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Memorandum

SEC Issues Concept Release Regarding Modernization of Business and Financial Disclosure Requirements

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On April 13, 2016, the Securities and Exchange Commission ("SEC") issued a lengthy concept release, seeking public comment on ways to modernize and improve certain business and financial disclosure requirements codified in Regulation S-K. [1] In particular, the SEC seeks to assess whether these requirements continue to provide the information that investors need to make informed investment and voting decisions, whether any of the rules have become outdated or unnecessary, and how registrants can most effectively present information they are required to disclose.

The concept release is part of the SEC's comprehensive evaluation of its disclosure requirements recommended by the staff in its Report on Review of Disclosure Requirements in Regulation S-K ("S-K Study"), which was mandated by the Jumpstart Our Business Startups Act ("JOBS Act"). The comprehensive evaluation, known as the Disclosure Effectiveness Initiative, is aimed to improve the SEC's disclosure regime for both investors and registrants.

The concept release is focused on the business and financial disclosures issuers are required to provide in their periodic reports and covers a wide array of topics grouped in three main categories:

1. The SEC's disclosure framework;
2. Information for investment and voting decisions; and
3. The presentation and delivery of important information.

The SEC is soliciting comments on its concept release, to be received by the SEC by July 21, 2016.

[1] *See* *Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064, 34-77599; File No. S7-06-16 (Apr. 13, 2016).

I. Disclosure Framework

A. Sunset Provisions and Temporary Rules

At times, the SEC has adopted temporary rules or rules with automatic sunset provisions to better assess the effect of or necessity for a particular rule before adopting the rule on a permanent basis. In some instances, the SEC has determined to permanently adopt a rule that it initially adopted on a temporary basis, while in other cases, it has allowed temporary rules to expire. The SEC is seeking the public's input on the utility of sunset provisions and temporary rules in the context of business and financial disclosure requirements. Specifically, the SEC asks the following questions, among others:

- Should the SEC consider including automatic sunset provisions in new disclosure requirements? If so, for what types of disclosure requirements and for what length of time?
- Should the SEC consider requiring the staff to study and report to the SEC on the impact of new disclosure requirements when adopting them?

B. Principles-Based Versus Prescriptive Disclosure Requirements

As noted in the release, the concept of materiality is the bedrock of the disclosure system established by the federal securities laws. The SEC has adopted the definition of materiality articulated by the Supreme Court in *TSC Industries, Inc.* v. *Northway, Inc.* – Information is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." "Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

The release explains that many of the SEC's disclosure requirements are principles-based, requiring disclosure when information is material to investors. These rules "articulate a disclosure objective" and rely on each registrant's management to exercise judgment in satisfying that objective by evaluating the information and its significance to investors in the context of the registrant's overall business and financial circumstances. On the other hand, some of the SEC's rules are prescriptive, employing objective, quantitative thresholds to identify when disclosure is required or simply requiring issuers to disclose information in all cases.

Questions posed by the SEC in its request for comment include the following:

- Should the SEC retain the current materiality definition or consider a different definition for disclosure purposes?
- Should the SEC limit prescriptive disclosure requirements and emphasize a principles-based approach?
- Should the SEC develop qualitative and/or quantitative thresholds for disclosure?

C. Audience for Disclosure

The SEC recognizes the diverse composition and varied informational needs, sophistication and financial resources of investors, and that some investors may obtain their analysis or advice from or through third parties who use registrant disclosures. Moreover, different types of investors and various third parties may focus on different filings or items of disclosure.

In its request for comment, the SEC asks, for example:

- Should registrants assume some level of investor sophistication in preparing their disclosures? If so, what level(s) of sophistication, and how should investor sophistication be measured?
- Should disclosure requirements be revised in response to comments suggesting that disclosure be written for a more sophisticated investor and that tailoring disclosure to less sophisticated investors contributes to excessive disclosure?

Additionally, questions regarding the audience for specific disclosure requirements appear throughout the release.

D. Costs of Disclosure

In the release the SEC recognizes that disclosure imposes certain costs on registrants and that, "[a]s disclosure costs rise, registrants' costs of capital may increase, which can reduce investment, lower the value of a company and impede economic growth." These costs include administrative and compliance costs that are incurred in preparing and disseminating the company's disclosure, as well as "the potential costs of disclosing sensitive information to competitors." Accordingly, the SEC is requesting comment on changes that could reduce costs for registrants, while still providing investors with information that is important or useful to making informed investment and voting decisions. Specifically, the SEC poses the following questions, among others:

- Do current disclosure requirements appropriately consider the costs and benefits of disclosure to registrants and investors?
- In addition to scaled disclosure and confidential treatment, are there other accommodations that the SEC could make to reduce costs for registrants while still providing investors with the information that is important or useful to making informed investment and voting decisions?

In its questions regarding specific disclosure requirements throughout the release, the SEC often asks about the costs involved in complying with the requirement at issue.

II. Information for Investment and Voting Decisions

A. Core Company and Business Information

According to the SEC, disclosures regarding an issuer's business lays the foundation for understanding and assessing the company, its operations and its financial condition. The release discusses the various disclosure requirements in Item 101(a)(1) and (c) and Item 102 of Regulation S-K and seeks the public's input on whether any of these disclosure requirements should be eliminated or modified and whether any new disclosure requirements should be added to these items.

