



KPMG LLP  
345 Park Avenue  
New York, N.Y. 10154-0102

Telephone +1 212 758 9700  
Fax +1 212 758 9819  
Internet [www.us.kpmg.com](http://www.us.kpmg.com)

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Office of the Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

**File No. S7-08-17**  
**FAST Act Modernization and Simplification of Regulation S-K**  
**Release Nos. 33-10425; 34-81851; IA-4791; IC-32858**

Dear Office of the Secretary:

We appreciate the opportunity to respond to the Securities and Exchange Commission's (SEC or Commission) request for comment on the proposed rule, *FAST Act Modernization and Simplification of Regulation S-K* (Proposed Rule). KPMG continues to support the ongoing efforts of the SEC to improve the public company disclosures provided to investors for purposes of making their investing and voting decisions.

Overall, we agree with the Commission that the disclosure requirements of Regulation S-K should be modernized as it currently has numerous disclosure requirements that have become outdated, duplicative, unnecessary, and/or fail to leverage technology. We also believe the compliance efforts of registrants and their auditors could be simplified by updating the disclosure requirements in Regulation S-K while still providing relevant, useful and material information to investors.

The Proposed Rule reflects these concepts and objectives, and while we agree with several of the proposed amendments, we recommend that the Commission;

- establish clear disclosure objectives for Regulation S-K;
- clarify how to operationalize proposed changes to Management's Discussion and Analysis (MD&A) and the use of incorporation by reference and hyperlinks; and
- fully consider how incorporation by reference and hyperlinks may affect auditors and their responsibilities in complying with the Public Accounting Oversight Board's (PCAOB) auditing standards.

We have expanded on those observations requiring the Commission's further consideration.

## Disclosure Framework

As part of the simplification of Regulation S-K, and as communicated in our previous comment letter<sup>1</sup>, we encourage the Commission to incorporate within the rules and regulations the objective(s) of the disclosure requirements. We believe clear objectives established through an objectives-based disclosure framework would enable registrants and investors to better understand the intent and benefit of each disclosure requirement. In our view, the SEC's existing materiality standard combined with clear objectives would not only promote company-specific, rather than boiler-plate, disclosures, it may also assist in reversing the trend of the increasing length and complexity of filings.

## Management's Discussion and Analysis

The Commission is proposing that for registrants providing financial statements covering three years in a filing, a discussion of the earliest year would not be required if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations, and (ii) the registrant has filed its prior year Form 10-K on EDGAR containing MD&A of the earliest of the three years included in the financial statements of the current filing. As currently drafted, it is unclear why, if the registrant concludes the third year back is not material, it can only take advantage of omitting the discussion for the earliest of the three years if it has filed that discussion in its prior year Form 10-K. Without clarification, this condition could suggest that the current filing information, *in conjunction with* the discussion in the previously filed Form 10-K, is required to fulfill the three-year discussion under Item 303 of Regulation S-K.

We do not believe it is the Commission's intent that the content of both filings be required for a registrant to satisfy the three-year disclosure requirement in a current Exchange Act of 1934 (Exchange Act) or Securities Act of 1933 (Securities Act) filing. While there is no discussion in the proposing release to suggest this is the case and the Proposed Rule does not include any amendments that would require a registrant to incorporate by reference into a Form S-3 a previous year's Form 10-K *and* the most recent Form 10-K, if the disclosure in both filings were to be required to satisfy the three-year discussion requirement for MD&A, it is unclear how this should be considered in the securities offering process. As the Commission considers this observation, we encourage outreach to underwriters and other participants about any unforeseen consequences of this condition.

We believe that registrants, with the encouragement of the SEC staff in speeches<sup>2</sup>, have always had the ability to omit discussion from MD&A that is no longer material or relevant resulting from the passage of time and changes in a registrant's business. If the Commission's intent is to

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<sup>1</sup> KPMG comment letter on *Business and Financial Disclosure Required by Regulation S-K*, SEC Release Nos. 33-10064; 34-77599, July 21, 2016, page 2.

<sup>2</sup> Keith G. Higgins, "Disclosure Effectiveness" (Speech, American Bar Association Business Law Section Spring Meeting, April 11, 2014), [www.sec.gov](http://www.sec.gov).

eliminate the discussion of the third year back when it is not material, we recommend the Commission provide additional guidance about the circumstances when it would be appropriate to include or exclude discussion about the earliest of the three years. Otherwise registrants may default to including discussion of the earliest year in their current filings to minimize the risk of their materiality assessment being challenged.

