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July 22, 2016

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

VIA E-MAIL: rule-comments@sec.gov

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

Dear Mr. Fields:

We are submitting this letter in response to the request by the Securities and Exchange Commission (the "**Commission**") for comment on the business and financial disclosure required by Regulation S-K discussed in the above-referenced concept release (the "**Release**"). We appreciate the opportunity to comment on the Release and the important issues it raises.

We support the Commission's broad-based review of public-company disclosure requirements under the Disclosure Effectiveness Initiative, as well as the initiative by the staff (the "**Staff**") of the Division of Corporation Finance to consider ways to improve disclosure for the benefit of both investors and public companies. Review of these requirements should work toward the dual goals of streamlining disclosure requirements while improving the clarity, relevance and usability of disclosure for investors.

As long-time capital markets advisors, we work regularly with registrants of all sizes and business complexity, often beginning prior to their initial public offerings and continuing long after they have become large accelerated filers. We are often on the front line helping management understand and comply with their disclosure obligations. Based on our experience, we agree that existing disclosure requirements at times result in long, overly-complex periodic filings with redundant, obsolete or immaterial information. In order to streamline disclosure and enhance investor decision making, we think there are a number of guiding principles and potential improvements that the Commission should consider. To that end, we set out below certain general principles in respect of the overall disclosure framework, followed by more specific comments on certain Regulation S-K requirements.

General Considerations Regarding the Overall Disclosure Framework

1. Materiality should continue to be the cornerstone of disclosure requirements

The central purpose of corporate disclosure is to provide investors with the information they need to make informed investment and voting decisions. To this end, the concept of materiality has always been central to registrants' disclosure obligations under the federal securities laws. For information to be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[1] In formulating the "total mix" standard, the U.S. Supreme Court refused to find that a fact is material just because a reasonable investor "might" consider it important, explaining that such a low standard of materiality poses the danger of too much disclosure, namely that "management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making."[2] In other words, the concept of materiality serves the dual purposes of highlighting information that a reasonable investor would likely consider important while filtering out relatively unimportant details that could confuse or overwhelm investors.[3] In this regard, we note that a reasonable investor makes investment and voting decisions based upon maximizing financial value. Accordingly, while we agree that disclosure requirements must evolve over time, we believe they should do so in a manner that retains the central concept of materiality as a safeguard from information overload in filings with the Commission.

We also think it important that the Supreme Court focused on the "reasonable investor." There may well be information that a particular investor considers important to its investment and voting decisions that investors generally do not feel they need. When evaluating comments received on the Release from the investor community, we believe the Commission should ask whether any information being sought is information that a "reasonable" investor needs, or rather just information that a particular investor would find useful.

2. The benefits of disclosure requirements to investors should outweigh the associated costs to registrants

In addition to the central concept of materiality, as the Staff has pointed out, other important policy considerations must come into play as to whether informational benefits to investors are appropriately balanced against "compliance costs to companies, and the potential impact on efficiency, competition and capital formation."[4] Disclosure is costly for registrants to prepare and disseminate, and disclosure of sensitive information can result in competitive disadvantages. In

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[1] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[2] *Id.* at 448-49.

[3] We would note, however, that in order to assist investors' understanding of their business, registrants often provide information beyond that required under a strict materiality standard – a practice we believe should remain within management discretion.

[4] 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.

particular, compiling underlying facts, assessing materiality and drafting responsive disclosure is often a complex and time-consuming process. Registrants have varying methods to manage this process, ranging from some large and sophisticated registrants employing large internal teams who oversee substantially all aspects of this process to small emerging registrants who coordinate extensively with outside counsel and advisors. Significant resources, both time and money, are required to support the disclosure process—a process that is necessary even when the required information is of little or no value to investors. For these reasons, we propose two core principles that should inform and guide any proposed changes to disclosure requirements:

- The disclosure requirements should be designed to solicit material information needed by reasonable investors to make informed investment and voting decisions; and

- The anticipated benefits of any such disclosure obligation should outweigh the associated costs.

3. Proponents of new disclosure requirements should bear the burden of showing that the benefits outweigh the costs since registrants must bear those costs.

As the Commission conducts its review of the business and financial disclosure required by Regulation S-K, we think that it is important to note that the cost of disclosure is borne by registrants. As noted above, registrants must expend time and other resources to prepare and disseminate responsive disclosure regardless of whether the requirements solicit information that is material to an investment or voting decision. However, where such information is immaterial, investors indirectly bear the cost of its production even if they can simply ignore it. For example, although Congress has enacted legislation requiring registrants to engage in costly diligence inquiries to support disclosure about their use of conflict minerals and payments for resource extraction, we think investors generally ignore such information as immaterial to their investment and voting decisions. In these circumstances, investors do not typically complain about such disclosure because it is superfluous to an investment decision and they bear no direct cost associated with its preparation.[5] For these reasons, in addition to the two core principles noted above in respect of materiality and the benefits of disclosure outweighing the costs, we think that proponents of new disclosure requirements should be required to affirmatively demonstrate how such disclosure would be useful toward enhancing investor decision-making and that such benefits outweigh the costs to issuers.

