SOCIETY
of Corporate Secretaries
& Governance Professionals

September 10, 2014

Keith F. Higgins
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Disclosure Effectiveness for '34 Act Reports

Dear Mr. Higgins:

The "effective disclosure task force" of the Society of Corporate Secretaries & Governance Professionals appreciates the opportunity to provide suggestions to the Staff of the Division of Corporation Finance (the "Staff") in connection with its initiative to improve disclosure effectiveness. Founded in 1946, the Society is a professional membership association of more than 3,200 corporate secretaries, in-house counsel and other governance professionals who serve approximately 1,600 entities, including 1,200 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive managements of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

The Society strongly supports efforts to identify ways to improve the efficiency and effectiveness of disclosure. The suggestions below are focused primarily on proposed disclosure enhancements for Forms 10-K, 10-Q and 8-K (collectively referred to herein as "'34 Act documents" or "'34 Act reports"). In general, we have excluded proxy disclosure requirements from the scope of our comments, as we understand that the Staff plans to take these up at a later time (although we acknowledge that some suggestions may flow through to

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disclosure in proxy statements). We also have not covered possible changes to Regulation S-X or the industry guides at this time.

Background

Communicating information to investors in a complete, transparent and effective way is a key imperative for public companies. In order to make disclosures more effective, they need to be better ordered, more clearly written, and provide the information that is needed by investors. The guiding principle for effective disclosure is to provide investors, in a clear and transparent manner, information with the right level of detail on the topics material to an investor's understanding of the financial performance of a company and his or her investment decision-making process. One of the most frequent complaints, from both investors and registrants, about '34 Act documents is that they are overly-complex and overly-long because they contain redundant or obsolete information. Our suggestions to improve disclosure effectiveness, therefore, focus not only on eliminating some disclosure requirements that we believe have become outdated or are otherwise no longer meaningful for investors, but also include suggestions for other ways to reduce redundancy and deliver more effectively the information that is material to investors.

(a) Eliminate Disclosure of Obsolete Information. The easiest and fastest method by which to make '34 Act documents less complex, more readable and more relevant to investors is by eliminating information that has become obsolete due to changes in technology. We believe that disclosure requirements calling for information that can be obtained easily, reliably and, in certain circumstances, more rapidly from sources other than SEC filings, should be eliminated. The following are examples that we believe would meet these criteria:

- historical stock price disclosures and the stock performance graph mandated by S-K Item 201;
- ratio of earnings to fixed charges disclosure required by S-K Item 503(d);
- selected financial data required by S-K Item 301;
- disclosures required by S-K Item 101(e) regarding the registrant's website address and the availability of the registrant's SEC filings on EDGAR and the SEC's Public Reference Room.

Eliminating such information from a registrant's '34 Act documents would help streamline such reports without adversely affecting the amount of information an investor could obtain about the issuer, as such information is readily available elsewhere.

(b) Eliminate Duplicative Disclosure. An even more effective way to streamline '34 Act documents and reduce their complexity is to eliminate the amount of redundant information included in them. There are several reasons cited for the amount of redundancy found in '34 Act documents: Regulation S-K disclosure items that overlap; competing disclosure requirements from the SEC and FASB; issuers' liability concerns; and under-utilization of current technology capabilities. We discuss each of these factors below, with suggestions on how their effects on redundancy in '34 Act documents can be ameliorated.

(1) Redundant S-K Requirements. From time to time, the SEC has adopted specific disclosure requirements for the description of a registrant's business and operations; most, but not all, of these are contained in Items 101 and 102 of Regulation S-K. This information is not unimportant, but not all of it is necessarily material to all companies. More to the point, when such information *is* material to a company, we believe investors would be better served by having the company address that information in its MD&A (or, to the extent such information describes a risk, as a risk factor). The following items currently required to be disclosed in "Item 1" and "Item 2" of Form 10-K ("business description" and "properties" disclosure) are examples:

- backlog (S-K Item 101(c)(1)(viii)),
- working capital practices (S-K Item 101(c)(1)(vi)),
- sources and availability of raw materials (S-K Item 101(c)(iii)),
- dependence on certain customers (S-K Item 101(c)(vii)),
- competitive conditions (S-K Item 101(c)(xi),
- risks attendant to foreign operations (S-K Item 101(d)(3)),
- compliance with environmental laws (S-K Item 101(c)(xii), and
- properties (S-K Item 102).

