



NEW YORK
CITY BAR

**COMMITTEE ON
MERGERS, ACQUISITIONS AND
CORPORATE CONTROL CONTESTS**

TREVOR S. NORWITZ

CHAIR

WACHTELL, LIPTON, ROSEN & KATZ

51 W 52ND STREET

NEW YORK, NY 10019

Phone: [REDACTED]
[REDACTED]

July 18, 2019

Office of the Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Via email to rule-comments@sec.gov

**Re: File No. S7-05-19
Request for Comment on Amendments to Financial Disclosures about Acquired and
Disposed Businesses**

Ladies and Gentleman:

This letter is submitted on behalf of the Committee on Mergers, Acquisitions and Corporate Control Contests of the New York City Bar Association (the “Committee”). Our Committee is composed of experienced attorneys whose practices focus on merger and acquisition transactions and related corporate law, corporate governance and securities regulation matters. Our Committee includes lawyers with diverse perspectives on corporate and securities law issues, including partners at law firms and in-house counsel to issuers, investors and financial advisors.

We are responding to the request of the Securities and Exchange Commission (the “Commission”) for comment on the proposed amendments to the Commission’s rules and forms to improve the disclosure requirements for financial statements relating to the acquisitions and dispositions of businesses, as described in Release No. 33-10635; File No. S7-05-19 (the “Release”).

We applaud the comprehensive effort of the Commission and its Staff to tailor disclosure requirements to the needs of investors and we are generally supportive of the proposals in the Release to revise and update the disclosure rules with respect to material acquisitions and dispositions. While we believe that financial information regarding material business acquisitions and dispositions is important and useful disclosure for investors, we also consider

that not all information is equally valuable and indeed too much or the wrong type of information can actually be detrimental to investors, inundating them with an excess of material that makes it difficult for them to distinguish between that which is important and that which is not, and potentially even misleading them. We are also highly cognizant of the costs inherent in complying with disclosure obligations, not only in financial terms but also by way of commitment of management time and resources and delays in progressing business transactions efficiently. We believe that most of the rule changes proposed in the Release will help to ensure that investors receive the information necessary to make informed investment decisions regarding material acquisitions and dispositions without being inundated with unhelpful or misleading information, while managing the compliance burden for registrants.

We have limited our comments in this letter to the one area in which we have concerns, which is the proposed changes to the rules regarding the presentation of pro forma financial information.

Under the current framework for pro forma financial information, the only adjustments that are permitted are those that are directly attributable to the specific transaction and factually supportable. Article 11 of Regulation S-X precludes inclusion of pro forma adjustments for the potential effects of post-acquisition actions expected to be taken by management. As explained in the Division of Corporation Finance's Financial Reporting Manual, "pro forma financial information should illustrate only the isolated and objectively measurable (based on historically determined amounts) effects of a particular transaction, while excluding effects that rely on *highly judgmental estimates* of how historical management practices and operating decisions may or may not have changed as a result of that transaction. Information about the possible or expected impact of current actions taken by management in response to the pro forma transaction, as if management's actions were carried out in previous reporting periods, is considered a *projection* and not an objective of S-X Article 11" (Financial Reporting Manual 3210.2) (emphasis added).¹

The proposed rules would require pro forma financial information to include "Management's Adjustments" constituting reasonably estimable synergies and other transaction effects that have occurred or are reasonably likely to occur. In essence, the proposal would reverse the current standard and *require* registrants to include in their pro forma financial statements not only those "highly judgmental estimates" of how historical management practices and operating decisions may change as a result of the transaction in question, but presumably also projections of how other factors, such as competitive dynamics or changing relationships with stakeholders like customers and suppliers can be expected to impact the combined business.

¹ See also Financial Reporting Manual 3250.1(e): "Termination of employees and closing facilities are typical actions taken in connection with business combinations to eliminate costs perceived by management as redundant. The timing and effects of these actions are generally too uncertain to meet the S-X Article 11 criteria for pro forma adjustments. Management's estimate of how these actions (and other business integration activities not specifically associated with the disposition of a business) are expected to impact the operations and liquidity of the newly combined companies going forward should be discussed in MD&A and in supplemental information clearly identified as forward-looking information." (See also Financial Reporting Manual 3310.3.)