1. General Development of Business (Item 101(a)(1))

Item 101(a)(1) of Regulation S-K requires registrants to describe the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business. The SEC's questions regarding Item 101(a)(1) include the following:

- Does the current requirement in Item 101(a)(1) provide useful disclosure that is not available either elsewhere in the current filing, such as in the financial statements or MD&A, or in any prior filing, including current reports on Form 8-K?
- Once a registrant has disclosed this information in a registration statement, should the SEC allow it to omit this disclosure from subsequent periodic reports unless material changes occur?
- Should the SEC permit a summary disclosure of the general development of a registrant's business in all filings except the initial filing?
- Should Item 101(a)(1) be revised to require disclosure of the registrant's business strategy?

2. Narrative Description of Business (Item 101(c))

Item 101(c) requires a narrative description of a registrant's business and identifies thirteen specific items that must be disclosed. The SEC is seeking comment on the continuing relevance of this disclosure requirement in light of the wide spectrum of business models today and changes in the way businesses currently operate. The SEC's request for comment includes the following questions:

- Do the disclosure requirements in Item 101(c) continue to provide useful information to investors?
- How can the SEC update Item 101(c) to better reflect changes in the way businesses operate?
- Are there additional line-item disclosure requirements regarding a registrant's business that should be included in Item 101(c)?

3. Technology and Intellectual Property Rights (Item 101(c)(1)(iv))

Item 101(c)(1)(iv) requires the disclosure of the importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises, and concessions held. According to the SEC, disclosure in response to Item 101(c)(1)(iv) varies among registrants and across industries. With regard to Item 101(c)(1)(iv), the SEC asks the following questions, among others:

- Should the scope of Item 101(c)(1)(iv) be retained or should the rule be expanded to include other types of intellectual property, such as copyrights?
- Should Item 101(c)(1)(iv) be revised to require more detailed intellectual property disclosure?

4. Government Contracts and Regulation, Including Environmental Laws (Items 101(c)(1)(ix) and (xii))

Item 101(c)(1)(ix) requires registrants to provide a description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the government. The SEC's request for comment regarding this requirement includes the following questions:

- Is disclosure about government contracts important to investors?
- Is there any additional information about a registrant's contracts with the government that would be important to investors?
- Should registrants be required to briefly describe all material contracts, instead of only government contracts?

Item 101(c)(1)(xii) requires disclosure of the "material effects" on the capital expenditures, earnings and competitive position of the registrant and its subsidiaries" of compliance with federal, state and local provisions regarding discharge of materials into the environment, or otherwise relating to the protection of the environment. Item 101(c)(1)(xii) further requires disclosure of "any material estimated capital expenditures for environmental control facilities for the remainder of [the company's] current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material." In its request for comment regarding this requirement, the SEC asks the following questions, among others:

- Is the disclosure required by Item 101(c)(1)(xii) important to investors, and if so, should registrants be required to present this disclosure in a particular format?
- Should the SEC increase or reduce the environmental disclosure required by Item 101(c)(1)(xii)?
- Would this disclosure be more appropriate in the MD&A or the business section?

Noting that "many registrants discuss government regulations relevant to their business" although not required by Item 101, the SEC presents several questions, including:

- Would a specific requirement to provide disclosure of material government regulations result in the disclosure of information that is important to investors?
- Should the SEC specifically require registrants to describe foreign regulations that affect their business?

5. Number of Employees (Item 101(c)(1)(xiii))

Item 101(c)(1)(xiii) requires disclosure of the number of persons employed by the registrant. Noting that there is variability among registrants with regard to the level of detail they provide in response to this item, the SEC asks, for example:

- Is this disclosure important to investors and why? Is there additional information about employees that would be important to investors?
- Should registrants be required to distinguish among their employees, such as between full-time, part-time and seasonal workers; employees and independent contractors; or domestic and foreign employees?

6. Description of Property (Item 102)

Item 102 requires disclosure of, among other things, the location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries. The release notes that the S-K Study suggested that Item 102 be reviewed to determine whether it continues to be relevant given that many businesses no longer require or depend on physical locations. Questions presented by the SEC in its request for comment include the following:

- Should the SEC retain or eliminate Item 102?
- Is there any additional disclosure regarding a registrant's properties that would be important to investors?
- Should property disclosure be required only for registrants in certain industries?

B. Company Performance, Financial Information and Future Prospects

As the SEC explains, "[f]inancial information is essential to understanding a registrant's performance, financial condition and future prospects." Furthermore, narrative disclosure explaining the company's financial statements is necessary, according to the SEC, "to assess the quality of the earnings and the likelihood that past performance is indicative of future performance." Through its concept release, the SEC aims to determine whether the disclosure requirements relating to a company's financial condition and results of operations "continue to provide investors with information that is important to evaluating a registrant's performance, financial condition and prospects for the future and what, if any, aspects of the

disclosure requirements are duplicative." Additionally, the SEC is seeking comment on whether it should consider any new disclosure requirements relating to registrants' financial information.

1. Selected Financial Data (Item 301)

Item 301 requires registrants to provide, in comparative columnar form, selected financial data that highlight significant trends in the registrant's financial condition and results of operations. Registrants are required to provide this information for each of their last five fiscal years, as well as any additional fiscal years where such disclosure would be necessary to keep the information from being misleading. The SEC requests comment on several questions regarding Item 301, including the following:

- Is Item 301 disclosure that is not otherwise available (such as in the annual financial statements) important to investors?
- Should the SEC retain, modify or eliminate Item 301? Does Item 301 achieve the goals of (1) highlighting significant trends in a registrant's financial condition and results of operations and (2) providing selected financial data in a convenient and readable format?
- Should the SEC require Item 301 disclosure for the full five years only in certain instances?

2. Supplementary Financial Information (Item 302)

Item 302(a)(1) requires specified registrants to disclose quarterly financial data of selected operating results, and Item 302(a)(2) requires disclosure of variances in these results from amounts previously reported. Furthermore, Item 302(a)(3) calls for a description of the "effect of any disposals of segments of a business, and extraordinary, unusual or infrequently occurring items recognized in each full quarter within the two most recent fiscal years," as well as the "aggregate effect and the nature of year-end or other adjustments which are material to the results of that quarter." The SEC notes that "[w]hile most of the disclosure required by Item 302(a) is required in prior quarterly reports, Item 302(a)(1) also requires a separate presentation of certain items for a registrant's fourth quarter, which is not otherwise required." The SEC requests comment on Item 302(a), including in response to the following questions:

- Do investors use the disclosure required by Item 302(a)?
- Should the SEC retain or eliminate Item 302(a)? If Item 302(a) is retained, should it be modified and, if so, how?
- Is fourth quarter information important to investors?

3. Content and Focus of MD&A (Item 303 Generally)

Item 303 requires disclosure of information relevant to assessing a registrant's financial condition, changes in financial condition and results of operations. The SEC has previously provided guidance designed to improve the quality of MD&A disclosure, particularly with regard to the quality and focus of analysis, forward-looking information, and the use of key performance indicators. The SEC is requesting public comment on these topics and how it could improve the overall quality of MD&A disclosure. Specific questions posed by the SEC include the following:

- Do the current requirements of Item 303 result in disclosure that highlights the most significant aspects of the registrant's financial condition and results of operations?
- Are there any requirements in Item 303 that result in immaterial disclosures that may obscure significant information?
- Should the SEC adopt a qualitative or quantitative threshold in Item 303, rather than materiality, for requiring MD&A disclosure?
- Should the SEC consolidate in a single source all of its MD&A guidance, which is currently scattered among various sources? If so, which guidance remains helpful, and is there guidance that should be omitted?
- Should Item 303 be revised to include a principles-based requirement to disclose performance metrics and other key variables important to the business?
- Should the SEC mandate disclosure of any commentary, analysis, performance indicators or business drivers related to a registrant's key indicators?

4. Results of Operations (Item 303(a)(3))

Item 303(a)(3) calls for a discussion and analysis of the issuer's results of operations, specifying four areas of disclosure. The discussion is required to cover the three-year period covered by the financial statements and use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding. Among the questions posed by the SEC regarding Item 303(a)(3) are the following:

- Should the SEC retain, eliminate or modify the period-to-period comparisons provided in MD&A?
- Does the three-year comparison provide material information about trends or uncertainties that would not be reflected in filings for prior periods?
- Would any additional disclosure regarding a registrant's results of operations be important to investors?

5. Liquidity and Capital Resources (Items 303(a)(1) and (2))

Item 303(a)(1) requires, among other things, the identification of any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a "material deficiency" is identified, the registrant must indicate the course of action it "has taken or proposes to take to remedy the deficiency."

Item 303(a)(2) requires issuers to describe their "material commitments for capital expenditures" and "indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments." Registrants must also describe "any known material trends, favorable or unfavorable" in their capital resources and indicate "any expected material changes in the mix and relative cost of such resources."

Despite guidance the SEC has issued regarding the liquidity and capital resources disclosure requirements, the staff indicates that it has observed that discussions of liquidity and capital resources often recite various changes in line items from the statement of cash flows without a detailed analysis. According to the release, while "registrants generally discuss their liquidity needs and the sources of cash available to meet those needs," their "disclosure of known trends and uncertainties affecting their future needs and availability of cash often is less detailed." The SEC's questions regarding the liquidity and capital resources disclosure requirements include the following:

- How could Item 303(a) be revised to elicit a more meaningful analysis of a registrant's liquidity and capital resources while retaining the flexibility of registrants to analyze liquidity and capital resources in the context of their business and the way they manage liquidity?
- Would defining the term "capital resources" be helpful for registrants? And should the SEC modify the definition of "liquidity" in Instruction 5 to Item 303(a), which currently defines "liquidity" generally as "the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs for cash"?
- Do the disclosure requirements of Item 303 elicit adequate disclosure of a registrant's reliance on short-term borrowings?

6. Off-Balance Sheet Arrangements (Item 303(a)(4))

Item 303(a)(4) requires a discussion, in a separately-captioned section, of the registrant's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors. The SEC has recognized that parts of the disclosure requirement in Item 303(a)(4) may overlap with disclosure presented in the footnotes to the financial statements and with other disclosures required by U.S. GAAP. Questions posed by the SEC

regarding Item 303(a)(4) include the following:

- Does Item 303(a)(4) elicit disclosure that is important to investors? Is this information otherwise available in SEC filings?
- If the SEC retains the disclosure requirements in Item 303(a)(4), should it expand the disclosure required by the item?
- If Item 303(a)(4) is eliminated, do the other requirements in Item 303 and the requirements in U.S. GAAP require adequate disclosure of the location, presentation and nature of information about off-balance sheet arrangements?

