WSGR Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

650 Page Mill Road
Palo Alto, CA 94304-1050
PHONE 650.493.9300
FAX 650.493.6811
www.wsgr.com

July 21, 2016

Via E-mail to rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Brent J. Fields, Secretary

Re: File No. S7-06-16
Release No. 33-10064; 34-77599
Concept Release: Business and Financial Disclosure Required by Regulation S-K

Ladies and Gentlemen:

Wilson Sonsini Goodrich & Rosati ("WSGR") appreciates the opportunity to submit this letter in response to the solicitation of comments by the Securities and Exchange Commission ("SEC") with respect to the above-referenced release.

We are a legal advisor to technology, life sciences and other growth enterprises worldwide and represent companies at every stage of development, from entrepreneurial start-ups to multibillion-dollar global corporations. Among our clients are over 300 public companies, to which we provide advice on a wide range of areas, including antitrust, corporate finance, corporate governance, intellectual property, securities litigation and employee benefits and compensation matters. Among our public company clients are a number of small public companies and recent public companies that qualify as Emerging Growth Companies ("EGCs"), as such term is defined in the Jumpstart our Business Startups Act of 2012 (the "JOBS Act"). We also represent a significant number of private companies that are contemplating listing on an exchange in the next 12 to 24 months.

On April 13, 2016, the SEC published a request for comment regarding its concept release (the "Release") regarding modernizing certain business and financial disclosure requirements in Regulation S-K as part of the Division of Corporation Finance's initiative to improve the requirements for the benefit of investors and registrants. Given the scope of the Release, we have chosen to limit our comments to those areas that we believe are of most interest to our clients, including (1) disclosure of information related to public policy and sustainability

matters; (2) management's discussion and analysis of financial condition and results of operations; and (3) risk factors.

Disclosure of Information Related to Public Policy and Sustainability Matters

The SEC requested feedback on the importance of sustainability and public policy matters to informed investment and voting decisions and, in particular, feedback on which, if any, sustainability and public policy disclosures are important to an understanding of a registrant's business and financial condition and whether there are other considerations that make these disclosures important to investment and voting decisions. The SEC also requested feedback on the potential challenges and costs associated with compiling and disclosing this information.

The interest of investors in certain sustainability and public policy matters has increased in recent years. However, we have concerns that the purported increase in investor interest in environmental, social or governance ("ESG") matters and calls for additional ESG disclosure have been amplified more by socially and ideologically-driven thought leaders than driven by actual demonstrable analysis of the materiality of ESG matters to a company's financial performance or value of securities. While certain sustainability and public policy matter disclosure not currently itemized in prescriptive disclosure requirements may be material to investors in certain industries or on a unique company-by-company basis, we believe a broad prescriptive disclosure regime, even if phased-in or limited to non-EGC filers, would impose unnecessary costs on many companies to implement systems and produce disclosure that is ultimately not material to investors except those with niche preferences. Moreover, if such policy matters are material with respect to certain issuers and/or in certain cases, the SEC's current disclosure requirements, most notably Item 303 of Regulation S-K, adequately covers disclosure of such matters.

We are also concerned that adding or altering prescriptive disclosure requirements to address often politically-charged sustainability and public policy matters that cannot be objectively demonstrated to be material to a broad base of reasonable investors will have the inevitable result of tainting the SEC's reputation as a neutral body. Further, there is no logical end to the number of political, social and other similar policy issues that could give rise to an increasingly burdensome set of disclosure requirements. We therefore encourage the SEC to abide by its historical approach and not require additional disclosure relating to environmental

and other matters of social concern of all registrants unless pursuant to a congressional mandate, or if such disclosure would be material, as determined on a company-by-company basis.[1]

The SEC's Mandate

As described in detail in the Release, the underlying goal of the federal securities laws is full and fair disclosure to give investors access to accurate information important to making investment and voting decisions.[2] In addition to crafting certain specifically mandated disclosure requirements, the SEC has the authority to make rules and regulations requiring mandated disclosure necessary to carry out the purposes of the Securities Act and Exchange Act,[3] though in doing so, the SEC must consider whether the action will promote efficiency, competition, and capital formation.[4]

As also further discussed in the Release, we agree that the concept of materiality is the cornerstone of the disclosure regime based on the Securities Act and the Exchange Act. Schedule A to the Securities Act identifies certain categories of information that are generally viewed as material to investors,[5] is generally intended to allow investors to determine a security's value, and is therefore predominantly focused on financial indicators.[6] Those same categories of areas material to investors have comprised the base for the disclosure requirements further built out in Regulation S-K.

