

# FREQUENTLY ASKED QUESTIONS ABOUT PERIODIC REPORTING REQUIREMENTS FOR U.S. ISSUERS PRINCIPAL EXCHANGE ACT REPORTS

*These Frequently Asked Questions should be read together with our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview (the “Overview”). Defined terms used herein, but not defined, shall have the meaning set forth in the Overview.*

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## Annual Report on Form 10-K

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### **What is an Annual Report on Form 10-K?**

Form 10-K is a detailed annual report of the Reporting Company’s operations.<sup>1</sup> The SEC requires Form 10-K to be used for annual reports pursuant to Section 13 or 15(d) of the Securities Exchange Act. It includes information regarding the issuer’s business, material legal proceedings, management’s discussion and analysis of the issuer’s financial condition and results of operations, directors and officers, executive compensation, stock performance and dividend policies, and certain corporate governance issues. Audited

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<sup>1</sup> The term Reporting Company is used herein to cover only U.S. reporting companies. We do not discuss reporting obligations for foreign private issuers. Please refer to our Frequently Asked Questions About Foreign Private Issuers, available on our website at: <http://www.mofo.com/files/Uploads/Images/100521FAQForeignPrivate.pdf>.

financial statements for the applicable year must be included with this report. As a result of the Sarbanes-Oxley Act, the CEOs and CFOs of Reporting Companies must personally certify as to the accuracy of certain information in the Form 10-K and Form 10-Q. See “What are Sarbanes-Oxley certifications?” in our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview.

Although similarly named, the annual report on Form 10-K is distinct from the “annual report to shareholders.” See “What is the annual report to shareholders?”

### **Who must file a Form 10-K?**

All Reporting Companies must file a Form 10-K. The filing deadline will vary, depending on the issuer’s status (whether it is a Large Accelerated Filer, an Accelerated Filer or a Non-Accelerated Filer). See “What are the filing deadlines for Form 10-K and Form 10-Q?” in our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview. In addition, the disclosure requirements for Form 10-K are scaled for Smaller Reporting Companies. See “What accommodations are afforded Smaller Reporting Companies?”

***Where are the disclosure requirements for Form 10-K set forth?***

The annual report on Form 10-K is the most comprehensive periodic report filed with the SEC. It contains most of the information that would also be provided in a registration statement for an offering of securities. The SEC “form” (*i.e.*, the Form 10-K) sets forth, item by item, the disclosure requirements by referring to the requirements of Regulation S-K and Regulation S-X

- Regulation S-K is the main source of disclosure requirements for information (other than financial statements) required to be included in periodic reports, registration statements, proxy materials and other filings made under the Securities Act and the Exchange Act.
- Regulation S-X is the main source of the SEC’s requirements for financial statements included in periodic reports, registration statements and other SEC filings.

***What are the disclosure items required in Form 10-K?***

The Form 10-K is divided into six sections, consisting of the cover page and signature page and Parts I through IV information. Below is a list of the disclosure items in Parts I through IV, with the corresponding section and Item references from Form 10-K and Regulation S-K:

- Part I information
  - Item 1 Business (Regulation S-K Item 101)
  - Item 1A Risk Factors (Regulation S-K Item 503(c))
  - Item 1B Unresolved Staff Comments

- Item 2 Properties (Regulation S-K Item 102)
- Item 3 Legal Proceedings (Regulation S-K Item 103)
- Item 4 Mine Safety Disclosures (Regulation S-K Item 104)
- Part II information
  - Item 5 Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities (Regulation S-K Items 201, 701 and 703)
  - Item 6 Selected Financial Data (Regulation S-K Item 301)<sup>2</sup>
  - Item 7 Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A) (Regulation S-K Item 303)
  - Item 7A Quantitative and Qualitative Disclosures about Market Risk (Regulation S-K Item 305)
  - Item 8 Financial Statements and Supplementary Data (Regulation S-X and Regulation S-K Item 302)
  - Item 9 Changes in and Disagreements With Accountants on Accounting and Financial Disclosure (Regulation S-K Item 304(b))

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<sup>2</sup> Smaller Reporting Companies do not need to provide selected financial data. In addition, an “emerging growth company” is only required to present selected financial data as of the earliest audited period presented in its IPO registration statement. The Jumpstart Our Business Startups (JOBS) Act (the “JOBS Act”), which was signed into law on April 5, 2012, created this new issuer category.