7. Contractual Obligations (Item 303(a)(5))

Item 303(a)(5) requires the disclosure, in a tabular format, of the registrant's contractual obligations, aggregated by type – specifically, long-term debt, capital leases, operating leases, purchase obligations and other long-term liabilities reflected on the registrant's balance sheet under GAAP. With regard to this requirement, the SEC asks, for example:

- Does the table present a meaningful snapshot of a registrant's cash requirements for contractual obligations? How could the format of disclosure be improved?
- Should the SEC require narrative disclosure to accompany the tabular disclosure?
- Should the SEC expand the rule to require the disclosure of additional categories of contractual obligations?

8. Critical Accounting Estimates

As explained by the SEC, critical accounting estimates "are those accounting judgments and estimates that relate to the items that are material to the financial statements, taken as a whole, and that management believes are most critical – that is, those that are most important to portraying the registrant's financial condition and results and require management's most difficult, subjective or complex judgments." The SEC issued interpretive guidance in 2003 regarding disclosure of critical accounting estimates and is now seeking public input on how to revise its requirements to improve the discussion of critical accounting estimates in MD&A. Among other questions, the SEC asks:

- Should Item 303 be revised to require disclosure of critical accounting estimates?
- Should the SEC define "critical accounting estimates" and if so, how?
- How can the SEC encourage registrants not to repeat in the MD&A their discussion of accounting policies provided in the notes to the financial statements?

C. Risk and Risk Management

As explained by the SEC, "[d]isclosure of a registrant's most significant risks provides investors with important context for assessing the registrant's financial potential." The SEC seeks comment on how its risk-related disclosure requirements could be enhanced.

1. Risk Factors (Item 503(c))

Item 503(c) requires a concise discussion, organized logically, of the most significant factors that make the offering speculative or risky. While this disclosure requirement is principles-based, Item 503(c) lists several examples of risk factors. Item 503(c) further states that issuers should "not present risks that could apply to any issuer or any offering" and requires issuers to "[e]xplain how the risk affects the issuer or the securities being offered." Seeking to improve the effectiveness of risk factor disclosure, the SEC asks, for example:

- Should the SEC require registrants to disclose the probability of occurrence and the effect on performance for each risk factor?
- How can Item 503(c) be revised to discourage registrants from providing risk factor disclosure that is not specific to the registrant but instead describes risks that are common to an industry or to registrants in general?
- Should the SEC retain or eliminate the examples of risk factors in Item 503(c)?

2. Quantitative and Qualitative Disclosures About Market Risk (Item 305)

Item 305 requires quantitative and qualitative disclosure of market risk sensitive instruments that affect a registrant's financial condition. Under Item 305(a), issuers are required to provide quantitative information about market risk in accordance with one of three disclosure alternatives. Item 305(b) requires registrants to disclose qualitative information about market risk. In its request for comment regarding Item 305, the SEC asks several questions, including the following:

- Does Item 305 result in information that allows investors to effectively assess a registrant's aggregate market risk exposure and the impact of market risk sensitive instruments on a registrant's results of operations and financial condition?
- Should the SEC limit the quantitative disclosure requirement to certain registrants, such as financial institutions and those registrants engaged in financial services?
- Should Item 305 be revised to provide for more standardized disclosure that would enhance comparability among registrants?

3. Disclosure of Approach to Risk Management and Risk Management Process

The SEC notes that disclosure regarding a registrant's approach to risk management "could enhance investor understanding of the possible impact of a disclosed risk and the registrant's overall risk profile," though it may have some potential drawbacks, such as its occasional inclusion of registrants' confidential or proprietary information. The SEC requests public comment on several questions, including the following:

- Should the SEC require registrants to describe their risk management process?
- Should the SEC require issuers to disclose when risk tolerance limits or other fundamental aspects of its risk management approach are waived or changed?
- Should the SEC require registrants to disclose their efforts to manage or mitigate each risk factor disclosed?

4. Consolidating Risk-Related Disclosure

In addition to Items 503(c) and 305, there are several items in Regulation S-K that call for risk-related disclosures. The SEC seeks public input on whether to consolidate such disclosures. In this regard, the SEC asks, for example:

- Should the SEC require a consolidated discussion of risk and risk management, including legal proceedings, in a single section of a filing, and if so, what information should be included?
- What challenges, if any, would a consolidated risk-related disclosure requirement present?

D. Securities of the Registrant

According to the SEC, disclosure regarding "a registrant's capital stock and transactions by registrants in their own securities helps inform investment and voting decisions by providing investors with information about a security that can be useful in assessing its value." The concept release seeks public comment regarding the items in Regulation S-K that require such disclosure.

1. Number of Equity Holders (Item 201(b))

Item 201(b) mandates disclosure of "the approximate number of holders of each class of common equity of the registrant as of the last practicable date." In relation to this item, the SEC asks, among other things:

- Should the SEC retain or eliminate Item 201(b)?
- As the vast majority of investors now hold their shares in street name, does disclosure regarding the number of record holders continue to be important to investors? Should the SEC require registrants to disclose the amount of each class of equity securities held in street name and/or the number of beneficial owners?

2. Description of Securities (Item 202)

Under Item 202, registrants must briefly describe the capital stock, debt, warrants, rights, American Depositary Receipts or any other securities that are being registered. Noting that Item 202's disclosure requirements are not required in periodic reports, the SEC poses several questions, such as the following:

- In addition to the disclosure requirements in registration statements and certain proxy statements, should the SEC require registrants to provide Item 202 disclosure annually in Form 10-K? Should the SEC require registrants to disclose in their quarterly and annual reports whether changes have been made to the terms and conditions of their securities during the reporting period?

