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November 30, 2015

Re: Request for Comment on the Effectiveness of Financial Disclosures About Entities Other Than the Registrant
Release No. 33-9929; 34-75985; IC-31849
File No. S7-20-15

Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Ladies and Gentlemen:

We appreciate the opportunity to submit this comment letter in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its release entitled "Request for Comment on the Effectiveness of Financial Disclosures About Entities Other Than the Registrant" (the "Release"), published on September 25, 2015.

We support the Commission's efforts to improve the financial disclosure requirements of Regulation S-X in registration statements filed under the Securities Act of 1933, as amended (the "Securities Act"), and in periodic and current reports filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). We do not comment on every item contained in the Release. We do, however, have certain concerns and suggestions on specific items, as set forth below.

In particular, we are concerned about the potential unintended consequences of certain of the financial disclosure requirements of Regulation S-X, particularly in the context of initial public offerings and companies with alternative organizational structures. First, the income test used to test the significance of acquired businesses under Rule 3-05 and investees under Rule 3-09 frequently requires a registrant to include separate financial statements for acquired businesses and investees although they are in actuality immaterial to the total assets and overall business of the registrant. Second, with respect to issuances of debt securities, the "100% ownership" threshold requirement for being able to utilize the alternative disclosures under Rule 3-10 is overly restrictive in that it does not allow a parent company to provide alternative disclosures about its non-corporate subsidiary issuers and guarantors in "Up-C" or similar organizational structures. Third, we believe that a registrant's obligation to provide alternative disclosures under Rule 3-10 as long as the guaranteed securities remain outstanding acts as a disincentive for registrants to engage in public debt offerings as opposed to offerings under Rule 144A or pursuant to other Securities Act exceptions. In this regard, we believe that the obligation to provide consolidating information under Rule 3-10 should cease at the time that the reporting obligation of all subsidiary guarantor/registrants under Section 15(d) of the Exchange Act would otherwise have been suspended had Rule 3-10 not been utilized.

Each of these issues in Rules 3-05, 3-09 and 3-10 of Regulation S-X creates significant burdens to registrants that we believe are not outweighed by the value of the required disclosure to investors. Accordingly, for reasons described in detail below, we recommend that these Rules should be revised.

I. Rule 3-05, Financial Statements of Businesses Acquired or to be Acquired

The use of the income test (the "Income Test") under Rule 1-02(w)(3) of Regulation S-X ("Rule 1-02(w)") to evaluate the significance of an acquired business frequently yields anomalous results where an acquired business is considered "significant" to the registrant for purposes of Rule 3-05 of Regulation S-X ("Rule 3-05"), despite actually being immaterial to the registrant in terms of size. In such situations, Rule 3-05 imposes a burdensome requirement on the registrant, requiring the inclusion of up to three years of separate audited annual and unaudited interim pre-acquisition financial statements for each such acquired business in the registrant's disclosure.

We have seen this anomalous result on several occasions, particularly in the context of initial public offerings ("IPOs") of large corporations that have made acquisitions in the three-year period prior to the filing of the Securities Act registration statement relating to the IPO. Due in part to their pre-IPO capital structures, in many cases pretax income in at least one year during the three-year period is at or near zero, making the denominator for the Income Test very small.[1] Consequently, a registrant's acquisition of one or more small businesses with modest income that would not be considered significant (or close to

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[1] The second computational note in S-X 1-02(w), permitting the use of average income over a five year period rather than income for the most recent fiscal year when 10% or more lower than average income, is of limited practical value in these circumstances, particularly given the requirement to use a value of zero for any year where a loss has been reported in calculating average income, as well as the requirement to use the absolute value of any loss for the last fiscal year when comparing to average income.

significant) under the asset and investment tests of Rule 1-02(w) will often trigger the Rule 3-05 separate financial statement disclosure requirement under the Income Test.[2]

We believe that the investment test under Rule 1-02(w)(1) (the "Investment Test") and the asset test under Rule 1-02(w)(2) (the "Asset Test") provide a more accurate picture of the true significance of an acquired business to a registrant's overall business, as they use the registrant's total assets as the baseline for comparison to the acquired business's financials. For example, consider a registrant with $5 billion in total assets and $8 million in pretax income that acquires a business (the "Acquired Business") with $40 million in total assets and $5 million in pretax income for a purchase consideration of $300 million. The significance levels of the Acquired Business under the Investment and Asset Tests of Rule 1-02(w) would be 6% and 0.8%, respectively; nowhere near the 20% significance threshold for triggering financial statement disclosure under Rule 3-05. However, the significance level of the Acquired Business under the Income Test would be 62.5%, triggering the Rule 3-05 requirement for the registrant to include three years of audited annual and unaudited interim period pre-acquisition financials for the Acquired Business, even though the Acquired Business is immaterial to the overall size of the Portfolio Company (as evidenced by the results of the Investment and Asset Tests).

Furthermore, registrants (and particularly pre-IPO companies) often have a history of acquiring small businesses that previously may have not had audited financial statements. As a result, to comply with the Rule 3-05 disclosure requirements, such registrants must invest significant time and expense to have the acquired business's historical financials audited for the first time. Moreover, where Rule 3-05 is triggered at the 50% level, audited financial statements are required for a three-year period, which means that these statements may be required to be prepared even when the acquisition was completed one or two years before the registration statement filing date. This can pose significant challenges, expense and delay to the registrant, which often has to go back and attempt to prepare audited financial statements for an entity where the prior management and auditors are no longer accessible.

The Rule 3-05 requirement to include separate financial statements of an acquired business may provide investors with useful information when a registrant has acquired a business that is truly significant to the registrant's overall business. However, separate financial statements of an acquired business do not provide incremental value to a potential investor if the acquired entity is, for practical purposes, actually immaterial to the registrant's overall business. The substantial expense, delay and burden to the registrant of preparing and providing financial statements of an immaterial subsidiary are not outweighed

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2 The ability in certain circumstances to apply SAB 80 instead of Rule 3-05 also does not provide sufficient relief in these instances due to the stringent conditions for its utilization. For example, the requirement that the acquired businesses be discrete and substantially intact after the acquisition often proves difficult to satisfy, and the "first-time registrant" requirement can also be a limiting factor.

by the limited value of such information to investors. Accordingly, we believe that the Asset Test and Investment Test are sufficient on their own to determine if an acquired entity is significant for purposes of Rule 3-05 because it is the best measure of relative size. The Income Test should not be used to determine significance of an acquired business under Rule 3-05.

If, however, it is determined that a test based upon financial performance is warranted, we recommend that the Income Test be replaced with a test based upon a comparison of annual revenues. A revenue-based test would be far less likely to result in the anomalies discussed above given that smaller companies tend to generate smaller revenues and larger companies tend to generate larger revenues, in each case unimpacted by many of the factors (such as interest expense or depreciation) that could result in a registrant having pre-tax income at or near zero. As a result, using a test based upon revenues as opposed to pre-tax income would eliminate outliers and present a more consistent test of whether an acquisition is material.

II. Rule 3-09, Separate Financial Statements of Subsidiaries Not Consolidated and 50 Percent or Less Owned Persons

The Income Test presents similar issues in the context of Rule 3-09 of Regulation S-X ("Rule 3-09") as those discussed above under Rule 3-05. Under Rule 3-09, if a registrant owns 50% or less of an entity (an "Investee"), the registrant must include separate audited or unaudited annual financial statements of the Investee if it is considered "significant." Significance of an Investee is determined by using the Income Test and the Investment Test. If the result of either the Income Test or the Investment Test exceeds 20% for any of the fiscal years presented by the registrant, the registrant must include financial statements for of the Investee for all years and the financial statements must be audited for each year that the test exceeds 20%.

As in Rule 3-05, the Income Test often yields anomalous results in Rule 3-09, particularly in the context of registrants who have recently completed IPOs. The Income Test often considers as "significant" investments and joint ventures that a registrant does not consider material to its overall business, particularly when the registrant has a net income at or near zero. Consequently, a registrant is faced with the burden and expense of attempting to obtain audited financial statements for Investees that it does not control and that it views as immaterial to its overall business, often resulting in delays to the registrant's filings. Moreover, for any given registrant the Income Test may be tripped for multiple Investees, inundating investors with voluminous additional information of questionable importance.

