SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, New York 10004-2498

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.
FRANKFURT • LONDON • PARIS
BEIJING • HONG KONG • TOKYO
MELBOURNE • SYDNEY

August 9, 2016

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

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-1090.

Attention: Brent J. Fields, Secretary

Re: Business and Financial Disclosure Required by Regulation S-K – File No. S7-06-16

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Commission's concept release and request for comment on modernizing business and financial disclosure requirements in Regulation S-K (the "Release").[1] The Release includes a comprehensive review of the portions of Regulation S-K it addresses and poses hundreds of detailed questions, apparently in contemplation of a similarly wide-ranging rule-making proposal to follow. While the effort to modernize Regulation S-K is commendable, we respectfully submit that this sort of comprehensive, bottoms-up approach is not the best or quickest or most efficient way to enhance the overall quality of registrant disclosure. Rather, for the reasons elaborated below, we suggest a different approach, one that would build on the fundamentally sound foundation of the Commission's existing disclosure

---

1 Release No. 33-10064; 34-77599 (April 22, 2016).

rules, and then focus attention and effort at the individual issuer level, where disclosure judgments are most meaningfully and most effectively made.

Proposed Approach

We think that the best and most efficient way the Commission could drive improvement in the overall quality of registrants' disclosure would be to (1) subject all of Regulation S-K line-item disclosure requirements to an over-arching materiality standard, and then (2) devote substantial attention, on an ongoing basis, to developing interpretive guidance on specific industry or situational topics (with the usual follow-up provided by the staff review and comment process).

The first element of this suggested approach could be implemented relatively easily. One of the pre-Release comment letters[2] included a proposed a new subsection (g) to Item 10 of Regulation S-K, which would be an excellent starting point for developing such a provision:

> "In addition to the information expressly required to be disclosed, the registrant shall disclose such additional material information, if any, as may be necessary to make the required statements in the light of the circumstances under which they are made not misleading, and issuers may omit information otherwise called for by a line item on the ground that it is not material, as long as the effect of omitting the information would not be misleading. It shall be presumed, in the absence of facts to the contrary, that the omission of any disclosure called for by a Regulation S-K line item was an intentional omission by

---

2 Letter submitted by Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, et al., Business Law Section, American Bar Association (March 6, 2015), *available at* https//www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.

> the registrant in reliance upon this sub-section (g) and not a failure to provide the disclosure called for by such line item."

Our only change to this suggested provision would be to add an express statement clarifying that is does not override the requirements of Item 3.03 of Regulation S-K to disclose known trends and uncertainties that will or are reasonably likely to have a material effect on financial condition or operating results. The known trends and uncertainties requirement is a fundamental element of the current disclosure rules, which we would not propose to change. Given the Commission's position that this requirement is not governed by the two-part probability and magnitude test of Basic v. Levinson, the suggested clarification seems desirable, if not necessary.

We would further suggest that in adopting such a provision, the Commission take the opportunity to confirm the meaning of "material" for these purposes. Specifically, in the context of Securities Act registration and Exchange Act periodic reporting (and absent a specific subsequent statutory requirement, such as the "conflict minerals" provisions of §1502 of the Dodd-Frank Act), "materiality" is an economic standard, relating solely to matters that could ultimately be thought to bear on firm value and thus the value of the issuer's securities. We believe that this confirmation would be entirely consistent with the Commission's longstanding views, as well as its statutory authority, and would be a timely reminder, given the wide range of comment letters that appear to be premised, to a greater or lesser extent, on some other conception of the term.

The second element of our proposed approach is really just a continuation of the Commission's (and the staff's) past practice of providing targeted guidance on

matters of topical interest, including in recent years climate change[3] and cybersecurity[4]. We suggest that the Commission prioritize its efforts going forward, concentrating on the most challenging emerging topics – for example, sustainability disclosure. We think it is just axiomatic that by focusing its efforts on the most challenging emerging topics, the Commission would put itself in the best position to drive improvement in the overall quality of issuer disclosure.

Rationale for Proposed Approach

1. *Existing disclosure requirements are not that bad, particularly if subject to a general "materiality" override.*

There are certainly specific areas which from time to time benefit from targeted rulemaking, particularly where the Commission can leverage off the work of others; the recently proposed property disclosure rules for mining registrants[5], which would bring the Commission's rules in line with current industry and global regulatory standards, is a good example of that. (In reviewing the comment letters responding to the Release, the Commission may identify other "high value" targets, but we would urge it to be quite selective in this regard). There are also opportunities to reorganize and simplify existing guidance, which would be helpful to registrants and likely lead to improved disclosure; the existing guidance on MD&A, which is generally of very high quality but consists of many different pieces, would benefit from such a revision. And periodic cleanup of the rules, such as the recently proposed Disclosure Update and

---

3 Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106; 34-61469 (Feb. 8, 2010)

4 CF Disclosure Guidance: Topic No. 2, Cybersecurity (October 13, 2011).

5 Release No. 33-10098; 34-78086 (June 16, 2016)

Simplification[6], is also useful from time to time. But we don't see the existing disclosure requirements as fundamentally flawed, and would not expect a comprehensive review of Regulation S-K, if carried through completion of rule-making, to result in substantial changes. If the existing requirements were now made subject to a general materiality override, we think registrants could continue to develop, and refine and improve, their disclosure in a positive and satisfactory manner. This would particularly be the case if going forward, the Commission focused, as we suggest, on developing and providing guidance on emerging topics.

