Ernst & Young LLP
5 Times Square
New York, NY 10036

Tel: 212 773 3000
www.ey.com

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

11 September 2012

Section 108 of the JOBS Act — Regulation S-K Review

Dear Ms. Murphy:

Ernst & Young LLP is pleased to provide comments to the Securities and Exchange Commission (SEC or the Commission) for consideration in its *Review of Regulation S-K* as required by Section 108 of the JOBS Act. This section requires the SEC to comprehensively analyze the current registration requirements of Regulation S-K (the Regulation) and determine how these requirements might be updated to modernize and simplify the registration process and reduce the costs associated with these requirements for issuers that are emerging growth companies (EGCs). Because the Regulation also specifies disclosures required in periodic Exchange Act reports under the SEC's integrated disclosure regime, this process should aim to simplify ongoing reporting by EGCs as well.

Overall, in addition to increasing efficiencies for EGCs, we believe the SEC also should comprehensively reconsider the disclosure requirements of Regulation S-K for all issuers. Moreover, we believe the SEC should consider revising its related filing and updating requirements. Our comments below include considerations for the Commission in reviewing the Regulation to make its requirements more efficient and effective for both issuers and investors.

Context for Ernst & Young recommendations

Over the last 30 years, the volume of required disclosures in SEC filings has grown at a steady rate. The SEC, the FASB and the AICPA have each issued incremental financial disclosure requirements as standalone documents with limited collaboration or post-implementation review. In many cases, changes in the economic environment and related issuer challenges were the driving forces behind new disclosure requirements as regulatory bodies and standard setters attempted to respond to the needs of investors in a timely manner. While this resulted in more transparent disclosures about the focus areas at the time, the respective entities have not recently addressed disclosures that may be outdated or less relevant for today's investor.

In 1999, Chairman Arthur Levitt said "our passion for full disclosure has created fact-bloating reports and prospectuses that are redundant." That was 13 years ago and the volume of disclosures and the size of reports has grown significantly since then. This growth is highlighted in a recent EY study[1] tracking the annual report size of 20 well-known companies from 1992 through 2011. Over this almost twenty year period, our study found an increase in MD&A disclosure volume of 400% to 48 pages from 12 pages. Financial statement note disclosure over this same time frame increased 406% to 69 pages from 17 pages.

In preparing this letter, we reviewed the history of disclosure recommendations and projects questioning the efficiency and delivery of the ever increasing volume of both financial and non-financial disclosures. In developing our recommendations, we have leveraged various thought leadership over the past 20 years, including the 1994 column in The Wall Street Journal by former Ernst & Young LLP Chairman, Ray Groves, "Here's the Annual Report. Got a Few Hours?" That article led to an SEC proposal[2], as well as thoughts raised in the SEC's 2008 *21st Century Disclosure Initiative* on the delivery of information to investors. In addition to researching the history of disclosure recommendations, we evaluated the current climate for change in financial reporting, noting that the FASB currently has an open comment period on its Disclosure Framework Project. This project is similarly focused on improving the effectiveness of disclosures with the hope of reducing the overall burden of financial reporting (specifically in notes to financial statements). Although these projects and studies focus on modernizing and simplifying financial statement disclosure information, they share the broader goal of Section 108: to deliver timely, concise information to investors and other stakeholders while at the same time attempting to simplify the overall disclosure process.

Recommendations for simplifying and modernizing Regulation S-K

As discussed above, the goal to ease the regulatory burden imposed by Regulation S-K on emerging growth companies should be extended to all registrants. Section 108 provides a great opportunity for the SEC to perform a much-needed review of the disclosure requirements of Regulation S-K. We see no reason to limit the scope of the planned study to solely emerging growth companies.

We believe certain Regulation S-K disclosures impose unnecessary costs while not providing concomitant value to investors. In our view, this is because the original purposes of the disclosure requirements have been achieved or are no longer as important.

We believe that, to review Regulation S-K, the SEC should develop and articulate a disclosure framework of guiding principles and objectives consistent with its missions and statutory responsibilities. Such a framework would be consistent with one of our recommendations in our letter dated 6 October 2011 on the Retrospective Review of Existing Regulations. The SEC also should coordinate with the FASB to establish clear boundaries between financial statement disclosure principles and objectives and those of supplemental disclosures beyond the financial statements. This will help avoid redundancy.

