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March 6, 2015

BY E-MAIL: RULE-COMMENTS@SEC.GOV

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Request for Public Comments on the Securities and Exchange
Commission's Disclosure Effectiveness Initiative – Recommendations on
Regulation S-K**

Ladies and Gentlemen:

This letter is submitted on behalf of the Disclosure Effectiveness Working Group (the "Working Group") of the Federal Regulation of Securities Committee and the Law & Accounting Committee (together, the "Committees") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") with respect to the "Disclosure Effectiveness" initiative of the U.S. Securities and Exchange Commission (the "SEC" or "Commission"). In particular, we are responding to the Commission's invitation for public comment on ways to improve both the content and presentation of business and financial information disclosed in registration statements filed under the Securities Act of 1933, as amended (the "Securities Act"), and in periodic and current reports filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). This is the second of a series of comment letters from the Committees addressing specific aspects of the Commission's Disclosure Effectiveness initiative.

The comments set forth in this letter represent the views of the Committees and have been prepared by members of the Working Group. These comments have not been approved by the ABA's House of Delegates or Board of Governors, and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the Section.

The Committees thank the Commission for instituting a comprehensive review of the current regulatory regime administered by the Division of Corporation Finance (the "Division" or the "Staff"), and are pleased to submit the following comments and suggestions for improving the quality of disclosure required by

certain provisions of Regulation S-K in ways that we believe will benefit both investors and registrants. As noted, we expect to submit an additional comment letter (or letters) focusing on other disclosure requirements, the manner of presentation of such disclosure and various uses of technology that we believe will facilitate and enhance the content and delivery of timely and more relevant information to investors.

For discussion purposes, we have separated our recommendations in the main body of this letter into the following four categories drawn from themes outlined in the Staff Study¹ and subsequent Staff observations:² materiality, eliminating duplication, consolidating guidance and obsolescence. While there is some overlap between and among these categories, we believe that grouping our suggestions together by theme better clarifies the rationale for the changes we propose. For each theme, we have provided a brief discussion of the related principles, along with specific recommendations for revising/updating the disclosure requirements.

Materiality

We considered whether information that would not qualify as “material” from the perspective of a “reasonable” investor should continue to be disclosed solely because it is codified in a line-item requirement of Regulation S-K. While in many instances the information required by Commission rule would constitute information that a “reasonable” investor would deem important in making investment and/or voting decisions, in other instances investors may no longer want or need such information.

While we agree that the central policy objective of the federal securities laws is the disclosure by public companies of relevant financial and other information that will facilitate informed investor decision making, as the Staff also has pointed out, other important policy considerations must come into play as the Commission evaluates whether investor informational benefits are appropriately balanced against “compliance costs to companies, and the potential impact on efficiency, competition and capital formation.”³ In this regard, we believe that the use of the antifraud materiality standard in various line-item requirements has served as a constructive tool for achieving that balance – both by requiring disclosure of additional information not otherwise prescribed by Commission rule where necessary to render the

¹ See Division of Corporation Finance, U.S. Securities and Exchange Commission, “Report on Review of Disclosure Requirements in Regulation S-K” (Dec. 2013) (the “Staff Study”), *available at* <http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>.

² See Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, “Disclosure Effectiveness: Remarks before the American Bar Association Business Law Section Spring Meeting” (April 11, 2014), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370541479332>; Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, “Shaping Company Disclosure: Remarks before the George A. Leet Business Law Conference” (October 3, 2013) (“Higgins/Leet Remarks”), *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370543104412>.

³ *Id.*

mandated disclosure not materially misleading,⁴ while at the same time compelling companies to disclose meaningful information that is difficult to capture through detailed regulatory text.

Consistent with the Staff Study's recommendation that revisions to Regulation S-K should preserve and emphasize a materiality-centered, principles-based disclosure framework while preserving the benefits of a rules-based system,⁵ we believe that the Commission should consider amending Item 10 of Regulation S-K to permit companies to omit certain information from periodic reports and other Commission filings, even if disclosure is otherwise specifically required pursuant to a Regulation S-K Item, if such information is not material and the inclusion of such information is not necessary to make any required statements not materially misleading. There may be limited instances in which this amendment should not apply, given the nature of the required disclosure and the latitude already provided by the Commission for principles-based materiality analysis. For example, we believe that the retention of a quantitative threshold for related-person transactions or relationships enumerated in Item 404 of Regulation S-K involving amounts in excess of \$120,000 in which the related person has a "direct or indirect material interest" is useful and appropriate.

Specifically, we recommend that the Commission amend Item 10 of Regulation S-K to include the following text as subsection (g):

"(g) In addition to the information expressly required to be disclosed, the registrant shall disclose such additional 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,⁶ and issuers may omit information otherwise called for by a line item on the ground that it is not material, as long as the effect of omitting the information would not be misleading. It shall be presumed, in the absence of facts to the contrary, that the omission of any disclosure called for by a Regulation S-K line item was an intentional omission by the registrant in reliance upon this sub-section (g) and not a failure to provide the disclosure called for by such line item."

To highlight the potential application of the proposed amendment to Item 10, we note that a registrant with substantially all of its operations and sales located in the United States or a registrant with an internet-only business model could determine to omit the relevant disclosure called for by Item 101(d)(1)(i)(A) and (B) and Item 101(d)(1)(ii)(A) and (B) of Regulation S-K.⁷

By analogy, and of particular relevance given the Staff's stated goal of working with the Financial Accounting Standards Board ("FASB") to rationalize and avoid unnecessary

⁴ See, e.g., Exchange Act Rule 12b-20.

⁵ See Staff Study, *supra* note 1, at 98.

⁶ We have suggested that this specific language be included in the new instruction to underscore the existing requirements of Exchange Act Rule 12b-20 and Exchange Act Rule 10b-5.

⁷ We note that FASB ASC Topic 280, *Segment Reporting*, requires the provision of substantially similar financial information.

duplication of business and financial disclosures required by Commission rules, on the one hand, and U.S. Generally Accepted Accounting Principles (“GAAP”) on the other, we note FASB’s “materiality” qualifier is applicable to all GAAP. More specifically, FASB has stated that any GAAP provision it adopts need not be applied to immaterial items.⁸

In addition to our review of the overarching application of materiality as a guiding principle, and development of the suggested amendment to Item 10 of Regulation S-K discussed above, we also reviewed specific Regulation S-K Items and considered whether certain line-item requirements could be better calibrated to provide disclosure that investors will find relevant and useful while at the same balancing the cost of compliance to companies. Set forth below are specific suggestions for revision of current Regulation S-K line-item requirements (the text of the line items has been marked to show the suggested revisions).

- Item 101(d)(1):

(1) State for each of the registrant’s last three fiscal years, or for each fiscal year the registrant has been engaged in business, whichever period is shorter, to the extent material to understanding the registrant’s business:

(i) Revenues from external customers attributed to:

(A) The registrant’s country of domicile;

(B) All foreign countries, in total, from which the registrant derives revenues; and

(C) Any individual foreign country, ~~if material~~. Disclose the basis for attributing revenues from external customers to individual countries.

(ii) Long-lived assets, other than financial instruments, long-term customer relationships of a financial institution, mortgage and other servicing rights, deferred policy acquisition costs, and deferred tax assets, located in:

(A) The registrant’s country of domicile;

(B) All foreign countries, in total, in which the registrant holds assets; and

(C) Any individual foreign country, ~~if material~~.

- Item 101(d)(2): A registrant shall report the amounts based on the financial information that it uses to produce the general-purpose financial statements. If providing the geographic information is impracticable, the registrant shall disclose that fact. A registrant must provide, in addition to the information required by paragraph (d)(1) of this section, subtotals of geographic information about groups of

⁸ See FASB ASC Topic 105.

countries only if such information would show trends material to the registrant's business that are not otherwise disclosed.⁹

- Item 103, Instruction 5(C): A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than ~~\$100,000~~\$1,000,000;¹⁰ provided, however, that such proceedings which are similar in nature may be grouped and described generically.
- Item 301: Furnish in comparative columnar form the selected financial data for the registrant referred to below, for
 - (a) Each of the last ~~five~~ three fiscal years of the registrant (or for the life of the registrant and its predecessors, if less), unless the inclusion of the two fiscal years preceding those three fiscal years is necessary to illustrate or evidence a material trend in the registrant's business, in which case each of the last five fiscal years of the registrant;
 - ~~(b) Any additional fiscal years necessary to keep the information from being misleading;~~
 - (b) A registrant may omit the earliest two of the five fiscal years of financial data that may be included pursuant to paragraphs (a) and (b) in circumstances where that information is unavailable or not obtainable without unreasonable cost or expense as long as information (qualitative and, if reasonably available without unreasonable cost or expense, quantitative) in respect of a material trend in the registrant's business is otherwise provided in respect of such two fiscal years.
- Item 303(a), Instruction 4: Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes shall be described to the extent necessary to an understanding of the registrant's businesses as a whole; provided, however, that if the causes for a change

⁹ As noted above (*supra* note 7), FASB ASC Topic 280, *Segment Reporting*, requires the provision of substantially similar financial information. As such, we believe that the Staff could, in the alternative, recommend to the Commission that Item's 101(d)(1) and 101(d)(2) be eliminated in their entirety.

¹⁰ As with the requirements of Item 404 (see discussion above), we believe that retention of a quantitative threshold here is useful and appropriate. Instruction 5(C), which incorporated the \$100,000 threshold, was adopted in 1982. We have suggested a \$1,000,000 threshold, which we believe to be more indicative of a disclosure trigger that investors would deem material. In lieu of adopting a \$1,000,000 threshold, the Commission could undertake the type of analysis and review noted in Release No. 33-17762 and that formed the basis for the current \$100,000 threshold, including a review of actual fines assessed in environmental proceedings, to develop a new fine threshold that better reflects the current environmental enforcement landscape and relevant disclosure considerations.

in one line item also relate to other line items, no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. To the extent that changes from year to year in a line item are not material such that the omission of disclosure of those changes would not materially impair an investor’s understanding of the registrant’s results of operations for the relevant period, no disclosure regarding the changes is required. Registrants need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion shall not merely repeat numerical data contained in the consolidated financial statements.

- Item 601, Instruction 1:

(A) A registrant is not required to file schedules (or similar attachments) to an exhibit unless such schedules contain information that is material to an investment decision and is not otherwise disclosed in the exhibit or the disclosure document. The exhibit filed shall contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.¹¹

(B) If an exhibit to a registration statement (other than an opinion or consent), filed in preliminary form, has been changed only (A) to insert information as to interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters’ or dealers’ commissions, names, addresses or participation of underwriters or similar matters, which information appears elsewhere in an amendment to the registration statement or a prospectus filed pursuant to Rule 424(b) under the Securities Act (§230.424(b) of this chapter), or (B) to correct typographical errors, insert signatures or make other similar immaterial changes, then, notwithstanding any contrary requirement of any rule or form, the registrant need not refile such exhibit as so amended. ~~Any such incomplete exhibit may not, however, be incorporated by reference in any subsequent filing under any Act administered by the Commission.~~

- Item 601(a)(4): We suggest adding language or an instruction that would exclude amendments that do not affect the economics of a material contract (e.g., technical amendments) from the requirement in Item 601(a)(4) to file “any amendment or modification to a previously filed exhibit.”

