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May 16, 2016

Mr. Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

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

Dear Mr. Fields:

Wachtell, Lipton, Rosen & Katz is pleased to submit these comments to the Securities and Exchange Commission (the "Commission") in response to the Concept Release on Business and Financial Disclosure Required by Regulation S-K (File No. S7-06-16, Release Nos. 33-10064, 34-77599) (the "Regulation S-K Concept Release").

We applaud the Commission's acknowledgment that the structure and effectiveness of the disclosure system should be reviewed in light of modern investor needs and disclosure practices. Set forth below are what we believe should be the Commission's key areas of focus in this initiative.

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*Disclosures in the New Paradigm*

As we have written elsewhere,<sup>1</sup> a developing new paradigm for corporate governance prioritizes sustainable value over short-termism, and integrates long-term corporate strategy with engagement between companies, their directors and long-term shareholders. We believe that the Commission's reforms should be crafted with this new paradigm in mind, so that the disclosure system facilitates the communication of information that investors want to hear and that companies want to convey.

In some respects, the Regulation S-K Concept Release is an important step in this direction. For example, the Regulation S-K Concept Release asks whether registrants should provide an executive-level "overview of their performance in the most recent year as well as expectations and concerns for the coming year, similar to what a CEO might report to the Board of Directors."<sup>2</sup> Such an overview could be a useful means for explaining to investors how management and the board think about performance, strategy, expectations, capital allocation priorities, future drivers of growth, key risks and other important topics of concern.

Similarly, disclosure about companies' approach to risk management, another area of inquiry in the Regulation S-K Concept Release, potentially can be useful for investors, in order to better understand how companies are adapting to and dealing with evolving issues relating to, for example, cybersecurity. Likewise, environmental, social and governance ("ESG") issues, discussed in the Regulation S-K Concept Release, have become a focus of engagement between investors and companies.

*Facilitating Relevant Disclosures*

That companies and investors want to broaden their communication on topics such as those mentioned above is demonstrated by the increasing discussion of these topics outside of periodic filings under the Securities Exchange Act of 1934 (the "Exchange Act"). For example, companies often present detailed "deep dive" reviews of their strategy, performance, capital allocation, etc. on "investor days," and are increasingly discussing ESG and related issues in dedicated sections of their websites.

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<sup>1</sup> See, e.g., Martin Lipton, *An Important British Version of a New Paradigm for Corporate Governance* (2016), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25193.16.pdf>; Martin Lipton, Sabastian V. Niles and Sara J. Lewis, *Succeeding in the New Paradigm for Corporate Governance* (2016), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25172.16.pdf>; Martin Lipton, *The New Paradigm for Corporate Governance* (2016), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25155.16.pdf>; Martin Lipton, *The New Paradigm for Corporate Governance* (2016), <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25114.16.pdf>.

<sup>2</sup> Regulation S-K Concept Release, at 98-99 and note 292, referring to a comment letter from the Committee on Financial Reporting, New York City Bar (Sept. 3, 2014).

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This observation—that companies are communicating about issues of concern to investors outside of Exchange Act filings—provides important context. Put simply, many companies and investors do not view Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q as an effective means of communicating. This is partly because companies understand that investors do not want to wade through all of the information in an Exchange Act filing in order to find the information that is most relevant to them. Over time, Exchange Act periodic reports have become ever more prescriptive, with increasing line-item disclosure requirements and Commission guidance as to content.<sup>3</sup> As acknowledged in the Regulation S-K Concept Release, the Supreme Court “has held that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.”<sup>4</sup> Yet it is difficult to conclude that all or even most of the information required to be included in Exchange Act filings meets this standard of materiality. Furthermore, the risk of liability for failure to disclose information also encourages companies to overdisclose, in order to minimize the risk of a claim that some fact or risk, in hindsight and in a regime laden with prescriptive requirements, arguably should have been disclosed, even if it was reasonably viewed at the time as immaterial and not required to be disclosed. As a result, many companies feel compelled to sacrifice usefulness and accessibility in favor of protection from legal risk through overdisclosure and standardized disclosure such as “boilerplate” risk factors. Such overdisclosure not only burdens corporate resources—at the expense of all shareholders—but often buries shareholders in an avalanche of information that ultimately limits the practical utility of Exchange Act filings.

This context has significant implications for the Commission’s review of the disclosure system. As an initial matter, simply adding more line items to Forms 10-K and 10-Q—even on topics that companies and investors may want to communicate about in the new paradigm—may be counterproductive. Disclosures added to these periodic filings pursuant to new mandates may end up being written with a view to minimizing legal risk rather than maximizing informativeness. Periodic filings will become even lengthier, and even less likely to be reviewed by investors.