While Congress has on occasion mandated additional disclosure requirements, some of which are not directly tied to financial performance or the value of securities, changes to

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[1] See Environmental and Social Disclosure, Release No. 33-5627 (Oct. 14, 1975) [40 FR 51656 (Nov. 6, 1975)] ("1975 Environmental Disclosure Release").

[2] See Release pp. 23-24, citing Preamble of the Securities Act.

[3] See, e.g., Sections 19(a) and 28 of the Securities Act and Sections 3(b), 23(a)(1) and 36(a)(1) of the Exchange Act.

[4] See, e.g., Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)]. See also Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)].

[5] See *Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission*, Cmte. Print 95-29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess (Nov. 3, 1977) at 324 available at http://opc-adils/InmagicGenie/DocumentFolder/report%20of%20the%20advisory%20committee%20on%20corporate%20disclosure%20to%20the%20sec%2011011977.pdf.

[6] See, Release p. 23 citing H.R Rep. No. 73-85, 73rd Cong., 1st Sess., 1933.

disclosure requirements made by the SEC without new or altered underlying specific mandates from Congress have tended to be in response to market developments in which investor losses supported the need for new or different disclosure requirements, and in response to technological changes facilitating or improving the timing or delivery methods of relevant disclosure.

In the SEC's Report on Review of Disclosure Requirements in Regulation S-K (the "S-K Study") published in December 2013[7], the Staff noted in its recommendations for further study that "as a general matter, the staff believes that any recommended revisions should emphasize a principles-based approach as an overarching component of the disclosure framework, in order to address the tendency toward implementation of increasing layers of static requirements, while preserving the benefits of a rules-based system."[8]

Furthermore, as noted in the Release, under the Fixing America's Surface Transportation Act of 2015 (the "FAST Act"), the SEC is required in its study of Regulation S-K to

- emphasize a company-by-company approach that allows relevant and material information to be disseminated to investors without boilerplate language or static requirements while preserving completeness and comparability of information across registrants; and

- evaluate methods of information delivery and presentation and explore methods for discouraging repetition and the disclosure of immaterial information.[9]

The FAST Act also requires the SEC to revise Regulation S-K "to further scale or eliminate requirements of regulation S-K, in order to reduce the burden on emerging growth companies, accelerated filers, smaller reporting companies and other smaller issuers, while still providing all material information to investors; [and] to eliminate provisions of regulation S-K, required for all issuers, that are duplicative, overlapping, outdated or unnecessary."[10]

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[7] See *Report on Review of Disclosure Requirements in Regulation S-K* (December 2013), available at https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf

[8] See S-K Study at 98.

[9] See Release p. 21 (citing Pub. L. No. 114-94, Sec. 72003, 129 Stat. 1312 (2015)).

[10] Pub. L. No. 114-94, Sec. 72002, 129 Stat. 1312 (2015).

Interest from Investors Regarding ESG Matters may be Overstated

Among the data cited by the SEC in the Release evidencing an increasing interest by investors in additional ESG disclosure, the SEC referred to the results of two limited surveys of institutional investors conducted by Ernst & Young[11] ("E&Y") and PricewaterhouseCoopers[12] of approximately 200 and 40 institutional investors, respectively, comments from a speech by Mark Carney, Governor of the Bank of England[13], and assertions made in several letters the SEC had previously received in connection with its Disclosure Effectiveness Initiative from sustainability advocates.[14] Though these and other recent relevant sources[15] report an increase in investor interest in ESG matters and desire for enhanced disclosure, we are concerned that they may over-represent investor interest and fail to accurately reflect the extent to which investors actually view ESG matters to be material to their investment and voting decisions.

The SEC also referenced the Standards & Financial Markets Integrity division, CFA Institute's comment letter in response to the Disclosure Effectiveness Initiative, which found that a "small, albeit growing, constituency of investors has advocated for the inclusion of sustainability information/disclosures."[16] This generally aligns with our experience that while many investors are indeed interested in ESG matters, will join in requests for additional ESG disclosure, and may, in fact, incorporate ESG analysis into their investment evaluation

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[11] See, Ernst & Young LLP, *Tomorrow's Investment Rules 2.0*, 2015 ("Tomorrow's Investment Rules 2015"), available at http://www.ey.com/Publication/vwLUAssets/EY-tomorrows-investment-rules2/$FILE/EY-tomorrows-investment-rules-2.0.pdf.

[12] See, PricewaterhouseCoopers LLP, Sustainability goes mainstream: Insights into investor views, May 2014, available at https://www.pwc.com/us/en/pwc-investor-resource-institute/publications/assets/pwc-sustainability-goes-mainstream-investor-views.pdf.

[13] See Mark Carney, Breaking the Tragedy of the Horizon – Climate Change and Financial Stability, Speech given at Lloyds of London (Sept. 29, 2015), available at http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx.

[14] See, e.g. letter from US SIF and US SIF Foundation (Sept. 18, 2014), available at https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-18.pdf; letter from Ceres (Apr. 17, 2015) available at https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-38.pdf.

[15] See, e.g. Morgan Stanley, Sustainability Through the Eye of the Investor (Feb. 27, 2015), available at http://www.morganstanley.com/ms-articles/sustainability-in-the-eye-of-the-investor (Morgan Stanley through a survey of 1,000 individual investors conducted in November 12-24, 2014, determined that 71% were interested in sustainable investing, 54% believe there is a trade-off between profitable and sustainable investments, 72% believe that companies benefit when they focus on sustainability and millennials are more focused on sustainability than the overall investor population).

[16] See letter from Standards & Financial Market Integrity division, CFA Institute (Nov. 12, 2014).

methodology, ultimately only a small number of niche investors would alter an investment or voting decision based on ESG matters not clearly tied to demonstrable financial risks.

Further exemplifying the perhaps disproportionate focus generally on ESG disclosure versus the actual materiality of ESG matters to investors, according to investment research company Morningstar, "funds with explicit sustainable or responsible investment mandates comprise only about 2 percent of the fund universe."[17] Despite this market-based indication of the level of investment interest in ESG-focused enterprises, on March 1, 2016, Morningstar kicked off a significant initiative focusing on sustainability reporting and requiring associated necessary disclosure from companies by beginning to provide a sustainability rating for over 21,000 mutual funds and exchange traded funds totaling $13 trillion in assets under management.[18]

We believe that part of the difficulty in assessing whether ESG matters really are material to investors arises from the broad category of issues encompassed within "ESG" and the fact that many surveys of investors do not elicit data distinguishing between, for example, corporate governance, anti-bribery and climate change concerns. For example, the results of the E&Y surveys cited by the SEC demonstrated that ESG risks most relevant for investors generally focus on good governance, not sustainability or climate change.[19]

Given the often ideologically-driven political discourse and advocacy surrounding sustainability and climate change matters, we believe it is not only important to distinguish the analysis of a need for additional mandated sustainability and climate change disclosure from that of corporate governance and other social and environmental matters but also to carefully consider the motives behind calls for a more onerous disclosure regime, especially when taking into account the SEC's mandate. For example, the SEC referred to Mark Carney's speech ("Breaking the Tragedy of the Horizon – Climate Change and Financial Stability")[20] and quoted

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[17] See Morningstar, Inc., Press Release, "Morningstar Introduces Industry's First Sustainability Rating for 20,000 Funds Globally, Giving Investors New Way to Evaluate Investments Based on Environmental, Social, and Governance (ESG) Factors" (Mar. 1, 2016) available at http://www.prnewswire.com/news-releases/morningstar-introduces-industrys-first-sustainability-rating-for-20000-funds-globally-giving-investors-new-way-to-evaluate-investments-based-on-environmental-social-and-governance-esg-factors-300228589.html.