We note that the SEC's S-K Report provides useful background on the implementation of many of these requirements, tracing them back to the SEC's response to the so-called "hot issues markets" in the early 1970s involving initial public offerings of start-up companies.[1] Since that time, MD&A disclosure has evolved significantly, and the Staff has issued guidance that requires the MD&A to discuss "known trends and uncertainties". In our view, the information noted above would be more useful to investors, to the extent material to an issuer, if it were included *only* in the MD&A as part of such a discussion. Requiring such information to be included in the "Business Description" or "Properties" section of the '34 Act report, only to be again repeated in whole or in part in the MD&A, creates unnecessary redundancy; presenting the information in a single location in the '34 Act document would make the document more straightforward the information more accessible and, thereby, more useful to investors.

More significantly, however, we suggest that the Staff, in thinking about disclosure enhancement generally, and the disclosure rules more specifically, undertake a more principles-based approach to the disclosure regime. We understand that there should be a basic set of information about an issuer (see discussion in (4) below), but we also believe that registrants must be allowed the flexibility to exercise appropriate judgment in applying disclosure requirements so that they are able to communicate effectively the information that is material to their own businesses and circumstances. As almost all commentators have noted, overloading disclosure documents with information that is not material to a reasonable investor has the effect of obfuscating information that is *in fact* material to an investment or voting decision.

To this end, we suggest that the SEC review its disclosure rules and forms to eliminate incremental, line-item disclosure requirements that apply without regard to materiality, as well as review those requirements with quantitative disclosure thresholds as such thresholds may not appropriately reflect materiality for a particular company. The amount, detail, and extent of information required to be included in '34 Act reports should be based on its materiality to a

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1 *See* "Report on Review of Disclosure Requirements in Regulation S-K" (Dec. 2013) available at http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf (the "S-K Report") at 33-34.

particular company's business, financial condition or prospects. For example, disclosure of sales of unregistered securities required by S-K Item 701 should be limited to sales that are material to the issuer. At a minimum, the disclosure thresholds for reporting unregistered sales of equity securities on Form 8-K and Form 10-K should be reconciled.[2] We support the recommendation made in the S-K Report to replace quantitative thresholds with general materiality standards. Revising the SEC disclosure requirements to eliminate arbitrary disclosure thresholds and make explicit that only material information is required to be included in an issuer's '34 Act reports will go far to eliminate extraneous and non-meaningful disclosure.

In order to ensure matters are considered (and adequately disclosed, if material) by a registrant, Staff guidance can be issued reminding registrants of specific factors that should be considered in making materiality determinations in connection with particular disclosure items.[3] We note in this regard the Staff bulletin reminding issuers to consider discussing cyber-security threats to their business and operations.[4] The Staff's guidance puts issuers on notice that if such threats are material to their business they should be discussed in their '34 Act documents, but did not create a new disclosure line item that would have required all companies to include such information in their '34 Act documents irrespective of the materiality of such threats to their particular company. We encourage the Staff to continue to issue guidance in this manner as new disclosure topics emerge.

(2) Coordination between the SEC and FASB. A predominant source of redundancy in '34 Act reports is the overlap of disclosure requirements among regulators and standard setters, particularly requirements for financial information disclosure. Over the years, as the SEC and FASB have each issued disclosure requirements on the same or similar topics, the current

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2 Form 8-K, which requires prompt reporting of unregistered sales of equity securities, does not require disclosure of sales of less than 1% of the number of shares outstanding of the securities being sold. In contrast, Form 10-K requires Item 701 disclosure as to all equity securities sold by the registrant during the period covered by the report, unless already included in a Form 10-Q or 8-K. Issuers need to report the number of their outstanding shares, so it is not clear why unregistered sales that were not material enough to be reported on Form 8-K would need to be reported in the Form 10-K.

3 *See* S-K Report at note 327.