Consequently, consistent with our recommendations above in (I), we recommend that the Income Test be eliminated altogether for revaluating whether financial statements of equity method investees are required under Rule 3-09.[3]

III. Rule 3-10, Financial Statements of Guarantors and Issuers of Guaranteed Securities Registered or Being Registered

A. The Current Definition of "100% Owned" Should Be Modified to Enable a Parent Company to Provide Alternative Disclosures Under Rule 3-10 with Respect to the Non-Corporate Subsidiary Issuers or Guarantors That It Controls

Under Rule 3-10 of Regulation S-X ("Rule 3-10"), both issuers and guarantors of registered securities that are guaranteed must file their own audited annual and unaudited interim financial statements. However, in certain circumstances, Rule 3-10 allows a parent company to provide disclosures in its own financial statements to cover a subsidiary issuer or guarantor in the form of a consolidating footnote to the parent's financial statements (rather than requiring separate financial statements for the subsidiary issuer/guarantor) ("Alternative Disclosures"). As a threshold issue to qualify for Alternative Disclosures, Rule 3-10 requires that a subsidiary issuer or guarantor must be "100% owned" by the parent company and the guarantees must be "full and unconditional." We believe that the "100% ownership" requirement, as currently defined, is overly restrictive, given recent trends in the structure of IPOs.

In recent years, we have observed a notable trend in the context of IPOs. Increasingly, registrants that are organized as limited liability companies ("LLCs") or as limited partnerships ("LPs"; such LLC or LP, the "Operating Company") are opting to structure their IPOs using an "Up-C" or similar structure to allow the pre-IPO Operating Company owners (the "pre-IPO Owners") to maintain the tax benefits of ownership in a non-corporate structure even following completion of an IPO.

In an Up-C structure, a parent corporation (the "Parent Public Company") is incorporated above the Operating Company and becomes the Operating Company's sole managing member or general partner, as applicable, and owns all of the membership interests in the Operating Company not retained by the pre-IPO Owners. The Parent Public Company is also the registrant that files the S-1 registration statement to offer shares of its common stock to the public in the IPO. The pre-IPO Owners maintain non-voting membership interests in the Operating Company, with the right to exchange their membership interests in the Operating Company for shares in the Parent Public Company in the event that they wish to transfer their equity ownership. Although the pre-IPO Owners

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3 Please note that, in comparison to Rule 3-05, we do not believe that a revenues-based test would be a satisfactory alternative under Rule 3-09 given that Investees are reflected on the balance sheet of the registrant using the equity method of accounting, making a revenue comparison inappropriate.

retain a membership interest in the Operating Company (so as to maintain favorable pass-through tax treatment), they customarily do not possess voting rights or have the ability to change the managing member or general partner, as applicable, of the Operating Company.[4]

Although in this structure the Parent Public Company owns 100% of the voting interests in the Operating Company, these registrants face significant challenges under Rule 3-10 in the context of guaranteed debt offerings due to Rule 3-10's "100% owned" threshold requirement to be eligible for Alternative Disclosures. Under Rule 3-10(h), a subsidiary is "100% owned" if, (i) in the case of a corporate subsidiary, all of its voting shares are owned, either directly or indirectly, by its parent company or (ii) in the case of a non-corporate subsidiary, the sum of all interests are owned by its parent company (with certain exceptions). While the "100% owned" test only considers shares with voting rights for corporate subsidiaries, it considers all membership interests (voting and non-voting) for non-corporate subsidiaries. In an Up-C structure, although the Parent Public Company owns 100% of the voting interests in the Operating Company, because it does not own 100% of all of the membership interests in the non-corporate Operating Company, it is not considered "100% owned" under Rule 3-10 and it is precluded from taking advantage of the Rule 3-10 Alternative Disclosures exemptions. Consequently, the Operating Company and the Parent Public Company cannot issue or guarantee registered debt without preparing separate audited financial statements for each entity and making the Operating Company a separate reporting company under the Exchange Act.

We believe that the distinction between corporate subsidiaries and non-corporate subsidiaries in this context does not make sense.[5] Investors do not require more information about a subsidiary issuer or guarantor simply because it is organized as an LLC or an LP rather than as a corporation. In our experience, companies that use the Up-C or similar structures in their IPOs are unwilling and unable to access the public debt markets because the Operating Company in such structures would have to prepare separate audited financial statements and to become a separate reporting company under the Exchange Act. The current Rule 3-10 "100% owned" threshold requirement for Alternative Disclosures is unduly burdensome for these registrants.

Accordingly, we believe that the "100% owned" test should be modified so that it does not distinguish between corporate and non-corporate entities. If a parent company owns

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4 Recent IPOs utilizing this Up-C structure include Adeptus Health Inc. (File No. 333-196142) and GoDaddy Inc. (File No. 333-196615).

5 Although outside the scope of the Commission's request for comment, we note another context where we believe there is an unnecessary distinction between the treatment of corporate and non-corporate entities. In Rule 405 under the Securities Act, a limited partnership is deemed an "Ineligible Issuer" for all circumstances other than an offer and sale of its own securities in a firm commitment underwriting. There is no analogous treatment for corporations.

100% of the voting interests of a subsidiary, whether corporate or non-corporate, such subsidiary should be treated as 100% owned for purposes of Rule 3-10.

B. The Obligation to Provide Alternative Disclosures Under Rule 3-10 Should Cease if the Reporting Obligation is Suspended Under Section 15(d) of the Exchange Act

Under current SEC guidance, if a registrant relies on Rule 3-10 and/or Rule 12h-5 under the Exchange Act to omit the financial statements of its subsidiary issuers and guarantors or to obtain an exemption for those entities from the reporting requirements of Section 13(a) and 15(d) of the Exchange Act, the registrant must continue to provide the Alternative Disclosures as long as the securities remain outstanding. This obligation extends beyond the time when a subsidiary issuer/guarantor's reporting obligation might otherwise be suspended under Section 15(d) of the Exchange Act had Rule 3-10 not been utilized. As outlined below, we believe that when the reporting obligations of all subsidiary issuers/guarantors would otherwise have been permitted to be automatically suspended under Section 15(d) of the Exchange Act, the parent registrant's obligation to provide the Alternative Disclosures under Rule 3-10 should simultaneously be suspended.

Section 15(d) of the Exchange Act provides that a registrant's duty to file under that subsection is automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective if, at the beginning of such fiscal year, the securities to which the registration statement relates are held of record by less than 300 persons. Given the method for determining securities held of record pursuant to Rule 12g5-1, in many cases when a debt security is offered and sold on a registered basis there will be fewer than 300 holders of record, meaning that in such cases the reporting obligation of subsidiary issuers/guarantors under Section 15(d) would become automatically suspended within 1-2 years following completion of the registered offering.

We believe that a registrant's obligation under Rule 3-10 to continue to provide alternative disclosures under Rule 3-10 as long as the guaranteed securities remain outstanding acts as a disincentive for registrants to engage in public debt offerings as opposed to offerings under Rule 144A or pursuant to other Securities Act exceptions. Given that Rule 3-10 provides an exception from the obligation to report under Section 15(d), we believe that the exception should only be applicable when there is an underlying reporting obligation. Put another way, if the reporting obligation under Section 15(d) of the Exchange Act would otherwise have been suspended for all subsidiary issuers and guarantors, the requirement for Alternative Disclosures relating to subsidiary issuers and guarantors should also be suspended. The Rule 3-10 reporting requirements should end simultaneously with when the Exchange Act reporting obligation would have ceased if Rule 12h-5 had not been available.

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We appreciate the opportunity to submit, and the Commission's consideration of, our comments on the financial disclosure requirements in Regulation S-X for certain entities other than a registrant. We would be pleased to discuss our comments with you or provide any additional information you would find useful. If you have any questions regarding this letter, please do not hesitate to contact Joseph H. Kaufman at [redacted] or [redacted] or Katharine Thompson at [redacted] or [redacted].

Very truly yours,

Joseph H Kaufman

Joseph H. Kaufman