4. Encourage a materiality-centered, principles-based disclosure framework

We think that the most effective way to implement the principles discussed above is for the Commission to promote a materiality-centered, principles-based disclosure framework. Although we acknowledge that a limited set of prescribed disclosure requirements eliciting certain basic information about a registrant should be helpful to a broad range of investors, a materiality-centered, principles-based disclosure framework will elicit more relevant and useful information than a strictly rule-based framework by providing more flexibility for registrants to use their judgment in disclosing information that they believe is material to investors depending on registrants' unique facts and circumstances. In keeping with a materiality-centered, principles-

[5] In light of this, we think some commentators' observation of the absence of investor complaints about over-disclosure is a red herring as it is the registrant who bears the burden of over-disclosure and investors can simply skim or skip over immaterial information. See Andrew Ackerman, *Elizabeth Warren Says She's 'More Disappointed Than Ever' with SEC Chief*, The Wall Street Journal, June 14, 2016.

based disclosure framework, we recommend that prescriptive rule-based requirements be limited and that the Commission consider enacting an overriding principle allowing registrants to omit prescribed information so long as the effect of omitting the information would not be misleading. We also believe that a materiality-centered, principles-based disclosure framework will assist registrants in developing their disclosure on an ongoing basis in light of the ever-changing business environment, increasing and new challenges registrants face in the global economy, continued advances in the speed with which communication can occur and the proliferation of vast amounts of information. These trends all suggest that a prescriptive rule-based approach could result (and has in many cases resulted) in static "line-item" disclosure requirements that quickly become obsolete and not meaningful.[6]

5. Utilize advancements in technology to produce better, more efficient disclosure and facilitate communication with a diverse investor audience

We believe that the federal securities laws should continue to be informed by the adoption of advancements in technology as well as trends in the use of various forms of technology by registrants and investors. We think that the type and content of disclosure may often provide a helpful framework for thinking about new ways to use technology to organize and deliver information in a manner that limits repetition and maximizes clarity and efficiency. We believe that when evaluating companies and making investment decisions, investors seek to answer a handful of basic questions:

- What does the company do?
- How does the company do it?
- What has the company's performance been in recent periods?
- What are the company's plans going forward?

We think the type of disclosure responsive to these basic investor questions can be broadly categorized in a manner that can inform the optimal method of delivery to investors. For example, we believe that disclosure relating to what a company does and how it does it is less dynamic and, therefore, lends itself to new forms of information delivery, such as a "company profile" system, while information on the company's recent performance and future plans (which are dynamic by nature) would remain in periodic reports. Under a "company profile" regime, basic information about the company and its operations could be presented in a centralized place, so that investors can refer to it as needed. Periodic reports could then focus solely on new information about the latest fiscal period and/or plans going forward, which would significantly reduce the length and scope of periodic reports, making them easier to navigate and use.

[6] In light of a materiality-centered, principles-based disclosure framework, we are generally supportive of the Commission's use of automatic sunset provisions in new disclosure requirements as well as, where appropriate, Commission studies and analyses of the impact of new rules or amendments, each of which allow for further amendment and/or revocation if such requirements, amendments or new rules prove ineffective when balanced against the associated costs to registrants. We are sensitive to the fact that seeking repeal of requirements only a few years after their enactment imposes an additional layer of costs on both registrants and the Commission. Nevertheless, we suggest that some sort of formal review (with or without Commission action) would be helpful in order to ensure that disclosure requirements remain sufficiently responsive to changing circumstances.

We envision that the "company profile" would use "tabs" or "folders" to present information by topic. Separate tabs could, for example, cover the basic description of the registrant's business, its officers and directors, corporate governance structure and policies, and descriptions of its outstanding securities. In addition, there could be a tab that would include links for filed exhibits. Furthermore, the company profile could have a tab for the reformulated risk disclosure discussed below that highlights the risks relating to the registrant's operations, its structure, its industry, and its legal, environmental, regulatory or other material risks. (In this way, a periodic report would only need to include a discussion of recent performance and the trends and uncertainties that are reasonably likely to affect the registrant's future performance and plans.) We think other tabs in the company profile could be used for non-GAAP information and their reconciliations, and changes in accounting standards that may be adopted by the registrant in upcoming periods, since this information does not change significantly from quarter to quarter.

Disclosure under the various tabs of the company profile would be updated annually, with periodic and current reports providing the mechanism for updating that information as necessary. We are not suggesting, and do not advocate, that the company profile system become analogous to a continuous disclosure system. We believe that the existing disclosure requirements for periodic and current reports are sufficient to provide investors with timely updates on new material information contained in the company profile.

In addition to the company profile concept, we think that facilitating the use of hyperlinks and cross-referencing has the ability to meaningfully improve accessibility to and navigability of company information. We think that the Commission should encourage registrants to include hyperlinks and cross-references to permit investors to navigate quickly between related sections. For example, if the MD&A section of a registrant's Form 10-K refers to a particular note to the financial statements for further explanation of a topic, we think a hyperlink can be included to permit investors to quickly view the relevant related disclosure. We think that these types of improvements should be facilitated by the Commission.