We understand from the Release and from statements by representatives of the Commission and its Staff that the proposed changes to the presentation of pro forma financial information are intended to yield more useful information to investors, and to enable investors to hold boards and management teams more accountable for the synergy estimates they disclose. We appreciate the view that pro forma financial statements, as currently constructed, may be of limited utility to investors. They present a synthetic hypothetical combination of the financial statements of the participating businesses as though the combination had been completed in the past. Since the pro formas may not include adjustments for management practices and operating decisions that are expected to change as a result of the transaction (or other factors like changing market dynamics or stakeholder relationships), they do not purport to and could not present a full depiction of the financial implications of the transaction. They do however provide an accounting perspective on the financial implications of the transaction, and as such are, we believe, a useful objective data point.

We understand that, in addition to trying to make pro forma financial information more meaningful to investors and to provide investors with a better understanding of the full financial effects of a significant transaction, the Commission is also motivated by a desire to clarify and simplify the disclosure rules. Under the current framework, the pro forma financial statements can be difficult for registrants to prepare and are among the most prolific sources of questions for the Staff. We applaud the proposals in the Release aimed at clarification and simplification. However, we are concerned that requiring disclosure of expected synergies in the pro formas could have the opposite effect and may have other unintended negative consequences. In this regard, we note that the preparation and review of the pro forma financial statements for a transaction is already often the gating item for getting the registration statement or other SEC disclosure document on file with the Commission, and a requirement to add Management's Adjustments would likely extend the time needed for their preparation and review.

It is the view of the Committee that pro forma financial information is an inapt means for communicating the anticipated synergies that may result from a transaction. This letter will provide several reasons for this belief, including the fundamental timing disconnect (that pro formas are prepared based on historical financial information for a specific time period but synergy estimates are forward-looking projections over several years), the fact that synergies are not always considered a material part of the rationale for entering into particular transactions, and the reality that the possible revenue and cost synergies that may be available in a particular transaction, as well as the costs to achieve them and associated dis-synergies, are among the most difficult projections to make with specificity, especially given the limited available information on which they are necessarily based.

I. PRO FORMA FINANCIAL STATEMENTS ARE NOT WELL SUITED AS A VEHICLE FOR CONVEYING SYNERGY PROJECTIONS

Pro forma financial information is not intended to describe for investors how the financial characteristics of the combined businesses are expected to look in the future. Instead pro forma financial statements present, as a data point for investor consideration, a hypothetical combination of the historical financial statements of the participating businesses as though the combination had been completed at an earlier date, typically combining the parties' most recent

balance sheet and most recent annual and interim period income statements (with certain required adjustments). Preparation of pro forma financial statements is, necessarily, backward-looking as the preparation of the historical financial statements of both a registrant and any acquired business is also backward-looking. Moreover the preparation of synergy estimates is qualitatively different from the traditional pro forma financial information compilation process, because the latter involves the application of known rules to known historic financial information and does not generally involve forward-looking estimations.

The proposal to require the importation of “reasonably expected” synergies into pro forma financial information would entail grafting forward-looking projections onto historical information. We appreciate that the Commission hopes to provide investors “insight into the potential effects of the acquisition and post-acquisition plans expected to be taken by management” (Release at page 80). However, we believe that there are complexities associated with the generation of synergy estimates in anticipation of a transaction that do not easily lend themselves to the type of line-item treatment that is proposed in the Release. As a result, we believe that it would be very difficult for registrants to apply the proposed requirements uniformly in practice, and that the resulting disclosures would be more likely to be confusing or even misleading to investors who are evaluating the combined businesses’ expected performance over different time horizons.