- Item 9A(T) Controls and Procedures (Regulation S-K Items 307 and 308)
- Item 9B Other Information
- Part III information
  - Item 10 Directors and Executive Officers and Corporate Governance of the Registrant (Regulation S-K Items 401, 405, 406, 407(c)(3), 407(d)(4) and 407(d)(5))
  - Item 11 Executive Compensation (Regulation S-K Items 402 and 407(e)(4) and 407(e)(5))
  - Item 12 Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters (Regulation S-K Items 201(d) and 403)
  - Item 13 Certain Relationships and Related Transactions, and Director Independence (Regulation S-K Items 404 and 407(a))
  - Item 14 Principal Accountant Fees and Services (Item 9(e) of Schedule 14A)

Part III information is required in the proxy statement, and is frequently omitted from Form 10-K and incorporated by reference from the proxy statement. *See “May an issuer use incorporation by reference in its Form 10-K?”*

- Part IV information
  - Item 15 Exhibits, Financial Statement Schedules (Regulation S-K Item 601)

The “form” of Form 10-K can be found on the SEC’s website.<sup>3</sup> Not every item will be applicable to every Reporting Company each fiscal year. As an example,

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<sup>3</sup> Form 10-K is available on the SEC’s website at: <http://www.sec.gov/about/forms/form10-k.pdf>.

Item 1B regarding unresolved staff comments only applies to Accelerated Filers, Large Accelerated Filers and WKSI issuers.

***What exhibits are required to be filed with Form 10-K?***

In addition to the various applicable exhibits and financial statements required by Item 601 of Regulation S-K, the following documents must be filed as exhibits to Form 10-K (as well as exhibits to each Form 10-Q):

- Sarbanes-Oxley certifications;
- XBRL files; and
- mine safety disclosure exhibit (if applicable).

***What accommodations are afforded Smaller Reporting Companies?***

Effective February 4, 2008, the SEC adopted a new system of disclosure rules for smaller companies that file periodic reports with the SEC to reflect the characteristics and needs of smaller companies and their investors. These rules are included in Regulation S-K and replace the disclosure requirements formerly contained in Regulation S-B, which applied to “small business issuers.” The SEC exempts Smaller Reporting Companies from complying with various regulations that the SEC determines would be unduly burdensome or costly for these issuers. Examples of some of the more significant accommodations include:

- less detailed financial statement provisions, thereby enabling Smaller Reporting Companies to provide fewer years of financial statements under Article 8 of Regulation S-X;
- relief from the costly auditor attestation of internal controls under Section 404(b) of the Sarbanes-Oxley Act;

- relief from the requirement to provide risk factor disclosure in Form 10-K and Form 10-Q; and
- permission to exclude the Compensation Discussion and Analysis (“CD&A”) and certain executive compensation tables in annual reports on Form 10-K or proxy statements under Item 402 of Regulation S-K.

***What are the scaled disclosure requirements for Smaller Reporting Companies?***

Regulation S-K details the specific scaled disclosure requirements for Smaller Reporting Companies. A unique feature of the system of disclosure rules is that a Smaller Reporting Company may choose on an “a la carte” basis (even within a single filing) whether to comply with Regulation S-K requirements for larger companies or avail itself of the scaled requirements for Smaller Reporting Companies in its periodic reports on Form 10-K and Form 10-Q and in registration statements.

***What financial statements are required to be included in Form 10-K?***

Pursuant to Item 8 of Part II of Form 10-K, larger issuers must provide audited financial statements for the most recently completed fiscal year and certain additional fiscal years, and notes to the financial statements, as set forth below:

- auditor’s opinion relating to the financial statements;
- balance sheets as of the end of the most recent fiscal year and the previous fiscal year;
- income statements for the most recent fiscal year and the previous two fiscal years;

- statements of cash flows for the most recent fiscal year and the previous two fiscal years;
- statements of stockholders’ equity for the most recent fiscal year and the previous two fiscal years; and
- notes to the audited financial statements.

Under the more lenient requirements for Smaller Reporting Companies, such filers only need to include income statements, statements of cash flows and statements of stockholders’ equity for the most recent fiscal year and the previous fiscal year. See “*What are the scaled financial disclosure requirements for Smaller Reporting Companies?*” below.

The audited financial statements are prepared in accordance with Regulation S-X and U.S. GAAP. As opposed to Form 10-Q, Form 10-K requires audited financial statements.