6. Periodic and current reports are only one form of communication by registrants with investors and the public

As discussed above, the goal of corporate disclosure should be to provide, in an efficient manner, the information needed by reasonable investors to make informed investment and voting decisions. A corollary is that disclosure requirements should not solicit all information that may be desired by all investors or the public. Accordingly, we think the Commission should continue to recognize that registrants often communicate with investors and the public regarding a number of issues through media outside of their periodic and current reports and that such communications should be encouraged and facilitated by relevant stakeholders. For example, we are mindful that some parties seek information in areas of corporate sustainability, including issues such as conflict minerals, environmental matters and climate change, workforce diversity and labor conditions, among others. Although these types of issues are often considered by registrants' boards and management as part of broader strategy and business profile reviews, they are not in most cases material to an understanding of a registrant's operating results and financial performance, and, accordingly, are not appropriate for inclusion in periodic and current reports. Instead, there are a variety of avenues through which companies can, and do, communicate how they are addressing social and other non-financial issues. For example, many public companies publish corporate sustainability reports and provide extensive corporate responsibility information on their websites. We believe that, to be effective, periodic reports should remain focused on the information that is material to an understanding of a registrant's

operating results and financial performance. As we mentioned above in our discussion of the "reasonable" investor, we do not think the Commission should assume that just because some investors request specific information on these non-financial topics, and some companies voluntarily provide it, that this provides a conclusive justification for requiring these disclosures in Commission filings.

Existing and Potential Disclosure Requirements

In our view, consistent with the principles discussed above, there are a number of possible revisions to the existing disclosure requirements under Regulation S-K. These revisions could take various forms, such as a wholesale reorganization of Regulation S-K, or through more surgical edits to the existing requirements designed to capture only material information. For example, one possibility would be to reframe the requirements of Regulation S-K in a manner that more closely and intuitively dovetails to the basic investor questions around four main areas: (i) a description of the registrant's business, including its strategic plans, (ii) information about the people who manage and own the registrant, (iii) financial information, including recent performance and (iv) non-financial information covering topics including risks and corporate governance. Short of a wholesale reorganization of Regulation S-K, we suggest that the Commission amend Item 10 of Regulation S-K to permit registrants 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 misleading. In addition, below are a number of specific suggestions in respect of existing disclosure required by Regulation S-K.

1. Core Company Business Information

Disclosure about a registrant's business lays the groundwork for understanding and assessing the registrant, its operations and financial condition. In addition, information about a registrant's industry, business environment and other factors affecting the business helps inform investment and voting decisions by placing other disclosure in context. However, we think that consistent with a materiality-centered, principles-based disclosure framework, other than a basic set of information requirements applicable to all registrants, prescribed disclosure requirements should be limited in favor of allowing registrants to describe their business in the manner that they feel most efficiently and accurately conveys how management views and manages their business. In this light, we have the following observations on core company business disclosure requirements:

Item 101(a)(1)—General development of business	• We would suggest removing Item 101(a)(1) in favor of a more materiality-centered, principles-based disclosure requirement in respect of a registrant's business. Whether disclosure of the general development of a registrant's business over the last five years is material depends on the facts and circumstances specific to the particular registrant. Based on our experience, where registrants have changed significantly or undertaken transformative events during their recent history, registrants generally include applicable explanatory and background disclosure. For those registrants, however, that do not have comparable events, the requirement to discuss development

over the last five years is arbitrary and may distract from more meaningful and germane disclosure. We think that this is true whether for a first time registrant or a seasoned registrant.

Item 101(c)—Narrative description of business

- We agree that providing a narrative description of a registrant's business remains foundational to understanding and assessing the registrant. However, we think the requirement should be reformulated in favor of a more materiality-centered, principles-based disclosure requirement in respect of the registrant's business. Similar to Item 303, we envision this reformulated requirement would tie more closely with management's view of the business and operations seeking to answer two basic questions: what the company does and how it does it.

  In its current form, Item 101(c) contains a list of required disclosure topics, many of which are irrelevant to all but a small selection of registrants. We think that many of the specific items that must be disclosed (which are often treated as a checklist) are either more effectively covered elsewhere or do not meaningfully assist investors in understanding the registrant's business. For example, backlog, compliance with environmental laws and renegotiation or termination of government contracts (in each case outside of select industries) are generally immaterial to an investor's ability to understand the registrant's business. Similarly, although employee numbers may be relevant to an investor assessing the scale of a registrant, we think that information can be conveyed outside of the business narrative in an equally helpful format (e.g., as a numerical figure on a company profile page). In addition, where material, registrants generally discuss other specific items, such as seasonality, sources and availability of raw materials, dependence on certain customers and research and development activities, whether in the business narrative or elsewhere, including in the MD&A. We also think registrants generally would continue to communicate the material business points, risks and prospects associated with their intellectual property portfolio and government regulation. We think that these points are true whether for a first time registrant or a seasoned registrant. For these reasons, we would suggest reformulating Item 101(c) to remove the specific factors in Item 101(c) in favor of a more materiality-centered, principles-based disclosure requirement in respect of registrants' business.

