October 22, 2019

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SEC File Number S7-11-19 on Modernization of Regulation S-K Items 101, 103, and 105

Dear Ms. Countryman:

The Society for Corporate Governance (the "Society") appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission ("SEC" or "Commission") on the Modernization of Regulation S-K Items 101, 103, and 105.

Founded in 1946, the Society is a professional membership association of more than 3,700 corporate and assistant secretaries, in-house counsel, outside counsel and other governance professionals who serve approximately 1,700 entities, including 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance and disclosure matters.

Introduction

The Society commends the SEC for continuing its efforts to improve disclosure for investors while simplifying compliance efforts for issuers. In general, the Society agrees that a more principles-based disclosure regime would afford companies greater flexibility in providing the required material information to investors and could reduce compliance burdens. To that end, the Society supports the SEC's proposal to revise Items 101(a), 101(c), and 105 to emphasize a principles-based approach. The Society further suggests the SEC apply that same principles-based approach to a revision of Item 103. The Society's specific comments and concerns on particular components of the proposed rules are set forth below.

I. Item 101(a)—General Development of the Business

Support Principles and Materiality-Based Approach: We support the Commission's proposal to make the general development of the business disclosure more principles-based, thus streamlining the items currently listed in Item 101(a). These proposed changes, if finalized, will serve the capital markets well by eliminating immaterial information and focusing investors on the material information disclosed under this section in initial registration statements and Form 10-Ks and by easing the burden for private companies considering whether to list their shares publicly.

We further agree with the Commission's proposal to eliminate from Item 101(a) the five-year timeframe for the description of the general development of the business for purposes of initial registration statements. The fixed, five-year time period no longer elicits the most relevant disclosure for every company, and may, in fact, tie the hands of companies that believe that a longer or shorter disclosure period is more appropriate to provide material information to their investors.

For purposes of the Annual Report on Form 10-K, however, we note that the Form 10-K itself already limits discussion of the development of the registrant's business to the last fiscal year.[1] This one-year disclosure timeframe provides investors with a clear and focused source of information about the general development of a company's business under Item 101(a) during the last fiscal year, which is the focus of a company's Annual Report. Accordingly, we believe this one-year timeframe should be added to Item 101(a) of Regulation S-K in order to clarify that, for purposes of a Form 10-K filing, no information beyond this one-year time period is required to be included or incorporated by reference into a Form 10-K. As is the case now, Item 101(a) disclosure in an Annual Report on Form 10-K should focus on the material general developments of a company's business during the most recent fiscal year, and companies should not be required to incorporate by reference to Item 101(a) information from prior SEC filings to fulfill the current year Form 10-K disclosure requirement under Item 101(a).[2] To the extent developments of a business beyond this one-year timeframe are material, companies disclose them as warranted in other sections of their Annual Report.[3] As such, there is no need to change the existing disclosure timeframe for the Form 10-K under Item 101(a).

"May Affect" Standard Lowers Disclosure Standard and Strategy Disclosure Is Unnecessary: We oppose the proposed inclusion of a separate disclosure concerning transactions and events that affect or may affect the company's operations, including material changes to a previously disclosed business strategy.

The proposal's language: "may affect the company's operations" introduces a different threshold or standard from the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A), which provides for disclosure of information the registrant "reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[4] To the extent the SEC includes this as a listed disclosure topic, the Society urges the SEC to harmonize the standards in favor of the existing language in Item 303(a)(3)(ii).

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[1] Part I, Item 1 of the Form 10-K states: "Furnish the information required by Item 101 of Regulation S-K (§ 229.101 of this chapter) except that the discussion of the development of the registrant's business need only include developments since the beginning of the fiscal year for which this report is filed."

[2] We note that the proposal to only allow for one hyperlink could also complicate matters for public reporting companies, which provide annual updates to Item 101(a) disclosure in each 10-K.

[3] For example, companies will often need to discuss a bankruptcy or acquisition that occurred prior to the last fiscal year in their risk factors or MD&A to the extent it remains material, and Rule 12b-20 provides that, "[i]n addition to the information expressly required to be included in a statement or report, there shall be added such further 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."

[4] 17 CFR §229.303, Item 303 (a)(3)(ii)

As to the proposed inclusion of strategy specifically, first, we believe that a basic understanding of a company's strategy can be obtained from the description of its business in Item 101, together with the disclosure required by Item 303, MD&A. More specifically, if the pursuit of a company's strategy will likely cause its most recent financial results to not be indicative of future results, Item 303 requires companies to disclose the trends or uncertainties relating to this strategy that may prompt different results. Second, we note that many issuers currently disclose information about their strategy in a variety of ways, including investor presentations and conference calls, investor days, websites, etc., but that not all of this information necessarily needs to be included in a company's MD&A. Requiring a separate discussion of a company's business strategy in Item 101(a) could have the effect of encouraging less rather than more disclosure about an issuer's strategy due to understandable concerns about securities law liability attaching to statements made in the Business description. Third, we believe that if companies are required to disclose changes to their business strategy in Item 101(a), it could compel them to disclose proprietary or sensitive information that could damage their competitive position well before it is known how, or even if, such strategy will materially impact the company's financial results or condition. Fourth, as drafted, the proposal would result in disparate treatment where updates are required only if companies disclosed their prior strategy in previous filings. As most companies conducting an IPO include strategy disclosure in their registration statement, the proposed rule could be among those factors that deter companies from conducting IPOs, which is counter to the Commission's stated objectives. To address these concerns, we respectfully request the Commission not require disclosure of material changes to business strategy in Item 101(a), and that it instead rely on the currently effective disclosure framework in the MD&A.

If a business strategy requirement is included in the final rule, however, we request that the SEC modify the language to address the above concerns, including explicitly providing that the provision does not require companies to disclose proprietary or other sensitive information, the disclosure of which they believe could damage their competitive position.

II. Item 101(c)—Narrative Description of Business

Support Principles-based Approach: Generally, consistent with Item 101(a), we further support the SEC's proposed revision of Item 101(c) to make it more principles-based, including replacing the current list of twelve items with the non-exclusive list of disclosure topics. While companies may continue to disclose all the proposed items (with the understanding that many have interpreted the list as requiring disclosure of each item, even if not material), this principles-based approach allows companies the flexibility to continue doing so or to tailor their disclosure to their specific circumstances. Specific concerns on a handful of topics are noted below.

Disclosure of Development Efforts for New or Enhanced Products Should be Qualified: The release proposes that companies disclose material information related to the "[s]tatus of development efforts for new or enhanced products, trends in market." If this "new or enhanced products" requirement is included in the final rule, we request that the SEC modify the language to make clear that it does not require companies to disclose proprietary or other sensitive information, the disclosure of which they believe could damage their competitive position.

Scope of Intellectual Property Disclosure Should be Retained: We support the SEC's proposal to leave as is the disclosure topic of intellectual property in Item 101(c)(1)(iv), and not expand it to include copyrights and trade secrets, disclosure of which would be costly and time-consuming for companies, with minimal benefits to investors.

Disclosure of Compliance with Non-Environmental Regulations is Unnecessary: We disagree with the proposal to expand Item 101(c)(1)(xii), which currently requires disclosure of the material effects of environmental regulatory compliance, to encompass non-environmental regulation. While we acknowledge that some companies may be disclosing the effects of compliance with non-environmental regulations in Item 101, and while we understand and support the importance of disclosing to investors the material impacts that complying with non-environmental laws has on a company's capital expenditures, earnings and financial condition, we believe that companies are already obligated to disclose, and are disclosing,[5] these material impacts in their MD&As, financial statements and/or in any other sections where they are discussing their capital expenditures, earnings and financial condition. In addition, companies commonly disclose compliance with governmental regulations in their risk factors to the extent they deem this to be among the most significant or principal factors that make their securities speculative or risky. If companies are required to also include this disclosure in Item 101(c), we believe that companies in practice will feel obliged to prepare lengthy (and possibly prophylactic) recitations of all laws to which they are subject, material or not, resulting in boilerplate disclosure in future filings with negligible benefits to investors. It may also result in companies feeling obligated to add additional detail (and length) to risk factors relating to regulatory risk. As this would run counter to one of the goals of this amendment – to improve the readability of disclosure documents - we believe that this change is unnecessary.