The first complexity concerns the timing of anticipated synergies (including the timing of anticipated costs to achieve those synergies). There are many types of potential synergies that might be implicated in a transaction, and these may be hoped to be achieved over a range of time periods – usually significantly longer than the period covered by the pro forma financial information. Actions such as closing facilities, terminating or renegotiating leases and laying off employees may lead to synergies in the long-term but typically entail increased costs in the near term as severance and other breakage obligations are incurred. Revenue synergies such as those derived from cross-selling products from one of the combining businesses to customers of the other may take longer to be achieved, and may also be impacted over time by changes in market dynamics, as well as dis-synergies such as customer cannibalization or having to give larger discounts to customers whose buying power increases as a result of the combination. Typically when companies do consider that there will be material synergy benefits from a transaction and choose to announce that, they will provide an estimate of the overall run-rate savings expected to be achieved within a specified time period. A registrant might, for example, announce that it expects to achieve \$100 million in run-rate synergies within three years.

It is not clear from the Release how these timing differentials should be addressed in Management’s Adjustments to the pro forma financial statements. It would not seem to be accurate or appropriate to depict only the near-term effects (*i.e.*, increased up-front costs to achieve synergies), even though those are the most immediate and most certain implications, without also reflecting somehow management’s estimate of the synergies that may be achieved in later years as a result. However, a presentation that shows, within a 12 to 21 month pro forma period, the full costs to achieve synergies and also the steady state synergies estimates is not likely to be accurate or appropriate either. We suppose that the full anticipated run-rate synergies could be reflected in the pro forma income statement for the most recent year, but those could take several years to be fully realized and may be offset not only by the costs

incurred to achieve those savings but also by potential dis-synergies which may manifest on an entirely different time frame. There appears to be a significant risk that the Management's Adjustments would either provide an incomplete picture—if, for example, the near-term effects resulting from the combination are emphasized—or an unrealistically rosy one that depicts the achievement of full anticipated synergies in the current pro forma financial statements. Moreover, the registrant's results of operations often will evolve throughout the synergy-realization period for reasons independent of the synergies themselves (e.g., revenue may be expected to grow organically), further compounding the timing disconnect between the historical periods reflected in the pro formas and the synergies.

We appreciate that the Commission proposes requiring qualitative disclosure to provide a fair and balanced presentation of pro forma financial information and Management's Adjustments, but still believe that it would be difficult if not impossible for registrants to consistently and appropriately map such forward-looking synergy projections onto historical financial statements.

Exacerbating the timing disconnect is the inherent complexity and uncertainty of synergy projections. Business combinations (unlike securities offerings or financings) are by their nature unique transactions, each involving entities with their own characteristics which combine in different ways to offer a wide range of synergy (and dis-synergy) possibilities. In some cases, the potential synergies to be obtained are of the essence to the transaction, which might not make economic sense without them; in others, while there may still be some synergies, these are not a significant part of the rationale for the deal. When analyzing a potential transaction, the parties often try to identify, at least in general terms, potential synergy opportunities (and dis-synergy risks), and may seek to quantify these as best they can, recognizing how difficult that can be. This is especially true of the acquiring party, which will bear the burden of capturing the synergies and hope to reap most of the benefits, but also applies to the selling party, which will often argue for a portion of those benefits to be conveyed to it or its shareholders in the form of a higher purchase price. These assessments are of necessity made under great time pressure with imperfect information: the buyer will only have access (for a short period before the transaction is entered into) to due diligence materials made available by the seller, and often their ability to speak to people lower in the selling organization, who are closer to the operational decisions which will determine what synergies are feasible, will be very limited for obvious reasons of confidentiality. The seller of course will have even less insight into the buyer's synergy prospects. Representatives of the buyer will typically think of the range of possible synergy opportunities in "buckets" of possible cost savings (such as employee headcount reductions, facility closures, R&D consolidation, improved negotiating leverage with suppliers, and so on) and revenue synergy prospects (such as cross-selling old products to new customers or selling acquired products to existing customers), and will consider the expected costs to achieve these synergies, and try to identify and take into account possible dis-synergies. Each of these many items involves a possible synergy (or dis-synergy) amount that might manifest over time and a range of probability weightings. In our experience, parties engaging in transactions will often be reasonably confident that they will be able to achieve some measure of overall synergies, recognizing that while some may be harder to achieve, those may be offset by others that are more achievable than expected (or that were not identified in advance at all). With that degree of confidence, registrants are often willing to disclose an overall target (or range) for anticipated

run-rate synergies to be achieved over time. On many occasions, however, even those estimates consciously exclude the most unpredictable categories of synergies, including those on the revenue side. It is an entirely different proposition to require registrants to identify and disclose with reasonable specificity all the specific synergy items that are expected to be achieved. Indeed it is highly likely, given how speculative many of these synergies necessarily are, and all the changes that will occur in the businesses and in the broader market during the few years following the transaction, that many of the specific disclosures will prove highly inaccurate, even if they offset each other and the overall impact is not far from the overall assessment generated in anticipation of the transaction.

Estimates of revenue synergies resulting from a transaction are especially uncertain and speculative, as they tend to result from changes to the competitive or industry landscape, as opposed to operating improvements and other managerial decisions. Even though the examples provided in the Release (on page 80) are all of the cost-saving type, we expect that if the Commission decides that registrants must identify and quantify potential synergies in the pro forma financial information, that requirement would apply to all synergies, and not only cost synergies. It is also worth noting that with market and competitive changes, it can be very difficult to identify even with hindsight whether anticipated synergies have in fact been achieved. For example, a retail company that combined with another retailer two years ago might have expected that its increased scale would yield synergies in buying power and logistics costs, and those expectations may well have been fulfilled, even as its sourcing and logistics costs have soared as the imposition of import tariffs and transport labor shortages (which could not have been anticipated) have driven costs up across the board.

In theory it might be possible to identify each possible synergy or dis-synergy, to attribute to each a probability, and to disclose the probability-weighted expected value for each line-item. However, this would be a very complex and time-consuming exercise, may well require premature disclosure of sensitive plans or proposals (as discussed below), and would ultimately still be so speculative that it would seem unlikely to yield meaningfully more helpful disclosure to investors than the overall synergy targets that are typically cited today when registrants consider synergies an important part of the rationale for the transaction. In our view, the proposed rules would require the disclosure of information that is too speculative and susceptible to change to properly be included in the line items of pro forma financial statements. Further, as we have experienced and observed from our clients, integration planning for a material acquisition is an ongoing and iterative process in the planning stages of a transaction, between its announcement and closing, and even beyond that. Actions may seem reasonably likely to be taken at the time pro forma financial information is prepared, but plans often change based on additional information that is learned as the acquirer actually begins integrating the acquired business, or as the competitive landscape changes. In this context, even items that might be considered “reasonably expected to occur” at the time a deal is announced are, fundamentally, speculative projections.

The current regulatory framework does of course allow registrants to disclose synergy targets if they consider them meaningful and material to the transaction. The Commission has previously indicated that adjustments that give effect to actions expected to be taken by management or to occur after a business combination are generally not appropriate to be

incorporated into pro forma financial statements, but could be disclosed in the footnotes, in separate forecasts or in projections (Financial Reporting Manual 3310.3) and, if expected to impact the operations and liquidity of the newly combined companies going forward should be discussed in the MD&A and in supplemental information clearly identified as forward-looking information (Financial Reporting Manual 3250.1(e)).

In the view of the Committee, the current regulatory framework provides sufficient information and disclosure for investors to be able to hold registrants and their management teams accountable for their synergy estimates. Currently, when synergies are considered material to a transaction, registrants will typically disclose them, frequently file them with the Commission under the Commission's "early communication" rules and discuss them as part of their investor communications. Registrants can do so with a level of specificity that is tailored to the specifics of the transaction and their judgment as to the materiality of that information in the context of the overall mix of information being made available to investors. Registrants may also discuss the anticipated effects of material acquisitions and other material events in the MD&A, and of course a set of management-blessed projections (which would include synergy estimates if considered material) are typically disclosed as the underlying basis for the investment bankers' fairness opinion. Indeed, where expected synergies are considered material, registrants have strong incentives to disclose them both in order to "sell" the transaction and because, in an environment where appraisal litigation has been highly prevalent, synergies are protective in that they are generally not taken into account under state law in determining the "fair value" of a target company. These disclosures of anticipated synergies are constrained, from a legal perspective, by general antifraud rules, and from a practical perspective by the fact that investors can and do hold management teams accountable based on their ability to achieve stated synergy targets.

Another reason for not requiring synergy disclosures as part of the pro forma financial statements is that the pro formas are generally subject to a thorough and time consuming accounting review. It is not at all clear why a registrant's accountants should be inserted into the process of vetting and reporting synergy estimates as to which they are not experts. Taking any synergy disclosure requirement out of the pro forma financial statements would likely avoid unnecessary delays in getting registration statements and other disclosure documents on file.

Finally, as noted above, there are many acquisition and disposition transactions in which synergies are not a significant part of the rationale for the deal. In these cases, registrants would today often not disclose a synergy target at all even if some synergies may be possible. Adoption of a one-size-fits-all rule requiring the complex and time-consuming speculative analysis of synergies in the pro formas on a line-item basis, as described above, would be particularly inappropriate in such cases, and the marginal disclosure benefit to investors would seem to be greatly outweighed by the added disclosure burden on registrants (in terms of time, cost, effort and delay). Even if the Commission disagrees with the primary recommendation in this letter and determines to revise the pro forma adjustment requirements as proposed in the Release, we would respectfully recommend that the Commission provide an exception or a safe harbor for cases where synergies are not a material element of the transaction. Specifically, we would propose that if a registrant includes an express statement that expected synergies are not material

to its decision to engage in the transaction, then it would not have to address synergies in its pro forma financial statements.

II. POTENTIAL UNINTENDED CONSEQUENCES OF INCLUDING “REASONABLY EXPECTED” SYNERGIES IN PRO FORMA FINANCIAL INFORMATION

a. Premature Disclosure of Sensitive Information

We are concerned that the proposed rules could require registrants to disclose, in greater detail than they would otherwise have wanted to, strategic and operational changes to be made in connection with a significant acquisition or disposition. The Release stated that, among other things, Management’s Adjustments would include effects such as “closing facilities, discontinuing product lines, terminating employees and executing new or modifying existing agreements” (page 80). Although a registrant may feel comfortable disclosing an overall synergy target (taking into account all of the factors described above), registrants do not typically disclose, in advance, the specific actions that will likely be taken in order to achieve these synergies. There are a number of reasons for this. First, disclosing such plans may interfere with or jeopardize important relationships a registrant has with various stakeholders and may even prevent a registrant from actually achieving the projected synergies because competitors and other stakeholders will have a roadmap to the registrant’s key strategies. To offer just one example, if a registrant was required to disclose that it expects to be able to lower its lease expenses by a specified amount, that could lead one or more of its landlords (rightly or wrongly) to deduce that the company was going to terminate or try to renegotiate their leases and they may take defensive actions in response that could affect the registrant’s negotiating leverage and perhaps its very ability to achieve the desired synergy benefit. Second, premature disclosure of synergies could also complicate registrants’ relationships with their regulators. In some cases, increased market power might be a form of “synergy” that is extremely sensitive and may involve extensive discussions and negotiations with a variety of regulators. Mandating disclosure of revenue synergies at the time the proxy statement of the transaction is filed could have significant implications for the success or failure of some transactions.

Incremental disclosure requirements always need to balance the benefits to investors against the detriments both in terms of added compliance costs and real-world effects. Ideally disclosure requirements should not have negative real-world implications for registrants at all, but the required disclosure of potential synergies and plans to generate synergies is one area where they may well do so. In addition, as discussed above, premature disclosure of strategic plans may turn out to be misleading because these plans may change before they are implemented.

Further, employee communications are a key work stream in the context of an acquisition or disposition. A registrant expends great time and energy to thoughtfully announce the pendency of a significant transaction to employees and, later, to communicate the effects of that transaction on the registrant’s workforce. In our experience, information regarding the closure of facilities, termination of product lines or workforce reductions is generally communicated to

employees only once a decision has been taken and is about to be implemented, for fear of destabilizing the workforce.

Requiring registrants to include information regarding anticipated facility closures, workforce reductions, and other plans affecting employees before such decisions are final and about to be implemented could have seriously deleterious effects on employee morale and even retention. Requiring more specific disclosure of synergy opportunities could compel registrants to communicate potential changes to employees before such plans are ripe for action, causing individual employees to become rightly concerned about their employment prospects before the registrant is equipped to provide full information about such matters. In addition, registrants' performance may suffer if employees leave in anticipation of being laid off or in reaction to uncertainty about their futures.

b. Securities Liability and Shareholder Litigation

We are concerned that requiring the inclusion of synergies in pro forma financial information would likely lead to a greater number of frivolous lawsuits being brought in connection with acquisition and disposition transactions. We appreciate that the Release specifies that Securities Act Rule 175 and Exchange Act Rule 3b-6, which provide that forward-looking statements would not be considered fraudulent unless it is shown that the statements lacked a reasonable basis or were not made in good faith, would apply to forward-looking statements included in pro forma financial information. Nonetheless, we are concerned that in circumstances where a registrant's stock performance suffers following an acquisition, the registrant could be faced with frivolous lawsuits challenging—with the benefit of hindsight—the reasonableness of the assumptions initially embedded in the pro forma financial information. While such a risk attends any incremental disclosure, we believe it is especially acute in a case like this where the synergy expectations required to be disclosed are necessarily so speculative. Even if a registrant ultimately prevails, such a lawsuit would entail a significant diversion of management time and company resources.

Because, as described above, integration planning is an ongoing and iterative process, synergy estimates often remain in flux and can be very difficult to pin down at any moment in time. While we believe that this is one of the reasons not to require synergy estimates in pro forma financial information, should the Commission disagree, we respectfully submit that at the very least, the Commission's rules should be very specific that the synergy estimates speak only as of the date of the relevant disclosure document and that there is no obligation to update the estimates at any time in the future, even if the registrant in the future has different estimates or otherwise believes or has reason to believe the estimates will not be met. The risk that the pro forma financial statements may have to be updated, possibly more than once before the completion of the transaction, could lead to confusion and delay, and possibly even create a disincentive to ongoing integration planning.

The fear of frivolous litigation (and possibly also shareholder activism aimed at purported overestimation or underachievement of synergies) could lead management teams to be unduly conservative in their synergy estimates and discourage prudent risk-taking.

c. Possible Impact on Board Decision-Making

In the view of the Committee, the proposal to mandate disclosure of estimated synergies represents a significant departure from the Commission's historic approach towards board decision-making and disclosure in the context of mergers and acquisitions, one that may have unintended consequences for the manner in which boards conduct themselves and make decisions. In general terms, the Commission has not in the past used its rules to require a board of directors to develop or take into account any particular class of information in connection with pursuing or approving an M&A transaction. Instead, the Commission has left those decisions to the business judgment of the board, while requiring that the material information about the board's *actual* decision-making be disclosed to investors, with heightened disclosure requirements in certain circumstances (such as in connection with conflict transactions and the delivery of fairness opinions). In this sense, the Commission's rules have dove-tailed well with State fiduciary law and disclosure requirements and enforcement mechanisms for board behavior. Thus, for example, the Commission does not require the preparation of fairness opinions or particular presentations or projections. While we acknowledge that the Commission's proposal regarding synergy estimates in pro forma financial information does not by its terms require that these estimates be created before approving and entering into a transaction, the reality is that the existence of a post-signing disclosure requirement (applicable potentially to both the acquirer and the target) would likely impel the acquirer and the target to actually confer and reach some measure of agreement regarding these estimates before signing a merger or acquisition agreement. Mandating synergy disclosures may also might force boards to devote more time to reviewing and approving synergies even in cases where those might not merit such focus in accordance with their business judgment. In addition to potentially changing the manner in which directors will be expected to conduct themselves, this added work-stream may introduce additional complexity to what is typically already an intense, time-pressured and delicate process, which may have an unpredictable impact on deal making activity.

