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October 17, 2019

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

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SEC File No. S7-11-19
Release Nos. 33-10668; 34-86614 (the "Release")
Proposed Amendments of Regulation S-K Items 101, 103, and 105

Dear Ms. Countryman:

We are writing to comment on the above-referenced amendments proposed by the Securities and Exchange Commission (the "Commission") on August 8, 2019. These comments are provided by the Corporations Committee (the "Committee") of the Business Law Section (the "Business Law Section") of the California Lawyers Association. The Business Law Section is composed of attorneys regularly engaged in advising business enterprises in California; the Committee is composed of attorneys regularly advising California corporations and out-of-state corporations transacting business in California. The views expressed in this comment are those only of the Committee and not those of the Business Law Section or California Lawyers Association.

This letter provides responses to certain questions posed by the Commission in the Release. We do not address other queries posed in the Release. For convenience of cross reference, the specific questions addressed in this letter retain the numbering of them set forth in the Release.

Preliminary Comments

As a preliminary matter, the Committee notes that the Release focuses on the dichotomy of a principles-based and prescriptive approaches to disclosure. The Committee views this focus as misplaced.[1] In the Committee's view, the primary objective of the securities disclosure regime is to promote efficient capital markets by ensuring that investors have the material information necessary to make an investment decision. Therefore, the fundamental question is not whether to

[1] This approach can be likened to prescription first, diagnosis second (or worse, no diagnosis at all).

pursue a principles-based or prescriptive approach to regulation. Rather, the Committee believes that before imposing a disclosure requirement, the Commission should first determine whether material information is being provided to investors (either by the issuer or third parties).[2] The Committee believes that little purpose is achieved by requiring issuers to disclose information that has already been disclosed to the market by third parties. If the Commission determines that the information is not being provided, then the Commission should weigh the costs of disclosure against the benefit to investors.[3]

In addition, we believe that investors are better able to make informed decisions between possible investment opportunities when the disclosure requirements provide a basis for comparison. While it is important that issuers disclose material information that is unique to them, that should augment standard disclosure requirement so such comparisons can be made.

Responses to Requests for Comments (Item 101)

1. **Is a prescribed timeframe for disclosure regarding the general development of a registrant's business necessary or desirable? If we should retain a prescribed timeframe, is the current five-year timeframe appropriate, or should it be longer or shorter?**

In general, the Committee supports the elimination of a prescribed timeframe in Item 101. The Committee believes that any timeframe imposed by the Commission would be necessarily arbitrary and could not account for the diversity of issuers. As noted above, moreover, the Commission's specification of a timeframe may cause investors to incorrectly conclude that longer or shorter timeframes are not material.

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2 The Committee notes that issuers have significant interest in disclosure because, in the absence of disclosure, investors would either not invest or assign a lower value to the issuer's business. Moreover, issuers that provide more accurate disclosures will achieve higher valuations than issuers that provide less or inaccurate disclosures. The antifraud provisions of federal and state securities laws provide significant incentives to make accurate disclosures.

3 The Committee notes that disclosure requirements can impose significant costs on both issuers and investors. For issuers, costs include (i) the costs of producing the disclosures which involve significant resources in the form of internal controls, disclosure controls, and auditing and legal expenses; (ii) potential fraud liability; and (iii) potential competitive harm. Investors incur costs when regulators require the disclosure of irrelevant information that may mask more important information. If the Commission incorrectly assesses the importance of information to investors when mandating disclosures, investors may wrongly conclude that the information is material.

As the same time, however, the Committee believes it is important to include disclosure requirements that are sufficiently standard for all reporting companies that investors can at least have a basis for making comparisons as between investment opportunities. We therefore propose that after the reporting company makes disclosure based on a time period material to it, the issuer also address a specified time period common to all reporting companies, either by identifying any differences as between the time period unique to that issuer and the specified one or by disclosing why use of the standard timeframe is either not informative or potentially misleading. The Committee does not take a position as to whether the standard timeframe should be five years, longer, or shorter. But for purposes of comparison, it should be standard.

2. **Alternatively, should we require a more detailed discussion of a registrant's general development of business on a periodic basis, such as every three years, and summary disclosure in other years? If so, would three years be an appropriate period, or should it be shorter or longer?**

For the reasons discussed above, the Committee does not support this alternative as it does not believe that one size can fit all. Whatever benefit might be achieved by this alternative, it is provided instead by having parallel time periods for reporting: one that is unique to the reporting company and one that is standard for all of them such that comparisons can be made.

3. **For filings other than initial registration statements, should we no longer require a full discussion of the general development of the registrant's business, and require instead an update to the general development of the business disclosure with a focus on material developments in the reporting period, as proposed?**

The Committee believes that the Commission's current disclosure regime requires duplication of disclosures made by the issuer that are already known to the market. Because the market prices of these issuers will have incorporated all relevant *publicly* available information (from whatever source), requiring a full discussion for filings other than initial registration statements is redundant and costly to both issuers and investors for the reasons discussed above.

However, the Committee is concerned that limiting by disclosure to material developments *in the reporting period* may not account for the possibility that non-material changes will in the aggregate become material over the longer term. Therefore, the Committee recommends that the Commission require an update to the general development of the business disclosure with a focus on (i) material developments in the reporting period; and (ii) developments that have become material in the aggregate. Currently, an issuer is required to provide a full discussion of its business in its annual report, with material developments being addressed in current reports (such as acquisitions) and quarterly reports (such as risk factors and trends affecting business operations). Plus, issuers, in many cases, may incorporate by reference in registration statements disclosure about its business, thereby reducing the need to repeat previous disclosures.

Accordingly, the Committee does not support a full description of general business development solely in an initial registration statement with material developments in subsequent reports.

4. When only updated business disclosure is provided in a filing, should we require the incorporation by reference of, and active hyperlink to, the most recently filed disclosure that, together with the update, would present a full discussion of the general development of a registrant's business, as proposed? Would such an approach, which would enable a reader to review the updated disclosure and one hyperlinked disclosure, facilitate an investor's understanding of the general development of a registrant's business?

The Committee notes that while requiring incorporation and an active hyperlink may facilitate some reader's understanding, it may be counterproductive. If issuers are required to incorporate by reference, they will be forced to review and update information in prior disclosures that may or may not be material. Therefore, the Committee believes that such a requirement will be costly and distracting to investors.

6. Would principles-based requirements for Item 101(a) effectively facilitate the provision of information that is material to an investment decision? If not, how might Item 101(a) be further improved?

For the reasons discussed above, the Committee believes that the Commission should not focus on whether to pursue a principles-based or prescriptive approach. Instead, the Commission should focus on whether material information is not being provided to investors and if so, whether the value of disclosure exceeds the cost of production.

8. Should we make disclosure of business strategy mandatory in Commission filings? If so, how should "business strategy" be defined and what can we do to address concerns about confidentiality?

The Committee notes that without a definition of "business strategy" it is impossible to address the question of whether mandating disclosure is advisable. In general, the Committee believes that issuers have significant incentives to disclose their overall business strategy in order to attract investor attention and to differentiate themselves from their competitors. The Committee is unaware of any significant market impediments to disclosure that would justify mandating disclosure. The Committee is also unaware of any facts or circumstances that would indicate that the current practices of reporting companies as to what is said about a "business strategy" is causing inefficiencies in the market, much less resulting in misleading information upon which investors make decisions.

9. Should we revise Item 101(h) to eliminate the provision that currently requires smaller reporting companies to describe the development of their business during the last three years, as proposed? Is a prescribed timeframe for such disclosure necessary or desirable? If we should retain a prescribed timeframe, is the current three-year timeframe appropriate, or should it be longer or shorter?

The Committee supports the elimination of the three-year period in Item 101(h) for the reasons set forth above. The Committee believes that companies in this category are by their nature much less comparable to other companies. For that reason, the Committee does not make a corresponding recommendation for both unique and specified time periods for disclosure.

17. Currently, the duration and effect of copyright and trade secret protection is not included within the scope of Item 101(c) disclosure. Should we include it as a listed disclosure topic that could be provided?

The Committee believes that when considering the adoption of disclosure requirements, the Commission should distinguish intrinsic information and extrinsic information. Intrinsic information is information from inside the issuer while extrinsic information is information from outside the issuer. The Committee believes that, although copyright is not required to be registered with any agency and it is secured automatically when it is created, the duration and effect of copyright protection is extrinsic information that is derived from applicable U.S. and foreign copyright laws. The Committee further notes that trade secret protection is generally indefinite as it lasts only as long as the secret is maintained. Therefore, it does not believe that disclosure of the duration of trade secret protection should be required.

18. Is backlog typically discussed in MD&A or is it better suited for disclosure under Item 101(c) to the extent material? Similarly, is working capital typically sufficiently disclosed in MD&A or is it better addressed under Item 101(c)?

In the Committee's experience, issuers typically discuss backlog and working capital in Management's Discussion and Analysis. Therefore, requiring discussions of these topics under Item 101(c) will likely lead to duplicative and bifurcated disclosures.

21. Should disclosure regarding human capital resources, including any material human capital measures or objectives that management focuses on in managing the business, be included under Item 101(c) as a listed disclosure topic, as proposed? Should we define human capital? If so, how?

The Committee notes that without a definition of "human capital" it is impossible to address adequately the question of whether mandating disclosure is advisable.[4] The Committee is also concerned that categorizing this topic as relating to "capital" is misleading. Among other things, investors typically consider "capital" as relating to a financial asset over which a reporting company has control and ownership. That is not true with respect to the labor pool utilized by the reporting company. Accordingly, the Committee is concerned that the term "human capital" could be misleading to investors. It also fails to account for interactive dynamics between the company and the individual persons included within that pool.

In general, the Committee believes that the Commission should be focused on ensuring efficient capital markets by requiring that investors have the information necessary to evaluate potential and actual investments. The Committee notes that the Release does not cite any specific examples in which (i) relevant human capital information was not provided; or (ii) investors inaccurately valued investments because of nondisclosures or inaccurate disclosures concerning human capital. Without a detailed assessment of whether these conditions exist, the imposition of specific disclosure requirements will only be "guesses" as to what is actually material. The Committee is also concerned that when the Commission proceeds in this manner, its core mission of ensuring efficient capital markets could be undermined as it responds to agendas other than investor protection.

Responses to Requests for Comments (Item 103)

31. Should we expressly provide for the use of hyperlinks or cross-references, as proposed? Would the use of multiple hyperlinks be cumbersome for investors? Are there alternative recommendations that would more effectively decrease duplicative disclosure?

The Committee supports the proposed amendment allowing the use of hyper-links or cross-references. The Committee, however, cautions that the Commission not impose requirements under the assumption that all investors must read disclosures in an efficient capital market. *See Basic Inc. v. Levinson*, 485 U.S. 224, 246 & n. 24 (1988).

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4 The Release cites a number of disparate examples of "human capital" but fails to provide a unifying definition.

Responses to Requests for Comments (Item 105)

35. Would our proposal to require summary risk factor disclosure if the risk factor discussion exceeds 15 pages result in improved risk factor disclosure for investors?

The Committee does not support the Commission's proposal to require a summary risk factor disclosure if the risk factor discussion exceeds 15 pages. The Committee believes that a summary is unnecessary because the price of a security will reflect all publicly available information in an efficient capital market. Individual investors, moreover, may be misled if they rely solely on the summary disclosure.

37. Is 15 pages an appropriate number of pages to trigger summary risk factor disclosure? If not, what is the appropriate page limit that should trigger summary risk factor disclosure? Is there a better alternative than a page limit to trigger summary risk factor disclosure (e.g., should we consider a word limit instead)?

The Committee believes that the specification of any number of pages would be arbitrary and capricious as the Committee is unaware of a logical basis for determining a page limit. For the same reasons, the Committee opposes a word limit.

40. Should we specify that registrants should present summary risk factor disclosure in the forepart of the prospectus or annual report, as proposed? Alternatively, should the summary immediately precede the full discussion of risk factors? Currently, when the risk factor discussion is included in a registration statement, it must immediately follow the summary section. Should registrants be permitted to provide the full discussion of risk factors elsewhere in the document to enhance readability when a summary section is included?

The Committee believes that requirements as to the location of disclosures within a prospectus or annual report are arbitrary and capricious because the price of a security will reflect all publicly available information in an efficient capital market.

41. Would changing the standard from the requirement to discuss the "most significant" factors to the "material" factors, as proposed, result in more tailored disclosure and reduce the length of the risk factor disclosure? Would changing the standard, as proposed, result in other consequences that we have not considered? If so, provide specific examples of such consequences.

The Committee believes that the standard should be the "most significant factors" that are (i) specific and material to the registrant; and (ii) not otherwise disclosed to the market. Risks specific to the registrant are risks that do not affect all registrants in a similar manner.

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We hope the foregoing is useful to the Commission and Staff in considering changes to Regulation S-K Items 101, 103 and 105. Please do not hesitate to contact either of the undersigned if you have any questions on the matters raised herein.

Very truly yours,

Keith Paul Bishop
Co-Chair, Corporations Committee

Steven Kelsey Hazen
Co-Chair, Corporations Committee

Drafting Committee: Keith Paul Bishop, Katherine J. Blair, and Steven Kelsey Hazen

California Lawyers Association Business Law Section Corporations Committee Members:

As of the date of this letter, the Corporations Committee is composed of the members shown below, not all of whom necessarily endorse each and every recommendation and view expressed in this letter. Taken as a whole, however, this letter reflects a consensus of the members of the Corporations Committee.

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Steven Kelsey Hazen, Co-Chair
Darren L. Nunn, Vice Chair, Legislation
Katherine J. Blair, Vice Chair, Publications
Rachelle Cohen, Secretary
Curt C. Barwick
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