Some registrants will likely continue to base their three-year discussion on a year-to-year comparison of financial statement items (as permitted) because they believe it to be the best way to frame the discussion. We recommend the Commission clarify in the final rule whether or not it would be sufficient to include only a comparison of the most recent fiscal year to the previous year in the current filing if a registrant determines discussion of the third year back to be immaterial.

As registrants may have revised the earliest year's MD&A in a filing<sup>3</sup> other than the prior year Form 10-K, we recommend the Commission expand the second condition to permit exclusion of the earliest year if it was previously filed in any SEC filing on EDGAR made by that registrant under the Securities Act or Exchange Act, such as Form S-1, Form S-4, Form 10 and Form 8-K. If the Commission concludes that the current filing information, *in conjunction with* the discussion in the previously filed Form 10-K, is required to fulfill the three-year discussion under Item 303 of Regulation S-K (see earlier discussion) and a registrant omits the third year back in its current filing because it is no longer material, we recommend that a registrant disclose in its current Form 10-K or other current filing the form (and its filing date) that includes the MD&A discussing the earliest of the three years.

Furthermore, we do not believe a restatement, retrospective adoption of a new accounting principle, or other events that require a registrant to recast prior year financial statements should preclude the registrant from excluding the earliest of the three years MD&A discussion in a current filing if the registrant has concluded that the third year discussion is not material to understanding the registrant's financial condition, changes in financial condition or results of operations. In the final rule, we recommend that the Commission clarify that when MD&A filed for the earliest year does not correspond to the financial statements included in the current Form 10-K it is still subject to the same assessment of whether the third year discussion is material. Consistent with our comment above, the registrant retains its responsibility to adhere to the disclosure objectives regardless of the presence of these circumstances.

We encourage the Commission to perform outreach to investors to gather their perspective to understand any potential impact of this proposed change to their needs to make informed investment decisions.

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<sup>3</sup> Registrants commonly file revised financial statements and MD&A on Form 8-K or in a registration statement to report major events that affect a registrant's prior year financial statements, such as discontinued operations and changes in segments.

## **Auditor's Responsibility**

We agree with the Commission's goal to enhance the accessibility and navigability of documents. As previously communicated<sup>4</sup>, the auditor's responsibility for "other information" may require revised guidance from the PCAOB. Paragraph .04 of PCAOB Auditing Standard (AS) 2710, *Other Information in Documents Containing Audited Financial Statements*<sup>5</sup>, states:

"The auditor's responsibility with respect to information in a document does not extend beyond the financial information identified in his report, and the auditor has no obligation to perform any procedures to corroborate other information contained *in a document* (emphasis added). However, he should read the other information and consider whether such information, or the manner of its presentation, is materially inconsistent with information, or the manner of its presentation, appearing in the financial statements."

If the auditor were to uncover other information that is materially inconsistent with information, or the presentation of such information, that appears in the financial statements, then the auditor is required to determine whether the financial statements or the auditor's report, or both, require revisions.

Our concern is that it is unclear, and thereby challenging to determine, what constitutes a "document" as discussed in PCAOB AS 2710.04, when hyperlinks are used. If hyperlinks are encouraged by the SEC, it is critical for "document" to be clearly defined and to fall within a registrant's system of disclosure controls and procedures to provide appropriate parameters for auditor involvement. Therefore, we support the Commission's proposal that a description of the location of the information hyperlinked and incorporated by reference be provided.

In the Proposed Rule, the Commission asked if the information that may be incorporated by reference into a prospectus under any of the Commission's forms should be changed. Similar to our above concerns, changes in the information incorporated by reference may impact the auditor's responsibility for that information. While the scope of AS 2710 includes only annual reports filed with the SEC under the Exchange Act, PCAOB AS 4101, *Responsibilities Regarding Filings Under Federal Securities Statutes*, provides guidance to auditors on registration statements filed under the Securities Act. PCAOB AS 4101.02 states that an auditor's responsibility with respect to registration statements containing their audit report is in substance no different from that involved in other types of reporting. In addition, while the Auditing Standards Board Statement on Auditing Standards – Clarified (AU-C) 925, *Filings With the U.S. Securities and Exchange Commission Under the Securities Act of 1933*, relates to exempt offerings, paragraphs .07 and .08 provide additional guidance to auditors on their responsibilities

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<sup>4</sup> [KPMG comment letter on Business and Financial Disclosure Required by Regulation S-K](#), SEC Release Nos. 33-10064; 34-77599, July 21, 2016, pages 5 – 7.