We encourage the Commission to adopt reforms that facilitate the inclusion of relevant, readable disclosure, and eliminate incentives for unhelpful overdisclosure. For example, the

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<sup>3</sup> A recent paper notes that some have been concerned that “corporate disclosure (in particular the annual report, Form 10-K) is becoming increasingly lengthy, redundant, complex, and onerous.” The paper’s authors found evidence that “the largest drivers of 10-K length are additional disclosures created in response to new disclosure requirements.” The paper’s authors further state that “[w]hile we cannot make any conclusions about the net benefits of these new requirements, our results suggest that the costs to financial statement users in the form of unnecessarily long and complex disclosures are larger than perhaps anticipated, with only limited benefits in the form of additional information.” Travis Dyer, Mark H. Lang and Lorien Stice-Lawrence, *The Ever-Expanding 10-K: Why are 10-Ks Getting so Much Longer (and Does it Matter)?* (March 3, 2016), <http://ssrn.com/abstract=2741682>

<sup>4</sup> Regulation S-K Concept Release, at 37 and note 107, referring to *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) at 231, quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) at 449.

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Commission could adopt a rule providing that, if a company chooses to include in its Form 10-K an executive-level overview of the type described above, the overview would be deemed “furnished” rather than “filed,” similar to the current treatment of compensation committee reports disclosed pursuant to Item 407(e)(5) of Regulation S-K under Instruction 2 to that Item. The Commission also could expressly provide that the safe harbors for forward-looking statements are available for such an executive-level overview, similar to the Commission’s position that forward-looking disclosures included as part of Management’s Discussion and Analysis of Financial Condition and Results of Operations are eligible for such safe harbors.<sup>5</sup> Disclosure of risk management, sustainability and ESG-related information also could be encouraged if the Commission makes clear that such disclosure does not create incremental liability risk, for example, by similarly providing that such disclosures are eligible for the forward-looking statement safe harbors, and by adopting an interpretation that such disclosures should not be read as assertions that the risks described in risk factor disclosures have been mitigated. Risk factor disclosure could be streamlined if registrants were given more comfort that their disclosure obligations truly are limited to the actual line item requirement for risk factors, which provides for “the most significant factors that make an investment in a registrant’s securities speculative or risky.”<sup>6</sup>

Issuers should also be provided with greater flexibility in the types of information required. For example, the extensive prescriptions regarding the manner in which companies must describe their business in their Form 10-K could be replaced with more high-level, principles-based requirements that give companies more flexibility (subject, of course, to antifraud rules) to supplement and/or replace detailed narrative disclosure with more easy-to-read formats (which may include graphics) to convey this information.

#### *Flexibility in Communicating to Different Investor Audiences*

We also urge the Commission to expand companies’ ability to satisfy disclosure requirements by posting information on their website and incorporating it by reference into their filings. This would allow companies the choice to use their Exchange Act filings to provide more focused discussion of key financial information in a standardized way, to serve the needs of market participants who may value standardization (e.g., active institutional investors and research analysts who regularly review disclosures of significant numbers of companies on a

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<sup>5</sup> See, e.g., Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Release No. 33-6835 (May 18, 1989) [54 FR 22427 (May 24, 1989)] (explaining that the safe harbors of Securities Act Rule 175(c) and Exchange Act Rule 3b-6(c) apply both to required statements in the MD&A concerning the future effect of known trends, demands, commitments, events or uncertainties, as well as to optional forward-looking statements); Brief for Securities and Exchange Commission as Amicus Curiae, *Slayton v. Am. Express Co.*, No. 08-5442-cv (2d Cir.), filed on January 21, 2010, <http://www.sec.gov/litigation/briefs/2010/slayton0110.pdf> (setting forth the Commission’s view that the safe harbors provided by the Private Securities Litigation Reform Act of 1995 are available for forward-looking statements made in the MD&A).

<sup>6</sup> See Item 503(c) of Regulation S-K.

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comparative basis), while using other media to convey information in a more customized and/or high-level format for investors who benefit more from readability than standardization and granular detail. The Commission also should facilitate the use of modern technology such as social media platforms to communicate with investors, as many companies already are doing. This may also require, for example, that certain online materials accessed and made available through filings, nonetheless not be deemed “filed” for liability purposes.

As an overarching principle, the Commission’s approach to these matters should be voluntary, rather than prescriptive, to give each company a range of options as to how to communicate with its investors in the most effective way given its particular circumstances and to allow best practices to develop in the marketplace.

*Conclusion*

The Regulation S-K Concept Release represents an important step towards modernization of the disclosure system. We urge the Commission to prioritize companies’ flexibility to communicate with investors about the topics most relevant to them, through user-friendly and customizable methods, accessible within the Commission’s system, while taking advantage of technological advances. Such an approach will best serve the goal of investor protection in a way that both is robust and continues to be effective as methods of communication and areas of investor concern inevitably continue to change.

Please feel free to contact Andrew R. Brownstein, Adam O. Emmerich, David M. Silk, Andrew J. Nussbaum, William Savitt or Victor Goldfeld at 212-403-1000 to discuss any of these matters in more detail.

Very truly yours,

*Wachtell, Lipton, Rosen & Katz*

Wachtell, Lipton, Rosen & Katz