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1 *Now is the time to address disclosure overload,* Ernst & Young To The Point, 21 June 2012

2 Proposed Rules on SEC's website — *Use of Abbreviated Financial Statements in Documents Delivered to Investors Pursuant to the Securities Act of 1933 and Securities Exchange Act of 1934,* 27 June 1995

Based on our evaluation of the requirements of Regulation S-K, we believe the disclosures warranting elimination or revision fall into the following categories:

- Disclosures created to address a void in GAAP requirements in the past that may now be redundant with note disclosures that were mandated later
- Disclosures of information investors can more easily obtain from sources other than SEC filings
- Disclosures that have become industry-specific rather than applicable to all entities
- Disclosures based on purely quantitative thresholds without regard for materiality

Disclosures created to address a void in GAAP requirements — In response to new financial instruments and ownership structures, disclosure requirements were created to provide investors with more transparent information not addressed at the time by GAAP. For example, the requirement in MD&A to disclose certain off-balance sheet arrangements was primarily intended to help users of financial statements understand certain exposures posed by such arrangements. However, the accounting and disclosure requirements for variable interest entities have evolved over the past decade. Many of the required financial statement disclosures related to variable interest entities, now specified by FASB ASC 810 *Consolidation*, address the objectives of the MD&A discussion of off-balance sheet arrangements. This results in redundancy.

Similarly, certain fair value disclosures required by FASB ASC 820 *Fair Value Measurements and Disclosure* now render redundant certain tabular disclosures recommended in FR-61: *Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations*. Finally, we observe that the FASB has issued for comment an Exposure Draft[3] on liquidity and interest rate disclosures that could create redundancies with certain disclosures currently required by Items 303 and 305 of Regulation S-K. This is an opportune time to coordinate these efforts and eliminate redundancies between FASB and SEC disclosure requirements.

Disclosures of information investors can more easily obtain from sources other than SEC filings — Investors no longer rely on an SEC filing for all company information. The SEC acknowledged the expanded use of technology by investors in its Interpretive Release, *Commission Guidance on the Use of Company Web Sites*[4]. Investors today look to other sources for historical stock price and trend information on a real-time basis. Data manipulation tools and daily stock information on most finance websites have made the historical stock price disclosures mandated by Item 201 of Regulation S-K largely obsolete. Similarly, the computation of the ratio of earnings to fixed charges required by Item 503(d) of Regulation S-K appears an anachronism in the age of sophisticated financial modeling and analysis, facilitated by the wealth of data available from issuer financial statements.

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[3] Proposed Accounting Standards Update on FASB's website — *Financial Instruments (Topic 825): Disclosures about Liquidity Risk and Interest Rate Risk*

[4] Interpretive Guidance on SEC's website — *Commission Guidance on the Use of Company Web Sites (Release No. IC-28351),* 1 August 2008

Another example is the requirement for annual reports to repeat the prior-year's MD&A. While we appreciate that the goal of the disclosure is to provide analysis of operations and trend information from management's perspective, the practice of copying and pasting last year's MD&A discussion is a good example of disclosures that do not provide additional value. In the age of EDGAR and company websites, MD&A for the prior year can be easily acquired from last year's annual report. Further, we believe that requiring the comparison of the preceding annual periods distracts from a comprehensive analysis of the three-year trend. Existing requirements in Item 303 of Regulation S-K should be sufficient to promote a discussion of trends over the periods for which operating results are presented, without a detailed prior-year to preceding-year comparison.

Disclosures that have become industry specific rather than applicable to all entities — Some disclosure requirements may no longer apply to all companies due to market or other changes. For example, all companies are required to disclose backlog, which does not appear to provide useful data to investors in several major US industries (e.g., media and entertainment, real estate). The burden of providing backlog information nevertheless is imposed on all registrants. Another example is the required disclosure about properties, which are no longer a significant element of enterprise value for many companies. If a disclosure is not universal, it may be better addressed through certain principles-based disclosure requirements. For example, backlog may be relevant for inclusion within MD&A of certain companies, depending on the facts and circumstances (e.g., when it is important to address known trends that could have a material effect on future revenues and margins).

Disclosure requirements based on purely quantitative thresholds without regard for materiality — In a disclosure environment that focuses on company-specific qualitative and quantitative materiality factors, it is counterintuitive to define disclosure requirements using one-size-fits-all quantitative thresholds. Yet the required disclosure of related-party activity greater than $120,000 does just that. This bright-line test assumes that materiality, both quantitatively and qualitatively, is constant across all registrants regardless of the nature of the transaction. This appears to contradict the usual principle that the materiality of information should be based on the facts and circumstances unique to each company and transaction. We therefore believe that this requirement should be revisited to provide better scaling based on size of the issuer.

Another example is the presumed materiality and related disclosure of legal proceedings involving claims that exceed 10% of a company's consolidated current assets. The amount of current assets, as opposed to total company value or liquidity, may not represent materiality, and thus should be reconsidered as the threshold for Regulation S-K disclosure.

Even if quantitative thresholds are used to determine disclosures, thresholds should be adjusted over time. It is also important for the SEC to coordinate with the FASB on the concept of materiality to achieve a more consistent application between financial statement and other disclosures.