Item 102—Description of property

- Although the specific requirements of Item 102 have become outdated, we think that certain components of the rationale underlying Item 102 remain relevant. In requiring a brief description of the general character and location of "principal plants and other important units," we think that the primary intention is to provide investors with a basic understanding of

the core assets utilized by a registrant in its business. Given changes in the economy and the nature of many companies, however, the specific requirements of Item 102 are obsolete and harken back to a largely industrial and manufacturing economy that has changed significantly. However, as the Staff notes, a description of physical properties remains relevant to certain types of registrants. For example, registrants in the hotel and lodging industry tend to disclose the location and number of rooms at each of their properties and registrants with casino operations disclose the number of table games and slot machines at each location. In contrast, registrants that provide services and information technology often have no material physical properties to describe. Nonetheless many of these registrants have non-physical assets that are key to their business. For these reasons, we think that Item 102 should be reformulated in conjunction with Item 101(c) to provide that a full narrative description of a registrant's business should include an overview of the core assets, be they physical or not, integral to the registrant's business. We think that, consistent with a materiality centered, principles based disclosure framework, this type of reformulation would allow registrants to contextualize their key assets within the broader narrative description of the business in a manner that enhances disclosure to investors.

2. Company Performance, Financial Information and Future Prospects (S-K Items 301, 302 and 303)

We agree with the Staff that financial information is essential to understanding a registrant's performance, financial condition and future prospects. We further agree that there is a need for a narrative explanation of the financial statements, as a numerical presentation and accompanying footnotes alone may be insufficient for an investor to assess the quality of the earnings and the likelihood that past performance is indicative of future performance. However, we also think that consistent with a materiality-centered, principles-based disclosure framework, other than certain limited historical information, prescribed disclosure requirements should be limited in favor of allowing registrants to describe their financial performance and relevant trends and uncertainties in the manner management feels most efficiently and accurately conveys financial performance and results of operations. In this light, we have the following observations on the disclosure requirements relating to company performance, financial information and prospects:

Item 301—Selected financial data

- We think that providing five years of selected financial information in a convenient and readable format assists investors and others in efficiently identifying trends and highlights in a registrant's financial condition and results of operations. Although earlier periods are often available for seasoned issuers in prior reports, the compilation of such information into a single table eases review. Moreover, in our experience the compilation of five years of historical financial data into a table at times requires explanations of retrospective

revisions to a registrant's annual financial statements (e.g., to reflect discontinued operations or other adjustments) and registrants need to consider how they will treat years four and five in the selected financial data table. We generally think this is helpful to investors. Notwithstanding the general usefulness of the table, in light of the two core principles discussed above, we think that the Commission should extend the accommodation currently provided to foreign private issuers and emerging growth companies to all registrants allowing them to omit the earliest two of the last five fiscal years where the information cannot be provided without unreasonable cost or expense as long as information (qualitative and, if reasonably available without unreasonable cost or expense, quantitative) about a material trend is otherwise provided for such two fiscal years.[7]

Item 302(a)—Supplementary financial data

- We would recommend the elimination of Item 302(a). In light of its application only to certain registrants (on selected forms) and quarterly reporting obligations on Form 10-Q, the value of the requirement to investors is limited. We note that the requirement for quarterly financial data can be an unwelcome surprise for newly public companies attempting to do a follow-on offering. If the quarterly information was not needed to market the initial public offering, it is unclear why it should be required in a follow-on offering that rapidly follows the IPO.

Item 303—General

- We support the objectives behind Item 303 to:
  - Provide a narrative explanation a registrant's financial statements that enables investors to see the registrant through the eyes of management;
  - Enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and
  - Provide information about the quality of, and potential variability of, a registrant's earnings and cash flow so investors can ascertain the likelihood that past performance is indicative of future performance.

  We believe that by encouraging registrants to include not only a discussion but also an analysis of known material trends and uncertainties that does not simply reiterate financial statement information in narrative form, Item 303 generally facilitates a materiality-centered, principles-based disclosure framework

[7] We would also note that historical selected financial information would lend itself well to disclosure in the form of a chart via a tab on a company profile webpage thereby eliminating the need to include such information in ongoing periodic filings.