4 *See* CF Disclosure Guidance Topic No. 2, Cybersecurity, October 13, 2011, available at http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

disclosure regime has increasingly been subjected to duplicative or overlapping disclosure requirements, and to increasing amounts of qualitative information included in the financial statements. Addressing these issues necessitates better, more coordinated efforts by the SEC and FASB.

Overlapping requirements. The Staff should eliminate requirements for the same disclosure under both U.S. GAAP and SEC requirements. Indeed, if a cross-reference to the financial statements would be appropriate to satisfy a particular disclosure requirement, the separate SEC disclosure requirement should be expressly satisfied. Further, where the requirements call for slightly different disclosure, such as additional details or differing disclosure thresholds, the SEC and FASB must coordinate to determine whether such differences continue to serve a purpose. For example, the requirements for legal proceedings disclosure under S-K Item 103 are also covered under ASC 450 *Contingencies*, although S-K Item 103 has slightly different thresholds for particular litigation matters. Because of these slight differences, while many registrants do cross-reference to their "litigation and contingencies" footnote, many others repeat large portions of the footnote in their MD&As. Similarly, as others have suggested, SEC rules that were implemented to address a gap in accounting rules should be eliminated where U.S. GAAP has evolved. This would include, for example, disclosure of certain off-balance sheet arrangements required by S-K Item 303(a)(4) that are now addressed by ASC 810 *Consolidation* and certain market risk disclosures required by S-K Item 305 that are now covered by ASC 820 *Fair Value Measurements and Disclosure* and ASC 815 *Derivatives and Hedging.* In some cases, SEC and FASB requirements cover the same topics but from different perspectives, which leads to disclosure that appears repetitive but is actually more confusing for investors as they try to reconcile the information. In addition to the legal proceedings disclosure noted above, examples include the disclosure requirements about share repurchases to be included in the MD&A under S-K Item 703 and in the footnotes under ASC 505 E*quity*, and the disclosure requirements related to "critical accounting estimates" in the MD&A and "critical accounting policies" in the financial statements.[5] A coordinated effort between the SEC and FASB to review and clarify the

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[5] Although not adopted, the recent FASB Exposure Draft issued in June 2012, "Disclosures about Liquidity Risk and Interest Rate Risk", which would have applied to financial institutions, illustrates this

different disclosure objectives of similar, but somewhat divergent, requirements would help to determine whether those different approaches continue to provide distinct and useful information. Alternatively, if both disclosure objectives are determined to be still meaningful, the SEC and FASB should issue joint guidance, as discussed below, on how both such requirements in a particular area should work together (and where best — MD&A or footnotes — to provide such information).

Qualitative information in financial statements. As important as a commitment by the SEC and FASB to review current disclosure requirements would be their joint commitment to collaborate when implementing financial disclosure requirements in the future. This is because another factor that adds to the complexity and length of '34 Act reports is that footnote disclosure increasingly resembles a "mini-MD&A," rather than a snapshot of financial data as of a specified historical period. FASB has recently implemented several requirements for the inclusion of MD&A-type information in the footnotes, such as ASC 820 *Fair Value* (requiring an analysis of Level 3 instruments for both changes in the balance sheet and income statement) and ASC 310 *Receivables* (requiring disaggregation of loans based on how management evaluates credit risk). In addition, some of the FASB's most recent proposals call for MD&A-type analysis, such as information on how changes in macro-economic or market factors could affect the prospects for future cash flows. The comments submitted in connection with the FASB's Exposure Draft relating to notes to the financial statements highlight the concerns of public companies and accountants with the FASB's proposed approach to the placement of MD&A-type information in the financial statements.[6]

We believe that the SEC and FASB must work together to delineate the appropriate presentation of qualitative and quantitative disclosure on a given topic. A significant part of this collaborative effort should focus on the placement of qualitative information, with the goal

issue: the Exposure Draft would have required a "liquidity" gap table in the footnotes based on *expected* maturity of obligations (although there is currently required SEC disclosure based on *contractual* maturity) and an interest rate sensitivity analysis (which would be *in addition* to the currently required SEC quantitative analyses of interest rate sensitivities under the market risk disclosure rules).