[18] See Keith Larsen, "Morningstar and the democratization of ESG information" (Mar. 28, 2016) available at https://www.greenbiz.com/article/morningstar-and-democratization-esg-information (Morningstar calculates each fund's portfolio sustainability score based on individual company ESG scores calculated by the analytics firm Sustainalytics.)

[19] See, Tomorrow's Investment Rules 2015, at 19.

[20] See supra note 13.

in the Release his idea that imposing a new disclosure "framework for firms to publish information about their climate change footprint, and how they manage their risks and prepare (or not) for a 2 degree world, could encourage a virtuous circle of analyst demand and greater use by investors in their decision making."[21] Carney's suggestion embodies, in our view, the risk associated with the SEC imposing a new disclosure framework based on a public policy determination to "encourage" demand by analysts and use by investors of such information—the implication of which is that otherwise, additional climate change disclosure would not necessarily be demanded by analysts or considered material to an investor's decision-making.

What ESG Matters are Most Material to Investors

In our experience with clients, there continues to be debate over the effect of ESG matters on companies' long-term financial returns, with many researchers continuing to pursue demonstrable links.[22] Of the ESG matters considered by investors, we have found that those most directly and clearly tied to a company's financial performance and mitigating demonstrable financial risks are those most material to investors.[23]

According to the E&Y report, "it is often good governance that specifically receives investors' largest endorsement as valuable to companies' performance and as a useful criterion to include in investment decisions," including, as a portfolio manager at an Australian firm explained in the E&Y survey, "the explicit use of bribery and corruption policies; anti-corruption

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[21] See Release, at 204.

[22] See Gunnar Friedea, Timo Buschb and Alexander Bassen, ESG and financial performance: aggregated evidence from more than 2000 empirical studies, Journal of Sustainable Finance & Investment, 2015, Vol. 5, No. 4, 210–233, available at http://dx.doi.org/10.1080/20430795.2015.1118917 and https://www.db.com/newsroom_news/ESG_study_Jan16.pdf. Acknowledging that "the question of how compatible ESG criteria are with corporate financial performance (CFP) has remained a central debate for practitioners and academics alike for more than 40 years," the authors analyzed over 2,200 unique primary studies of the relationship between ESG and CFP attempting to find evidence for the business rationale for ESG investing. "Based on this exhaustive review effort, our main conclusion is: the orientation toward long-term responsible investing should be important for all kinds of rational investors in order to fulfill their fiduciary duties and may better align investors' interests with the broader objectives of society." See id at 277.

[23] See, e.g. Tomorrow's Investment Rules 2015, at 12 (finding that "Investors focus on nonfinancial factors that are tied most directly to measurable company performance and to client requirements. . . . Survey respondents are most likely to judge visible, measurable elements of nonfinancial performance—those that affect operating performance, risk and valuation—as essential or important. . . . Granted, very few respondents dismiss factors such as their own values, investment codes, external advice or company-level policies as unimportant. However, the survey data clearly indicates that investors care more about the nonfinancial factors that are linked most closely to the risk and return prospects of particular investments.")

measures; whistle-blower programs; separation of the chair and CEO; separation of key parties within the company; diversity; audit committee independence; the amount of money spent on political lobbying; the disclosure of hacks, and remuneration."[24] We note that Subpart 400 of Regulation S-K, which addresses management and corporate governance, is expressly not within the scope of the Release request for comment.[25]

In our view of ESG matters, good corporate governance is also most likely to universally impact company performance across industries whereas other ESG matters are much more likely to have industry-specific and even company-specific ramifications. For example, one of the most salient ways in which sustainability disclosures are important to an understanding of a registrant's business and financial condition are when environmental and social changes risk resulting in stranded assets—or assets whose measurable life expectancies or risk-and-return profiles are dramatically altered as a result of exogenous factors, resulting in a loss of value or liquidity. However, stranded asset risks are generally much more material in the oil and gas, mining and utilities industries.[26] Investors surveyed by E&Y consider nonfinancial data most important to the energy sector, followed by mining and metals, industrial, and consumer products.[27]

Relevant Disclosures are Difficult to Determine, Vary by Industry Sector and are Evolving