¹¹ The proposed revision is modeled on the provisions of Item 601(b)(2), and we believe that permitting the omission of schedules to all exhibits in accordance with the requirements of the proposed revision would appropriately balance the interest that investors have in full and accurate disclosure with the efficiencies to be gained by issuers by not having to routinely apply for confidential treatment to protect sensitive information that is of minimal use or interest to investors. Alternatively, should the Commission choose to not amend Instruction 1 as proposed, we suggest the instruction be amended to allow the omission of personally identifiable and similar information (e.g., bank account numbers, home addresses, locational information relating to tangible collateral).

- Item 601(b)(10)(ii):¹²

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price, or otherwise on terms no less favorable to the registrant than could have been obtained from unrelated third parties;

- Item 601(b)(10)(iii)(A): Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the registrant, as defined by Item 402(a)(3) (§229.402(a)(3)), participates shall be deemed material and shall be filed; ~~and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.~~

In addition, we note that throughout Regulation S-K, certain line-item disclosures are required to be included in periodic reports and registration statements based on varied triggers that are not tied to specific quantitative thresholds or concepts of materiality: for example, Item 101(h)(4)(vi)'s "Dependence on one or a few major customers"; Item 102's "If any such property is not held in fee or is held subject to any major encumbrance, so state and describe briefly how held" and "If individual properties are of major significance to an industry segment"; and Item 601(b)(10)(ii)(B)'s "continuing contracts to sell the major part of registrant's products or services or to purchase the major part of registrant's requirements of goods, services or raw materials" (emphasis added). Others are tied to a qualified concept of materiality, such as Item 102's "materially important". We recommend that the Commission undertake a study to determine whether these varied formulations should be harmonized to lessen ambiguity as to how these undefined disclosure standards should be applied.

Duplication

We have reviewed the requirements of Regulation S-K and the periodic reports and registration statements filed by registrants to comply with Regulation S-K to determine whether there are opportunities to reduce repetition and increase the clarity of disclosure. We recommend three sets of changes: (1) amendments to Rule 12b-23(a)(3) under the Exchange Act to facilitate the use of incorporation by reference, (2) the addition of a new Commission policy

¹² We recommend modifying the Form 8-K Item 1.01 disclosure requirements to bring them into conformity with Item 601(b)(10)(ii) to the extent applicable.

on the avoidance of duplication and the use of cross-references; and (3) recommendations related to specific Regulation S-K items.

One approach that we believe would promote more streamlined and useful disclosure to investors is to provide registrants the flexibility to choose where in a periodic report or registration statement to include disclosure responsive to specific Regulation S-K items. The inclusion of responsive disclosure anywhere in a document should be sufficient to satisfy the disclosure requirement. Registrants should not be required to cross-reference to responsive disclosure or repeat the disclosure elsewhere in the document. In addition, to encourage the use of incorporation by reference, the Commission should revise Rule 12b-23(a)(3) to eliminate the requirement that copies of the pertinent pages of the document containing incorporated disclosure be filed as an exhibit to the relevant statement or report. Further, to ease the navigability of the filed version of a report, the Commission instead could require the incorporated disclosure to be made accessible via live hyperlink in the EDGAR-filed version of the document such that investors can access the relevant disclosure directly.¹³

In order to facilitate a more streamlined and readable approach to disclosure, we suggest that the Commission amend Item 10 of Regulation S-K to add a new sub-section (h) stating the new policy, as follows:

“(h) Commission Policy on Avoidance of Duplication. The Commission encourages registrants to view each periodic report and each registration statement as a single, unitary disclosure document. To the extent disclosure required under a specific item of Regulation S-K is in the document, registrants are not required to repeat the same disclosure elsewhere in the document, including, without limitation, Risk Factors or Management’s Discussion and Analysis of Financial Condition and Results of Operations, or to include cross-references to the same disclosure. The one exception to this principle is the financial statements and notes to the financial statements, which should be considered a standalone section; cross-references should not be used to satisfy disclosure requirements applicable to the financial statements or notes to the financial

¹³ See Staff Study, *supra* note 1, at 99. Our suggested revisions to Rule 12b-23(a)(3) are below:

- (3) ~~Copies of a~~Any registration statement or report filed with the Commission electronically in the Commission’s EDGAR system which includes ~~any~~ information or financial statements incorporated into such registration statement or report by reference in accordance with the Commission’s rules shall include a hyperlink to the filing in the Commission’s EDGAR system where such information or financial statements originally appeared.~~;~~ ~~or copies of the pertinent pages of the document containing such information or statement, shall be filed as an exhibit to the statement or report, except that:~~
- (i) A proxy or information statement incorporated by reference in response to Part III of Form 10-K (17 CFR 249.310);
 - (ii) A form of prospectus filed pursuant to 17 CFR 230.424(b) incorporated by reference in response to Item 1 of Form 8-A (17 CFR 249.208a); and
 - (iii) Information filed on Form 8-K (17 CFR 249.308) need not be filed as an exhibit.

statements.¹⁴ However, where the financial statements and notes to the financial statements include disclosure that is responsive to Regulation S-K items, the registrant may include a cross-reference to the relevant financial statement disclosure to satisfy the Regulation S-K requirement if it determines that the cross-reference is appropriate. The EDGAR version of the document filed with the Commission must contain a live hyperlink to any disclosure that is being cross-referenced.”