2. Writing (or revising) prescriptive line-item disclosure requirements is very difficult to do.

We have substantial experience advising registrants on disclosure matters. To be effective in that practice, it is essential to gain as clear an understanding as possible of the registrant's particular facts and circumstances, and then to make disclosure judgments in that context. Those particular facts and circumstances frame the thought process. While this work is interesting and challenging, we submit that formulating generally-applicable line item disclosure requirements, which by their nature must be developed in the abstract, is at least several orders of magnitude more difficult than making individualized disclosure judgments. Apart from the abstraction, there is the unavoidable fact that pieces of information that are very significant for some issuers will be irrelevant for others. And while it is possible to form judgments on even abstract questions, we do not see any meaningful way to *quantify* the costs and benefits of a particular item of required disclosure. "Disclosure overload" may or may not be a serious problem – views obviously differ – but it is very hard to translate one's views on that subject into a concrete and defensible rationale for specific changes to line item

---

6 Release No. 33-10110; 34-78310; IC-32175 (July 13, 2016).

requirements. If the objective is to improve the overall quality of registrants' disclosure, then a comprehensive revision of the line item requirements is not the obvious or easy way to get there.

We think the Commission's disclosure regime is and always will be critically dependent on the materiality principle (reflected in Rule 408 and Rule 12b-20) to fill in the gaps, for individual registrants, left by the line item requirements. It seems only logical to adopt this principle in both directions – permitting omission of immaterial information, as well as requiring addition of unspecified but material information – and to focus attention and resources on individual registrants' disclosure, rather than on comprehensive attempts to perfect generally-applicable disclosure requirements.

3. *A targeted approach to revision of disclosure standards, responding to identified problems and leveraging off the work of others whenever possible, would a better path to more improvement, delivered more quickly and efficiently.*

On one level, it might be thought self-evident that focusing time and effort on areas most in need of development or improvement will yield the best and most impactful results. But we think the emerging topic of "sustainability" disclosure illustrates the point in a concrete way.

The comment letter submitted by the Sustainability Accounting Standards Board ("SASB") sets out a cogent analysis of existing disclosure practices with respect to sustainability, the lack of current guidance, and how disclosure standards might be developed in the context of the Commission's materiality-based disclosure system. Development of prescribed industry-specific disclosure metrics (as suggested by SASB) strikes us as an extremely ambitious goal, and we do not think the Commission should take up SASB's suggestion to simply outsource the job to SASB; among other things, whatever "due process" SASB has done to date, the usual notice-and-comment public debate at Commission level would be essential to any development of specific

prescriptive guidance in this area. At the same time, as reflected in a wide range of comment letters and elsewhere, the sustainability topic is clearly on the table at this point, and the Commission will sooner or later have to – and should – address it. We think that SASB's work to date and its ongoing efforts could represent an important contribution to the Commission's development of disclosure standards in this area, but that development of those standards would still be an enormous task for the Commission. This is the sort of challenge toward which the Commission should be concentrating its resources.

4. *How one thinks about line-item disclosure requirements would be substantially affected by a real update of the Commission's technology platform, which should be a high priority.*

The Commission's EDGAR platform is in need of a substantial update, focused on the way information is conveyed to investors and other users of the platform. From the registrant and liability perspectives, the traditional model of stand-alone periodic and current reports, filed in response to set deadlines or defined triggering events, continues to make sense. But from the investor or user perspective, the resulting reverse-chronological file of self-contained reports is very difficult to navigate, particularly when the user wishes to locate specific information about a registrant, and particularly for retail or other smaller investors. Updating the user interface should be a matter of priority, and the Commission should aim high in this effort.

We think that the "company file" approach, as elaborated in the pre-Release comment letter of the Disclosure Effectiveness Working Group of two ABA committees[7], would be a worthy objective. Even if focused entirely on the user

---

7 Letter submitted by David Lynn, Chair, Federal Regulation of Securities Committee, et al, Business Law Section, American Bar Association (February 15, 2016), *available at* https//www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.

experience, with no change to registrants' disclosure requirements, such an approach would almost certainly involve many changes to how registrants' information is (at the point of delivery) presented and formatted, and layered and cross-referenced. Those changes, in turn, could have a significant impact on the way one thinks about line-item requirements going forward. To give some obvious examples, a platform that sorted registrant information into an accessible and easily used format might reduce concerns about "information overload;" it also might permit a streamlining of required disclosure, to focus on things that are new and different at the time of each filing. Because we think the technology platform should be a very high priority, we see this as an additional reason to defer a comprehensive review of line-item disclosure requirements.

5. *Adoption of a general "materiality" overlay will not necessarily reduce the amount of disclosure, but would improve the quality of disclosure.*

The Commission and its staff have many tools to promote high-quality disclosure and to target practices deemed undesirable. The recent and ongoing focus put on registrants' use of "non-GAAP measures" – through speeches, published staff guidance, and review of individual filings – illustrates this point. We are not suggesting adoption of a general materiality standard as a way to ease the burden on registrants, but rather as a way to rationalize and improve the Commission's disclosure requirements. The Commission could fully address any concerns on this score through the messaging that accompanies adoption of such a standard. Permitting registrants to tailor their disclosure more closely to their particular facts and circumstances, under the staff's watchful eye, should result in clearer and more effective disclosure.

* * *

If you would like to discuss our letter, please feel free to contact Robert E. Buckholz at [redacted] or Robert W. Downes at [redacted].

Very truly yours,

Sullivan & Cromwell LLP

Sullivan & Cromwell LLP