preparing guarantor disclosures that exclude the non-obligor group either using the equity method, cost method, or excluding the non-obligated subsidiaries entirely, when a registrant must account for the non-obligor subsidiaries for consolidation purposes.

[130] *See* letter from Comcast.

[131] *See* letters from Davis Polk and NYC Bar.

Group or the non-guarantor subsidiaries.[132] These commenters stated that such disclosures[133] would be consistent with the information provided in Rule 144A offerings[134] or high yield Rule 144A offerings.[135]

In response to the Commission's request for comment on whether the proposed amendments should specify an accounting method (*e.g.*, the equity method) that must be used to exclude the financial information of non-obligated subsidiaries from the Summarized Financial Information of the Obligor Group, some commenters recommended that the Commission specify acceptable accounting methods in the rule.[136]

Some commenters agreed with the proposed rule permitting the parent company to determine which method to use in excluding the financial information of non-issuer and non-guarantor subsidiaries.[137] A few commenters supported the requirement to disclose and/or apply consistently the selected method.[138]

Several commenters recommended modifications to the proposed amendments. A few commenters recommended that the Commission allow issuers to use only certain prescribed

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[132] *See* letter from Shearman.

[133] Two of these commenters stated their recommendations for required disclosures were based on the information they believe allows investors to evaluate structural subordination. *See* letters from Davis Polk and Shearman.

[134] *See* letters from Davis Polk and NYC Bar.

[135] *See* letter from Shearman.

[136] *See, e.g.,* letters from BDO, Deloitte and PWC. One of these commenters stated that questions may arise from the proposed flexibility in the method of excluding non-issuer and non-guarantor information, as the proposed amendments do not address the option to fully exclude investments in non-issuer and non-guarantor subsidiaries from the summarized financial information of the Obligor Group, and that providing a list of acceptable methods would indicate whether complete exclusion is an acceptable option. *See* letter from BDO. Another commenter stated that the Commission should consider specifically identifying and describing the acceptable methods of exclusion if the final rule permits the use of methods other than those based on existing U.S. GAAP principles. *See* letter from Deloitte.

[137] *See, e.g.*, letters from ABA, Dell, Eaton Corp., EY, Grant, and PWC.

[138] *See* letters from CAQ and Deloitte.

accounting methods, including those consistent with U.S. GAAP[139] or IFRS,[140] those permitted under the accounting framework used to prepare their financial statements or otherwise specified in Regulation S-X,[141] the equity method,[142] the fair value method,[143] and the cost method (or the fair value practical expedient for equity securities without a readily determinable fair value model as contemplated in U.S. GAAP[144]).[145] One commenter stated that, if the Commission decides to require the financial information to be audited, any acceptable method should be objectively auditable.[146] One commenter contended that the proposed requirement that the parent company disclose its basis for the accounting method it applied to exclude the financial information of non-issuer and non-guarantor subsidiaries from the Proposed Alternative Disclosures added an unnecessary element of complexity.[147] Alternatively, a few commenters suggested the Commission consider completely excluding the financial information of non-issuer and non-guarantor subsidiaries.[148] One of these commenters stated that the Summarized Financial Information is more meaningful if it excludes the financial information of non-issuer and non-guarantor subsidiaries,[149] and another stated that excluding balances related to investments in non-obligated subsidiaries altogether would eliminate the possible confusion over

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[139] *See* letters from CAQ, Deloitte, and EY.

[140] *See* letters from CAQ and EY.

[141] Letter from Grant Thornton.

[142] *See* letters from Deloitte, KPMG, and PWC.

[143] *See* letters from Deloitte and PWC.

[144] ASC 321-10-35-2, Investments - Equity Securities.

[145] *See* letters from Deloitte, KPMG, and PWC.

[146] *See* letter from Deloitte.

[147] *See* letter from ABA.

[148] *See, e.g.*, letters from BDO, KPMG, and PWC.

[149] *See* letter from BDO.

including amounts attributable to the non-obligated subsidiary investments within the Obligor Group financial information.

Two commenters asserted that the proposed amendments would require parent companies to present the Summarized Financial Information separately if the required qualitative disclosures differed within the group of subsidiary issuers or guarantors, which these commenters maintained was overly prescriptive.[150] These commenters recommended permitting greater flexibility in such instances, such as allowing the parent company to present Summarized Financial Information for the aggregate group with supplemental qualitative or quantitative disclosure regarding material differences within the group.

(C) Final Amendments

After considering the public comments, we are adopting the amendments substantially as proposed with modifications, including separating certain requirements within proposed Rule 13-01(a)(4) into distinct subparagraphs for clarity. As supported by several commenters, we are adopting the amendment that permits the supplemental financial disclosures of issuers and guarantors specified in Rule 13-01(a)(4) to be provided on a combined basis. Specifically, final Rule 13-01(a)(4)(i) permits the Summarized Financial Information of each issuer and guarantor consolidated in the parent company's consolidated financial statements to be presented on a combined basis with the Summarized Financial Information of the parent company, and Rule 13-01(a)(4)(ii) requires intercompany balances and transactions between issuers and guarantors whose information is presented on a combined basis to be eliminated.[151] We agree with those

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[150] *See* letter from EY and Grant Thornton.

[151] Proposed Rule 13-01(a)(4) would have required, in part, that "[i]ntercompany transactions between issuers and guarantors whose summarized financial information is presented on a combined basis shall be eliminated."

commenters that said providing this information on a combined basis would provide investors with material information in making an investment decision[152] while also reducing the burden on issuers.[153]

The proposed rule would have permitted the parent company to determine the method of excluding the financial information of non-issuer and non-guarantor subsidiaries from the Proposed Alternative Disclosures. Although most line items required to be disclosed under Summarized Financial Information would be unaffected, under the proposed approach, the effect on the financial information of the Obligor Group could have varied depending on the method used to exclude non-issuer and non-guarantor subsidiary financial information. For example, under the equity method, the investments in those subsidiaries would have continued to be included within the Obligor Group's non-current assets, and earnings or losses from those subsidiaries would have continued to be included in income or loss of the Obligor Group. A similar effect would likely exist under certain other methods described above that were suggested by commenters, such as the fair value method or the cost method as previously contemplated by U.S. GAAP.

Instead of adopting the proposed approach, or specifying certain methods of accounting that should be used, we agree with those commenters that recommended completely excluding the financial information of non-issuer and non-guarantor subsidiaries. In particular, we agree with one commenter that said excluding balances related to investments in non-obligated subsidiaries altogether would eliminate the possible confusion over including amounts

While we are adopting the amendments substantially as proposed, final Rule 13-01(a)(4)(ii) clarifies that intercompany "balances" must also be eliminated in this regard.

152 *See, e.g.*, letters from Dell, FedEx, and Sullivan & Cromwell.

153 *See, e.g.*, letters from Davis Polk, KPMG, and Sullivan & Cromwell.

attributable to the non-issuer and non-guarantor subsidiaries within the financial information of the Obligor Group.[154] In this regard, amounts attributable to non-issuer and non-guarantor subsidiaries are not generally available for payment of debt or useful for evaluating debt-paying ability. As such, we believe excluding non-issuer and non-guarantor subsidiary information will enhance the Revised Alternative Disclosures for investors.

Accordingly, under the final amendments, Rule 13-01(a)(4)(iii) requires subsidiaries that are not issuers or guarantors to be excluded from the Summarized Financial Information. Pursuant to this requirement, all non-issuer and non-guarantor subsidiary financial information must be entirely removed from the financial information of the Obligor Group, even if an issuer or guarantor would otherwise consolidate such non-issuer and non-guarantor subsidiaries. An issuer or guarantor would not present its investments in non-issuer and non-guarantor subsidiaries in the Summarized Financial Information. While we continue to expect that most line items required by Summarized Financial Information would have been unaffected by the particular method selected by a parent company to exclude non-issuer and non-guarantor subsidiary information under the proposed rule, after considering the comments received, we now believe that requiring complete exclusion of the financial information of such non-issuer and non-guarantor subsidiaries in all cases will avoid potential confusion on the part of both issuers and investors about the appropriate method of exclusion. We note that a parent company may have experienced lower costs under the proposed amendments by being able to select the method of excluding non-issuer and non-guarantor subsidiary information that its systems were already designed to produce. However, under the final amendments, a parent company is not required to justify that its selected method was reasonable under the circumstances as was

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[154] *See* letter from PWC.

proposed, and we expect in most circumstances that requiring complete exclusion of non-issuer and non-guarantor subsidiary financial information will be a less costly presentation than methods that would have required the disclosure of such financial information.

We are also adopting, substantially as proposed, the requirement that when information provided in response to Rule 13-01 is applicable to one or more, but not all, issuers and guarantors, separate disclosure of Summarized Financial Information for the issuers and guarantors to which the information applies is required. This requirement is stated in Rule 13-01(a)(4)(iv). For clarity, the final rule includes an example of disclosure required by Rule 13-01 that would trigger separate disclosure for the affected issuers and guarantors.[155] The example is disclosure that is required by Rule 13-01(a)(3): "factors that may affect payments to holders of the guaranteed security."

One commenter suggested that the Commission provide a framework for presenting Summarized Financial Information for the affected issuers and guarantors in aggregate based on the nature of disclosures.[156] We believe a parent company should consider materiality[157] and exercise judgement in determining the appropriate level of aggregation of issuers and guarantors based on the nature of the disclosure. In this regard, it may be useful to consider quantitative factors, such as the financial significance of the affected issuers and guarantors, and qualitative factors, such as the nature of the facts and circumstances applicable to the issuers and guarantors.

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[155] This example is being included to clarify one situation requiring separate presentation of the Summarized Financial Information applicable to some but not all issuers and guarantors.

[156] *See* letter from Grant.

[157] The disclosures specified in Rule 13-01(a) are required to the extent material. Rules 13-01(a)(6) and (7) require disclosure of "[a]ny financial and narrative information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee," and "[s]ufficient information so as to make the financial and non-financial information presented not misleading," respectively. *See* discussion within Section III.C.2.c, "When Disclosure is Required."

For example, if the same contractual or statutory restrictions affect some but not all subsidiary guarantors, and such subsidiary guarantors represent a substantial portion of the Obligor Group, aggregation of the Summarized Financial Information of such subsidiary guarantors may be appropriate. Conversely, it may not be appropriate to aggregate the Summarized Financial Information of such subsidiary guarantors where the contractual or statutory restrictions are different.

Another commenter stated its belief that requiring separate presentation of the Summarized Financial Information applicable to affected issuers and guarantors under proposed Rule 13-01(a)(4) is overly prescriptive.[158] While we continue to believe that separate disclosure of Summarized Financial Information for the affected issuers and guarantors is appropriate in most cases, we also agree with this commenter's suggestion that it could be acceptable to present Summarized Financial Information for the aggregate Obligor Group with supplemental qualitative or quantitative disclosure to inform investors about the disclosures affecting one or more, but not all issuers and guarantors. Accordingly, final Rule 13-01(a)(4)(iv) permits, in limited circumstances, narrative disclosure to be provided in lieu of the separate Summarized Financial Information of the affected issuers and guarantors which the paragraph otherwise requires. The limited circumstances when a narrative may be provided are when such separate financial information applicable to the affected issuers and guarantors can be easily explained and understood. For example, if contractual or statutory restrictions are applicable to one subsidiary guarantor, and that subsidiary guarantor constitutes a similar percentage of the Obligor Group's assets, liabilities, and operations, narrative disclosure may be permissible depending on the facts and circumstances. In other circumstances, such as if the subsidiary

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158 *See* letter from EY.

guarantor's financial significance to the Obligor Group is not easily explained (*e.g.*, the subsidiary guarantor constitutes varying proportions of each line item within the Obligor Group's Summarized Financial Information), narrative disclosure is unlikely to be sufficient.

Although a few commenters recommended that the required financial disclosures depict non-guarantor subsidiaries,[159] the final amendments continue to focus on issuers and guarantors because those are the entities a holder can make claims against in the event of default. While the final rules do not require financial information to be disclosed about subsidiaries not obligated under the guarantee or guaranteed debt security, a parent company may separately provide supplemental information about non-issuer and non-guarantor subsidiaries.

iii. Periods to Present

(A) Proposed Amendments

Instead of the periods specified in 17 CFR 210.3-01 and 210.3-02[160] required by the existing rule, the proposed rule would require Summarized Financial Information only as of, and for, the most recently ended fiscal year and year-to-date interim period, if applicable.

In addition, because Item 1 of Part I of Form 10-Q[161] requires a registrant to provide the information required by Rule 10-01 of Regulation S-X, the Commission proposed adding Rule 10-01(b)(9) to require compliance with Rules 3-10 and 13-01.

(B) Comments on the Proposed Amendments

Comments on the proposed amendments were mixed. A number of commenters agreed with the proposed amendments, which would limit the periods for which Summarized Financial

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159 *See* letters from Davis Polk and Shearman.

160 Rules 3-01 and 3-02 of Regulation S-X.

161 17 CFR 249.308a.

Information is required to the most recently ended fiscal year and the year-to-date interim period.[162] One commenter stated that the periods in the proposed rules were consistent with disclosures that are typically provided in Rule 144A and 17 CFR 230.901 through 230.905[163] debt offerings.[164] Some commenters suggested that only the current period of the Summarized Financial Information, either annual or interim, should be required because it is the most relevant for an investment decision, especially because many issuers experience legal-entity structure changes.[165]

Other commenters, however, disagreed with the proposed requirement to include the interim period of Summarized Financial Information in all cases.[166] Some commenters suggested not requiring interim disclosures unless there has been a material change since the most recent annual period,[167] which certain commenters noted is consistent with Article 10 of Regulation S-X.[168] Some of these commenters indicated that the costs of providing interim information when no material change has occurred would be overly burdensome[169] and, without that disclosure, investors would still receive information necessary to make an informed investment decision.[170]

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[162] *See, e.g.*, letters from Cravath, Davis Polk, EEI / AGA, FEI, Freeport, Grant Thornton, Nareit, NYC Bar, and Sullivan & Cromwell.

[163] Regulation S.

[164] *See* letter from Cravath.

[165] *See, e.g.*, letters from Eaton Corp., FEI, and Medtronic.

[166] *See, e.g.*, letters from ABA, Ball Corp., Comcast, Dell, Deloitte, Eaton Corp., EY, FedEx, FEI, and PWC.

[167] *See, e.g.*, letters from ABA, Ball Corp., Comcast, Dell, Deloitte, EY, FedEx, FEI, and PWC.

[168] *See, e.g.*, letters from Deloitte, FEI, and PWC

[169] *See, e.g.*, letters from Ball Corp. and FedEx.

[170] *See* letter from FedEx.

(C) Final Amendments

After considering the comments received, we are adopting the amendments as proposed, with one clarification. As adopted, Rule 13-01(a)(4)(v) requires the financial disclosures to be provided as of and for the most recently ended fiscal year and year-to-date interim period included in the parent company's consolidated financial statements, which as described above many commenters supported. When used in conjunction with the parent company's consolidated financial statements, we continue to believe the most recent full fiscal year and year-to-date interim period should provide investors the additional information about the Obligor Group necessary for an informed investment decision and eliminate unnecessary compliance costs for registrants.

We are not adopting the approach some commenters recommended, which would have required the most recent interim period in limited circumstances, such as when there had been a material change since the most recent annual period. We continue to believe, as stated in the Proposing Release, that the most recent interim period should be provided so that investors can make decisions based on the most recent information available.[171] We also are not adopting an approach suggested by some commenters that would require only the most recent interim or annual period.[172] We believe that investors should be provided with the most recent annual period of financial information about issuers and guarantors as a supplement to the parent company consolidated financial statements in all cases, and the most recent interim period, if applicable. While we acknowledge the concerns about the burden to provide interim information in all cases, we note that the final amendments already significantly reduce the burdens on parent

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[171] *See* Section III.C.2.iii of the Proposing Release.

[172] *See, e.g.*, letters from Eaton and Medtronic.

companies by eliminating the earliest two years of required Summarized Financial Information and, in filings on Form 10-Q, by eliminating both the quarter-to-date interim period requirement in filings covering more than one fiscal quarter and comparable prior year interim period(s), as applicable. Under the final rules, investors will continue to receive the most recent interim and annual period information, and we continue to believe this is the most appropriate approach to reducing burdens for parent companies while providing investors with the information they need to make informed investment decisions.

Proposed Rule 13-01(a)(4) did not specify that the required interim period was only for the most recent year-to-date period. In certain filings, such as a parent company's Form 10-Q for its second and third fiscal quarters, both year-to-date and quarter-to-date interim financial statements are required to be presented for the parent company. To avoid any confusion, and consistent with the proposed rule's intent and suggestions from certain commenters,[173] the final rule's interim period requirement has been revised to clarify that only the most recent year-to-date interim period is required.

Finally, as proposed, we are adopting Rule 10-01(b)(9) to require compliance with Rules 3-10 and 13-01 in quarterly reports on Form 10-Q.

b. Non-Financial Disclosures

i. Proposed Amendments

When Consolidating Information is presented, the existing rule requires limited non-financial disclosures about the issuers and guarantors and the guarantees,[174] restricted net

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173 *See, e.g.*, letters from EY and PWC.

174 Existing Rules 3-10(i)(8)(i) through (iii) require disclosure, if true, that each subsidiary issuer or subsidiary guarantor is 100%-owned by the parent company, that all guarantees are full and unconditional, and where there is more than one guarantor, that all guarantees are joint and several.

assets,[175] and certain types of restrictions on the ability of the parent company or any guarantor to obtain funds from their subsidiaries.[176] In addition to proposing amendments to existing Rule 3-10 for financial disclosures, the Commission also proposed amendments to require specific non-financial disclosures. These amendments were proposed to enhance the information provided about subsidiary issuers and guarantors, particularly in light of the proposal to require Summarized Financial Information for those subsidiaries. Proposed Rules 13-01(a)(1) through (3) would require certain disclosures about the issuers and guarantors, the terms and conditions of the guarantees, and how the issuer and guarantor structure and other factors may affect payments to holders of the guaranteed securities. Disclosure of additional non-financial disclosures beyond what is specified in proposed Rules 13-01(a)(1) through (3) would have been required by proposed Rule 13-01(a)(5), to the extent they are material to an investment decision.

ii. Comments on the Proposed Amendments

Some commenters expressed general support for the proposed requirements regarding non-financial disclosures.[177] One commenter noted that the proposed amendments would be less burdensome on registrants than existing requirements under Rule 3-10.[178] Another commenter did not discuss the specific proposed non-financial disclosures, but stated its belief that qualitative disclosures are important to the debt holder's understanding of the overall picture of credit quality and suggested that, in certain instances, qualitative disclosures alone may be sufficient information for investors.[179] One commenter stated that, outside of the registration

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[175] Rule 3-10(i)(10) of Regulation S-X.

[176] Rule 3-10(i)(9) of Regulation S-X.

[177] *See, e.g.*, letters from Davis Polk, Freeport, and NYC Bar.

[178] *See* letter from Davis Polk.

[179] *See* letter from Comcast.

statement and/or the related prospectus that would identify the issuers and guarantors of the security, it was not clear why identification and disclosure of such entities would be meaningful to an investor in the context of financial disclosures.[180] The commenter recommended that the issuer and guarantors of the guaranteed security should be identified in the registration statement, but not in other filings, such as periodic reports. This commenter also suggested that, if the Commission believes this information should be presented in connection with an annual report, the disclosure should be included as an exhibit to such filing.

iii. Final Amendments

After considering the comments received, we are adopting the amendments largely as proposed with certain modifications based on comments received. Final Rules 13-01(a)(1) through (3) will require certain disclosures about the issuers and guarantors, the terms and conditions of the guarantees, and how the issuer and guarantor structure and other factors may affect payments to holders of the guaranteed securities. Consistent with the proposal, we believe these requirements will result in enhanced narrative disclosures that will improve investor understanding of the issuers, guarantors, and guarantees, and make the financial disclosures they accompany easier to understand. While the adopted non-financial disclosures are composed of the items we believe are most likely to be material to an investor, disclosure of additional facts and circumstances is required if necessary to comply with Rule 13-01(a)(6) and (7).[181] Additionally, when a non-financial disclosure is applicable to one or more, but not all, issuers and guarantors, Rule 13-01(a)(4)(iv) requires, to the extent it is material, separate disclosure of Summarized Financial Information for the issuers and guarantors to which the non-financial

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[180] *See* letter from PWC.

[181] *Supra* note 114.

disclosure applies.[182]

We are not adopting one commenter's suggestion that disclosure of the identity of the issuers and guarantors should be required only at the time of registration of the offer and sale of guaranteed securities.[183] These entities are legally obligated under the guaranteed security along with the parent company, and we believe such information is material to investors in ongoing periodic reports. However, we are adopting the commenter's alternative suggestion that the disclosures be included in an exhibit to the subject filing.[184] After considering this commenter's suggestion, we believe that the nature of this information is better suited for disclosure in an exhibit as it can efficiently be provided in list form, and, depending on the number of subsidiary issuers and guarantors, this information could distract investor focus from the other financial and non-financial disclosures required by final Rule 13-01 if presented alongside them. Furthermore, if the entities required to be disclosed do not change from period to period, the parent company could refer to an earlier filing's exhibit rather than filing the exhibit again. Because registrants are required to hyperlink to each exhibit filed with, or incorporated by reference to a filing,[185] this information will be easily accessible to investors. Due to this change, we have revised Rule 13-01(a)(1) to require a description of the issuers and guarantors of the guaranteed security,

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[182] *See* discussion in Section III.C.2.ii, "Presentation on a Combined Basis."

[183] *See* letter from PWC.

[184] *See* amended Item 601(a) and new Item 601(b)(22) of Regulation S-K. A parent company will be required to list, under an appropriately captioned heading that identifies the associated securities, each of its subsidiaries that is a guarantor, issuer, or co-issuer of each guaranteed security registered or being registered that the parent company issues or guarantees. A subsidiary need not be listed more than once so long as its role as issuer, co-issuer, or guarantor of a guaranteed security is clearly indicated with respect to each applicable security. This exhibit will be required in Forms S-1 [17 CFR 239.11], S-3 [17 CFR 239.13], S-4 [17 CFR 239.25], SF-1 [17 CFR 239.44], SF-3 [17 CFR 239.45], S-11 [17 CFR 239.18], F-1 [17 CFR 239.31], F-3 [17 CFR 239.33], F-4 [17 CFR 239.34], 10 [17 CFR 249.210], 10-Q [17 CFR 249.308a], and 10-K [17 CFR 249.310]. In addition, we are making corresponding revisions to the exhibit requirements of Form 20-F by creating new Exhibit 17 within Item 19, and Form 1-A by creating new Exhibit 17 within Item 17. This exhibit will also be required in Forms 1-K and 1-SA. *See* discussion in Section V.H.3.c, "Offerings pursuant to Regulation A".

[185] *See* 17 CFR 232.102(d) [Rule 102(d) of Regulation S-T].

instead of their identification, in Securities Act registration statements and Exchange Act registration statements and periodic reports. We believe this approach will provide the information to investors in a more efficient manner and make the accompanying financial and non-financial disclosures easier to understand.

c. When Disclosure is Required

i. Proposed Amendments

One of the conditions that must be met under existing Rule 3-10 to be eligible to omit the financial statements of a subsidiary issuer and guarantor is providing the Alternative Disclosures. If certain numerical thresholds are met, including that the parent company has "no independent assets or operations" and that all non-issuer and non-guarantor subsidiaries are "minor,"[186] the Alternative Disclosures may take the form of a brief narrative in lieu of detailed Consolidating Information, but some type of the Alternative Disclosures is always required.[187] Under these thresholds, minor changes in circumstances can result in dramatically different disclosures being required. Existing Rules 3-10(i)(11)(i) and (ii) provide that Rule 3-10 disclosure may not omit any financial and narrative information about each guarantor if it would be material for investors to evaluate the sufficiency of the guarantee, and shall include sufficient information so as to make the financial information presented not misleading. This disclosure is required when Consolidating Information is disclosed.

The proposed amendments would eliminate the "no independent assets or operations" and "minor" thresholds, as well as the brief narrative form of Alternative Disclosures, and

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[186] Rules 3-10(h)(5) and (6) specify the numerical thresholds that must not be exceeded for a parent company to have "no independent assets or operations," and for a subsidiary to be "minor," respectively. *See discussion* in Section II.F of the Proposing Release.

[187] *See* discussion of existing requirements in Section II.F of the Proposing Release.

instead require financial and non-financial disclosures to the extent material to holders of the guaranteed security. For example, under the proposed rule, the Summarized Financial Information of the Obligor Group could be omitted if the parent company's consolidated financial statements do not differ in any material respects from the Obligor Group. While the disclosures specified in proposed Rule 13-01(a)(1) through (4) could have been omitted if not material to holders of the guaranteed security, for clarity, proposed Rule 13-01(a)(4) would have required the registrant to include a statement that those financial disclosures have been omitted and disclose the reason(s) why the disclosures are not considered to be material.

While the proposed rules include specific financial and non-financial disclosures, there may be other information about the guarantees, issuers, and guarantors that could be material to holders of the guaranteed security. Accordingly, proposed Rule 13-01(a)(5) would have required disclosure of any information that would be material to making an investment decision with respect to the guaranteed security, rather than the sufficiency of the guarantee as stated in the existing rule. This requirement would have applied in all cases, including when the proposed Summarized Financial Information is omitted in accordance with the proposed rule.

ii. Comments on the Proposed Amendments

Comments were mixed on these proposals. A number of commenters generally supported the proposed elimination of existing Rule 3-10's numerical thresholds in favor of allowing issuers to provide the specified disclosures based on what information the issuer believes is material to investors.[188] However, a few commenters supported some type of numerical threshold for establishing whether financial information of an obligor group should be deemed

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[188] *See, e.g.*, letters from CII, FedEx, FEI, Nareit, and Sullivan & Cromwell.

material.[189] One commenter suggested establishing a 50% threshold as a non-exclusive safe harbor for guarantee significance.[190] This commenter stated that if the significance is at or below 50%, the alternative disclosures should be deemed not material and not required to be disclosed; while if it is above 50%, issuers should still be able to conclude that the Proposed Alternative Disclosures are not required if they would not provide material information. Another commenter recommended that the Commission establish a quantitative test that would allow issuers to evaluate whether Summarized Financial Information of an Obligor Group may be omitted.[191]

Some commenters opposed the requirement in proposed Rule 13-01(a)(4) that would require a registrant to disclose, if the required financial disclosures were omitted because they were not material, a statement to that effect and the reasons therefore.[192] Some commenters asserted that such disclosure would not be useful to investors,[193] could possibly result in an increase in liability,[194] and was counter to the Commission's objective of focusing on material disclosures and providing a principles-based framework.[195] One commenter suggested that, if the proposal were adopted, the Commission should make clear that issuers would only need to

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189 *See* letters from SIFMA and T-Mobile.

190 *See* letter from SIFMA. This commenter said that significance under this suggestion would be measured in a manner consistent with the existing rule's determination of a "minor" subsidiary specified in Rule 3-10(h)(6), except that 50% would be substituted for the existing rule's 3% threshold. *See* additional discussion in Section II.F of the Proposing Release.

191 *See* letter from T-Mobile. This commenter did not provide a specific figure for a quantitative threshold, but noted that the threshold should be higher than existing Rule 3-10's thresholds for minor subsidiaries. The commenter asserted that using the criteria for being considered a "significant subsidiary" specified in § 210.1-02(w) would better reflect materiality to investors compared to the existing definition of minor subsidiaries.

192 *See, e.g.*, letters from Debevoise, EY, KPMG, and SIFMA.

193 *See* letters from Debevoise and KPMG.

194 *See* letters from Debevoise and SIFMA.

195 *See* letter from Debevoise.

make a simple statement that management does not believe the information is material.[196] In contrast, one commenter specifically supported this part of proposed Rule 13-01(a)(4), asserting that the requirement would provide clarity about which disclosures were omitted and why.[197]

A number of commenters opposed proposed Rule 13-01(a)(5), which would have required disclosure of any information that would be material to making an investment decision with respect to the guaranteed security.[198] Several of these commenters contended that the proposed requirement is overly broad. Some commenters asserted that the proposed requirement would cause uncertainty for issuers and auditors as they seek to apply and assess the adequacy of the disclosures.[199] One commenter asserted that the proposed requirement would override all other relevant disclosure obligations;[200] another commenter questioned whether the Commission is proposing to modify the overall materiality assessment in its disclosure framework;[201] and a third commenter stated its belief that in addition to creating litigation risk, the proposed rule could extend the duty to disclose material information beyond information specific to the guarantee, such as pending merger negotiations and other potential transactions.[202] However, one commenter supported this proposed requirement "because it would provide relevant

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[196] *See* letter from SIFMA.

[197] *See* letter from CII.

[198] *See, e.g.*, letters from ABA, BDO, CAQ, Comcast, Cravath, Davis Polk, Deloitte, EY, Freeport, KPMG, PWC, Shearman, and Sullivan & Cromwell.

[199] *See, e.g.*, letters from BDO, CAQ, EY, and PWC.

[200] *See* letter from Cravath.

[201] *See* letter from Deloitte.

[202] *See* letter from Shearman.

information, not otherwise explicitly required by the [p]roposed [r]ule, which would likely render the disclosures taken as a whole to be more useful for investment decisions."[203]

In response to the Commission's request for comment on whether the proposed amendments were sufficiently clear about the disclosures that should be provided and when, one commenter recommended that the final rules should provide explicit objectives related to assessing the guarantee, which would help issuers to prepare their disclosures.[204] Some commenters suggested that it would be helpful for the final rules to provide additional guidance or examples of information that may be material to investors.[205] One commenter recommended that the rules expressly provide that the Alternative Disclosures need not be included in a registration statement at the time of effectiveness so long as they are provided prior to an offering of the securities in respect of which the Alternative Disclosures are required.[206] Another commenter asserted that a parent company could conclude that disclosure is not material if no investor owns (or is currently being offered) the specific guaranteed or collateralized security and therefore the disclosure could be excluded based on proposed Rule 13-01.[207]

iii. Final Amendments

We are adopting the amendments largely as proposed with modifications based on comments received.

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[203] *See* letter from CII.

[204] *See* letter from EY.

[205] *See, e.g.*, letters from KPMG and Shearman.

[206] *See* letter from Cravath.

[207] *See* letter from PWC.

As supported by several commenters,[208] the existing "no independent assets or operations" and "minor" numerical thresholds used to determine the form and content of disclosure have been replaced with a requirement to provide all disclosures specified in the final rule, unless such information is not material.[209] Whereas proposed Rule 13-01(a) required the proposed financial and non-financial disclosures "to the extent material to holders of the guaranteed security," the final rule has been revised to require the financial and non-financial disclosures "to the extent material," which is discussed in further detail below.

A few commenters suggested including numerical thresholds in the rule for determining whether financial information may be omitted,[210] while others requested that we provide additional guidance or examples of what information may be material.[211] While we appreciate the desire for certainty about when disclosure is required, determinations of what information is material are highly dependent on the applicable facts and circumstances, and we are concerned that specifying numerical thresholds or providing detailed guidance could undermine the principles-based nature of this provision, to the detriment of both investors and issuers. We are therefore not adopting these suggestions. Instead, akin to the suggestion of one commenter,[212] the final rule identifies four non-exclusive scenarios in which the required information could be

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208 *See, e.g.*, letters from CII, FedEx, FEI, Nareit, and Sullivan & Cromwell.

209 This requirement is specified in new Rule 13-01(a). Whether a disclosure specified in new Rule 13-01 may be omitted depends on whether the disclosure would be material to a reasonable investor. The Supreme Court in *TSC v. Northway* held that a fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

210 *See* letters from SIFMA and T-Mobile.

211 *See, e.g.*, letters from KPMG and Shearman.

212 *See* letter from SIFMA. This commenter recommended the Commission establish, as a non-exclusive safe harbor, "a numerical threshold of guarantee significance at or below which [the required disclosures] would be deemed immaterial and thus not required and above which registrants would still be able to conclude that [the required disclosures] are not required because they would not provide material information." We are not adopting the commenter's suggestion of a numerical threshold of significance, but we have identified four non-exclusive scenarios in which the required information could be omitted as discussed below.

omitted on the basis that it is not material, provided the applicable scenario is disclosed to investors. We discuss these four scenarios in further detail below.

The proposed rule sets forth financial and non-financial disclosures that were focused on the information the Commission expected was most likely to be material. It also included proposed Rule 13-01(a)(5), which would have required disclosure of "any other quantitative or qualitative information that would be material to making an investment decision with respect to the guaranteed security." The intent of this proposed requirement was to elicit disclosure about the obligated entities and the guarantees that would be material but was not otherwise specifically required by the proposed financial and non-financial disclosures. While one commenter supported this proposed requirement, many others did not.

Instead of proposed Rule 13-01(a)(5), we are adopting new Rules 13-01(a)(6) and (7), which retain the requirements in existing Rules 3-10(i)(11)(i) and (ii),[213] respectively, as suggested by several commenters.[214] However, we are aligning the wording of existing Rules 3-10(i)(11)(i) and (ii) to the structure of Rule 13-01. We are also modifying the requirement in existing Rule 3-10(i)(11)(ii) to make reference to non-financial information, in addition to financial information, because we see no reason to limit such disclosure to financial information. Parent companies are already required to comply with existing Rule 3-10(i)(11)(i) and (ii), and we are not aware of any issues surrounding their application. We believe these existing requirements capture the disclosures the proposed rule was intended to elicit while addressing the concerns raised by commenters as discussed above. Notwithstanding these requirements in

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[213] *See* Section III.C.2.c.i, "When Disclosure is Required," for a discussion of the requirements in existing Rules 3-10(i)(11)(i) and (ii).

[214] *See, e.g.*, letters from BDO, PWC, and Shearman.

the final rule, in 17 CFR 230.408(a)[215] and 17 CFR 240.12b-20[216] require a parent company to disclose, in addition to the information expressly required to be included, such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading. While some commenters indicated these requirements provide sufficient investor protections,[217] we believe retaining the requirements in existing Rule 3-10(i)(11)(i) and (ii), in addition to those other requirements, will help to ensure that material information is provided to investors.

Based on comments received on proposed Rule 13-01(a)(5), we have also revised Rule 13-01(a) for clarity. Proposed Rule 13-01(a) would have required disclosures "to the extent material to holders of the guaranteed security" and was not intended to introduce a nuanced or different materiality analysis specific to these disclosure requirements. A parent company's responsibility to determine whether the disclosures specified in Rule 13-01 are material is not different from how it assesses materiality in connection with other information it files with the Commission. Accordingly, we have revised final Rule 13-01 to require the financial and non-financial disclosures "to the extent material."

Proposed Rule 13-01(a)(4) would have required, if the financial disclosures specified in proposed Rule 13-01(a)(4) were omitted because they are not material, disclosure of a statement to that effect and the reasons therefore. Most of the commenters that discussed this proposed requirement did not support it.[218] The intent of the proposed rule was not to require a parent

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[215] Securities Act Rule 408(a).

[216] Exchange Act Rule 12b-20.

[217] *See, e.g.,* letters from Deloitte and EY.

[218] *See, e.g.*, letters from Debevoise, EY, KPMG, and SIFMA.

company to disclose the analysis supporting its conclusion that the financial disclosures were not material. Rather, it was to inform an investor that financial information about issuers and guarantors was not being provided and the basic reason(s) for the omission, similar to the narrative forms of Alternative Disclosures in existing Rule 3-10.[219] In response to these comments, we are not adopting this requirement as proposed. Instead, we are adopting an approach that should help address concerns[220] about the need for greater certainty as to the circumstances when the omission of financial disclosures may be appropriate while continuing to provide investors with the basic reasons as to why the financial information was omitted in a manner similar to existing Rule 3-10's narrative exceptions. As adopted, Rule 13-01(a)(4)(vi) includes four scenarios, which we believe are the most common situations under which the financial information would not be material.[221] If the scenario is applicable and disclosed, the parent company could then omit the financial disclosures. The four scenarios are:

1) The assets, liabilities and results of operations of the combined issuers and guarantors of the guaranteed security are not materially different than corresponding amounts presented in the consolidated financial statements of the parent company;[222]
2) The combined issuers and guarantors, excluding investments in subsidiaries that

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219 The content of the brief narratives is specified within each of the exceptions of existing Rules 3-10(b) through (f) based on the applicable facts and circumstances. For example, if the conditions are met, existing Rule 3-10(b)(4) of Regulation S-X specifies that the narrative disclosure to be included in a footnote to the parent company's consolidated financial statements must state, if true, "that the issuer is a 100%-owned finance subsidiary of the parent company and the parent company has fully and unconditionally guaranteed the securities." It also requires the footnote to include "the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section."

220 *See, e.g.*, letter from Shearman.

221 These scenarios were discussed in the Proposing Release. *See* Section III.C.2.c of the Proposing Release.

222 This scenario is contained in Rule 13-01(a)(4)(vi)(A).

are not issuers or guarantors, have no material assets, liabilities or results of operations;[223]

3) The issuer is a finance subsidiary of the parent company, the parent company has fully and unconditionally guaranteed the security, and no other subsidiary of the parent company guarantees the security;[224] and

4) The issuer is a finance subsidiary that co-issued the security, jointly and severally, with the parent company, and no other subsidiary of the parent company guarantees the security.[225]

While we believe these scenarios encompass most of the situations under which the required financial information would not be material, these scenarios are not intended to be exclusive. As discussed below, there may be other circumstances in which it would be appropriate to omit the required financial information on the basis that it is not material.

In the first scenario, we believe financial information of the combined Obligor Group would not be material to an investor as it is not materially different than that of the consolidated parent company.[226] If the related scenario was disclosed, investors would not need supplemental financial information as it would largely duplicate the corresponding information in the parent company's consolidated financial statements. In the second scenario, we believe disclosure that the combined Obligor Group has no material assets, liabilities or results of operations obviates the need for supplemental disclosures as an investor would know such information would not be

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[223] This scenario is contained in Rule 13-01(a)(4)(vi)(B).

[224] This scenario is contained in Rule 13-01(a)(4)(vi)(C).

[225] This scenario is contained in Rule 13-01(a)(4)(vi)(D).

[226] Rule 13-01(a)(4)(vi) clarifies that this scenario does not apply where separate disclosure of the Summarized Financial Information of one or more, but not all issuers and/or guarantors, is required by Rule 13-01(a)(4)(iv).

material. The third and fourth scenarios involve finance subsidiary issuers or finance subsidiaries that co-issue securities with the parent company. These last two scenarios, which are generally consistent with existing Rule 3-10(b) narrative disclosures involving finance subsidiaries,[227] inform investors that the finance subsidiary issuer or co-issuer has no independent material debt-paying ability and has no material assets or operations other than those related to the issuance, administration, and repayment of the guaranteed security such that supplemental financial disclosures are not material.

Rule 13-01(a)(4)(vi)(C) applies to a finance subsidiary issuer of a security that the parent company has fully and unconditionally guaranteed, and Rule 13-01(a)(4)(vi)(D) applies to a finance subsidiary that co-issues a security, jointly and severally, with the parent company. No other subsidiaries of the parent company may guarantee the security under either of these scenarios. Rule 13-01(a)(4)(vi) defines when a subsidiary is a "finance subsidiary" for the purposes of the rule. This definition is consistent with the definition in existing Rule 3-10(h)(7) except that the amended definition does not make reference to revenues, which we believe are subsumed by the reference to "operations," and does not make reference to "cash flows," as cash flow information is not a required financial disclosure under the amended rule.

While we believe these scenarios generally capture the situations under which the financial information would not be material and may be omitted, there may be other scenarios under which the parent company may conclude Summarized Financial Information is not

[227] *See* discussion above in Section III.C.1.d.iii. As one of the conditions to omit the financial statements of the finance subsidiary issuer under existing Rule 3-10(b), the parent company must provide the narrative disclosure in paragraph (4) of existing Rule 3-10(b), which is that "the issuer is a 100%-owned finance subsidiary of the parent company and the parent company has fully and unconditionally guaranteed the securities. The footnote also must include the narrative disclosures specified in paragraphs (i)(9) and (i)(10) of this section." The Note to existing Rule 3-10(b) states that "[p]aragraph (b) is available if a subsidiary issuer satisfies the requirements of this paragraph but for the fact that, instead of the parent company guaranteeing the security, the subsidiary issuer co-issued the security, jointly and severally, with the parent company. In this situation, the narrative information required by paragraph (b)(4) must be modified accordingly."

necessary. These scenarios would be evaluated under the general materiality provision of Rule 13-01(a). Based on this analysis, if a parent company determines that not all of the required financial information is material, the information that is not material may be omitted without additional disclosure or explanation. Thus, under the final rule, the parent company could either rely on one of the identified scenarios, if applicable, to omit information that is not material, or make its own assessment based upon a consideration of other relevant facts and circumstances.[228] We believe this approach will preserve the principles-based nature of Rule 13-01 while providing greater certainty for issuers, and appropriate transparency for investors, regarding the information required to be disclosed.

Two commenters encouraged the Commission to expressly provide that the Proposed Alternative Disclosures need not be provided at the time of effectiveness so long as they are provided prior to an offering of the guaranteed securities,[229] with one of these commenters suggesting that we amend 17 CFR 230.430B(a)[230] to cover information required by proposed Rule 13-01.[231] We are not amending Rule 430B as suggested. Issuers meeting the definition of Well-Known Seasoned Issuer ("WKSI") are currently afforded significant flexibility under Rule 430B(a), which would include the flexibility to omit the information specified in Proposed Rule 13-01 at effectiveness so long as the information is added when the shelf registration statement is amended to identify subsidiary issuers and guarantors.[232] We acknowledge that non-WKSI

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[228] To provide clarity to an issuer that its ability to omit the Summarized Financial Information required by final Rule 13-01(a)(4) is not limited to the four scenarios discussed herein, final Rule 13-01(a)(4)(vi) states: "Notwithstanding that a parent company may omit this summarized financial information if not material…"

[229] *See* letters from Cravath and PWC.