***What are the scaled financial disclosure requirements for Smaller Reporting Companies?***

Smaller Reporting Companies may choose to provide financial disclosures under Article 8 of Regulation S-X. Article 8 does not:

- require the filing of supplemental schedules;
- designate financial statement format;
- stipulate percentage thresholds for many disclosures; or
- require inclusion of separate financial statements of significant investees.

Smaller Reporting Companies are required to include in their Form 10-K an audited balance sheet as of the end of the most recent two fiscal years, and audited statements of income, cash flows and changes in stockholders’ equity for each of the last two fiscal years

preceding the date of the most recent audited balance sheet.<sup>4</sup>

***What is the “MD&A” section?***

The section titled “Management’s Discussion and Analysis of Financial Condition and Results of Operation” (the “MD&A”) is required by Form 10-K and serves as an important component of an issuer’s filings. The MD&A section should provide investors with the information necessary to understand a Reporting Company’s financial condition, changes in its financial condition, results of operations and trends. There are three basic objectives of the MD&A:

- to provide a narrative explanation of an issuer’s financial statements, enabling investors to see the issuer through the eyes of management;
- to enhance overall financial disclosure and provide a context for the analysis of financial information; and
- to provide information about the quality and potential variability of a company’s earnings and cash flow, so that investors can assess whether past performance is indicative of future performance.

Item 303 of Regulation S-K prescribes the specific components of the MD&A. Among other features, the MD&A must contain a discussion and analysis of currently known trends, events, or uncertainties that are reasonably likely to have a material effect on the issuer’s results of operations or financial affairs. The MD&A should not be merely a restatement of financial statement information in a narrative form. The MD&A is also required to be included in Form 10-Q.

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<sup>4</sup> Rule 8-02 of Regulation S-X.

***May an issuer use incorporation by reference in its Form 10-K?***

An issuer may satisfy certain of the Form 10-K requirements through incorporation by reference in accordance with the requirements of Rule 12b-23 under the Exchange Act. An issuer may omit some or all of the Part III information from its Form 10-K and incorporate this information by reference from its proxy statement if the proxy statement is filed within 120 days after the end of the fiscal year. In such case, the issuer must provide a statement to that effect in the Form 10-K under each affected item under Part III. If the issuer is unable to file its proxy statement by the 120th day, it must amend its Form 10-K, and file a Form 10-K/A by the 120th day after the end of its fiscal year to include all of the Part III information in such Form 10-K/A.

If an issuer prepares an annual report to shareholders separate from its Form 10-K, it may incorporate some or all of the Part I and Part II information required to be in Form 10-K by reference from its annual report as long as the annual report is filed as an exhibit to Form 10-K.

***Are the board of directors and any board committees involved in the Form 10-K preparation process?***

Yes. The board of directors reviews drafts of the Form 10-K, approves the Form 10-K and authorizes its filing. The directors must sign the Form 10-K, and bear potential liability for any inaccurate, misleading or omitted information. If the issuer has a disclosure committee, it will review drafts of the Form 10-K (and other periodic reports) and determine whether there is any other material information that should be disclosed. The audit committee reviews and approves the financial statements and related notes, and recommends to the full board of directors that the financial statements be

included in Form 10-K. The audit committee is required to report on these actions in the issuer's proxy statement. Finally, the compensation committee reviews and approves the CD&A section and recommends to the full board of directors that the CD&A be included in Form 10-K or the proxy statement, as applicable.

#### ***Who must sign Form 10-K?***

At least one complete copy of Form 10-K must be manually signed by the principal executive officer, the principal financial officer, the principal accounting officer or controller and a majority of the directors.

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### **Quarterly Report on Form 10-Q**

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#### ***What is the Form 10-Q?***

The Form 10-Q is a quarterly report on the Reporting Company's operations and financial position. The SEC requires Form 10-Q to be used for quarterly reports pursuant to Section 13 or Section 15(d) of the Exchange Act. Form 10-Q contains information similar to that contained in the Form 10-K, however, the information is generally less detailed. The Form 10-Q provides a continuing view of the issuer's financial position during the year and the financial statements are unaudited. Form 10-Q compares the issuer's last quarter to the current quarter and the prior year's quarter to the current year's quarter and primarily provides financial information about the issuer during the completed quarter, including quarterly unaudited financial statements and an MD&A section. Any material updates and changes to the risk factors disclosed in Form 10-K (but not required in every Form 10-Q) are

required to be reported in Form 10-Q. Form 10-Q also describes any material events, including events that would trigger the filing of a Form 8-K, that occurred during the quarter and the submission of any matters to a shareholder vote during the quarter. As a result of the Sarbanes-Oxley Act, the CEOs and the CFOs of Reporting Companies must personally certify to the accuracy of certain information in Form 10-Q. See *"What are Sarbanes-Oxley certifications?"* in our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview.