[6] *See, e.g.*, the FASB Exposure Draft, Proposed Statement of Financial Accounting Concepts, Chapter 8: Notes to the Financial Statements, comments available at http://www.fasb.org/jsp/FASB/CommentLetter_C/CommentLetterPage&cid=1218220137090&project_id=2014-200.

of reducing the amount of qualitative analysis contained in the financial statements. Equally important is consideration of the placement of forward-looking information in order to avoid situations in which disclosure requirements in financial statements implicitly or explicitly provide for forward-looking information without the benefit of safe-harbor protections for registrants.[7] Specifically, we believe there needs to be greater clarity regarding the type of forward-looking information that should be reported in MD&A versus the "future-oriented information" that the FASB believes is appropriate to be reported in U.S. GAAP financial statements. Footnote disclosures should be limited to information about a company's historical transactions, financial position, and accounting principles underlying the financial statements. In contrast, qualitative disclosure that explains or analyzes the results of an entity or information that is forward-looking or is predictive of future events is best suited for disclosure in the MD&A, where public companies are provided safe harbor protections. Establishing clear boundaries between the principles and objectives of financial statement disclosure and those of financial disclosure outside of the financial statements will promote more efficient presentation, reduce redundancy, and preserve the benefit of the safe harbor for forward-looking information.

(3) Liability Concerns. As noted above, registrants, in drafting their '34 Act reports, are mindful of preserving the protections afforded by the Private Securities Litigation Reform Act ("PSLRA") safe harbor. We believe, however, that these liability concerns do not contribute significantly to the complexity or redundancy of disclosure documents. It is in everyone's interest, particularly registrants, to disclose information in a transparent manner as efficiently as possible.[8] As such, we do not agree with assertions that the issuer community is not willing to change disclosure practices because of liability concerns.

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[7] Federal securities laws and SEC rules provide a safe harbor for some forward-looking information; however, the safe harbor does not extend to notes to the financial statements. *See* Section 27A(C) of the Securities Act of 1933, Section 21E of the Securities Exchange Act of 1934, Securities Act Rule 175 and Exchange Act Rule 3b-6.

[8] Registrants are aware that safe harbor protection is predicated on substantive, thoughtful and tailored cautionary statements. Because boilerplate, vague, or generalized cautionary statements are not meaningful cautionary language for purposes of the PSLRA safe harbor, incentives already exist for companies to tailor their risk factors to specific, known risks that could cause actual results to differ materially from their forward looking statements.

We do acknowledge that liability concerns may contribute to the length of ’34 Act documents, as registrants seek to include risk factors and other “meaningful cautionary language” in these documents in order to obtain the benefits of the PSLRA safe harbor. We understand that some would recommend shortening the risk factor section. Concerned about the length and complexity of filings in 1998, the SEC considered limiting the number and length of risk factors in connection with its Plain English initiative, but declined to adopt changes.[9] Many of the comments submitted in that rulemaking remain valid; importantly, that “no issuer should ever be put in the position of choosing among significant material risks in order to satisfy a numerical limitation.”[10] Instead of imposing arbitrary restrictions on the use of risk factors and cautionary statements, we believe that the company profile system, discussed further below, would be helpful to achieving more readable and accessible filings while still making all material disclosure available to investors. Effective and efficient disclosure can be obtained by changing the way information is disclosed, rather than by eliminating information that is important to both issuers and investors alike.

(4) <u>Current technologies can produce better, more efficient disclosure</u>. As one commentator pointed out in a recent presentation on disclosure reform,[11] to be effective disclosure requirements should address four fundamental questions:

- what does the company do?
- how does the company do it?
- what has the company’s performance been in recent periods?
- what are the company’s plans going forward?

Information responsive to these questions provides investors with the necessary context for understanding the company’s business, its performance and its future prospects and risks. These questions are also a helpful framework for thinking about new ways to deliver

9 *See* Release No. 33-7497 (January 28, 1998) and Release No. 33-7380 (January 14, 1997).

10 Letter dated March 21, 1997 from the Committee on Securities Regulation of the Business Law Section of the New York State Bar Association, available at http://www.sec.gov/rules/proposed/s7397/gutman1.htm.