[230] Securities Act Rule 430B(a).

[231] *See* letter from Cravath.

[232] *See* Securities Act Rule 430B(a) and *Securities Offering Reform*, Release No. 33-8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)] ("Securities Offering Reform") at text accompanying note 520.

issuers are not similarly able to omit this information but note that WKSIs are afforded substantially greater latitude in registering and marketing securities.[233]

d. Location of Revised Alternative Disclosures and Audit Requirement

i. Proposed Amendments

The primary source of financial information provided to investors—the consolidated financial statements of the parent company—is required to be audited as specified in Regulation S-X.[234] The Proposed Alternative Disclosures would provide incremental detail as a supplement to the parent company's audited annual and unaudited interim consolidated financial statements to facilitate an analysis of the parts of the consolidated enterprise that are obligated to make payments as issuers or guarantors. The proposed rule would provide parent companies with the flexibility to provide the Proposed Alternative Disclosures inside or outside of the consolidated financial statements in registration statements covering the offer and sale of the guaranteed debt securities and any related prospectus, as well as annual and quarterly Exchange Act periodic reports required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed. If a parent company elects to provide the Proposed Alternative Disclosures outside its audited financial statements, the disclosures would be required in specified prominent locations in its offering documents and periodic reports.

Accordingly, the note to proposed Rule 13-01(a) would have allowed the parent company to provide the Proposed Alternative Disclosures in a footnote to its consolidated financial statements or, alternatively, in MD&A,[235] in the registration statement covering the offer and

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[233] *See* Securities Offering Reform at note 220.

[234] Rules 3-01 and 3-02 of Regulation S-X.

[235] *See* 17 CFR 229.303 (Item 303 of Regulation S-K).

sale of the subject securities and any related prospectus, and in Exchange Act reports on Forms 10-K and 10-Q[236] required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed. If a parent company were to elect to provide the disclosures in its audited financial statements, the Proposed Alternative Disclosures would be required to be audited.[237] If not otherwise included in the consolidated financial statements or in the MD&A, the parent company would be required to include the Proposed Alternative Disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in 17 CFR 229.503(c) ("Item 503(c) of Regulation S-K").[238] Beginning with the parent company's annual report filed on Form 10-K for the fiscal year during which the first bona fide sale of the subject securities is completed, however, the parent company would have been required to provide the Proposed Alternative Disclosures in a footnote to its consolidated financial statements in its annual and quarterly reports. These proposed amendments would also apply to foreign private issuers and issuers offering securities pursuant to Regulation A and the forms applicable to such entities.[239]

ii. Comments on the Proposed Amendments

Comments on the proposed amendments were mixed. A few commenters generally supported the flexibility under the proposed amendments for the parent company to provide the

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236 These proposed amendments also would apply to foreign private issuers and issuers offering securities pursuant to 17 CFR 230.251 through 230.263 ("Regulation A") and the forms applicable to such entities. *See* Section III.D, "Application of Proposed Amendments to Certain Types of Issuers," below.

237 Regardless of where the Proposed Alternative Disclosures are presented in the filing, U.S. GAAP requires disclosure in the financial statements of the pertinent rights and privileges of the various securities outstanding. *See* ASC 470-10-50-5 and ASC 505-10-50-3.

238 Subsequent to the issuance of the Proposing Release, the Commission amended and relocated the requirements previously contained in Item 503(c) to 17 CFR 229.105 [new Item 105 of Regulation S-K]. *See FAST Act Modernization and Simplification of Regulation S-K*, Release No. 33-10618 (Mar. 20, 2019) [84 FR 12674 (Apr. 2, 2019)].

239 *See* Section III.D, "Application of Amendments to Certain Types of Issuers," below.

Proposed Alternative Disclosures in specified locations outside its consolidated financial statements in the subject registration statement and Forms 10-K and 10-Q required to be filed during the fiscal year in which the first bona fide sale of the debt securities is completed, but would have required the parent company to provide the disclosures in a footnote to its consolidated financial statements in its annual and quarterly reports starting with its annual report filed on Form 10-K for the fiscal year during which the first bona fide sale of the debt securities is completed.[240]

A number of commenters stated that the Proposed Alternative Disclosures should be permitted to be presented outside of the parent company's consolidated financial statements in all cases, not just in the registration statement and Forms 10-K and 10-Q required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed.[241] One commenter suggested that the existing rule's requirement that the disclosures be included in the audited financial statements has driven would-be registered debt issuers to the Rule 144A debt market,[242] an effect other commenters asserted would continue if the Proposed Alternative Disclosures were required to be included in the consolidated financial statements in subsequent Exchange Act reports.[243] Several commenters asserted that not requiring these disclosures to be

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[240] *See* letters from Ball Corp., Nareit, and WTW. While one commenter expressed support for the proposed amendment that would allow locating the disclosures outside the footnotes of the financial statements in certain instances, the commenter stated its belief that having a requirement for the disclosures to be audited creates additional cost over an area of accounting and disclosure where there is limited focus from the investment community. *See* letter from WTW.

[241] *See, e.g.*, letters from ABA, Cravath, Davis Polk, Dell, Freeport, SIFMA, Simpson Thacher and Sullivan & Cromwell.

[242] *See* letter from Cravath.

[243] *See* letters from Dell and Sullivan & Cromwell.

audited would reduce costs[244] and possibly allow issuers to more quickly register guaranteed debt securities and access capital markets.[245] A few commenters stated that requiring an audit of the Proposed Alternative Disclosures would provide little marginal benefit to investors.[246]

Other commenters, however, asserted that the flexibility to determine the location of the Proposed Alternative Disclosures under the proposed amendments could lead to investor confusion about the location of the disclosures,[247] and uncertainty as to the level of audit assurance that applied to the disclosures.[248] One commenter contended that the Proposed Alternative Disclosures should be required to be presented in a single location to avoid inconsistencies in the location and varied reliance by investors.[249] Another commenter stated that companies should not have the option to choose where their disclosures will appear, and that reported disclosures should be consistently reported in the same location.[250]

One commenter did not support locating the Proposed Alternative Disclosures outside the financial statements,[251] and another suggested either requiring the Proposed Alternative Disclosures to be audited or limiting unaudited disclosures to underwritten offerings.[252] One of these commenters argued that many investors place significant value on having required disclosures subject to annual audit and/or interim review, internal control over financial

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[244] *See, e.g.*, letters from ABA, Ball Corp., Cravath, Davis Polk, Dell, Freeport, SIFMA, Simpson Thacher, Sullivan & Cromwell, and WTW.

[245] *See, e.g.*, letters ABA, BDO, Cravath, Davis Polk, Dell, and Simpson Thacher.

[246] *See, e.g.*, letters from Davis Polk, Dell, Freeport, and Sullivan & Cromwell.

[247] *See* letters from Deloitte, FedEx, and PWC.

[248] *See* letters from Deloitte and KPMG.

[249] *See* letter from KPMG.

[250] *See* letter from XBRL US, Inc.

[251] *See* letter from CII.

[252] *See* letter from BDO.

reporting, and XBRL tagging requirements, and not being subject to the forward-looking statements safe harbor.[253] Another commenter did not express a view on where the disclosures should be located, but indicated that investors may benefit from having the disclosures in the financial statements because they would be subject to audit and interim review requirements.[254]

Other commenters, however, recommended the disclosures be located outside the financial statements in all cases.[255] One of these commenters argued presentation outside the financial statements in all cases was appropriate as the Proposed Alternative Disclosures are supplementary to the financial statements.[256] This commenter asserted that this change would reduce costs of preparing the disclosures by allowing the information to be unaudited, and noted that the disclosures would still be subject to the parent company's disclosure controls and procedures and required certifications. Another of these commenters recommended the disclosures be required in the liquidity and capital resources section of the MD&A or in a separate section following "Risk Factors" as is currently done in the Rule 144A market and has been accepted by the investor community.[257] This commenter also observed that if disclosure outside the financial statements is sufficient at the time of the initial investment decision, it should be sufficient for future periods. Yet another of these commenters observed the Proposed Alternative Disclosures would be better presented in a discussion about a parent's liquidity in the

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[253] *See* letter from CII.

[254] *See* letter from CAQ.

[255] *See, e.g.*, letters from FedEx, NYC Bar and PWC.

[256] *See* letter from FedEx.

[257] *See* letter from NYC Bar.

MD&A as opposed to in the financial statements given the objective of the disclosures to provide an investor in a debt security with information about the related guarantee.[258]

Some commenters emphasized that, even if the Proposed Alternative Disclosures are allowed to be located outside of the financial statements, these disclosures would be derived from the same internal accounting records used to prepare the parent company's audited consolidated financial statements[259] and would be subject to the parent company's disclosure controls and procedures[260] and certification by the parent company's principal executive and principal financial officers.[261]

Some commenters asserted that underwriters will likely request independent auditors to provide comfort on financial information provided outside the consolidated financial statements in connection with registered offerings.[262] Two of these commenters indicated this would involve performing limited procedures on such information under Public Company Accounting Oversight Board ("PCAOB") Auditing Standard 6101, *Letters for Underwriters and Certain Other Requesting Parties*.[263] One commenter suggested that such procedures may not result in a decrease in effort or cost for either auditors or registrants,[264] while the other commenter stated that while the scope and time required to perform such procedures is less than an audit, the auditor involvement may delay the time to market for underwritten offerings.[265] Another

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[258] *See* letter from PWC.

[259] *See* letters from Davis Polk and Freeport.

[260] *See* letters from Cravath and EY.

[261] *See* letter from FedEx.

[262] *See, e.g.*, letters from BDO, EY, Grant Thornton, KPMG, and Windstream.

[263] *See* letters from BDO and KPMG.

[264] *See* letter from KPMG.

[265] *See* letter from BDO.

commenter noted that the proposed rules would cause issuers to incur costs related to the incremental procedures necessary for such comfort procedures but investors would lose the benefit arising out of the audit of the disclosures.[266] Another commenter recommended that, if the final rules allow issuers the flexibility to determine the location of the Proposed Alternative Disclosures, the Commission should provide examples to clarify when the Proposed Alternative Disclosures must be in the financial statements.[267]

Some commenters suggested that because the Proposed Alternative Disclosures would be relevant only to the investors of the guaranteed security, if these disclosures were required to be audited, this information should be included in an audited supplemental schedule that could be filed as an exhibit to the filing, similar to the supplemental schedules required under 17 CFR 210.12-01 through 210.12-29 ("Article 12 of Regulation S-X").[268]

iii. Final Amendments

After considering comments received, we are adopting the amendments largely as proposed, with modifications. As discussed above, while a few commenters either did not support locating the disclosures outside the financial statements or suggested limiting unaudited disclosures to underwritten offerings, others recommended the disclosures be located outside the financial statements in all cases. We continue to believe, however, that it is appropriate to provide parent companies the flexibility to select the location of the disclosures, including locating them outside the parent company's consolidated financial statements. In this regard, and consistent with the views of several commenters, we expect not requiring the disclosures to

[266] *See* letter from Grant Thornton.

[267] *See* letter from Deloitte.

[268] *See* letters from CAQ, EY, and PWC.

be audited will reduce costs and allow issuers to register guaranteed debt securities and access capital markets faster, which may encourage more such registered offerings.[269] Although we appreciate that some investors may place a value on having financial information subject to annual audit and/or interim review and other requirements that flow from including disclosures in the parent company's financial statements, the proposed flexibility afforded to the parent company in selecting the location of the Proposed Alternative Disclosures, including locating them outside the parent company's audited financial statements, took into account the nature of those disclosures as a supplement to the parent company's consolidated financial statements. We also agree with those commenters who observed that, even if the Revised Alternative Disclosures are located outside the financial statements, they would be derived from the same internal accounting records and subject to the parent company's disclosure controls and procedures and management certification requirements.

Accordingly, and consistent with the proposed rule, final Rule 13-01(b)[270] permits the parent company to provide the Revised Alternative Disclosures in a footnote to its consolidated financial statements or alternatively, in MD&A. If the disclosures are not otherwise included in the consolidated financial statements or in MD&A, the final rule requires the parent company to include the disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in Item 105 of Regulation S-

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[269] We acknowledge that underwriters may request independent auditors to provide comfort on financial information provided outside the financial statements for registered offerings, which could limit the expected cost savings and delay the time to market. However, providing this flexibility will enable issuers and underwriters the option to present this supplemental information outside the financial statements when it is cost- and time-effective to do so and therefore may reduce frictions associated with registered offerings of guaranteed debt securities. We also observe, as one commenter noted, that the scope and time required to perform comfort procedures is less than an audit. *See* letter from BDO.

[270] Whereas this requirement was included in a note to proposed Rule 13-01(a), the final rule includes it in a separate paragraph, Rule 13-01(b).

K.[271]

As discussed above, some commenters suggested that the proposed flexibility in selecting the location of the disclosure may cause investors confusion about the location and level of assurance applied. While the proposed rule provided flexibility on where to locate the disclosures, we believe the locations where disclosures may be provided are clearly specified and that investors generally understand the levels of assurance applied to disclosures included inside or outside the parent company's consolidated financial statements. If provided in the parent company's consolidated financial statements, consistent with existing Rule 3-10, the disclosures must be included in a footnote. If provided outside the parent company's consolidated financial statements, they must be included in MD&A, or in other specified locations if the parent company's consolidated financial statements and MD&A are not otherwise included in the filing.[272] Consistent with the proposed rule, if the parent company elects to provide the Revised Alternative Disclosures in a footnote to its audited consolidated financial statements, the Revised Alternative Disclosures must be audited. Conversely, the Revised Alternative Disclosures need not be audited if the parent company provides them outside the audited consolidated financial statements. A few commenters recommended that, if audited, the information be included in a supplemental schedule similar to the ones required by Article 12 of Regulation S-X. Under the existing rule, a parent company must include the Alternative Disclosures in financial statements footnotes but has discretion over where to locate them. We are not aware of any practice issues associated with this discretion, and believe investors understand how to locate the disclosures

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[271] 17 CFR 229.105. As described above, subsequent to the issuance of the Proposing Release, the Commission amended and relocated the requirements previously contained in Item 503(c) of Regulation S-K to new Item 105 of Regulation S-K. The final amendments have been revised to reflect this change.

[272] These circumstances include when the consolidated financial statements and MD&A are included in previously filed reports that are incorporated by reference. In such instances, the disclosures are required to be provided in specified prominent locations.

and understand the level of audit assurance associated with the disclosures if included in the financial statement footnotes. We are therefore not adopting this suggestion.

Under the proposed rule, although the parent company would initially have the flexibility to locate the disclosures outside of its consolidated financial statements in the subject registration statement and certain periodic reports filed thereafter, the parent company would have been required to provide the disclosures in a footnote to its consolidated financial statements starting with its annual report filed on Form 10-K for the fiscal year during which the first bona fide sale of the subject securities is completed. A number of commenters did not support this proposed requirement, and stated that the disclosures should be permitted to be presented outside of the parent company's consolidated financial statements in all cases, as described above. Some commenters asserted that it was incongruous for a heightened compliance obligation to apply after an offering,[273] and others expressed the view that if audited information is not necessary for an investment decision, it is not necessary thereafter.[274] One commenter noted that this requirement is disproportionally burdensome on repeat issuers of debt securities,[275] and another asserted that eliminating this proposed requirement would allow issuers to provide their disclosure in a consistent location and avoid unnecessarily providing it in different locations.[276]

We considered responses to the Commission's request for comment on the potential benefits or concerns for investors and issuers with either permitting the parent company to provide the proposed disclosures outside its financial statements in the proposed circumstances or permitting the parent company to provide the proposed disclosures outside its financial

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[273] *See, e.g.*, letters from Cravath, Freeport, and Simpson Thacher.

[274] *See, e.g.*, letters from Davis Polk and PWC.

[275] *See* letter from Simpson Thacher.

[276] *See* letter from ABA.

statements in all circumstances. Having considered these comments, and in light of the benefits of the proposed flexibility discussed above, we are persuaded that there is no reason to limit this flexibility to the subject registration statement and certain periodic reports filed thereafter. Thus, under the final rule, the parent company will have flexibility to locate the disclosures in a footnote to its consolidated financial statements or in the locations specified in Rule 13-01(b) in all of its filings, consistent with the recommendations of many commenters.

e. Recently Acquired Subsidiary Issuers and Guarantors

i. Proposed Amendments

The proposed rule would eliminate the requirement in existing Rule 3-10(g) to provide pre-acquisition audited financial statements of a recently acquired subsidiary issuer or guarantor in certain circumstances.[277] Although the proposed rule would not require specific disclosures about recently-acquired subsidiary issuers and guarantors, information about these recently acquired subsidiaries would have been required if material to an investment decision in the guaranteed security pursuant to proposed Rule 13-01(a)(5).

Due to the proposed deletion of Rule 3-10(g), the Commission also proposed a conforming change to remove paragraph (b) of Rule 12h-5.[278]

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[277] *See* Section II.I of the Proposing Release for a detailed description of the pre-acquisition financial statements requirements of existing Rule 3-10(g).

[278] If the proposed removal of paragraph (b) of existing Rule 12h-5 was adopted, a subsidiary issuer or guarantor that was previously required to provide pre-acquisition financial statements pursuant to existing Rule 3-10(g) but was exempt from Exchange Act reporting by paragraph (b) of existing Rule 12h-5 would continue to be exempt from Exchange Act reporting through proposed Rule 12h-5.

ii. Comments on the Proposed Amendments

Many commenters expressed general support for the proposed elimination of Rule 3-10(g).[279] Several of these commenters contended that existing Rule 3-10(g) was burdensome and that existing 17 CFR 210.3-05[280] already requires disclosure of pre-acquisition financial statements of a significant acquired business.[281] One commenter asserted that the existing Rule 3-10(g) requirements often results in more detailed disclosure being provided for recently acquired entities than for other subsidiary issuers and guarantors.[282] Another commenter maintained that the requirements of existing Rule 3-10(g) caused it to alter guarantor structures in certain debt offerings.[283]

In response to the Commission's request for comment whether some other type of disclosure about recently acquired subsidiary issuers and guarantors should be required instead of pre-acquisition financial statements, one commenter recommended that the Commission consider requiring Summarized Financial Information of a recently acquired guarantor in registration statements if the guarantor is not already included in the Summarized Financial Information of the Obligor Group (i.e., it is acquired after the most recent balance sheet date) and if the guarantor had a material effect on the financial capacity of the obligated group.[284] Some commenters noted that although the proposed amendments would not include a requirement

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[279] *See, e.g.*, letters from Cravath, Davis Polk, Dell, EY, FEI, Nareit, and T-Mobile.

[280] Rule 3-05 of Regulation S-X.

[281] *See, e.g.*, letters from Cravath, Davis Polk, Dell, FEI, and Nareit.

[282] *See* letter from FEI.

[283] *See* letter from T-Mobile. This commenter stated that the resources needed to compile the information necessary to meet the disclosure requirements of Regulation S-X and availability of the information related to pre-acquisition financial statements of recently acquired subsidiaries have directly resulted in alterations to the contemplated guarantor structure in its debt offerings where it would have been unable to provide the required disclosures, resulting in the exclusion of guarantees that would have otherwise been made available to investors.

[284] *See* letter from EY.

similar to existing Rule 3-10(g), information about recently acquired subsidiaries would be required if material to an investment decision in the guaranteed security under proposed Rule 13-01(a)(5).[285] One commenter encouraged the Commission "not to perpetuate separate disclosure rules in this context for recently acquired subsidiaries."[286] Another commenter indicated that the existing disclosure requirements under ASC 805, *Business Combinations*, would continue to provide sufficient information related to material subsidiaries acquired and their impact on the consolidated entity.[287]

iii. Final Amendments

After considering the public comments, we are adopting the proposed changes with certain modifications. We agree with those commenters that supported the proposed elimination of the pre-acquisition financial statements requirement of existing Rule 3-10(g), most of which cited the burdensome nature of the requirement and that existing Rule 3-05 of Regulation S-X already requires pre-acquisition financial statements of significant acquired business as reasons not to include such a requirement in the final rules.[288] Accordingly, as proposed, the final rule will not include such a requirement.

Under the proposed rule, although the requirement to provide pre-acquisition financial statements of recently acquired subsidiary issuers and guarantors in existing Rule 3-10(g) would be eliminated, information about such recently acquired subsidiaries would have been required if material to an investment decision in the guaranteed security pursuant to proposed Rule 13-

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[285] *See* letters from Cravath and Nareit.

[286] *See* letter from Cravath.

[287] *See* letter from T-Mobile.

[288] *See, e.g.*, letters from Cravath, Davis Polk, Dell, FEI, and Nareit.

01(a)(5).[289] As described above, we received limited comments specific to this requirement, with one commenter opposing separate disclosure rules for recently acquired subsidiary issuers and guarantors in this context[290] and another stating that existing disclosures required by U.S. GAAP were sufficient.[291] However, we agree with another commenter[292] that suggested Summarized Financial Information for recently acquired subsidiary guarantors should be included in registration statements if the guarantor is not already included in the Summarized Financial Information of the Obligor Group.[293] In this regard, under the proposed and final amendments, a subsidiary issuer or guarantor acquired after the parent company's most recent balance sheet date would not be included in the Summarized Financial Information specified in Rule 13-01(a)(4).[294] To address this potential information gap, and similar to the commenter's suggestion, the final rule requires, in certain circumstances (discussed below), pre-acquisition Summarized Financial Information for recently acquired subsidiary issuers and guarantors to be provided in a Securities Act registration statement[295] filed in connection with the offer and sale

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[289] The requirements applicable to recently acquired subsidiary issuers and guarantors have been included in final Rule 13-01(a)(5). Proposed Rule 13-01(a)(5) would have required disclosure of "any other quantitative or qualitative information that would be material to making an investment decision with respect to the guaranteed security." Instead of this proposed requirement, the final amendments include Rules 13-01(a)(6) and (7). *See* discussion in Section III.C.2.c, "When Disclosure is Required."

[290] *See* letter from Cravath.

[291] *See* letter from T-Mobile.

[292] *See* letter from EY.

[293] While this commenter's suggestion only referred to recently acquired subsidiary guarantors, we believe this information need similarly extends to recently acquired subsidiary issuers.

[294] Unless disclosure is otherwise required (*e.g.*, the parent company provides disclosure pursuant to ASC 805, *Business Combinations*, or IFRS 3, *Business Combinations*, as applicable, or pre-acquisition financial statements are required due to the acquisition exceeding 50% significance under Rule 3-05 of Regulation S-X), an investor may not receive information about a subsidiary issuer or guarantor acquired after the balance sheet date. Additionally, such disclosures do not take into consideration that only certain entities within an acquired business may be obligated as issuers or guarantors.

[295] Consistent with existing Rule 3-10(g), this requirement is only applicable to Securities Act registration statements. In subsequent Exchange Act reports, financial information of a recently acquired subsidiary issuer

of the subject guaranteed security.

When considering pre-acquisition financial information requirements, we believe issuers benefit from certainty as to when such information is required.[296] We also believe that the pre-acquisition Summarized Financial Information required by the final rule should be consistent with what Rule 13-01(a)(4) requires for existing issuers and guarantors, as we do not see a basis for requiring varying levels of detail in this context.[297] Accordingly, final Rule 13-01(a)(5) will require pre-acquisition Summarized Financial Information when a parent company has acquired a significant "business" after the date of its most recent balance sheet included in its consolidated financial statements,[298] and that acquired business and/or one or more of its subsidiaries are

or guarantor will be included in the financial information of issuers and guarantors required by final Rule 13-01(a)(4).

[296] As described above, information about recently acquired subsidiaries would have been required under the proposed rule if material to an investment decision in the guaranteed security. Unlike disclosure that relates solely to the Obligor Group, which will be prepared by the parent company on an ongoing basis, and where materiality will therefore be evaluated regularly, in an acquisition context parent companies must rely on information provided by third parties to make a determination of whether the acquisition is significant and whether the related disclosure is material. A numerical threshold-based significance test provides parent companies with a level of certainty that allows them to efficiently make determinations of what level of disclosure is required in an environment where delay is costly. Also, where a parent company determines not to provide disclosure, investors would not receive information about the recently acquired subsidiary issuer's or guarantor's financial impact on the Obligor Group until the operating results of the acquired business have subsequently been reflected in the Summarized Financial Information of the Obligor Group. As a result, the impact of the acquisition may be difficult for investors to discern from other events affecting the Obligor Group, even where the acquisition may be economically significant. Thus, we expect a numerical threshold in the case of these disclosures could be less costly for parent companies and result in more consistent disclosure to investors where transactions are of economic significance.

[297] As pointed out by one commenter, the pre-acquisition financial statements required by existing Rule 3-10(g) result in more detail for recently acquired entities than for other subsidiary issuers and guarantors. *See* letter from FEI.

[298] Under the final amendments, pre-acquisition financial information of recently acquired subsidiary issuers and/or guarantors will not be required for acquisitions that occur before the date of the parent company's most recent balance sheet included in the parent company's financial statements. By contrast, under existing Rule 3-10(g), pre-acquisition financial statements are required if such subsidiary issuers and/or guarantors have not yet been included in the parent company's audited consolidated financial statements for nine months and the acquisition is significant.

obligated as issuers and/or guarantors.[299] Whether a "business" has been acquired will be determined in accordance with the guidance set forth in 17 CFR 210.11-01(d),[300] and the parent company would also need to treat acquisitions of related businesses as a single business acquisition in a manner consistent with Rule 3-05(a)(3). An acquired business will be deemed significant if it meets any of the conditions specified in the definition of significant subsidiary in Rule 1-02(w),[301] substituting 20 percent for 10 percent each place it appears therein, based on a comparison of the most recent annual financial statements of the acquired business and the parent company's most recent annual consolidated financial statements filed at or prior to the date of acquisition. To simplify compliance and provide certainty as to when disclosure is required, these significance tests are the same tests used to determine whether pre-acquisition financial statements are required for an acquired business pursuant to Rule 3-05 of Regulation S-X.[302]

Generally, under the final rule, a parent company will be required to provide pre-acquisition Summarized Financial Information of a recently acquired issuer or guarantor for those acquisitions where it will be required to provide pre-acquisition financial statements of the

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[299] In our experience, recently acquired subsidiary issuers and guarantors would typically be considered a business because separate entities, subsidiaries, or divisions are presumed to be businesses.

[300] Rule 11-01(d).

[301] 17 CFR 210.1-02(w).

[302] Rule 3-05 provides for use of a 20% significance threshold, rather than the 10% threshold indicated in Rule 1-02(w). We note that the Commission has proposed amendments to the significance tests used in Rule 3-05 of Regulation S-X. *See Amendments to Financial Disclosures About Acquired and Disposed Businesses*, Release No. 34-85765 (May 3, 2019) [84 FR 24600 (May 28, 2019)]. Certain of these proposed amendments would affect the tests used to determine whether an acquired business is significant. If these significance tests are amended, the trigger for determining whether pre-acquisition financial information about recently acquired subsidiary issuers and guarantors would also change. We believe the alignment of these significance tests simplifies compliance for issuers while providing material information about recently acquired subsidiary issuers and guarantors for investors.

acquired business pursuant to Rule 3-05 of Regulation S-X.[303] We recognize that not all of the entities that compose an acquired business may be issuers and/or guarantors. Accordingly, the required Summarized Financial Information will only be for those entities acquired that are issuers or guarantors, and follows the form and content prescribed in new Rule 13-01(a)(4). We also recognize that the pre-acquisition Summarized Financial Information may be required in advance of when pre-acquisition financial statements are required pursuant to Rule 3-05 of Regulation S-X.[304] However, we believe investors in a registered debt offering should be provided with information about issuers and guarantors in advance of an investment decision, and we note that the level of detail required is far less than pre-acquisition financial statements required by Rule 3-05. In sum, while the adopted approach differs from the more principles-based approach in the proposal, we believe it will continue to alleviate burdens on issuers while providing greater certainty about when pre-acquisition financial information should be provided by identifying specific circumstances in which such information is likely to be material to an investment decision.

We also are adopting the conforming change to remove paragraph (b) of Exchange Act

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[303] There may be some circumstances where a registrant is required to provide this pre-acquisition Summarized Financial Information of a recently acquired issuer or guarantor, but is not required to provide pre-acquisition financial statements of the acquired business pursuant to Rule 3-05 of Regulation S-X. For example, a parent company that is a foreign private issuer that consummates an acquisition of a significant business after the date of the most recent balance sheet presented would be required to provide pre-acquisition Summarized Financial Information of a recently acquired issuer or guarantor pursuant to new Rule 13-01(a)(5), but may be able to omit the pre-acquisition financial statements of a greater than 20% but less than 50% significant acquired business from its registration statement pursuant to Rule 3-05(b)(4) and from any subsequent Exchange Act filings.

[304] For example, Rule 3-05(b)(4) of Regulation S-X in part permits, in certain circumstances, pre-acquisition financial statements of an acquired business to be omitted from a registration statement if the significance of the acquisition does not exceed 50% and the registration statement is declared effective no more than 74 calendar days after consummation of the acquisition. We note that filing requirements in Items 2.01 and 9.01 of Form 8-K may differ.

Rule 12h-5, as proposed.[305]

f. Continuous Reporting Obligation

i. Proposed Amendments

An issuer of securities is required to file Exchange Act reports with the Commission under Section 13(a), with respect to any class of securities registered pursuant to Sections 12(b) or 12(g), or for any class of securities for which it has a reporting obligation under Section 15(d) of the Exchange Act.[306] Section 12(b) registration is required only for so long as the class of securities is listed for trading on a national securities exchange.[307] An issuer incurs a Section 15(d) reporting obligation for each class of securities that is the subject of a Securities Act registration statement that becomes effective.[308] Section 15(d)(1)[309] provides that if, at the beginning of any subsequent fiscal year, the securities of any class to which the registration statement relates are held of record by fewer than 300 persons, or in the case of a bank, a savings and loan holding company,[310] or bank holding company,[311] by fewer than 1,200 persons, the registrant's Section 15(d) reporting obligation is automatically suspended with respect to that

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[305] A subsidiary issuer or guarantor that was previously required to provide pre-acquisition financial statements pursuant to existing Rule 3-10(g) but was exempt from Exchange Act reporting by paragraph (b) of existing Exchange Act Rule 12h-5 will continue to be exempt from Exchange Act reporting through amended Rule 12h-5.

[306] Section 12(g) registration is triggered when an issuer exceeds specified asset and ownership thresholds and only applies to equity securities.

[307] Accordingly, Section 12(b) reporting obligations are terminated when, for example, the class is delisted by the exchange or the registrant determines to no longer list the securities on a national securities exchange.

[308] 15 U.S.C. 78 j(a)(3).

[309] 15 U.S.C. 78o(d)(1).

[310] As that term is defined in Section 10 of the Home Owners' Loan Act, 12 U.S.C. 1461.

[311] As that term is defined in Section 2 of the Bank Holding Company Act of 1956, 12 U.S.C. 1841.

class.[312] Title 17 CFR 240.12h-3 ("Rule 12h-3") permits registrants to suspend a Section 15(d) reporting obligation at any time during a fiscal year provided the conditions of the rule are met.[313] A foreign private issuer likewise may terminate its Exchange Act reporting obligation regarding a class of equity securities under either Section 12(g) or Section 15(d) if it complies with the conditions of 17 CFR 240.12h-6 ("Rule 12h-6").[314] Similarly, the periodic and current reporting requirements applicable to an issuer that has filed an offering statement for a Tier 2 offering that has been qualified pursuant to Regulation A[315] may be suspended if the issuer complies with the requirements of 17 CFR 230.257(d) ("Rule 257(d)").[316]

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[312] The automatic statutory suspension of an issuer's Section 15(d) reporting obligation is not available as to any fiscal year in which the issuer's Securities Act registration statement becomes effective.

[313] Rule 12h-3 provides that the duty to file reports under Section 15(d) for a class of securities is suspended immediately upon the filing of a certification on Form 15, provided that the issuer has fewer than 300 holders of record, fewer than 500 holders of record where the issuer's total assets have not exceeded $10 million on the last day of each of the preceding three years, or, in the case of a bank, a savings and loan holding company, or a bank holding company, 1,200 holders of record; the issuer has filed its Section 13(a) reports for the most recent three completed fiscal years, and for the portion of the year immediately preceding the date of filing the Form 15 or the period since the issuer became subject to the reporting obligation; and a registration statement has not become effective or was required to be updated pursuant to Exchange Act Section 10(a)(3) during the fiscal year.

[314] Rule 12h-6 permits the termination of Exchange Act reporting regarding a class of equity securities under either Section 12(g) or Section 15(d) of the Exchange Act by a foreign private issuer if the U.S. average daily trading volume of the subject class of securities has been no greater than 5 percent of the average daily trading volume of that class of securities on a worldwide basis for a recent 12-month period; and the issuer has been an Exchange Act reporting company for at least one year, has filed or submitted all Exchange Act reports required for this period, and has filed at least one Exchange Act annual report; has not sold its securities in a registered offering in the United States, except for specified offerings, during the preceding 12 months (except for exempted securities offerings); and has maintained a listing on one or more exchanges for at least a year in a foreign jurisdiction that, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's subject class of securities. The proposed and final amendments also apply to foreign private issuers. *See* Section III.D.1, "Foreign Private Issuers," below.

[315] 17 CFR 230.251-230.263.

[316] Rule 257(d) permits A Tier 2 issuer that has filed all reports required by Regulation A for the shorter of: (1) the period since the issuer became subject to such reporting obligation, or (2) its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z to immediately suspend its ongoing reporting obligation under Regulation A at any time after completing reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons (1,200 persons for a bank or bank holding company) and offers or sales made in reliance on a Tier 2 offering statement are not ongoing. *See generally,* Securities Act Rules 257(d)(2) through (4). The proposed and final amendments apply to issuers offering securities pursuant to Regulation A and the forms applicable to such entities. *See* Section III.D.3, "Offerings pursuant to Regulation A," below.

The Commission explained in the 2000 Release that the parent company must continue to provide the Alternative Disclosures in its periodic reports for as long as the subject securities are outstanding.[317] This disclosure requirement continues to apply to the parent company even if the reporting obligation of its subsidiary issuer or guarantor with respect to the subsidiary's guaranteed securities or subsidiary's guarantees could be suspended under either Section 15(d) or Rule 12h-3 of the Exchange Act.

The Commission proposed that a parent company be permitted to cease providing the Proposed Alternative Disclosures if the corresponding subsidiary issuer's or guarantor's Section 15(d) obligation is suspended automatically by operation of Section 15(d)(1) or through compliance with Rule 12h-3. To implement this change, the proposed rule would eliminate the statement in existing Rule 3-10(a) that "[e]very issuer of a registered security that is guaranteed and every guarantor of a registered security must file the financial statements required for a registrant by Regulation S-X." As proposed, if a subsidiary issuer or guarantor is required to file financial statements required by Regulation S-X with respect to the guarantee or guaranteed security, the subsidiary may omit such financial statements if it complies with conditions set forth in proposed Rule 3-10. The parent company would be able to cease providing the Proposed Alternative Disclosures for a subsidiary issuer or guarantor that is not required to file financial statements required by Regulation S-X with respect to the guarantee or guaranteed security.

As described above, Section 12(b) registration is required for so long as a class of securities is listed for trading on a national securities exchange. As a continued condition of eligibility to omit the financial statements of a subsidiary issuer or guarantor under the proposed

[317] *See* Section III.C.1 of the 2000 Release ("The parent company periodic reports must include the modified financial information permitted by paragraphs (b) through (f) of Rule 3-10. The parent company periodic reports must contain this information for as long as the subject securities are outstanding.").

rule, a parent company would be required to continue providing the Proposed Alternative Disclosures for so long as the subsidiary issuer or guarantor has a Section 12(b) reporting obligation with respect to the guarantee or guaranteed security. If the subsidiary issuer's or guarantor's reporting obligation with respect to the guarantee or guaranteed security is terminated under Section 12(b), the parent would be permitted to cease providing the Proposed Alternative Disclosures once the subsidiary issuer's and guarantor's Section 15(d) obligation is suspended automatically by operation of Section 15(d)(1) or through compliance with Rule 12h-3.

Under the proposed rule and consistent with the 2000 Release,[318] if a subsidiary issuer or guarantor with an Exchange Act reporting obligation for the guaranteed securities would initially be eligible to omit its financial statements, because it would meet the requirements of proposed Rule 3-10 and could rely on proposed Rule 12h-5, but later ceased to satisfy those requirements, that subsidiary would then be required to begin filing Exchange Act reports for the period during which it ceased to satisfy the requirements of proposed Rule 3-10. Also, the subsidiary would be required to present the financial statements that are required by Regulation S-X at the time a report is due, and would not be able to present the Proposed Alternative Disclosures that proposed Rule 3-10 would have allowed it to present for historical periods.

ii. Comments on the Proposed Amendments

Comments on the proposed amendments were generally supportive. Many commenters supported eliminating the existing Rule 3-10 requirement that the parent company provide continuous reporting of the Alternative Disclosures for as long as the guaranteed securities are

318 *See* Section III.C.3. of the 2000 Release.

outstanding if the parent company elects to provide the Alternative Disclosures in lieu of separate financial statements of eligible subsidiary issuers and guarantors.[319] One of these commenters stated that it "supports the Commission's proposal to harmonize the treatment of the duration of the continuing reporting requirements so registrants that meet the criteria for presenting alternative disclosures and elect to do so are not unfairly burdened compared to those that elect to file separate audited annual and unaudited interim financial statements."[320] Another commenter stated that the existing rule's continuous reporting requirement "is highly anomalous and frequently results in an expensive ongoing disclosure cost with no discernable benefit to investors following business combination transactions."[321] Some commenters suggested that eliminating these requirements would reduce burdens on issuers.[322]

Two commenters opposed eliminating existing Rule 3-10's continuous reporting requirement and suggested that the Commission retain the requirement.[323] These commenters argued that the Proposed Alternative Disclosures would be important to investors, and therefore the Commission should require continuous reporting for as long as the securities were outstanding.[324] One of these commenters contended that a failure to provide continuous reporting could result in a ratings withdrawal by a nationally recognized statistical rating organization ("NRSRO") that tracks the security, and asserted that many investors cannot invest in securities without a rating.[325]

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[319] *See, e.g.*, letters from Cravath, Davis Polk, FedEx, Freeport, Nareit, PWC, and Sullivan & Cromwell.

[320] *See* letter from Freeport.

[321] *See* letter from Cravath.

[322] *See, e.g.*, letters from Cravath, Freeport, Nareit, and Sullivan & Cromwell.

[323] *See* letters from CII and Credit Roundtable.

[324] *See* letters from CII and Credit Roundtable.

[325] *See* letter from Credit Roundtable.

A few commenters asserted that requiring continuous reporting when an issuer's reporting obligation could be suspended is an anomaly.[326] One commenter indicated that the requirement is not needed because it has become commonplace for issuers to tailor contractual reporting obligations to meet the perceived needs of investors.[327]

iii. Final Amendments

After considering the comments received as well as the benefits and burdens of continued Exchange Act reporting when a subsidiary issuer or guarantor would otherwise be able to suspend its reporting obligations, we are eliminating, as proposed, the requirement that the parent company must continue to provide the Alternative Disclosures in its periodic reports for as long as the subject securities are outstanding. Instead, the parent company will be permitted to cease providing the Alternative Disclosures if the corresponding subsidiary issuer's or guarantor's Section 15(d) obligation is suspended automatically by operation of Section 15(d)(1) or through compliance with Rule 12h-3, thereby harmonizing the existing rule with the statutory reporting regime and the Commission's rules that govern when an issuer may terminate or suspend reporting. We agree with those commenters who stated that requiring continuous reporting when a subsidiary issuer's or guarantor's reporting obligation could be suspended is an anomaly and that eliminating such requirements would reduce burdens on issuers. We also do not believe it is necessary to require the parent company to continue providing the Revised Alternative Disclosures when the corresponding reporting obligations of its subsidiary issuers and guarantors with respect to the guaranteed security have been suspended or terminated. For similar reasons, we are making conforming amendments to provide analogous relief with respect to subsidiary

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[326] *See* letters from Cravath and Davis Polk.

[327] *See* letter from Cravath.

issuers or guarantors that meet the definition of foreign private issuer and terminate their reporting obligations through compliance with Rule 12h-6, and subsidiary issuers or guarantors that have filed an offering statement for a Tier 2 offering that has been qualified pursuant to Regulation A and suspend their reporting obligations through compliance with Rule 257(d). In these circumstances, we see no reason why reporting obligations should be different for parent companies of these types of subsidiary issuers and guarantors.

Although these amendments may result in fewer entities providing the Revised Alternative Disclosures in periodic reports, if continued reporting is necessary due to the necessity of maintaining a rating for the debt security by a NRSRO or for other reasons, debt issuers and investors are free to negotiate the terms of debt instruments, including with respect to information to be provided about subsidiary issuers and guarantors, and to include the reporting requirements in the indentures governing the debt as they have done in the past.[328] Also, as described above, a parent company would continue to be required to provide the Revised Alternative Disclosures with respect to securities that are traded on a national securities exchange. Today's amendments do not change this requirement.

Lastly, under the final amendments, consistent with the Proposing Release and the 2000 Release,[329] if a subsidiary issuer or guarantor with an Exchange Act reporting obligation for the guaranteed securities were initially eligible to omit its financial statements, because it met the requirements of amended Rule 3-10 and could rely on amended Rule 12h-5, but later ceased to satisfy those requirements, that subsidiary will be required to begin filing Exchange Act reports for the period during which it ceased to satisfy the requirements of amended Rule 3-10. In

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[328] *See* letter from Cravath.