3. Recent Sales of Unregistered Securities (Items 701(a)-(e))

Items 701(a)-(e) require the disclosure of specified information relating to all sales of unregistered securities by the registrant within the past three years. The questions posed by the SEC regarding Items 701(a)-(e) include the following:

- Does the disclosure required under Items 701(a)-(e) provide important information that is not available in either MD&A or the financial statements?
- Does the disclosure requirement in Item 3.02 of Form 8-K for issuances of 1% or greater and the requirement in Item 701, which covers all issuances, strike the right balance between disclosing larger issuances promptly and all others quarterly?
- Should the SEC revise Forms 10-K and 10-Q to require the disclosure of all unregistered sales of securities during the reporting period, including those already reported on Form 10-K?
- Should the Item 701 disclosure requirement be removed from Forms 10-K and 10-Q? If so, should the SEC revise Item 3.02 of Form 8-K to require registrants to disclose all unregistered sales of securities on Form 8-K, or alternatively, eliminate Item 3.02 of Form 8-K and instead require disclosure only in Forms 10-K and 10-Q?

4. Use of Proceeds from Registered Securities (Item 701(f))

Item 701(f) requires registrants to disclose the use of proceeds from their first registered offering. Among the questions posed by the SEC with regard to Item 701(f) is the following:

- Should the SEC retain or eliminate disclosure about the use of offering proceeds required by Item 701(f)? If the requirement is retained, how can it be improved?

5. Purchases of Equity Securities by the Issuer and Affiliated Purchasers (Item 703)

Item 703 requires tabular disclosure of purchases of registered equity securities by the registrant or any affiliated purchaser, as well as footnote disclosure of certain items. The SEC adopted Item 703 "to increase the transparency of security repurchases by registrants and their affiliates and to inform investors of registrants' stated repurchasing intentions and subsequent repurchases." Noting, in part, that stock repurchases have increased significantly in recent years, the SEC seeks comment on whether the SEC should require more frequent or more granular information about repurchases or whether the current disclosure requirements are sufficient. Questions posed by the SEC in its request for comment include the following:

- Does Item 703 provide important information that is not also disclosed in a registrant's financial statements?
- Should the SEC adopt a general materiality standard or specify a monetary threshold for Item 703 disclosure in periodic reports?
- Should the SEC require more frequent Item 703 disclosure? If so, what timeframe for reporting repurchases would be appropriate?

E. Industry Guides

As explained by the SEC, "[t]he Industry Guides express the disclosure policies and practices of the SEC and are intended to assist registrants and their counsel in preparing disclosure for their filings." The SEC is soliciting public comment on whether the Industry Guides "provide useful guidance for registrants that improves disclosure to investors" and where the Industry Guides or portions thereof should be codified in Regulation S-K. Additional specific questions presented by the SEC include the following:

- Do the Industry Guides result in disclosure that is important to investors that registrants might not otherwise disclose under Regulation S-K or Regulation S-X?
- Should some or all of the Industry Guides be updated?
- Does the status of the Industry Guides as staff policy rather than SEC rules have any impact on the extent to which registrants provide disclosure consistent with the Industry Guides?

F. Disclosure of Information Relating to Public Policy and Sustainability Matters

The concept release acknowledges that legislation passed in recent years required the SEC to promulgate various disclosure rules designed to address certain public policy concerns.

In 1975, the SEC had concluded that it would not require disclosure relating to social and environmental concerns unless such information is necessary in light of a Congressional mandate or unless, under the particular facts and circumstances, such information is material to investors. According to the SEC, the

current framework for adopting disclosure requirements has remained unchanged since then.

The SEC is requesting comment on the following questions, among others:

- Are there specific sustainability or public policy issues important to informed voting and investment decisions?
- Would line-item requirements for disclosure about sustainability or public policy issues cause registrants to disclose information that is not material to investors? Would these disclosures obscure information that is important to an understanding of a registrant's business and financial condition?
- Are there sustainability or public policy issues for which line-item disclosure requirements would be consistent with the SEC's rulemaking authority and its mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation?

G. Exhibits

Item 601 of Regulation S-K specifies, by form type, the exhibits that public companies must file with the forms required by the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act"). With regard to exhibits required in quarterly and annual reports filed pursuant to the Exchange Act, the SEC asks the following questions, among others:

- Should any of the exhibit requirements in Item 601 be modified or eliminated?
- Should any of Item 601's exhibit requirements be modified to change the presentation or format of the exhibits?
- Should the SEC consider changes to improve the usefulness of the exhibits? For example, should the exhibits be provided in a tagged or searchable manner?
- Should the SEC allow registrants to omit immaterial schedules and attachments from their filed exhibits?

1. Amendments to Exhibits (Item 601(a)(4))

Under Item 601(a)(4), any amendment or change to a previously filed exhibit to a Form 10-K or 10-Q – regardless of its significance – must be filed as an exhibit to a Form 10-K or 10-Q. The SEC's request for comment regarding this requirement includes the following questions:

- Should the SEC continue to require registrants to file all amendments or modifications to previously filed exhibits?
- Should the SEC instead amend Item 601(a)(4) to exclude immaterial amendments? If so, should the SEC provide guidance to registrants about how to determine whether an amendment is immaterial?