As is made clear by the studies and comments cited by the SEC in its Release, neither the interest of investors in ESG disclosure nor the data they find useful is uniform across industry sectors. At the same time investors complain about the lack of reporting standards that would facilitate cross-company comparisons, many recognize that the relevant measures in each

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[24] See Tomorrow's Investment Rules 2015, at 13. See, also, Usman Hayat and Matt Orsagh, CFA Institute, Environmental, Social, and Governance Issues in Investing: A Guide for Investment Professionals (November 2015) at 14 (noting that "[g]overnance issues tend to remain relevant and material across companies and sectors. Historically, among the ESG issues, corporate governance has been covered the most in business and finance curricula and in investment research and analysis, and finding that in the results of their survey of 1,325 portfolio managers and research analysis, respondents ranked board accountability first when asked which ESG issues they consider and climate change last.)

[25] See, Release at 6 fn. 4.

[26] See, Tomorrow's Investment Rules 2015, at 9. (noting that stranded asset risks have "most often been associated with the energy and extraction industries, such as oil and gas, mining, and utilities").

[27] See, Tomorrow's Investment Rules 2015, at 17.

industry, and even from company to company, vary significantly.[28] One asset manager quoted in the E&Y report noted, “The measures that we are interested in vary quite a lot across industries. While we might be interested in, say, the injury rates of companies that haul dangerous materials, the impacts we’re interested in are quite different for hydro dams being built where communities must be shifted. The measures do vary quite a lot, which is why we do detailed, bottom-up research to understand the specific opportunities and risks for every company.”[29]

In our experience, ESG reporting is already generally good across industries for which ESG reporting is most material and for larger companies.[30] As an analyst at a large U.S. asset management firm in the E&Y survey noted, “Look at some of the industries that are typically associated with a high level of ESG risks—mainly the extractive industries such as oil and gas and mining. At the higher-quality companies (generally the non-smallcap companies that we consider for purchase), they’re quite good at releasing the information that you would want to see. For example, looking at the time-lost-to-injury rate for all of the firms, you can get that information, and you can compare it easily across companies.”[31]

We believe that as the relevance of ESG disclosure to investors’ decision-making across various industry sectors continues to evolve, the most appropriate and effective way for the SEC to ensure that relevant, material ESG disclosure is being provided to investors is to stay the course the SEC determined to be appropriate in 1975. Companies are more responsive now than ever before to the disclosure demands of sophisticated investors who are now, in more and more cases, pressuring companies in specific industry sectors to provide the ESG disclosures those investors find material. Most of the studies the SEC referenced in the Release, in fact,

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[28] See Steve Lydenberg, Jean Rogers and David Wood, From Transparency to Performance: Industry-Based Sustainability Reporting on Key Issues, at 12, available at http://www.sasb.org/wp-content/uploads/2012/03/IRI_Transparency-to-Performance.pdf Arguing for mandated ESG disclosure, the authors propose a six-step method for developing industry-specific key performance indicators, involving a materiality analysis. “Key performance indicators work best when focused on a specific industry because the importance of specific ESG information categories varies substantially across sectors: the electronics industry faces specific challenges in supply chain management, use of toxic chemicals in manufacturing and waste disposal; retail groceries in managing their employee relations and the sustainability of the products they sell; the mining industry in human rights practices, tailings management, availability of water, government relations; and so on.”)

[29] See Tomorrow’s Investment Rules 2015, at 25.

[30] See KPMG, The KPMG Survey of Corporate Responsibility Reporting 2015, at 30-34, available at https://home.kpmg.com/xx/en/home/insights/2015/11/kpmg-international-survey-of-corporate-responsibility-reporting-2015.html (finding that of the largest global 250 companies, 92% provide “corporate responsibility” reporting; across industries, mining and utilities lead in reporting).

[31] See, Tomorrow’s Investment Rules 2015, at 26.

encouraged companies to take steps to improve their ESG reporting in order to be competitive with their peers. In our view, the materiality standard, which has long been the foundation of the SEC's approach to determining requisite disclosure, remains the best approach for calibrating ESG disclosure requirements on a company-by-company basis, and any specifically mandated additional disclosures should be narrowly tailored on an industry-by-industry basis. We believe this approach furthers the goals of the S-K Study and the FAST Act to emphasize a principles-based approach to disclosure requirements, a company-by-company approach emphasizing the dissemination of material information to investors and reduction in boilerplate language and static requirements.

Management's Discussion and Analysis of Financial Condition and Results of Operations

The SEC also requested feedback on the presentation and delivery of important information given the volume, complexity and sophistication of corporate disclosure. We believe that while almost all of the Regulation S-K requirements elicit disclosure that is material to investors' decisions, the single most important set of requirements relate to Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"). When effectively prepared, MD&A:

- provides a narrative explanation of a reporting company's financial statements prepared through the eyes of management;
- enhances financial disclosure and provides context through which financial information should be analyzed; and
- provides information about the quality of, and potential variability of, a reporting company's earnings and cash flows to enable investors to determine the likelihood that past performance is indicative of future results.[32]

While the intended goals of effective MD&A are straightforward, companies' MD&A disclosure oftentimes suffers from a build-up of stale or immaterial information from prior reports and a tendency to have MD&A become a mechanical recitation of results of operations and other financial aspects of reporting companies' businesses that change infrequently. These shortcomings reduce the effectiveness of MD&A and can unintentionally obfuscate key information necessary for a complete understanding of a company's business. We believe that renewed focus on a company's annual report on Form 10-K as the primary vehicle for comprehensive disclosure and the adoption of an MD&A executive overview requirement would

[32] See Release p. 97

greatly improve the effectiveness and accessibility of disclosure while also streamlining disclosures made in a reporting company's quarterly reports on Form 10-Q.

Form 10-K currently serves as a company's most thorough report to investors, and a company's Form 10-K should provide a full discussion of all material information necessary to satisfy the three goals of effective MD&A set forth above. The MD&A contained in Form 10-K should enable any investor that was previously unacquainted with a company to gain a reasonably complete understanding of such company's business. However, while the MD&A of a company's Form 10-K should contain information identifying, and in some cases defining, the company's key financial metrics and factors affecting performance, sources and uses of liquidity and capital resources, critical accounting policies and significant estimates, and qualitative factors regarding market risk, much of such information changes infrequently. We respectfully submit that none of the foregoing information should be repeated in Forms 10-Q unless there have been material changes since the last time the disclosure was presented.

Both companies and investors will benefit from the elimination of such repetitive disclosure. Reporting companies will be able to focus their efforts on factors that do actually change from period to period. Investors will be able to review a more streamlined document that focuses only on the results of operations, changes in liquidity and financial condition and the unique drivers thereof for the affected period. Inclusion of such updates will better highlight their importance to investors, making such disclosures more impactful than if they were to be included alongside pages of information that had not changed materially.

We believe that Item 303 of Regulation S-K should require companies to include an executive overview at the beginning of MD&A. As noted in the Release, this executive overview would not be a duplicative layer of disclosure but rather should emphasize, analyze and provide context for the most critical factors that impact a reporting company's financial results. The balance of the disclosure in MD&A would contain the remaining required information, but by leading with an executive overview, reporting companies could properly orient readers as to the elements of their financial results that deserve the most attention.

In the SEC's 2003 interpretive release on MD&A[33], the concept of an executive overview was discussed, and the SEC noted that an effective overview would:

- include economic or industry-wide factors relevant to the company;

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[33] Available at: https://www.sec.gov/rules/interp/33-8350.htm.

- serve to inform the reader about how the company earns revenues and income and generates cash;
- to the extent necessary or useful to convey this information, discuss the company's lines of business, location or locations of operations, and principal products and services; and
- provide insight into material opportunities, challenges and risks (such as those presented by known material trends and uncertainties on which the company's executives are most focused for both the short and long term), as well as the actions these executives are taking to address these opportunities, challenges and risks.

Because much of the information contained in this executive overview would change frequently, we would expect companies to revisit the content of the executive overview with each periodic filing. Consistent with our recommendations above, the MD&A executive overview contained in the Form 10-K should serve as the baseline, with material changes emphasized in executive overviews set forth in subsequent reports on Form 10-Q.

Finally, the SEC has asked for feedback regarding whether its guidance regarding MD&A through multiple interpretive releases, the financial reporting manual and compliance and disclosure interpretations should be incorporated in Item 303. We do not think such an exercise is necessary or desirable. Item 303 provides an adequate framework, and inclusion of previously issued MD&A guidance in a revised Item 303 would likely make it unwieldy and confusing. However, the SEC should consider amending Item 303 to add explicit cross-references to MD&A guidance outside of Regulation S-K. This approach would preserve Item 303's current framework while ensuring that the existing MD&A guidance receives the proper consideration from companies and their service providers.

Risk Factors

While the intended goals of effective risk factor disclosures are apparent, companies' disclosures regularly include boilerplate language reciting generic risks applicable to industries as a whole. Although necessary for complete disclosure, these recitations, in conjunction with the current structure of the disclosures, reduce the effectiveness of the risk factor disclosures and can unintentionally overwhelm the investor with information immaterial to the company's financial position and results of operation. We believe that a renewed focus on flexibility and organization within the risk factor disclosure, as well as an increased focused on the material financial effects each risk carries would greatly improve the effectiveness of the disclosures and provide investors with necessary information.

Organization and Content of Companies Risk Factor Disclosure

The Release touches on many facets of a company's risk factor disclosure, but arguably, no topic is more important than organization and content of the disclosure. In question 147 of the Release, the SEC seeks comment on whether it should require companies to present their risk factors in order of management's perception of the magnitude of the risk or by the order of importance to management. We believe that the manager's perception of the magnitude of risk is not an appropriate test. Although the importance to management test has been met with criticism,[34] this test is more reasonable because it balances both the magnitude of risk and likelihood of occurrence concerns. Alternatively, the perception of risk magnitude test increases the opportunity for litigation as there may be several high probability risks that have low impact, or conversely, low probability risks that have high impact.

Furthermore, requiring companies to discuss the probability of occurrence and the material effect each risk may have on financial performance is beyond the scope of what a company could reasonably and accurately prepare. This will likely lead to potential risks of conflict with evaluating contingencies under the ABA Statement of Policy[35] and ASC 450-20.[36] Thus, it is our position that the SEC should allow companies to disclose risks as prioritized by its principal executive officer.

Length of Companies Risk Factor Disclosures is Not a Material Concern

As evidenced by the studies and comments cited in the Release, the length of risk factor disclosures has increased in recent years.[37] We believe that lengthy risk factor disclosures are appropriate because they allow investors the opportunity to acquire more information about the

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[34] The New York State Bar Association's Committee on Securities Regulation argues that the order of importance of risk factors is impossible to determine, and the process of ranking such factors will make issuers vulnerable to claims that they attempted to downplay certain risks by listing them last. The Capital Markets Committee of the Securities Industry Association also believes that such ranking of risk factors is inappropriate. According to the SIA, such a requirement would not only expose companies to greater liability, but also result in investors being misled and encouraged to consider less than all the material risks. See, New York Bar Prefers Staff Guidance on Plain English Disclosure, Issue No. 219, Corp. Governance Guide 3539194; SIA Committee Urges SEC "Plain English" Initiative Should be Voluntary, 27 Sec. Reg. & L. Rep. (BNA) at 610 (May 2, 1997).

[35] See, Lawyers' Responses to Auditors' Requests for Information (1999), available at https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00337C.pdf.

[36] See, 450 Contingencies, available at https://law.resource.org/pub/us/code/bean/fasb.html/fasb.450.2011.html.

[37] See, Release p. 161 citing Anne Beatty et al., Sometimes Less is More: Evidence from Financial Constraints Risk Factor Disclosures, Mar. 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186589.

company and its business. It is our recommendation that the SEC find that length of risk factor disclosures are not at issue but rather, as discussed below, the concern should be the location of the disclosures within the filing.

Furthermore, the SEC queries whether it should, without limiting the total number of risk factors permitted, require companies to identify and disclose their ten most significant risks in order. We believe there are two apparent issues with such a proposal. First, companies are likely to have more or less than ten significant risk factors. Where a company feels it does not have ten significant risk factors, it might include a non-significant factor in such a list in order to satisfy the requirement. Second, where a company has more than ten significant risk factors, investors are likely to believe that those not provided in the ten identified risk factors are less significant to the company's business. It is our belief that requiring companies to list their ten most significant factors will increase company liability and create confusion among investors as to which risk factors may or may not be significant.

Summary of Key Risk Factors Should Precede the Disclosure; Risk Factor Disclosure to Follow Business Descriptions

The SEC requested feedback on whether including a risk summary would help investors better understand a registrant's risks by highlighting certain information. It is our position that the adoption of such reforms will help fashion a straightforward understanding of a company's risk factors. This will look like a summary list placed in the forward sections of the filing, with the more complete list of risk factor disclosures to follow the MD&A and Business sections. Accordingly, investors will have a better understanding of the business prior to reading the risk factors disclosed by the company. Duplicative language will result from the use of both a summary list and full disclosure section; nevertheless, strong emphasis on the risk factor disclosure language is essential because the information provided by the company is pivotal in an investor's analysis of the future financial performance. Furthermore, the risk factors may be less duplicative if they follow the detailed discussion of the Business or MD&A sections, allowing an investor to understand the core business model before trying to understand the risks to that business. This approach would preserve the existing framework of Item 503(c) disclosures while ensuring that investors are readily capable of comprehending the risks companies face.

Generic Risk Factors and Companies Use of Boilerplate Language

The SEC asked for feedback on how it can ensure that companies include meaningful, rather than boilerplate, language in their risk factor disclosure. We encourage the SEC to consider including an "Industry Risk" section separate from those risks specific to the company. This change will result in a clearer and more concise reading of those risks specific to the

company, meeting the disclosure goals developed through case law and SEC releases.[38] Additionally, a separate Industry Risk section could highlight those risks that are not specific to the company but nonetheless may be more volatile (e.g., environmental risks for mining companies).

The SEC can motivate companies to avoid generic and boilerplate disclosures by creating a safe harbor from litigation for those disclosures that are clearly defined. Much like the forward looking statement safe-harbor provided in the Private Securities Litigation Reform Act, a safe harbor for meaningful and descriptive risk factor disclosures would likely motivate companies to disclose the specific facts of each risk and, in turn, will provide investors with the necessary information to thoroughly understand such risk.

Market Forces Motivate Companies Disclosure Behavior

The SEC seeks comment on whether it should require each risk factor to be accompanied by a specific discussion on how the company is addressing the risk. It is our position that companies should not be motivated to suggest that risks are mitigated because, as the Release observes,[39] such language might dilute an investor's perception of the magnitude of risk. Adversely, market forces motivate companies to be cautious when stating risks, for an overstatement of a risk factor may render the offering less appealing to investors.

The central debate surrounding disclosure requirements concerns the extent to which such requirements should be mandated by the government or whether investors are better served if market forces determine the content of disclosure. The SEC previously recognized that the task of identifying what information is material to an investment is a continuing one in the field of securities regulation.[40] Therefore, the SEC should find that Item 503(c) does not need to be updated to reflect emerging risks because companies, seeking to avoid securities claims, will be driven by market forces to disclose such risks. Furthermore, we take the position that frequently updating Item 503(c) to reflect emerging risks will be a continuing and costly burden on the issuers.

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[38] The risk factor discussion must describe the most significant factors that may adversely affect the issuer's business or its future financial performance and should go beyond generic or boilerplate discussions to explain specifically how the risk affects the securities being offered. See, *In re WorldCom, Inc. Sec. Litig*., 346 F.Supp.2d 628, 691 (S.D.N.Y.2004); Statement of the Comm'n Regarding Disclosure of Year 2000 Issues & Consequences by Pub. Companies, Inv. Advisers, Inv. Companies, & Mun. Sec. Issuers, Release No. 1149 (July 29, 1998).

[39] See, Release p. 167.

[40] See, Release p. 210 and note 690, referring to the Proposed Comprehensive Revision to System for Registration of Securities of Securities Offerings, Rel. No. 33-6235 (Sept. 2, 1980).

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Thank you for considering our view on this subject. We would be pleased to discuss our comments and our experience with you and answer any questions you may have. Please do not hesitate to contact Michael Nordtvedt, Steve Bochner or me at [redacted].

Sincerely,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

/s/ Michael Labriola

Michael Labriola