[329] *See* Section III.C.3. of the 2000 Release.

addition, the subsidiary is required to present the financial statements that are required by Regulation S-X at the time a report is due and is not able to present the Revised Alternative Disclosures that amended Rule 3-10 would have allowed it to present for historical periods.

D. Application of Amendments to Certain Types of Issuers

Rule 3-10's requirements apply to several categories of issuers, including foreign private issuers,[330] smaller reporting companies ("SRCs"),[331] and issuers offering securities pursuant to Regulation A. The proposed amendments also would apply to these types of issuers. In certain circumstances, Rule 3-10 also applies to the financial information of third parties provided by issuers of asset-backed securities ("ABS").

1. Foreign Private Issuers

a. Proposed Amendments

Under the proposal, foreign private issuers would continue to be required to comply with Rule 3-10, and would also be required to comply with proposed Rule 13-01. As foreign private issuers would be required to provide the disclosures specified in proposed Rule 13-01, Instruction 1 to Item 8 of Form 20-F would be amended to specifically require compliance with proposed Rule 13-01. The Commission also proposed amendments to conform Forms F-1 and F-3 to the streamlined structure of proposed Rule 3-10(a). General Instruction I.B of Form F-1 and the note to General Instruction I.A.5 of Form F-3 contain eligibility requirements for the use of these forms applicable to issuers and guarantors of guaranteed securities that are majority-owned subsidiaries. Rather than the current form language stating that Rule 3-10 specifies the financial statements that are required, the Commission proposed to amend these forms to instead

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[330] *See* 17 CFR 230.405 and 240.3b-4 (defining "foreign private issuer").

[331] *See* 17 CFR 230.405 and 240.12b-2 (defining "smaller reporting company").

state that the requirements of Rule 3-10 are applicable to financial statements for those subsidiary issuers or guarantors.

Existing Rule 3-10(a)(3) includes a reference, solely for convenience, directing foreign private issuers to Item 8.A of Form 20-F rather than having them go first to Rules 3-01 and 3-02 of Regulation S-X to determine the periods for which financial statements are required.[332] The Commission proposed to simplify the rule by deleting this reference.

Also, existing Rule 3-10(i)(12) requires a parent company that prepares its financial statements on a comprehensive basis other than U.S. GAAP or IFRS as issued by the International Accounting Standards Board to reconcile Consolidating Information to U.S. GAAP. Although the reconciliation requirement would be eliminated, proposed Rule 13-01(a)(5) would have required the parent company to disclose any other quantitative or qualitative information that would be material to making an investment decision with respect to the guaranteed security.

b. Comments on the Proposed Amendments

One commenter agreed that the proposed amendments should apply to foreign private issuers.[333] This commenter also recommended that the Commission confirm that the periods covered under the Summarized Financial Information would be required to track only those covered by a foreign private issuer's consolidated financial statements.[334] Another commenter

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[332] Rule 3-01(h) of Regulation S-X and Rule 3-02(d) of Regulation S-X direct foreign private issuers to Item 8.A of Form 20-F.

[333] *See* letter from Sullivan & Cromwell.

[334] *See* letter from Sullivan & Cromwell.

suggested that, if the final amendments require interim reporting by issuers, the Commission should address the application of those requirements to foreign private issuers.[335]

One commenter opposed the proposal to eliminate the requirement that foreign private issuers using an accounting framework other than U.S. GAAP or IFRS reconcile that framework with U.S. GAAP.[336] This commenter maintained reconciliation promotes accounting discipline and thoroughness of the financial information. This commenter also contended that reconciliation was a key tool in educating investors about substantive differences between U.S. GAAP and other accounting standards. Another commenter expressed concern that eliminating the reconciliation requirement could result in investors receiving less consistent and relevant information, and that its elimination appears to contradict the view that the Summarized Financial Information is material to investors.[337]

c. Final Amendments

After considering public comments, we are adopting the amendments as proposed. Accordingly, foreign private issuers will be required to comply with amended Rule 3-10 as well as new Rule 13-01.

A few commenters requested the Commission confirm or address the periods of Summarized Financial Information that foreign private issuers would be required to present.[338] As specified in Rule 13-01(a)(4)(v), a parent company is required to disclose the Summarized Financial Information as of and for the most recently ended fiscal year and, if applicable, year-to-date interim period, included in the parent company's consolidated financial statements.

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[335] *See* letter from Deloitte.

[336] *See* letter from CII.

[337] *See* letter from KPMG.

[338] *See* letters from Deloitte and Sullivan & Cromwell.

Although a few commenters opposed or expressed concern about the proposed elimination of the existing Rule 3-10(i)(12) requirement for a parent company that prepares its financial statements on a comprehensive basis other than U.S. GAAP or IFRS as issued by the International Accounting Standards Board to reconcile Consolidating Information to U.S. GAAP, we are eliminating this requirement as proposed. Because of the supplemental nature of the Revised Alternative Disclosures and the requirement in Item 18 of Form 20-F that the parent company's consolidated financial statements be reconciled to U.S. GAAP, we do not believe continuing to include a requirement to reconcile the financial information in the Revised Alternative Disclosures to U.S. GAAP is necessary. Although the reconciliation requirement would be eliminated, we note that Rules 13-01(a)(6) and (7)[339] require the parent company to disclose additional financial information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee, as well as sufficient information so as to make the financial and non-financial information presented not misleading.

For the same reasons described above,[340] we have created new Exhibit 17 within Item 19 of Form 20-F, which will require the identification of each subsidiary that is a guarantor, issuer, or co-issuer of each guaranteed security that the parent company issues or guarantees.

When a Canadian parent company and one or more subsidiaries register the offer and sale of guaranteed securities under the multijurisdictional disclosure system ("MJDS"),[341] the parent

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[339] *See* discussion in Section III.C.2.c, "When Disclosure is Required."

[340] *See* discussion in Section III.C.2.b.iii, "Non-Financial Disclosures."

[341] The MJDS was adopted by the Commission to permit eligible Canadian issuers to satisfy the Commission's registration and reporting requirements by providing disclosure documents prepared in accordance with the requirements of Canadian securities regulatory authorities. *See Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers*, Release No. 33-6902 (June 21, 1991) [56 FR 30036 (July 1, 1991)].

company and the subsidiaries incur reporting obligations under Section 15(d).[342] When a subsidiary issuer or subsidiary guarantor is also eligible to register the offer and sale of its security under the MJDS,[343] the financial statements that would appear in the registration statement and in any annual report on Form 40-F[344] filed by the Canadian parent company would not be affected by amended Rule 3-10 or new Rule 13-01. Instead, the disclosure would be in accordance with Canadian disclosure standards. When a subsidiary issuer or subsidiary guarantor is not eligible to register the offer and sale of its security under the MJDS,[345] however, the requirements of amended Rule 3-10 will be applicable to financial statements of that subsidiary.

2. Smaller Reporting Companies

a. Proposed Amendments

Note 3 to Rule 8-01 of Regulation S-X requires compliance with existing Rule 3-10 if the subsidiary of an SRC issues securities guaranteed by the SRC or the subsidiary guarantees securities issued by the SRC, except that the periods presented are those required by 17 CFR 210.8-02.[346] Because the subsidiary issuer or guarantor is itself a registrant, it is required to file financial statements meeting the requirements of Regulation S-X. Such financial statements may

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342 17 CFR 240.12h-4 (Exchange Act Rule 12h-4), however, exempts an issuer that has registered the offer and sale of securities under the Securities Act on Forms F-7, F-8 and F-80 from Section 15(d)'s Exchange Act reporting obligations, provided that the issuer is exempt from the obligations of Section 12(g) of the Exchange Act pursuant to 17 CFR 240.12g3-2(b) (Rule 12g3-2(b)). *See* Exchange Act Rule 12h-4.

343 General Instruction I.H of Form F-10 permits majority-owned subsidiaries to register the offer and sale of securities on that form if various conditions are met.

344 17 CFR 249.240f.

345 This situation arises when the subsidiary issuer or subsidiary guarantor is not incorporated in Canada. In this situation, registrants have filed the registration statement on a combined form (*e.g.*, Form F-10/S-4), depending on what registration form the subsidiary is eligible to use.

346 Rule 8-02 of Regulation S-X.

be prepared in accordance with 17 CFR 210.8-01 through 210.8-08[347] so long as the subsidiary issuer or guarantor qualifies as an SRC.[348] Consistent with the existing rule, if the conditions of proposed Rule 3-10 are satisfied, the subsidiary issuer's or guarantor's financial statements could be omitted. While the substance of this requirement would not change, the Commission proposed amendments to Note 3 to Rule 8-01 to conform it to the streamlined structure of proposed Rule 3-10(a). Rather than stating that the subsidiary issuer or guarantor of the SRC issuer or guarantor must present financial statements as required by existing Rule 3-10, Note 3 to Rule 8-01 would instead state that the requirements of proposed Rule 3-10 are applicable to financial statements of the subsidiary issuer or guarantor. In addition, the Commission proposed to add a sentence to Note 3 to Rule 8-01 to require an SRC to provide the disclosures specified in proposed Rule 13-01. Lastly, because Item 1 of Part I of Form 10-Q permits an SRC to provide the information required by Rule 8-03 of Regulation S-X if it does not provide the information required by Rule 10-01, the proposed rule would add Rule 8-03(b)(7) to require compliance with Rules 3-10 and 13-01.

b. Comments on the Proposed Amendments

One commenter agreed that the proposed amendments should apply to SRCs.[349] Another commenter supported the proposed amendments to Note 3 to Rule 8-01 of Regulation S-X to conform it to the streamlined structure of proposed amendments Rule 3-10(a).[350]

c. Final Amendments

After considering the public comments, we are adopting the amendments as proposed.

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[347] Article 8 of Regulation S-X.

[348] 17 CFR 229.10(f).

[349] *See* letter from Sullivan & Cromwell.

[350] *See* letter from ABA.

We believe that investors in smaller reporting companies will benefit from the simplified disclosures that will result from the amendments and that the cost of providing the disclosures will be reduced for smaller reporting companies. We are amending Note 3 to Rule 8-01 which, rather than stating that the subsidiary issuer or guarantor of the SRC issuer or guarantor must present financial statements as required by existing Rule 3-10, will state that the requirements of Rule 3-10 are applicable to financial statements of the subsidiary issuer or guarantor. The final amendments also add a sentence to Note 3 to Rule 8-01 to require an SRC to provide the disclosures specified in proposed Rule 13-01. Finally, because Item 1 of Part I of Form 10-Q permits an SRC to provide the information required by Rule 8-03 of Regulation S-X if it does not provide the information required by Rule 10-01, we have added Rule 8-03(b)(6)[351] to require compliance with Rules 3-10 and 13-01.

3. Offerings pursuant to Regulation A

a. Proposed Amendments

In connection with offerings made pursuant to Regulation A, Forms 1-A,[352] 1-K,[353] and 1-SA[354] direct an entity ("Regulation A Issuer") to present financial statements of a subsidiary that issues securities guaranteed by the parent company or guarantees securities issued by the parent company as required by Rule 3-10 for the same periods as the Regulation A Issuer's

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[351] Proposed Rule 8-03(b)(7) would have sequentially followed existing 17 CFR 210.8-03(b)(6) [Rule 8-03(b)(6) of Regulation S-X]. Subsequent to the issuance of the Proposing Release, the Commission eliminated Rule 8-03(b)(6). *See Disclosure Update and Simplification*, Release No. 33-10532 (Aug. 17, 2018) [83 FR 50204 (Oct. 4, 2018)]. The final amendments have been revised to reflect this change. The requirements in proposed Rule 8-03(b)(7) have been included in new Rule 8-03(b)(6).

[352] 17 CFR 239.90.

[353] 17 CFR 239.91.

[354] 17 CFR 239.92.

financial statements,[355] because under these circumstances such subsidiary issuers or guarantors would themselves be Regulation A Issuers. Consistent with existing requirements, if the conditions of proposed Rule 3-10 are satisfied, the subsidiary issuer's or guarantor's financial statements could be omitted. While the substance of this requirement would not change, the Commission proposed amendments to Forms 1-A, 1-K, and 1-SA to conform the requirements to the streamlined structure of proposed Rule 3-10(a). Rather than stating that the subsidiary issuer or guarantor of the parent company must present financial statements as required by existing Rule 3-10, Forms 1-A, 1-K, and 1-SA would instead state that the requirements of proposed Rule 3-10 are applicable to financial statements of the subsidiary issuer or guarantor. Additionally, the proposed amendments would modify each form to require the disclosures specified in proposed Rule 13-01 and specify the location of the disclosures, similar to the proposed note to Rule 13-01(a) but consistent with the requirements of Regulation A. However, if a parent company elects to provide the disclosures in its audited financial statements, the Proposed Alternative Disclosures would be required to be audited.

b. Comments on the Proposed Amendments

One commenter expressed support for applying the proposed amendments to Regulation A issuers.[356]

c. Final Amendments

After considering the public comments, we are adopting the amendments as proposed with minor technical modifications. We believe that investors in Regulation A offerings will

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[355] Forms 1-A and 1-K also specify the audit requirements applicable to financial statements of other entities, which includes those of subsidiary issuers and guarantors of an issuer offering guaranteed securities pursuant to Regulation A. The Commission did not propose any changes to these audit requirements for circumstances where the separate financial statements of subsidiary issuers and guarantors are filed.

[356] *See* letter from Sullivan & Cromwell.

benefit from the simplified disclosures that will result from the amendments and that the cost of providing the disclosures will be reduced for Regulation A Issuers.

Rather than stating that the subsidiary issuer or guarantor of the parent company must present financial statements as required by existing Rule 3-10, Forms 1-A, 1-K, and 1-SA have been amended to state that the requirements of Rule 3-10 are applicable to financial statements of the subsidiary issuer or guarantor. The final amendments also modify each form to require the disclosures specified in Rule 13-01 and specify the location of the disclosures, similar to Rule 13-01(b) but consistent with the requirements of Regulation A. However, if a parent company elects to provide the disclosures in its audited financial statements, the Revised Alternative Disclosures will be required to be audited.

The final amendments also include a technical modification to address the definition of the "parent company" as it relates to issuers under Regulation A. One element of the definition of "parent company" in amended Rule 3-10(b)(1)(ii) is that the parent company "is, or as a result of the subject Securities Act registration statement will be, an Exchange Act reporting company." As a result, strict application of this definition would exclude Regulation A Issuers that are not and will not become Exchange Act reporting companies (i.e., those issuers only report pursuant to Regulation A). As stated in the Proposing Release, we believe these amendments should apply to Regulation A Issuers. Accordingly, we are adopting a technical modification to Forms 1-A, 1-K, and 1-SA to clarify the applicability of the definition of parent company as it relates to Regulation A Issuers.

In addition, as described above, subsidiary issuers and guarantors that are permitted to omit their separate financial statements under Rule 3-10 are also automatically exempt from Exchange Act reporting under Exchange Act Rule 12h-5. Regulation A does not currently

provide for a similar exemption from reporting under the Rule 257(b) reporting requirements for subsidiary issuers and guarantors. As a further technical modification, to ensure consistency in the treatment of subsidiary issuers and guarantors under the Exchange Act and Regulation A, we are adding a new paragraph to Rule 257(b) of Regulation A specifying that subsidiary issuers and guarantors that are permitted to omit their separate financial statements from Forms 1-A, 1-K and 1-SA through the application of Rule 3-10 are automatically exempt from the periodic and current reporting requirements of Rule 257(b) of Regulation A. Consistent with Rule 12h-5, a subsidiary issuer or guarantor that later ceases to satisfy the requirements of Rule 3-10 (*e.g.*, it ceases to be a consolidated subsidiary of the parent company), would then be required to begin filing reports under Rule 257(b) for the period during which it ceased to satisfy the requirements of Rule 3-10.

Lastly, for the same reasons described above,[357] we have created new Exhibit 17 within Item 17 of Form 1-A, which will require the identification of each subsidiary that is a guarantor, issuer, or co-issuer of each guaranteed security qualified or being qualified under Regulation A that the parent company issues or guarantees. This exhibit will also be required in Form 1-K by Item 8(b) of Part II of that form, and in Form 1-SA by Item 4(b) of that form.

4. Issuers of Asset-backed Securities – Third Party Financial Statements

a. Proposed Amendments

The disclosure items for issuers of ABS, set forth in 17 CFR 229.1100 through 229.1125,[358] specify circumstances when an ABS issuer must provide financial information for

[357] *See* discussion in Section III.C.2.b.iii, “Non-Financial Disclosures.”

[358] Regulation AB.

certain third parties[359] in its filings. For example, under Regulation AB, financial information about significant obligors of pool assets and guarantors of those pool assets may be required. In lieu of providing the financial information of certain unrelated significant obligors, if certain conditions are met, Item 1100(c)(2) of Regulation AB permits the ABS issuer to reference the significant obligor's Exchange Act reports (or, for certain circumstances, its parent's Exchange Act reports) on file with the Commission. One of these conditions is that the significant obligor meets one of the categories of eligible significant obligors specified in Item 1100(c)(2)(ii) of Regulation AB. Of these eligible categories, two relate to pool assets guaranteed by a parent or subsidiary of the significant obligor, as outlined in Items 1100(c)(2)(ii)(C) and (D). For these two categories, Item 1100(c)(2)(ii) permits an ABS issuer to reference Exchange Act reports containing the parent's consolidated financial statements if the information requirements of Rule 3-10 of Regulation S-X and certain other conditions are satisfied.

The Commission proposed conforming amendments to Items 1100(c)(2)(ii)(C) and (D) of Regulation AB because of the proposal to relocate the disclosure requirements associated with issuers and guarantors of guaranteed securities to proposed Rule 13-01. Thus, rather than refer to the information requirements of Rule 3-10, Items 1100(c)(2)(ii)(C) and (D) would instead state that disclosures specified in proposed Rule 13-01 must be provided in the reports to be referenced and that financial statements of the subsidiary third party or subsidiary guarantor, as applicable, may be omitted if the requirements of proposed Rule 3-10 are satisfied. The function

[359] These third parties include: (1) significant obligors of pool assets, (17 CFR 229.1112(b)); (2) entities that provide credit enhancement and other support, except for certain derivative instruments, (17 CFR 229.1114(b)(2)); and (3) certain derivative instrument counterparties, (17 CFR 229.1115(b)). Depending on the specified measures of significance, the financial information required for these third parties ranges from selected financial data required by 17 CFR 229.301 (Item 301 of Regulation S-K) to audited financial statements meeting the requirements of Regulation S-X (except Rule 3-05 of Regulation S-X and 17 CFR 210.11-01 through 210.11-03 (Article 11 of Regulation S-X)).

of the eligible categories in Items 1100(c)(2)(ii)(C) and (D) would not change under the proposed revisions.

Additionally, the Commission proposed conforming amendments to Items 1112, 1114, and 1115 of Regulation AB and Item 504 of Regulation S-K because the citations to Regulation S-X in those item requirements refer to Regulation S-X as encompassing "§§ 210.1-01 through 210.12-29." Those citations would be updated to include proposed Rules 13-01 and 13-02 of Regulation S-X.

b. Comments on the Proposed Amendments

We did not receive any comments that addressed the proposed conforming amendments to Regulation AB.

c. Final Amendments

We are adopting the amendments as proposed. Under the final amendments, rather than referring to the information requirements of Rule 3-10, Items 1100(c)(2)(ii)(C) and (D) instead state that disclosures specified in Rule 13-01 must be provided in the reports to be referenced and that financial statements of the subsidiary third party or subsidiary guarantor, as applicable, may be omitted if the requirements of Rule 3-10 are satisfied. The function of the eligible categories in Items 1100(c)(2)(ii)(C) and (D) will not change due to these revisions. Further, we have made conforming amendments to Items 1112, 1114, and 1115 of Regulation AB and Item 504 of Regulation S-K because the citations to Regulation S-X in those item requirements refer to Regulation S-X as encompassing "§§ 210.1-01 through 210.12-29." These citations have been updated to include Rules 13-01 and 13-02 of Regulation S-X.[360]

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[360] Similar to the conforming amendments that update references to Regulation S-X to include new Rules 13-01 and 13-02, we have also made a similar conforming amendment to Item 1100(c)(2)(ii)(F) of Regulation AB. Item 1100(c)(2)(ii)(F) of Regulation AB referred to Regulation S-K, but the related citation extended only from

IV. Rule 3-16 of Regulation S-X

Rule 3-16 contains requirements for affiliates whose securities are pledged as collateral for securities registered or being registered. Existing Rule 3-16 requires a registrant to provide separate annual and interim[361] financial statements for each affiliate whose securities constitute a "substantial portion" of the collateral for any class of securities registered or being registered as if the affiliate were a separate registrant ("Rule 3-16 Financial Statements").[362] Rule 1-02(b) of Regulation S-X defines an "affiliate" by stating that an "*affiliate* of, or a person *affiliated* with, a specific person is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified" (emphasis in original).[363] In practice, affiliates whose securities collateralize a registered security are almost always consolidated subsidiaries of that registrant.

Whether an affiliate's portion of the collateral is a "substantial portion" is determined by comparing the highest amount among the aggregate principal amount, par value, book value, or market value of the affiliate's securities to the principal amount of the securities registered or being registered. If the highest of those values equals or exceeds 20 percent of the principal amount of the securities registered or being registered for any fiscal year presented by the registrant, Rule 3-16 Financial Statements are required.[364]

§§ 229.10 through 229.1208. As Regulation S-K extends from §§ 229.10 through 229.1305, we have made a corresponding conforming change.

[361] Rule 3-16 Financial Statements are not required in quarterly reports, such as on Form 10-Q. *See* Section III.A.6. of the 2000 Release.

[362] Rule 3-16(a) of Regulation S-X. These financial statements are required to be provided for the periods required by Rules 3-01 and 3-02 of Regulation S-X.

[363] Rule 1-02(b) of Regulation S-X.

[364] Rule 3-16(b) of Regulation S-X.

The requirements in existing Rule 3-16 have remained unchanged for many years,[365] and we proposed changes to improve the disclosures required by the rule.

V. Amendments to Rule 3-16 and Partial Relocation to Rule 13-02

A. Overarching Principle

The final amendments to Rule 3-10 are based on the principle that investors in guaranteed securities rely primarily on the consolidated financial statements of the parent company as supplemented by details about the subsidiary issuers and guarantors when making investment decisions. Similarly, the final amendments to Rule 3-16 are based on our belief that the investors in securities that are collateralized by securities of a registrant's affiliate(s) rely primarily on the consolidated financial statements of the registrant and supplemental details about the affiliate(s) whose securities are pledged when making investment decisions. The pledge of collateral is a residual equity interest that could potentially be foreclosed upon only in the event of default and almost always relates to an affiliate whose financial information is already included in the registrant's consolidated financial statements.[366] While we believe information about the affiliate(s) whose securities are pledged as collateral is material for an investor to consider potential outcomes in the event of foreclosure, we believe that separate financial statements of each such affiliate are not material in most situations. Rather, we believe the nature and extent of disclosures about the affiliate(s) and the related collateral arrangement should be consistent with the supplemental nature of the information and better balanced with the cost of providing

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[365] *See Separate Financial Statements Required by Regulation S-X*, Release No. 33-6359 (Nov. 6, 1981) [46 FR 56171 (Nov. 16, 1981)].

[366] Generally, in the event of default, the holders of debt without the benefit of a pledge of collateral are comparatively disadvantaged. In the event of default, a holder of a debt security can make claims for payment directly against the issuer. Unpledged assets of an issuer's subsidiaries would generally only be indirectly accessible to the holder through bankruptcy proceedings, subordinate to direct claims against those subsidiaries or their assets. A debt security that is secured by a pledge of collateral typically allows a holder to make direct claims to that collateral in the event of default.

such disclosures.

Several commenters expressed support for the overarching principle that the consolidated financial statements of the registrant are the most relevant information for investors when making investment decisions about that registrant's securities that are collateralized by securities of its affiliates.[367]

B. Overview of the Proposed and Final Amendments

1. Proposed Amendments

The proposed rule would replace the existing requirement—that a registrant provide separate financial statements for each affiliate whose securities are pledged as collateral—with a requirement that a registrant provide financial and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement to the registrant's consolidated financial statements. Similar to the proposed disclosures for issuers and guarantors of guaranteed securities discussed above, the proposed amendments would give registrants the flexibility to provide the proposed disclosures inside or outside the registrant's audited annual and unaudited interim financial statements in registration statements covering the offer and sale of the collateralized securities and any related prospectus, as well as annual and quarterly Exchange Act periodic reports required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed.[368] Accordingly, the disclosure requirements in Rule 3-16 would have been amended and relocated to proposed Rule 13-02 and Rule 3-16 would have been removed and reserved.

Additionally, instead of requiring disclosure only when the pledged securities meet or

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[367] *See, e.g.*, letters from Cravath, Davis Polk, EY, FEI, and Nareit.

[368] *See* Section V.F, "Location of Disclosures and Audit Requirement," below.

exceed a numerical threshold relative to the securities registered or being registered under the existing rule's "substantial portion" test, the proposed amendments would require the specified disclosures unless they are not material to holders of the collateralized security. Further, the proposed changes would have required disclosure of any additional information about the collateral arrangement and each affiliate whose security is pledged as collateral that would be material to making an investment decision with respect to the collateralized security. The proposed amendments, comments received, and final amendments are discussed further below.

2. Comments on the Proposed Amendments

Comments on the proposed amendments were generally supportive. Several commenters supported the proposed amendments to replace existing Rule 3-16 with simplified financial and non-financial disclosures about the affiliates and collateral arrangements.[369] Some commenters asserted the proposed amendments to Rule 3-16 would benefit investors, who would receive information critical to making informed decisions in a simpler format, as well as registrants by reducing the costs of conducting these types of debt offerings.[370] Several commenters indicated that the requirements of existing Rule 3-16 were overly burdensome and have caused many issuers to structure transactions to avoid application of existing Rule 3-16, by either avoiding pledges of an affiliate's securities or pursuing unregistered offerings where separate financial statements are not included.[371] One commenter who expressed general support for the Commission's effort to amend Rule 3-16 recommended that the Commission eliminate Rule 3-16 without amending or replacing it.[372] This commenter asserted that other disclosure

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[369] *See, e.g.*, letters from Davis Polk, Dell, EY, FEI, Grant Thornton, Nareit, NYC Bar, PWC, and Sullivan & Cromwell.

[370] *See, e.g.*, letters from Davis Polk, EY, and FEI.

[371] *See* letters from Cravath, Davis Polk, Dell, NYC Bar, and PWC.

[372] *See* letter from Cravath.

requirements and market incentives were sufficient to cause registrants to disclose relevant material information in offerings of debt secured by securities of affiliates.

3. Final Amendments

After considering the public comments, we are adopting the amendments largely as proposed, with modifications. Although one commenter recommended eliminating rather than amending or replacing existing Rule 3-16, as supported by several other commenters, the final amendments replace the requirement to provide separate financial statements of an affiliate with financial and non-financial disclosures about the affiliate(s) and collateral arrangement(s). We agree with those commenters that asserted such a change will benefit investors who would receive information critical to making informed decisions in a simpler format, as well as registrants by reducing offering costs.[373] These amended financial and non-financial disclosures will be included in new Rule 13-02[374] and are discussed below.[375]

C. Financial Disclosures

1. Level of Detail

a. Proposed Amendments

Existing Rule 3-16 requires separate financial statements of each affiliate whose securities constitute a substantial portion of the collateral. These affiliates whose securities are pledged as collateral are almost always consolidated subsidiaries of the registrant, and their

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[373] *See, e.g.*, letters from Davis Polk, EY, and FEI.

[374] The disclosures specified in proposed Rule 13-02(a) would be required "[f]or each class of security registered or being registered…" As a technical modification, final Rule 13-02(a) has been revised to require the disclosures specified therein "[f]or each security subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, and for each security the offer and sale of which is being registered under the Securities Act of 1933,…"

[375] As a transitional matter, the final amendments do not eliminate existing Rule 3-16, which will continue to be applicable to registered collateralized securities with collateral release provisions issued and outstanding as of the effective date of the final amendments. *See* Section VI.B "Rule 3-16 Collateral Release Provisions."

financial information is thus already reflected in the registrant's consolidated financial statements. Proposed Rule 13-02(a)(4) would require Summarized Financial Information, a widely understood and common set of requirements, for each such affiliate, which would include select balance sheet and income statement line items.[376] Disclosure of additional line items of financial information beyond what is specified in proposed Rule 13-02(a)(4) would have been required by proposed Rule 13-02(a)(5) if material to an investment decision. For example, if a material amount of reported revenues of the affiliate(s) are derived from transactions with related parties, such as other subsidiaries of the registrant whose securities are not pledged as collateral, disclosure of such related party revenues would be required.

The proposed rule did not include a financial statement requirement for when the affiliate is either a non-subsidiary controlled affiliate of the registrant or a controlling affiliate of the issuer, because practice has demonstrated that affiliates whose securities are pledged as collateral are almost always consolidated subsidiaries of the registrant. In the rare circumstances where the affiliate is not a consolidated subsidiary of the registrant, proposed Rule 13-02(a)(5) would have required the registrant to disclose any other quantitative or qualitative information that would be material to making an investment decision with respect to the collateralized security.[377] Because the unconsolidated affiliate's financial information is not included in the registrant's consolidated financial statements, the Commission indicated in the Proposing Release that it would expect disclosure beyond what is specified in proposed Rule 13-02(a)(1) through (4) to be provided in these circumstances.[378] In this regard, separate financial statements of the

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[376] As with proposed Rule 13-01(a)(4), Summarized Financial Information would be the information specified in Rule 1-02(bb)(1) of Regulation S-X.

[377] *See* Section V.E, "When Disclosure is Required."

[378] *See* Section V.C,1 of the Proposing Release.

unconsolidated affiliate may be necessary if material to an investment decision.[379]

b. Comments on the Proposed Amendments

Several commenters generally supported the proposal to replace the separate financial statements of an affiliate required by existing Rule 3-16 with Summarized Financial Information.[380] Some commenters asserted that the proposed amendment would reduce a registrant's costs and burdens[381] while still providing investors with clear and sufficient information.[382]

One commenter urged the Commission to adopt an even more simplified and flexible approach, based on the commenter's assertion that offerings pursuant to Rule 144A include less detail than what is required in Summarized Financial Information.[383] This commenter recommended that the final rule only require quantitative disclosure of revenue, operating income, assets, and liabilities of the relevant affiliates as a group.

Additionally, although they mostly agreed with the proposed amendment to replace the separate financial statements of an affiliate with less detailed financial information, a few commenters stressed that the Commission should require more information than is called for by Summarized Financial Information.[384] One commenter indicated that the final rule should include the balance sheet and income statement information of the collateralizing subsidiaries in a level of detail similar to that specified in Article 10 of Regulation S-X.[385] Another commenter

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[379] *See* proposed Rule 13-02(a)(5). *See also* 17 CFR 210.3-13 ("Rule 3-13 of Regulation S-X").

[380] *See, e.g.*, letters from Cravath, Davis Polk, EY, and FEI.

[381] *See, e.g.*, letters from Davis Polk, EY, FEI, and PWC.

[382] *See* letters from EY and FEI.

[383] *See* letter from NYC Bar.

[384] *See, e.g.*, letters from EY and PWC.

[385] *See* letter from PWC.

recommended that the Commission require additional disclosures regarding intercompany and related-party transactions to accompany and thereby enhance the transparency of the Summarized Financial Information when securities of affiliates are pledged as collateral in a manner similar to its recommendations for the level of detail in the proposed amendments to Rule 3-10.[386]

c. Final Amendments

We are adopting amendments in substantially the form proposed, but with modifications in response to comments received. As described above, one commenter recommended different and more limited information than what is required by Summarized Financial Information and another recommended more detailed information. However, and consistent with our rationale for the corresponding requirement in the final amendments to Rule 13-01(a)(4) discussed above,[387] we agree with those commenters that supported requiring Summarized Financial Information. We believe the select balance sheet and income statement line items that Summarized Financial Information requires are focused on the information that is most likely to be material to an investment decision and should be less burdensome for registrants to prepare than Rule 3-16 Financial Statements. Under the final amendments, disclosure of additional line items of financial information beyond the line items specified in Summarized Financial Information is required if necessary to comply with Rule 13-02(a)(6) and (7).[388]

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[386] *See* letter from EY. In its comments on the level of detail in the proposed amendments to Rule 3-10, the commenter recommended requiring disclosure of investments held by the obligated group in non-obligated subsidiaries, intercompany or related-party transactions between the obligated and non-obligated groups, and when the obligated group includes variable interest entities, a cross-reference to the relevant disclosures in the consolidated financial statements.

[387] *See* discussion in Section III.C.2.a.i.(C), "Level of Detail."

[388] Proposed Rule 13-02(a)(1) through (4) set forth proposed requirements to disclose specific financial and non-financial information. Proposed Rule 13-02(a)(5), which would have required disclosure of "any other quantitative or qualitative information that would be material to making an investment decision with respect to

Although the Commission requested comment on whether the final rules should specifically address the rare circumstances where the affiliate is not a consolidated subsidiary of a registrant, we did not receive any comments. As such, consistent with the proposal, the final rule does not include requirements specific to non-subsidiary affiliates, such as a non-subsidiary controlled affiliate of the registrant or a controlling affiliate of the issuer. However, and also consistent with the proposal, in the rare circumstances where the affiliate is not a consolidated subsidiary of the registrant, Rules 13-02(a)(6) and (7) would require the registrant to provide any financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral and sufficient information so as to make the financial and non-financial information presented not misleading.[389] Because the unconsolidated affiliate's financial information is not included in the registrant's consolidated financial statements, in these circumstances disclosure beyond what is specified in Rule 13-02(a)(1) through (4) may need to be provided. In this regard, separate financial statements of the unconsolidated affiliate may be necessary to satisfy the requirements of Rules 13-02(a)(6) and (7).[390]

The Proposing Release included an example of when incremental disclosure of related party revenues would be required under the proposed rule.[391] Specifically, if a material amount

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the collateralized security," was included to require disclosure about the collateral arrangements and affiliates whose securities are pledged that would be material but was not otherwise already required by the specified proposed financial and non-financial disclosures. Instead of proposed Rule 13-02(a)(5), the final amendments include Rules 13-02(a)(6) and (7), which require disclosure of "[a]ny financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral" and "[s]ufficient information so as to make the financial and non-financial information presented not misleading," respectively. *See* discussion within Section V.E.3, "When Disclosure is Required."

[389] *See* Section V.E, "When Disclosure is Required."

[390] *See also* Rule 3-13 of Regulation S-X.

[391] *See* Section V.C.1 of the Proposing Release. Such disclosure would have been required by proposed Rule 13-02(a)(5).

of reported revenues of the affiliate(s) are derived from transactions with related parties, such as other subsidiaries of the registrant whose securities are not pledged as collateral, disclosure of such related party revenues would be required. Instead of including this as an example of when disclosure would be required under Rule 13-02(a)(6) and (7), we agree with the commenter that recommended including a requirement to separately disclose intercompany and related-party transactions in addition to Summarized Financial Information, which the commenter asserted would enhance the transparency of the Summarized Financial Information.[392] Accordingly, as adopted, Rule 13-02(a)(4)(iii) requires an affiliate's amounts due from, amounts due to, and transactions with certain entities not included in that affiliate's Summarized Financial Information to be presented in separate line items, to the extent material. Such entities include the registrant, any of the registrant's subsidiaries not included in the Summarized Financial Information of the affiliate,[393] and related parties. For example, material revenue transactions between an affiliate and a separate non-pledged subsidiary of the registrant that is not included in that affiliate's financial information (i.e., the non-pledged subsidiary would not be a consolidated subsidiary of the affiliate) must be presented in a separate line item. If the transaction was between the affiliate and another affiliate whose securities are pledged, and those affiliates' Summarized Financial Information is presented on a combined basis pursuant to Rule 13-02(a)(4)(i), separate presentation of the transaction is not required as it will be required to be

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392 *See* letter from EY. This commenter suggested flexibility to provide these disclosures as either explanatory notes or separate line items. Based on the nature of these items, and to drive consistency in the disclosures between registrants, Rule 13-02(a)(4)(iii) requires the amounts to be in separate line items.

393 These entities include, for example, other affiliates whose securities are pledged as collateral but whose Summarized Financial Information required by Rule 13-02(a)(4) is presented separately from the affiliate in question, as well as other subsidiaries of the registrant that are not subsidiaries of the affiliate.

eliminated in accordance with Rule 13-02(a)(4)(ii).[394] We expect clearly establishing this expectation as a stated requirement will assist in the preparation of the disclosures and provide useful information to investors, and agree with one commenter that such separate disclosure enhances the transparency of the Summarized Financial Information presented.[395]

Lastly, for the same reasons described in connection with the corresponding requirement in final Rule 13-01(a)(4),[396] final Rule 13-02(a)(4) includes a requirement to briefly describe the basis of presentation applicable to each of the required financial disclosures therein. In addition to simplifying the final rule, we believe this requirement will better inform users about the form and content of the disclosures provided pursuant to final Rule 13-02(a)(4).[397] We believe such disclosure enhances the understandability of the financial information provided.

2. Presentation on a Combined Basis

a. Proposed Amendments

The existing test used to determine whether the securities of an affiliate constitute a "substantial portion" of the collateral for securities registered or being registered is required to be performed for each affiliate whose securities are pledged. In the Proposing Release, the Commission noted that the existing requirements can result in potentially confusing disclosure

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[394] *See* Section V.C.2, "Presentation on a Combined Basis."

[395] *See* letter from EY.

[396] *See* Section III.C.2.a.i.(C), "Level of Detail."

[397] Such disclosure could state, for example, that the financial information presented is that of the affiliates whose securities are pledged as collateral for the registered securities. If applicable, the disclosure could also state, for example: that the financial information of affiliates is presented on a combined basis; intercompany balances and transactions between affiliates have been eliminated; that the affiliate's amounts due from, amounts due to, and transactions with the registrant, any of the registrant's subsidiaries not included in the summarized financial information of the affiliate(s) subsidiaries, and related parties have been presented in separate line items; and that financial information of certain identified affiliates has been presented separately due to disclosed facts and circumstances applicable to those subsidiaries (as required by Rule 13-02(a)(4)(iv)).

about the extent of collateral.[398] For example, when the securities of a registrant's subsidiary ("Subsidiary A") are pledged as collateral and the securities of an entity consolidated by Subsidiary A ("Subsidiary B") are also pledged, separate Rule 3-16 Financial Statements may be required for both Subsidiary A and Subsidiary B. In such a scenario, Subsidiary B's assets, liabilities, operations, and cash flows would be included twice (i.e., in the financial statements of both Subsidiary A and Subsidiary B). The proposed amendments would permit a registrant to disclose the financial information of consolidated affiliates on a combined rather than individual basis. Proposed Rule 13-02(a)(4) would require intercompany transactions between affiliates presented on a combined basis to be eliminated. Unlike the proposed amendments to Rule 13-01, because the securities pledged as collateral are an equity interest in that pledgor affiliate, the financial information of all subsidiaries that would be consolidated by that affiliate would be included in the Summarized Financial Information presented pursuant to proposed Rule 13-02(a)(4), even if the securities of those subsidiaries are not pledged as collateral.[399]

The proposed rule took into consideration that there may be circumstances where separate financial information about certain affiliates is material to an investment decision. Accordingly, when the information provided in response to proposed Rule 13-02 is applicable to one or more, but not all, affiliates, proposed Rule 13-02(a)(4) would require separate disclosure of Summarized Financial Information for the affiliates to which it is applicable. For example, if securities of one, but not all, of the affiliates that are pledged as collateral are subject to a contractual or statutory delay from being transferred to the holder of the collateralized security in

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398 *See* Section V of the Proposing Release.

399 Proposed Rule 13-01 would prohibit combining the financial information of non-issuer and non-guarantor subsidiaries of issuers and guarantors with that of issuers and guarantors in the Proposed Alternative Disclosures in order to distinguish the financial information of entities that are legally obligated to pay from those that are not. Proposed Rule 13-02 relates to pledged residual equity interests in affiliates as opposed to guarantees to pay, and as such, no similar prohibition is necessary.

the event of default, disclosure of these facts and circumstances would be required by proposed Rule 13-02(a)(2). In that case, proposed Rule 13-02(a)(4) would require separate disclosure of the Summarized Financial Information specified in proposed Rule 13-02(a)(4) for that affiliate.

Generally, a pledge of an affiliate's securities as collateral includes all of the outstanding ownership interests in that affiliate, which are held directly or indirectly by the entity issuing the debt securities. There could be circumstances where either the pledge of collateral does not include all of the outstanding ownership interests in the affiliate held by the issuing entity, or certain ownership interests in the affiliate are held by a third party and therefore unpledged. In such cases, disclosure of these facts and circumstances would be required by proposed Rule 13-02(a)(5), which would have required disclosure of any other quantitative or qualitative information that would be material to making an investment decision with respect to the collateralized security. If such circumstances were applicable to one or more, but not all, affiliates, proposed Rule 13-02(a)(4) would require separate disclosure of Summarized Financial Information for the affiliates to which it is applicable.

b. Comments on the Proposed Amendments

The majority of comments we received on the proposed amendments supported permitting issuers to disclose the financial information of the group of consolidated affiliates whose securities are pledged on a combined rather than individual basis.[400] One commenter contended that providing this type of disclosure would allow issuers to focus on disclosure that is material and important to investors for making an informed investment decision.[401]

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[400] *See, e.g.*, letters from Cravath, Davis Polk, Dell, NYC Bar, and PWC.

[401] *See* letter from Dell.