11 Comments of Commissioner Cynthia Glassman at panel discussion, U.S. Chamber of Commerce, July 29, 2014.

information that would avoid the repetition of information that does not change very often from period to period. For example, disclosure relating to the first two questions lends itself to new forms of information delivery, such as a "company profile" system, while information on the company's recent performance and future plans would remain in periodic reports. Under a "company profile" regime, basic information about the company and its operations could be presented in a centralized place, so that investors can refer to it as needed. Periodic reports could then focus solely on new information about the latest fiscal period, which would significantly reduce the length and scope of periodic reports, making them easier to navigate and use.

We envision that the "company profile" would use "tabs" or "folders" to present information by topic. Separate tabs could, for example, cover the basic description of the company's business, its officers and directors, corporate governance structure and policies (other than committee reports which would still be included in the proxy statement), and descriptions of its outstanding securities. In addition, there could be a tab that would include links for filed exhibits; this would make locating them easier and more efficient. Furthermore, as noted above, instead of imposing arbitrary restrictions or limitations on the use of risk factors and cautionary statements, the company profile could have a tab for risk factors that highlight the risks relating to the company's operations, its structure, its industry, and its legal, environmental, and regulatory, or other material risks. (In this way, a periodic report would only need include a discussion of the trends and uncertainties that are reasonably likely to affect the company's future performance and plans.) We think other tabs in the company profile could be used for non-GAAP information and their reconciliations, and changes in accounting standards that may be adopted by the company in upcoming periods, since this information does not change significantly from quarter to quarter.

Disclosure under the various tabs of the company profile would be updated at least annually, but may need to be updated more frequently so that the information is accurate as of the filing date of the related periodic reports.[12] Although a company could choose to update its

[12] We envision that the information in the company profile that is deemed to be "filed" would be covered by the registrant's annual and quarterly SOX certifications, and, therefore, the disclosure would be need to be accurate as of the filing date of the related periodic reports.

profile more often than annually (or quarterly, if need be), we are not suggesting, and do not advocate, that the company profile system become analogous to a continuous disclosure system.[13] We believe that the existing disclosure requirements for '34 Act reports (*e.g.*, including the requirement to file a Form 8-K upon the occurrence of certain events) are sufficient to provide investors with timely updates on new material information contained in the company profile. A time stamp or filing date for each tab or item under the tab would be sufficient to identify when the disclosure was last updated; prior filings could be archived chronologically.[14]

We urge the Staff to consider this type of presentation in its upcoming modernization of EDGAR's functionality. In the meantime, we recognize that the implementation of such functionality will take time, particularly the development and testing of new technology. As an interim measure, we would encourage the Staff to continue to permit and encourage registrants to experiment with the format and information flow in periodic reports, rather than strictly following the prescribed format of disclosure items in the applicable form. For example, a company might begin its report with its MD&A, followed by the financial statements, and then include as an appendix the description of its business, its corporate governance and securities information, its risk factor disclosures and list of exhibits.[15] As long as required information is included, companies should be able to tell their story in a way that is appropriate to their own

[13] We would, however, suggest that the Staff explore the possibility that updates to information in the company profile be permitted to be made at any time (taking into account the need for any such information to be accurate at the time of a '34 Act filing); the flexibility to update the company profile disclosures on a time line that is not the same as the filing deadlines of the '34 Act reports could allow companies to allocate their staff and resources more efficiently.

[14] Commentators have noted that a company profile could be implemented either through EDGAR or on registrants' own websites. Using a company website would raise issues, including liability matters, certifications, preservation of past disclosure, comparability and accessibility that would need to be addressed in SEC rulemakings and guidance; accordingly, as a general matter, the Society would suggest that any company profile system be implemented through the SEC's EDGAR system.

[15] Under this example, information required under Items 7, 7A and 8 of Part II of Form 10-K would precede the information required under Part I. Information required by Items 1, 1A, 1B, 2 and 3 of Part I would be presented in an appendix with information required by Items 5, 9, 9A and 9B of Part II and Item 15 of Part IV. Part III information would continue to be incorporated by reference from the proxy statement pursuant to General Instruction G(3) of Form 10-K. There may be other ways that a company might reorder the presentation of the information.

business. A cross reference to the Form 10-K/Q form requirements could be included in the ’34 Act report, if the Staff or investors would find that useful.