		often resulting in some of the most meaningful disclosure contained in periodic reports. In this light, however, we believe it would be helpful to registrants for the Staff to consolidate the various sources of guidance on the MD&A into a single source. Doing so would enable registrants to approach their MD&A in the context of fresh Staff guidance. In compiling Staff guidance, we would recommend that the Staff avoid prescriptive quantitative thresholds or requiring specific formatting or presentation styles, including in respect of executive overviews. Each of these approaches would deviate from a materiality-centered, principles-based disclosure framework and potentially increase cost to registrants.
Item 303—Forward-looking disclosure	•	As discussed above, we believe that in addition to a registrant's recent historical performance, a registrant's expectations and plans going forward are important to a voting or investment decision. We believe that the Staff should continue to encourage the inclusion of forward-looking disclosure and, to such end, consider taking certain incremental facilitative steps. In particular, we would encourage the Commission to reconsider the liability regime under Section 11 and Section 12 of the Securities Act in respect of forward-looking projections. As the Commission has recognized, "reasonably based and adequately presented projections should not subject issuers to liabilities under the federal securities laws solely because the projected results did not materialize," further noting that "even the most carefully prepared and thoroughly documented projections may prove inaccurate." [8] We agree, and we acknowledge the importance of the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and the Commission's guidance thereunder in facilitating forward-looking disclosure. However, notwithstanding the PSLRA, we think registrants generally limit their voluntary forward-looking disclosure to earnings press releases, quarterly calls or other investor presentations that are "furnished" with the Commission under Form 8-K rather than in "filed" periodic or current reports in response to the heightened litigation risk associated with documents that may be included or incorporated into a registration statement or prospectus and therefore subject to Section 11 and Section 12 of the Securities Act. In order to reconcile this common divergence in disclosure between "furnished" and "filed" documents, we encourage the Commission to adopt the position that forward-looking projections be deemed to be "furnished" for liability purposes even where included in "filed" periodic or current reports.
Item 303—Key	•	As part of a materiality-centered, principles-based MD&A, some

[8] Safe Harbor Rule for Projections, Release No. 33-6084 (June 25, 1979) [44 FR 38810 (July 2, 1979)].

performance indicators		registrants elect to include various key performance indicators. For example, electronic gaming or social media companies typically discuss numbers of monthly active users and unique users. In our experience, this is an active conversation among registrants and the lead underwriters during their initial public offering process and continues thereafter between registrants and the analyst community. Based on our experience, we think that registrants generally try to balance a number of factors, including costs required to monitor, track and report and the value to investors of providing such key performance indicators. We think that the fact that some industries and registrants elect to provide such indicators voluntarily is evidence that registrants are, in general, best situated to understand what types of disclosure investors value and will seek to provide such information where the benefits of doing so outweigh the costs. Accordingly, consistent with the existing practice and a materiality-centered, principles-based disclosure framework, we do not think adding a prescriptive requirement for performance indicators would meaningfully improve corporate disclosure and instead would run the risk of adding potentially significant cost to registrants (in many cases, for registrants who have already considered whether to include performance indicators and elected not to do so).
Item 303—Results of operations	•	In light of advancements in technology and consistent with efforts to streamline disclosure, we suggest that the Staff consider modifying the existing period-on-period comparisons to require discussion only of the most recent two years. We think that this would allow registrants (and therefore investors) to focus on new, material information about the latest fiscal year without significant repetition from prior filings that are easily accessible. We would also recommend revising Instruction 4 to Item 303(a) to allow registrants to omit a discussion of changes in line items on the financial statements to the extent such changes are not material and such omission would not materially impair an investor's understanding of the registrant's results of operations. This would allow registrants (and therefore investors) to focus the discussion on those line items that most impact the registrant's results of operations for recent periods and going forward.
Item 303—Liquidity and capital resources	•	As the Staff has noted, disclosure about liquidity and capital resources is critical to an assessment of a registrant's prospects for the future and even the likelihood of its survival. As noted above, we recommend that the Staff consolidate the various sources of guidance on the MD&A into a single source. One key benefit of such an exercise would be the opportunity for the Staff to expand upon and underscore its view of the importance of a robust discussion of liquidity and capital

resources. In doing so, we would urge the Staff not to depart from the existing policy of recognizing the terms “liquidity” and “capital resources” as general terms in a manner that might decrease the flexibility needed by management for a meaningful discussion. Such an effort would also allow the Staff to focus specifically on what time periods should be analyzed, which we would recommend be limited to the most recent period consistent with the approach on the period-on-period discussion recommended above. We would not recommend expanding prescriptive requirements in respect of liquidity risk and maturity mismatches or other comparable prescriptive requirements, noting that, in our experience, registrants regularly disclose in the liquidity section of the MD&A or elsewhere (including in the risk factors) risks associated with their liquidity profile where material.

Item 303—Off-balance sheet arrangements

- We recommend rationalizing disclosure of off-balance sheet arrangements between the MD&A and the financial statements. Specifically, because the substance of Item 303(a)(4) is now substantially required to be included in the financial statements under US GAAP, we would suggest that the Commission reassess the continued utility of Item 303(a)(4). Short of removing Item 303(a)(4), we suggest that the Staff revise the requirements to make clear that only discussion of those off-balance sheet arrangements that are material to an understanding of the registrant’s financial condition, changes in financial condition or results of operations is required and, to the extent such disclosure is already included in the financial statements, that a cross-reference is encouraged.