Consistent with its comments on proposed Rule 13-01(a)(4), one commenter asserted the proposed amendment that would require registrants to separately present the Summarized Financial Information for an affiliate if the required qualitative disclosures differed within the group of affiliates was overly prescriptive.[402] This commenter recommended permitting greater flexibility in such instances, such as allowing a registrant to present Summarized Financial Information for the aggregate group with supplemental qualitative or quantitative disclosure regarding material differences within the group.

c. Final Amendments

After considering the public comments, we are adopting the amendments substantially as proposed with modifications, including separating certain requirements within proposed Rule 13-02(a)(4) into distinct subparagraphs for clarity.

As supported by several commenters, we are adopting the proposed amendment that permits the supplemental financial disclosures of affiliates specified in Rule 13-02(a)(4) to be provided on a combined basis. Specifically, Rule 13-02(a)(4)(i) will permit the Summarized Financial Information of each affiliate whose securities are pledged as collateral that is consolidated in the registrant's consolidated financial statements to be presented on a combined basis, and Rule 13-02(a)(4)(ii) will require that intercompany balances and transactions between affiliates whose information is presented on a combined basis to be eliminated.[403] We agree with the commenter that stated that the ability to provide the financial information on a combined

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[402] *See* letter from EY.

[403] Proposed Rule 13-02(a)(4) would have required, in part, that "[i]ntercompany transactions between affiliates whose summarized financial information is presented on a combined basis shall be eliminated." While we are adopting the amendments substantially as proposed, final Rule 13-02(a)(4)(ii) clarifies that intercompany "balances" must also be eliminated in this regard.

basis would allow registrants to focus on disclosure that is material and important to investors without omitting information investors need for an informed investment decision.[404] Consistent with the proposed amendments, unlike the final amendments to Rule 13-01, because the securities pledged as collateral are an equity interest in that pledgor affiliate, the financial information of all subsidiaries that would be consolidated by that affiliate will be included in the Summarized Financial Information presented pursuant to Rule 13-02(a)(4), even if the securities of those subsidiaries are not pledged as collateral.[405]

We are adopting, substantially as proposed, the requirement that when information provided in response to Rule 13-02 is applicable to one or more, but not all, affiliates, separate disclosure of Summarized Financial Information for the affiliates to which the information applies is required. This requirement is stated in Rule 13-02(a)(4)(iv). For clarity, the final rule includes an example of disclosure required by Rule 13-02 that would trigger separate disclosure for the affected affiliates.[406] The example is disclosure that is required by Rule 13-02(a)(3): "the trading market for the affiliate's security pledged as collateral or a statement that there is no market." Consistent with the corresponding requirement in final Rule 13-01(a)(4)(iv), we believe a registrant should consider materiality[407] and exercise judgment in determining the

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[404] *See* letter from Dell.

[405] Rule 13-01(a)(4)(iii) requires the financial information of non-issuer and non-guarantor subsidiaries of issuers and guarantors to be excluded from the financial information of issuers and guarantors in order to distinguish the financial information of entities that are legally obligated to pay from those that are not. Rule 13-02 relates to pledged residual equity interests in affiliates as opposed to guarantees to pay, and as such, no similar prohibition is necessary.

[406] This example is being included to clarify one situation requiring separate presentation of the Summarized Financial Information applicable to some but not all affiliates.

[407] The disclosures specified in Rule 13-02(a) are required to the extent material. Rules 13-02(a)(6) and (7) require disclosure of "[a]ny financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral," and "[s]ufficient information so as to make the financial and non-financial information presented not misleading," respectively. *See* discussion within Section V.E.3, "When Disclosure is Required."

appropriate level of aggregation of affiliates based on the nature of the disclosure. In this regard, it may be useful to consider quantitative factors, such as the financial significance of the affected affiliates, and qualitative factors, such as the nature of the facts and circumstances applicable to the affiliates. For example, if the trading market for an affiliate's security is the same as some but not all affiliates, and such similar affiliates represent a substantial portion of the Summarized Financial Information of the combined affiliates, aggregation of the Summarized Financial Information of such affiliates may be appropriate depending on the facts and circumstances. Conversely, it may not be appropriate to aggregate the Summarized Financial Information of such affiliates where the trading markets for the securities are different.

One commenter stated its belief that requiring separate presentation of the Summarized Financial Information applicable to affected affiliates under proposed Rule 13-02(a)(4) is overly prescriptive.[408] Consistent with final amendments to Rule 13-01(a)(4)(iv), while we do believe separate disclosure of Summarized Financial Information for the affected affiliates would be appropriate in most cases, we also agree with this commenter's suggestion that it could be acceptable to present Summarized Financial Information for the combined affiliates with supplemental qualitative and/or quantitative disclosure to inform investors about the disclosures affecting one or more, but not all affiliates. Accordingly, Rule 13-02(a)(4)(iv) permits, in limited circumstances, narrative disclosure to be provided in lieu of the separate Summarized Financial Information of the affected affiliates to which the paragraph otherwise requires. The limited circumstances when a narrative may be provided are when such separate financial information applicable to the affected affiliates can be easily explained and understood. For example, if certain terms and conditions of the collateral arrangement are applicable to one affiliate, and that

[408] *See* letter from EY.

affiliate constitutes a similar percentage of the combined group of affiliates' assets, liabilities, and operations, narrative disclosure may be permissible depending on the facts and circumstances. In other circumstances, such as if that affiliate's financial significance to the combined group of affiliates is not easily explained (*e.g.*, the affiliate constitutes varying proportions of each line item within the combined group of affiliates' Summarized Financial Information), narrative disclosure would not be sufficient.

As described in the Proposing Release, generally, a pledge of an affiliate's securities as collateral includes all of the outstanding ownership interests in that affiliate, which are held directly or indirectly by the entity issuing the debt securities. There could be circumstances where either the pledge of collateral does not include all of the outstanding ownership interests in the affiliate held by the issuing entity, or certain ownership interests in the affiliate are held by a third party and therefore unpledged. In such cases, disclosure of these facts and circumstances would be required by Rules 13-02(a)(6) and (7) if material for investors to evaluate the pledge of the affiliate's securities as collateral, or so as to make the financial and non-financial information presented not misleading.[409] If such circumstances are applicable to one or more, but not all, affiliates, Rule 13-02(a)(4)(iv) would require separate disclosure of Summarized Financial Information for the affiliates to which it is applicable.

3. Periods to Present

a. Proposed Amendments

Proposed Rule 13-02(a)(4) would require the disclosure of Summarized Financial Information as of, and for, the most recently ended fiscal year and interim period included in the

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[409] *Supra* note 388.

registrant's consolidated financial statements. Under the existing rule, Rule 3-16 Financial Statements are not required in quarterly reports, such as on Form 10-Q.[410] The proposed rule would require disclosure in quarterly filings, such as Form 10-Q. Because Item 1 of Part I of Form 10-Q requires a registrant to provide the information required by Rule 10-01 of Regulation S-X, the Commission proposed adding Rule 10-01(b)(10) to require compliance with proposed Rule 13-02.

b. Comments on the Proposed Amendments

Comments on the proposed amendments were mixed. A few commenters supported providing the disclosure of the Summarized Financial Information as of, and for, the most recently ended fiscal year and interim period included in the registrant's consolidated financial statements.[411] However, some commenters suggested that the Commission should not require interim disclosures unless there had been a material change since the most recent annual period.[412] Two of these commenters contended that this change would be consistent with Article 10 of Regulation S-X.[413] One commenter stated that interim reporting would be burdensome and costly.[414] This commenter asserted annual disclosure should be sufficient for investors to make informed investment decisions.

c. Final Amendments

After considering the comments received, we are adopting the amendments as proposed, with one clarification. As adopted, consistent with final Rule 13-01(a)(4)(v), final Rule 13-

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[410] *See* Section III.A.6 of the 2000 Release.

[411] *See* letters from Grant Thornton and NYC Bar.

[412] *See* letters from Deloitte, EY, FEI, and PWC.

[413] *See* letters from Deloitte and PWC.

[414] *See* letter from SIFMA.

02(a)(4)(v) requires the financial disclosures to be provided as of and for the most recently ended fiscal year and year-to-date interim period included in the registrant's consolidated financial statements.

We are not adopting the approach some commenters recommended, which would have required the most recent interim period in limited circumstances, such as when there had been a material change since the most recent annual period. We continue to believe, as the Commission stated in the Proposing Release, that the most recent interim period should be provided so that investors can make decisions based on the most recent information available.[415] Furthermore, while we acknowledge the concerns about the burden to provide interim information in all cases, consistent with our rationale for the corresponding requirement in the final amendments to Rule 13-01(a)(4)(v),[416] we believe the adopted approach will significantly reduce burdens on issuers while providing investors with the information they need to make informed investment decisions. For similar reasons, we are adopting the proposal that requires the amended disclosures in quarterly filings, such as Form 10-Q. To accomplish this, because Item 1 of Part I of Form 10-Q requires a registrant to provide the information required by Rule 10-01 of Regulation S-X, we have added Rule 10-01(b)(10) to require compliance with Rule 13-02. Proposed Rule 13-02(a)(4) did not specify that the required interim period was only for the most recent year-to-date period. In certain filings, such as a registrant's Form 10-Q for its second and third fiscal quarters, both year-to-date and quarter-to-date interim financial statements are required to be presented for the registrant. To avoid any such confusion, and consistent with the proposed rule's intent and suggestions from certain commenters,[417] the final rule's interim period

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415 *See* Section V.C.3 of the Proposing Release.

416 *See* discussion in Section III.C.2.a.iii.(C), "Periods to Present."

417 *See, e.g.*, letters from EY, FEI, and PWC.

requirement has been revised to clarify that only the most recent year-to-date interim period is required.

D. Non-Financial Disclosures

1. Proposed Amendments

Under the existing rule, a registrant is not required to provide non-financial disclosures about the affiliates and the collateral arrangement unless they would be included as part of the Rule 3-16 Financial Statements. In addition to proposing amendments to the financial information required about the affiliates whose securities are pledged as collateral, the proposed rule would also require specific non-financial disclosures to be provided. Proposed Rules 13-02(a)(1) through (3) would require certain non-financial disclosures about the securities pledged as collateral, each affiliate whose securities are pledged, the terms and conditions of the collateral arrangement, and whether a trading market exists for the pledged securities. While the proposed requirements comprised the items the Commission believed would most likely be material to an investor, there could be additional facts and circumstances specific to particular affiliates that would be material to holders of the collateralized security. In that case, proposed Rule 13-02(a)(5) would have required disclosure of those facts and circumstances.[418] Additionally, when a non-financial disclosure is applicable to one or more, but not all, affiliates, proposed Rule 13-02(a)(4) would require separate disclosure of Summarized Financial Information for the affiliates to which it is applicable.[419]

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[418] *See* discussion in Section V.E, "When Disclosure is Required."

[419] *See* discussion in Section V.C.2, "Presentation on a Combined Basis."

2. Comments on the Proposed Amendments

Comments on the proposed amendments were generally supportive. Some commenters generally supported the proposed rule's requirement to provide, to the extent material, certain non-financial disclosures about the securities pledged as collateral, each affiliate whose securities are pledged, the terms and conditions of the collateral arrangement, and whether a trading market exists for the pledged securities.[420] One asserted that such disclosure would be helpful to investors.[421]

One commenter, however, stated that it was not clear why a description of the security pledged as collateral and disclosure of each affiliate whose security is pledged would be meaningful to an investor in the context of financial disclosures.[422] This commenter recommended that the Commission consider requiring such disclosures be included as an exhibit to the filing similar to the list of subsidiaries required by Item 601.

3. Final Amendments

After considering the comments received, we are adopting the amendments largely as proposed with modifications based on comments received. Consistent with the Proposing Release, we believe these requirements will result in enhanced narrative disclosures that would improve investor understanding of the affiliates and the collateral arrangement(s) and make the financial disclosures they accompany easier to understand. While the adopted non-financial disclosures are composed of the items we believe are most likely to be material to an investor, disclosure of additional facts and circumstances is required if necessary to comply with Rule 13-

[420] *See* letters from Davis Polk, FEI, and NYC Bar.

[421] *See* letter from Davis Polk.

[422] *See* letter from PWC.

02(a)(6) and (7).[423] Additionally, when a non-financial disclosure is applicable to one or more, but not all, affiliates, Rule 13-02(a)(4)(iv) requires, to the extent it is material, separate disclosure of Summarized Financial Information for the affiliates to which the non-financial disclosure applies.[424]

Consistent with the final amendments to Rule 13-01 and our related rationale,[425] while we are not adopting one commenter's[426] suggestion that disclosure of the identification of the security pledged as collateral only be required upon registration of the collateralized securities and the related prospectuses, we are adopting the commenter's alternative suggestion that this disclosure be included in an exhibit to the subject filing.[427] Due to this change, we have revised Rule 13-02(a)(1) to require a description of the securities pledged as collateral and the affiliates whose securities are pledged as collateral. We believe this approach will provide the information to investors in a more efficient manner and make the accompanying financial and non-financial disclosures easier to understand.

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[423] *Supra* note 388.

[424] *See* discussion in Section V.C.2, "Presentation on a Combined Basis."

[425] *See* discussion in Section III.C.2.b.iii, "Non-Financial Disclosures."

[426] *See* letter from PWC.

[427] *See* amended Item 601(a) and new Item 601(b)(22) of Regulation S-K. A registrant will be required to list, under an appropriately captioned heading that identifies the associated securities, each of its affiliates whose security is pledged as collateral for the registrant's security registered or being registered. For each affiliate, the security or securities pledged as collateral must also be identified. An affiliate need not be listed more than once so long as its role as affiliate whose security is pledged as collateral for a registrant's security is clearly indicated with respect to each applicable security. Similarly, if an affiliate required to be identified in this exhibit is also required to be identified as an issuer, co-issuer, or guarantor of a guaranteed security in this exhibit, the entity need not be listed more than once so long as its role as issuer, co-issuer, or guarantor of a guaranteed security and/or as affiliate whose security is pledged as collateral for a registrant's security is clearly indicated with respect to each applicable security. This exhibit will be required in Forms S-1, S-3, S-4, SF-1, SF-3, S-11, F-1, F-3, F-4, 10, 10-Q, and 10-K. In addition, we are making corresponding revisions to the exhibit requirements of Form 20-F by creating new Exhibit 17 within Item 19, and Form 1-A by creating new Exhibit 17 within Item 17. This exhibit will also be required in Forms 1-K and 1-SA. *See* discussion in Section V.H.3.c, "Offerings pursuant to Regulation A".

E. When Disclosure is Required

1. Proposed Amendments

As discussed above,[428] existing Rule 3-16 requires separate financial statements for each affiliate whose securities are pledged as collateral when those securities constitute a "substantial portion" of the collateral. If the numerical thresholds specified in the rule are not met, no disclosure is required. At the same time, if the numerical thresholds are met, Rule 3-16 Financial Statements may be required even though the affiliate represents an insignificant portion of the registrant's consolidated financial statements. The proposed rule would replace this test with one based on materiality, similar to the framework in proposed Rule 13-01.[429] Under this approach, investors would be provided with disclosure where it is material, whereas under the existing rule, no disclosure would be provided unless the collateral represented a "substantial portion."

Proposed Rule 13-02(a) would have required the disclosures specified in proposed Rule 13-02(a)(1) through (4) to the extent material to holders of the collateralized security. For example, under the proposed rule, if the Summarized Financial Information of the combined affiliates required by proposed Rule 13-02(a)(4) is not materially different from corresponding amounts in the registrant's consolidated financial statements, the information could be omitted. While the disclosures specified in proposed Rule 13-02(a)(1) through (4) could have been omitted if not material to holders of the collateralized security, for clarity, proposed Rule 13-02(a)(4) would have required the registrant to include a statement that the financial disclosures have been omitted and disclose the reason(s) why the disclosures are not material.

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[428] *See* Section IV, "Rule 3-16 of Regulation S-X."

[429] Whether a disclosure specified in proposed Rule 13-02 may be omitted or whether additional disclosure would have been required by proposed Rule 13-02(a)(5), as discussed below, depends on whether it would be material to a reasonable investor. *See* Section III.C.2.c.iii, "When Disclosure is Required," above.

Conversely, there may be additional information about the collateral arrangement and affiliates beyond the financial disclosures specified in proposed Rule 13-02(a)(4) or the non-financial disclosures specified in proposed Rules 13-02(a)(1) through (3) that would be material to holders of the collateralized security. Accordingly, proposed Rule 13-02(a)(5) would have required disclosure of any quantitative or qualitative information that would be material to making an investment decision with respect to the collateralized security. For example, additional financial information beyond what is required by Summarized Financial Information would have been required if that information is material to an investment decision in the collateralized security.

2. Comments on the Proposed Amendments

Comments on the proposals were mixed. Several commenters generally supported replacing existing Rule 3-16's "substantial portion" test with a principles-based materiality standard.[430] Two commenters asserted that the existing "substantial portion" test could lead to registrants disclosing information that is not essential to making an informed investment decision.[431] One of these commenters contended that moving to a materiality standard under the proposed amendments would only require registrants to incur the cost to provide the required disclosure when doing so would be helpful to investors.[432] However, a few commenters supported some type of numerical threshold for establishing whether disclosure would be deemed not material.[433] One commenter suggested establishing a 50% numerical threshold as a

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430 *See, e.g.*, letters from CII, Cravath, Davis Polk, Deloitte, EY, and FEI.

431 *See* letters from Davis Polk and Dell.

432 *See* letter from Davis Polk.

433 *See* letters from NYC Bar and SIFMA.

non-exclusive safe harbor at or below which the share collateral would be deemed not material and above which the registrant must evaluate materiality.[434] The other commenter suggested retaining existing Rule 3-16's 20% threshold in the form of a safe harbor, such that any collateral arrangement that does not trigger the existing rule would be deemed not material for the purposes of the new rule.[435]

Consistent with comments received in connection with the corresponding requirement in proposed Rule 13-01(a)(5),[436] a number of commenters opposed proposed Rule 13-02(a)(5), which would have required disclosure of any information that would be material to making an investment decision with respect to the collateralized security.[437] One commenter expressed concern that this requirement possibly went beyond the Commission's existing materiality standard.[438] Some commenters asserted that the proposed requirement would cause uncertainty for issuers and auditors as they seek to apply and assess the adequacy of the disclosures.[439] One commenter asserted that the proposed requirement would override all other relevant disclosure obligations;[440] another commenter questioned whether the Commission was proposing to modify the overall materiality assessment in its disclosure framework;[441] and a third commenter stated its belief that in addition to creating litigation risk, the proposed rule could extend the duty to

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[434] *See* letter from SIFMA.

[435] *See* letter from NYC Bar.

[436] *See* Section III.C.2.c.ii, "When Disclosure is Required."

[437] *See, e.g.*, letters from ABA, BDO, CAQ, Cravath, Davis Polk, Deloitte, EY, KPMG, PWC, Shearman, and Sullivan & Cromwell.

[438] *See* letter from ABA.

[439] *See, e.g.*, letters from BDO, CAQ, EY, and PWC.

[440] *See* letter from Cravath.

[441] *See* letter from Deloitte.

disclose material information beyond information specific to the guarantee, such as pending merger negotiations and other potential transactions.[442] However, one commenter supported this proposed requirement "because it would provide relevant information, not otherwise explicitly required by the [p]roposed [r]ule, which would likely render the disclosures taken as a whole to be more useful for investment decisions."[443]

Consistent with comments received in connection with the corresponding requirement in proposed Rule 13-01(a)(4),[444] some commenters opposed the requirement in proposed Rule 13-02(a)(4) that would require issuers to disclose, if the required financial disclosures were omitted because they were not material, a statement to that effect and the reasons therefore.[445] Some commenters asserted that such disclosure would not be useful to investors,[446] could possibly result in an increase in liability,[447] and was counter to the Commission's objective of focusing on material disclosures and providing a principles-based framework.[448] One commenter suggested that the Commission should make clear that, if the proposal were adopted, issuers would only need to make a simple statement that management does not believe the information is material.[449] In contrast, one commenter specifically supported this part of proposed Rule 13-

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[442] *See* letter from Shearman.

[443] *See* letter from CII.

[444] *See* Section III.C.2.c.ii, "When Disclosure is Required."

[445] *See* letters from Cravath, EY, KPMG, and SIFMA.

[446] *See* letters from Debevoise and KPMG.

[447] *See* letters from Debevoise and SIFMA.

[448] *See* letter from Debevoise.

[449] *See* letter from SIFMA.

02(a)(4), asserting that the requirement would provide clarity about which disclosures were omitted and why.[450]

One commenter expressed concern that there could be uncertainty over the application of proposed Rule 13-02 because of possible overlap in disclosure requirements when a subsidiary is a guarantor, in which case proposed Rules 3-10 and 13-01 would apply, and also has securities pledged as collateral, in which case proposed Rule 13-02 would apply.[451] This commenter suggested that the Commission clarify that proposed Rule 13-02 would apply only to the extent proposed Rules 3-10 and 13-01 would not be applicable because investors would generally consider the guarantee to be more valuable than pledged securities.

3. Final Amendments

We are adopting the amendments largely as proposed with modifications based on comments received. As supported by several commenters,[452] the final amendments replace existing Rule 3-16's "substantial portion" numerical thresholds with a requirement to provide all disclosures specified in the final rule, unless such information is not material.[453] Whereas proposed Rule 13-02(a) required the proposed financial and non-financial disclosures "to the extent material to holders of the collateralized security," the final rule has been revised to require the financial and non-financial disclosures "to the extent material," which is discussed in further detail below. A few commenters suggested including numerical thresholds in the rule for

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[450] *See* letter from CII.

[451] *See* letter from NYC Bar.

[452] *See, e.g.*, letters from CII, FedEx, FEI, Nareit, and Sullivan & Cromwell.

[453] Whether a disclosure specified in proposed Rule 13-02 may be omitted, as discussed below, depends on whether it would be material to a reasonable investor. *See* Section III.C.2.c, "When Disclosure is Required," above.

determining whether financial information may be omitted.[454] We are not adopting this suggestion, as we agree with those commenters that supported the proposal to require information the registrant believes is material to investors. In these circumstances, and consistent with our rationale for the corresponding requirement in the final amendments to Rule 13-01(a),[455] we believe requiring disclosure to the extent material provides investors with information useful to an investment decision and avoids certain potential challenges associated with numerical thresholds.[456]

We are not adopting the suggestion by one commenter that we require compliance with Rule 13-02 only to the extent Rules 3-10 and 13-01 do not apply.[457] This suggestion was based on the commenter's belief that there could be uncertainty over the application of proposed Rule 13-02 because of what the commenter views as possible overlaps in disclosure requirements when a subsidiary is a guarantor, in which case proposed Rules 3-10 and 13-01 would apply, and also has securities pledged as collateral, in which case proposed Rule 13-02 would apply. This commenter asserted that investors would generally consider the guarantee to be more valuable than pledged securities. However, we do not agree that disclosure about only the guarantee should be required in such circumstances. Where a subsidiary is an issuer or guarantor of a guaranteed security and its securities also are pledged as collateral, each are separate credit enhancements for which different disclosure may be necessary. We believe that requiring compliance with both rules in these circumstances will help to ensure that material information is provided to investors about each credit enhancement.

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[454] *See* letters from NYC Bar and SIFMA.

[455] *See* discussion in Section III.C.2.c.iii, "When Disclosure is Required."

[456] For example, one commenter asserted that the existing rule's "substantial portion" test could lead to registrants disclosing information that is not essential to making an informed investment decision. *See* letter from Dell.

[457] *See* letter from NYC Bar.

The proposed rule sets forth financial and non-financial disclosures that were focused on information the Commission expected were most likely to be material. It also included proposed Rule 13-02(a)(5), which would have required disclosure of "any other quantitative or qualitative information that would be material to making an investment decision with respect to the collateralized security." The intent of this proposed requirement was to elicit disclosure about the affiliate(s) and the collateral arrangement(s) that would be material but was not otherwise specifically required by the proposed financial and non-financial disclosures. As described above, comments on this proposed requirement were consistent with those received on the corresponding requirement in proposed Rule 13-01(a)(5). While one commenter supported this proposed requirement, many others did not.

In response to the comments received, instead of proposed Rule 13-02(a)(5), we are adopting Rules 13-02(a)(6) and (7), which are similar to the disclosures required by final Rule 13-01(a)(6) and (7) but tailored to apply to collateral arrangements. In this regard, whereas final Rule 13-01(a)(6) requires disclosure of any information that would be material for investors to evaluate the "sufficiency of the guarantee," final Rule 13-02(a)(6) requires disclosure of "[a]ny financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral." Similarly, final Rule 13-02(a)(7) is consistent with final Rule 13-01(a)(7), requiring disclosure of "[s]ufficient information so as to make the financial and non-financial information presented not misleading." For the same reasons cited in adopting final Rule 13-01(a)(6) and (7),[458] we believe these requirements capture the disclosures the proposed rule was intended to elicit while addressing the concerns raised by commenters as discussed above. Notwithstanding these requirements in

[458] *See* discussion in Section III.C.2.c.iii, "When Disclosure is Required."

the final rule, Securities Act Rule 408(a) and Exchange Act Rule 12b-20 require a registrant to disclose, in addition to the information expressly required to be included, such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading. While some commenters indicated these requirements provide sufficient investor protections,[459] we believe the requirements in final Rule 13-02(a)(6) and (7), in addition to these other requirements, will help to ensure that material information is provided to investors.

Based on comments received on proposed Rule 13-02(a)(5), we have also revised Rule 13-02(a) for clarity, consistent with revisions to Rule 13-01(a).[460] Proposed Rule 13-02(a) would have required disclosures "to the extent material to holders of the collateralized security" and was not intended to introduce a nuanced or different materiality analysis specific to these disclosure requirements. A registrant's responsibility to determine whether the disclosures specified in Rule 13-02 are material is not different from how it assesses materiality in connection with other information it files with the Commission. Accordingly, final Rule 13-02 has been revised to require the financial and non-financial disclosures "to the extent material."

Proposed Rule 13-02(a)(4) would have required, if the financial disclosures specified in proposed Rule 13-02(a)(4) were omitted because they are not material, disclosure of a statement to that effect and the reasons therefore. Most of the commenters that discussed this proposed requirement did not support it.[461] In response to these comments, and for the same reasons cited

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[459] *See, e.g.,* letters from Deloitte and EY.

[460] *See* discussion in Section III.C.2.c.iii, "When Disclosure is Required."

[461] *See, e.g.*, letters from Cravath, EY, KPMG, and SIFMA.

in adopting final amendments to the corresponding requirement in final Rule 13-01,[462] we are not adopting this requirement as proposed. Instead, we are adopting an approach that should help address concerns[463] about the need for greater certainty as to the circumstances when omission of financial disclosures may be appropriate, while continuing to provide investors with the basic reasons as to why the financial information was omitted. As adopted, Rule 13-02(a)(4)(vi) identifies two scenarios, which we believe are the most common situations under which the financial information would not be material. If the scenario is applicable and disclosed, the registrant could then omit the financial disclosures. The two scenarios are:

1) The assets, liabilities and results of operations of the combined affiliates whose securities are pledged as collateral are not materially different than the corresponding amounts presented in the consolidated financial statements of the registrant;[464] and
2) The combined affiliates whose securities are pledged as collateral have no material assets, liabilities or results of operations.[465]

Similar to the corresponding amendments to Rule 13-01,[466] while we believe these scenarios encompass most of the situations under which the required financial information would not be material, these scenarios are not intended to be exclusive. As discussed below, there may be other circumstances in which it would be appropriate to omit the required financial information on the basis that it is not material.

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462 *See* discussion in Section III.C.2.c.iii, "When Disclosure is Required."

463 *See, e.g.*, letter from Shearman.

464 This scenario is contained in Rule 13-02(a)(4)(vi)(A).

465 This scenario is contained in Rule 13-02(a)(4)(vi)(B).

466 *See* discussion in Section III.C.2.c.iii, "When Disclosure is Required."

In the first scenario, we believe financial information of the combined affiliates would not be material to an investor as it is not materially different than that of the consolidated registrant.[467] If the related scenario was disclosed, investors would not need supplemental financial information as it would largely duplicate the corresponding information in the registrant's consolidated financial statements. In the second scenario, we believe disclosure that the combined group of affiliates has no material assets, liabilities or results of operations obviates the need for supplemental disclosures as an investor would know such information would not be material.

While we believe these scenarios generally capture the situations under which the financial information would not be material and may be omitted, there may be other scenarios under which the registrant may conclude Summarized Financial Information is not necessary. These scenarios would be evaluated under the general materiality provision of Rule 13-02(a). Based on this analysis, if a registrant determines that not all of the required financial information is material, the information that is not material may be omitted without additional disclosure or explanation. Thus, under the final rule, the registrant could either rely on one of the identified scenarios, if applicable, to omit information that is not material, or make its own assessment based upon a consideration of other relevant facts and circumstances.[468] We believe this approach will preserve the principles-based nature of Rule 13-02 while providing greater certainty for issuers, and appropriate transparency for investors, regarding the information required to be disclosed.

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[467] Rule 13-02(a)(4)(vi) clarifies that this scenario does not apply where separate disclosure of the Summarized Financial Information of one or more, but not all affiliates, is required by Rule 13-02(a)(4)(iv).

[468] To provide clarity to an issuer that its ability to omit the Summarized Financial Information required by final Rule 13-02(a)(4) is not limited to the four scenarios discussed herein, final Rule 13-02(a)(4)(vi) states: "Notwithstanding that a registrant may omit this summarized financial information if not material…"

F. Location of Disclosures and Audit Requirement

1. Proposed Amendments

Similar to the proposed disclosures for issuers and guarantors of guaranteed securities discussed above,[469] the proposed amendments would give registrants the flexibility to provide the proposed disclosures inside or outside the registrant's audited annual and unaudited interim financial statements in registration statements covering the offer and sale of the collateralized securities and any related prospectus, as well as annual and quarterly Exchange Act periodic reports required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed.

Accordingly, the note to proposed Rule 13-02(a) would have allowed the registrant to provide the disclosures required by this section in a footnote to its consolidated financial statements or, alternatively, in MD&A in the registration statement covering the offer and sale of the subject securities and any related prospectus, and in Exchange Act reports on Form 10-K, Form 20-F, and Form 10-Q required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed. If not otherwise included in the consolidated financial statements or in MD&A, the registrant would be required to include the disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in Item 503(c) of Regulation S-K.[470] The registrant, however, would be required to provide the disclosures in a footnote to its consolidated financial statements in its annual and quarterly reports beginning with its annual report filed on Form 10-K or Form

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[469] *See* Section III.C.2.d.i, "Location of Revised Alternative Disclosures and Audit Requirement."

[470] As described above, subsequent to the issuance of the Proposing Release, the Commission amended and relocated the requirements previously contained in Item 503(c) of Regulation S-K to new Item 105 of Regulation S-K.

20-F for the fiscal year during which the first bona fide sale of the subject securities is completed. If the registrant provides the proposed disclosures in its financial statements, the disclosures would be subject to annual audit, interim review, internal control over financial reporting, and XBRL tagging requirements.[471] These proposed amendments would also apply to foreign private issuers and issuers offering securities pursuant to Regulation A and the forms applicable to such entities.[472]

2. Comments on the Proposed Amendments

Comments on the proposed amendments were mixed, and several commenters expressed views on these proposed amendments that were similar to their views on the corresponding proposed location and audit requirement for disclosures about issuers and guarantors of guaranteed securities discussed above.[473] Some commenters stated that the proposed disclosures should be permitted to be presented outside the registrant's consolidated financial statements in all cases, not just in the registration statement and Forms 10-K and 10-Q required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed.[474] A few commenters asserted that not requiring the proposed disclosures to be audited would reduce costs[475] and possibly allow issuers to more quickly register these securities and access capital markets.[476] A few commenters stated that requiring an audit of the proposed disclosures would provide little marginal benefit to investors,[477] and one of these commenters argued that this

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[471] *See* Section III.C.2.d, "Location of Revised Disclosures and Audit Requirement."

[472] *See* Section V.H, "Application of Amendments to Certain Types of Issuers," below.

[473] *See* Section III.C.2.d.ii, "Location of Revised Alternative Disclosures and Audit Requirement."

[474] *See, e.g.*, letters from Cravath, Davis Polk, SIFMA, and Sullivan & Cromwell.

[475] *See* letters from Davis Polk and Sullivan & Cromwell.

[476] *See* letters BDO and Davis Polk.

[477] *See* letters from Davis Polk, and Sullivan & Cromwell.

proposed requirement would discourage issuers from pursuing registration of the original offering of the securities.[478]

Other commenters, however, asserted that the flexibility to determine the location of the proposed disclosures under the proposed amendments could lead to investor confusion about the location of the disclosures,[479] and uncertainty as to the level of audit assurance that applied to the disclosures.[480] One commenter contended that the proposed disclosures should be required to be presented in a single location to avoid inconsistencies in the location and varied reliance by investors.[481] Another commenter stated that companies should not have the option to choose where their disclosures will appear, and that reported disclosures should be consistently reported in the same location.[482]

One commenter did not support locating the proposed disclosures outside the financial statements.[483] This commenter argued that many investors place significant value on having required disclosures subject to annual audit and/or interim review, internal control over financial reporting, and XBRL tagging requirements, and not subject to the forward-looking statements safe harbor.

Other commenters, however, recommended the disclosures be located outside the financial statements in all cases.[484] One of these commenters recommended the disclosures be required in the liquidity and capital resources section of the MD&A or in a separate section

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[478] *See* letter from Sullivan & Cromwell.

[479] *See* letter from PWC.

[480] *See* letter from KPMG.

[481] *See* letter from KPMG.

[482] *See* letter from XBRL US, Inc.

[483] *See* letter from CII.

[484] *See* letters from NYC Bar and PWC.

following "Risk Factors" as is currently done in the Rule 144A market and has been accepted by the investor community.[485] This commenter also observed that if disclosure outside the financial statements is sufficient at the time of the initial investment decision, it should be sufficient for future periods. The other commenter observed the Proposed Alternative Disclosures would be better presented in a discussion about a parent's liquidity in the MD&A as opposed to in the financial statements given the objective of the disclosures to provide an investor in a debt security with information about the related guarantee.[486]

Some commenters emphasized that, even if the proposed disclosures are allowed to be located outside of the financial statements, these disclosures would be derived from the same internal accounting records used to prepare the registrant's audited consolidated financial statements[487] and would be subject to the registrant's disclosure controls and procedures.[488]

Some commenters asserted that underwriters will likely request independent auditors to provide comfort on financial information provided outside the consolidated financial statements in connection with registered offerings.[489] Two of these commenters indicated this would involve performing limited procedures on such information under PCAOB Auditing Standard 6101, *Letters for Underwriters and Certain Other Requesting Parties*.[490] One commenter suggested that such procedures may not result in a decrease in effort or cost for either auditors or registrants,[491] while the other commenter stated that while the scope and time required to

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[485] *See* letter from NYC Bar.

[486] *See* letter from PWC.

[487] *See* letter from Davis Polk.

[488] *See* letters from Cravath and EY.

[489] *See, e.g.*, letters from BDO, EY, Grant Thornton, and KPMG.

[490] *See* letters from BDO and KPMG.

[491] *See* letter from KPMG.

perform such procedures is less than an audit, the auditor involvement may delay the time to market for underwritten offerings.[492] Another commenter noted that the proposed rules would cause issuers to incur costs related to the incremental procedures necessary for such comfort procedures but investors would lose the benefit arising out of the audit of the disclosures.[493]

A few commenters suggested that because the proposed disclosures would be relevant only to the investors of the subject security, if these disclosures were required to be audited, this information should be included in an audited supplemental schedule that could be filed as an exhibit to the filing, similar to the supplemental schedules required under Article 12 of Regulation S-X.[494]

3. Final Amendments

After considering comments received, we are adopting the amendments largely as proposed, with modifications. As discussed above, while one commenter did not support locating the disclosures outside the financial statements, others recommended the disclosures be located outside the financial statements in all cases. We continue to believe, however, and for the same reasons cited in adopting the corresponding final amendments to Rule 3-10,[495] that it is appropriate to provide registrants the flexibility to select the location of the disclosures, including locating them outside the registrant's consolidated financial statements. In this regard, and consistent with the views of several commenters, we expect not requiring the disclosures to be audited will reduce costs and allow issuers to register the subject securities and access capital

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[492] *See* letter from BDO.

[493] *See* letter from Grant Thornton.

[494] *See* letters from EY and PWC.

[495] *See* discussion in Section III.C.2.d.iii, "Location of Revised Alternative Disclosures and Audit Requirement."

markets faster, which may encourage more such registered offerings.[496]

Accordingly, and consistent with the proposed rule, final Rule 13-02(b)[497] permits the registrant to provide the disclosures required by final Rule 13-02(a) in a footnote to its consolidated financial statements or alternatively, in MD&A. If the disclosures are not otherwise included in the consolidated financial statements or in MD&A, the final rule requires the registrant to include the disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in Item 105 of Regulation S-K.[498]

As discussed above, some commenters asserted that the flexibility to determine the location of the proposed disclosures under the proposed amendments could lead to investor confusion about the location of the disclosures and uncertainty as to the level of assurance applied. While the proposed rule provided flexibility on where to locate the disclosures, we believe the locations where disclosures may be provided are clearly specified, and that investors generally understand the levels of assurance applied to disclosures included inside or outside the registrant's consolidated financial statements. If provided in the registrant's consolidated financial statements, the disclosures must be included in a footnote. If provided outside the registrant's consolidated financial statements, they must be included in MD&A, or in other specified locations if the registrant's consolidated financial statements and MD&A are not

[496] *See supra* note 269.

[497] Whereas this requirement was included in a note to proposed Rule 13-02(a), the final rule includes it in a separate paragraph, Rule 13-02(b).

[498] 17 CFR 229.105. As described above, subsequent to the issuance of the Proposing Release, the Commission amended and relocated the requirements previously contained in Item 503(c) of Regulation S-K to new Item 105 of Regulation S-K. The final amendments have been revised to reflect this change.

otherwise included in the filing.[499] Consistent with the proposed rule, if the registrant elects to provide the amended disclosures in a footnote to its audited consolidated financial statements, the disclosures must be audited. Conversely, the disclosures need not be audited if the registrant provides them outside the audited consolidated financial statements. Also consistent with the proposed rule, the final rule specifies the locations where disclosures must be provided. Similar to the proposed amendments to Rule 3-10, a few commenters recommended that, if audited, the information be included in a supplemental schedule similar to the ones required by Article 12 of Regulation S-X. We are not adopting this suggestion for the same reasons cited in connection with final amendments to Rule 3-10.[500]

Under the proposed rule, although the registrant would initially have the flexibility to locate the disclosures outside of its consolidated financial statements in the subject registration statement and certain periodic reports filed thereafter, the registrant would have been required to provide the disclosures in a footnote to its consolidated financial statements starting with its annual report filed on Form 10-K for the fiscal year during which the first bona fide sale of the subject securities is completed. Comments on this proposed requirement were consistent with the corresponding proposed change to Rule 3-10, albeit from fewer commenters. Consistent with our rationale for the corresponding final amendments to Rule 3-10,[501] and as recommended by several commenters, we are not adopting this requirement. Under the final rule, the registrant will have flexibility to locate the disclosures in a footnote to its consolidated financial statements or in the locations specified in Rule 13-02(b) in all of its filings.

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[499] These circumstances include when the consolidated financial statements and MD&A are included in previously filed reports that are incorporated by reference. In such instances, the disclosures are required to be provided in specified prominent locations.

[500] *See* discussion in Section III.C.2.d.iii, “Location of Revised Alternative Disclosures and Audit Requirement.”

[501] *See* Section III.C.2.d.iii, “Location of Revised Alternative Disclosures and Audit Requirement.”

G. Recently Acquired Affiliates Whose Securities are Pledged as Collateral

1. Proposed Amendments

Existing Rule 3-16 does not contain a specific requirement to provide pre-acquisition financial information of recently acquired affiliates whose securities are pledged as collateral. However, if a recently acquired affiliate meets the substantial portion threshold in the existing rule, financial statements for periods prior to the date of acquisition by the registrant are required to be filed.

In connection with the proposed amendments to the pre-acquisition financial statement requirement for recently acquired subsidiary issuers and guarantors, while the proposed rule would contain no specific requirement, the Commission stated in the Proposing Release that information about recently acquired subsidiaries would be required if material to an investment decision in the guaranteed security pursuant to proposed Rule 13-01(a)(5).[502] Similarly, no specific requirement was included in proposed Rule 13-02, but information about recently acquired affiliates would have been required if material to an investment decision in the collateralized security pursuant to proposed Rule 13-02(a)(5).

2. Comments on the Proposed Amendments

We received no public comments specific to pre-acquisition financial information of recently acquired affiliates. However, we considered comments received in connection with the proposed amendments to Rule 3-10(g).[503] As it related to the proposed amendments to Rules 3-10 and 13-01, one commenter encouraged the Commission "not to perpetuate separate disclosure rules in this context for recently acquired subsidiaries."[504] One commenter recommended that

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502 *See* Section III.C.2.e of the Proposing Release.

503 *See* Section III.C.2.e.ii, "Recently Acquired Subsidiary Issuers and Guarantors."

504 *See* letter from Cravath.

the Commission should consider requiring Summarized Financial Information of a recently acquired guarantor in registration statements if the guarantor is not already included in the Summarized Financial Information of the obligated group (i.e., it is acquired after the most recent balance sheet date) and if the guarantor had a material effect on the financial capacity of the obligated group.[505] Another commenter indicated that the existing disclosure requirements under ASC 805-10-50 would continue to provide sufficient information related to material subsidiaries acquired and their impact on the consolidated entity.[506]

3. Final Amendments

Under the proposed rule, information about such recently acquired affiliates would have been required if material to an investment decision in the collateralized security pursuant to proposed Rule 13-02(a)(5).[507] The disclosures required by Rule 13-01 and 13-02 are similar in many respects, and we believe such similarities should extend to pre-acquisition financial information of recently acquired affiliates. After considering the comments received, we are adopting amendments requiring disclosure similar to what is required for recently acquired subsidiary issuers and guarantors by new Rule 13-01(a)(5). Our rationale for these amendments is consistent with our rationale for adopting the amendments to new Rule 13-01(a)(5).[508] To that end, in certain circumstances (discussed below), pre-acquisition Summarized Financial Information for recently acquired affiliates will be required to be provided in a Securities Act

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505 *See* letter from EY.