(c) Other Suggestions for Enhanced Disclosure. In addition to eliminating obsolete disclosure and reducing the amount of redundancy contained within ’34 Act reports through the use of a company profile system, more principles-based disclosure requirements and better SEC/FASB coordination, as discussed above, we believe there are additional steps the Staff can take as part of its initiative to improve disclosure effectiveness.

(1) Eliminate the “Glossy” Annual Report. For issuers subject to the proxy rules, the requirement to deliver an annual report to shareholders with the proxy represents another unnecessary redundancy. Rule 14a-3 requires many of the same items of Regulation S-K to be included in the annual report to shareholders, and therefore the “glossy” annual report to shareholders largely repeats lengthy portions of the Form 10-K; indeed, currently companies can elect to use their Form 10-K to satisfy this requirement in lieu of a separate annual report. Moreover, due to the accelerated filing deadlines for periodic reports, the Form 10-K is, in most cases, available before the annual report. While, historically, the annual report was a primary source of information for shareholders, simply because ‘34 Act documents filed with the SEC were difficult to obtain in a timely manner,[16] that is not the case today and the need for such a report has become obsolete. Revising the proxy rules to eliminate this requirement would reduce duplicative disclosures of already publically available information.

We recognize that some companies use the annual report format as a marketing and investor relations tool; for these companies, any voluntarily prepared “glossy” supplemental information to already-available Form 10-K information (such as a letter to shareholders or “year-in-review”) could be filed as additional soliciting material or furnished as Regulation FD disclosure. We note that the SEC solicited comment in 1995 on whether to eliminate the

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16 *See, e.g.*, “Disclosures to Investors — A Reappraisal of the Federal Administrative Policies Under the ’33 and ’34 Acts — the Wheat Report” (1969) for details of the historical differences in the availability of Forms 10-K and annual reports to shareholders.

requirements for annual reports to shareholders, although final rules were not adopted.[17] We believe it is time to revisit this question, particularly in light of changes since 1995 in ’34 Act filing deadlines and the readily-available access to information filed with the SEC.

(2) Eliminate the Repetition of Prior-Period Results in MD&A. The time periods covered by MD&A should focus on the most recently completed fiscal period and its comparisons to the immediate prior year. Accordingly, the need to repeat a discussion of the third year of operating and financial results should be eliminated. Too often, the narrative discussions of the second prior-year to third prior-year results are merely repeated from previous filings and the reiteration of previously disclosed year-over-year comparative financial information is not incrementally informative. Existing requirements in Item 303 should elicit a discussion of material trends over the three-year period for which operating results are presented, if such a trend does in fact exist and is meaningful over that time frame. To the extent prior-period comparative information is needed, it can always be easily accessed from prior ’34 Act documents.

(3) Institute Formal Post-Adoption Sunset Reviews. The Society suggests that the Staff institute a formal post-adoption review process for significant new disclosure requirements. Eliminating stale disclosure — disclosure that has become immaterial due to changes in circumstances or the passage of time — is not as simple a task as it appears. Notably, the U.K.’s Financial Reporting Council published a report identifying the various influences that act as barriers to eliminating extraneous disclosure,[18] suggesting that it is not only the preparers, but also auditors, advisors and regulators that contribute to the bias of inclusion. We commend the Staff and its Director for their recent initiatives reiterating that companies can and should remove immaterial disclosure, even if it was originally added in response to a Staff comment. Nevertheless, we believe more formal steps by the Staff are required in this area.

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17 Use of Abbreviated Financial Statements in Documents Delivered to Investors Pursuant to the Securities Act of 1933 and Securities Exchange Act of 1934, Release No. 33-7183 (June 27, 1995).

18 *See* “Cutting clutter, combating clutter in annual reports”, FRC (2011), available at https://www.frc.org.uk/getattachment/8eabd1e6-d892-4be5-b261-b30cece894cc/Cutting-Clutter-Combating-clutter-in-annual-reports.aspx.

We therefore suggest that after a period of time subsequent to which a significant new disclosure requirement has been adopted (for example, five years after adoption), the Staff be required to formally undertake a review to determine the continuing need for such disclosures in light of the then current economic, business and regulatory landscape to assess whether the new disclosure requirement should be made permanent — or should be extended for only another particular length of time — and make a recommendation to the Commission about the continuing need for the requirement. Formal Commission action would be required to indefinitely extend new disclosure requirements.

Alternatively — and at least as a minimum — we believe it would be helpful for the Staff not only to continue issuing "disclosure topics" guidance with respect to new areas of focus as they emerge but, just as importantly, also to issue "closing guidance" when those topics are no longer a primary area of concern. One example of guidance that could be considered "closed" is the 2003 MD&A guidance on disclosure of critical accounting estimates.[19] While these disclosures initially may have served to educate investors as to the judgments that impact the quality and variability of financial information, they are lengthy disclosures that do not vary significantly from period to period or even from company to company. Twelve years after Sarbanes-Oxley, it is not clear that investors are unaware of the uncertainties associated with the methods, assumptions and estimates underlying a company's critical accounting measurements. In any event, such disclosure would be a prime candidate for moving to a company profile, where explanatory information about a registrant can be accessed by those investors who continue to seek it.[20]

We are sensitive to the fact that seeking repeal of requirements only a few years after their enactment imposes an additional layer of costs on both companies and the Commission. Nevertheless, we do suggest some sort of formal review (with or without Commission action)

19 Indeed, although almost all issuers include such information in their '34 Act reports, the SEC's 2002 rule proposal for MD&A requirements in this area were never formally adopted.

20 Where disclosure responsive to SEC rulemaking or guidance is moved to a "tab" in the company profile, the SEC could leverage technology to review how often such disclosure is accessed, which could help to determine whether it continues to be relevant—or should be considered for a "closing guidance" review.

is needed in order to ensure that disclosure requirements remain sufficiently responsive to changing circumstances.

(4) More Effective ’34 Act Documents Should Eliminate the Need for Summary Disclosure Documents for Retail Investors. We are hopeful that these suggestions, which are intended to create clearer, less complex, more streamlined periodic reports with an easy-to-navigate company profile, without eliminating information that is material for investors, will also help address some of the “overload” issues facing retail investors and obviate the need for summary disclosure documents in the context of Forms 10-K and 10-Q. Past efforts to require the use of summary disclosure documents in this context have had limited success. We believe that all investors, retail or institutional, should have access to full and fair disclosure. In order to enable them to do so, a solution that eliminates redundancy and leverages technology to modernize the delivery and presentation of disclosure in ’34 Act reports will enhance effective disclosure for all investors.

(5) Sustainability Disclosures Can Be Effectively Communicated Outside of ‘34 Act Reports. We are equally mindful that some investors seek information in areas of corporate sustainability, including issues such as environmental matters and climate change, workforce diversity and labor conditions, among others. Although these types of issues are important, and information about these topics is increasingly important to a variety of corporate stakeholders, for most companies, they are not typically material to an understanding of the company’s financial performance, and, accordingly, we believe are not appropriate for inclusion in all ’34 Act reports.[21] Instead, there are a variety of avenues through which companies can, and do, communicate how they are addressing critical social and other non-financial issues. Many public companies publish corporate sustainability reports and provide extensive corporate responsibility information on their websites. We believe that, to be effective, ’34 Act documents should remain focused on the information that is material to the financial performance and financial results of operations of a company.

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[21] Where these types of issues are, in fact, material to a company’s financial performance and prospects, companies generally do provide disclosure as is required under existing SEC requirements; this would be the case, for example, if the costs of obtaining ethically-sourced raw materials or the risk of non-compliance with labor laws would have a material impact on a manufacturer’s financial results.

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The challenges of improving disclosure effectiveness should not be underestimated. All constituencies — companies, and their lawyers and auditors involved in the reporting process, as well as the Staff, and, ultimately, investors — will need to be flexible as companies experiment with ways to make their disclosures more effective. We commend the SEC for taking on this project. We are available to answer any questions you may have on our comments and to meet with the Staff if that would assist in the Commission's efforts.

Sincerely yours,

Neila B. Radin
Co-Chair, Effective Disclosure Task Force

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