We have separately identified below specific Regulation S-K items where we believe the addition of cross-references or deletion of the requirement entirely would help to eliminate duplicative disclosure:

- Item 101(b) – Financial information for segments.
 - Delete this requirement because financial-related disclosure is more appropriately addressed in the financial statements and/or the MD&A.
- Item 101(c)(ix) – A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government.
 - Include an instruction indicating that, to the extent disclosure is responsive to this item is included in the notes to the financial statements, cross-references should be used to avoid duplicative disclosure.
- Item 101(d) – Financial information about geographic areas.
 - Delete this requirement because financial-related disclosure is more appropriately addressed in the financial statements and/or MD&A. Item 101(d)(3) should be addressed in Item 503(c) if such risks attendant to foreign operations are material.
- Item 303 – Critical accounting estimates and assumptions.
 - See Release Nos. 33-8350; 34-48960 (Interpretation: Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations). As Item 303 specifically includes an instruction that discussion of critical accounting estimates should include a cross-reference to the description of accounting policies included in the notes to the financial statements, include guidance in the instruction indicating that the disclosure

¹⁴ If FASB modifies its approach on this issue, then it may be possible to simplify this item further by dropping this exception from proposed Item 10(h).

included in MD&A is meant to supplement, not duplicate, the disclosure in the notes to the financial statements.¹⁵

- Item 303(a)(1) – Liquidity.
 - Include an instruction indicating that, to the extent disclosure responsive to this item is included in the notes to the financial statements, cross-references should be used to avoid duplicative disclosure.
- Item 303(a)(4) – Off-balance sheet arrangements.
 - Include an instruction indicating that, to the extent disclosure responsive to this item is included in the notes to the financial statements, cross-references should be used to avoid duplicative disclosure.¹⁶¹⁷
- Item 303(a)(5) – Tabular disclosure of contractual obligations.
 - Include an instruction indicating that, to the extent disclosure responsive to this item is included in the notes to the financial statements, cross-references should be used to avoid duplicative disclosure.¹⁸
- Items 503(a) / 301 – Prospectus Summary – Summary Financial Information / Selected Financial Information.
 - Add an instruction to Item 503(a) indicating that, to the extent summary financial information is included in a document pursuant to Item 503(a), such information should be summary in nature and not duplicate all the line items included in the selected financial information required by Item 301. The summary financial information should include only those limited line items that are needed to show material trends (e.g., revenue and net income). To avoid duplication, the registrant may opt to include a summary financial table that meets the requirements of Item 301, using narrative as necessary and appropriate to explain the tabular disclosure.
- Item 503(a) and Item 503(c) – Prospectus summary—Risk Factors.

¹⁵ See also the recommendation on codifying the Commission’s position on critical accounting estimates set forth in the letter, dated November 14, 2014 (the “November 14 Letter”), submitted to the SEC by the Working Group on behalf of the Committees.

¹⁶ See also the November 14 Letter.

¹⁷ We also recommend that conforming changes be made to: (i) Form 20-F, Part 1, Item 5E, and (ii) Form 40-F, General Instruction B, paragraph (11).

¹⁸ We also recommend that conforming changes be made to: (i) Form 20-F, Part 1, Item 5F, and (ii) Form 40-F, General Instruction B, paragraph (12).

- Include an instruction that states that a cross-reference to the Risk Factors may be included in the Summary section, where applicable. We also suggest that the Staff avoid issuing comments to registrants in connection with the review of registration statements that require a summary of risk factors to be included in the summary section. Consider adding a requirement or instruction to Item 503(c) that would encourage a summary of material risk factors at the beginning of the Risk Factor section if such summary is useful.
- Item 503(c) – Risk Factors.
 - Add an instruction to Item 503(c) that disclosure intended to satisfy the requirements of Section 21E(c)(1)(A) of the Exchange Act may be included in the beginning of the Risk Factors section as a separate subsection. This would help to avoid duplicative disclosure of risk factors that are typically included in the Forward-Looking Statement disclosure.

Guidance Consolidation

Since the adoption of Regulation S-K in 1977, the Commission and its Staff have provided useful guidance as to Regulation S-K in a variety of formats, including the Division of Corporation Finance’s Financial Reporting Manual (the “FRM”), Interpretive Releases, Staff Compliance & Disclosure Interpretations (“CDIs”), and sample letters to public companies (“Dear CFO Letters”). In addition, the Commission has undertaken significant efforts to make many, if not all, of these materials available on the Commission’s website. MD&A (Item 303) is one topic with respect to which a significant amount of guidance has been provided that is currently available on the Commission’s website. In our experience, such guidance has been extremely helpful.

As part of the Disclosure Effectiveness Review, there is an opportunity for the Commission and the Staff to further consolidate and distill available guidance with respect to MD&A to facilitate capital formation efforts and reduce the cost of compliance with non-financial statement disclosure requirements for public companies, especially for smaller and emerging companies with fewer resources allocable to disclosure compliance. The consolidation and restatement of this MD&A guidance could not only reduce the time and effort necessary to identify, retrieve and assess all relevant sources in order to understand the Staff’s current position on a given issue, it could also improve the quality of MD&A disclosure, and thereby promote investor understanding and issuer compliance.

Accordingly, we propose that the Commission and the Staff consolidate currently effective guidance of the Commission and its Staff with respect to MD&A. MD&A is considered by the Commission to be the “heart and soul of the Commission’s disclosure rules,” with both the purpose and function of providing “the investor an opportunity to look at the company through the eyes of management by providing both a short- and long-term analysis of the business of the company.” By providing access to, and a clarification of the universe of,

authoritative guidance, both issuers and investors would benefit from a clear understanding of what the Commission and the Staff expect with regard to required MD&A disclosure.