506 *See* letter from T-Mobile.

507 The requirements applicable to recently acquired affiliates whose securities are pledged as collateral have been included in final Rule 13-02(a)(5). Proposed Rule 13-02(a)(5) would have required disclosure of "any other quantitative or qualitative information that would be material to making an investment decision with respect to the collateralized security." Instead of this proposed requirement, the final amendments include Rules 13-02(a)(6) and (7). *See* discussion within Section V.E.3, "When Disclosure is Required."

508 *See* Section III.C.2.e.iii, "Recently Acquired Subsidiary Issuers and Guarantors."

registration statement[509] filed in connection with the offer and sale of the subject collateralized security. Similar to the amendments to final Rule 13-01(a)(5), the pre-acquisition Summarized Financial Information will be required when a registrant has acquired a significant "business" after the date of its most recent balance sheet included in its consolidated financial statements, and that acquired business and/or one or more of its subsidiaries are affiliates whose securities are pledged as collateral. Whether a "business" has been acquired will be determined in accordance with the guidance set forth in § 210.11-01(d), and the registrant would also need to treat acquisitions of related businesses as a single business acquisition in a manner consistent with § 210.3-05(a)(3). An acquired business will be deemed significant if it meets any of the conditions specified in the definition of significant subsidiary in § 210.1-02(w), substituting 20 percent for 10 percent each place it appears therein, based on a comparison of the most recent annual financial statements of the acquired business and the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition. To simplify compliance and provide certainty as to when disclosure is required, these significance tests are the same tests used to determine whether pre-acquisition financial statements are required for an acquired business pursuant to Rule 3-05 of Regulation S-X.

Generally, under the final rule, a registrant will be required to provide pre-acquisition Summarized Financial Information of a recently acquired affiliate for those acquisitions where it will be required to provide pre-acquisition financial statements of the acquired business pursuant to Rule 3-05 of Regulation S-X.[510] We recognize that not all of the entities that comprise an

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[509] This requirement is only applicable to Securities Act registration statements. In subsequent Exchange Act reports, financial information of a recently acquired affiliate whose securities are pledged as collateral will be included in the financial information of affiliates required by final Rule 13-02(a)(4).

[510] *See* discussion in Section III.C.2.e.iii, "Recently Acquired Subsidiary Issuers and Guarantors."

acquired business may be affiliates whose securities are pledged. Accordingly, the required Summarized Financial Information will only be for those entities acquired that are affiliates whose securities are pledged, and follows the form and content prescribed in new Rule 13-02(a)(4). We also recognize that the pre-acquisition Summarized Financial Information may be required in advance of when pre-acquisition financial statements are required pursuant to Rule 3-05 of Regulation S-X.[511] However, we believe investors in a registered debt offering should be provided with information about affiliates whose securities are pledged in advance of an investment decision, and we note that the level of detail required is far less than pre-acquisition financial statements required by Rule 3-05.

H. Application of Amendments to Certain Types of Issuers

Rule 3-16's requirements apply to several categories of issuers, including foreign private issuers, SRCs, and issuers offering securities pursuant to Regulation A. The proposed amendments would also apply to these types of issuers, because, for the reasons discussed above, we believe investors would benefit from the simplified and improved disclosures that would result from the proposed amendments and the cost of providing the disclosures would be reduced for these types of issuers.

1. Foreign Private Issuers

a. Proposed Amendments

Foreign private issuers are required to comply with existing Rule 3-16. Under the proposal, Rule 3-16 would be eliminated and foreign private issuers would be required to comply

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[511] For example, Rule 3-05(b)(4) of Regulation S-X in part permits, in certain circumstances, pre-acquisition financial statements of an acquired business to be omitted from a registration statement if the significance of the acquisition does not exceed 50% and the registration statement is declared effective no more than 74 calendar days after consummation of the acquisition. Note that filing requirements in Items 2.01 and 9.01 of Form 8-K may differ.

with the disclosures specified in proposed Rule 13-02. Accordingly, Instruction 1 to Item 8 of Form 20-F would be amended to specifically require compliance with proposed Rule 13-02.

b. Comments on Proposed Amendments

We received one comment on this aspect of the proposed amendments. The commenter recommended that the Commission confirm that the periods covered under the Summarized Financial Information would be required to track only those covered by a foreign private issuer's consolidated financial statements.[512]

c. Final Amendments

After considering public comments, we are adopting the proposed amendments with modifications. For clarity, as the final amendments do not delete existing Rule 3-16, Instruction 1 to Item 8 of Form 20-F will be amended to make reference to required compliance with Rule 3-16.[513] Consistent with the proposal, that instruction also will be modified to require compliance with proposed Rule 13-02.

One commenter requested the Commission confirm the periods of Summarized Financial Information that foreign private issuers would be required to present.[514] Consistent with our response to a similar comment on proposed Rule 13-01, as specified in Rule 13-02(a)(4)(v), a registrant is required to disclose the Summarized Financial Information as of and for the most recently ended fiscal year and, if applicable, year-to-date interim period, included in the registrant's consolidated financial statements.

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[512] *See* letter from Sullivan & Cromwell.

[513] This instruction cites rules under which a foreign private issuer may be required to provide financial statements or financial information for entities other than the issuer. This instruction, however, does not currently make reference to Rule 3-16. As the proposed and final amendments make reference to new Rule 13-02, for clarity, the instruction has been revised to also make reference to Rule 3-16.

[514] *See* letter from Sullivan & Cromwell.

Lastly, for the same reasons described above,[515] we have created new Exhibit 17 within Item 19 of Form 20-F, which will require the identification of each affiliate whose security is pledged as collateral, as well as the identification of the security or securities pledged as collateral.

2. Smaller Reporting Companies

a. Proposed Amendments

Note 4 to Rule 8-01 of Regulation S-X requires financial statements to be presented as required by Rule 3-16 for an SRC's affiliate whose securities constitute a substantial portion of the collateral for securities registered or being registered, except that the periods presented are those required by Rule 8-02 of Regulation S-X. As the proposed amendments would have eliminated Rule 3-16 and required the disclosures specified in proposed Rule 13-02, SRCs would be required to comply with proposed Rule 13-02. A corresponding change to Note 4 to Rule 8-01 was therefore proposed. Additionally, as proposed Rule 13-02(a)(4) specifies the periods of Summarized Financial Information that would be required to be presented, no reference to the periods required by Rule 8-02 of Regulation S-X in Note 4 to Rule 8-01 is necessary and would be removed. Lastly, because Item 1 of Part I of Form 10-Q permits a SRC to provide the information required by Rule 8-03 of Regulation S-X if it does not provide the information required by Rule 10-01, the Commission proposed adding Rule 8-03(b)(8) to require compliance with proposed Rule 13-02.

b. Comments on Proposed Amendments

We did not receive any comments that addressed this aspect of the proposed amendments.

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[515] *See* discussion in Section V.D.3, "Non-Financial Disclosures."

c. Final Amendments

We are adopting the proposed amendments with modifications. We believe that investors in smaller reporting companies will benefit from the simplified disclosures that will result from the amendments and that the cost of providing the disclosures will be reduced for smaller reporting companies. As the final amendments do not delete existing Rule 3-16, we are not adopting the proposed amendment that would have eliminated the reference to that requirement in Note 4 to Rule 8-01, nor are we eliminating the reference to the periods required in such financial statements. We are, however, adopting the proposed change that requires compliance with Rule 13-02, but with slightly different wording than proposed. The final amendments to Note 4 to Rule 8-01 establish that the requirements of final Rules 3-16 and 13-02 are applicable if a smaller reporting company's securities registered or being registered are collateralized by the securities of the smaller reporting company's affiliates,[516] and that the periods presented for purposes of compliance with final Rule 3-16 are those required by Rule 8-02. Finally, as proposed, because Item 1 of Part I of Form 10-Q permits an SRC to provide the information required by Rule 8-03 of Regulation S-X if it does not provide the information required by Rule 10-01, we have added Rule 8-03(b)(7) to require compliance with Rule 13-02.[517]

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[516] Because the final amendments do not eliminate existing Rule 3-16, which will continue to be applicable to registered collateralized securities with collateral release provisions issued and outstanding as of the effective date of the final amendments, amended Note 4 to Rule 8-01 states, for clarity, that final Rule 13-02 must be followed unless amended Rule 3-16 applies. *See* Section VI.B "Rule 3-16 Collateral Release Provisions."

[517] Proposed Rule 8-03(b)(8) would have sequentially followed existing Rule 8-03(b)(6) of Regulation S-X [17 CFR 210.8-03(b)(6)] and proposed Rule 8-03(b)(7). As described within Section III.D.2 "Smaller Reporting Companies," subsequent to the issuance of the Proposing Release, the Commission eliminated Rule 8-03(b)(6). The final amendments have been revised to reflect this change. The requirements in proposed Rule 8-03(b)(8) have been included in new Rule 8-03(b)(7), which follows new Rule 8-03(b)(6).

3. Offerings pursuant to Regulation A

a. Proposed Amendments

In connection with offerings made pursuant to Regulation A, Forms 1-A and 1-K direct a Regulation A Issuer to comply with Rule 3-16 for the same periods as the Regulation A Issuer's financial statements and specifies the applicable audit requirements. Accordingly, the proposed rule would have replaced the existing requirement in those forms that Regulation A Issuers comply with Rule 3-16 with a requirement to provide the disclosures specified in proposed Rule 13-02 and specify the location of the disclosures, similar to the proposed note to Rule 13-02(a) but consistent with the requirements of Regulation A.[518] Additionally, consistent with the discussion above about requiring registrants to comply with proposed Rule 13-02 in filings made on Form 10-Q, a requirement to comply with proposed Rule 13-02 would be added to Form 1-SA.

b. Comments on Proposed Amendments

We did not receive any comments that addressed this aspect of the proposed amendments.

c. Final Amendments

We are adopting the proposed amendments with modifications. We believe that investors in Regulation A offerings will benefit from the simplified disclosures that will result from the amendments and that the cost of providing the disclosures will be reduced for Regulation A Issuers. As the final amendments do not delete existing Rule 3-16, we are not adopting the proposed amendment that would have eliminated the existing requirement in Forms 1-A and 1-K

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[518] If a Regulation A Issuer elects to provide the proposed disclosures in its audited financial statements, such disclosures would be required to be audited.

that Regulation A Issuers comply with Rule 3-16. We are, however, adopting the proposed change to those forms that requires compliance with Rule 13-02, but with slightly different wording than proposed. The final amendments to Forms 1-A and 1-K establish that the requirements of final Rules 3-16 and 13-02 are applicable if a Regulation A Issuer's securities qualified or being qualified pursuant to Regulation A are collateralized by the securities of the issuer's affiliates.[519] We are also adopting the proposed requirement specifying the location of the disclosures, similar to Rule 13-02(b) but consistent with the requirements of Regulation A. Consistent with the discussion above about requiring registrants to comply with Rule 13-02 in filings made on Form 10-Q, a requirement to comply with Rule 13-02 has been added to Form 1-SA. Lastly, for the same reasons described above,[520] we have created new exhibit 17 within Item 17 of Form 1-A, which will require the identification of each affiliate whose security is pledged as collateral, as well as the identification of the security or securities pledged as collateral. This exhibit will also be required in Form 1-K by Item 8(b) of Part II of that form, and in Form 1-SA by Item 4(b) of that form.

VI. Transition to Final Amendments and Rule 3-16 Collateral Release Provisions

A. Transition to Final Amendments

A number of commenters recommended that the Commission provide transition guidance or a phase-in period for proposed Rules 13-01 and 13-02.[521] In response to these concerns, we

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[519] Because the final amendments do not eliminate existing Rule 3-16, which will continue to be applicable to registered collateralized securities with collateral release provisions issued and outstanding as of the effective date of the final amendments, amended Forms 1-A and 1-K state, for clarity, that final Rule 13-02 must be followed unless amended Rule 3-16 applies. *See* Section VI.B "Rule 3-16 Collateral Release Provisions."

[520] *See* discussion in Section V.D.3, "Non-Financial Disclosures."

[521] *See* letters from BDO, CAQ, Cravath, Deloitte, EY, FedEx, Grant Thornton, KPMG, NYC Bar, PWC, and Shearman.

are providing the following transition period for compliance to mitigate any potential burdens that issuers may experience in transitioning to the final amendments:

For Securities Act registration statements:[522]

- Any registration statement that is first filed on or after January 4, 2021, must comply with the final amendments; and
- Any post-effective amendment filed on or after January 4, 2021, to include either the registrant's latest audited financial statements in the registration statement or to update the prospectus under Section 10(a)(3) must comply with the final amendments.

For Exchange Act registration statements:

- Any registration statement that is first filed on or after January 4, 2021, must comply with the final amendments.

For Exchange Act periodic reports:[523]

- If the reporting company was required to comply with the final amendments in a registration statement, all Exchange Act periodic reports for periods ending after that registration statement became effective must comply with the final amendments; and
- For all other Exchange Act reporting companies, the annual report on Form 10-K or Form 20-F, as applicable, for fiscal years ending after January 4, 2021, and quarterly reports on Form 10-Q for quarterly periods ending after January 4, 2021,

[522] This transition period is also applicable to filings made in connection with offerings of securities pursuant to Regulation A, including Form 1-A and post-qualification amendments thereto.

[523] This transition period is also applicable to periodic reporting pursuant to Rule 257 of Regulation A, including Forms 1-K and 1-SA.

must comply with the final amendments.[524]

Voluntary compliance with the final amendments in advance of January 4, 2021, will be permitted. After voluntary compliance, subsequent Exchange Act or Regulation A periodic reports must comply with the final rules.

B. Rule 3-16 Collateral Release Provisions

As described in the Proposing Release,[525] registrants often structure debt agreements to release affiliate securities pledged as collateral if the disclosure requirements of Rule 3-16 would be triggered, thereby depriving investors of that collateral protection. Some commenters observed that in many registered debt offerings, the indenture will contain such collateral release provisions.[526] Commenters expressed concern that, depending on the wording of such collateral release provisions in previously issued indentures, the proposed elimination of existing Rule 3-16 and new requirements in proposed Rule 13-02 could change the collateral available to holders of these debt securities, causing unintended credit consequences.[527]

In response to these comments, so as not to change the amount of collateral available to investors in previously issued debt securities that include collateral release provisions, the final amendments will not apply to existing collateralized debt securities with such provisions. To accomplish this, the final amendments do not eliminate existing Rule 3-16 as was proposed.

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[524] For example, a registrant with a fiscal year ending on January 31st would be required to comply with the final amendments in its Form 10-K for its fiscal year ended January 31, 2021, and subsequent quarterly reports on Form 10-Q starting with its Form 10-Q for the quarterly period ended April 30, 2021. As another example, a registrant with a fiscal year ending on December 31st would be required to comply with the final amendments in its Forms 10-Q for quarterly periods ended March 31, 2021, June 30, 2021, and September 30, 2021, and in its Form 10-K for its fiscal year ended December 31, 2021.

[525] *See* Section II of the Proposing Release.

[526] *See* letters from Cravath, NYC Bar, PWC, and Shearman.

[527] *See supra* note 526.

Instead, Rule 3-16 has been amended to include a scope paragraph stating that the requirements of Rule 3-16 apply to each registered security issued and outstanding before January 4, 2021 for which the registrant has not previously been required to provide Rule 3-16 Financial Statements.[528] While we recognize that these investors will not receive the disclosures required by Rule 13-02, their investment decision in such securities presumably contemplated the release of collateral were it to exceed the substantial portion threshold, and we note that these investors have historically not received supplemental information. In contrast to those indentures with collateral release provisions, the new disclosures will apply to existing collateralized debt securities that do not contain such provisions. To accomplish this, final Rule 13-02 includes a scope paragraph stating that the requirements of new Rule 13-02 apply to each registered security issued and outstanding before January 4, 2021, for which the registrant has previously been required to provide Rule 3-16 Financial Statements. Finally, any collateralized debt securities issued on or after the compliance date of the final amendments must comply with new Rule 13-02, which is clearly stated in the scope paragraph to final Rule 13-02.

VII. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[529] the Office of Information and Regulatory

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[528] A registrant that has issued securities with collateral release provisions would not have been required to provide Rule 3-16 Financial Statements. Requiring continued compliance with the requirements of existing Rule 3-16 will allow such collateral release provisions to operate as intended and not change the amount of collateral available to investors.

[529] 5 U.S.C. 801 *et seq*.

Affairs has designated these rules a "major rule," as defined by 5 U.S.C. 804(2).

VIII. Economic Analysis

A. Introduction

As discussed above, we are adopting amendments to the financial disclosure requirements in Rules 3-10 and 3-16 of Regulation S-X to improve those requirements for both investors and registrants. These amendments may result in simplified disclosures that highlight information that is material to investment decisions. They may also serve to reduce existing regulatory burdens that otherwise inhibit registrants from engaging in registered debt offerings that are backed by guarantees or pledges of affiliate securities as collateral and may unnecessarily restrict the set of investment opportunities available to some investors. The discussion below addresses the potential economic effects of the final amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation, measured against a baseline that includes both current regulatory requirements and current market practices. We also discuss the potential economic effects of certain alternatives to the amendments. Throughout this analysis, we draw on academic studies and incorporate public comments, where appropriate.

We are mindful of the costs and benefits of our rules. Section 2(b) of the Securities Act, Section 3(f) of the Exchange Act, Section 2(c) of the Investment Company Act, and Section 202(c) of the Investment Advisers Act require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital

formation.[530] Additionally, Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act, to consider, among other things, the impact that any new rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act.[531]

B. Baseline and Affected Parties

The existing regulatory requirements of Rules 3-10 and 3-16 under Regulation S-X are described above[532] and have prompted registrants to adopt disclosure and business practices specifically designed to comply with or avoid these requirements. We analyze the economic effects of the final amendments by assessing their impact on affected parties as compared to the current disclosure regime, including both existing disclosure requirements and available exemptions, where applicable.

The parties that are likely to be affected by these amendments include issuers and guarantors of guaranteed debt securities, issuers of debt securities collateralized by securities of those issuers' affiliate(s), and investors in each of these types of securities.[533]

1. Market Participants

The first main group of market participants affected by the amendments consists of issuers and guarantors of guaranteed debt securities and issuers of debt securities collateralized by securities of those issuers' affiliate(s). These issuers will be affected because the disclosures called for by the amendments will differ from the content and format of disclosures currently

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[530] 15 U.S.C. 77b(b), 78c(f), 80a-2(c), and 80b-2(c).

[531] 15 U.S.C. 78w(a)(2).

[532] *See* Section II for Rule 3-10 and Section IV for Rule 3-16.

[533] While the amendments would apply to registered closed end funds and business development companies ("BDCs"), and could thereby affect registered investment advisers, based on staff experience, we believe closed end funds and BDCs are unlikely to engage in the activities addressed by the final amendments. Accordingly, we also we believe the amendments are unlikely to affect registered investment advisers.

required to be presented in registered debt offerings and in certain ongoing reporting. Additionally, issuers and guarantors of guaranteed debt securities may be affected by amendments to the eligibility conditions that must be met to omit the separate financial statements of subsidiary issuers and guarantors of guaranteed debt securities. The amendments may also alter the capital raising decisions of potential issuers.

The second group of market participants affected by the amendments consists of investors in these securities. These investors can be divided into three main categories: (1) Qualified Institutional Buyers ("QIBs");[534] (2) institutional investors (other than QIBs); and (3) non-institutional (retail) investors. In addition to the change in content and location of the disclosed information presented to them, which is discussed below in Section VII.C.1.b, the impact on these investors will also depend on whether there is a change in the number of registered debt offerings by new issuers, issuers that would have offered debt securities under Rule 144A before the amendments,[535] or both, as a result of the amendments.

Currently, there are four options that issuers typically consider in deciding whether and how to issue guaranteed or collateralized debt securities. First, issuers may offer and sell guaranteed and/or collateralized debt securities in a registered securities offering and provide the required disclosures and any separate financial statements under existing Rules 3-10 and 3-16. Second, issuers may opt to offer the debt securities in transactions that rely on Rule 144A's safe harbor exemption from Securities Act registration, with guarantees or pledges of affiliate securities as collateral and registration rights. This may allow issuers to access the capital markets more quickly because they would not have to provide the disclosures required by

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[534] 17 CFR 230.144A(a)(1).

[535] Only QIBs can participate in Rule 144A offerings; retail and institutional investors other than QIBs are unable to participate in such offerings.

existing Rules 3-10 and 3-16 at the time of the Rule 144A offering. Issuers do, however, have to provide the disclosures and financial statements required by existing Rules 3-10 and 3-16 when the unregistered debt securities are exchanged for debt securities issued in a registered offering. Third, issuers may opt to offer the debt securities in transactions that rely on Rule 144A's safe harbor exemption from Securities Act registration, with guarantees or pledges of affiliate securities as collateral, but without registration rights. Under this approach, issuers do not have to provide the disclosures or financial statements required by existing Rules 3-10 and 3-16, but issuers and investors are not afforded the benefits of registration. Fourth, issuers may structure a registered offering without including guarantees or pledges of affiliated securities as collateral. In this case, while issuers do not have to provide disclosures or financial statements required by existing Rules 3-10 and 3-16, they may incur a higher cost of capital than if they had structured their debt securities offerings with these credit enhancements. Issuers in this category may decide not to offer these credit enhancements because the cost of providing the required disclosures exceeds the premium that must be paid to issue the debt on an unsecured basis.

Collateralized debt offerings are often structured to include collateral release provisions, which automatically reduce the amount of pledged collateral that investors might receive in the event of default if it would trigger the existing requirement for a registrant to file Rule 3-16 Financial Statements. To the extent the practice of structuring these offerings in this manner changes as a result of the final amendments, investors may experience both a change in the number of investment opportunities in collateralized debt, as well as a change in the information presented to them in registered offerings.

2. Market Conditions

To provide context for debt securities offerings likely to be impacted by the final amendments, Table 1 provides estimates of the number and dollar amount of all registered debt offerings and Rule 144A debt offerings per year since 2013.[536] The dollar volume of registered debt and Rule 144A offerings generally appears to be higher in recent years (i.e., 2016, 2017, 2018) than in earlier years (i.e., 2013, 2014, 2015), which may be a result of improving macroeconomic conditions and a low interest rate environment.[537]

Table 1: Registered Debt and Rule 144A Debt Offerings from 2013 – 2018

	Registered Debt		Rule 144A	
Year	No. of Offerings*	$ Amount (bil)	No. of Offerings	$ Amount (bil)
2013	1,509	1,052	969	512
2014	1,597	1,113	920	530
2015	1,560	1,206	808	575
2016	1,639	1,329	785	526
2017	1,853	1,298	995	657
2018	1,671	1,132	871	658

Source: DERA staff analysis

* The number of registered offerings and amounts raised do not include registered exchanges of debt securities previously issued pursuant to an exemption from Securities Act registration, such as Rule 144A. Based on staff analysis of Commission filings on Forms S-4 and F-4, there was an average of 129 registered exchange offers per year between 2013 and 2018, seeking an average (median) amount of proceeds of approximately $146 billion ($140 billion) per year. These estimates are based on information disclosed at the time of initial filing; actual offering amounts may have differed upon effectiveness of the registration statement. Debt securities with registration rights are usually issued under Rule 144A and, thus, may also be included in the columns summarizing Rule 144A offerings. One study estimates that approximately 98% of high-yield Rule 144A bonds and 40% of investment-grade Rule 144A bonds have registration

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[536] These estimates are based on staff analysis of data from the Mergent database. Data specific to offerings of guaranteed securities and offerings of securities collateralized by the securities of an issuer's affiliate(s) is unavailable. We begin our sample in the post-financial crisis timeframe in order to exclude capital raising concerns, liquidity shocks, and other constraints that are exogenous to our baseline analysis. For perspective, the amount of funding obtained through the registered debt market on an annual basis is much larger than that obtained through the registered equity market. *See Access to Capital and Market Liquidity Report*.

[537] *See id*.

rights. *See* Miles Livingston & Lei Zhou, The Impact of Rule 144A Debt Offerings Upon Bond Yields and Underwriter Fees, 31 Fin. Mgmt. 5 (2002).

According to studies examining registered debt offerings and debt offerings made under Rule 144A, the two types of debt offerings have distinct characteristics. Issuers offering debt securities under Rule 144A have, on average, lower credit quality and higher information asymmetry than registered debt offerings.[538] These conditions may increase the likelihood that investors require guarantees and collateral from these issuers relative to investment grade issuers who may not need such credit enhancements. This is consistent with studies that have found the cost of capital associated with debt offerings made under Rule 144A to be higher than the cost of capital in registered debt offerings.[539] According to these studies, there are two main benefits of Rule 144A offerings: (1) the speed of issuance, given the absence of a registration requirement; and (2) relatively high liquidity, given the possibility to exchange the securities for registered securities.[540]

As discussed above,[541] existing Rule 3-10 requires that every issuer of a registered security that is guaranteed and every guarantor of a registered security file the financial statements required for a registrant by Regulation S-X, except under certain circumstances when

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538 *See, e.g.*, Matteo P. Arena, The Corporate Choice Between Public Debt, Bank Loans, Traditional Private Debt Placements, and 144A Debt Issues, 36 Rev. of Quantitative Fin. & Acct. 391 (2011).

539 *See* George W. Fenn, Speed of Issuance and the Adequacy of Disclosure in the 144A High-Yield Debt Market, 56 J. of Fin. Econ. 383 (2000); Miles Livingston & Lei Zhou, The Impact of Rule 144A Debt Offerings Upon Bond Yields and Underwriter Fees, 31 Fin. Mgmt. 5 (2002); Susan Chaplinsky & Latha Ramchand, The Impact of SEC Rule 144A on Corporate Debt Issuance by International Firms, 77 J. of Bus. 1073 (2004); Usha R. Mittoo & Zhou Zhang, The Evolving World of Rule 144A Market: A Cross-Country Analysis (2010) (unpublished working paper) (University of Manitoba, Winnipeg MD). The studies of Fenn (2000) and Chaplinsky and Ramchand (2004) find the yield premium decreased over time, whereas the study of Livingston and Zhou (2002) and unpublished working paper of Mittoo and Zhang (2011) do not observe that trend. Mittoo and Zhang (2011), however, find that the yield premium increased after the Sarbanes-Oxley Act was enacted.

540 *See, e.g.*, Fenn (2000), note 539 above.

541 *See* Section II.A, "Background."

Alternative Disclosures are permitted. There are two forms of Alternative Disclosures prescribed by the existing rule: (1) Consolidating Information; and (2) a brief narrative. Consolidating Information is the most common type of Alternative Disclosure under existing Rule 3-10. Table 2 presents data on the number of unique registrants and filings that included Consolidating Information under Rule 3-10 in that filing for the period 2013-2018.[542]

Table 2: Estimated Number of Unique Registrants and Filings Including Consolidating Information under Existing Rule 3-10

Year	Number of Unique Registrants	Number of Total Filings	10-K	10-Q	20-F	S-1	S-4	F-4
2013	533	1834	431	1339	12	15	34	3
2014	530	1861	461	1360	10	9	21	0
2015	500	1750	437	1288	9	5	11	0
2016	469	1641	417	1199	8	1	16	0
2017	403	1430	369	1043	5	1	11	0
2018	349	1261	328	922	6	0	4	0

Source: DERA staff analysis of Edgar Filings

The second and less common form of Alternative Disclosures under existing Rule 3-10 is a brief narrative. While we believe the number of filings including the brief narrative form of Alternative Disclosure is smaller than the number of filings using Consolidating Information, we are unable to determine that number due to methodological and data extraction challenges.[543]

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[542] To identify these disclosures, we searched all Forms 10-K, 10-Q, 20-F, S-1, S-4, and F-4 and their amendments using XBRL tags most commonly associated with Consolidating Information. The amounts in the table represent the number of annual, quarterly, and periodic filings including amendments that are unique for the covered period in each calendar year from 2013-2018. We also searched Forms S-4, S-11, 10, F-1, F-4, SF-1, SF-3, 1-A, 1-K, and 1-SA using XBRL tags most commonly associated with Consolidating Information. However, this extrapolation method did not provide meaningful results because registrants rarely include XBRL tags for these affected forms. For example, only one percent of Form S-4 filings include XBRL tags. Therefore, to provide a more meaningful estimate of the number of these forms that include the Alternative Disclosures, we conducted separate database searches for filings of those forms using specific search terms. We were unable to find any filings on the remaining affected forms that included the Alternative Disclosures. Our analysis did not include Forms S-3 or F-3, because Consolidating Information included with those registration statements is typically incorporated by reference from Exchange Act reports.

[543] These narrative disclosures are typically no more than a paragraph in length and vary in content based on the three scenarios under which the brief narrative can be provided. We conducted text searches of EDGAR filings

As discussed above,[544] under existing Rule 3-16, a registrant is required to provide Rule 3-16 Financial Statements for each affiliate whose securities, which are pledged as collateral, constitute a substantial portion of the collateral for any class of securities registered or being registered. Table 3 presents data on the number of filings and unique registrants that included Rule 3-16 Financial Statements since 2013. The number of registrants remained steady over this period. Due to the manual process by which we attained these estimates, there are likely more registrants providing Rule 3-16 Financial Statements than are reflected here.[545]

Table 3: Estimated Number of Unique Registrants and Filings Including Rule 3-16 Financial Statements

Year	Number of Unique Registrants	Number of Total Filings	10-K	20-F
2013	7	7	6	1
2014	7	7	6	1
2015	7	7	6	1
2016	7	7	6	1
2017	7	7	6	1
2018	7	7	6	1

Source: DERA staff analysis of EDGAR filings

C. Anticipated Economic Effects

In this section we discuss the anticipated economic benefits and costs of the amendments to Rules 3-10 and 3-16.

in an attempt to accurately identify issuers providing narrative disclosure under Rule 3-10. However, given the variation in phrasing in these paragraphs, the search did not produce meaningful results.

544 *See* Section IV, "Rule 3-16 of Regulation S-X."

545 There are no XBRL tags specific to Rule 3-16. To identify these disclosures, we searched all Forms 10-K, 10-Q, 20-F, S-1, S-3, S-4, S-11, F-1, F-3, F-4, 10, 1-A, 1-K, and 1-SA and their amendments using a text search on the word combination "Rule 3-16." We applied different text search combinations and found that using "Rule 3-16" offered the most accurate search results. Even so, we received hundreds of false hit returns. These were mainly registrants mentioning "Rule 3-16" as part of a description of collateral release provisions. That is, if Rule 3-16 were triggered, the debt agreement would release the collateral that triggered Rule 3-16. We manually sifted through these false returns to identify the positive results listed in Table 3.

1. Amendments to Rule 3-10 and Partial Relocation to Rule 13-01

The final rules amend the disclosure requirements in Rule 3-10 of Regulation S-X to better align those requirements with the needs of investors and to simplify and streamline the disclosure obligations of registrants. We expect the amendments to benefit issuers and investors.

As a result of the overall reduced burdens associated with the amendments, investors may benefit from access to more registered offerings that are structured to include guarantees and, accordingly, the additional protections that come with a registered offering. Also, an increase in the overall use of guarantees could reduce structural subordination issues that arise. Typically, all of a parent company's subsidiaries support the parent company's debt-paying ability. However, in the event of default, the holders of debt without the benefit of guarantees are disadvantaged as compared to the direct creditors of any subsidiary not providing a guarantee. In the event of default, a holder of a debt security issued by a parent company can make claims for payment directly against the issuer and guarantors. In a bankruptcy proceeding, the assets of non-guarantor subsidiaries that are not issuers typically would be accessible only by the holder indirectly through the parent's equity interest. In such a proceeding, without a direct guarantee, the claims of the holder would be structurally subordinate to the claims of other creditors, including trade creditors of those subsidiaries. The less burdensome disclosures under the final amendments may lead to greater use of guarantees to address these structural subordination issues, which could result in more efficient risk sharing within corporate groups and potentially a lower cost of capital for registrants.

Furthermore, the less burdensome disclosures may lead issuers to register the initial offerings of guaranteed securities rather than opting to issue them under Rule 144A with registration rights. Issuers may be able to access the capital markets more quickly than under the

existing Rule 3-10 requirements because it is likely to take issuers less time and cost to prepare Summarized Financial Information under the final amendments than to prepare Consolidating Information under existing Rule 3-10. By registering the initial offering, these issuers would incur the cost of only one offering, rather than two; that is, issuers would not incur any additional costs associated with exchanging the guaranteed debt securities issued in an unregistered Rule 144A offering for guaranteed debt securities issued in an offering registered under the Securities Act.

Commenters generally agreed with these assessments.[546] Some commenters argued that the expected reduction in registrants' costs and burdens of providing the proposed disclosures would lead to an increase in the number of registered debt offerings with guarantees.[547] One commenter suggested that this increase would result from the disclosures that would be required in proposed Rule 13-01 more closely resembling the disclosure practice in the Rule 144A and Regulation S market.[548] One commenter noted that, although the proposed amendments would reduce the burdens of registering offerings of guaranteed securities, the proposed amendments may not result in a significant increase in such offerings because of the general trend toward Rule 144A transactions.[549] Even so, the commenter asserted that the proposed amendments could result in more uniform and better financial disclosures for investors if they are incorporated into market practice for Rule 144A offerings. Another commenter, however, was skeptical that, due to the proposed amendments, high-yield issuers using the Rule 144A market

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[546] *See*, *e.g.*, letters from Ball Corp., Cravath, Davis Polk, Eaton Corp., EY, FEI, and Simpson Thacher.

[547] *See*, *e.g.*, letters from Ball Corp., Davis Polk, EY, and FEI.

[548] *See* letter from Cravath.

[549] *See* letter from NYC Bar.

would return to the registered market "to a meaningful extent" because, according to that commenter, the Rule 144A market has "largely eliminated the historical pricing benefits" of registered offerings.[550]

Several commenters provided us with burden estimates regarding the disclosure requirements of Rule 3-10. One commenter noted that presentation of Consolidating Information required under existing rules comprises approximately 10% of the total pages in its Forms 10-Q and 10-K and the preparation of this information is both costly and time consuming.[551] Another commenter indicated that the existing Rule 3-10 disclosure requirements add approximately one week of additional time to the preparation of its annual and quarterly reports on Forms 10-K and 10-Q, respectively, and stated that its annual report for 2017 included nine pages of Rule 3-10 disclosures even though its compliance with the terms of its credit facility and indentures is measured based on consolidated financial statement amounts and not guarantor financial information.[552] One commenter stated that its 2017 annual report on Form 10-K contained 27 pages of Rule 3-10 disclosures.[553] Another commenter estimated that the existing Rule 3-10 disclosure requirements add approximately three weeks of additional time annually to the preparation of its quarterly and annual reports.[554] One commenter stated that the preparation and review of its Consolidating Information is time-consuming and costly, requiring approximately 280 hours per year.[555]

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550 *See* letter from Shearman.

551 *See* letter from T-Mobile.

552 *See* letter from Windstream.

553 *See* letter from WTW.

554 *See* letter from Freeport.

555 *See* letter from FedEx.

a. Eligibility Conditions to Omit Financial Statements of Subsidiary Issuer or Guarantor

As detailed in Section III.C.1.b, "Consolidated Subsidiary Condition," the final amendments will replace one of the conditions that must be met to be eligible to omit the separate financial statements of a subsidiary issuer or guarantor—that the subsidiary issuer or guarantor be 100%-owned by the parent company—with a condition that the subsidiary issuer or guarantor be consolidated in the parent company's consolidated financial statements. This change will permit the parent company to omit the separate financial statements of a consolidated subsidiary issuer or guarantor even if third parties hold non-controlling ownership interests in that subsidiary issuer or guarantor. However, the final rule will require, to the extent material, a description of any factors that may affect payments to holders of the guaranteed security, such as the rights of a non-controlling interest holder.

In addition to the change from 100%-owned to consolidation, we are simplifying the other eligibility conditions. Namely, as discussed in Section III.C.1.d, "Eligible Issuer and Guarantor Structures Condition," the final amendments will replace the five specific issuer and guarantor structures currently eligible under the existing rule with a broader two-category framework. Under these changes, separate financial statements of consolidated subsidiary guarantors may be omitted for each issuer and guarantor structure that is eligible. Additionally, unlike the existing rule, the nature of the subsidiary guarantees, including whether the guarantee is full and unconditional or joint and several, will no longer impact the eligibility to omit separate subsidiary financial statements and instead will only impact the extent of disclosure in the Revised Alternative Disclosures.

Overall, these final amendments should permit a broader scope of issuers and guarantors to be eligible to provide the Revised Alternative Disclosures in lieu of separate financial

statements of each subsidiary issuer and guarantor than under existing Rule 3-10. This, in turn, will reduce the compliance costs associated with preparation of disclosures for these registered debt offerings and ongoing periodic reporting. To the extent there are more issuers and guarantors that are eligible to provide the Revised Alternative Disclosures in lieu of separate financial statements of each subsidiary issuer and guarantor under amended Rule 3-10, these entities may be more likely to register their guaranteed debt offerings, either at the outset or through an exempt offering with registration rights. As a result, some issuers may realize a lower cost of capital. Such an outcome would be consistent with previous studies that have found the cost of capital associated with registered debt offerings to be lower than that of private offerings made under Rule 144A,[556] although other issuer characteristics indicative of creditworthiness would remain relevant with respect to the cost of capital, regardless of offering method. Additionally, subsidiary issuers and guarantors that are currently required to file separate financial statements because they do not meet existing Rule 3-10's eligibility criteria could have reduced compliance costs to the extent they meet the revised eligibility criteria under the final Rule 3-10 and the Revised Alternative Disclosures are provided in lieu of their separate financial statements.

Certain investors could also benefit from the final amendments to the eligibility conditions. If issuers opt to register debt offerings, rather than structure them as private offerings using Rule 144A, then new investors—namely, non-QIB institutional investors and retail investors who cannot participate in Rule 144A offerings—would be eligible to participate in the offerings. To the extent that the final amendments to the eligibility conditions encourage additional registered debt offerings, more investment opportunities would be made available, and

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[556] *See* discussion within Section VIII.B.2, "Market Conditions." *See also supra* note 539.

a resulting increase in market participation could improve the overall competitiveness and efficiency of the capital markets. Furthermore, registered debt offerings would benefit investors by extending to them the protections associated with registration.

We expect little, if any, adverse effect on issuers and guarantors of guaranteed debt securities from these final amendments. We also believe the adverse effects on investors, if any, are likely to be limited. Under the existing rule, investors receive separate financial statements of subsidiary issuers and guarantors if these entities are less than 100%-owned by the parent company. If these subsidiaries are consolidated in the parent company's financial statements and all other conditions of amended Rule 3-10 are met, investors may no longer receive the separate financial statements of these subsidiary issuers and guarantors. In such cases, although investors would not receive the detailed information about each such subsidiary issuer or guarantor included in the separate financial statements, a parent company would be required to provide, to the extent material, financial and non-financial information for consolidated subsidiary issuers and guarantors with non-controlling interests, as well as a description of any factors associated with non-controlling interest holders that may affect payments to holders of the guaranteed security. Where all eligibility conditions of the final rule are met, we believe the Revised Alternative Disclosures will provide the information investors need to make informed investment decisions with respect to a guaranteed security.

b. Disclosure Requirements

As detailed in Section III.C.2, "Disclosure Requirements," one of the conditions in the existing rule for omitting separate financial statements of a subsidiary issuer or guarantor is providing the Alternative Disclosures in the footnotes to the parent company's consolidated financial statements. The final rule retains the requirement to provide the Alternative

Disclosures, but with modifications. We address below the amendments related to the Alternative Disclosures (the Revised Alternative Disclosures).

i. Financial and Non-Financial Disclosures

As described in Section III.C.2.a, “Financial Disclosures,” the final rules should simplify the financial disclosures required by current Rule 3-10 by replacing Consolidating Information with a requirement to provide Summarized Financial Information. The level of detail currently required in Consolidating Information often contributes to multiple pages of detail in the parent company’s financial statements. The Summarized Financial Information is intended to focus on the information that we believe is most likely to be material to an investment decision. Additional line items beyond what is required in the Summarized Financial Information are required to be disclosed if they are material for investors to evaluate the sufficiency of the guarantee and/or are necessary to make the financial and non-financial information presented not misleading. Additionally, the final rules require that an issuer’s or guarantor’s receivables from, payables to, and transactions with non-obligated subsidiaries and related parties be presented in separate line items. This requirement in the final rule, which is a change from the proposal, should enhance the transparency of the Summarized Financial Information and further an investor’s evaluation of the sufficiency of the guarantee. At the same time, we do not expect this requirement to impose significant costs on issuers.

The final amendments should simplify the disclosures and reduce the cost of compliance, and could engender further benefits. For example, academic literature finds that simplified financial statements are associated with more efficient price discovery, and that investors on

average take more time to incorporate complex financial disclosures.[557] More generally, we believe the final amendments will provide investors with streamlined and easier to understand financial information that we believe is material to an investment decision. Thus, to the extent that the final amendments have their intended effect of reducing complexity while maintaining the material completeness of financial disclosures, we anticipate that the financial disclosures that result from the final amendments will improve price discovery, enhance the allocative efficiency of markets, and facilitate capital formation. Commenters generally agreed with such arguments, asserting that providing the Summarized Financial Information instead of the Consolidating Information would reduce an issuer's burdens[558] while continuing to provide investors with sufficient information to make informed investment decisions.[559]

Under the final rules, a parent company will generally be permitted to provide financial disclosures about the Obligor Group on a combined basis rather than on a disaggregated basis. As proposed, if non-financial disclosure provided in response to Rule 13-01 were applicable to one or more, but not all, issuers and/or guarantors, such as where a subsidiary's guarantee is limited to a particular dollar amount, separate disclosure of Summarized Financial Information for the affected issuers and/or guarantors would be required, to the extent material. In a change from the proposal, the final rules will permit, in limited circumstances (i.e., where the separate financial information of the affected issuers and guarantors can be easily explained and understood), narrative disclosure in lieu of separate disclosure of the financial information of the

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[557] *See* Haifeng You & Xiao-jun Zhang, Financial Reporting Complexity and Investor Underreaction to 10-K Information, 14 Rev. of Acct. Stud. 559 (2009); Brian P. Miller, The Effects of Reporting Complexity on Small and Large Investor Trading, 85 Acct. Rev. 2107 (2010); Alastair Lawrence, Individual Investors and Financial Disclosure, 56 J. of Acct. & Econ. 130 (2013).

[558] *See*, *e.g.*, letters from Ball Corp., Eaton Corp., EY, FEI, Freeport, KPMG, NYC Bar, Sullivan & Cromwell, and T-Mobile.

[559] *See*, *e.g.*, letters from Ball Corp., EY, FedEx, FEI, Freeport, and Sullivan & Cromwell.

subsidiary issuers and guarantors affected by those factors. This change to the final rule is expected to reduce the compliance burden for registrants without loss of relevant information for investors. By simplifying and streamlining the disclosure of financial and non-financial information, this amendment could also facilitate investors' information processing, leading to more efficient investment decisions.[560]

Whereas the existing rule required issuers and guarantors to account for their investments in non-issuer and non-guarantor subsidiaries under the equity method of accounting within the Alternative Disclosures, the final rules require the complete exclusion of non-issuer and non-guarantor subsidiary financial information from the combined financial information of the Obligor Group. In this regard, investments in non-issuer and non-guarantor subsidiaries held by issuers and guarantors will be excluded from the financial information of the issuers and guarantors. The financial information depicted will be only that of the issuers and guarantors. This requirement represents a change from the proposal, which would have permitted parent companies to determine the method of exclusion. We acknowledge that a parent company may have incurred lower costs under the proposed amendments by being able to select the method of excluding non-issuer and non-guarantor subsidiary information at its choice (*e.g.*, the parent company would likely incur lower costs if its systems were already designed to utilize a particular method). However, under the final amendments, a parent company is not required to justify that its selected method was reasonable under the circumstances as was proposed, and we expect in most circumstances that requiring exclusion of non-issuer and non-guarantor subsidiary financial information will be a less costly presentation than methods that would have required the disclosure of such financial information under the proposed amendments or than the required

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[560] *See supra* note 557.

used of the equity method under the existing rule. By requiring the complete exclusion of non-issuer and non-guarantor subsidiary financial information, the final rule will also avoid potential confusion among issuers and investors about the appropriate method of exclusion.

To the extent that investors are indifferent about whether payment under the guaranteed security comes from the issuer or one or more guarantors in the same consolidated group, or both, the disclosure resulting from the final amendments would not adversely impact investment decisions and could offer investors more readable, streamlined financial information. To the extent that increased readability without loss of material information would facilitate investor evaluation of whether the entities in the Obligor Group have the ability to make payments as required under the guaranteed security, the final amendments may promote the efficiency of security prices and investor portfolios. Consistent with potential benefits from these changes, a growing body of academic literature finds that financial statement readability affects the information environment and that more readable statements are associated with lower cost of debt capital and reduced bond rating agency disagreement.[561] Some commenters argued that providing this information on a combined basis would still provide investors with material information in making an investment decision[562] while also reducing a burdensome requirement for issuers.[563]

The final rule also will require that Summarized Financial Information be provided for the most recently ended fiscal year and year-to-date interim period, if applicable, included in the parent company's consolidated financial statements, rather than for the additional periods

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[561] *See* Samuel B. Bonsall & Brian P. Miller, The Impact of Narrative Disclosure Readability on Bond Ratings and the Cost of Debt, 22 Rev. of Acct. Stud. 608 (2017).

[562] *See*, *e.g.*, letters from Dell, FedEx, and Sullivan & Cromwell.

[563] *See*, *e.g.*, letters from Davis Polk, KPMG, and Sullivan & Cromwell.

specified under existing Rules 3-01 and 3-02 of Regulation S-X. This is intended to provide information that is material to an investment decision while reducing compliance costs for registrants. Some commenters, however, recommended requiring the most recent interim period only in limited circumstances, such as when there had been a material change since the most recent annual period.[564] While we acknowledge the concerns about the burden to provide interim information in all cases, we note that the final amendments already significantly reduce the burdens on parent companies by eliminating the earliest two years of required Summarized Financial Information and, in filings on Form 10-Q, by eliminating both the quarter-to-date interim period requirement in filings covering more than one fiscal quarter and comparable prior year interim period(s), as applicable. Under the final amendments, investors will continue to receive the most recent interim and annual period information, and we continue to believe this is the most appropriate approach to reducing burdens for parent companies while providing investors with the relevant information they need to make informed investment decisions.

In addition, the final rules will require non-financial disclosures to supplement the amended financial disclosures with additional information, to the extent material. This would include information about how payments to holders of guaranteed securities may be affected by such factors as the issuer and guarantor structure, the terms and conditions of the guarantees, the impact of non-controlling ownership interests, or other facts and circumstances specific to the offering. These final amendments should enhance the information provided to investors about the investment without imposing significant burdens on registrants. Overall, this should lead to greater transparency and reduce information asymmetries between issuers and investors.

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[564] *See, e.g.*, letters from ABA, Ball Corp., Comcast, Dell, Deloitte, EY, FedEx, FEI, and PWC.

Finally, as with any change to reporting format and presentation of information, the final amendments may lead companies and investors to incur costs to adjust to the new disclosures. As further discussed in Sections VIII.C.1.b.ii and iii below, we do not expect such costs to be substantial.

ii. When Disclosure is Required

As explained in Section III.C.2.c, "When Disclosure is Required," we are eliminating the numerical thresholds of existing Rule 3-10 that are used to determine the form and content of disclosure.[565] Instead, disclosures specified in new Rule 13-01 will be required unless such information would not be material. Additionally, the final rule will require disclosure of any financial and narrative information about each guarantor if it would be material for investors to evaluate the sufficiency of the guarantee, and disclosure of sufficient information to make the financial and non-financial information presented not misleading. While numerical thresholds may be easier to apply than a materiality standard that requires judgment, this change will allow for a more principles-based disclosure approach that is more tailored to the specific circumstances and the needs of investors.[566] Furthermore, registrants are already well-versed in making judgements about whether disclosure is material as part of complying with other disclosure requirements.

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[565] While we are eliminating the numerical thresholds of existing Rule 3-10 used to determine the form and content of disclosure for existing issuers and guarantors and instead requiring disclosure to the extent material, the final amendments continue to use a numerical test for determining whether pre-acquisition financial information of recently acquired subsidiary issuers and guarantors is required. *See* discussion in Section VIII.C.1.b.iv, "Recently Acquired Subsidiary Issuers and Guarantors."

[566] A number of academic studies have explored the use of numerical thresholds and "when material" disclosure standards. The majority of these papers highlight a preference for principles-based "when material" standard. *See generally, e.g.*, Eugene A. Imhoff Jr. & Jacob K. Thomas, *Economic Consequences of Accounting Standards: The Lease Disclosure Rule Change*, 10 J. of Acct. & Econ. 277 (1988) (providing evidence that management modifies existing lease agreements to avoid crossing numerical threshold for lease capitalization).

Despite being unable to estimate the number of filings that provide brief narrative disclosures under the existing Alternative Disclosure, we do not expect parent companies currently providing the brief narrative to incur significant costs to provide the Revised Alternative Disclosures. For example, where Alternative Disclosures under the current rule constitute only a brief narrative, we generally believe separate financial disclosures about the issuers and guarantors of the guaranteed securities likely would not be material and therefore could be omitted under the amendments.

Proposed Rule 13-01(a)(4) would have required, if the financial disclosures specified in proposed Rule 13-01(a)(4) were omitted because they are not material, disclosure of a statement to that effect and the reasons therefore. As discussed above, we did not adopt this proposed requirement.[567] In a change from the proposal, the final rule identifies four scenarios which we believe generally capture the situations under which the financial disclosures would not be material. These scenarios are intended to help address concerns[568] about the need for greater certainty as to the circumstances when the omission of financial disclosures may be appropriate while continuing to provide investors with the basic reasons as to why the financial information was omitted in a manner similar to existing Rule 3-10's narrative exceptions. If the scenario is applicable and disclosed, the parent company could then omit the financial disclosures. We believe the greater certainty afforded to a parent company that chooses to rely on one of the identified scenarios, if applicable, will result in lower burdens in preparing the disclosure. If one of the identified scenarios does not apply, however, the parent company has the option to make

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[567] *See* discussion in Section III.C.2.c.iii, "When Disclosure is Required."

[568] *See, e.g.*, letter from Shearman.

its own assessment based upon a consideration of other relevant facts and circumstances under the general materiality provision of Rule 13-01(a).

Allowing the parent company to omit information that is not material will lower the costs of disclosure relative to existing requirements and may help focus investor attention on decision-relevant information. This could also increase the risk that a parent company would omit, potentially inadvertently, value-relevant information, and that investors may make suboptimal investment decisions. Such risk will be mitigated, however, by the requirement to disclose any financial and narrative information about each guarantor if it would be material for investors to evaluate the sufficiency of the guarantee and sufficient information to make the financial and non-financial information presented not misleading. Also, omitting material information would subject issuers and guarantors to increased litigation risk, providing incentive for issuers to make careful determinations on the form and content of disclosures.

In certain settings, there is academic evidence that allowing issuers to make principles-based disclosure decisions using a materiality criterion is consistent with investor preferences.[569] However, there is also evidence of investor benefits from rules-based reporting standards.[570] While the final amendments could result in reduced comparability across registrants and transactions, investors could benefit from disclosures that are more tailored to the material facts and circumstances through registrants' application of a principles-based standard.

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569 *See* Usha Rodrigues & Mike Stegemoller, *An Inconsistency in SEC Disclosure Requirements? The Case of the "Insignificant" Private Target*, 13 J. of Corp. Fin. 251 (2007) (providing evidence, in the context of mergers and acquisitions, that numerical thresholds can deviate from investor preferences).

570 *See* Mark W. Nelson, *Behavioral Evidence on the Effects of Principles- and Rules-Based Standards*, 17 Acct. Horizons 91 (2003); *see also* Katherine Schipper, *Principles-Based Accounting Standards*, 17 Acct. Horizons 61 (2003). These studies note potential advantages of rules-based accounting standards, including: increased comparability among firms, increased verifiability for auditors, and reduced litigation for firms.

iii. Location of Alternative Disclosures and Audit Requirement

The final amendments will allow the parent company the choice of whether to provide the Revised Alternative Disclosures in its consolidated financial statement footnotes or, alternatively, in MD&A. If not otherwise included in the consolidated financial statements or MD&A, the disclosures must be provided in other specified prominent locations. Under the proposed amendments, this flexibility of where to locate the disclosures would only be available in the registration statement covering the offer and sale of the subject securities and any related prospectus, and in Exchange Act reports on Forms 10-K and 10-Q required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed. Under the final amendments, consistent with the recommendation of a number of commenters,[571] the parent company will have flexibility to locate the disclosures in a footnote to its consolidated financial statements or in the locations specified in Rule 13-01(b) in all of its filings.

If the parent company were to provide the Revised Alternative Disclosures in its consolidated financial statements, consistent with the existing rule, the disclosures would be subject to annual audit, interim review, and internal control over financial reporting requirements. Investors may perceive this choice of placement to mean the disclosures are more reliable.

In contrast, if the parent company were to provide the Revised Alternative Disclosures outside its financial statements, lower compliance costs would likely result with respect to these filings. Consistent with this, some commenters argued that not requiring the disclosures to be

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[571] *See, e.g.*, letters from ABA, Cravath, Davis Polk, Dell, SIFMA, Simpson Thacher and Sullivan & Cromwell.

audited will reduce costs.[572] While we generally expect lower compliance costs for parent companies that provide the Revised Alternative Disclosures outside of their consolidated financial statements, these parent companies may incur other costs, such as due diligence activities (*e.g.*, comfort letters).[573] Additionally, this optionality may reduce the potential for delay in offerings that exists under the current rule due to the requirement to have the Alternative Disclosures audited. Parent companies using this option to provide the disclosures outside the consolidated financial statements may be able to register guaranteed debt offerings and go to market more quickly than under the existing rule. This may allow parent companies to more promptly access favorable market conditions. Several commenters agreed with our assessment that such an option would allow issuers to register guaranteed debt securities and access capital markets faster.[574]

Although these disclosures are supplemental in nature, investors may nevertheless perceive them to be less reliable if a parent company provides these disclosures outside its financial statements as they would not benefit from an audit or interim review conducted by the auditor. Some commenters asserted that the flexibility to determine the location of the Proposed Alternative Disclosures under the proposed amendments could lead to investor confusion about the location of the disclosures,[575] and uncertainty as to the level of audit assurance that is applied to the disclosures.[576] One commenter did not support locating the Proposed Alternative

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[572] *See, e.g.*, letters from ABA, Ball Corp., Cravath, Davis Polk, Dell, Freeport, SIFMA, Simpson Thacher, Sullivan & Cromwell, and WTW.

[573] *See, e.g.*, letters from BDO, EY, Grant Thornton, KPMG, and Windstream.

[574] *See, e.g.*, letters from ABA, BDO, Cravath, Davis Polk, Dell, and Simpson Thacher. *Cf.* letter from BDO. *See* also note 269.

[575] *See* letters from Deloitte, FedEx, and PWC.

[576] *See* letters from Deloitte and KPMG.

Disclosures outside the financial statements,[577] and another suggested either requiring the Proposed Alternative Disclosures be audited or limiting unaudited disclosures to underwritten offerings.[578] One of these commenters indicated that many investors place significant value on having required disclosures subject to annual audit and/or interim review, internal control over financial reporting, and XBRL tagging requirements, and not subject to the forward-looking statements safe harbor.[579] To the extent that investors prefer the Revised Alternative Disclosures to be included in the parent company's financial statements, their willingness to invest may be influenced or they may discount the information provided in the unaudited portion of the disclosure, potentially reducing the amount of information incorporated into security prices and increasing the issuer's cost of capital.

Additionally, the amount of information that investors receive in the registration statement and in certain Exchange Act periodic reports could be affected by the choice of placement. The safe harbor for forward-looking information under PSLRA is not available for disclosures provided in the financial statements. A parent company providing the Revised Alternative Disclosures outside its consolidated financial statements may be more likely to voluntarily supplement those required disclosures with forward-looking information, as compared to a parent company that provides the Revised Alternative Disclosures in its consolidated financial statements. Such supplemental forward-looking information, if provided, could benefit investors. The location of disclosures may also affect the prominence of the

[577] *See* letter from CII.

[578] *See* letter from BDO.

[579] *See* letter from CII.

disclosures. Some academic research provides indirect evidence that users may treat information differently depending on the location of the disclosure.[580]

If a parent company provides the Revised Alternative Disclosures in its financial statements, consistent with the existing rule, such disclosures would be subject to XBRL tagging requirements. Because the machine-readable nature of XBRL disclosures facilitates aggregation, comparison, and large-scale analysis of reported information through automated means, investors stand to benefit from enhanced analysis capabilities, particularly in the comparison of disclosures across issuers and time periods. The parent company may incur additional costs to comply with these tagging requirements. In contrast, Revised Alternative Disclosures provided outside the financial statements would not be subject to XBRL tagging requirements. Investors would not benefit from the enhanced analysis capabilities and the parent company would not incur the related costs to comply with the tagging requirements. In general, we believe the incremental cost of tagging the Revised Alternative Disclosures in XBRL, and hence the incremental cost savings of not having to tag the Revised Alternative Disclosures likely would be relatively low, as issuers already would have software or processes in place for tagging financial statement information. One commenter argued that the cost of XBRL formatting should be minimal.[581]

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[580] For instance, research shows a weaker relation between equity prices and disclosed items in the notes to the financial statements versus recognized items on the face of the financial statements. *See, e.g.*, Maximilian A. Müller, Edward J. Riedl & Thorsten Sellhorn, *Recognition versus Disclosure of Fair Values*, 90 Acct. Rev. 2411 (2015) (showing a lower association between equity prices and disclosed investment property fair values relative to recognized investment property fair values and finding that reduced information processing costs and higher readability mitigates the discount applied to disclosed fair values); Hassan Espahbodi et al., *Stock Price Reaction and Value Relevance of Recognition versus Disclosure: The Case of Stock-Based Compensation*, 33 J. of Acct. & Econ. 343 (2002) (examining the equity price reaction to the announcements related to accounting for stock-based compensation to assess the value relevance of recognition (on the face of the financial statements) versus disclosure (in the notes to the financial statements) and concluding that recognition and disclosure are not substitutes).

[581] *See* letter from XBRL.

iv. Recently Acquired Subsidiary Issuers and Guarantors

The final rule eliminates the requirement to provide pre-acquisition audited financial statements of a recently acquired subsidiary issuer or guarantor. The existing requirement for pre-acquisition financial statements of recently acquired subsidiary issuers or guarantors calls for far greater detail than what is required for any other subsidiary issuer and guarantor. In addition, the trigger for pre-acquisition financial statements of a recently acquired subsidiary issuer or guarantor under existing Rule 3-10(g) is based on the significance of the acquired subsidiary compared to the size of the offering. This may require issuers to provide audited financial statements of a recently acquired subsidiary that is small relative to its consolidated parent company, which would increase issuers' compliance burdens.

The proposed rule would have required parent companies to provide information about recently acquired subsidiary issuers and guarantors only if material to an investment decision in the guaranteed security. The final rule contains a different test for determining whether disclosures about recently acquired subsidiary issuers and guarantors must be provided. More specifically, the final rule requires, in certain circumstances,[582] pre-acquisition Summarized Financial Information for significant recently acquired subsidiary issuers and guarantors to be provided in a Securities Act registration statement filed in connection with the offer and sale of the subject guaranteed security. Whereas separate financial statements are required for significant recently acquired subsidiary issuers and guarantors under existing Rule 3-10(g), the final rule requires Summarized Financial Information for significant recently acquired subsidiary issuers and guarantors, which is substantially less burdensome and costly for issuers to prepare

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[582] *See* description of the circumstances when pre-acquisition summarized financial information is required in Section III.C.2.e.iii, "Recently Acquired Subsidiary Issuers and Guarantors."

and consistent with what is required for existing issuers and guarantors under the final amendments. We believe Summarized Financial Information required by the final rule for recently acquired subsidiary issuers and guarantors will provide investors with material information with which to make an informed investment decision while reducing costs for issuers.

Consistent with existing Rule 3-10(g), the final amendments specify a numerical threshold-based significance test for determining whether pre-acquisition financial information for recently acquired subsidiary issuers and guarantors is required, albeit a different significance test than existing Rule 3-10(g), and the information continues to be required only in Securities Act registration statements. The continued use of a numerical threshold for pre-acquisition financial information is in contrast to the amendments to existing Rule 3-10 to determine the form and content of disclosures related to existing issuers and guarantors.[583] Unlike disclosure that relates to existing issuers and guarantors, which will be prepared by the parent company on an ongoing basis, and where materiality will therefore be evaluated regularly, in an acquisition context parent companies must rely on information provided by third parties to make a determination of whether the acquisition is significant and whether the related disclosure is material. In these circumstances, a numerical threshold will provide parent companies with a level of certainty that allows them to efficiently make determinations of what level of disclosure is required in an environment where delay of the debt securities offering can be costly. In addition, absent a specific numerical threshold requirement, if the parent company determines not to provide disclosure, investors would not receive information about the recently acquired subsidiary issuer's or guarantor's financial impact on the Obligor Group until the operating

[583] *See* discussion in Section VII. C.1.b.ii, "When Disclosure is Required."

results of that acquired issuer or guarantor have been subsequently reflected in the Summarized Financial Information of the Obligor Group. As a result, the impact of the acquisition may be difficult for investors to discern from other events affecting the Obligor Group, even where the acquisition may be economically significant. Thus, we expect a numerical threshold requirement in the case of these disclosures to be less costly for parent companies and result in more consistent disclosure for investors where transactions are of economic significance.

Overall, we believe replacing the existing pre-acquisition financial statement requirement with pre-acquisition Summarized Financial Information in certain circumstances will reduce the compliance burden for preparers without reducing material information for investors. Furthermore, investors may find the information provided under the existing pre-acquisition financial statement requirement redundant, as it overlaps with Rule 3-05 of Regulation S-X. Consequently, eliminating the existing requirement would streamline disclosures. Academic research suggests that individuals invest more in firms with more concise financial disclosures.[584] Thus, to the extent that the final amendments alleviate duplication and do not affect the completeness of financial disclosures, the resulting disclosures could result in improved price discovery, enhance the allocative efficiency of the market, and facilitate capital formation.

v. Continuous Reporting Obligation

As discussed in Section III.C.2.f, "Continuous Reporting Obligation," the final rules permit a parent company to cease providing the Revised Alternative Disclosures in its ongoing reporting if the corresponding subsidiary issuers' and guarantors' reporting obligations under Section 13 and/or Section 15(d) of the Exchange Act with respect to the guaranteed securities are

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[584] *See* Lawrence, note 557 above.

terminated or suspended. This amendment will reduce compliance costs without loss of material information for investors. To the extent that the existing requirements impose unnecessary burdens by requiring a parent company to continue providing the Revised Alternative Disclosures beyond when the subsidiary would otherwise have to report under the Exchange Act with respect to the guaranteed securities, or otherwise deter issuers and guarantors from engaging in public debt offerings to avoid such reporting obligations, this amendment will address such issues.

Many commenters supported eliminating the existing Rule 3-10 requirement to provide continuous reporting for as long as the guaranteed securities are outstanding if they use the Alternative Disclosures.[585] One commenter stated that the existing rule's continuous reporting requirement "is highly anomalous and frequently results in an expensive ongoing disclosure cost with no discernable benefit to investors following business combination transactions."[586] Some commenters suggested that eliminating these requirements would reduce burdens on issuers.[587] In contrast, two commenters opposed eliminating existing Rule 3-10's continuous reporting requirement and stressed that the Commission should retain the requirement.[588] These commenters asserted that the Proposed Alternative Disclosures are important to investors, and recommended the Commission require continuous reporting for as long as the securities are outstanding.[589] These commenters also argued that investors accept less compensation for securities whose issuers provide financial reporting because it reduces the risks of investing in

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585 *See*, *e.g.*, letters from Cravath, Davis Polk, FedEx, Freeport, Nareit, PWC, and Sullivan & Cromwell.

586 *See* letter from Cravath.

587 *See, e.g.*, letters from Cravath, Freeport, Nareit, and Sullivan & Cromwell.

588 *See* letters from CII and Credit Roundtable.

589 *See* letters from CII and Credit Roundtable.

those securities, so issuers should not be able to pay less interest while being permitted to stop financial reporting. We note that any potential adverse effects from eliminating continuous reporting may be mitigated by the fact that, as one commenter indicated, it has become commonplace for issuers to tailor contractual reporting obligations to meet the perceived needs of investors.[590]

2. Amendments to Rule 3-16 and Partial Relocation to Rule 13-02

As discussed in detail in Section V.B, "Overview of the Amendments," although affiliates whose securities are pledged as collateral are not registrants with respect to the collateralized security, Rule 3-16, when triggered, requires financial statements as if such affiliates were registrants. The final rule will replace the existing requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with financial and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement to the consolidated financial statements of the registrant that issues the collateralized security.[591]

Debt agreements are often structured to avoid the requirements of Rule 3-16 by either structuring the debt agreement to release pledges of affiliate securities as collateral if and when such pledge triggers the requirements under Rule 3-16, or by not including pledges of affiliate securities as collateral altogether. In such circumstances, investors may demand a higher interest rate from issuers to compensate for the absence of collateral, potentially increasing the cost of capital to issuers. The final amendments will reduce the burden of having to provide separate

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[590] *See* letter from Cravath.

[591] As a transitional matter, the final amendments do not eliminate existing Rule 3-16, which will continue to be applicable to registered collateralized securities with collateral release provisions issued and outstanding as of the effective date of the final amendments. *See* Section VI.B "Rule 3-16 Collateral Release Provisions."

financial statements of affiliates in comparison to the requirements under the existing rule and thereby provide issuers with the flexibility to structure their debt agreements with pledges of affiliate securities. If, as a result of the final amendments, debt agreements are no longer structured to avoid disclosure requirements about affiliates whose securities are pledged as collateral, investors would obtain the benefit of the collateral as well as the related disclosures, which would be subject to Section 11 liability. This flexibility may also permit issuers to attract investors that prefer to invest in obligations where collateral is fully available and not subject to the release mechanisms designed to avoid Rule 3-16 requirements. By appealing to a broader range of investors and providing more attractive collateral arrangements, registrants may be able to obtain a lower cost of capital. Commenters generally supported the amendments to Rule 3-16. Several commenters asserted the proposed amendments to Rule 3-16 would benefit investors, who would receive information critical to making informed decisions in a simpler format, as well as registrants by reducing offering costs.[592]

Finally, as with any change to reporting format and presentation of information, the amendments may lead companies and investors to incur costs to adjust to the new disclosures, as further discussed in Sections VIII.C.2.a through c below.

a. Financial Disclosures

i. Level of Detail

As discussed in Section V.C.1, "Level of Detail," affiliates whose securities are pledged as collateral are almost always consolidated subsidiaries of the registrant,[593] and their financial

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[592] *See*, *e.g.*, letters from Davis Polk, EY, and FEI.

[593] In the rare circumstances where the affiliate is not a consolidated subsidiary of the registrant, Rule 13-02(a)(6) requires the registrant to provide "[a]ny financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral" and

information is thus already reflected in the registrant's consolidated financial statements. The final amendments require Summarized Financial Information for each such affiliate and disclosure of additional financial information about each affiliate if material for investors to evaluate the pledge of the affiliate's securities as collateral and/or necessary to make the financial and non-financial information presented not misleading. For registrants, this will reduce compliance costs by reducing the amount of information they need to prepare and disclose.[594] For investors, we do not anticipate significant costs since material information will still be required to be provided. The simplified disclosures will highlight material information needed to make informed investment decisions and therefore should enable investors to process information more efficiently and make more informed investment decisions.

Several commenters asserted that the proposed amendment would reduce a registrant's costs and burdens[595] while still providing investors with clear and sufficient information.[596]

ii. Presentation on a Combined Basis

The final rules will permit a registrant to provide the Summarized Financial Information of consolidated affiliates that are pledged as collateral on a combined rather than individual basis. However, if non-financial disclosure provided in response to Rule 13-02 were applicable to one or more, but not all, affiliates, separate disclosure of Summarized Financial Information for the affected affiliates would be required, to the extent material. The final rules will permit, in

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Rule 13-02(a)(7) requires "[s]ufficient information so as to make the financial and non-financial information presented not misleading." In this regard, separate financial statements of the unconsolidated affiliate may be necessary to comply with these requirements. *See* additional discussion in Section V.C.1, "Level of Detail."

594 For purposes of the PRA, we estimate that the final amendments to Rule 3-16 will result in an overall reduction of 30 burden hours for each form (other than Form 10-Q) affected by the final amendments. *See* Section VIII.B.2, "Rule 3-16," below.

595 *See*, *e.g.*, letters from Davis Polk EY, FEI, and PWC.

596 *See* letters from EY and FEI.

limited circumstances (i.e., where the separate financial information of the affected affiliates can be easily explained and understood), narrative disclosure in lieu of separate disclosure of the financial information of the affiliates affected by those factors. Although this narrative would be allowed in limited circumstances, separate columnar financial information for affected affiliates would generally be expected. As with the effects of the final amendments to Rules 3-10 and 13-01 discussed above,[597] we believe the simplified disclosures in the final amendments to Rules 3-16 and 13-02 will both lower compliance costs for issuers and provide investors with more streamlined and concise disclosures that will promote more efficient decision-making by investors. We do not anticipate significant costs to investors since material information will still be required to be provided.

iii. Periods to Present

Under the existing rule, the periods required in Rule 3-16 Financial Statements are those required by Rules 3-01 and 3-02 of Regulation S-X, or, for smaller reporting companies, the periods required by Rule 8-02 of Regulation S-X. The final amendments will require the disclosure of Summarized Financial Information for the most recently ended fiscal year and year-to-date interim period included in the registrant's consolidated financial statements, consistent with the proposed amendments to Rule 3-10 above. Rule 3-16 financial statements are not currently required in quarterly reports, and as such, registrants will incur costs to provide this additional interim disclosure.[598] While we acknowledge the concerns about the burden to provide interim information in all cases, consistent with our analysis of the economic effect of

[597] *See* discussion in Section VII.C.1.b.i, "Financial and Non-Financial Disclosures."

[598] For purposes of the PRA, we estimate that the amendments to Rule 3-16 will result in an increase of 70 burden hours per Form 10-Q filing. *See* Section VIII.B.2, "Rule 3-16," below.

the corresponding requirement in the final amendments to Rules 3-10 and 13-01 above, we believe the adopted approach will significantly reduce burdens on issuers while providing investors with the relevant information they need to make informed investment decisions.[599]

b. Non-Financial Disclosures

The final rules will require non-financial information about affiliates whose securities are pledged as collateral and the collateral arrangements. We do not believe this amendment will impose undue costs for issuers, as the majority of the information required to be disclosed under the final amendments should be readily available or attainable.[600] We believe the amendments will benefit investors by supplementing the required financial disclosures with additional, material information, thereby rendering the combined financial and non-financial disclosures more informative for investment decisions.

Commenters generally supported the proposed rules' requirement to provide certain non-financial disclosures, to the extent material, about the securities pledged as collateral, each affiliate whose securities are pledged, the terms and conditions of the collateral arrangement, and whether a trading market exists for the pledged securities.[601] Consistent with our analysis of the potential impact on investors, one commenter explicitly stated that such disclosure would be helpful to investors.[602]

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[599] *See* discussion in Section VII.C.1.b.i, "Financial and Non-Financial Disclosures."

[600] The content of the amended non-financial disclosures consists of basic information about the collateral arrangement and the entities involved. We do not expect such information, which is generally available from debt agreements, will impose a significant burden on a registrant to prepare.

[601] *See*, *e.g.*, letters from Davis Polk, FEI, and NYC Bar.

[602] *See* letter from Davis Polk.

c. When Disclosure is Required

Rather than utilizing existing numerical thresholds, disclosure of the specified financial and non-financial disclosures will be required unless the information is not material. Additionally, the final rule will require disclosure of any financial and narrative information about each affiliate if it would be material for investors to evaluate the pledge of the affiliate's securities as collateral, and disclosure of sufficient information to make the financial and non-financial information presented not misleading. A number of commenters stated explicitly that they supported replacing existing Rule 3-16's numerical threshold requirement with a principles-based materiality standard.[603] One commenter noted that, by focusing on materiality, proposed Rule 13-02 would require registrants to undertake the expense of providing the required disclosures only when doing so would be helpful to investors.[604] Another commenter contended that the existing substantial portion numerical threshold requirement could cause registrants to provide information that is not material or possibly not require financial statements even if such affiliates are material to the registrant's business.[605] To the extent the numerical thresholds under the existing rule result in disclosure of information that is not material, investors may benefit from reduced search costs and the facilitation of more efficient information processing.[606] Further, we believe that, compared to the existing rule, final Rule 13-02 will reduce compliance costs for issuers and increase the likelihood that offerings will be registered because issuers will

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[603] *See*, *e.g.*, letters from CII, Cravath, Davis Polk, Deloitte, EY, and FEI.

[604] *See* letter from Davis Polk.

[605] *See* letter from Dell.

[606] *See* David Hirschleifer & Siew Hong Teoh, *Limited Attention, Information Disclosure, and Financial Reporting*, 36 J. of Acct. and Econ. 337 (2003) (developing a theoretical model where investors have limited attention and processing power). The authors show that with partially attentive investors, means of presenting information may have an impact on stock price reactions, misvaluation, long-run abnormal returns, and corporate decisions.

only be required to provide disclosure to the extent material. At the same time, compared to numerical thresholds, having a principles-based disclosure approach may create more uncertainty for issuers as it requires more judgement. However, we expect any additional uncertainty would be justified by the ability to provide disclosures more tailored to the specific circumstances and the needs of investors, and we note that registrants are already well-versed in making judgements about whether disclosure is material as part of complying with other disclosure requirements.

Proposed Rule 13-02(a)(4) would have required, if the financial disclosures specified in proposed Rule 13-02(a)(4) were omitted because they were not material, disclosure of a statement to that effect and the reasons therefor. As discussed above, we did not adopt this proposed requirement.[607] Similar to the final amendments to Rules 3-10 and 13-01, in a change from the proposal, the final rule identifies two scenarios which we believe generally capture the situations under which the financial disclosures would not be material. These scenarios were intended to help address concerns[608] about the need for greater certainty as to the circumstances when the omission of financial disclosures may be appropriate while continuing to provide investors with the basic reasons as to why the financial information was omitted. If the scenario is applicable and disclosed, the parent company could then omit the financial disclosures. We believe the greater certainty afforded to a registrant that chooses to rely on one of the identified scenarios, if applicable, will result in lower burdens in preparing the disclosure. If one of the identified scenarios does not apply, however, the registrant has the option to make its own assessment based upon a consideration of other relevant facts and circumstances under the general materiality provision of Rule 13-02(a).

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607 *See* discussion in Section V.E.3, "When Disclosure is Required."

608 *See, e.g.*, letter from Shearman.

d. Location of Disclosures and Audit Requirement

As discussed above for the final amendments to Rule 3-10, new Rule 13-02 will allow registrants the choice of whether to provide the amended disclosures in its consolidated financial statement footnotes or, alternatively, in MD&A. If not otherwise included in the consolidated financial statements or MD&A, the disclosures must be provided in other specified prominent locations. Under the proposed amendments, this flexibility of where to locate the disclosures would only be available in the registration statement covering the offer and sale of the subject securities and any related prospectus, and in Exchange Act reports on Forms 10-K and 10-Q required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed. Under the final amendments, registrants will have flexibility to locate the disclosures in a footnote to the consolidated financial statements or in the locations specified in Rule 13-02(b) in all of its filings. Our analysis of this amendment is generally consistent with our analysis of the economic effect of the corresponding requirement in the final amendments to Rule 13-01 above. If a registrant provides the amended disclosures in its consolidated financial statements, the disclosures will be subject to annual audit, interim review, internal control over financial reporting, and XBRL tagging requirements. Investors may perceive this choice of placement to indicate that the disclosures are more reliable. To the extent that investors prefer these disclosures to be located in the registrant's financial statements, this choice may influence their willingness to invest. Registrants could attempt to influence such willingness by including the disclosures in their financial statements.

In contrast, if a registrant provides the disclosures outside its financial statements, lower compliance costs would likely result with respect to these filings, and the registrant may be able to register guaranteed debt offerings more quickly than under the existing rule and thereby more

promptly access favorable market conditions. However, registrants may incur other costs, such as due diligence activities. Although these disclosures are supplemental in nature, investors may nevertheless perceive them to be less reliable if a registrant provides these disclosures outside its financial statements as they would not benefit from an audit or interim review conducted by the auditor. To the extent that investors prefer the disclosures to be included in the registrant's financial statements, their willingness to invest may be influenced or they may discount the information provided in the unaudited portion of the disclosure, potentially reducing the amount of information incorporated into security prices and increasing the issuer's cost of capital.

e. Recently Acquired Affiliates Whose Securities are Pledged as Collateral

The proposed rule would have required registrants to provide information about recently acquired subsidiary affiliates only if material to an investment decision in the collateralized security. The final rule contains a different test for determining whether disclosures about recently acquired affiliates must be provided. More specifically, the final rule requires, in certain circumstances,[609] pre-acquisition Summarized Financial Information for recently acquired affiliates to be provided in a Securities Act registration statement filed in connection with the offer and sale of the subject collateralized security. Existing Rule 3-16 does not contain a specific requirement to provide pre-acquisition financial information of recently acquired affiliates whose securities are pledged as collateral. However, if a recently acquired affiliate meets the substantial portion threshold in the existing rule, financial statements for periods prior to the date of acquisition by the registrant are required to be filed. Generally consistent with the effects of the corresponding final amendments to Rule 3-10 discussed above, we believe

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[609] *See* description of the circumstances when pre-acquisition summarized financial information is required in Section V.G.3, "Recently Acquired Affiliates Whose Securities are Pledged as Collateral."

requiring pre-acquisition Summarized Financial Information of affiliates whose securities are pledged as collateral in certain circumstances will provide material information for investors without imposing significant burdens on issuers.[610]

D. Anticipated Effects on Efficiency, Competition, and Capital Formation

As discussed above, and as a general matter, we believe the final amendments will improve the content, format, and focus of required registrant disclosures. This should both reduce the compliance cost for issuers and allow more efficient decision-making by investors. This may be true particularly to the extent that the final amendments result in more efficient and effective dissemination of material information to investors and increase the efficiency of investor processing and usage of this information.

To the extent that the final amendments ease registration burdens for issuers, there could be an increase in the number of registered offerings. If such issuers would not have otherwise issued debt securities, this would result in an increase in capital formation. If such issuers would have otherwise issued debt under Rule 144A, it is possible that a switch to a registered offering would lower the issuers' cost of capital while also providing investors with the enhanced protections afforded by registered offerings.

Since the final rule amendments may increase the number of registered debt offerings as discussed above, the investment opportunities available for different types of investors may be broadened and may allow for more efficient matching of investors with assets that meet their investment objectives and preferences. To the extent that the final amendments to the eligibility conditions that must be met to omit the separate financial statements of subsidiary issuers and guarantors of guaranteed debt securities encourage additional registered guaranteed debt

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[610] *See* discussion in Section VII.C.1.b.iv, "Recently Acquired Subsidiary Issuers and Guarantors."

offerings, more investment opportunities would be made available, and a resulting increase in market participation could improve the overall competitiveness and efficiency of the capital markets. Retail investors could additionally be indirectly affected through their investments managed by institutional investors, who would have greater access to a broader range of investment opportunities in the registered debt market.

To the extent that the final amendments provide investors with streamlined and easier to understand financial information while maintaining the material completeness of the financial disclosures, we expect that the financial disclosures that result from the final amendments would improve price discovery, enhance the allocative efficiency of markets, and facilitate capital formation.

Rather than only 100%-owned subsidiaries of the parent company, the final amendments permit subsidiary issuers or guarantors that are consolidated in the parent company's financial statements to omit separate subsidiary issuer and guarantor financial statements, if the other criteria in amended Rule 3-10 are satisfied. To the extent that the final amendments expand the scope of subsidiary issuers and guarantors that meet Rule 3-10 eligibility requirements, the final amendments may promote greater competition among issuers and guarantors of guaranteed debt securities. This may enable more registrants, especially those on the margins, to compete on better terms.

As describe above,[611] many outstanding registered debt securities have a collateral release provision, which automatically reduces the pledged collateral if it would trigger existing Rule 3-16's requirement for a registrant to file separate financial statements for each affiliate whose securities constitute a substantial portion of the collateral for any class of registered

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[611] *See* Section VI.B "Rule 3-16 Collateral Release Provisions."

securities as if the affiliate were a separate registrant. The proposed amendments could possibly have affected senior lenders and unsecured lenders indirectly as these collateral release provisions may no longer be operable and the collateral available to lenders may be modified, potentially causing unintended credit consequences. As a transitional matter, the final amendments do not eliminate existing Rule 3-16, which will continue to be applicable to registered collateralized securities with collateral release provisions issued and outstanding as of the effective date of the final amendments.[612] Subsequent to the transition period, new issuances of registered securities collateralized by affiliate securities must comply with new Rule 13-02, and provide certain financial and non-financial disclosures of that affiliate in all cases, to the extent material. If, as a result of the final amendments, issuers no longer include collateral release provisions in their indentures, the pledged collateral would be maintained, which would lead to improved investment options for investors and thus increased market efficiency.

E. Consideration of Reasonable Alternatives

We discuss below potential alternatives to the final amendments to existing Rules 3- 10 and 3-16.

1. Alternative to Final Amendments to Existing Rule 3-10

An alternative to the final amendments to Rule 3-10 would have been to permit the Revised Alternative Disclosures to be provided if the subsidiary issuers and/or guarantors were "wholly owned" by the parent company, as defined in Rule 1-02(aa) of Regulation S-X.[613] Using "wholly owned" as the parent company ownership threshold, rather than the existing

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[612] *See id*.

[613] Rule 1-02(aa) of Regulation S-X ("The term *wholly owned subsidiary* means a subsidiary substantially all of whose outstanding voting shares are owned by its parent and/or the parent's other wholly owned subsidiaries." (Emphasis in original.)).

100%-ownership requirement, would likely permit more subsidiary issuers and guarantors to use the Alternative Disclosures as compared to the existing rule, but would be less flexible than the final amendments, as detailed above. As a result, we believe the final amendments better serve to enhance efficiency, competition and capital formation, while still maintaining appropriate investor protections. Many commenters supported the revision to existing Rule 3-10's condition that a subsidiary issuer or guarantor be 100% owned by the parent company to one in which the subsidiary issuer or guarantor be consolidated in the parent company's financial statements.[614]

2. Alternatives Common to Final Amendments to Existing Rule 3-10 and Existing Rule 3-16

One alternative to each set of final amendments would have been to require that the Revised Alternative Disclosures, or the disclosures specified in final Rule 13-02, as applicable, be located in the audited annual and unaudited interim financial statement footnotes of the parent company, or registrant, as applicable, in all filings. Under this alternative, the parent company or registrant would not have a choice of whether to locate the disclosures outside its consolidated financial statements. On the one hand, this could increase investor confidence in the disclosed information and provide the benefits of XBRL tagging. On the other hand, the cost to a parent company or registrant associated with preparing registration statements and certain periodic reports would be higher with this alternative than if the disclosures were permitted to be provided outside of the financial statements. Furthermore, the flexibility of going to market more quickly would not be available under this alternative. This could limit the incentives to pursue registered offerings compared to the final amendments, and those registrants that do pursue registered offerings may be less likely to issue guarantees, or pledge affiliate securities as

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614 *See*, *e.g.*, letters from Comcast, Cravath, Davis Polk, EEI / AGA, FedEx, FEI, Nareit, NYC Bar, and Sullivan & Cromwell.

collateral, given the additional costs associated with including the disclosures in the financial statements. Additionally, a parent company or registrant may be less likely to voluntarily supplement the disclosures with forward-looking information because the safe harbor for forward-looking information under PSLRA is not available for disclosures provided in the financial statements. As discussed above,[615] guarantees and pledges of affiliate securities as collateral serve, in part, to reduce investor risk of structural subordination. Overall, we believe the benefits to investors of enhanced access to registered offerings with guarantees and pledges of affiliate securities as collateral, together with the benefits of reduced compliance burdens for issuers, justify forgoing the benefits of requiring these disclosures to be located in the financial statement footnotes of the parent company, or registrant, as applicable.

While providing additional flexibility to the parent company or registrant in the location of the disclosures will likely further reduce the compliance burdens associated with registered offerings with guarantees or collateral, we acknowledge that investors may demand a higher expected return if they perceive reduced reliability of the Revised Alternative Disclosure. The potential for higher borrowing costs may encourage issuers to voluntarily include the Revised Alternative Disclosures in the financial statements of the parent company, or registrant, as applicable.

Finally, another alternative relevant to each set of final amendments would have been to require the Summarized Financial Information specified in final Rules 13-01 and 13-02 to be provided for the same periods as the parent company or registrant, as applicable, instead of the most recent annual and interim period. While this alternative would increase the amount of

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615 *See* Section VII.C.1, "Amendments to Rule 3-10 and Partial Relocation to Rule 13-01."

information available to investors in the specific filing, the additional information may not be material in making informed investment decisions. As discussed above,[616] prior studies have suggested that simpler disclosures may benefit investors by reducing search costs and facilitating more efficient information processing. Moreover, including additional historical periods would result in higher costs to registrants when preparing registration information and ongoing reporting. We do not believe the potential benefit to investors of this additional historical information justifies the potential cost to the registrants.

Related to the above alternative, some commenters recommended not requiring the most recent interim period disclosures or requiring them only in limited circumstances, such as when there had been a material change since the most recent annual period.[617] As discussed in Section VIII.C.1.b.i. with respect to new Rule 13-01, we acknowledge that parent companies will continue to incur compliance costs to include the most recent interim period disclosure under the final amendments. However, we believe that the most recent interim period disclosures provide timely and relevant information for investors to make informed investment decisions. Moreover, in comparison to the existing rules, the final amendments already significantly reduce the burdens on parent companies by eliminating, in filings on Form 10-Q, both the quarter-to-date interim period requirement in filings covering more than one fiscal quarter and the comparable prior year interim period(s), as applicable. These observations related to new Rule 13-01 also extend to new Rule 13-02. Overall, we believe that the benefit of providing the most recent interim period disclosures under the final amendments justifies the compliance costs to registrants.

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[616] *See* note 557and accompanying text.

[617] *See* note 564 and accompanying text.

IX. Paperwork Reduction Act

A. Background

Certain provisions of our rules, schedules, and forms that would be affected by the rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[618] We published a notice requesting comment on revisions to these collections of information requirements in the Proposing Release and have submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[619] The hours and costs associated with preparing, filing, and sending the schedules and 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 comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the collections of information are:

- Regulation S-X (OMB Control No. 3235-0009);
- Regulation S-K (OMB Control No. 3235-0071);[620]
- Form S-1 (OMB Control No. 3235-0065);
- Form S-4 (OMB Control No. 3235-0324);
- Form S-3 (OMB Control No. 3235-0073);

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[618] 44 U.S.C. 3501 *et seq*.

[619] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[620] The paperwork burdens for Regulation S-K and Regulation S-X are imposed through the forms, schedules and reports that are subject to the requirements in these regulations and are reflected in the analysis of those documents.

- Form S-11 (OBM Control No. 3235-0067);
- Form F-1 (OMB Control No. 3235-0258);
- Form F-3 (OMB Control No. 3235-0256);
- Form F-4 (OMB Control No. 3235-0325);
- Form 20-F (OMB Control No. 3235-0288);
- Form 10-K (OMB Control No. 3235-0063);
- Form 10-Q (OMB Control No. 3235-0070);
- Form SF-1 (OMB Control No. 3235-0707);
- Form SF-3 (OMB Control No. 3235-0690);
- Form 1-A (OMB Control No. 3235-0286);
- Form 1-K (OMB Control No. 3235-0720); and
- Form 1-SA (OMB Control No. 3235-0721).

The regulations, schedules, and forms listed above were adopted under the Securities Act and/or the Exchange Act. These regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic and current reports, distribution reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions.

As described in more detail above, we are amending the disclosure requirements in Rules 3-10 and 3-16 of Regulation S-X to better align those requirements with the needs of investors and to simplify and streamline the disclosure obligations of registrants. We are amending both rules and relocating parts of the disclosure requirements of Rule 3-10 and Rule 3-16 to new Rules 13-01 and 13-02. We also are making conforming amendments to Items 504, 1100, 1112, 1114, and 1115 of Regulation S-K; Forms F-1, F-3, 1-A, 1-K, 1-SA, and Rule 257(b) under the

Securities Act; and Rule 12h-5 and Form 20-F under the Exchange Act. These amendments are intended to provide investors with the information that is material given the specific facts and circumstances, make the disclosures easier to understand, and reduce the costs and burdens to registrants.

B. Summary of Comment Letters

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that directly addressed the PRA analysis of the proposed amendments. Several commenters, however, did provide responses to certain requests for comment that have informed some of our PRA estimates. In this regard, several commenters indicated that the costs and burdens of providing the disclosures under the proposed amendments would be lower than the compliance burdens under the current disclosure requirements and could potentially result in an increase in the number of registered debt offerings.[621]

C. Summary of the Impact on Collections of Information

As discussed in more detail in the Proposing Release,[622] we derived the burden hour estimates by estimating change in paperwork burden as a result of the amendments, both in terms of the change to the paperwork burden for current responses as well as the change in the number of responses. For purposes of the PRA, we estimate that the current disclosure burdens under Rules 3-10 and 3-16 require an average of 100 burden hours to prepare and process, and that the amendments would reduce these burdens by 30 hours. Correspondingly, we estimate that the

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[621] *See* letters from Ball Corp., Davis Polk, EY, and FEI. *Cf.* letter from NYC Bar (indicating that the proposed amendments would reduce the burdens for registering offerings but may not result in a significant increase in such offerings because of the general trend toward private offerings).

[622] *See* Section VIII of the Proposing Release.

disclosure burdens under the amendments will require 70 hours to prepare and process. We estimated the number of responses by conducting separate database searches of filings containing XBRL tags most commonly associated with Consolidating Information and terms associated with the Alternative Disclosures during the calendar years of 2016 through 2018.

As discussed in Sections III through V, we have made some changes to the proposed amendments as a result of comments received. While certain of these changes could further reduce burdens on registrants, others may incrementally increase those burdens relative to the proposals. Considered together, we do not expect these changes to appreciably impact our assessment of the compliance burdens of the final rule amendments for purposes of the PRA. Accordingly, we have not revised the estimates from the Proposing Release of the impact on the per hour burden for the affected forms.

PRA Table 1 summarizes the estimated impact of the final amendments on the paperwork burdens associated with the affected forms listed above.

PRA Table 1. Estimated Paperwork Burden Effects of the Final Amendments

Final Amendments and Effects	Affected Forms	Estimated Net Effect
Rule 3-10 and New Rule 13-01 of Regulation S-X: • Replaces the Consolidating Information required by current Rule 3-10 with Summarized Financial Information for each issuer and guarantor and in certain circumstances additional summarized disclosure of intercompany and related-party transactions. • Allows supplemental financial and non-financial disclosure about subsidiary issuers and/or guarantors to be disclosed outside of the parent company's financial statements; • Eliminates current requirement to provide pre-acquisition financial statements of recently acquired subsidiary issuers and guarantors, but requires, in certain instances, pre-acquisition Summarized Financial Information about significant recently acquired subsidiary issuers and guarantors.	• Forms S-1, S-3, S-4, S-11, F-1, F-3, F-4, SF-1, SF-3, 20-F, 10-K, 10-Q, 1-A, 1-K, and 1-SA	• 30 hour net decrease in compliance burden per each existing filing containing current Rule 3-10 disclosures • Small increase in the number of Form S-1, Form S-3, Form S-4, Form S-11, Form F-1, Form F-4, and Form 20-F filings
Rule 3-16 and New Rule 13-02 of Regulation S-X: • Replaces current Rule 3-16's requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with a requirement that the registrant provide Summarized Financial Information and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement to the registrant's consolidated financial statements, including disclosure of intercompany and related-party transactions. • Permits the Summarized Financial Information and non-financial disclosures to be presented outside of the registrant's financial statements; • Requires, in certain instances, pre-acquisition Summarized Financial Information about significant recently acquired affiliates.	• Forms S-1, S-3, S-4, S-11, F-1, F-3, F-4, SF-1, SF-3, 20-F, 10-K, 10-Q, 1-A, 1-K, and 1-SA	• 30 hour net decrease in compliance burden per each existing filing containing current Rule 3-16 disclosures • Small increase in the number of Form S-1, Form S-3, Form S-4, Form S-11, Form F-1, Form F-4, Form 20-F, Form 10-K, Form 10-Q, and Form 1-A filings

D. Burden and Cost Estimates to the Amendments

Below we estimate the incremental change in paperwork burdens as a result of the final amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the size and nature of their business.

The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a registrant to prepare and review the disclosures required under the proposed amendments. For purposes of the PRA, the burden is allocated between internal burden hours and outside professional costs. The table below sets forth the percentage estimates the Commission typically uses for the burden allocation for each affected form. We also estimate that the average cost of retaining an outside professional is $400 per hour.[623]

PRA Table 2: Standard Estimated Burden Allocation for Specified Forms and Schedules.

Form / Schedule Type	Internal	Outside Professionals
Forms S-1, S-3, S-4, S-11, F-1, F-3, F-4, 20-F, SF-1, and SF-3.	25%	75%
Forms 10-K, 10-Q, 1-A, and 1-K	75%	25%
Form 1-SA	85%	15%

[623] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other entities that regularly assist registrants in preparing and filing documents with the Commission.

PRA Table 3 illustrates the estimated incremental reduction to the annual compliance burdens for the affected forms, in hours and in costs, as a result of the final amendments.

PRA Table 3: Calculation of the Reduction in Burden Estimates to Existing Affected Responses that Include Disclosures under Current Rules 3-10 and 3-16

Form	Estimated Number of Affected Responses (A) *	Estimated Incremental burden hours/form (B)	Total incremental burden hours (C) = (A) x (B)	Estimated Internal Burden Hours (D) = (C) x (Allocation %)	Estimated Outside Professional Hours (E) = (C) x (Allocation %)	Estimated Outside Professional Costs/Affected Responses (F) = (E) x $400
10-K	481	(30)	(14,430)	(10,822.5)	(3,607.5)	($1,443,000)
10-Q	1,252	(30)	(37,560)	(28,170)	(9,390)	($3,756,000)
S-1	10	(30)	(300)	(75)	(225)	($90,000)
20-F	15	(30)	(450)	(112.5)	(337.5)	($135,000)
S-4	100	(30)	(3,000)	(750)	(2,250)	($900,000)
S-11	5	(30)	(150)	(37.5)	(112.5)	($45,000)
F-1	5	(30)	(150)	(37.5)	(112.5)	($45,000)
F-4	7	(30)	(210)	(52.5)	(157.5)	($63,000)
1-A	0	---	---	---	---	---
1-K	0	---	---	---	---	---
1-SA	0	---	---	---	---	---
SF-1	0	---	---	---	---	---
SF-3	0	---	---	---	---	---
Totals				(40,057.5)		($6,346,845)

* The number of estimated affected responses is an estimate of the average number of filings that included Consolidating Information under Rule 3-10, Alternative Disclosures or Rule 3-16 financial statements over the 2016-2018 calendar years.

PRA Table 4 below illustrates the estimated increase in the number of filings and the related total annual compliance burdens of the affected forms, in hours and in costs, as a result of the final amendments.

PRA Table 4: Calculation of the of the Incremental Change in Burden Estimates from the Increase in the Number of Affected Responses Filed as a result of the Final Amendments

Form	Estimated Increase in Affected Responses (A)	Estimated Incremental burden hours/form (B)	Total incremental burden hours (C) = (A) x (B)	Estimated Internal Burden Hours (D) = (C) x (Allocation %)	Estimated Outside Professional Hours (E) = (C) x (Allocation %)	Estimated Outside Professional Costs/Affected Responses (F) = (E) x $400
10-K	6	70	420	315	105	$42,000
10-Q	18	70	1,260	945	315	$126,000
S-1	4	70	280	70	210	$84,000
S-3	4	70	280	70	210	$84,000
20-F	4	70	280	70	210	$84,000
S-4	37	70	2,590	647.5	1,942.5	$777,000
S-11	3	70	210	52.5	157.5	$63,000
F-1	3	70	210	52.5	157.5	$63,000
F-3	1	70	70	17.5	52.5	$21,000
F-4	3	70	210	52.5	157.5	$63,000
1-A	1	70	70	52.5	17.5	$7,000
1-K	0	---	---	---	---	---
1-SA	0	---	---	---	---	---
SF-1	0	---	---	---	---	---
SF-3	0	---	---	---	---	---
Totals				2,345		$1,414,000

PRA Table 5 illustrates the estimated net incremental change to the total annual compliance burdens for the affected forms, in hours and in costs, as a result of the final amendments.

PRA Table 5: Calculation of the Net Incremental Change in Burden Estimates of Affected Responses Resulting from the Final Amendments

Form	Estimated Number of Affected Responses (A)	Estimated Change in Burden Hours/ Affected Response (B)	Estimated Internal Burden Hours (C)	Outside Professional Hours (D)	Estimated Outside Professional Costs/Affected Response (E)
10-K	487	(14,610)	(10,958)	(3,652)	($1,460,800)
10-Q	1,270	(36,300)	(27,225)	(9,075)	($3,630,000)
S-1	14	(20)	(5)	(15)	($6,000)
20-F	19	(170)	(42.5)	(127.5)	($51,000)
S-4	137	(410)	(102.5)	(307.5)	($123,000)
S-11	8	60	15	45	$18,000
F-1	8	60	15	45	$18,000
F-4	10	0	0	0	0
1-A	1	70	52.5	17.5	$7,000
1-K	0	---	---	---	---
1-SA	0	---	---	---	---
SF-1	0	---	---	---	---
SF-3	0	---	---	---	---
Total			(38,235.5)		($5,227,800)

PRA Table 6 summarizes the current OMB collections of information inventory for the affected forms and the requested change in the total reporting burdens and costs as a result of the final amendments.[624]

PRA Table 6. Requested Paperwork Burden under the Final Amendments

	Current Burden			Program Change			Requested Change in Burden		
Form	Current Annual Responses	Current Burden Hours	Current Cost Burden	Number of Affected Responses	Increase or Reduction in Company Hours	Increase or Reduction in Professional Costs	Annual Responses	Burden Hours	Cost Burden
S-1	901	148,556	$182,048,700	14	(5)	($6,000)	905	148,551	$182,042,700
S-3	1,657	193,730	$236,322,036	4	70	$84,000	1,661	193,800	$236,406,036
S-4	551	563,216	$678,291,204	137	(103)	($123,000)	588	563,113	$678,168,204
S-11	64	12,290	$15,016,968	8	15	$18,000	67	12,305	$15,034,968
F-1	63	26,815	$32,445,300	8	15	$18,000	66	26,830	$32,463,300
F-3	112	4,448	$5,712,000	1	18	$21,000	113	4,466	$5,733,000
F-4	39	14,076	$17,106,000	10	0	0	42	14,076	$17,106,000
SF-1	6	2,076	$2,491,200	0	---	---	6	2,076	$2,491,200
SF-3	71	24,548	$29,457,900	0	---	---	---	---	---
10-K	8,137	14,220,652	$1,898,891,869	487	(10,958)	($1,460,800)	8,143	14,209,694	$1,897,431,069
10-Q	22,907	3,253,411	$432,290,354	1,270	(27,225)	($3,630,000)	22,925	3,226,186	$428,660,354
1-A	179	98,396	$13,111,912	1	53	$7,000	180	98,449	---$13,118,912
20-F	725	479,304	$576,875,025	19	(43)	($51,000)	729	479,262	$576,824,025
1-K	36	16,200	$2,160,000	0	---	---	36	16,200	$2,160,000
1-SA	55	8,791	$618,420	0	---	---	55	8,791	$618,420

X. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act ("RFA").[625] It relates to amendments to Rules 3-10 and 3-16 of Regulation S-X, and corresponding amendments to certain other rules and forms to improve the

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[624] For convenience, figures in the table have been rounded to the nearest whole number.

[625] 5 U.S.C. 601 *et seq*.

disclosures of guarantors and issuers of guaranteed securities and issuers' affiliates whose securities collateralize securities.

A. Need for, and Objectives of, the Amendments

The purpose of the amendments is to modernize and simplify Rules 3-10 and 3-16 of Regulation S-X to better align the requirements of these rules with the needs of investors and reduce disclosure burdens on registrants. Specifically, the amendments modernize and simplify these rules by clarifying, consolidating, relocating and eliminating elements of these rules. These changes are intended to provide investors with information that is material to an investment decision, make the disclosures easier to understand, and reduce costs and burdens of these requirements on registrants. The amendments are discussed in more detail in Sections III through V, above. We discuss the economic impact and potential alternatives to the amendments in Section VIII (Economic Analysis), and the estimated compliance costs and burdens, of the amendments Section IX (Paperwork Reduction Act) above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, the Commission requested comment on any aspect of the Initial Regulatory Flexibility Analysis ("IRFA"), including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would be affected by the proposed rule and form amendments, the existence or nature of the potential effects of the proposed amendments on small entities discussed in the analysis, and how to quantify the effects of the proposed amendments. We did not receive any comments that specifically addressed the IRFA. However, some commenters addressed aspects of the proposed rules that could potentially affect small entities. One commenter indicated that the costs and challenges of preparing condensed consolidating information currently required by Rule 3-10 is

likely far greater for smaller reporting companies in comparison to larger companies, and that the proposed summarized financial information would be easier for issuers and guarantors to prepare and disclose.[626] Another commenter agreed that the proposed amendments should apply to smaller reporting companies.[627]

C. Small Entities Subject to the Amendments

The amendments will apply to some registrants that are small entities. The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[628] For purposes of the RFA, under our rules, a registrant, other than an investment company or an investment adviser, is 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 and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[629] An investment company, including a business development company,[630] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[631]

Commission staff estimates that there are 1,171 registrants that file with the Commission, other than investment companies, that may be considered small entities.[632] In addition, our staff

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[626] *See* letter from Freeport. Under Commission rules, most small entities would qualify as smaller reporting companies.

[627] *See* letter from Sullivan & Cromwell.

[628] 5 U.S.C. 601(6).

[629] *See* 17 CFR 230.157 [Securities Act Rule 157] and 17 CFR 240.0-10(a) [Exchange Act Rule 0-10(a)].

[630] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64].

[631] *See* 17 CFR 270.0-10(a) [Investment Company Act Rule 0-10(a)].

[632] This estimate is based on staff analysis of EDGAR filings and related XBRL submissions made during the 2018 calendar year, and data from Compustat, and Audit Analytics.

estimates that, as of June 2019, there were 99 investment companies that may be considered small entities.[633]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

As described in greater detail above, the amendments will simplify and update disclosure requirements of Rules 3-10 and 3-16 of Regulation S-X. For example, the amendments replace existing requirements that registrants must provide consolidating information or separate financial statements with Summarized Financial Information, and allows registrants to present supplemental financial and non-financial disclosure outside of the registrant's financial statements. We anticipate that the amendments will reduce reporting, recordkeeping, and other compliance burdens for all registrants, including small entities. As noted above, one commenter indicated that currently required disclosures are disproportionately burdensome for smaller reporting companies to produce.[634] As a result, these companies may particularly benefit from any resulting decrease in compliance burdens. The professional skills necessary to comply with the amendments may include legal, accounting, and information technology skills.

E. Agency Action to Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;

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[633] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data reported to the Commission for the period ending June 2019.

[634] *See* letter from Freeport.

- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The amendments clarify, consolidate and simplify compliance and reporting requirements for small entities and other registrants. For example, the amendments streamline the five exceptions in existing Rules 3-10(b) through (f) by consolidating these elements into a single set of eligibility criteria that applies to all issuer and guarantor structures. The amendments also consolidate the requirements for the Revised Alternative Disclosures by including them in a single location in new Rule 13-01, as opposed to the existing requirements under Rule 3-10 which are dispersed among multiple provisions in the rule. Similarly, the amendments simplify the requirements of existing Rule 3-16 by replacing the current requirement to provide separate financial statements for each affiliate whose securities are pledged as collateral with a requirement to provide financial and non-financial disclosures about the affiliate(s) and the collateral arrangement as a supplement to the consolidated financial statements of the registrant that issues the collateralized security. As discussed above, the amendments are expected to reduce compliance burdens for all registrants, including small entities.[635]

We do not believe that the amendments will impose any significant new compliance obligations. Moreover, we do not believe it is necessary to establish different compliance and reporting requirements or timetables or to exempt small entities from all or part of the amendments. Nevertheless, to minimize the initial compliance burden on all registrants we are

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[635] *See supra* Sections VIII (Economic Analysis) and IX (Paperwork Reduction Act).

adopting a transition period for compliance to mitigate any potential compliance burdens that registrants may experience in transitioning to the final rule amendments.[636]

Finally, with respect to using performance rather than design standards, the amendments use a combination of design and performance standards in order to promote uniform filing requirements for all registrants. We believe the final rules will be more beneficial to investors and registrants if there are specific uniform disclosure requirements that apply to all registrants. In addition, the amendments introduce more principles-based disclosure requirements that will provide registrants with increased flexibility to determine what information to disclose.

XI. Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 3, 6, 7, 8, 10, 19(a), and 28 of the Securities Act, as amended, and Sections 3(b), 12, 13, 15(d), 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 210, 229, 230, 239, 240, and 249

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 210 – FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

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636 *See supra* Section VI (Transition to Final Amendments).

1. The authority citation for part 210 continues to reads as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78*l,* 78m, 78n, 78*o*(d), 78q, 78u-5, 78w, 78*ll,* 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012), unless otherwise noted.

2. Revise § 210.3-10 to read as follows:

§ 210.3-10 Financial statements of guarantors and issuers of guaranteed securities registered or being registered.

(a) If an issuer or guarantor of a guaranteed security that is registered or being registered is required to file financial statements required by Regulation S-X with respect to the guarantee or guaranteed security, such financial statements may be omitted if the issuer or guarantor is a consolidated subsidiary of the parent company, the parent company's consolidated financial statements have been filed, and the conditions in paragraphs (a)(1) and (2) of this section have been met:

(1) The guaranteed security is debt or debt-like; and

(i) The parent company issues the security or co-issues the security, jointly and severally, with one or more of its consolidated subsidiaries; or

(ii) A consolidated subsidiary issues the security or co-issues the security with one or more other consolidated subsidiaries of the parent company, and the security is guaranteed fully and unconditionally by the parent company; and

(2) The parent company provides the disclosures specified in § 210.13-01.

(b) For the purposes of this section and § 210.13-01:

(1) The "parent company" is the entity that:

(i) Is an issuer or guarantor of the guaranteed security;

(ii) Is, or as a result of the subject Securities Act registration statement will be, an Exchange Act reporting company; and

(iii) Consolidates each subsidiary issuer and/or subsidiary guarantor of the guaranteed security in its consolidated financial statements.

(2) A security is "debt or debt-like" if it has the following characteristics:

(i) The issuer has a contractual obligation to pay a fixed sum at a fixed time; and

(ii) Where the obligation to make such payments is cumulative, a set amount of interest must be paid.

Note 1 to paragraph (b)(2). Neither the form of the security nor its title will determine whether a security is debt or debt-like. Instead, the substance of the obligation created by the security will be determinative.

Note 2 to paragraph (b)(2). The phrase "set amount of interest" is not intended to mean "fixed amount of interest." Floating and adjustable rate securities, as well as indexed securities, may meet the criteria specified in paragraph (b)(2)(ii) of this section as long as the payment obligation is set in the debt instrument and can be determined from objective indices or other factors that are outside the discretion of the obligor.

(3) A guarantee is "full and unconditional," if, when an issuer of a guaranteed security has failed to make a scheduled payment, the guarantor is obligated to make the scheduled payment immediately and, if it does not, any holder of the guaranteed security may immediately bring suit directly against the guarantor for payment of all amounts due and payable.

3. Amend § 210.3-16 by adding introductory text to read as follows:

§210.3-16 Financial statements of affiliates whose securities collateralize an issue registered or being registered.

The requirements of this section shall apply to each registered security issued and outstanding before January 4, 2021, unless the requirements of § 210.13-02 apply.

* * * * *

4. Amend § 210.8-01 by revising Note 3 and Note 4 to read as follows:

§ 210.8-01 Preliminary Notes to Article 8.

* * * * *

Note 3 to § 210.8: The requirements of § 210.3-10 are applicable to financial statements for a subsidiary of a smaller reporting company that issues securities guaranteed by the smaller reporting company or guarantees securities issued by the smaller reporting company. Disclosures about guarantors and issuers of guaranteed securities registered or being registered must be presented as required by § 210.13-01.

Note 4 to § 210.8: The requirements of § 210.3-16 or § 210.13-02 are applicable if a smaller reporting company's securities registered or being registered are collateralized by the securities of the smaller reporting company's affiliates. Section 210.13-02 must be followed unless § 210.3-16 applies. The periods presented for purposes of compliance with § 210.3-16 are those required by § 210.8-02.

* * * * *

5. Amend § 210.8-03 by adding paragraphs (b)(6) and (7) before Instruction 1 to read as follows:

§ 210.8-03 Interim financial statements.

* * * * *

(b)* * *

(6) *Financial statements of and disclosures about guarantors and issuers of guaranteed securities*. The requirements of § 210.3-10 are applicable to financial statements for a subsidiary of a smaller reporting company that issues securities guaranteed by the smaller reporting company or guarantees securities issued by the smaller reporting company. Disclosures about guarantors and issuers of guaranteed securities registered or being registered must be presented as required by § 210.13-01.

(7) *Disclosures about affiliates whose securities collateralize an issuance*. Disclosures about a smaller reporting company's affiliates whose securities collateralize any class of securities registered or being registered and the related collateral arrangement must be presented as required by § 210.13-02.

* * * * *

6. Amend § 210.10-01 by adding paragraphs (b)(9) and (10) to read as follows:

§ 210.10-01 Interim financial statements.

* * * * *

(b) * * *

(9) The requirements of § 210.3-10 are applicable to financial statements for a subsidiary of the registrant that issues securities guaranteed by the registrant or guarantees securities issued by the registrant. Disclosures about guarantors and issuers of guaranteed securities registered or

being registered must be presented as required by § 210.13-01.

(10) Disclosures about a registrant's affiliates whose securities collateralize any class of securities registered or being registered and the related collateral arrangement must be presented as required by § 210.13-02.

* * * * *

7. Add an undesignated center heading and §§ 210.13-01 and 210.13-02 to read as follows:

Financial and Non-Financial Disclosures for Certain Securities Registered or Being Registered.

§ 210.13-01 Guarantors and issuers of guaranteed securities registered or being registered.

(a) For each guaranteed security subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, and for each guaranteed security the offer and sale of which is being registered under the Securities Act of 1933, for which the registrant is the parent company (as that term is defined in § 210.3-10(b)(1)) of one or more subsidiaries that issue or guarantee the guaranteed security, provide the following disclosures to the extent material:

(1) A description of the issuers and guarantors of the guaranteed security;

(2) A description of the terms and conditions of the guarantees, and how payments to holders of the guaranteed security may be affected by the composition of and relationships among the issuers, guarantors, and subsidiaries of the parent company that are not issuers or guarantors of the guaranteed security;

(3) A description of other factors that may affect payments to holders of the guaranteed security, such as contractual or statutory restrictions on dividends, guarantee enforceability, or the rights of a noncontrolling interest holder;

(4) Summarized financial information as specified in § 210.1-02(bb)(1) of each issuer and guarantor of the guaranteed security as follows, with an accompanying note that briefly describes the basis of presentation:

(i) The summarized financial information of each such issuer and guarantor consolidated in the parent company's consolidated financial statements may be presented on a combined basis with the summarized financial information of the parent company;

(ii) Intercompany balances and transactions between issuers and guarantors whose summarized financial information is presented on a combined basis shall be eliminated;

(iii) The summarized financial information shall exclude subsidiaries that are not issuers or guarantors. An issuer's or guarantor's investment in a subsidiary that is not an issuer or guarantor shall not be presented. An issuer's or guarantor's amounts due from, amounts due to, and transactions with any of the following shall be presented in separate line items:

(A) Subsidiaries that are not issuers or guarantors; and

(B) Related parties;

(iv) If the information provided in response to the requirements of this section (e.g., factors that may affect payments to holders of the guaranteed security) is applicable to one or more, but not all, issuers and/or guarantors, separately disclose the summarized financial information applicable to those issuers and/or guarantors. In limited circumstances (i.e., where the separate financial information applicable to those issuers and/or guarantors can be easily explained and understood), narrative disclosure may be provided in lieu of the separate summarized financial information otherwise required by this paragraph (a)(4)(iv);

(v) Disclose this summarized financial information as of and for the most recently ended fiscal year and year-to-date interim period included in the parent company's consolidated

financial statements; and

(vi) Notwithstanding that a parent company may omit this summarized financial information if not material, it may also be omitted if one of the following in paragraphs (a)(4)(vi)(A) through (D) of this section is true and disclosed. However, paragraph (a)(4)(vi)(A) does not apply if separate disclosure of summarized financial information applicable to one or more, but not all, issuers and/or guarantors is required by paragraph (a)(4)(iv) of this section. For the purposes of this section, a finance subsidiary is a subsidiary that has no assets or operations other than those related to the issuance, administration and repayment of the security being registered and any other securities guaranteed by its parent company:

(A) The assets, liabilities and results of operations of the combined issuers and guarantors of the guaranteed security are not materially different than corresponding amounts presented in the consolidated financial statements of the parent company;

(B) The combined issuers and guarantors, excluding investments in subsidiaries that are not issuers or guarantors, have no material assets, liabilities or results of operations;

(C) The issuer is a finance subsidiary of the parent company, the parent company has fully and unconditionally guaranteed the security, and no other subsidiary of the parent company guarantees the security; or

(D) The issuer is a finance subsidiary that co-issued the security, jointly and severally, with the parent company, and no other subsidiary of the parent company guarantees the security;

(5) In a Securities Act registration statement filed in connection with the offer and sale of the guaranteed security, if the parent company acquired a significant business after the date of the parent company's most recent balance sheet included in its consolidated financial statements and the acquired business, one or more of the acquired business's subsidiaries, or the acquired

business and one or more of its subsidiaries are issuers or guarantors of the guaranteed securities, disclose pre-acquisition summarized financial information as specified in paragraph (a)(4) of this section for each such issuer or guarantor. The acquired business is significant if it meets any of the conditions specified in the definition of significant subsidiary in § 210.1-02(w), substituting 20 percent for 10 percent each place it appears therein, based on a comparison of the most recent annual financial statements of the acquired business and the parent company's most recent annual consolidated financial statements filed at or prior to the date of acquisition. The determination of whether a business has been acquired shall be made in accordance with the guidance set forth in § 210.11-01(d). Acquisitions of a group of related businesses shall be treated as if they are a single business acquisition for purposes of this comparison. The determination of whether a group of businesses are related shall be made in a manner consistent with § 210.3-05(a)(3);

(6) Any financial and narrative information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee; and

(7) Sufficient information so as to make the financial and non-financial information presented not misleading.

(b) The parent company may elect to provide the disclosures required by this section in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in § 229.303 (Item 303 of Regulation S-K) of this chapter. If not otherwise included in the consolidated financial statements or in management's discussion and analysis of financial condition and results of operations, the parent company must include the disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information

described in § 229.105 (Item 105 of Regulation S-K) of this chapter.

§ 210.13-02 Affiliates whose securities collateralize securities registered or being registered.

The requirements of this section shall apply to each security registered or being registered that is issued on or after January 4, 2021, and to each registered security issued and outstanding before January 4, 2021, for which the registrant had prior to that date provided the financial statements specified in § 210.3-16.

(a) For each security subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, and for each security the offer and sale of which is being registered under the Securities Act of 1933, that is collateralized by a security of the registrant's affiliate or affiliates, provide the following disclosures to the extent material:

(1) A description of the securities pledged as collateral and the affiliates whose securities are pledged as collateral;

(2) A description of the terms and conditions of the collateral arrangement, including the events or circumstances that would require delivery of the collateral;

(3) A description of the trading market for the affiliate's security pledged as collateral or a statement that there is no market;

(4) Summarized financial information as specified in § 210.1-02(bb)(1) of each affiliate whose securities are pledged as collateral as follows, with an accompanying note that briefly describes the basis of presentation:

(i) The summarized financial information of each such affiliate consolidated in the registrant's financial statements may be presented on a combined basis;

(ii) Intercompany balances and transactions between affiliates whose summarized financial information is presented on a combined basis shall be eliminated;

(iii) An affiliate's amounts due from, amounts due to, and transactions with any of the following shall be presented in separate line items:

(A) The registrant;

(B) Any of the registrant's subsidiaries not included in the summarized financial information of the affiliate(s); and

(C) Related parties;

(iv) If the information provided in response to the requirements of this section (e.g., the trading market for the affiliate's security pledged as collateral or a statement that there is no market) is applicable to one or more, but not all, affiliates, separately disclose the summarized financial information applicable to those affiliates. In limited circumstances (i.e., where the separate financial information applicable to those affiliates can be easily explained and understood), narrative disclosure may be provided in lieu of the separate summarized financial information otherwise required by this paragraph (a)(4)(iv);

(v) Disclose this summarized financial information as of and for the most recently ended fiscal year and year-to-date interim period included in the registrant's consolidated financial statements; and

(vi) Notwithstanding that a registrant may omit this summarized financial information if not material, it may also be omitted if one of the following in paragraph (a)(4)(vi)(A) or (B) of this section is true and disclosed. However, paragraph (a)(4)(vi)(A) does not apply if separate disclosure of summarized financial information applicable to one or more, but not all, affiliates is required by paragraph (a)(4)(iv) of this section:

(A) The assets, liabilities and results of operations of the combined affiliates whose securities are pledged as collateral are not materially different than the corresponding amounts

presented in the consolidated financial statements of the registrant; or

(B) The combined affiliates whose securities are pledged as collateral have no material assets, liabilities or results of operations;

(5) In a Securities Act registration statement filed in connection with the offer and sale of the collateralized security, if the registrant acquired a significant business after the date of the registrant's most recent balance sheet included in its consolidated financial statements and the acquired business, one or more of the acquired business's subsidiaries, or the acquired business and one or more of its subsidiaries are affiliates whose securities collateralize the registrant's collateralized security, disclose pre-acquisition summarized financial information as specified in paragraph (a)(4) of this section for each such affiliate. The acquired business is significant if it meets any of the conditions specified in the definition of significant subsidiary in § 210.1-02(w), substituting 20 percent for 10 percent each place it appears therein, based on a comparison of the most recent annual financial statements of the acquired business and the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition. The determination of whether a business has been acquired shall be made in accordance with the guidance set forth in § 210.11-01(d). Acquisitions of a group of related businesses shall be treated as if they are a single business acquisition for purposes of this comparison. The determination of whether a group of businesses are related shall be made in a manner consistent with § 210.3-05(a)(3);

(6) Any financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral; and

(7) Sufficient information so as to make the financial and non-financial information

presented not misleading.

(b) The registrant may elect to provide the disclosures required by this section in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in § 229.303 (Item 303 of Regulation S-K) of this chapter. If not otherwise included in the consolidated financial statements or in management's discussion and analysis of financial condition and results of operations, the registrant must include the disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in § 229.105 (Item 105 of Regulation S-K) of this chapter.

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

8. The authority citation for part 229 reads 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, 78j-3, 78*l,* 78m, 78n, 78n-1, 78*o,* 78u-5, 78w, 78*ll,* 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq.*; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

9. Amend § 229.504 by revising Instruction 6 to read as follows:

§ 229.504 (Item 504) Use of proceeds.

* * * * *

Instructions to Item 504: * * *

6. Where the registrant indicates that the proceeds may, or will, be used to finance

acquisitions of other businesses, the identity of such businesses, if known, or, if not known, the nature of the businesses to be sought, the status of any negotiations with respect to the acquisition, and a brief description of such business shall be included. Where, however, pro forma financial statements reflecting such acquisition are not required by §§ 210.1-01 through 210.13-02 (Regulation S-X) of this chapter, including § 210.8-05 (Rule 8-05 of Regulation S-X) of this chapter for smaller reporting companies, to be included in the registration statement, the possible terms of any transaction, the identification of the parties thereto or the nature of the business sought need not be disclosed, to the extent that the registrant reasonably determines that public disclosure of such information would jeopardize the acquisition. Where Regulation S-X, including § 210.8-04 (Rule 8-04 of Regulation S-X) of this chapter for smaller reporting companies, as applicable, would require financial statements of the business to be acquired to be included, the description of the business to be acquired shall be more detailed.

* * * * *

10. Amend § 229.601 by:

a. In the exhibit table in paragraph (a), adding entry 22; and

b. Adding paragraph (b)(22).

The revisions read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

EXHIBIT TABLE																
	Securities Act Forms										Exchange Act Forms					
	S-1	S-3	SF-1	SF-3	S-4[1]	S-8	S-11	F-1	F-3	F-4[1]	10	8-K[2]	10-D	10-Q	10-K	ABS-EE
* * * * * * *																
(22) Subsidiary guarantors and issuers of guaranteed securities and affiliates whose securities collateralize securities of the registrant	X	X	X	X	X		X	X	X	X	X			X	X	
* * * * * * *																

[1]An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S-4 or F-4 to provide information about such company at a level prescribed by Form S-3 or F-3; and (2) the form, the level of which has been elected under Form S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

[2]A Form 8-K exhibit is required only if relevant to the subject matter reported on the Form 8-K report. For example, if the Form 8-K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

* * * * *

(b) * * *

(22) *Subsidiary guarantors and issuers of guaranteed securities and affiliates whose securities collateralize securities of the registrant*. List each of the entities in paragraphs (b)(22)(i) and (ii) of this section under an appropriately captioned heading that identifies the associated securities. An entity need not be listed more than once so long as its role as issuer, co-issuer, or guarantor of a guaranteed security and/or as affiliate whose security is pledged as collateral for a registrant's security is clearly indicated with respect to each applicable security:

(i) For a registrant that is the parent company (as that term is defined in § 210.3-10(b)(1) of this chapter) and subject to § 210.13-01 of this chapter, each of the registrant's subsidiaries

that is a guarantor, issuer, or co-issuer of the guaranteed security subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, or the offer and sale of which is being registered under the Securities Act of 1933; and

(ii) For a registrant that is subject to § 210.13-02 of this chapter, each of the registrant's affiliates whose security is pledged as collateral for the registrant's security subject to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, or the offer and sale of which is being registered under the Securities Act of 1933. For each affiliate, also identify the security or securities pledged as collateral.

* * * * *

11. Amend § 229.1100 by revising paragraphs (c)(2)(ii)(C), (D), and (F) to read as follows:

§ 229.1100 (Item 1100) General.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(C) If the third party does not meet the conditions of paragraph (c)(2)(ii)(A) or (B) of this section and the pool assets relating to the third party are fully and unconditionally guaranteed by a direct or indirect parent of the third party, General Instruction I.C.3 of the form described in § 239.13 (Form S-3) of this chapter or General Instruction I.A.5(iii) of the form described in § 239.33 (Form F-3) of this chapter is met with respect to the pool assets relating to such third party and the disclosures specified in § 210.13-01 (Rule 13-01 of Regulation S-X) of this chapter have been provided in the reports to be referenced. Financial statements of the third

party may be omitted if the requirements of § 210.3-10 (Rule 3-10 of Regulation S-X) of this chapter are satisfied.

(D) If the pool assets relating to the third party are guaranteed by a wholly owned subsidiary of the third party and the subsidiary does not meet the conditions of paragraph (c)(2)(ii)(A) or (B) of this section, the criteria in either paragraph (c)(2)(ii)(A) or (B) of this section are met with respect to the third party and the disclosures specified in Rule 13-01 of Regulation S-X have been provided in the reports to be referenced. Financial statements of the subsidiary guarantor may be omitted if the requirements of Rule 3-10 of Regulation S-X are satisfied.

* * * * *

(F) The third party is a U.S. Government-sponsored enterprise, has outstanding securities held by non-affiliates with an aggregate market value of $75 million or more, and makes information publicly available on an annual and quarterly basis, including audited financial statements prepared in accordance with generally accepted accounting principles covering the same periods that would be required for audited financial statements under §§ 210.1-01 through 210.13-02 (Regulation S-X) of this chapter and non-financial information consistent with that required by this part (Regulation S-K).