Item 303—Contractual obligations

- We generally agree with the Staff that aggregating information of contractual obligations in a single location assists investors in assessing the impact of balance sheet and off-balance sheet arrangements with respect to liquidity and capital resources. We would, however, recommend rationalizing disclosure of contractual obligations between the MD&A and the financial statements as there is significant redundancy. In addition, we would note that in an effort to make the table entirely comprehensive, registrants may spend significant time and resources to identify and track immaterial obligations that provide minimal incremental value to investors. For this reason, we would suggest that the Staff expand its guidance in respect of the table to continue to permit flexibility for registrants to develop a presentation method of obligations that is clear, understandable and appropriately reflects the categories of obligations that are meaningful in light of a registrant’s capital structure and business, but also to expressly note that registrants may omit obligations that would are not material to an understanding of such registrant’s contractual obligations for

		the relevant periods.
Item 303—Critical accounting estimates	•	Based on our experience, we do not think critical accounting estimates disclosure results in meaningful additional disclosure to investors, particularly given the disclosure required in the financial statement footnotes. We understand that the Staff has articulated that the critical accounting estimates disclosure required under Item 303 should supplement significant accounting policy disclosure in the financial statements by addressing why the accounting estimate or assumption bears the risk of change and analyze the impact such a change in assumption might have on operating results and financial condition. However, we think that the very nature of critical accounting estimates and assumptions is, by definition, based on one or more highly uncertain matters. This, in turn, makes incremental forward looking granularity in respect of the potential impact of an alternative scenario, compared to that assumed by the registrant, challenging (if not impossible) to model and generally without a solid basis for investor reliance. For these reasons, we think that registrants generally repeat some or all of the relevant disclosure from the financial statements in response to Item 303 resulting in redundant boilerplate disclosure of little or no use to investors. Accordingly, we would suggest eliminating this requirement.

3. Risk and Risk Management (S-K Items 305 and 503(c))

We agree with the Staff that disclosure of a registrant's most significant risks provides investors with important context for assessing the registrant's business and prospects. However, risk disclosure requirements have expanded in a piecemeal fashion over time. Currently, registrants are required to discuss risks under various items of Regulation S-K, including Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 303 (MD&A), Item 305 (Quantitative and Qualitative Disclosure About Market Risk) and Item 503 (Risk Factors). In addition to the overlap among these requirements, certain of these items concerning risk have not been updated to reflect developments in financial reporting, creating even more redundancy. In light of this, we would encourage the Commission to consolidate the various risk discussions that are currently scattered throughout registrants' periodic reports into a single, centralized section. In doing so, consistent with a materiality-centric, principles-based disclosure framework, we would encourage the Commission to guide registrants to a risk discussion that highlights the material operational and financial risks that management views as the most significant to the business. We also think that this reformulated risk disclosure should include elements of registrants' risk management methods currently contemplated by Item 305(b) as disclosure about a registrant's approach to risk management could enhance investor understanding of the possible impact of a disclosed risk and the registrant's overall risk profile. Registrants often organize their risk discussion topically and attempt to prioritize the risks within that framework. For example, a company might organize its discussion to include separate sections on business, regulatory, financial and other risks. We believe the Commission should continue to permit this flexibility.

To facilitate this reformulated risk disclosure, we would suggest that the Commission consider the form in which risk factors are presented. Specifically, we believe that risk disclosure generally speaks to the questions about what a company does and how a company does it (including what might go wrong). As discussed earlier, we believe that disclosure relating to these matters is often less dynamic and lends itself fittingly to a company profile system. Under such a system, risk disclosure could be moved to a specific tab on a company profile system and removed from periodic reports, which could then focus primarily on recent performance and future plans. Registrants could be required to update its risk disclosure on a quarterly basis, but the disclosure itself would be removed from the reports, which would significantly reduce the length and scope of periodic reports, enhancing both the navigability and use of both risk disclosure and periodic reports.

In addition to these general suggestions, we have the following observation on risk disclosure requirements:

Item 503(c)—Risk Factors	• Consistent with a materiality-centered, principles-based disclosure framework, we agree with the general approach of Item 503(c) that provides registrants with the flexibility to craft their own risk factors and includes certain specific examples as factors that may make an offering or investment in a particular security speculative or risky. We would not recommend that the Staff include additional prescriptive risk requirements. We generally think registrants are in the best position to understand and disclose the risk specifically pertaining to their business. However, we would recommend that the Staff consider revising Item 503(c) to also include examples of generic disclosure and other items that do not need to be included as risk factors. We think that this would assist registrants in not including factors that they don't believe are specific to their business simply because peers or others in their industry have included. In addition, we think that efforts to limit potential litigation contribute to lengthy risk factor disclosure as registrants may at times seek to provide investors with every conceivable factor that could, if realized, adversely affect the registrant. Absent any change in the rules we think that there is little chance that this over-disclosure decreases. For this reason, we encourage the Commission to address over-disclosure of generic and common risks through the adoption of a safe-harbor protecting registrants from liability solely for failing to identify common and generic risks notwithstanding the inclusion of focused and meaningful registrant-specific risk disclosure.
Item 305—Quantitative and qualitative disclosures about market risk	• We think that the requirements related to quantitative and qualitative aspects of market risks associated with derivatives and other market-sensitive instruments solicit disclosure that is meaningful only for registrants in certain industries, primarily banking and financial services. Although such disclosure can be important to understanding a bank's or financial holding

company's statement of financial position, cash flows and results of operations, we think such disclosure has significantly less value in other industries. Accordingly, we think the Commission should consider limiting the application of these requirements to specific industries or permit exclusion of required disclosure if not material.