<sup>5</sup> PCAOB AS 2710 covers all other information included in a registrant's annual reports filed with regulatory authorities under the Exchange Act and other documents to which the auditor, at the client's request, devotes attention.

when their audit report on audited financial statements are included in a registration statement filed under the Securities Act. It is important that any such revisions by the Commission consider the auditor's responsibility as specified in these current auditing standards.

Therefore, because of the impact the above observations regarding hyperlinks and incorporating information by reference, whether it be in a Securities Act or Exchange Act filing, may have on auditing standards, we encourage the Commission to collaborate with the PCAOB. Such association may facilitate the parallel release and implementation of the Commission's rules with that of conformed auditing standards involving auditor responsibility for other information in documents containing audited financial statements, including any additional information that potentially may be incorporated by reference into a prospectus under any of the Commission's forms.

#### **Foreign Private Issuers (FPIs)**

We support the Commission's proposed amendment to prohibit registrants from incorporating or cross-referencing information that is outside the financial statements into their financial statements unless otherwise specifically permitted or required by the SEC's rules; however, this amendment may present challenges for FPIs who prepare their financial statements in accordance with International Financial Reporting Standards (IFRS) or home country laws or regulations that permit certain disclosures that are part of the audited financial statements to be located outside the related notes with a cross-reference in the notes to the financial statements that identified this information, such as allowed by IFRS 7, *Financial Instruments: Disclosures*. Therefore, we recommend the Commission tailor this amendment to permit FPIs to incorporate by reference or cross-reference information outside of the audited financial statements when expressly permitted by IFRS, law, regulation, or by the primary securities regulator in the FPI's home country jurisdiction.

#### **Registered Investment Companies**

The proposed amendments to Investment Company Act Rule 0-4 prohibit a registrant from incorporating by reference or cross-referencing to information in an investment company's financial statements to satisfy its non-financial information disclosure requirements. However, the proposed amendments do not prohibit an investment company from incorporating by reference or cross referencing to all or portions of financial statements to satisfy other financial statement requirements.

It is unclear how the proposed amendments to Rule 0-4 would apply to reporting under master/feeder arrangements and certain fund of funds arrangements. A feeder fund generally invests its assets solely in another investment company known as the master fund. In certain circumstances, a fund of fund may have a single investment that is so significant management should consider whether it would be appropriate to attach the financial statements of that single

investment to the fund of funds financial statements.<sup>6</sup> We recommend the Commission clarify whether the intent of the rulemaking is to allow a feeder fund and certain fund of funds to incorporate by reference the financial statements of the master fund or another fund that is deemed to be significant or whether the Commission expects investment companies to continue to apply informal guidance currently in place.<sup>7</sup>

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We appreciate the opportunity to respond to the Request for Comment. If you have any questions regarding our comments or other information included in this letter, please do not hesitate to contact Jeffrey Jones ([REDACTED]) or ([REDACTED]) or Melanie Dolan ([REDACTED]) or ([REDACTED]).

Very truly yours,

KPMG LLP

cc:

Jay Clayton, Chairman  
Michael Piwowar, Commissioner  
Kara Stein, Commissioner  
William Hinman, Director, Division of Corporation Finance  
Kyle Moffatt, Acting Chief Accountant, Division of Corporation Finance  
Wesley Bricker, Chief Accountant  
Alison Staloch, Chief Accountant, Division of Investment Management  
Russell Golden, Chairman, Financial Accounting Standards Board

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<sup>6</sup> Financial Accounting Standards Board (FASB)'s Accounting Standards Codification (ASC) 946, *Financial Services – Investment Companies*, paragraph 210-45-7.

<sup>7</sup> Dear Chief Financial Officer Letter, SEC Division of Investment Management, December 30, 1998 and November 7, 1997.