#### ***Who must file Form 10-Q?***

Similar to Form 10-K, all Reporting Companies must file Form 10-Q, although the filing deadline is shorter for Large Accelerated Filers and Accelerated Filers. See *"What are the filing deadlines for Form 10-K and Form 10-Q?"* in our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview. In addition, the disclosure requirements for Form 10-Q are scaled for Smaller Reporting Companies. See *"What accommodations are afforded Smaller Reporting Companies?"* and *"What are the scaled disclosure requirements for Smaller Reporting Companies?"* above, which also apply to Form 10-Q, as applicable.

#### ***Must issuers file Form 10-Q for the fourth quarter?***

No. Form 10-Q must be filed after the end of each of the first three quarters of the fiscal year. Issuers need not file a Form 10-Q for the fourth quarter of their fiscal year. Information for the final quarter of an issuer's fiscal year is included in Form 10-K.

***Where are the disclosure requirements for Form 10-Q set forth?***

The SEC “form” (i.e., Form 10-Q) sets forth, item by item, the disclosure requirements by referring to the requirements of Regulation S-K and Regulation S-X.

***What are the disclosure items required in Form 10-Q?***

Form 10-Q follows a format similar to the Form 10-K and contains much of the same information as Form 10-K, although less detailed and adjusted for the quarterly period. Form 10-Q is divided into four sections, consisting of the cover page and signature page and Part I and II information. The Part I and II information is set forth below with the corresponding section and Item references from Form 10-Q and Regulation S-K:

- Part I Financial Information
  - Item 1 Financial Statements (Regulation S-X Rule 10-01)
  - Item 2 Management’s Discussion and Analysis of Financial Condition and Results of Operations (Regulation S-K Item 303)
  - Item 3 Quantitative and Qualitative Disclosures About Market Risk (Regulation S-K Item 305)
  - Item 4 Controls and Procedures (Regulation S-K Items 305, 307 and 308(c))
- Part II Other Information
  - Item 1 Legal Proceedings (Regulation S-K Item 103)

- Item 1A Risk Factors (any material changes from risk factors as previously disclosed in the registrant’s Form 10-K in response to Item 1A under Part 1 of Form 10-K)
- Item 2 Unregistered Sales of Equity Securities and Use of Proceeds (Regulation S-K Items 701 and 703)
- Item 3 Defaults Upon Senior Securities
- Item 4 Mine Safety Disclosures (Regulation S-K Item 407(c)(3))
- Item 5 Other Information (Regulation S-K Item 103)
- Item 6 Exhibits (Regulation S-K Item 601)

Before preparing Form 10-Q, an issuer should refer to Form 10-Q and its related instructions. The “form” of Form 10-Q can be found on the SEC’s website.<sup>5</sup> As with Form 10-K, not every Form 10-Q will have all of the Parts I and II information because some items may not be applicable to every Reporting Company for every quarterly period.

***What exhibits are required to be filed with Form 10-Q?***

In addition to the various applicable exhibits required by Item 601 of Regulation S-K, the following documents must be filed as exhibits to each Form 10-Q:

- Sarbanes-Oxley certifications;

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<sup>5</sup> Form 10-Q is available on the SEC’s website at: <http://www.sec.gov/about/forms/form10-q.pdf>.

- XBRL files; and
- mine safety disclosure exhibit (if applicable).

***What financial statements must be provided in Form 10-Q?***

Pursuant to Item 1 of Part I of Form 10-Q, issuers (other than Smaller Reporting Companies) must provide unaudited financial statements for the most recently completed fiscal quarter and, if applicable, any interim periods as set forth below, and unaudited notes to the financial statements:

- balance sheets as of the end of the most recent fiscal quarter and as of the end of the previous fiscal year;
- income statements for the most recent fiscal quarter and the current interim period (from the beginning of the year through the end of the most recent fiscal quarter), if longer than the first fiscal quarter, and for the corresponding fiscal quarter and interim period of the previous fiscal year; and
- statements of cash flows for the current interim period and for the corresponding interim period of the previous fiscal year.

The unaudited financial statements are prepared in accordance with Regulation S-X as well as U.S. GAAP. While the financial statements need not be audited, generally the independent accountants will review them and related notes and provide substantial support and comments to the issuer's financial reporting department.

***What are the scaled financial statement requirements for Smaller Reporting Companies for Form 10-Q?***

Smaller Reporting Companies may provide shorter condensed interim financial statements, with fewer line items, than the interim financial statements for larger issuers. When it comes to Form 10-Q, however, Smaller Reporting Companies must provide almost all of the same financial statements as larger issuers, including balance sheets and statements of cash flows for similar periods as larger issuers. The only difference is in respect of the income statement. A Smaller Reporting Company must only provide income statements for the current interim period and for the corresponding interim period of the previous fiscal year.<sup>6</sup>

***Who generally participates in the preparation of Form 10-Q?***

Because Form 10-Q presents the business and financial information of the issuer, it is typically prepared by the issuer, subject to review by the independent accountants and outside counsel. If it is the first periodic report after its IPO, or if an issuer has a small accounting or legal department, an issuer may ask its outside counsel to prepare substantial portions of Form 10-Q with its assistance.

While the time frame is shorter, the process and departments involved with Form 10-Q preparation are similar to Form 10-K preparation. Financial reporting personnel should prepare a draft of Form 10-Q as promptly as practicable after financial information for the most recent fiscal quarter is available. The draft should be reviewed by members of management and internal counsel, and subsequently distributed to independent accountants and outside counsel for their

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<sup>6</sup> Rule 8-03 of Regulation S-X.

review and comment. One difference is that the independent accountants are not auditing the financial statements included in Form 10-Q and therefore their review is less involved. Although no auditor consent is required, issuers will generally not file their Form 10-Q until the accountants have signed off on the financial disclosure. Because the CEO and CFO certify the information presented in Form 10-Q, they must review such Form 10-Q as well. See “What are Sarbanes-Oxley certifications?” in our Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview.

***Are the board of directors and any board committees involved in the Form 10-Q preparation process?***

Yes. The board of directors reviews drafts of the Form 10-Q, approves the Form 10-Q and authorizes its filing. The audit committee reviews and approves the financial statements and related notes, and recommends to the full board of directors that the financial statements be included in Form 10-Q. If the issuer has a disclosure committee, it will review drafts of Form 10-Q and determine whether there is any material information that should be disclosed.

***Who must sign Form 10-Q?***

At least one complete copy of Form 10-Q must be manually signed by a duly authorized officer of the issuer and the principal financial or chief accounting officer of the issuer (which indicates the signatures of two officers are required). However, it is sufficient to obtain only the signature of the principal financial or chief accounting officer if this officer is authorized to sign documents for the issuer.

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**Form 8-K<sup>7</sup>**

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***What is Form 8-K?***

Form 8-K is the form on which the SEC requires all Reporting Companies to report, on a current basis, the occurrence of significant corporate events.

***What are the reportable events under Form 8-K?***

Form 8-K identifies the specific “reportable” events that require the filing of Form 8-K and provides detailed instructions for filing. The following is a list of the events that trigger a filing, along with the corresponding section and Item references from Form 8-K:

- Section 1 Registrant’s Business and Operations
  - Item 1.01 Entry into a Material Definitive Agreement
  - Item 1.02 Termination of a Material Definitive Agreement
  - Item 1.03 Bankruptcy or Receivership
  - Item 1.04 Mine Safety – Reporting of Shutdowns and Patterns of Violations
- Section 2 Financial Information
  - Item 2.01 Completion of Acquisition or Disposition of Assets
  - Item 2.02 Results of Operations and Financial Condition
  - Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an

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<sup>7</sup>Our Frequently Asked Questions About Form 8-K are available on our website at: <http://www.mofo.com/files/Uploads/Images/FAQ-Form-8-K.pdf>.

- Off-balance Sheet Arrangement of a Registrant
  - Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-balance Sheet Arrangement
  - Item 2.05 Costs Associated with Exit or Disposal Activities
  - Item 2.06 Material Impairments
- Section 3 Securities and Trading Markets
  - Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing
  - Item 3.02 Unregistered Sales of Equity Securities
  - Item 3.03 Material Modification to Rights of Security Holders
- Section 4 Matters Related to Accountants and Financial Statements
  - Item 4.01 Changes in Registrant's Certifying Accountant
  - Item 4.02 Non-reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review
- Section 5 Corporate Governance and Management
  - Item 5.01 Changes in Control of Registrant
  - Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers;
- Compensatory Arrangements of Certain Officers
  - Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year
  - Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans
  - Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics
  - Item 5.06 Change in Shell Company Status
  - Item 5.07 Submission of Matters to a Vote of Security Holders
  - Item 5.08 Shareholder Director Nominations
- Section 6 Asset-backed Securities<sup>8</sup>
  - Item 6.01 ABS Informational and Computational Material
  - Item 6.02 Change of Servicer or Trustee
  - Item 6.03 Change in Credit Enhancement or Other External Support
  - Item 6.04 Failure to Make a Required Distribution
  - Item 6.05 Securities Act Updating Disclosure
- Section 7 Regulation FD
  - Item 7.01 Regulation FD Disclosure
- Section 8 Other Events

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<sup>8</sup> The items in this Section 6 apply only to asset-backed securities.

- Item 8.01 Other Events
- Section 9 Financial Statements and Exhibits
  - Item 9.01 Financial Statements and Exhibits

For additional details on the reportable events as well as other aspects of Form 8-K filings, please refer to our “Frequently Asked Questions About Form 8-K.”<sup>9</sup>

#### *What is included in Form 8-K?*

In addition to the cover page and the signature page, the information required to be included in Form 8-K depends on the specific reportable event. For some of the events, the information to be included is based on the disclosure requirements in Regulation S-K. Form 8-K also may include any exhibits, such as financial statements, press releases or other information referenced in the description of the event. Before preparing Form 8-K, an issuer should refer to Form 8-K and its related instructions. The “form” of Form 8-K can be found on the SEC’s website.<sup>10</sup>

#### *Who generally participates in the preparation of Form 8-K?*

Form 8-K presents company information and therefore the issuer (the legal department and/or the accounting department) typically prepares Form 8-K, subject to review by outside counsel. In some instances, an issuer may ask its outside counsel to prepare Form 8-K with its assistance, for example, if outside counsel has been closely involved in a transaction that triggers a Form 8-K filing obligation, such as the completion of an

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<sup>9</sup> Our Frequently Asked Questions About Form 8-K are available on our website at: <http://www.mofo.com/files/Uploads/Images/FAQ-Form-8-K.pdf>.

<sup>10</sup> Form 8-K is available on the SEC’s website at: <http://www.sec.gov/about/forms/form8-k.pdf>.

acquisition or negotiation of a new credit facility, or if the issuer has a small legal department.

#### *Who must sign Form 8-K?*

Before filing the Form 8-K with the SEC, it must be manually signed by an authorized officer of the issuer.

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### **Other Reports Required to be Filed by Certain Reporting Companies**

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#### *Are Reporting Companies required to file any other reports with the SEC?*

Yes. Issuers with a class of securities registered under Section 12 of the Exchange Act are also subject to the proxy solicitation rules and the beneficial ownership reporting rules for officers and directors. As such, they have to file proxy statements, and directors and officers of a Section 12 issuer must file beneficial ownership reports with the SEC. Issuers that become subject to Section 15(d) of the Exchange Act do not become subject to the beneficial ownership reporting and proxy statement rules.

#### *What is the Proxy Statement?*

Section 14(a) of the Exchange Act governs any proxy solicitation by Section 12 issuers. The rules promulgated under Section 14(a) require that, whenever an issuer makes such a solicitation, it must provide to its shareholders a proxy statement describing the matters being submitted to a vote and other information related to the shareholders’ meeting and solicitation process. The proxy statement also provides certain corporate governance information (such as a description of the board of directors, each committee of the board, corporate governance policies and reports from each of

the audit and compensation committees), executive and director compensation, and ownership of the issuer's securities by directors, officers and large shareholders.

Proxy statements relate to the annual shareholders' meeting or a special shareholders' meeting relating to any proposals other than a business combination. Proxy statements are also required for a business combination, *i.e.*, acquisitions, mergers, spin-offs, or sales of assets.

***Where are the disclosure requirements for proxy statements set forth?***

Regulation 14A and Schedule 14A comprise the SEC's requirements for the proxy solicitation process. Schedule 14A sets out the information required by the SEC to be included in the proxy statement, including by referring to applicable Items of Regulation S-K.

***What are the disclosure items required in proxy statements?***

Similar to Form 10-K and Form 10-Q, disclosure items required by Schedule 14A often refer to Regulation S-K. The following is a list of disclosure items required in proxy statements, along with the corresponding section and Item references from Schedule 14A and Regulation S-K:

- Letters from the Chairman of the Board or Chief Executive Officer<sup>11</sup>
- Notice of the Meeting (Items 1 of Schedule 14A)
- Proxy Summary<sup>12</sup>

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<sup>11</sup> This is not required under Schedule 14A or the proxy rules. However, some issuers choose to include a letter to highlight certain events, corporate governance initiatives or the issuer's financial performance.

<sup>12</sup> A proxy summary section is not required under Schedule 14A or the proxy rules. Issuers have begun including a proxy summary because the quantity of information required to be

- Voting Information (Item 2 and 21 of Schedule 14A)
- Director and Officer Information (Items 7 and 8 of Schedule 14A, referring to Items 401, 402, 404(a), 405 and 407 of Regulation S-K)
- Executive Compensation (Item 8 of Schedule 14A, referring to Item 402 of Regulation S-K)<sup>13</sup>
- Corporate Governance (Item 7 of Schedule 14A, referring to Item 407 of Regulation S-K)
- Independent Auditor Information (Item 9 of Schedule 14A)
- Related Party Transactions (Item 7 of Schedule 14A, referring to Item 404 of Regulation S-K)
- Security Ownership (Item 6(d) of Schedule 14A, referring to Item 403 of Regulation S-K)
- Section 16 Beneficial Ownership Reporting Compliance (Item 7 of Schedule 14A referring to Item 405 of Regulation S-K)
- Other Proposals (Items 10, 11, 12, 13, 14 and 24 of Schedule 14A)<sup>14</sup>
- Other Information

Some of the information required to be included in the proxy statement must also be included in Part III of Form 10-K. Issuers frequently omit from Form 10-K the

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presented in the proxy statement has increased in recent years, and issuers want to make it easier for shareholders to make an informed voting decision if they do not read the full document.

<sup>13</sup> Smaller Reporting Companies do not need to provide executive compensation disclosure and a CD&A section. In addition, an emerging growth company (as defined in the JOBS Act) may comply with the executive compensation and CD&A disclosures applicable to a Smaller Reporting Company.

<sup>14</sup> If the shareholders are going to vote on a proposal other than the election of directors or the ratification of accountants at the shareholders' meeting, the issuer must describe such proposals, *e.g.*, adoption of an equity compensation plan, approval of a business combination transaction or say-on-pay proposals.

Part III information and incorporate this information by reference from the proxy statement. See “*May an issuer use incorporation by reference into its Form 10-K?*” and “*What are the disclosure items required in Form 10-K?*”

The proxy statement must also contain the proxy card, which is the document that allows a shareholder to participate in voting at the meeting, whether or not they decide to attend, by granting its proxy.

***What is the CD&A?***

The CD&A is required by Item 402(b) of Regulation S-K and describes the compensation policies and decisions of the issuer, and the significant factors underlying those policies and decisions as they relate to, and are applied to, the named executive officers, including all material elements of the compensation of the named executive officers. Smaller Reporting Companies (and emerging growth companies as defined in the JOBS Act) are not required to provide a CD&A section. The inclusion of the CD&A section has generally made proxy statements more time consuming to prepare.

***Who generally participates in the preparation of the proxy statement?***

The issuer’s legal department typically prepares the proxy statement relating to the annual shareholders’ meeting with assistance from the compensation and investor relations departments, subject to review by its outside counsel. Some parts, such as the compensation committee report and the audit committee report, may be prepared by the issuer, and then reviewed and approved by the committees, or the relevant board committees may prepare those parts. If the proxy statement relates to a special shareholders’ meeting to approve a business combination, such as an acquisition, merger, or asset sales, and the issuer’s outside counsel

has been involved with the transaction, then the outside counsel may prepare the proxy statement.

***What are the filing and delivery requirements for proxy statements?***

The date that the issuer sets for its shareholders’ meeting drives the timing for filing and delivery of the proxy statement. As a general matter, a preliminary proxy statement and form of proxy must be filed with the SEC a minimum of 10 calendar days before public distribution of materials, although a substantially longer period should be allowed whenever the solicitation concerns a complex or controversial subject.

Copies of the definitive proxy materials, which are sent to shareholders, must be filed with the SEC no later than the date on which such materials are first mailed to shareholders. Subject to compliance with certain requirements, the issuer may send a paper copy of the notice of the annual meeting to its shareholders and post the remainder of the proxy statement on its website.

An issuer may file a definitive proxy statement with the SEC and send it out to its shareholders without the need to prepare any preliminary version (or wait for any SEC review) if the proposals for the shareholders’ meeting relate only to certain specific matters. The matters are (i) the election of directors, (ii) the selection of auditors, (iii) certain shareholder proposals, (iv) shareholder say-on-pay as required by TARP, or (v) any shareholder advisory vote on executive compensation, including the say-on-pay and frequency of say-on-pay votes required under Section 14A of the Exchange Act.<sup>15</sup>

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<sup>15</sup> Adopted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

If an issuer plans to omit some or all of the Part III information from its Form 10-K and incorporate this information by reference from its proxy statement, the proxy statement must be filed with the SEC within 120 days after the end of the fiscal year.

***Are proxy statements subject to SEC review?***

Yes. After the preliminary proxy statement has been filed with the SEC, the SEC Staff may comment on the proxy statement and require an issuer to make changes before mailing it to shareholders. During this 10-day period, the SEC determines whether to review the filing and only notifies the issuer if a determination to review the filing is made during such period. The issuer may have to delay its plans for mailing if the SEC chooses to review the proxy statement. The review process for a proxy statement is similar to the review process for periodic reports; however, the SEC often provides its first set of comments to the issuer within 10 days after filing of the preliminary proxy statement.

***What is the annual report to shareholders?***

When an issuer delivers its proxy statement to shareholders, it must also deliver its annual report to shareholders. The annual report to shareholders provides information about the issuer's business, management, operations and financial status. The annual report contains much of the same information as Form 10-K, such as audited financial statements, the MD&A, a description of certain aspects of the issuer's business, stock and dividend information and information about the issuer's directors and officers. Despite certain similarities, the annual report is different from Form 10-K in several ways:

- The annual report is primarily a communication to the shareholders, whereas

Form 10-K is a public disclosure document required by the SEC's annual reporting requirement.

- The annual report is subject to less SEC regulation and oversight.
- The annual report is typically prepared on glossy paper, containing pictures and charts, whereas Form 10-K has a required SEC format.
- The investor relations and legal departments of the issuer typically prepare the annual report.
- Outside counsel is generally not involved in preparation of the annual report.
- The annual report is not filed with the SEC.

An issuer may use its Form 10-K as its annual report to shareholders, without any additions or modifications. The annual report need not be filed with, or reviewed by, the SEC. The proxy solicitation rules require an issuer to provide paper copies of the annual report to the SEC when it delivers its proxy materials to its shareholders. This requirement is considered a delivery for informational purposes and not a filing with the SEC.

***Where are the disclosure requirements for annual reports to shareholders set forth?***

The minimum amount of information required to be included in the annual report is established by the SEC in Rule 14a-3 (or Rule 14c-3, if applicable) under the Exchange Act, which refers to the applicable items in Regulation S-K and Regulation S-X. The minimum information is substantially similar to certain sections in Form 10-K.

***What are Section 16 beneficial ownership reports?***

Insiders and some shareholders of a Section 12 issuer are subject to reporting obligations relating to their ownership of the issuer's stock. Section 16(a) of the Exchange Act requires the reporting of beneficial ownership of equity securities of a Section 12 issuer by directors, officers and shareholders owning more than 10% of the issuer's common stock. These individuals and entities must disclose their holdings of, and transactions in, equity securities, including stock options, warrants, rights and other convertible securities. This information is reported on Form 3, Form 4 or Form 5, as applicable, and filed with the SEC via EDGAR. Section 16 reporting is the responsibility of each individual filer; however, Form 3, Form 4 or Form 5 are often filed by the issuer or its counsel on behalf of its directors and officers.

***Are there any reporting requirements for 5% shareholders?***

Yes. Section 13(d) and Section 13(g) of the Exchange Act require the reporting of beneficial ownership of a Section 12 issuer's equity securities by shareholders owning more than 5% of the issuer's common stock. Each shareholder holding 5% or greater of the issuer's voting stock must disclose its ownership, and any changes in its ownership, of the issuer's equity securities on either Schedule 13D or Schedule 13G, as applicable, and file such reports with the SEC via EDGAR.

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