* * * * *

12. Amend § 229.1112 by revising paragraph (b)(2) to read as follows:

§ 229.1112 (Item 1112) Significant obligors of pool assets.

* * * * *

(b) * * *

(2) If pool assets relating to a significant obligor represent 20% or more of the asset pool,

provide financial statements meeting the requirements of §§ 210.1-01 through 210.13-02 (Regulation S-X) of this chapter, except §§ 210.3-05 (Rule 3-05) and 210.11-01 through 210.11-03 (Article 11 of Regulation S-X) of this chapter, of the significant obligor. Financial statements of such obligor and its subsidiaries consolidated (as required by § 240.14a-3(b) of this chapter) shall be filed under this item.

* * * * *

13. Amend § 229.1114 by revising paragraph (b)(2)(ii) to read as follows:

§ 229.1114 (Item 1114) Credit enhancement and other support, except for certain derivatives instruments.

* * * * *

(b) * * *

(2) * * *

(ii) If any entity or group of affiliated entities providing enhancement or other support described in paragraph (a) of this section is liable or contingently liable to provide payments representing 20% or more of the cash flow supporting any offered class of the asset-backed securities, provide financial statements meeting the requirements of §§ 210.1-01 through 210.13-02 (Regulation S-X) of this chapter, except §§ 210.3-05 (Rule 3-05) and 210.11-01 through 210.11-03 (Article 11 of Regulation S-X) of this chapter, of such entity or group of affiliated entities. Financial statements of such enhancement provider and its subsidiaries consolidated (as required by § 240.14a-3(b) of this chapter) shall be filed under this item.

* * * * *

14. Amend § 229.1115 by revising paragraph (b)(2) to read as follows:

§ 229.1115 (Item 1115) Certain derivatives instruments.

* * * * *

(b) * * *

(2) If the aggregate significance percentage related to any entity or group of affiliated entities providing derivative instruments contemplated by this section is 20% or more, provide financial statements meeting the requirements of §§ 210.1-01 through 210.13-02 (Regulation S-X) of this chapter, except §§ 210.3-05 (Rule 3-05) and 210.11-01 through 210.11-03 (Article 11 of Regulation S-X) of this chapter, of such entity or group of affiliated entities. Financial statements of such entity and its subsidiaries consolidated (as required by § 240.14a-3(b) of this chapter) shall be filed under this section.

* * * * *

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

15. The general authority citation for part 230 continues to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*-7 note, 78t, 78w, 78*ll*(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

16. Amend § 230.257 by adding paragraph (b)(7) to read as follows:

§230.257 Periodic and current reporting; exit report.

* * * * *

(b) * * *

(7) *Exemption for subsidiary issuers of guaranteed securities and subsidiary guarantors*. Any issuer of a guaranteed security, or guarantor of a security, that is permitted to omit financial statements by Item (b)(7)(i) of Part F/S of Form 1-A (referenced in §239.90), Item 7(g)(1) of Part II of Form 1-K (referenced in §239.91), and Item 3(e) of Form 1-SA (referenced in §239.92), is exempt from the requirements of this paragraph (b).

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

17. The general authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78*l*, 78m,78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

* * * * *

18. Amend § 239.31 by revising paragraph (b) to read as follows:

§ 239.31 Form F-1, registration statement under the Securities Act of 1933 for securities of certain foreign private issuers.

* * * * *

(b) If a registrant is a majority-owned subsidiary, which does not itself meet the conditions of these eligibility requirements, it shall nevertheless be deemed to have met such

conditions if its parent meets the conditions and if the parent fully guarantees the securities being registered as to principal and interest. In such an instance the parent-guarantor is the issuer of a separate security consisting of the guarantee which must be concurrently registered but may be registered on the same registration statement as are the guaranteed securities. Both the parent-guarantor and the subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on the form described in § 249.229f (Form 20-F) of this chapter after the effective date of the registration statement, then it shall disclose the information specified in the form described in § 239.11 (Form S-1) of this chapter. The requirements of § 210.3-10 (Rule 3-10 of Regulation S-X) of this chapter are applicable to financial statements for a subsidiary of a parent company that issues securities guaranteed by the parent company.

19. Amend Form F-1 (referenced in § 239.31) by revising Instruction I.B. under "General Instructions" to read as follows:

Note: The text of Form F-1 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F-1

* * * * *

B. If a registrant is a majority-owned subsidiary, which does not itself meet the conditions of

these eligibility requirements, it shall nevertheless be deemed to have met such conditions if its parent meets the conditions and if the parent fully guarantees the securities being registered as to principal and interest. Note: In such an instance the parent-guarantor is the issuer of a separate security consisting of the guarantee which must be concurrently registered but may be registered on the same registration statement as are the guaranteed securities. Both the parent-guarantor and the subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on Form 20-F after the effective date of the registration statement, then it shall disclose the information specified in Forms S-1 (§ 239.11 of this chapter). The requirements of Rule 3-10 of Regulation S-X (§ 210.3-10 of this chapter) are applicable to financial statements for a subsidiary of a parent company that issues securities guaranteed by the parent company.

* * * * *

20. Amend § 239.33 by designating the Note to paragraph (a)(5) as Note 1 to paragraph (a)(5) and revising newly designated Note 1 to paragraph (a)(5) to read as follows:

§ 239.33 Form F-3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

Note 1 to paragraph (a)(5): In the situations described in paragraphs (a)(5)(iii) through (v) of this section, the parent or majority-owned subsidiary guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed non-convertible securities. Both the parent and majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the majority-owned subsidiary will not be eligible to file annual reports on the forms described in § 249.220f (Form 20-F) or § 249.240f

(Form 40-F) of this chapter after the effective date of the registration statement, then it shall disclose the information specified in the form described in § 239.13 (Form S-3) of this chapter. The requirements of § 210.3-10 (Rule 3-10 of Regulation S-X) of this chapter are applicable to financial statements of a subsidiary of a parent company that issues securities guaranteed by the parent company or guarantees securities issued by the parent company.

* * * * *

21. Amend Form F-3 (referenced in § 239.33) by designating the Note to Instruction I.A.5. under "General Instructions" as Note 1 and revising newly designated Note 1 to read as follows:

Note: The text of Form F-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

I. Eligibility Requirements for Use of Form F-3

* * * * *

A. Registration Requirements

* * * * *

5. Majority-owned Subsidiaries. If a registrant is a majority-owned subsidiary, security offerings may be registered on this Form if:

* * * * *

Note 1: In the situation described in paragraphs I.A.5(iii) through (v) above, the parent or majority-owned subsidiary guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed non-convertible securities. Both the parent or majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the majority-owned subsidiary will not be eligible to file annual reports on Form 20-F or Form 40-F after the effective date of the registration statement, then it shall disclose the information specified in Form S-3. The requirements of Rule 3-10 of Regulation S-X are applicable to financial statements for a subsidiary of a parent company that issues securities guaranteed by the parent company or guarantees securities issued by the parent company.

* * * * *

22. Amend Form 1-A (referenced in § 239.90) by:

a. Revising paragraph (b)(7) of Part F/S; and

b. Revising Item 17 of Part III.

The revisions to read as follows:

Note: The text of Form 1-A does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-A

REGULATION A OFFERING STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Part F/S

* * * * *

(b) Financial Statements for Tier 1 Offerings

* * * * *

(7) *Financial Statements of and Disclosures About Other Entities.* The circumstances described below may require you to file financial statements of, or provide disclosures about, other entities in the offering statement. The financial statements of other entities must be presented for the same periods as if the other entity was the issuer as described above in paragraphs (b)(3) and (b)(4) unless a shorter period is specified by the rules below. The financial statements of other entities shall follow the same audit requirement as paragraph (b)(2) of this Part F/S:

(i) *Financial Statements of and Disclosures About Guarantors and Issuers of Guaranteed Securities.* The requirements of Rule 3-10 of Regulation S-X are applicable to financial statements of a subsidiary that issues securities guaranteed by the parent company or guarantees securities issued by the parent company. However, the reference in Rule 3-10(a) of Regulation S-X to "an issuer or guarantor of a guaranteed security that is registered or being registered is required to file financial statements required by Regulation S-X with respect to the guarantee or guaranteed security" instead refers to "an issuer or guarantor of a guaranteed security that is qualified or being qualified pursuant to Regulation A is required to file financial statements required by Part F/S of Form 1-A with respect to the guarantee or guaranteed security." The definition of "parent company" is the same as in Rule 3-10(b)(1) of Regulation S-X, except that Rule 3-10(b)(1)(ii) instead reads as follows: "Is, or as a result of the subject offering statement will be, required to file reports with the Commission pursuant to Rule 257(b) of Regulation A (§§ 230.251-230.263), or is an Exchange Act reporting company." The parent company must

also provide the disclosures required by Rule 13-01 of Regulation S-X. The parent company may elect to provide these disclosures in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in Item 9 of Form 1-A in its offering statement on Form 1-A filed in connection with the offer and sale of the subject securities.

(ii) *Financial Statements of and Disclosures About Affiliates Whose Securities Collateralize an Issuance.* The requirements of Rules 3-16 or 13-02 of Regulation S-X are applicable if an issuer's securities that are qualified or being qualified pursuant to Regulation A are collateralized by the securities of the issuer's affiliates. Rule 13-02 of Regulation S-X must be followed unless Rule 3-16 of Regulation S-X applies. The issuer may elect to provide the disclosures specified in Rule 13-02 of Regulation S-X in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in Item 9 of Form 1-A in its offering statement on Form 1-A filed in connection with the offer and sale of the subject securities.

* * * * *

Item 17. Description of Exhibits

As appropriate, the following documents must be filed as exhibits to the offering statement.

* * * * *

17. *Subsidiary guarantors and issuers of guaranteed securities and affiliates whose securities collateralize securities of the issuer*. List each of the entities in paragraphs (a) and (b) below under an appropriately captioned heading that identifies the associated securities. An entity need not be listed more than once so long as its role as issuer, co-issuer, or guarantor of a guaranteed security and/or as affiliate whose security is pledged as collateral for an issuer's

security is clearly indicated with respect to each applicable security:

(a) For an issuer that is the parent company (as that term is defined in paragraph (b)(7(i) of Part F/S) and subject to § 210.13-01 as described in paragraph (b)(7)(i) of Part F/S, each of the issuer's subsidiaries that is a guarantor, issuer, or co-issuer of the guaranteed security for which the issuer is required to file reports with the Commission pursuant to Rule 257(b) of Regulation A, or is an Exchange Act reporting company subject to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, or the offer and sale of which is qualified or being qualified pursuant to Regulation A; and

(b) For an issuer that is subject to § 210.13-02 as described in paragraph (b)(7)(i) of Part F/S, each of the issuer's affiliates whose security is pledged as collateral for the issuer's security for which the issuer is required to file reports with the Commission pursuant to Rule 257(b) of Regulation A, or is an Exchange Act reporting company subject to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, or the offer and sale of which is qualified or being qualified pursuant to Regulation A. For each affiliate, also identify the security or securities pledged as collateral.

* * * * *

23. Amend Form 1-K (referenced in § 239.91) by revising paragraph Item 7(g) of Part II to read as follows:

Note: The text of Form 1-K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-K

* * * * *

PART II

* * * * *

Item 7. Financial Statements

* * * * *

(g) *Financial Statements of and Disclosures About Other Entities.* The circumstances described below may require you to file financial statements of, or provide disclosures about, other entities. The financial statements of other entities must be presented for the same periods as the issuer's financial statements described above in paragraphs (d) and (e) unless a shorter period is specified by the rules below.

(1) *Financial Statements of and Disclosures About Guarantors and Issuers of Guaranteed Securities.* The requirements of Rule 3-10 of Regulation S-X are applicable to financial statements of a subsidiary that issues securities guaranteed by the parent company or guarantees securities issued by the parent company. However, the reference in Rule 3-10(a) of Regulation S-X to "an issuer or guarantor of a guaranteed security that is registered or being registered is required to file financial statements required by Regulation S-X with respect to the guarantee or guaranteed security" instead refers to "an issuer or guarantor of a guaranteed security that is qualified or being qualified pursuant to Regulation A is required to file financial statements required by Item 7 of Part II of Form 1-K with respect to the guarantee or guaranteed security." The definition of "parent company" is the same as in Rule 3-10(b)(1) of Regulation S-X, except that Rule 3-10(b)(1)(ii) instead reads as follows: "Is, or as a result of the subject offering statement will be, required to file reports with the Commission pursuant to Rule 257(b) of Regulation A (§§ 230.251-230.263), or is an Exchange Act reporting company." The parent

company must also provide the disclosures required by Rule 13-01 of Regulation S-X. The parent company may elect to provide these disclosures in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in Item 2 of Part II of Form 1-K.

(2) *Financial Statements of and Disclosures About Affiliates Whose Securities Collateralize an Issuance.* The requirements of Rules 3-16 or 13-02 of Regulation S-X are applicable if an issuer's securities that are qualified or being qualified pursuant to Regulation A are collateralized by the securities of the issuer's affiliates. Rule 13-02 of Regulation S-X must be followed unless Rule 3-16 of Regulation S-X applies. The issuer may elect to provide the disclosures specified in Rule 13-02 of Regulation S-X in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in Item 2 of Part II of Form 1-K.

* * * * *

24. Amend Form 1-SA (referenced in § 239.92) by revising Item 3(e) to read as follows:

Note: The text of Form 1-SA does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-SA

* * * * *

INFORMATION TO BE INCLUDED IN REPORT

* * * * *

Item 3. Financial Statements

* * * * *

(e) Financial Statements of and Disclosures About Other Entities. The circumstances described below may require you to file financial statements of, or provide disclosures about, other entities. These financial statements and disclosures may be unaudited.

(1) Financial Statements of and Disclosures About Guarantors and Issuers of Guaranteed Securities. The requirements of Rule 3-10 of Regulation S-X are applicable to financial statements of a subsidiary that issues securities guaranteed by the parent company or guarantees securities issued by the parent company. However, the reference in Rule 3-10(a) of Regulation S-X to "an issuer or guarantor of a guaranteed security that is registered or being registered is required to file financial statements required by Regulation S-X with respect to the guarantee or guaranteed security" instead refers to "an issuer or guarantor of a guaranteed security that is qualified or being qualified pursuant to Regulation A is required to file financial statements required by Item 3 of Form 1-SA with respect to the guarantee or guaranteed security." The definition of "parent company" is the same as in Rule 3-10(b)(1) of Regulation S-X, except that Rule 3-10(b)(1)(ii) instead reads as follows: "Is, or as a result of the subject offering statement will be, required to file reports with the Commission pursuant to Rule 257(b) of Regulation A (§§ 230.251-230.263), or is an Exchange Act reporting company." The parent company must also provide the disclosures required by Rule 13-01 of Regulation S-X. The parent company may elect to provide these disclosures in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in Item 1 of Form 1-SA.

(2) Disclosures About Affiliates Whose Securities Collateralize an Issuance. Disclosures about an issuer's affiliates whose securities collateralize any class of securities being offered must be provided as required by Rule 13-02 of Regulation S-X. The issuer may elect to provide these

disclosures in a footnote to its consolidated financial statements or alternatively, in management's discussion and analysis of financial condition and results of operations described in Item 1 of Form 1-SA.

PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

25. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o,* 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq*.; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, secs. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

26. Revise § 240.12h-5 to read as follows:

§ 240.12h-5 Exemption for subsidiary issuers of guaranteed securities and subsidiary guarantors.

Any issuer of a guaranteed security, or guarantor of a security, that is permitted to omit financial statements by § 210.3-10 (Rule 3-10 of Regulation S-X) of this chapter is exempt from the requirements of 15 U.S.C. 78m(a) (Section 13(a) of the Act) or 78o(d) (Section 15(d) of the Act).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

27. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C.

1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

28. Amend Form 20-F (referenced in § 249.220f) by:

a. Revising Instruction 1 to Item 8;

b. Revising Instruction 17 to the "Instructions as to Exhibits"; and

c. Reserving Instructions 18 through 100 under "Instructions as to Exhibits".

The revisions read as follows:

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

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 20-F

* * * * *

Item 8. Financial Information

* * * * *

Instructions to Item 8:

1. This item refers to the company, but note that under Rules 3-05, 3-09, 3-10, 3-14, 3-16, 13-01, and 13-02 of Regulation S-X, you also may have to provide financial statements or financial information for entities other than the issuer. In some cases, you may have to provide financial statements for a predecessor. See the definition of "predecessor" in Exchange Act Rule 12b-2 and Securities Act Rule 405.

* * * * *

Item 19. Exhibits.

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

17. Subsidiary guarantors and issuers of guaranteed securities and affiliates whose securities collateralize securities of the registrant. List each of the entities in paragraphs (a) and (b) below under an appropriately captioned heading that identifies the associated securities. An entity need not be listed more than once so long as its role as issuer, co-issuer, or guarantor of a guaranteed security and/or as affiliate whose security is pledged as collateral for a registrant's security is clearly indicated with respect to each applicable security:

(a) For a registrant that is the parent company (as that term is defined in § 210.3-10(b)(1)) and subject to § 210.13-01, each of the registrant's subsidiaries that is a guarantor, issuer, or co-issuer of the guaranteed security subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, or the offer and sale of which is being registered under the Securities Act of 1933; and

(b) For a registrant that is subject to § 210.13-02, each of the registrant's affiliates whose security is pledged as collateral for the registrant's security subject to Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, or the offer and sale of which is being registered under the Securities Act of 1933. For each affiliate, also identify the security or securities pledged as collateral.

18 through 100 [Reserved]

* * * * *

By the Commission.

Dated: March 2, 2020.

Vanessa A. Countryman,

Secretary

Note: The following appendix does not appear in the Code of Federal Regulations.

APPENDIX

FINANCIAL DISCLOSURES ABOUT GUARANTORS AND ISSUERS OF GUARANTEED SECURITIES AND AFFILIATES WHOSE SECURITIES COLLATERALIZE A REGISTRANT'S SECURITIES

For ease of reference, set forth below is a table summarizing the main features of existing Rule 3-10 and Rule 3-16 and the final rules. This is only a summary of certain requirements contained in the Commission's existing and amended rules and regulations; it is not a substitute for the existing and amended rules and regulations. Registrants should refer to the existing and amended rules for the full requirements and the description of those requirements in the release. Similarly, certain types of issuers, including foreign private issuers, smaller reporting companies, issuers offering securities pursuant to Regulation A, and issuers of asset-back securities, should refer to the existing and amended rules for the full requirements and the description of those requirements in the release as it relates to them. The changes we adopted include amending and relocating part of Rule 3-10 to new Rule 13-01, and replacing the requirements in Rule 3-16 with new Rule 13-02 except as described in the "Debt Agreements with Collateral Release Provisions" section below.

	Summary of Existing Rule 3-10	**Summary of Final Amendments**
Financial Statement Requirement & Omission of Subsidiary Issuer and Guarantor Financial Statements	Rule 3-10(a) states that every issuer of a registered security that is guaranteed and every guarantor of a registered security must file the financial statements required for a registrant by Regulation S-X. Rules 3-10(b) – (f) set forth five exceptions to this general rule, which permit the omission of separate financial statements of subsidiary issuers and guarantors when certain conditions are met, including that the parent company provides the Alternative Disclosures.	Each issuer of a registered security that is guaranteed and each guarantor of a registered security must file the financial statements required for a registrant by Regulation S-X; however, amended Rule 3-10(a) will no longer contain this express statement. Amended Rule 3-10(a) will continue to permit the omission of separate financial statements of subsidiary issuers and guarantors when certain conditions are met, including that the parent company provides the Revised Alternative Disclosures.

Rule Structure & Eligible Issuer and Guarantor Structures	Rules 3-10(b) through (f) set forth the five exceptions. Each exception specifies the eligible structures to which it applies, and the conditions that must be met. In each case, the parent company must provide the Alternative Disclosures. Eligible issuer and guarantor structures: • A finance subsidiary issues securities that its parent company guarantees (Rule 3-10(b)); • An operating subsidiary issues securities that its parent company guarantees (Rule 3-10(c)); • A subsidiary issues securities that its parent company and one or more other subsidiaries of its parent company guarantee (Rule 3-10(d)); • A parent company issues securities that one of its subsidiaries guarantees (Rule 3-10(e)); or • A parent company issues securities that more than one of its subsidiaries guarantees (Rule 3-10(f)).	The amended rules will replace the exceptions in existing Rule 3-10(b) through (f). Amended Rule 3-10(a) will permit the separate financial statements of a subsidiary issuer or guarantor to be omitted if the eligibility conditions in amended Rules 3-10(a) and 3-10(a)(1) are met and the Revised Alternative Disclosures specified in new Rule 13-01 are provided in the filing, as required by amended Rule 3-10(a)(2). Amended Rule 3-10(a)(1) sets forth the eligible structures. Eligible issuer and guarantor structures: • The parent company issues the security or co-issues the security, jointly and severally, with one or more of its consolidated subsidiaries (Amended Rule 3-10(a)(1)(i)); or • A consolidated subsidiary issues the security, or co-issues it with one or more other consolidated subsidiaries of the parent company, and the security is guaranteed fully and unconditionally by the parent company (Amended Rule 3-10(a)(1)(ii)). The role of subsidiary guarantors will not be specified in the amended categories of structures; however, the amended rules are intended to cover the structures permitted in existing Rules 3-10(b) through (f).

Conditions to Omit Separate Subsidiary Issuer and Guarantor Financial Statements	If an issuer and guarantor structure matches one of the exceptions in Rules 3-10(b) through (f), the conditions in the applicable exception paragraph must be met, including: • Consolidated financial statements of the parent company have been filed; • Each subsidiary issuer and guarantor is "100%-owned" by the parent company; • Each guarantee is "full and unconditional" and, where there are multiple guarantees, joint and several; and • The parent company provides the Alternative Disclosures in its financial statement footnotes. Additionally, the 2000 Release states the guaranteed security must be debt or debt-like.	The applicable conditions, set forth in amended Rule 3-10, include: • Consolidated financial statements of the parent company have been filed (amended Rule 3-10(a)); • The subsidiary issuer or guarantor is a consolidated subsidiary of the parent company (amended Rule 3-10(a)); • The guaranteed security is debt or debt-like (amended Rule 3-10(a)(1)); • The issuer and guarantor structure must match one of the eligible issuer and guarantor structures (amended Rule 3-10(a)(1)(i) or (ii)); and • The parent company provides the Revised Alternative Disclosures (amended Rule 3-10(a)(2)).
Parent Company Financial Statements Condition	The identity of the parent company will vary based on the particular corporate structure; however, the 2000 Release stated three conditions must be met before an entity can be considered a "parent company," including that the entity: • Is an issuer or guarantor of the subject securities; • Is an Exchange Act reporting company, or will be one as a result of the subject Securities Act registration statement; and • Owns 100%-of each subsidiary issuer or guarantor directly or indirectly.	"Parent company" will be defined in amended Rule 3-10(b)(1) and require that the entity: • Is an issuer or guarantor of the guaranteed security; • Is an Exchange Act reporting company, or will become one as a result of the subject Securities Act registration statement; and • Consolidates each subsidiary issuer and/or guarantor in its consolidated financial statements.

Ownership Condition	The exceptions in Rules 3-10(b) through (f) require that each subsidiary issuer or guarantor must be 100%-owned by the parent company to omit its separate financial statements.	Amended Rule 3-10(a) will require that the subsidiary issuer or guarantor be a consolidated subsidiary of the parent company pursuant to the relevant accounting standards already in use. New Rule 13-01(a)(3) will require a description of any factors that may affect payments to holders of the guaranteed security, such as the rights of a non-controlling interest holder. New Rule 13-01(a)(4)(iv) will require separate disclosure of Summarized Financial Information for subsidiary issuers and guarantors affected by those factors as described below.
Debt or Debt-Like Security Definition:	Rule 3-10 does not define when a security is "debt or debt-like;" however, the 2000 Release described characteristics of a debt or debt-like security, including: • The issuer has a contractual obligation to pay a fixed sum at a fixed time; and • Where the obligation to make such payments is cumulative, a set amount of interest must be paid.	Amended Rule 3-10(a)(1) will state explicitly that the guaranteed security must be "debt or debt-like" and amended Rule 3-10(b)(2) will state that a guaranteed security will be considered "debt or debt-like" if: • The issuer has a contractual obligation to pay a fixed sum at a fixed time; and • Where the obligation to make such payments is cumulative, a set amount of interest must be paid.
Subsidiary Guarantee Eligibility Requirements	The exceptions in Rule 3-10(b) through (f) specify that a guarantee be full and unconditional and, when there are multiple guarantees, be joint and several. The requirements are imposed on the guarantee regardless of whether the guarantor is the parent company or a subsidiary.	The parent company's role with respect to the guaranteed security will determine whether the structure is eligible to provide the Revised Alternative Disclosures. The parent company must be the issuer or full and unconditional guarantor of the guaranteed security (amended

		Rules 3-10(a)(1)(i) and (ii)). If a subsidiary guarantee is not full and unconditional, or where there are multiple guarantees, not joint and several, disclosure of such terms and conditions will be required by new Rule 13-01(a)(2). New Rule 13-01(a)(4)(iv) will require separate disclosure of the Summarized Financial Information for subsidiary guarantor(s) to which such terms and conditions apply.
Alternative Disclosures & Revised Alternative Disclosures	To be eligible to omit the separate financial statements of a subsidiary issuer or guarantor, each exception in Rules 3-10(b) through (f) requires that the parent company must provide the Alternative Disclosures in the footnotes to its consolidated financial statements. The form and content of the Alternative Disclosures are determined based on the facts and circumstances and are either a brief narrative or Consolidating Information. Specific elements of Consolidating Information are discussed below. Alternative Disclosures may consist of a brief narrative instead of Consolidating Information when: • The subsidiary is a finance subsidiary, and the parent company is the only guarantor of the securities; • The parent company of the subsidiary issuer has no independent assets or	The amended rule will replace the brief narrative form and Consolidating Information form of Alternative Disclosure with the Revised Alternative Disclosures specified in new Rule 13-01. Specific elements of the Revised Alternative Disclosures are discussed below. The Revised Alternative Disclosures will be required in all cases, to the extent material (amended Rule 13-01(a)). Additionally, new Rule 13-01(a)(6) will require disclosure of any financial and narrative information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee, and new Rule 13-01(a)(7) will require disclosure of sufficient information so as to make the financial and non-financial information presented not misleading.

	operations, the parent company guarantees the securities, no subsidiary of the parent company guarantees the securities, and any subsidiaries of the parent company other than the issuer are minor; and • The parent company issuer has no independent assets or operations and all of the parent company's subsidiaries, other than minor subsidiaries, guarantee the securities.	
Consolidating Information and Revised Alternative Disclosures – Level of Detail	The instructions for preparing Consolidating Information are specified in Rule 3-10(i). Consolidating Information includes all major captions of the balance sheet, income statement, and cash flow statement that are required to be shown separately in interim financial statements prepared under Article 10 of Regulation S-X. Rules 3-10(i)(11)(i) and (ii), respectively, require disclosure of any financial and narrative information about each guarantor if it would be material for investors to evaluate the sufficiency of the guarantee, and disclosure of sufficient information to make the financial information presented not misleading.	The amended rule will require the Revised Alternative Disclosures specified in new Rule 13-01. New Rule 13-01(a)(4) will require, for each issuer and guarantor, Summarized Financial Information, as specified in Rule 1-02(bb)(1) of Regulation S-X, which will include select balance sheet and income statement line items, as well as an accompanying note that briefly describes the basis of presentation. Additionally: • Disclosure of additional line items of financial information beyond what is specified in new Rule 13-01(a)(4) will be required if necessary to comply with new Rules 13-01(a)(6) and (7); • An issuer's or guarantor's amounts due from, amounts due to, and transactions with non-obligated subsidiaries and related parties will be required to be presented in separate line items by new Rule 13-01(a)(4)(iii); and • A parent company will be permitted to

		omit the required financial information if one of the four non-exclusive scenarios in new Rule 13-01(a)(4)(vi) is applicable and disclosed.
Consolidating Information and Revised Alternative Disclosures – Combined Basis	The applicable exception in Rule 3-10(c) through (f) specifies the columns of information that must be presented, and Rule 3-10(i)(6) describes circumstances when additional columns are required. To distinguish the assets, liabilities, operations, and cash flows of the entities that are legally obligated to make payments under the guarantee from those that are not, the columnar presentation must show: • A parent company's investments in all consolidated subsidiaries based upon its proportionate share of their net assets (Rule 3-10(i)(3)); and • Subsidiary issuer and guarantor investments in certain consolidated subsidiaries using the equity method of accounting (Rule 3-10(i)(5).	New Rule 13-01(a)(4)(i) will permit the Summarized Financial Information of each issuer and guarantor consolidated in the parent company's consolidated financial statements to be presented on a combined basis with the Summarized Financial Information of the parent company. In this regard: • New Rule 13-01(a)(4)(ii) requires intercompany balances and transactions between issuers and guarantors whose information is presented on a combined basis to be eliminated; • This Summarized Financial Information must exclude subsidiaries that are not issuers or guarantors (new Rule 13-01(a)(4)(iii)), even if an issuer or guarantor would otherwise consolidate such non-issuer and non-guarantor subsidiaries. An issuer's or guarantor's investment in a subsidiary that is not an issuer or guarantor must not be presented; and • If information provided in response to disclosures specified in new Rule 13-01 is applicable to one or more, but not all, issuers and guarantors, new Rule 13-01(a)(4)(iv) will require separate

		disclosure of Summarized Financial Information for the issuers and guarantors to which the information applies. In limited circumstances (i.e., where the separate financial information applicable to those issuers and/or guarantors can be easily understood), narrative disclosure may be provided in lieu of such separate Summarized Financial Information. The amended rule will no longer require separate disclosure of the financial information of non-guarantor subsidiaries.
Consolidating Information and Revised Alternative Disclosures – Periods to Present	Consolidating Information must be provided as of, and for, the same periods as the parent company's consolidated financial statements (Rule 3-10(i)(2)).	New Rule 13-01(a)(4)(v) will require Summarized Financial Information to be provided as of, and for, the most recently ended fiscal year and year-to-date interim period, if applicable, included in the parent company's consolidated financial statements.
Consolidating Information and Revised Alternative Disclosures – Non-Financial Disclosures and Related Exhibit	Rule 3-10 requires certain non-financial disclosures, including: • Disclosure, if true, that each subsidiary issuer or subsidiary guarantor is 100%-owned by the parent company, that all guarantees are full and unconditional, and where there is more than one guarantor, that all guarantees are joint and several (Rules 3-10(i)(8)(i) – (iii);	New Rules 13-01(a)(1) through (3) will require disclosures about the issuers and guarantors, the terms and conditions of the guarantees, and how the issuer and guarantor structure and other factors may affect payments to holder of the guaranteed securities. Additionally, disclosure of facts and circumstances specific to particular issuers and guarantors that are beyond what is specifically required in new Rules 13-01(a)(1)

	• Restricted net assets (Rule 3-10(i)(10); and • Certain types of restrictions on the ability of the parent company or any guarantor to obtain funds from their subsidiaries (Rule 3-10(i)(9). Rules 3-10(i)(11)(i) and (ii), respectively, require disclosure of any financial and narrative information about each guarantor if it would be material for investors to evaluate the sufficiency of the guarantee, and disclosure of sufficient information to make the financial information presented not misleading.	through (3) will be required if necessary to comply with new Rules 13-01(a)(6) and (7), which are described above. In new Exhibit 22 (Item 601(b)(22) of Regulation S-K), the parent company must list each of its subsidiaries that is a guarantor, issuer, or co-issuer of guaranteed securities registered or being registered that the parent company issues, co-issues, or guarantees.
Location and Audit Requirement of Alternative Disclosures and Revised Alternative Disclosure	The exceptions in Rules 3-10(b) through (f) require the Alternative Disclosures to be included in the notes to the parent company's consolidated financial statements. Rule 3-10(i)(2) requires Consolidating Information to be audited for the same periods that the parent company financial statements are required to be audited.	New Rule 13-01(b) will allow the parent company to provide the Revised Alternative Disclosures in a footnote to its consolidated financial statements or alternatively, in MD&A. If a parent company elects to provide the disclosures in its audited financial statements, the Revised Alternative Disclosures will be required to be audited. If not otherwise included in the consolidated financial statements or in MD&A, the parent company will be required to include the Revised Alternative Disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in Item 105 of Regulation S-K.

Recently Acquired Subsidiary Issuers and Guarantors	If a parent company acquires a new subsidiary issuer or guarantor, Rule 3-10(g) requires the parent company to provide one year of audited pre-acquisition financial statements of the newly acquired issuer or guarantor (and, if applicable, unaudited interim financial statements) when the: • Parent company acquires the new subsidiary during or subsequent to one of the periods for which financial statements are presented in a Securities Act registration statement filed in connection with the offer and sale of the debt securities; • Subsidiary is deemed "significant" (Rule 3-10(g)(1)(ii); and • subsidiary is not reflected in the audited consolidated results of the parent company for at least nine months of the most recent fiscal year (Rule 3-10(g)(1)).	New Rule 13-01(a)(5) will require pre-acquisition Summarized Financial Information specified in new Rule 13-01(a)(4) for recently-acquired subsidiary issuers and guarantors to be provided in a Securities Act registration statement filed in connection with the offer and sale of the guaranteed security if the parent company has acquired a significant "business" after the date of its most recent balance sheet date included in its consolidated financial statements and that acquired business and/or one or more of its subsidiaries are obligated as issuers and/or guarantors. Whether a "business" has been acquired will be determined in accordance with the guidance set forth in Rule 11-01(d) of Regulation S-X. An acquired business will be deemed significant based on the same significant tests and thresholds used to determine whether pre-acquisition financial statements are required for an acquired business pursuant to Rule 3-05 of Regulation S-X).
Exchange Act Reporting and Continuous Reporting Obligation	Subsidiary issuers and guarantors that avail themselves of an exception that allows for the Alternative Disclosures in lieu of separate financial statements are exempt from Exchange Act reporting by Rule 12h-5. The parent company, however, must continue to provide the Alternative Disclosures for as long as the guaranteed securities	Subsidiary issuers and guarantors that are permitted to omit their financial statements under amended Rule 3-10 will continue to be exempt from Exchange Act reporting under Rule 12h-5. The amended rule will permit a parent company to cease providing the Revised Alternative Disclosures if the corresponding subsidiary

	are outstanding. This obligation continues even if the subsidiary issuers and guarantors could have suspended their reporting obligations under Exchange Act Rule 12h-3 or Section 15(d) of the Exchange Act, had they chosen not to avail themselves of a Rule 3-10 exception and reported separately from the parent company.	issuer's or guarantor's Section 15(d) obligation is suspended automatically by operation of Section 15(d)(1) or through compliance with Rule 12h-3. As a continued condition of eligibility to omit the financial statements of a subsidiary issuer or guarantor, a parent company must continue providing the Revised Alternative Disclosures for so long as the subsidiary issuer or guarantor has a Section 12(b) reporting obligation with respect to the guarantee or guaranteed security.
	Summary of Existing Rule 3-16	**Summary of Final Amendments**
Rule 3-16 Financial Statements and Amended Disclosures	Rule 3-16(a) requires a registrant to provide separate annual and interim financial statements for each affiliate whose securities constitute a "substantial portion" of the collateral for any class of securities registered or being registered as if the affiliate were a separate registrant.	Under the final amendments, Rule 3-16 Financial Statements will be replaced with a requirement that a registrant provide the financial and non-financial disclosures about the affiliate(s) and the collateral arrangement specified in new Rule 13-02(a). New Rule 13-02 applies to collateralized debt securities issued on or after January 4, 2021, and to each registered security issued and outstanding before January 4, 2021 for which the registrant has previously been required to provide Rule 3-16 Financial Statements.
When Disclosure is Required	Rule 3-16 Financial Statements are required when an affiliate's securities constitute a "substantial portion" of the collateral for the securities registered or being registered. An affiliate's securities shall be deemed to constitute a	Under the final amendments, the disclosures specified in new Rule 13-02(a) will be required in all cases, to the extent material. Additionally, new Rule 13-02(a)(6) will require disclosure of any financial and narrative information about

	"substantial portion" if the aggregate principal amount, par value, or book value of the securities as carried by the registrant, or the market value of such securities, whichever is the greatest, equals 20 percent or more of the principal amount of the secured class of securities (Rule 3-16(b)).	each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral, and new Rule 13-02(a)(7) will require sufficient information so as to make the financial and non-financial information presented not misleading.
Financial Disclosures, Non-Financial Disclosures, and Related Exhibit	Rule 3-16 Financial Statements are those that would be required if the affiliate were a separate registrant.	New Rule 13-02(a)(4) will require, for each affiliate whose securities are pledged as collateral, Summarized Financial Information, as specified in Rule 1-02(bb)(1) of Regulation S-X, which will include select balance sheet and income statement line items, as well as an accompanying note that briefly describes the basis of presentation. Additionally: • Disclosure of additional line items of financial information beyond what is specified in new Rule 13-02(a)(4) will be required if necessary to comply with new Rules 13-02(a)(6) and (7); • An affiliate's amounts due from, amounts due to, and transactions with the registrant, any of the registrant's subsidiaries not included in the Summarized Financial Information of the affiliate(s), and related parties will be required to be presented in separate line items by new Rule 13-02(a)(4)(iii); and • A registrant will be permitted to omit the required financial information if one of the two non-exclusive scenarios in new Rule 13-01(a)(4)(vi) is applicable and

		disclosed. New Rules 13-02(a)(1) through (3) will require certain non-financial disclosures about the securities pledged as collateral, the affiliates whose securities are pledged, the terms and conditions of the collateral arrangement, and whether a trading market exists for the pledged securities. Additionally, disclosure of facts and circumstances specific to particular affiliates or the collateral arrangement that are beyond what is specifically required in new Rules 13-02(a)(1) through (3) will be required if necessary to comply with new Rules 13-02(a)(6) and (7). In new Exhibit 22 (Item 601(b)(22) of Regulation S-K), the registrant must list each of its affiliates whose securities are pledged as collateral for securities registered or being registered, and also identify the securities pledged as collateral.
Combined Basis	Separate Rule 3-16 Financial Statements are required for each affiliate whose securities constitute a "substantial portion" of the collateral for securities registered or being registered.	New Rule 13-02(a)(4)(i) will permit the Summarized Financial Information of each affiliate consolidated in the registrant's consolidated financial statements to be presented on a combined basis. In this regard: • New Rule 13-02(a)(4)(ii) requires intercompany balances and transactions between affiliates whose summarized financial information is presented on a combined basis to be eliminated; and

		• If information provided in response to disclosures specified in new Rule 13-02 is applicable to one or more, but not all, affiliates, new Rule 13-02(a)(4)(iv) will require separate disclosure of Summarized Financial Information for the affiliates to which the information applies. In limited circumstances (i.e., where the separate financial information applicable to those affiliates can be easily understood), narrative disclosure may be provided in lieu of such separate Summarized Financial Information.
Periods Presented	Rule 3-16 Financial Statements are required for the same annual and interim periods as if the affiliate were a separate registrant. As such, the financial statements are required to be provided for the periods required by Rules 3-01 and 3-02 of Regulation S-X. However, Rule 3-16 Financial Statements are not required in quarterly reports, such as Form 10-Q.	New Rule 13-02(a)(4)(v) will require disclosure as of, and for, the most recently ended fiscal year and year-to-date interim period, if applicable, included in the registrant's consolidated financial statements. Disclosure will be required in quarterly reports, such as Form 10-Q (amended Rule 10-01(b)(10)).
Location and Audit Requirement of the Disclosure	Rule 3-16 Financial Statements are required to be audited for the periods required by Rules 3-01 and 3-02 of Regulation S-X.	New Rule 13-02(b) will allow the registrant to provide the disclosures required by Rule 13-02 in a footnote to its consolidated financial statements or alternatively, in MD&A. If a registrant elects to provide the disclosures in its audited financial statements, the amended disclosures will be required to be audited. If not otherwise included in the consolidated financial statements or in

		MD&A, the registrant will be required to include the amended disclosures in its prospectus immediately following "Risk Factors," if any, or otherwise, immediately following pricing information described in Item 105 of Regulation S-K.
Recently-Acquired Affiliates Whose Securities are Pledged as Collateral	Existing Rule 3-16 does not contain a specific requirement to provide pre-acquisition financial information of recently-acquired affiliates whose securities are pledged as collateral. However, if a recently-acquired affiliate meets the substantial portion threshold in the existing rule, financial statements for periods prior to the date of acquisition by the registrant are required to be filed.	New Rule 13-02(a)(5) will require pre-acquisition Summarized Financial Information specified in new Rule 13-02(a)(4) for recently-acquired affiliates whose securities are pledged as collateral to be provided in a Securities Act registration statement filed in connection with the offer and sale of the collateralized security if the registrant has acquired a significant "business" after the date of its most recent balance sheet date included in its consolidated financial statements and that acquired business and/or one or more of its subsidiaries are affiliates whose securities are pledged as collateral. Whether a "business" has been acquired will be determined in accordance with the guidance set forth in Rule 11-01(d) of Regulation S-X. An acquired business will be deemed significant based on the same significant tests and thresholds used to determine whether pre-acquisition financial statements are required for an acquired business pursuant to Rule 3-05 of Regulation S-X.

Debt Agreements with Collateral Release Provisions	Under existing Rule 3-16, registrants often structure debt agreements to release affiliate securities pledged as collateral if the disclosure requirements of Rule 3-16 would be triggered.	As a transitional matter, so as not to change the amount of collateral available to investors in previously issued debt securities that include collateral release provisions, amended Rule 3-16, and not new Rule 13-02, applies to each registered security issued and outstanding before January 4, 2021 for which the registrant has not previously been required to provide Rule 3-16 Financial Statements.