Another possible unintended consequence of mandating estimated synergy disclosures in pro forma financial statements is that it may create or exacerbate a tension between the disclosure requirements and the "gun-jumping" restrictions under antitrust laws administered by the Department of Justice and the Federal Trade Commission. Companies required to provide synergy estimates (and motivated to be as accurate as possible for fear of litigation) may be tempted to "push the envelope" on permissible integration planning activities as they seek to check their assumptions about the achievability of certain types of synergies. One would certainly hope that sophisticated, well-advised parties will be able to walk the fine line, providing the required disclosure without engaging in any activities that the antitrust authorities would find objectionable. However we believe it is appropriate for the Commission, as it contemplates mandating synergy disclosures, to consider the incentives and risks that it would be creating.²

² There are other situations in which one can imagine unintended and unpredictable consequences of the mandatory disclosure of specific synergy estimates: in a hostile bid or a topping bid with stock consideration, the hostile bidder or interloper may stretch for larger synergy estimates, leading investors to give more credence to those estimates than should be due; activists opposing an announced transaction may cite the lack of quantified synergies as a reason to vote it down when the reason might be management's desire to be conservative about what they consider "reasonably estimable"; target boards may decide to get more involved in the buyer's quantification of synergies to

d. Possible Impact on Cross-Border Transactions

As the Commission staff is aware, the Takeover Codes in the United Kingdom and Ireland regulate synergy estimates. While neither jurisdiction requires synergy estimates to be publicly disclosed, each requires an independent expert's report on synergies if the parties choose to make estimates public. We anticipate those requirements would be applicable in those jurisdictions to any synergy estimate disclosed as part of the Commission's proposed revisions to the pro forma financial information rules.

Based on the experience of some Committee members in working on transactions that are subject to the Commission's rules and also to the Takeover Codes of Ireland and the United Kingdom, we anticipate that it will be extremely difficult to reconcile a Commission rule requiring synergy estimates with a foreign legal requirement for an expert's report on those estimates with the Staff's historic interpretation of Regulation MA Item 1015(b) as applied to experts' reports. The Committee anticipates that such difficulty will, at the very least, put U.S. registrants (both foreign private issuers and domestic registrants) at a very significant disadvantage in share-for-share transactions with Irish and U.K. companies. This could discourage non-U.S. companies from registering under the 1934 Act or increase pressure on those that are registered to deregister, and increase the extent to which non-U.S. companies exclude U.S. holders from business combinations involving Irish and U. K. companies.

If the Commission does implement a requirement for synergy estimates as part of pro forma financial information, the Committee recommends that the final rules (a) specifically exempt U.S. registrants from the need to file or furnish with the Commission any independent expert's report on those estimates required to be prepared under the laws of any other jurisdiction, (b) specifically exclude the author of any such report from Section 11(a)(4) of the Securities Act and (c) specifically exclude any such report from Regulation M-A Item 1015(b).

The Committee respectfully submits that, while most aspects of the Release appear intended and indeed seem likely to streamline and simplify the process of pursuing, engaging in and completing material merger, acquisition and disposition transactions, the inclusion of a new requirement to disclose synergy estimates in pro forma financial information would likely be markedly at odds with that objective.

III. CONCLUSION

As described above, while we commend the Commission and the Staff for many of the clarifications, simplifications and improvements proposed in the Release, it is the view of the Committee that pro forma financial information is not an appropriate vehicle for conveying the anticipated synergies that may result from significant acquisitions and dispositions. Not only will the proposed rules be very difficult to implement consistently in practice and yield little incremental benefit to investors, but we are concerned that the proposed required disclosures

protect their own shareholders' appraisal rights, which could lead to parties' having to break the price offered into intrinsic value, premium, and synergies.

could prove costly and time-consuming, and have unintended consequences, which could create operational challenges for companies, impact a range of corporate stakeholders and ultimately be prejudicial to the securities markets in general.

* * *

We appreciate the opportunity to participate in this process, and would be pleased to discuss our comments or any questions the Commission or its staff may have. Please do not hesitate to contact Trevor Norwitz, Chair of the Committee on Mergers, Acquisitions and Corporate Control Contests, at [REDACTED] or [REDACTED].

Respectfully submitted,

Committee on Mergers, Acquisitions
and Corporate Control Contests
Trevor S. Norwitz, Chair