2. Changes to Exhibits (Instruction 1 to Item 601)

Pursuant to Instruction 1 to Item 601, if an exhibit to a registration statement is filed in preliminary form, registrants are not required to file an amendment to the exhibit if the exhibit has been changed only (1) to insert certain information that appears elsewhere in an amendment to the registration statement or a prospectus filed pursuant to Securities Act Rule 424(b), or (2) to correct typographical errors, insert signatures or make other similar immaterial changes. The SEC's request for comment regarding this requirement includes the following questions:

- Should the SEC eliminate Instruction 1?
- Should the SEC expand the applicability of Instruction 1 to all filings?

3. Material Contracts (Item 601(b)(10))

Item 601(b)(10) of Regulation S-K requires registrants to file contracts that are:

1. not made in the ordinary course of business and are material to the registrant (Item 601(b)(10)(i));
2. made in the ordinary course of business and are of a type specified in the rule (Item 601(b)(10)(ii)); or
3. management contracts or compensatory plans in which any director, named executive officer, or other executive officer of the registrant participates (Item 601(b)(10)(iii)).

The SEC's request for comment includes the following questions:

- Should the SEC revise the requirement to provide quantitative or other thresholds for determining when a contract is material to the registrant?
- Does "not made in the ordinary course of business" provide a clear standard for agreements covered by the rule? Should a different standard to apply?
- Should Item 601(b)(10)(ii) be expanded to include additional types of contracts that, although made in the ordinary course of business, should be filed?
- Rather than specifying categories of contracts, is there an alternative approach that would appropriately capture those ordinary course contracts that are important to investors?

Turning to discuss the disclosure thresholds under Item 601(b)(10)(ii), the SEC seeks comment on subsection B, which requires registrants to file any contract upon which their business is "substantially dependent." The SEC seeks comment on whether to quantify the term "substantial dependence." With regard to Item 601(b)(10)(ii)(C), which provides that registrants must file "[a]ny contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15 percent of such fixed

assets of the registrant on a consolidated basis." The SEC seeks input on whether a quantitative threshold is useful and, if so, whether the 15% threshold is appropriate. The SEC's specific questions include the following:

- Should the SEC adopt additional or different qualitative or quantitative thresholds for determining when contracts identified in Item 601(b)(10)(ii) must be filed as exhibits?
- How could the SEC design a quantitative threshold that would accommodate the diversity of registrants and business models?
- Should the SEC revise Item 601(b)(10)(ii)(C) to either increase or decrease the 15% threshold for exhibits relating to acquisitions of property, plant or equipment? Should the threshold continue to be based on fixed assets?

4. Preferability Letter (Item 601(b)(18))

When a registrant makes a voluntary change in accounting principles or practices in cases where two or more generally accepted accounting principles apply, Item 601(b)(18) requires the registrant to file a letter from its independent accountant indicating whether, in the independent accountant's judgment, the change is preferable under the circumstances. With regard to this requirement, the SEC asks the following questions, among others:

- Do preferability letters continue to provide incremental information to investors that is not otherwise available in either the auditor's opinion on the annual financial statements or in the notes to the interim financial statements?
- Should the SEC eliminate Item 601(b)(18) in light of the current requirements under U.S. GAAP and the PCAOB's auditing standards?

5. Subsidiaries and Legal Entity Identifiers

Item 601(b)(21) requires registrants to list all of their subsidiaries, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business. Registrants are permitted to omit the names of particular subsidiaries if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as of the end of the year covered by the report. Among the SEC's questions regarding Item 601(b)(21) are the following:

- Should Item 601(b)(21) be revised to eliminate the exclusions and require registrants to disclose all subsidiaries?
- Should the SEC expand the exhibit requirement to include additional disclosure about the registrant's subsidiaries?

- Should the SEC require registrants to include an organization or corporate structure chart or similar graphic depicting their subsidiaries and their basis of control?

With regard to Legal Entity Identifiers ("LEIs") – reference codes that allow for "unique identification of entities engaged in financial transactions" – the concept release indicates in recent rulemakings, the SEC has prescribed disclosure of LEIs for parties to certain financial transactions. According to the SEC, "[t]o the extent that LEIs become more widely used by regulators and the financial industry, they could potentially facilitate investor and SEC use of registrant data by showing networks of control, ownership, liability and risks." In its request for comment on LEIs, the SEC asks, for example:

- Should registrants be required to disclose their LEI and the LEIs of their subsidiaries (if available) in the list of subsidiaries filed under Item 601(b)(21)?
- Should the SEC's rules encourage registrants to obtain an LEI?

H. Scaled Requirements

1. Categories of Registrants Eligible for Scaled Disclosure

Under the SEC's disclosure regime, an issuer that qualifies as a smaller reporting company ("SRC") or emerging growth company ("EGC") may be eligible for reduced disclosure requirements. The SEC is seeking comment on how it should approach the eligibility criteria for using scaled disclosure. Specific questions asked by the SEC include the following:

- Are there types of registrants that would meet the current criteria for scaled disclosure but are unsuited for providing such disclosure?
- Should the SEC exclude certain types of registrants from the use of scaled disclosure and if so, what should be the criteria and the time period of exclusion?
- Should the SEC tie eligibility for scaled disclosure to a certain proportion of companies, such as companies in the lowest 1% of total U.S. market capitalization or the lowest 6% of total U.S. market capitalization?

2. Scaled Disclosure Requirements for Eligible Registrants

The SEC's prior efforts to simplify disclosure requirements for small businesses have focused on "reducing requirements that impede the formation and growth of small business and . . . are not necessary for the protection of investors." In recent years, certain organizations have recommended the SEC to scale its requirements further and to exempt or exclude SRCs from having to make certain disclosures. Similarly, the 2015 FAST Act directed the SEC to revise Regulation S-K "to further scale or eliminate requirements in order to reduce the burden on EGCs, accelerated filers, SRCs, and other smaller issuers, while still providing all material information to investors." Accordingly, the SEC seeks public input with regard to the following

questions, among others:

- Are there any disclosure requirements for which scaling is not appropriate?
- How should the SEC assess whether scaled disclosures are effective at achieving the SEC's mission of protecting investors, maintaining fair and orderly markets and facilitating capital formation?
- Are there disclosure requirements that are particularly beneficial for investors in smaller registrants?
- Are there any current scaled disclosure requirements that the SEC should scale further or eliminate entirely?
- Should the SEC allow EGCs to take advantage of the scaled disclosure requirements currently available only to SRCs?

3. Frequency of Interim Reporting

Since the SEC began requiring quarterly reporting in 1970, quarterly reports have been "intended to provide a mechanism to update the information in an annual report on Form 10-K in a more consistent manner and on a regular basis." But, as the SEC notes, "the value of quarterly financial reporting has been the subject of debate." Opponents of quarterly reporting fear that frequent financial reporting may lead management to focus on short-term results. On the other hand, advocates believe that greater frequency provides benefits, such as less information asymmetry between managers and investors. The SEC recognizes that the value of quarterly reporting may vary by industry or by the size of the registrant and that there are both advantages and disadvantages to more frequent reporting. As such, the SEC requests comment on several questions regarding the frequency of interim reporting, including the following:

- What are the benefits and costs to investors, registrants and the markets from the current system of quarterly reporting?
- Should the SEC revise or eliminate its rules requiring quarterly reporting?
- Should the reporting requirements be different for different types of registrants?
- Should the SEC reduce the level of disclosure required in the quarterly reports for the first and third quarters? If so, what disclosures should the SEC require in these abbreviated quarterly reports?

III. Presentation and Delivery of Important Information

A. Cross-Referencing

SEC rules generally permit issuers to cross-reference to information in one section of a document to satisfy a disclosure requirement in another section of the document rather than duplicating the disclosure. The SEC recognizes that being able to access all relevant information in this manner in a single location may be easier

for an investor but that repetitive disclosure may obscure relevant information or render it difficult to evaluate the importance of the information. Accordingly, the release discusses the various ways cross-references could potentially be used to reduce redundant disclosure and improve the navigability of lengthy documents.

1. Cross-References to Reduce Repetitive Disclosure

In light of the fact that repetition of information may be beneficial in certain contexts, such as when registrants have complex organizational structures or business models, and burdensome in other contexts, such as when repetition can become "distracting," the SEC asks the following questions, among others:

- Do investors find that cross-referencing within a filing in lieu of repeating the disclosure helps them locate important information?
- Does cross-referencing negatively affect investors' ability to use disclosure by creating inconsistency in the location of information across different registrants and different filings?
- Should the SEC require registrants to provide certain disclosures in the same location (e.g., under a specific item of the form) in every filing, rather than permitting cross-referencing? If so, which information should be located consistently and where should that information be located?

2. Cross-References to Navigate Disclosure

The SEC notes that cross-references can also be beneficial in assisting readers navigate disclosure "where disclosures are not necessarily duplicative but relate to the same topic and may be required in multiple locations throughout a filing." According to the SEC, including such cross-references "may help readers obtain a more complete picture by directing them to other similar information that the reader may not have otherwise reviewed." Given such potential benefits of using cross-references, the SEC asks, for example:

- Are there certain items or topics that would benefit from a cross-reference to related or more comprehensive disclosure in different parts of the filing?
- Do cross-references that identify related information make the disclosure more or less readable?

3. Limitations on Cross-Referencing

The SEC acknowledges the limitations of cross-referencing and has discouraged cross-references where such use would render the disclosure "unclear or incomplete," such as where the cross-references are vague or may draw attention away from key information. The SEC also notes that cross-referencing can present a problem with regard to the PSLRA's safe harbor for forward-looking statements. Specifically, cross-referencing statements that are covered by the PSLRA, such as the MD&A, into sections like the financial statements that are not covered by the PSLRA could result in the former statements losing their PSLRA safe

harbor protection. Accordingly, preparers may be disincentivized from using cross-references. The SEC's questions regarding the limitations of cross-referencing include the following:

- Are there items or topics where cross-references detract from the readability of a filing?
- Are there items or topics where cross-references should be prohibited and instead all related information should be presented in a single location?
- Should the SEC introduce requirements or guidance for the use of cross-references in order to increase the consistency in location of information across periods and registrants? If so, what requirements or guidance should the SEC consider?

B. Incorporation by Reference

Under Rule 12b-23 under the Exchange Act, in response to any item of a registration statement or report, registrants can generally incorporate by reference information in any other part of a registration statement or report, including any information contained in the filed documents of another issuer. As observed by the SEC, advancements in technology have encouraged greater use of incorporation by reference as information can be made "readily accessible on a website maintained by or for the registrant." According to the SEC, the practice of incorporation by reference has helped eliminate duplicative disclosure, but "there is no assurance that the mere reference to incorporated information will be meaningful to an investor or potential investor." On the issue of incorporation by reference, the SEC asks, for example:

- To what extent does including previously disclosed information along with recent developments in a single self-contained filing facilitate an investor's understanding of a registrant's disclosure?
- Does repeating information that previously has been disclosed hinder an investor's ability to identify information that has changed since the registrant's last report?
- Should the SEC expand or limit registrants' ability to incorporate by reference?

C. Hyperlinks

Rule 105 of Regulation S-T permits registrants to include hyperlinks within a filing, so long as the hyperlinks are to information within the same filing or to information in other filings in the EDGAR system. However, registrants cannot "omit information required within the filing by providing it through a hyperlink," and hyperlinks cannot be used to short-circuit the form or rule requirements for incorporation by reference. Noting the "significant increase in the use of the Internet as a tool for disseminating information," the SEC asks several questions, including:

- Should the SEC consider revising its rules to permit registrants to include external hyperlinks in their filings?

- Should the SEC consider permitting registrants to include external hyperlinks in their filings to satisfy disclosure obligations?
- Would increased use of hyperlinks and further disaggregation of company disclosure into multiple filings hinder the quality or readability of disclosure?

D. Company Websites

In limited circumstances, SEC rules and forms allow or require the dissemination of information to investors through the company's website. Under SEC rules, however, registrants cannot satisfy disclosure requirements by incorporating by reference to information on registrant websites. Additionally, to protect investors, certain SEC rules permitting registrants to disclose information through their websites require registrants to maintain that information for a certain period of time. Similarly, the SEC requires historical information or previously posted materials to be separately identified as such and to be located in a separate section of the website containing previously posted materials or statements. Given that the Internet has become a primary source of information for investors, the SEC poses the following questions, among others:

- Should the SEC continue to limit the permitted sources of information incorporated by reference to SEC filings, or should it allow registrants to incorporate information from their websites?
- Are there challenges investors may face in using sources outside registrant filings to obtain information about a registrant?
- Are there categories of business or financial information that the SEC should permit registrants to disclose by posting on their websites in lieu of including in their periodic reports?
- To the extent that information about a registrant is readily available on its website, what are the benefits of continuing to require disclosure of the same information in the registrant's filing?

E. Specific Formatting Requirements

The business and financial disclosure requirements in Regulation S-K and the current Forms 10-K and 10-Q generally provide registrants wide latitude and discretion in the formatting of their disclosures. According to the SEC, an advantage of such flexibility is that registrants can "more effectively communicate the information most critical to understanding their particular company as prescriptive presentation requirements may increase the risk of important information being obscured by less important information." On the other hand, the SEC also recognizes that a "standard layout, format, or style requirement may enhance the comparability of disclosures across periods and across issuers and registrants." In turn, such comparability and consistency can "reduce the costs of acquiring information, increase valuation accuracy, and enhance investment efficiency." Accordingly, the SEC asks the following questions, among others:

- Do current disclosure requirements appropriately consider the need for both standardization and flexibility in presentation? If not, how can the SEC change its requirements?
- How could the SEC facilitate or encourage better presentation of disclosure by registrants?
- Would further prescribing the order and format for presenting information in annual or quarterly reports improve readability or increase comparability across registrants?
- Is there particular information that investors would prefer the SEC require registrants to present in a specific order or in a particular section of the document?

F. Layered Disclosure

In recognition that "informational needs, financial resources, and capacity to analyze disclosure may vary significantly among investors," the SEC's practice has been to encourage layered disclosures in certain instances. A layered approach to disclosures can make it easier for the reader to navigate the filing by highlighting the information that management believes to be the most important, while still providing "detailed data and analysis." The SEC acknowledges, however, that a "layered" approach could also be more burdensome for readers "seeking all available disclosure on a particular topic, as they may need to search summary disclosures as well as more detailed disclosures for all data and commentary relevant for their purposes." The SEC, therefore, asks the following questions:

- Other than a summary page, are there other approaches to layering or layered disclosure that we should consider for business and financial information in periodic reports? If so, what are the benefits and challenges of these approaches?

G. Structured Disclosures

Through its structured data requirements, the SEC has sought to "make disclosure easier for investors to access, analyze and compare across reporting periods, registrants and industries." Specifically, according to the SEC, disclosure items presented in a standardized data format enable investors to "more easily search and obtain specific information about registrants, compare common disclosures across registrants, and observe how registrant-specific information changes across reporting periods as the same registrant continues to file in a structured data format." The increase in data transparency and comparability can also potentially lower costs of "accessing, collecting and analyzing information" for investors. However, SEC rules calling for a structured format require that the data be filed as an exhibit to the filing instead of being embedded in the filing itself. This practice has raised several concerns, including those regarding the "accuracy and usability of the data" and "the costs and time burden associated with structured data requirements." The SEC requests comment on several questions regarding structured disclosures, including the following:

- How can the quality of structured disclosures be enhanced?
- Are there changes to the EDGAR system that the SEC should make to render the structured disclosure filed by registrants more useful?
- How does the availability of structured data in registrants' periodic reports affect the timeliness, efficiency, or depth of investors' review of disclosures?
- Are there other technologies that could make disclosure easier for investors to access, analyze and compare? If so, how should the SEC incorporate these technologies into their disclosure requirements?

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