To illustrate the opportunity for guidance consolidation throughout Regulation S-K, we have compiled in **Exhibit A** hereto a case study that includes a list of various sources of guidance concerning MD&A, by topic. We note that this analysis does not constitute an exhaustive collection of all Commission and Staff pronouncements and positions with respect to MD&A, including, but not limited to, speeches made by the Staff, no-action or interpretive letters and comment letters issued in connection with the Division's review and comment process. Based on this analysis, we note the following highlights:

- Topic 9 of the FRM appears to reaffirm certain Staff and Commission guidance on MD&A, but not all. As noted in **Exhibit A** hereto, the FRM references certain guidance in a specific subtopic (those marked with a dagger (†) in **Exhibit A**), while other guidance is referred to generally under "Additional Guidance" (those marked with an asterisk (*) in **Exhibit A**). For guidance listed under "Additional Guidance," users of the FRM must locate and then consult all the materials in their entirety simply to ascertain the particular topic to which it pertains.
- The FRM provides hyperlinks to only some of the guidance referenced therein.
- With respect to guidance on MD&A that is not referenced in the FRM, it is unclear whether such guidance is still considered binding and authoritative. For example, the Commission's initial interpretative release on Item 303 (Release No. 33-6349) provides a number of instructive disclosure examples, but is not listed in the FRM under "Additional Guidance."

Based on the foregoing, we propose the following next steps to consolidate guidance on MD&A compliance:

- The Commission and/or the Staff should provide, in a single electronically-accessible location, all sources that it currently deems authoritative concerning Item 303 of Regulation S-K, with electronic hyperlinks to such sources. This would serve both to promote transparency in the Commission's and the Staff's interpretive views as well as the quality of MD&A disclosure at a minimal cost to the Commission, as this could be easily incorporated into the Commission's existing electronic resource infrastructure.
- The Commission and/or the Staff should consider compiling this universe of authoritative sources applicable to MD&A into a single document or release, organized by subtopic and with cross-references to specific portions of guidance (pages, questions, etc.) to facilitate use. For example, Topic 9 of the FRM serves to provide MD&A guidance and cites to additional guidance on most (though not all) topics relevant to MD&A in the order presented in Item 303. The FRM already

attributes certain subtopics to particular sources (see the reference to Release No. 33-8350 in Section 9510 and to Release No. 33-5086 in Section 9600), so this would be a further extension of current practice. The specific cross-references, where appropriate, could include specific question/page/paragraph references to improve clarity. Whether in the FRM or an alternative location, guidance that is specific to a particular MD&A disclosure issue (see Release No. 33-9106 regarding climate change) or industry (see Sample Letter Sent to Participants in the Oil and Gas Industry) could then be separately categorized as “other guidance,” although the relevance of each would need to be clearly identified to avoid unnecessary confusion and/or the need for consultation of guidance not otherwise relevant.

- If comprehensive and complete consolidation of all prior guidance is desired, Commission should amend and restate Item 303 of Regulation S-K or otherwise codify Staff-level guidance published with respect to MD&A.

While our review of available Regulation S-K guidance has been focused on MD&A for purposes of this letter, we note that the same opportunity for consolidation and distillation potentially exists with respect to other areas of Regulation S-K.¹⁹

Obsolescence

As detailed in the Staff Study, many of the disclosure requirements in Regulation S-K date back to the adoption of the integrated disclosure system in 1982 (as refined periodically thereafter with the introduction of new forms such as Form S-4). While there have been periodic updates to the requirements, we reviewed Regulation S-K in light of the Obsolescence objective to find provisions that are no longer relevant to today’s disclosure system and recommend updates to or removal of those provisions that have become obsolete. Set forth below are our specific recommendations regarding items of Regulation S-K that we believe may be modified or removed from Regulation S-K on this basis:

- Item 101(e)(2) and (e)(4), *Available information*:

(e) Available information. Disclose the information in paragraphs (e)(1); ~~(e)(2)~~ and (e)(3) of this section in any registration statement you file under the Securities Act (15 U.S.C. 77a et seq.), and disclose the information in paragraphs (e)(3) ~~and (e)(4)~~ of this section if you are an accelerated filer or a large accelerated filer (as defined in §240.12b-2 of this chapter) filing an annual report on Form 10-K (§249.310 of this chapter):

¹⁹ For illustration, Item 301, Instruction 7 requires disclosure of a rate of exchange that is no longer published (The Federal Reserve Bank of New York no longer publishes noon buying rates, citing the widespread availability of third party sources of information regarding exchange rates) while Regulation S-K CDI 108.01 specifies that the exchange rates published on a weekly basis by the Board of Governors of the Federal Reserve Bank should be used.

~~(2) That the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, NE., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (<http://www.sec.gov>).~~

~~(4)(i) Whether you make available free of charge on or through your Internet website, if you have one, your annual report on Form 10-K, quarterly reports on Form 10-Q (§249.308a of this chapter), current reports on Form 8-K (§249.308 of this chapter), and amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) as soon as reasonably practicable after you electronically file such material with, or furnish it to, the SEC;~~

~~(ii) If you do not make your filings available in this manner, the reasons you do not do so (including, where applicable, that you do not have an Internet website); and~~

~~(iii) If you do not make your filings available in this manner, whether you voluntarily will provide electronic or paper copies of your filings free of charge upon request.~~

Due to advances in technology, this information is easily accessible online via the EDGAR filing system. Access to this information via the SEC's Public Reference Room will, in almost all cases, be more difficult and costly for investors than electronic access via EDGAR, which is available 24 hours a day year-round.

- Item 201(a)(1), *Market information*; Item 202(e), *Market information for securities other than common equity*.

Technological changes have made this information widely available online, making such disclosure unnecessary. The SEC's EDGAR website contains a field identifying the ticker symbol of each company with listed common equity; in addition, the websites of the major domestic and foreign stock exchanges, as well as third-party websites available at no charge to the investing public, maintain search features that allow investors to locate the trading symbol and principal trading market for listed companies. As a result, we believe the above-referenced requirements are obsolete and should be removed from Regulation S-K.

- Item 201(c), *Dividends*; Item 301, instruction 5(C) (relating to dividends of foreign private issuers)

Much like market price information, information regarding historical dividends is readily available online via a variety of websites, and many registrants provide this information on the investor relations portion of their own websites. In addition, information regarding restrictions on the ability of an issuer to pay dividends is covered both in Item 303 of Regulation S-K and in the financial statements required by Regulation S-X. As a result, we believe these requirements are obsolete and should be removed.

- Item 201(d)(3)

We recommend deleting the Item 201(d)(3) requirement to describe the material features of non-shareholder approved equity compensation plans in the Form 10-K (or proxy) because such plans are either not material to an investor or covered by other disclosure requirements. Item 201(d) was adopted in 2002. Subsequently, in 2003, the NYSE and NASDAQ adopted new rules that mandate shareholder approval for broad-based equity plans. As a result, most material equity plans that are in effect today are likely to have been approved by shareholders, and we believe this requirement is obsolete and should be removed. We note that disclosure of potential dilution would not be eliminated as a result of removing Item 201(d)(3) because the number of shares authorized for issuance under all equity compensation plans would still need to be included in the table required by Item 201(d)(2).

- Item 503(d), *Ratio of Earnings to Fixed Charges*; Item 601(b)(12), *Statements re computation of ratios*

Debt investors utilize a variety of financial metrics to evaluate a registrant's financial position and liquidity. Many of these are reflected in the measures of performance or liquidity that are defined in the issuers' debt instruments. For investors in such instruments, a metric that is tied to a contractually defined covenant test is more useful than the SEC-mandated disclosure. Importantly, our experience is that market participants in unregistered debt offerings – initial purchasers as well as institutional investors – do not generally request or require that the SEC-prescribed ratio of earnings to fixed charges be included in the offering document; instead, issuers disclose one or more interest coverage ratios or similar financial metrics that are calculated with reference to the instruments governing the securities being offered. Furthermore, the SEC has long considered whether this requirement should be removed as not providing useful information to investors, as evidenced by a concept release dating back to 1980. *See* Release No. 33-6196. Based on our experience, we believe these requirements are obsolete and should be removed.

- Item 506, *Dilution*

The amount of dilution faced by investors in an initial public offering does not appear to be useful information to investors. The amount of dilution in initial public offerings is often substantial and varies greatly between companies as a function of the company's relative

maturity, among other factors, and yet we are not aware of any evidence that the amount of dilution has not been shown to affect the success of an initial public offering. Furthermore, dilution is not included in “road show” materials, suggesting that issuers and/or underwriters do not believe this information is relevant for investors and that investors do not consider the information to be material. In addition, disclosing dilution in this way, which focuses on the net tangible book value per share, does not provide meaningful information when most companies are managed on the assumption of, and perceived by the market to have, a perpetual existence and significant intangible value that is not recognized in the financial statements. For companies for which book value per share is relevant (e.g., certain insurance companies), issuers frequently include the disclosure as a supplemental measure of financial condition or performance in MD&A. Furthermore, the typical form of the dilution disclosure is unwieldy and often confusing to the registrant trying to prepare it. This often leads to incorrect or confusing disclosure, which is sometimes not realized until the preparation of the final prospectus, after investors have made their investment decision. Lastly, similar information can be ascertained from a registrant’s recent balance sheet and capitalization table included in other sections of the prospectus. As a result, we believe this requirement is obsolete and should be removed.

- Item 512(e), *Incorporated annual and quarterly reports*.

A registrant’s latest annual and quarterly report to security holders is readily available online. Therefore, requiring the registrant to undertake to deliver with the prospectus its latest annual or quarterly report to security holders, if incorporated by reference, is an inefficient and burdensome requirement with no direct benefits due to the ease through which potential investors can access this information online, at no cost. As a result, we believe this requirement is obsolete and should be removed.

Further Areas for Study

The Staff identified eight specific areas of Regulation S-K in the Staff Study that could benefit from further review. While the recommendations set forth in this letter address certain aspects of the areas identified for review in the Staff Study,²⁰ we agree that investors would benefit from a comprehensive review of, and calibrated revisions to, the identified areas.

* * *

We appreciate the opportunity to comment on the Commission’s Disclosure Effectiveness project and respectfully request that the Commission and its Staff consider our

²⁰ For example, the Staff’s suggestion that the requirements relating to a registrant’s business and operations could be re-evaluated in light of their particular emphasis on disclosure relating to non-U.S. operations; the Staff’s suggestion that offering-related requirements such as dilution be reviewed and re-evaluated; and the Staff’s suggestion that the exhibit requirements be subject to a comprehensive review to determine whether the documents called for remain relevant and useful.

recommendations and suggestions. We are available to meet and discuss these matters with the Commission and/or its Staff, and to respond to any questions.

Very truly yours,

/s/ Catherine T. Dixon

Catherine T. Dixon

Chair of the Federal Regulation of Securities Committee

/s/ Randall D. McClanahan

Randall D. McClanahan

Chair of the Law & Accounting Committee

/s/ Thomas J. Kim

Thomas J. Kim

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cc:

The Hon. Mary Jo White, Chair
The Hon. Luis A. Aguilar, Commissioner
The Hon. Daniel M. Gallagher, Commissioner
The Hon. Kara M. Stein, Commissioner
The Hon. Michael S. Piwowar, Commissioner
Keith F. Higgins, Director, Division of Corporation Finance

Exhibit A – Guidance Consolidation

Topic	FRM / S-K 303	SEC Releases ¹	Dear CFO Letters ²	Other ²
Liquidity and Capital Resources - Liquidity - trends, demands and deficiencies	9210.2 / (a)(1)	<ul style="list-style-type: none"> • 33-6349 (1-2, 6-9, 11-16) • 33-6711 * (139) • 33-8056 * (3747-48) • 33-8350 † (75063-64) • 33-9144 (59894) 	<ul style="list-style-type: none"> • Loan Losses (3) • Fair Value Measurements (Mar. 2008) † (2) 	<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (8)
Liquidity and Capital Resources - Capital resources and commitments	9210.3 / (a)(2)	<ul style="list-style-type: none"> • 33-6349 (8-12) • 33-6835 * (22430-31) • 33-8056 * (3748-50) • 33-8350 † (75063) 	<ul style="list-style-type: none"> • Loan Losses (3) 	
Liquidity and Capital Resources - Cash requirements and cash flows	9210.4 / (a)(1)-(2)	<ul style="list-style-type: none"> • 33-6349 (8-9) • 33-6835 * (22430-31) • 33-8056 * (3749) • 33-8350 † (75063) 	<ul style="list-style-type: none"> • Loan Losses (3) 	<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (23)
Liquidity and Capital Resources - Debt instruments and guarantees	9210.5 / (a)(1)-(2)	<ul style="list-style-type: none"> • 33-8056 * (3748-49) • 33-8350 † (75064) 	<ul style="list-style-type: none"> • Loan Losses (3) • Fair Value Measurements (Sept. 2008) † (2) 	
Liquidity and Capital Resources - Improving disclosure	9210.6 / (a)(1)-(2)	<ul style="list-style-type: none"> • 33-8040 (65013) • 33-8056 * (3748) • 33-8350 † (75063-64) 	<ul style="list-style-type: none"> • Loan Losses (3) • Fair Value Measurements (Mar. 2008) † (2) 	
Results of Operations - Required disclosures	9220.2 / (a)(3)	<ul style="list-style-type: none"> • 33-6349 (3) • 33-7620 (1729-33) • 33-8056 * (3748-49) 		<ul style="list-style-type: none"> • C&DI (Securities Act) (Question 233.04)
Results of Operations - Significant components of revenue and expenses / segment analysis	9220.3 / (a)(3)	<ul style="list-style-type: none"> • 33-6349 (3-6) • 33-6835 * (22432-33) • 33-7620 (1730-33) • 33-8056 * (3749-50) • 33-8350 † (75062) 		<ul style="list-style-type: none"> • Summary Review Fortune 500 Companies (2003) *
Results of Operations - Tax matters	9220.4 / (a)(3)		<ul style="list-style-type: none"> • Accounting for Stock Option Grants (II.B) 	

Topic	FRM / S-K 303	SEC Releases ¹	Dear CFO Letters ²	Other ²
Results of Operations - Reasons for change in price and volume	9220.5 / (a)(3)	<ul style="list-style-type: none"> • 33-6349 (16) • 33-8350 † (75062) 	<ul style="list-style-type: none"> • Oil and Gas 	<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (23) • Observations re: Smaller Reporting Company IPOs (4)
Results of Operations - Pro forma disclosure due to change in underlying financial statements	9220.6-9 / (a)(3)	<ul style="list-style-type: none"> • 33-8176 (4821) 		
Results of Operations - Acquisitions - quantification of impact	9220.10 / (a)(3)	<ul style="list-style-type: none"> • 33-6349 (6) • 33-8056 * (3750-51) • 33-8176 (4821) 		
Results of Operations - Known versus unknown (trend, event, commitment, demand)	9220.11 / (a)(3)	<ul style="list-style-type: none"> • 33-6349 (2-7) • 33-6711 (140-41, 143) • 33-6835 * (22429-30) • 33-7620 (1732) • 33-8040 (65013) • 33-8056 * (3748-50) • 33-8350 † (75061-63) 	<ul style="list-style-type: none"> • Off Balance Sheet Entities (Dec. 2007) † (3) 	<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (8) • Observations re: Smaller Reporting Company IPOs (3)
Off-Balance Sheet Arrangements - Guarantee Contract	9230.1(a) / (a)(4)	<ul style="list-style-type: none"> • 33-8182 * (5987-88) 		<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (67-69) • Summary Review Fortune 500 Companies (2003) *
Off-Balance Sheet Arrangements - Retained/contingent interest in assets transferred to support an unconsolidated entity	9230.1(b) / (a)(4)	<ul style="list-style-type: none"> • 33-8182 * (5988) 		<ul style="list-style-type: none"> • Summary Review Fortune 500 Companies (2003) *
Off-Balance Sheet Arrangements - Derivative contracts	9230.1(c) / (a)(4)	<ul style="list-style-type: none"> • 33-8182 * (5988) 		<ul style="list-style-type: none"> • Summary Review Fortune 500 Companies (2003) *
Off-Balance Sheet Arrangements - Obligation arising out of a variable interest entity	9230.1(d) / (a)(4)	<ul style="list-style-type: none"> • 33-8182 * (5988) 	<ul style="list-style-type: none"> • Off Balance Sheet Entities (Dec. 2007) † (2) 	<ul style="list-style-type: none"> • Summary Review Fortune 500 Companies (2003) *

Topic	FRM / S-K 303	SEC Releases ¹	Dear CFO Letters ²	Other ²
Off-Balance Sheet Arrangements - General disclosure issues	9230.2-3/ (a)(4)	<ul style="list-style-type: none"> • 33-8056 * (3748-49) • 33-8182 * (5988-90) 	<ul style="list-style-type: none"> • Off Balance Sheet Entities (Dec. 2007) † (1-2) 	<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (44, 53) • Summary Review Fortune 500 Companies (2003) *
Tabular Disclosure of Contractual Arrangements - Overview / presentation	9240.1-2/ (a)(5)	<ul style="list-style-type: none"> • 33-8182 * (5990) • 33-9144 * (59895) 		<ul style="list-style-type: none"> • Report and Recommendations Pursuant to 401(c) of SOX * (88, 98)
Tabular Disclosure of Contractual Arrangements - Purchase obligations	9240.3 / (a)(5)	<ul style="list-style-type: none"> • 33-8182 * (5990-91) • 33-9144 * (59895) 		
Tabular Disclosure of Contractual Arrangements - Interest rate swap arrangements	9240.6(a) / (a)(5)			
Tabular Disclosure of Contractual Arrangements - Bank CDs	9240.6(b) / (a)(5)			
Tabular Disclosure of Contractual Arrangements - Long-term debt, Capital leases and operating lease obligations	9240.6(c) / (a)(5)	<ul style="list-style-type: none"> • 33-8056 * (3749) 		<ul style="list-style-type: none"> • Report and Recommendations pursuant to 401(c) of SOX * (98)
Tabular Disclosure of Contractual Arrangements - Footnotes	9240.7/ (a)(5)	<ul style="list-style-type: none"> • 33-9144 * (59895) 		
Tabular Disclosure of Contractual Arrangements - Smaller reporting companies	9240.8/ (a)(5)			
Interim Period Requirements - Differences with annual	9250.1, 3 / (b)	<ul style="list-style-type: none"> • 33-6835 * (22431-32) 		
Interim Period Requirements - Tabular disclosure of contractual arrangements not required	9250.4/ (b)			
Safe Harbor Provisions (Forward looking statements) - Available for (a)(4) and (a)(5), other than statements of historical fact	9260 / (c)	<ul style="list-style-type: none"> • 33-8182 * (5992-93) 		

Topic	FRM / S-K 303	SEC Releases ¹	Dear CFO Letters ²	Other ²
Disclosure Guidance for Recently Issued Accounting Standards	9270		<ul style="list-style-type: none"> Accounting for Stock Option Grants (II.A) 	
Critical Accounting Estimates - Goodwill impairment	9510 / (a)(3)(ii)	<ul style="list-style-type: none"> 33-8350 † (75064-65) 		<ul style="list-style-type: none"> Summary Review Fortune 500 Companies (2003) *
Critical Accounting Estimates - Share-based compensation in IPOs	9520			<ul style="list-style-type: none"> Summary Review Fortune 500 Companies (2003) *
Related Party Transactions	9600	<ul style="list-style-type: none"> 33-8056 * (3751†) 		
Fair Value Measurements	9700	<ul style="list-style-type: none"> 33-8056 * (3750-51) 	<ul style="list-style-type: none"> Fair Value Measurements (Sept. 2008) † (1-3) Fair Value Measurements (Mar. 2008) † (1-3) 	
Registration and Proxy Statements - retroactively revised annual financial statements	9830			
General MD&A guidance / disclosure - Purpose		<ul style="list-style-type: none"> 33-6711 * (II) 33-8040 (65013) 		<ul style="list-style-type: none"> Observations re: Smaller Reporting Company IPOs (3)
General MD&A guidance / disclosure - Presentation, focus		<ul style="list-style-type: none"> 33-8350 † (75058-60) 		<ul style="list-style-type: none"> Observations re: Smaller Reporting Company IPOs (1, 3)
General MD&A guidance / disclosure - Non-financial measures/key performance indicators		<ul style="list-style-type: none"> 33-6835 * (22428) 33-8350 † (75060) 	<ul style="list-style-type: none"> Accounting for Stock Options (II.C) 	
General MD&A guidance / disclosure – Materiality		<ul style="list-style-type: none"> 33-8176 (4822) 33-8350 † (75060) 		
Auditor review		<ul style="list-style-type: none"> 33-6711 * (144) 		

Topic	FRM / S-K 303	SEC Releases ¹	Dear CFO Letters ²	Other ²
Restructuring charges			<ul style="list-style-type: none"> Reporting Charges 	<ul style="list-style-type: none"> Summary Review Fortune 500 Companies (2003) *
Investment / bank holding company accounting			<ul style="list-style-type: none"> Bank Holding Companies 	<ul style="list-style-type: none"> Accounting and Financial Reporting Interpretations & Guidance (I.E)
Targeted Stock Issues			<ul style="list-style-type: none"> Accounting for Stock Option Grants (II.D) 	
Disclosure by Electric Companies			<ul style="list-style-type: none"> Accounting for Stock Option Grants (II.E) 	
Disclosure by Companies in Extractive Industries			<ul style="list-style-type: none"> Oil and Gas; Accounting for Stock Option Grants (II.F) 	
Foreign Operation, Taxes and Currency Transactions			<ul style="list-style-type: none"> Accounting for Stock Option Grants (II.J) 	
Defense contract procurement (investigations)		<ul style="list-style-type: none"> 33-6791 (721-22) 		
Participation in high-yield transactions		<ul style="list-style-type: none"> 33-6835 * (22433-35) 		
Effect of federal assistance on operations		<ul style="list-style-type: none"> 33-6835 * (22435) 		
Preliminary merger negotiations		<ul style="list-style-type: none"> 33-6835 * (22435-36) 		
Accounting for repurchase agreements, securities lending transactions, or other transactions			<ul style="list-style-type: none"> Transfer of Financial Assets* 	
Effect of currency fluctuations and currency-related extraordinary events on results of operations				
Pension plans				<ul style="list-style-type: none"> Summary Review Fortune 500 Companies (2003) *
Environmental and product liability disclosure				<ul style="list-style-type: none"> Summary Review Fortune 500 Companies (2003) *

Topic	FRM / S-K 303	SEC Releases ¹	Dear CFO Letters ²	Other ²
Non-GAAP financial information		<ul style="list-style-type: none"> • 33-8176 (4820-24) 		<ul style="list-style-type: none"> • Summary Review Fortune 500 Companies (2003) *
Revenue recognition				<ul style="list-style-type: none"> • Summary Review Fortune 500 Companies (2003) • C&DI (S-K) (Question 110.01)