In addition, given its current complexity and redundancy with information in the financial statements, we recommend that the Commission consider refocusing Item 305 to encourage registrants to issue materiality-centric, principles-based disclosure of market risk. As noted above, we think that this should be incorporated as one component part of a larger reformulation of risk disclosure. In doing so, we think that the reformulated framework should focus on the information and methods that management actually uses internally to evaluate, monitor and manage market risk. Although adopting this approach may create divergence in presentation among registrants, we think that registrants, in general, actively monitor, and are therefore better situated to communicate in a meaningful form, the market risks to which they are most subject and that investors are most interested. We think this is supported by the fact that, even under the current rules, Item 305 disclosure tends to vary among registrants (for example, large financial institutions often using a combination of tabular, sensitivity and value-at-risk presentations).

4. Registrant's Securities (S-K Items 201(b), 202, 701 and 703)

We think that in light of changes in technology and security ownership, some of the most straightforward disclosure efficiency initiatives involve the current disclosure requirements relating to registrants' securities. First, the internet has made vast amounts of information, including information about registrants' securities (e.g., stock price history and performance), readily available to investors. Various organizations publish for free information which can and does educate investors about economic trends, companies and the industries in which they operate. Moreover, some of these organizations provide advanced and customizable security-research techniques and screening allowing for sophisticated comparative analysis by investors. Second, there have been significant changes in the ownership profile and the manner of ownership of registrants' securities, including a significant increase in institutional ownership and the migration toward holding securities in "street name." We think that these trends prompt the reassessment of the continued utility of certain of the disclosure requirements relating to registrants' securities. In particular:

Item 201(b)(1)—Number of equity holders

- We believe that, in light of the significant migration away from ownership in registered form toward holding in street name, the disclosure required by Item 201(b)(1) is no longer meaningful to investors. Accordingly, we recommend that the Commission remove this requirement.

Item 202—Description of capital stock	•	We agree that a summary description of the material terms and conditions of the registrants' securities in registration statements and applicable proxy statements, as provided under Item 202, remains important disclosure to investors. We also think that such disclosure remains material to investors in the secondary market. We would not, however, recommend adding requirements compelling registrants to include such disclosure in their periodic reports (other than as required by Form 8-K and Schedule 14A). However, even without requiring such descriptions to be included in periodic reports, we think that if a company profile system were developed as discussed above, registrants could efficiently maintain a composite description of their securities easily accessible by investors.
Item 701(a)-(e)—Recent sales of unregistered securities	•	Consistent with a materiality-centered, principles-based disclosure framework, we believe that the Commission should eliminate the disclosure requirements of Item 701(a)-(e). To the extent recent sales of securities are material to investors, there are other disclosure requirements that would trigger such disclosure, including Item 303(a)(1) and (2) under which registrants are required to describe their liquidity and capital resources over the periods covered by financial statements included in the registration statement. Registrants do, and we believe would continue to, discuss any meaningful amount of proceeds from the issuance of their securities in their liquidity and capital resources discussion. In addition, the cash flow statements included in the registration statement contain more detailed information about the proceeds of securities issuances in the applicable periods, as do the statements of stockholders' equity with respect to sales of equity securities. In addition, Item 404 requires disclosure of the terms of any such sales made to related persons. In light of the expense to registrants to compile and document the information required by Item 701(a)-(e) even where immaterial and the redundancy, we recommend the elimination of these disclosure requirements. However, if the Commission retains Item 701(a)-(e), we would recommend that Item 701(c) be revised to allow for a range of prices rather than the price for each sale. This modification would continue to provide investors with a substantive understanding of the consideration involved without requiring the registrant to itemize each transaction in a manner that is distracting and challenging to compile.
Item 701(f)—Use of proceeds from registered securities	•	Under Item 504, registrants are required to disclose the principal purposes for which the net proceeds of an offering are intended to be used. We agree that such information is generally useful to investors. However, we do not believe that the continuing requirement to provide information regarding the application of proceeds pursuant to Item 701(f) in subsequent

		periodic reports provides meaningful information to investors given that cash is fungible and it is impossible for registrants, and therefore investors, to determine whether cash derives from net proceeds or operations. Moreover, a registrant's cash flow statement will disclose the use of cash in the applicable period covered by the periodic report and discussion of cash flow under Item 303 discusses the material uses of cash. Therefore, we recommend the elimination of Item 701(f).
Item 703—Purchases of equity securities	•	In light of the increase in stock repurchases by registrants over the years, we agree with the Staff that disclosure in respect of whether, and to what extent, registrants execute announced stock repurchase plans is meaningful information to investors. However, there is significant overlap between the disclosure objectives required by Item 703 and U.S. GAAP. We suggest that the Staff work with the Financial Accounting Standards Board to coordinate to issue joint guidance on how both requirements should work together to avoid redundancy and the provision of immaterial information.