In our view, using these four factors to review the requirements of Regulation S-K could help the SEC reduce the regulatory burden on all companies without sacrificing the quality and value of information disclosed to investors.

To avoid a repeat of this situation in the future, we believe the SEC also should consider adopting a formal "sunset" provision (e.g., five to 10 years) for significant new disclosure requirements. A sunset provision would require formal Commission action to indefinitely extend or modify new disclosure mandates before they would otherwise be allowed to expire. A sunset provision would require the SEC to consider changes in the economic, business and regulatory landscape in assessing whether new disclosure requirements should be made permanent.

Proposal to add consideration of XBRL requirement for ECGs to Regulation S-K review

We are sensitive to the purpose of Section 108 to reduce the administrative burden on EGCs and encourage IPOs. Separate from the discussion above, we recommend greater accommodations related to XBRL for EGCs. As part of the review of the disclosure requirements of Regulation S-K, the Commission should assess the value of XBRL for new registrants and their industries and consider allowing voluntary, rather than mandatory, data tagging by EGCs. This would not only reduce initial compliance costs for EGCs but would allow more time for the development of cost-effective tools, technologies and services related to XBRL in the market.

Proposed overhaul of the way Regulation S-K disclosures are delivered to investors

After conducting an extensive review and rationalization of the disclosure requirements in Regulation S-K, we suggest that the Commission revisit the way disclosure information is filed and presented to investors. We suggest analyzing each required disclosure, segregating them by nature and frequency of change. This could drive their method of filing and delivery as follows:

- *Informational/profile disclosures* — Disclosures (such as the description of the business, risk factors, officers and directors, website address) that would only need to be updated when something changes

- *Transactional disclosures* — Disclosures specifically related to a registered securities offering or shareholder solicitation

- *Periodic disclosures* — Disclosures (such as MD&A, selected quarterly financial data and executive compensation) pertaining to specific fiscal periods

Informational/profile disclosures — These disclosures include basic information, such as the nature of the business and certain risk factors, that typically do not significantly change from quarter to quarter, absent a specific transaction or event. They would be filed using a company profile form available on EDGAR that would be updated when material changes occur. The benefit of this approach is that it would remove repetitive information from periodic reports, which could then focus solely on new information about the latest fiscal period.

When company profile disclosures filed with the SEC need to be updated, the registrant would notify investors of the changes via a Form 8-K. Transactional filings could generally incorporate by reference the profile form. We believe this approach would reduce costs for registrants by reducing the length of, and eliminating “clutter” from, periodic reports. Since any material changes in this information would be highlighted to investors in a Form 8-K in a timely manner, updates would be more transparent. Today, by contrast, an investor might have to compare the information in two annual reports to identify any material changes.

Transactional disclosures — These disclosures would be required only in an SEC filing involving a registered securities offering. As with the other two proposed categories of disclosures, a detailed review of Regulation S-K would be required to identify disclosures that principally inform investor decisions about specific transactions, but we believe it would primarily include disclosures such as those currently required by Sections 500, 900 and 1000 of Regulation S-K. A registration statement or prospectus supplement generally would include only this information and incorporate by reference the issuer's relevant profile and periodic disclosures, creating a more streamlined offering document aimed at meeting the new informational needs of an investor with respect to a proposed transaction. With respect to an initial public offering, and perhaps other offerings before an issuer is seasoned, the SEC could require delivery to investors of the company profile and periodic disclosures in addition to the specific transactional disclosures.

Periodic disclosures — The information presented in periodic reports would be limited to new information specific to the most recent fiscal period. This would allow users to focus on the information they need to help understand current activities of the company and its recent results. These disclosures would include such items as selected financial data, management's discussion and analysis, the financial statements and executive compensation disclosures. The effect of this change would be to reduce the length of the annual report on Form 10-K.

As reporting deadlines have gotten tighter and the amount of required information has increased, reducing the volume of disclosure in periodic reports by segregating informational disclosures into company profile filings would provide the following benefits:

- Less time would be spent reviewing and drafting disclosures that do not materially change from period to period. In addition to the financial reporting team, legal counsel, the audit committee and other directors and external auditors would all benefit.
- More time would be available to devote to the disclosures about current results and prospects.
- Disclosure filings would be more "investor friendly." More streamlined quarterly and annual reports might help reduce the risk that important information gets buried in lengthy disclosure documents that may go unread by average investors due to time constraints.

We believe our recommendations would benefit all registrants and their investors while achieving the objective of the JOBS Act by making registration and periodic reporting requirements not only simpler and less costly, but more meaningful to investors.

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We would be pleased to discuss our comments with the Commission or its staff at your convenience.

Very truly yours,

Ernst + Young LLP