III. Item 101(c)—Human Capital Resources

A New Disclosure Requirement on Human Capital Resources is Unnecessary: The proposal to add human capital resources as a disclosure item in the business section is unnecessary because this information, to the extent deemed to be among the principal securities risks or material, is already required to be disclosed[6] and is therefore frequently found in risk factor sections of companies' Annual Reports on Form 10-K. For example, in their risk factors, companies often disclose information regarding "challenges of integrating, developing, and motivating a rapidly growing employee base" or the need to "attract and retain highly qualified personnel" and that "competition for these employees is intense." Because companies are already providing this disclosure in response to current SEC requirements, we believe that the SEC should instead provide

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[5] For example, see the "Supervision and regulation" section of the 2019 10-Ks of each of JPMorgan Chase & Co. and Consumers Bancorp, Inc.

[6] There are a number of existing disclosure requirements that could require disclosure related to human capital resources:

- Item 105 requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky;
- Item 303 of Regulation S-K and Item 5 of Form 20-F require a company to discuss its financial condition, changes in financial condition, and results of operations; and
- In addition to the information expressly required by Commission regulation, a company is required to disclose "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."

guidance for companies to help them assess when human capital resources information may be material and the corresponding locations in periodic reports where this disclosure would be appropriate, as described further below.

"Private Ordering" Obviates Any Need for Mandated Disclosure: As noted above, we generally support the SEC's move towards principles-based disclosure for Item 101. With respect to human capital resources matters in particular, we believe that a prescriptive (i.e., bright-line, quantitative thresholds) approach would be inappropriate because there is no one-size-fits-all approach to human capital matters, whether across industries or even across companies within a particular industry. In addition, the Society believes that requiring human capital disclosure is inconsistent with the SEC's disclosure simplification efforts and will add to the compliance burden confronting public companies, which is a significant factor in dissuading private companies from accessing the public capital markets.

We believe the "private ordering" that is unfolding in the area of human capital disclosure is still in its relatively early stages and should continue to evolve without the SEC's rulemaking involvement. We understand that some investors view this information as important; as a result, many of our members are discussing specific aspects of human capital matters that are relevant to their respective companies in their engagements with investors, as well as voluntarily providing detailed disclosures relating to their human capital resources in publicly-available non-SEC reports or other written materials that address their investors' requests.[7] This investor interest is likely to prompt companies to provide even more information regarding human capital resources, which benefits those investors interested in company-specific aspects of this type of disclosure. These voluntary disclosures are available to all investors who wish to access them, although it is Society members' experience that most investors are not requesting that human capital resources information be incorporated into SEC filings.

We note that over 60% of Fortune 50 and Dow 30 companies provide in their proxy statements a hyperlink to voluntary human capital disclosures published on their corporate websites.[8] While these hyperlinks typically state that the reports are not incorporated in these proxy statements, they illustrate company efforts to facilitate information flow to interested investors. We would further note that part of the rationale these human capital-related hyperlinks are typically not incorporated by reference in the proxy statement or otherwise disclosed in SEC filings is because companies do not view the information to be that which a reasonable investor would rely upon to base any decisions relating to the company's stock (i.e., the information is not deemed material under the securities laws).

We respectfully request that, in lieu of including human capital resources disclosures in Item 101(c), the Commission allow private ordering to continue to address this evolving investor interest. In this regard, we would note that key SEC staff has warned that regulatory prescriptions for

[7] For instance, BlackRock engaged 237 companies on human capital management globally this year. https://www.blackrock.com/corporate/literature/publication/blk-qtrly-commentary-2019-q2-amrs.pdf.

[8] See page 55 of https://argyleteam.com/pubres/downloads/Sustainability%20Communications%20in%20Proxy%20Statements.PDF

market-driven solutions while those solutions are evolving need to be managed "with the utmost care."[9]

Instead of Rulemaking, Provide Interpretive Guidance on Human Capital: Issues such as human capital—where investor interest and focus are in flux and relevant company information is highly variable—would benefit from the issuance of interpretive guidance similar to the SEC's 2010 guidance on climate change.[10] In the Commission Guidance Regarding Disclosure Related to Climate Change ("SEC Climate Guidance"), the SEC sought to "provide clarity and enhance consistency for public companies and their investors" on an issue (i.e., climate change) that "investors, analysts and public at large have expressed heightened interest in,"[11] similar to the current dynamics regarding human capital resources.[12] Because of the swiftly evolving and highly company-specific nature of human capital resources disclosure, interpretive guidance would be more beneficial to enhancing disclosure. Indeed, as the SEC noted with respect to Item 303, MD&A, the periodic guidance on MD&A disclosure "has resulted in disclosures that keep pace with the evolving nature of business models without the need to continuously amend the text of the rule."[13] Accordingly, the Society believes that the issuance of interpretive guidance and the attendant ability for the SEC to respond to investor and company interests and practices is clearly preferable to promulgating new requirements prematurely.

If Disclosure is Mandated, Principles-based Disclosure is Preferable to a Prescriptive Approach: If the Commission, however, ultimately determines that Item 101(c) must include a human capital disclosure requirement, we agree that a principles-based, as opposed to prescriptive, approach is appropriate for the reasons below.

The human capital disclosure of the Society's diverse public company membership varies substantially across and within industries. The evolving company-specific information sought by investors puts a premium on issuer judgment about the relevant items to be disclosed. Given the more qualitative nature of human capital disclosures, a principles-based approach would be more appropriate than a static, more prescriptive regime that will be rendered less relevant or obsolete by market trends and/or evolving investor understanding of the most probative aspects of human capital management.

In addition, the reliable and proven metrics needed to support prescriptive bright-line disclosure do not yet exist.[14] While a few organizations are undertaking efforts to create metrics or

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[9] https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519

[10] Commission Guidance Regarding Disclosure Related to Climate Change, January, 2010; https://www.sec.gov/rules/interp/2010/33-9106.pdf

[11] Id. at p. 1

[12] The SEC Climate Guidance usefully highlights Regulation S-K Items where climate might be addressed, including Items 101, 103 and 105 (then Item 503-c), which are the Items under consideration in the Proposed Rule.

[13] Id. at p.16

[14] For example, see the Sustainability Accounting Standards Board (SASB) public meeting presentation (https://www.sasb.org/wp-content/uploads/2019/09/Quarter3.2019.StandardsBoardMeetingPublicMasterDeck.pdf), which notes that SASB standards do not fully address all material human capital issues and current metrics are "very general."

standards for human capital, these efforts are nascent. Even if reliable and accepted metrics were available, given that voluntary disclosure from even the largest market cap companies in various industries and across various geographies represented by our membership does not allow for comparability or auditable metrics, prescriptive measures would result in the required disclosure of immaterial information for many companies. We suggest that if the Commission determines to proceed with this particular disclosure mandate, the two references in the current proposal to "measures" be omitted, such that the rule would require only the disclosure of "objectives," if material.

Human Capital Disclosures Should Not Include Proprietary or other Sensitive Information: If human capital resources disclosure is required under Item 101(c), the final rule should explicitly provide that companies shall not be required to disclose proprietary or other sensitive information that they believe could damage their competitive position.

IV. Item 103—Legal Proceedings

Support Principles-Based Approach: The Society appreciates the SEC's efforts to simplify and improve its disclosure requirements and believes the adoption of a principles-based disclosure requirement centered on materiality would best fulfill the SEC's mandate by simplifying the application of Item 103, reducing the regulatory burden on companies, and eliciting information that is more tailored to the particular facts and circumstances of individual companies and, therefore, more meaningful to investors.

Item 103 Should Expressly Provide for Hyperlinking and Cross-References: The Society supports the proposal to revise Item 103 to expressly state that some or all of the information required in the legal proceedings section may be provided by way of cross-references and/or hyperlinks to disclosure within the same filing. Many companies already include cross-references to disclosure outside of a particular filing's legal proceedings section, such as to the notes to the financial statements, and the Society believes that an express statement that such cross-references are permissible would encourage companies to remove redundant disclosure from their SEC filings. The Society also believes that permitting companies to hyperlink to cross-referenced disclosure intended to satisfy the Item 103 requirements could help increase the navigability of SEC filings for investors.

In addition, while the Society supports an express statement that cross-references and hyperlinks are permissible in this context, the rules should not mandate such cross-references or hyperlinks, particularly to the notes to the financial statements where disclosure is subject to audit or review under U.S. GAAP and is not covered by the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act of 1995.

Instruction 5.C. to Item 103 Should be Revised to Include a Materiality Standard: The Society believes the SEC should revise the $100,000 threshold in Instruction 5.C. to Item 103 regarding environmental proceedings involving a governmental authority. The entirely quantitative, one-size-fits-all threshold in existence since 1982 is arbitrary and results in disclosure that may not be material to investors and instead can obscure other, more meaningful information about a company's material legal proceedings. The resulting disclosure also does not assist investors in assessing whether a company has significant environmental compliance problems. A materiality threshold would provide this clarity for investors. Further, subjecting such environmental proceedings, which, like many other legal proceedings, are inherently uncertain, to an arbitrary threshold necessarily requires companies to engage in "guesswork" to determine whether potential monetary sanctions will equal or exceed $100,000 and, therefore, whether disclosure of a matter involving a potential fine is required in an SEC filing. The Society believes applying a materiality standard will address these shortcomings.

Adopting a materiality standard would fulfill the SEC's mandate under the Fixing America's Surface Transportation Act ("FAST Act") to "moderniz[e] and simplify[] the requirements in Regulation S-K in a manner that reduces the costs and burdens on companies while still providing all material information" and "to discourage . . . the disclosure of immaterial information." Further, such an approach would accord with the recommendation made more than two decades ago by the 1996 Task Force on Disclosure Simplification to replace the $100,000 standard "with a general materiality standard to ensure that companies will not be required to disclose non-material information."

To address concerns about eliminating a quantitative threshold, the Society believes that Item 103 could include a non-exhaustive list of qualitative factors that a company would be encouraged to consider when assessing the materiality of a particular environmental proceeding. Such factors could include, for example, whether a fine brought by a governmental authority is indicative of potentially significant environmental compliance problems and whether the fine relates to conduct with respect to which the company previously has been sanctioned. Enumerating such factors would provide a consistent approach to determining disclosure of environmental actions brought by governmental authorities that involve fines.

Modified Materiality Standard: If the SEC decides to include a quantitative threshold, as an alternative to the approach described above, the Society believes that the SEC could consider adopting a quantitative threshold of at least $300,000, indexed to inflation, above which a company would be required to affirmatively consider the materiality of an environmental action brought by a governmental authority that involves a fine by taking into account, among other things, the above-described non-exhaustive list of factors.

This alternative approach would retain a "bright-line" standard while also helping to ensure that companies assess the overall materiality of such environmental matters above the specified dollar amount, even if relatively small from a quantitative perspective. This approach would also enable companies to avoid disclosing non-material information and obscuring meaningful information in their disclosures for investors. Such approach would also align with other instances in which the SEC imposes a reporting obligation based on a specific quantitative threshold. For example, Item 404(a) requires disclosure of related person transactions that exceed $120,000 if the transaction is material to investors.[15] In this manner, the disclosure called for by Item 404(a) is only

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[15] *See also, e.g.*, Item 101(c), which requires disclosure of the amount or percentage of total revenue contributed by any class of similar products or services which accounted for 10 percent or more of consolidated revenue in any of the last three fiscal years or 15 percent or more of consolidated revenue, if total revenue did not exceed $50,000,000 during any of such fiscal years, where material; Item 101(c) also requires disclosure of any customer that accounts for 10% or more of a registrant's consolidated revenue and the loss of such customer would have a material adverse effect on the registrant, where material; Item 601(b)(10), which requires the filing of any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15% of such fixed assets of the registrant on a consolidated basis, unless immaterial in amount or significance. (Emphasis added in each instance.)

that which is material, rather than requiring disclosure any time a related person transaction exceeds $120,000.[16] Under this alternative approach, while a company may ultimately determine that an environmental action brought by a governmental authority that involves a fine exceeding the threshold is not required to be disclosed by Item 103 because it is not material to investors, the company would still need to consider, among other things, the qualitative factors to first assess their materiality for investors.

Scale Materiality Threshold to Market Capitalization: Virtually any quantitative threshold is arbitrary and may not be large or small enough to elicit information meaningful to investors. To that end, if the SEC decides to maintain a quantitative standard, an alternative to the modified materiality approach described above is to correlate the minimum quantitative threshold requiring disclosure of environmental proceedings to an issuer's market capitalization or some other benchmark that may be more indicative of materiality on a company-specific basis. Such an approach makes it more likely the relevant threshold bears a reasonable relationship to amounts that are, in practice, material to that issuer.

If the SEC determines to retain a quantitative threshold that is not based on a company-specific formula (whether subject to the Modified Materiality Standard described above or otherwise), the Society supports the proposal to increase the disclosure threshold for environmental proceedings from $100,000 to at least $300,000, and to periodically index the threshold for inflation.

V. Item 105—Risk Factors

Risk Factor Summary Would Be Unduly Burdensome and Increase Risk: The Society does not support the proposal to require summary risk factor disclosure if the risk factor section exceeds 15 pages. We believe that a risk factor summary would not provide meaningful disclosure for an investor, and suggest that the Commission's proposal requiring risk factor organization (addressed below) is a better solution for improving risk factor readability. Further, as discussed below, we believe that a summary requirement may actually promote practices that are inconsistent with optimal risk factor organization techniques and the proposed rule's stated goals "to improve…disclosures for investors, and to simplify compliance efforts for registrants." Finally, the

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[16] The SEC clarified in the release adopting current Item 404(a) that whether disclosure of a related person transaction ultimately is required turns on the materiality of the information to investors. The SEC also identified a non-exhaustive list of factors that companies should consider when making that materiality determination. The SEC stated:

> As was the case before adoption of amended Item 404(a), the relationship of the related persons to the transaction, and with each other, the importance of the interest to the person having the interest and the amount involved in the transaction are among the factors to be considered in determining the materiality of the information to investors.
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> We are also eliminating as proposed an instruction to Item 404(a) which had indicated that the dollar threshold is not a bright line materiality standard. It remains true, however, that when the amount involved in a transaction exceeds the prescribed threshold ($120,000 under the amended rule we adopt today), a company should evaluate whether the related person has a direct or indirect material interest in the transaction to determine if disclosure is required. We eliminated the instruction because it was repetitive of the general materiality standard applicable to the Item.
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> *See* Executive Compensation and Related Person Disclosure, SEC Release 33-8732A (Aug. 29, 2006).

Society is concerned that a risk factor summary may be disproportionately burdensome to smaller and pre-IPO companies given that a wider range of information may more commonly be deemed material at that stage of the company life cycle. As with other components of the proposed rules, we believe this could be a factor in dissuading private companies from going public.

Our primary concern regarding a new requirement for a risk factor summary is that such a summary may encourage investors to read only the summary and not the underlying detailed risk factors. Investors who read only the summary section are likely to be uninformed of all of the disclosed material and contextual company-specific details. Unlike other types of disclosures that can be more easily summarized and reviewed in greater detail at the reader's discretion without impacting the substantive quality of the communication, the level and nature of detail in risk factor disclosure is critical to a complete understanding of the risk factor's potential impact. In addition, the disclosures often include specific examples of how a risk has previously manifested or is likely to be manifested for the company.

The Society also believes that the burdens that would be imposed on those companies subject to a risk factor summary requirement would far outweigh any anticipated benefits. A company creating a summary section would need to consider whether the summary of each risk factor appropriately encapsulates the detail that is specific and material to the company. Society members are concerned that summary risk factor disclosure, which inherently would not capture important details and nuances included in the full risk factor description, could expose companies to legal claims and potential liability for highlighting certain points versus others.

Our secondary concern regarding the proposed risk factor summary requirement is the proposed 15-page limit. While the Society acknowledges the Commission's consideration of a meaningful threshold, applying an arbitrary limit may trigger unintended consequences, such as inadvertently encouraging companies to artificially limit risk factor disclosure to 15 pages through techniques that are likely to decrease readability and the quality of the disclosure. For example, plain English disclosures are enhanced with the use of headings, bulleted or numbered lists, and other techniques that increase white space and provide readers with sign-posts. Further, companies would likely be disinclined to consider innovative techniques designed to make risk factor disclosures more reader-friendly for investors, such as including graphics to supplement or replace narrative lists and discussion due to space and page limit considerations. More generally, the Society believes that a page or other arbitrary limit may encourage companies to eschew reader-friendly drafting techniques in favor of saving space, which is contrary to the SEC's proposal to organize disclosure in ways that will enhance reader comprehension.

A page limit also forces companies into a difficult position: either they provide the summary section and run the risks of investors being misinformed about company-specific details and targeting the company for allegedly omitting key information in the summary, or they limit disclosure to avoid the summary requirement and face an increased risk of litigation and potential liability for less fulsome disclosure. Unless the risk of litigation in connection with a failure to disclose declines and companies may affirmatively assert that their risk factors are not exhaustive, companies are likely to err on the side of over-disclosure.

In lieu of a summary requirement, the Society would propose the Commission consider requiring companies to include a risk factor index (which could include hyperlinks to specific risk factors) that consists solely of their risk factor categorical headings at the beginning of the risk factor section.[17] If the Commission considers that approach, the disclosure should clearly indicate that it is intended only as a navigational device for readers of the specific risk factors that are included, and not as a summary or prioritization of the risk factors.

Encourage Reader-Friendly Organizational Tools and Techniques: Subject to the caveats below, the Society supports a proposal that would encourage—but not require— registrants to organize their risk factor disclosure under relevant headings. As noted in the proposing release, many companies already organize their risk factors by category, and we believe this practice can be beneficial and may provide context for the more detailed risk factor disclosure. Some Society members believe that such organization would benefit all companies' disclosures by providing broader context and enhancing risk factor readability, which together could assist investors in navigating the disclosures and improve overall disclosure effectiveness.

However, for most registrants, there will be numerous risk factors that could be grouped into multiple categories. For example, a cyber-security risk factor could be categorized in multiple ways, as an operational, legal, reputational or regulatory risk, among other potential categories or groupings. If the Commission decides to require such categorization, Item 105 should note that that many risk factors could be included in multiple categories and the Commission should provide a safe harbor from legal liability for risk factor categorization unless it was shown that the company's particular categorization lacked a reasonable basis or was not made in good faith.

This categorization proposal is consistent with the existing plain English guidance recommending the use of simple, clear, and concise language that is easy to understand. Provided that the safe harbor is enacted, organizing risk factors under relevant headings is a method to help achieve that goal. For companies that do not already employ this technique, the Society believes this requirement should not present an undue burden, as it would require little additional disclosure.

The Society also recommends that the Commission encourage other organizational and reader-friendly drafting techniques, such as the grouping of related risk factors and bulleted and numbered lists, as well as other techniques (e.g., fonts for emphasis; more detailed tables of contents; charts and graphics). We believe, as noted above and identified at footnote 273 of the proposing release, that increased use of these techniques, which are already being used by some companies to beneficial effect,[18] should alleviate the Staff's perceived need for a summary of risk factor disclosure.

A General Risk Factor Category is Unnecessary and May Undermine Other Disclosure Objectives: The Society does not support a requirement to place certain types of risk factors into a separate "General Risk Factor" category. We understand that Item 105 requires that companies

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[17] See, by way of example, the Form 10-K filed by Annaly Capital Management, Inc. on February 15, 2019, providing a hyperlinked index allowing the reader to jump to different categories of risk factors, including business, capital-markets, and legal and regulatory risks.

[18] See, by way of example, the 10-K filed by JPMorgan Chase & Co. on February 26, 2019, separating risk factors into "regulatory," "political" and "market," among other categories; the 10-K filed by Perrigo Company plc on February 27, 2019, separating risk factors into "operations," "global" and "litigation and insurance," among other categories as well as making extensive use of bulleted lists; and the 10-K filed by Annaly Capital Management, Inc. on February 15, 2019, which, in addition to organizing risk factors under relevant headings, provided a hyperlinked index to the risk factor section.

explain how the risks disclosed affect the registrant or the securities offered, and that some commenters perceive that registrants employ “generic” risk factors that do not explain why the identified risk is relevant to an investor in its securities. However, as a number of commenters have identified, many risks that could be considered “generic” to an industry can be important to the overall understanding of the business environment in which the registrant operates.[19] In addition, companies at the same point in their lifecycles, such as newly public companies, may have similar risk factors related to, for example, adjusting to public reporting requirements, but these companies would not perceive these risks as “generic.”

A risk factor that applies or could apply to another company or security should not automatically be considered “generic” and either omitted or labeled “general” and relegated to a secondary risk category. Even assuming that all companies could determine which of their risk factors fit into a “general” category, the Society is concerned that this proposal would create a second-class tier of risk factors that investors might automatically perceive as less important simply due to their different characterization. Such a result is counter to the notion of risk factors generally, undermines the Commission’s overall objectives in this area, and would likely result in investors disregarding or discounting certain risk factors that may, in fact, be material disclosure.

Furthermore, differentiating between “specific” and “general” risk factors is not straightforward. While some readers may perceive certain risk factor disclosure as not being sufficiently specific to a company, that same disclosure may reflect a company’s perspective that the risk is relevant to the company or its securities because of the environment in which it operates and warrants information and context for a reader. In the experience of the Society’s members, companies do not view their risk factors in such simplistic terms as “specific” and “general/generic,” but rather recognize that they face a variety of risks. Imposing this categorization scheme would be burdensome, as companies would struggle to differentiate between “specific” and “general/generic” and may be apt to make determinations, derived from their company-specific perspectives, which would differ from those of the Commission.

We also note that creating this “general” category may hinder achievement of the other objectives in the proposing release. If required to place certain risk factors in a separate “general” category, such risk factors could not be placed within an otherwise relevant heading or category, in line with the proposal, resulting in companies being prohibited from placing certain risk factors where their informative value is most apparent in favor of an omnibus “general” categorization.

<u>Requiring Risk Factor Prioritization Would Be Unduly Burdensome:</u> The Society believes the proposal requiring risk factor prioritization would be unduly burdensome and conflicts with the Commission's proposal to organize risk factors under relevant headings, and thus recommends against adopting a formal prioritization requirement. While the Society recognizes that such prioritization could, in theory, provide beneficial disclosure, and that the Commission has encouraged registrants to structure its risk factors in this manner[20], many risk factors deal with evolving or uncertain circumstances that are unknown or are difficult to quantify, and requiring registrants to evaluate and rank often-equally significant and evolving risk factors will add undue

[19] See footnote 276 of the proposing release.

[20] See Item 3.D of Form 20, which states, “[c]ompanies are encouraged, but not required, to list the risk factors in the order of their priority to the company.”

burden, increase costs, take time and effort away from other efforts, and create liability concerns based on how the factors are prioritized. While the Society recommends prioritization not be included in the final rule, if it were to be included, the rule should clarify how grouping and prioritization should be applied.

VI. Timing for Final Rule Compliance

Given that preparations for and drafting of Registration Statements, Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q begin well in advance of their filing, the Society respectfully requests that the SEC provide for a phase-in period when adopting final rules such that companies are not obligated to comply with the updated rules for any relevant filings in 2020 to allow companies sufficient time to prepare these disclosures.

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We appreciate the opportunity to provide comments on the modernization of Regulation S-K Items 101, 103 and 105 and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

Darla C. Stuckey
President and CEO
Society for Corporate Governance