5. Industry Guides

As an initial matter, we think that there is some level of confusion among registrants and investors in respect of the existing Industry Guides. In particular, although the Industry Guides are reflected in the table of contents to Regulation S-K, they are technically and physically separated from Regulation S-K. Consistent with the recommendations of the Task Force on Disclosure Simplification in 1996, we recommend that the Industry Guides be subject to the Commission's rulemaking process with an opportunity for public comment, following which they should be incorporated into Regulation S-K. Although codifying the Industry Guides theoretically provides less flexibility to registrants to determine industry-specific disclosures, our experience suggests that registrants already generally treat the Industry Guides the same as other itemized disclosure requirements of Regulation S-K. In this light, we think that incorporating the Industry Guides into Regulation S-K, following notice-and-comment rulemaking, will clarify their import to registrants and create a stable set of requirements that will not be changed from time to time on a unilateral basis by the Commission or the Staff.

We additionally recommend that all of the industry-specific disclosure requirements be modernized and updated. In this modernization of the Industry Guides, whether or not it occurs as part of notice-and-comment rulemaking, we recommend that the Commission focus less on prescriptive disclosure requirements that apply equally to all or most registrants in a particular industry and more on facilitating disclosure of specifics relevant to a particular registrant. We also do not think that additional Industry Guides should be created.

6. Exhibits (Item 601)

As a threshold matter, we question the value of Item 601(b)(10) and would encourage the Commission to consider its ongoing utility in light of its disadvantages. In this respect, we note that almost by definition Item 601(b)(10) results in over-disclosure given the material terms and substance of material contracts are already summarized in the periodic and/or current reports. In fact, the Staff implied as much in the Form 8-K Adopting Release when explaining its rationale

for delaying the exhibit filing requirement of Item 1.01 of Form 8-K.[9] In addition, requiring the full contract to be filed often results in either the release of competitively sensitive information that is not material to investors' understanding of the contract or a timely confidential treatment request process that can require significant time and resources from the registrant and the Staff. Additionally, it is not uncommon in our experience that registrants must engage in time-consuming negotiations with contractual counterparties in respect of information to be redacted from contracts which can delay an entire transaction process. In considering the ongoing value of Item 601(b)(10), we would encourage the Commission to consider the disclosure regimes in other jurisdictions, the majority of which do not have any comparable requirement.

Aside from eliminating Item 601(b)(10), we believe that the Commission can meaningfully improve the usability of exhibits by modifying their method of presentation. In particular, we would suggest that the Commission consider the company profile construct discussed above, whereby the list of exhibits could be hyperlinked behind a specific exhibit tab. Such exhibits could be required to be updated in connection with the filing of annual reports such that the relevant exhibit, as amended, is available to investors. Prior to the development of a company profile system, we would suggest that the Staff consider allowing hyperlinks within an exhibit index to the underlying exhibits, a change that would eliminate the need to parse through historical filings in search of a desired document. In addition, we have the following suggestions to the existing exhibit requirements:

Item 601—Exhibits

- Short of eliminating the exhibits requirements of Item 601, we recommend that Item 601 be revised to permit the omission of schedules to all exhibits required to be filed unless such schedules contain material information that is not otherwise disclosed in the exhibit or in the filing (as is the case with current Item 601(b)(2)). Many exhibits, similar to agreements filed under Item 601(b)(2), include schedules that contain information that is not material to investors or that has been disclosed or sufficiently described elsewhere in the exhibit or in the disclosure. Examples of schedules and attachments providing information that may be immaterial include detailed product specifications, implementation plans, out of context lists of specific immaterial intellectual property assets. Given the limited value to investors and the cost to registrants to ensure correctness of potentially voluminous amounts of information, we think Item 601 should be revised to permit the omission of schedules to all exhibits required to be filed unless such schedules contain material information that is not otherwise disclosed in the exhibit or in the filing. We also think that registrants should not be required to file immaterial amendments to material contracts that have been filed as exhibits.

  In addition, we recommend that the relationship between Item

[9] See Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15594 (Mar. 25, 2004)] ("Form 8-K Adopting Release") ("Given the initial disclosure of the agreement and its material terms, delayed filing of the exhibit should have minimal effect on the utility of the Item 1.01 disclosure.")

601(b)(10) and Item 1.01 of Form 8-K be clarified. Although the Form 8-K Adopting Release notes that Item 1.01 parallels Item 601(b)(10) of Regulation S-K, the requirements of Item 1.01 and Item 601(b)(10) differ insofar as the latter contains specific exceptions to the general rule that contracts made in the ordinary course of business need not be filed. We think this has created confusion among registrants with respect to how their obligations relate and whether a contract may be required under Item 601(b)(10) but not under Item 1.01 of Form 8-K. We encourage the Commission to revise the requirements such that they are aligned.

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We appreciate the opportunity to participate in this process, and would be pleased to discuss our comments or any questions the Commission or its staff may have, which may be directed to Bruce K. Dallas, Derek Dostal, Joseph A. Hall, Michael Kaplan, Shane Tintle or Richard D. Truesdell, Jr., of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP