CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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May 4, 2020

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

Re: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information; 17 CFR Parts 210, 229, 239, 240and 249; Release Nos. 33-10750, 34-88093, IC-33795; File No. S7-01-20; RIN 3235-AM48

Dear Secretary Countryman:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "SEC" or "Commission") on January 30, 2020, titled "Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information" (the "Proposing Release").

We commend the Commission for its ongoing efforts to review and improve the effectiveness of existing regulations that impact capital formation in the United States. All regulators, including the Commission, should constantly review the effectiveness of regulation, including performing *ex ante* and *ex post* analysis on whether the costs of a particular regulation justify its ongoing benefits.

The CCMC supports a system of securities regulation in which investors are provided with material, decision-useful information to deploy capital efficiently and for businesses to raise the financial resources needed to grow and expand. Requiring public companies to disclose information that is material to investment decisions promotes capital formation and the efficient allocation of capital. On the other hand, excessively mandated disclosures have the capacity to overload investors, particularly

from Main Street, with extraneous information that can confuse or obfuscate material information.

We maintain that the disclosure documents issuers file with the SEC are expanding at a substantial rate. Despite recent reforms, the Commission's disclosure requirements still require the disclosure of some information that is obsolete, unnecessarily repetitive, or otherwise not useful to investors. The Proposing Release's focus on Management's Discussion and Analysis, or MD&A, is therefore a welcome step in the SEC's ongoing efforts to rationalize its disclosure regime.

We generally support the proposed amendments reflected in the Proposing Release. We favor a more principles-based approach to Items 301, 302 and 303 that emphasizes materiality as seen through the eyes of a reasonable investor. Currently, these three items are often duplicative of other required disclosures or focus on information that is no longer of prime importance to modern businesses. From a cost-benefit perspective, they should be revised to eliminate redundancy and to refocus on what is most material to investors in a 21st-century economy, as follows:

- We support the proposed amendments to eliminate current Items 301 and 302.
- We also support efforts to streamline and reorganize the flow of current Item 303.
- We support the proposed amendments that would modernize the discussion of capital resources and results of operations.
- Because they have become duplicative of current and proposed accounting requirements, we believe the current MD&A disclosures regarding off-balance sheet arrangements and the contractual obligations table can safely be eliminated.
- We support the Commission's reimagined disclosure requirement around critical accounting estimates, and are optimistic that resulting disclosures will go beyond the current widespread practice of repeating information contained in the financial statement footnotes.

- We generally support the proposed amendments that would give issuers greater flexibility to select interim periods over which to make comparisons in MD&A. We question proposed Item 303(c)(2)(i)'s requirement to provide a year-over-year comparison insofar as it would require an issuer that has otherwise selected to compare the current and most recently completed quarters to retain a year-over-year discussion. This seems disjointed and could be confusing to investors.

- While the proposed 180-day phase-in period should be sufficient for most seasoned issuers, we are concerned that smaller reporting companies and emerging growth companies may require additional time to implement any new MD&A requirements. We request at least a one-year transition period for smaller reporting companies and emerging growth companies.

- Though the Commission did not directly solicit comments in the Proposing Release on the topic of climate-related disclosure, a series of contemporaneous statements by several SEC commissioners still calls the issue into question. We oppose the small but vocal movement that seeks to politicize issuer disclosure with various and sundry matters extraneous to the SEC's core mission and wholly outside its area of expertise. We do not advocate for disclosure solely for the sake of disclosure, particularly when the information is not material to reasonable investors. SEC disclosure documents should not devolve into a dumping ground for special interest causes removed from the material financial and operational information Main Street investors demand. Regulation S-K is already sufficiently broad to capture any necessary disclosure on this topic.

Discussion

A. Selected Financial Data (Item 301)

Item 301 of Regulation S-K requires certain public companies to furnish selected financial data in comparative tabular form for each of the company's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. The Proposing Release would eliminate Item 301.

Given the widespread availability of this data online and in previous SEC filings, we support the proposed amendment. Prior years' data is easily obtainable for

those who desire information not disclosed in the present filing via Edgar, registrants' own web sites, and numerous third-party news and information services. We therefore do not believe elimination of Item 301 would result in the loss of disclosure of material information to investors.

B. Supplementary Financial Information (Item 302(a))

Item 302(a)(1) of Regulation S-K requires disclosure of selected quarterly financial data of specified operating results, and Item 302(a)(2) of Regulation S-K requires disclosure of variances in these results from amounts previously reported on a Form 10-Q. Item 302(a)(3) of Regulation S-K requires a description of the effect of any discontinued operations and unusual or infrequently occurring items recognized in each quarter.

The Proposing Release suggests eliminating Item 302(a), stating that the Commission's belief that the requirement results in duplicative disclosures. The SEC notes that the precursor to Item 302 was adopted at a time when quarterly data was "reported on an extremely abbreviated basis," whereas today such information is readily available in Edgar.

The disclosure required under Item 302(a) is yet another example of duplicative information that unnecessarily complicates and lengthens disclosure documents, while increasing burdens for registrants and offering little value to investors. Because the disclosure required by Item 302(a) is required in prior quarterly reports, we agree with the Commission and believe Item 302(a) can safely be eliminated.

C. Information about Oil and Gas Producing Activities (Item 302(b))

Item 302(b) of Regulation S-K requires certain issuers engaged in oil and gas producing activities to disclose information about those activities on a similar basis to information also required to be disclosed under U.S. generally accepted accounting principles ("GAAP"). A recent proposal by the Financial Accounting Standards Board ("FASB") would more closely align the GAAP standard with current Item 302(b).

Accordingly, the Proposing Release seeks to eliminate Item 302(b), subject to the FASB finalizing its proposed amendments to GAAP. Because Item 302(b) will become duplicative of GAAP when the FASB's amendments are finalized, we support elimination of the Regulation S-K requirement.

D. Restructuring and Streamlining (Current Item 303(a))

The Proposing Release contemplates several amendments to current Item 303(a), including the reordering and relocation of key text to other parts of Item 303, the establishment of a new Item 303(a) to clarify the objective of MD&A, and streamlining of various instructions. The amendments would also formally codify that the goal of MD&A is to present the issuer's results "from management's perspective."

We support a more principles-based approach to Item 303. CCMC agrees that providing a clear and concise objective for management will improve disclosure. We therefore support the proposed amendments.

E. Capital Resources (Current Item 303(a)(2))

Item 303(a)(2) currently requires an issuer to discuss its material commitments for capital expenditures as of the end of the latest fiscal period, and to indicate the general purpose of such commitments and the anticipated sources of funds needed to fulfill such commitments. An issuer also must discuss any known material trends in its capital resources, indicating any expected material changes in the mix and relative cost of such resources.

The Proposing Release would amend current Item 303(a)(2) to specify, consistent with the prior interpretive guidance, that an issuer should broadly disclose material cash commitments. The amendments would require an issuer to describe its material cash requirements, including commitments for capital expenditures, the anticipated source of funds needed to satisfy such cash requirements, and the general purpose of such requirements. The Proposing Release also notes that certain expenditures and cash commitments that are not necessarily capital investments in property, plant, and equipment may be increasingly important to issuers, "especially those for which human capital or intellectual property are key resources."

We support the proposed amendments to Item 303(a)(2). They reflect the modern reality that many businesses are no longer dependent on hard physical assets and are instead derived from the knowledge and services economy. Accordingly, it is sensible for management to discuss cash expenses associated with the modern economy. We believe the amended item would continue to afford management sufficient flexibility to provide a meaningful discussion of capital resources.

F. Results of Operations—Known Trends or Uncertainties (Current Item 303(a)(3)(ii))

Currently, Item 303(a)(3)(ii) requires an issuer to describe any known trends or uncertainties that have had or that the issuer reasonably expects will have a material impact on net sales or revenues or income from continuing operations. In an effort to align the item with other Item 303 disclosure requirements and SEC guidance, the Proposing Release would amend Item 303(a)(3)(ii) to require disclosure when an issuer knows of events that are "reasonably likely" to cause (as opposed to "will" cause) a material change in the relationship between costs and revenues. We support these proposed amendments.

G. Results of Operations—Net Sales and Revenues (Current Item 303(a)(3)(iii))

Under current Item 303(a)(3)(iii), to the extent financial statements disclose material increases in net sales or revenues, an issuer must provide a narrative discussion of the extent to which such increases are attributable to increases in prices, or to increases in the volume or amount of goods or services being sold, or to the introduction of new products or services. The Proposing Release would amend Item 303(a)(3)(iii) to codify prior interpretive guidance that the results of operations discussion should describe not only increases but also decreases in net sales or revenues and to further clarify this by tying the required disclosure to "material changes" in net sales or revenues, rather than solely to "material increases" in those line items. Again, we support the proposed amendments.

H. Results of Operations—Inflation and Price Changes (Current Item 303(a)(3)(iv); Instructions 8 and 9 to Item 303(a))

Item 303(a)(3)(iv) generally requires, for the three most recent fiscal years, a discussion of the impact of inflation and price changes on their net sales, revenue, and income from continuing operations. Instruction 8 to Item 303(a) provides that an issuer must provide a discussion of the effects of inflation and other changes in prices only to the extent it is material. Instruction 9 states that issuers electing to disclose supplementary information on the effects of changing prices may combine such disclosures with the Item 303(a) discussion and analysis or provide it separately with an appropriate cross-reference.

The Proposing Release would eliminate Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a) to "encourage companies to focus their MD&A on material information that is tailored to their respective facts and circumstances." The SEC notes that issuers would still be expected to discuss the impact of inflation or changing prices if they are part of a known trend or uncertainty that has had, or the issuer reasonably expects to have, a material favorable or unfavorable impact on net sales, or revenue, or income from continuing operations.

We continue to eschew a one-size-fits-all disclosure, and the proposed amendments would bring needed flexibility to current Item 303(a)(3)(iv) to permit issuers to customize disclosure to their own unique situations. We do not believe there would be a loss of material disclosure to investors. Accordingly, we support the proposed amendments.

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

The Proposing Release would replace the current Item 303(a)(4), which currently requires registrants to provide off-balance sheet arrangement disclosures in a separate section, with a principles-based instruction emphasizing the importance of discussing these obligations in the broader context of MD&A disclosure when such obligations are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources. Since this requirement was originally adopted in the aftermath of the Enron scandal, GAAP has been expanded to require disclosure of these issues as well, largely obviating the need for a duplicative SEC requirement. We therefore support the proposed changes.

J. Contractual Obligations Table (Current Item 303(a)(5))

The Proposing Release would eliminate Item 303(a)(5), which currently requires registrants to provide a tabular disclosure of contractual obligations, in light of the overlap with information now required in the financial statements. As with the proposed amendments to Item 303(a)(4), this information is now also required in an issuer's financial statements under GAAP, and thus, can be removed from Item 303. We support the proposed amendments.

K. Critical Accounting Estimates

The Proposing Release seeks to amend Item 303(a) to require explicit disclosure of critical accounting estimates, as is currently encouraged under prior SEC interpretive guidance. Under this proposal, a "critical accounting estimate" would be defined as an estimate made in accordance with GAAP that involves a significant level of estimation uncertainty and has had, or is reasonably likely to have, a material impact on the company's financial condition or results of operations. For each critical accounting estimate, the proposed amendments would require companies "to disclose, to the extent material, why the estimate is subject to uncertainty, how much each estimate has changed during the reporting period, the sensitivity of the reported amounts to the material methods, assumptions, and estimates underlying the estimate's calculation."

The CCMC has previously advocated for further interpretive guidance on this issue. Like the Commission, we are optimistic that the proposed disclosure would encourage companies to provide a more nuanced discussion of the issue than is found in the common current practice of repeating information already contained with the footnotes to the financial statements. The proposed instruction to new Item 303(b)(4), which provides that the discussion of critical accounting estimates should supplement (not duplicate) other disclosure and should be helpful to issuers as they craft the new disclosures. We do not believe the proposed disclosure would be duplicative of an auditor's discussion of critical accounting matters under new PCAOB standards. Therefore, we believe the proposed amendments would be beneficial and support them, although we ask that the SEC only require the disclosures to the extent it is practicable to provide sensitivity information.

L. Interim Period Discussion (Current Item 303(b))

Item 303(b) currently requires issuers to provide MD&A disclosure for interim periods to enable investors to assess material changes in financial condition and results of operations between specified periods. The Proposing Release would amend Item 303(b) "to allow for flexibility in comparisons of interim periods and to simplify the item." As proposed, renumbered Item 303(c) would permit issuers to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter. If a company elects to discuss changes from the immediately preceding sequential quarter, the company must provide summary financial information that is the subject of the

discussion for that quarter or identify the prior filing in Edgar that presents the information. Moreover, the Proposing Release would eliminate provisions of current Item 303(b) that require issuers subject to Rule 3-03(b) of Regulation S-X that elect to provide a statement of comprehensive income for the 12 month period ended as of the date of the most recent interim balance sheet to discuss material changes in that 12-month period with respect to the preceding fiscal year, rather than the corresponding preceding period, providing such issuers the same flexibility to choose comparison periods in their interim period MD&A.

Information about prior periods can be easily obtained by investors in previous filings on Edgar or elsewhere. Repetition of previously disclosed information can distract investors from new data and lead to confusion. On the other hand, we believe issuers should have greater flexibility to present their results in the manner most consistent with how they manage their businesses. We therefore support the amendments that provide them with greater flexibility to choose the comparison periods that are most relevant to their investors.

The Proposing Release would also amend Item 303(b) to eliminate text stating that issuers need not provide a discussion of the impact of inflation and changing prices, and amend Item 303(b)(2) to break the requirements into two subsections. Proposed Item 303(c)(2)(i) would continue to require issuers to discuss any material changes in their results of operations between the most recent year-to date interim period(s) and the corresponding period(s) of the preceding fiscal year for which statements of comprehensive income are provided. Additionally, proposed Item 303(c)(ii) would require issuers to compare their most recently completed quarter to either of the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter.

Again, we support elimination of requirements that have become outdated for many issuers, such as the one requiring a discussion of inflation and changing prices. We also support proposed Item 303(c)(ii)'s requirements that would provide issuers with the leeway to select the comparison periods most relevant to their investors. We therefore question proposed Item 303(c)(2)(i)'s requirement to provide a year-over-year comparison insofar as it would require an issuer that has otherwise selected to compare the current and most recently completed quarters to retain at least one year-over-year discussion. This result strikes us a disjointed one that could lead to investor confusion. We would instead suggest providing uniformity under proposed Item

303(c)(i) to permit an issuer to make consistent comparisons of interim periods throughout MD&A.

M. Safe Harbor for Forward-Looking Information (Current Item 303(c))

Because the SEC proposes to eliminate current Items 303(a)(4) and 303(a)(5), the Proposing Release also proposes to eliminate current Item 303(c), which explicitly applies the safe harbors under Section 27A of the Securities Act and 21E of the Exchange Act to paragraphs (a)(4) and (a)(5). The Proposing Release notes that the proposed amendments are not intended to alter the application of the statutory safe harbor provisions of the Private Securities Litigation Reform Act.

We support this proposed amendment and appreciate the Commission's ongoing commitment to the PSLRA safe harbors. We request that the Commission include similar laudatory language in any final adopting release.

Nevertheless, although issuers receive the benefit of a forward looking statement disclaimer for information included in MD&A, this is not necessarily the case for similar information provided in the financial statements, including any footnotes thereto. We urge the Commission to harmonize the treatment of forward looking statements in MD&A and financial statements in any final rules.

N. Smaller Reporting Companies (Current Item 303(d))

Under the current formulation of Item 303(d), a smaller reporting company may provide Item 303(a)(3)(iv) information for the most recent two fiscal years if it provides financial information on net sales and revenues and income from continuing operations for only two years. Item 303(d) also states that a smaller reporting company is not required to provide the contractual obligations table specified in Item 303(a)(5). The Proposing Release proposes to eliminate Item 303(d), given the proposed elimination of Items 303(a)(3)(iv) and (a)(5). The Proposing Release also notes that smaller reporting companies may continue to rely on Instruction 1 to Item 303(a), which states that a smaller reporting company's discussion shall cover the two-year period required in Article 8 of Regulation S-X.

For many years we have supported scaled disclosure for smaller reporting companies as a means to both incent privately-held businesses to enter the public

markets and to reduce regulatory burdens on issuers with more limited resources. Thus, we support the proposed amendments.

O. Compliance Date and Transition

The Proposing Release indicates that the Commission would set a compliance date of 180 days after effectiveness of any final rule, if adopted, and permit issuers to comply voluntarily before any effective date. While such a phase-in period should be sufficient for most seasoned issuers, we are concerned that smaller reporting companies and emerging growth companies may require additional time to digest and operationalize any new requirements. We therefore request that smaller and emerging growth companies receive at least a one-year transition period, though they should be permitted to voluntarily comply at an earlier date if they elect to do so.

Should the Commission adopt some or all of the proposed amendments, the ongoing validity of the Commission's 1989, 2003, 2010 and 2020 MD&A interpretive releases could be called into question insofar as the proposed amendments incorporate or supersede elements of each. We note that the proposed Instruction to Item 5 of Form 20-F refers registrants to each of the four releases, implying their ongoing enforceability. Form 20-F, however, is not available to domestic issuers, and the proposed amendments do not seem to contemplate a similar instruction in other forms under the Securities Act or Exchange Act. We recommend that the Commission clarify the continued status of the prior MD&A interpretive releases (parts of which are incorporated into the proposed amendments) in any final adopting release.

P. Climate Disclosure

Although the Proposing Release does not specifically seek comment on the point, several SEC commissioners provided various perspectives on climate-related disclosures in personal statements issued contemporaneously with the publication of the Proposing Release. Given the broad scope of the Proposing Release, we therefore believe it is appropriate to repeat for the official record the Chamber's long-standing position on the issue of special interest disclosures and mandatory climate-change disclosure.

We oppose disclosure solely for the sake of disclosure, particularly when the information is not material to reasonable investors. Materiality does not turn on the

needs of an investor that is not representative of investors more broadly or that is looking to advance a singular perspective. Certain stakeholders seek to expand what businesses are mandated to disclose to advance their groups' own parochial agendas and to further goals that are extraneous and contrary to the SEC's mission. The guiding principle for public company disclosure is, and should remain, materiality as viewed by a reasonable investor.

The SEC is not, has never been, and should not become an arbiter of social or environmental policy. The agency's true expertise instead lies in the regulation of the US capital markets—a mission at which it has excelled for over 85 years. We reject calls to politicize the Commission and to saddle Main Street investors with escalating costs imposed by special interest groups pursuing their own idiosyncratic objectives, far removed from the federal securities laws. The routine and widespread rejection of Rule 14a-8 shareholder proposals dealing with climate change as well as other environmental and social policy issues is conclusive evidence that mainstream investors agree.

The materiality framework that has existed for decades has served the Commission and Main Street investors well. We see no need to deviate from it here. Of course, if an issue concerning climate, the environment or any other topic is material to a particular registrant, then it may very well be required to make disclosure to investors under the SEC's existing disclosure framework. Indeed, as the Proposing Release aptly observes by citing to the Commission's 2010 climate change interpretive guidance, "This principles-based approach is also well-suited to elicit disclosure about complex and often rapidly evolving areas, without the need to continuously amend the text of the rule to impose bright-line or prescriptive requirements." Registrants already disclose a myriad of environmental, social and governance information in SEC reports, as well as via stand-alone corporate responsibility and sustainability reports. The Commission's proposed revisions to Item 303 strengthen those disclosure obligations, and as detailed in this letter, we are largely supportive of these amendments.

Conclusion

CCMC appreciates the opportunity to provide our comments on the Proposing Release. We commend the Commission for its continuing efforts to improve the effectiveness of the public company disclosure system. We believe the proposed

amendments to Items 301, 302 and 303 will provide meaningful improvements in disclosure for the benefit of Main Street investors. Please do not hesitate to let us know if the Commissioners or Staff would like to discuss our comments further.

Sincerely,

Erik Rust

cc: The Honorable Jay Clayton
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee