P B T K
PIERCY BOWLER
TAYLOR & KERN
Certified Public Accountants
Business Advisors

January 2, 2018

Mr. Brent Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

By email: rule-comments@sec.gov

Re: **File No. S7-08-17**: *FAST Act Modernization and Simplification of Regulation S-K*
(Release Nos. 33-10425; 34-81851; IA-4791; IC-32858)

Dear Mr. Fields:

We appreciate the opportunity to share our views and provide input on the Securities and Exchange Commission's (the Commission or the SEC) proposal entitled *FAST Act Modernization and Simplification of Regulation S-K.*

Piercy Bowler Taylor and Kern, CPAs, is a regional audit firm with only a few audit clients that are relatively small issuers. As you know, as auditors, we are required by professional standards[1] to read other information presented in a document together with an issuer's audited financial statements and to consider whether such information, or the manner of its presentation, is materially inconsistent with that which is (or should be) presented in the issuer's financial statements or related notes.

We often make editorial suggestions to our issuer clients regarding the content and quality of the disclosures that accompany their financial statements in their annual and quarterly reports and other SEC filings. And we have long believed that the SEC disclosure requirements, particularly of Reg. S-K, often as interpreted by the staff, have led to a proliferation of redundant and immaterial disclosures in such filings that have seriously impaired the clarity, readability and understandability of many of them in direct conflict with what should be the objectives of good disclosure.

Accordingly, we fully support the proposal as a significant first step toward modernizing and streamlining these disclosure documents in the Commission's ongoing disclosure effectiveness initiative. We believe that, in addition to the significant benefits to be realized by investors and other readers of these filings in the form of improved clarity, readability and understandability, the efficiency of preparing and reviewing the filings (in terms of reduced costs and time elapsed) would be greatly improved by taking such steps to modernize and streamline the end product. In fact, the undersigned authored the attached article, "Finding the Forest Among the Trees: Overcoming

1 PCAOB Auditing Standard No. 2710, *Other Information in Documents Containing Audited Financial Statements.* In 2013, the PCAOB proposed a new standard that would also require auditors to report on such other information but, to date, has not acted on that proposal.

Overload and Achieving Greater Disclosure Effectiveness,"2 citing the views on such matters of many SEC representatives and others and advocating such action by the SEC (and by the FASB). Among other things, preparation of this article was part of our long commitment to encourage our clients to strive to reduce redundancies and immaterial disclosures in their filings to the extent we judged permissible within the constraints of the current disclosure framework.

Because we are a small firm with limited resources, and because our interest in such matters is only indirect, our letter of comment is not comprehensive; rather, we are commenting only broadly and briefly on certain selected matters that we see as the essence of the proposal; therefore, we have not responded directly or specifically to the 97 questions presented therein. This letter contains several references to the comments of selected other respondents whose letters were available online at the time of its preparation.

General observation. We concur with the view of the Commission (as did the AICPA's Center for Audit Quality or CAQ[3]) that modern technology should be made available to enable and encourage users' to access information better. We observe, for example, that much of the historical information now required to be included in SEC filings is readily available in prior filings with a few clicks of a mouse using EDGAR. Most of these disclosure requirements for historical data arose long before this technology was available. And since SEC filings are now read mostly online, increased use of internal hyperlinks would eliminate many redundant disclosures and awkward unlinked internal cross references.

We believe that extensive use of cross-references, especially with internal hyperlinks, to information disclosed in the financial statements to meet Reg. S-K disclosure requirements should continue to be permitted (as they always have been) but disagree with the CAQ[4] that it is unnecessary that this be addressed in a revision to Reg. S-K. We welcome anything the Commission might do to encourage this practice further in the interest of streamlining a larger number of filings. Like Deloitte & Touche LLP (D&T),[5] however, we support the Commission's proposal to prohibit issuers explicitly from including cross-references in other direction, *i.e.*, from the financial statements to disclosures found elsewhere in an issuer's filings because it will likely be unclear to users whether such referenced material is covered by the audit report.

Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A). We concur with the Commission's proposal to allow issuers to omit from the MD&A a comparison of the immediately preceding year to the earliest of three years (whenever it would be otherwise required) if the oldest year has been included in an issuer's earlier filing if it is available on EDGAR. Consistent with our general observation about technology that is set forth above (and with the view expressed by D&T[6]), we believe that enabling omission of the oldest comparison should not be limited to Annual Reports on Form 10-K but rather should be permitted when the information was previously provided in ***any*** SEC filing by that issuer that is available on EDGAR (in fact, we believe such omission should be expressly encouraged) even when there has been an accounting change retrospectively applied in the omitted financial statements.

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2 Published by the New York State Society of Certified Accountants in *The CPA Journal*. pp. 6-10, July 2015,

3 Comment letter of December 18, 2017, p. 2

4 *Ibid.* p. 4

5 Comment letter of December 21, 2017. p. 2.

6 Comment letter of December 21, 2017. p. 2.

However, we concur with the view of BDO[7] that the evaluation of whether the omitted information is material to an understanding of the issuer's financial condition, results of operations and cash flows should be taken out of the equation primarily because materiality notwithstanding, the omitted information would be readily available online in a prior filing, as stated above. Basing this exemption on a subjective materiality evaluation that would inherently be subject to second-guessing by both auditors and regulators. As BDO wrote, this would likely discourage many issuers and their legal counsel from availing themselves of these streamlining opportunities and, therefore, result in excessive disclosures because of their tendency to err on the side of caution.

* * * * *

We fully support a principles-based approach to all disclosure requirements and, therefore, encourage the Commission to continue its efforts to streamline its Regulation S-K and other requirements through further consideration of similar changes.

Questions about these comments may be addressed to the undersigned at [redacted] or communicated by telephone at [redacted] or [redacted].

Very truly yours,

Howard B. Levy, Principal and
Director, Technical Services

Attachment

[7] Comment letter of December 19, 2017. p. 2

Finding the Forest Among the Trees

Overcoming Overload and Achieving Greater Disclosure Effectiveness

By Howard B. Levy

The fundamental objective of any disclosure document is the clear communication of relevant and material information in a summarized and understandable form. "Disclosure effectiveness" refers to the extent to which that objective is met. It is notable that the SEC has been said to prefer disclosure effectiveness to "disclosure overload," which is, essentially, its opposite. Perhaps this is because it focuses responsibility on issuers rather than regulators, which are inherently slow in taking action (absent an immediate crisis like Enron that results in Congressional pressure). Nevertheless, there are certain steps that regulators, rule makers, and standards setters can take in the short term to improve disclosures.

The term "transparency" has been used extensively in recent years to describe a highly valued characteristic of corporate disclosure; in a broader sense, the term has also been used almost interchangeably with disclosure effectiveness. One can reasonably conclude that disclosure overload is a severe impediment to transparency, and that the principle of "less is more" is consistent with both transparency and overall effectiveness.

The sheer quantity of financial disclosures has become so excessive that we've diminished the overall value of these disclosures. (Ray J. Groves, "Financial Disclosure: When More Is Not Better," *Financial Executive*, May 1994).

The *Wall Street Journal* recently reported that the average annual report on form 10K increased from about 30,000 words in 2000 to 42,000 words in 2013 (V. Monga, E. Chasan, "The 109,894-Word Annual Report," *Wall Street Journal*, June 1, 2015).

Despite all the speeches, studies, and publications to the contrary, the regulatory environment (as it is manifest in both the SEC comment letter and PCAOB inspection processes) continues to discourage the application of materiality or relevance judgments as well as other efforts that might be directed at improving disclosure effectiveness, but could seem risky to issuers.

What Is the Root of the Problem?

"Meaningful, effective disclosure does not simply mean more disclosure," said no less than former SEC Commissioner Troy A. Paredes. "Because of information overload, in some cases, more disclosure can mean less effective disclosure" (remarks at "The SEC Speaks in 2013," February 2013). The problem of disclosure effectiveness and its causes can be summarized as follows:

- Too many prescriptive requirements, such as for disaggregated detail and boilerplate
- Transactions that are too complex
- Descriptions that rely excessively on technical jargon
- No option to omit required disclosures that may actually be stale or redundant based upon materiality or relevance judgments
- Little discretion or judgment applied by issuers or regulators to distinguish the important from the unimportant
- Writing that is badly organized, redundant, overly dense or unfocused, and generally poor
- Issuers' fear of litigation risk or regulatory sanction
- Tight reporting deadlines that leave no time to streamline disclosures
- Slow and arduous process to change regulations.

The problem of disclosure can be found both within the financial statements and outside of the financial statements (e.g., in annual reports or proxy statements). Ineffective disclosure leads to information overload.

> When disclosure gets to be 'too much' or strays from its core purpose, it could lead to what some have called 'information overload'–a phenomenon in which ever-increasing amounts of disclosure make it

> difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant. (SEC Chair Mary Jo White, remarks at the National Association of Corporate Directors Leadership Conference, October 15, 2013)

Which Steps Have Been Taken?

The SEC launched its "Plain English" initiative in 1998 (which did not establish any rules for registration statements or periodic 1934 Act reports) and subsequently, along with FASB and the CAQ, it has conducted frequent surveys and forums, issued reports, and given speeches, many of which have been addressed to lawyers, not CFOs (see the sidebar, *For Further Reading*). In 2008, the SEC issued a "Report of the Advisory Committee on Improvements to Financial Reporting," and in 2009 it began what it called the "21st Century Disclosure Initiative." A congressional mandate was issued in 2013 under section 108 of the Jumpstart Our Business Startups Act.

In 1995, FASB issued a "prospectus" asking readers "to consider possible changes to current disclosure requirements consistent with one or both of the following objectives: (1) to reduce the cost of preparing and disseminating disclosures while providing users with the information they need and (2) to eliminate disclosures that are not useful for decision making." It began its Disclosure Framework Project in 2009, "with the goal of establishing an overarching framework intended to make financial statement disclosures more effective and coordinated and less redundant" and ultimately to provide guidance to issuers on how to decide what disclosures to make.

FASB followed in 2012 with an invitation to comment on its "Disclosure Framework" outlining possible approaches to improving disclosure effectiveness. In March 2014, FASB proposed an addition to its Conceptual Framework (Chapter 8: Notes to the Financial Statements) in order to improve the process for establishing disclosure requirements in new standards and evaluating existing ones.

> [FASB's] goal is to both improve disclosure content—make it more useful to investors—and at the same time, where we can, reduce the amount of disclosure content … The framework is designed to lead to disclosures that clearly communicate the information that is most important to the users. (FASB Chair Russell G. Golden, remarks at AICPA Conference on Current SEC and PCAOB Developments, December 2013)

Every Big Four firm has written about this subject and provided guidance to its issuer clients. But in my opinion, the many initiatives undertaken over the years have had little or no impact on disclosure effectiveness, as evidenced by current SEC filings.

What Can Regulators Do to Fix the Problem?

As recently as March 24, 2015, the SEC chair told Congress that the staff is "coordinating with FASB to identify ways to improve the effectiveness of disclosures in corporate financial statements and to minimize duplication with existing disclosure requirements" (Mary Jo White, testimony before the House of Representatives).

FASB could raise its priority for finalizing the proposed chapter 8 to its Conceptual Framework, providing conceptual guidance for establishing new disclosure requirements in future standards, but it could accelerate actions to evaluate and revise its existing standards to ensure more flexibility and greater issuer judgment as to appropriate disclosures and their placement. For example, ASC 235-10-50-6 states that accounting policy disclosure "is preferred in a separate summary of significant accounting policies preceding the notes to financial statements, or as the initial note, under the same or a similar title." In the author's opinion, FASB should remove that sentence and revise any direct or indirect references thereto to allow for greater flexibility as to the placement of this disclosure. Prescriptive words such as "shall" and "at a minimum" preceding a list of detailed "requirements" could also be eliminated from the standards.

In addition, FASB should introduce the concept of relevance into its standards as a disclosure criterion and consider revising its definition of materiality by substituting "would" (or "would likely") influence decisions of an investor for the less-open-to-judgment "could" and therefore conform more closely to the U.S. Supreme Court's definition [*TSC Industries, Inc. v. Northway. Inc.*, 426 U.S. 438, 449–450 (1976)].

FASB could insert language directly into its standards to suggest issuers use a line-by-line materiality or relevance assessment of disclosure items—rather than the current inference that all disclosure items are equally required, without regard to their significance to the users of a particular issuer's financial statements.

The PCAOB could instruct its inspectors to give credence to such materiality or relevance judgments as made by issuers and evaluated (and documented) by auditors. It also could recognize that both authoritative accounting standards and SEC disclosure regulations generally allow the omission of a "required" disclosure item, if it is not material or relevant to the needs of users in relation to the financial statements taken as a whole.

As for the SEC, it could change the tone and direction of its periodic comment letters to issuers, to signal that the staff is not merely interested in adding disclosures. It could also encourage issuers to improve disclosure effectiveness in future filings by suggesting specific opportunities for eliminating redundancies, stale or immaterial items, and other excessive disclosures—asking for commitments from issuers in that regard and making them accountable for improvements. The SEC could instruct its review staff to be clearer in comment letters when asking for additional information; this would avoid any implication that expanded disclosures are being requested if they are not. The staff should also recognize rationales set forth by issuers stating that additional disclosures would likely not be significant to users.

According to Deloitte, SEC staff members have said that an SEC comment letter should not be viewed as an indication that the staff has "concluded the requested information is material" and therefore must be disclosed, and that issuers should "consider relevance, applicability, and materiality before adding (or agreeing to add) disclosures to their filings" (Kolber and DiLeo, "SEC Staff Suggests Ingredients for Effective Disclosures," *Heads Up*, Deloitte & Touche LLP, October 16, 2014). Most issuers did not understand this, but according to the SEC:

Just because we issue a comment, it does not mean that we have concluded the requested information is material. It is the beginning of what we hope is a dialogue. A response of 'we don't believe the information is material, but we'll include it to clear the comment and move on' is not a desirable result—for the company, investors or us. (Keith F. Higgins, director, SEC Division of Corporation Finance, remarks before the American Bar Association's business law section, April 11, 2014).

Higgins said: "While it may be called 'disclosure overload,' 'cutting the clutter,' or 'losing the excess baggage,' we can all probably agree on the need to reduce immaterial disclosures that make more important information harder to identify" (remarks at PLI's 13th Annual Institute on Securities Regulation in Europe, March 20, 2014).

Lastly, the SEC could provide issuers with practical and useful drafting guidance that could be relied on with confidence for achieving greater disclosure effectiveness—and efficiency.

What Can Issuers Do?

Despite whatever regulators and standards setters do in the short (or long) term, real change will come only when issuers make a sincere effort to improve their filings. To do so, they will have to venture outside their comfort zones, break away from what they have always done, get more aggressive, and overcome their fear of litigation or adverse regulatory consequences.

Former FASB Chair Leslie Seidman suggested last year that companies can take steps to present information in a more user-friendly way, without any rulemaking by the SEC or FASB, and "without any significant concern about second-guessing" by regulators (remarks at the 40th Annual Meonske Professional Development Conference, Ohio Regional Council of the Institute of Management Accountants, Kent State University, April 25, 2014). Keith F. Higgins, director, SEC Division of Corporation Finance, has said that issuers can improve effectiveness outside of regulatory changes:

> Updating our rules is only one step—albeit an important one—in improving company disclosures. For their part, companies should examine how they can improve the quality and effectiveness of their disclosures. (SEC Press Release 2013-269, "SEC Issues Staff Report on Public Company Disclosure," Dec. 20, 2013)

Among the more specific steps listed below that can be taken, issuers are well advised, in general, to reevaluate facts and circumstances at least annually, and consider whether information presented in an old disclosure remains material and relevant, and to avoid continuous repetition of outdated information that has lost its significance, even if the disclosure was added in response to an earlier SEC comment letter. Attention should also be devoted to avoiding redundancies within disclosure documents in favor of cross-references to the financial statement notes from other sources. Cross-referencing should be used judicially when it is deemed to benefit readers:

> Think twice before repeating something [for example, regarding critical accounting estimates] … if there were ever a place in a report that cried out for a cross reference — and there are likely plenty of them—this is near the top of the list. … Before you repeat anything in a filing, please step back and ask yourself—do I need to say it again? (Keith F. Higgins, remarks before the American Bar Association Business Law Section, spring meeting, Apr. 11, 2014).

Management's Discussion and Analysis

Management's discussion and analysis (MD&A), introduced into Regulation S-K (item 303) in 1968, is probably second only to the financial statements in terms of the amount of attention it gets from the SEC staff and users of public disclosure documents. Many investors do appreciate the forward-looking information that may be included in the MD&A. But the MD&A has expanded and become the principal repository of redundant, irrelevant, stale and otherwise excessive disclosures. Consequently, the MD&A presents many opportunities for improving disclosure effectiveness.

The following discussion is divided into the principal categories of the MD&A. An expanded matrix of this guidance presented in a checklist form is also available from http://www.cpajournal.com.

Overview. The overview in the MD&A is often presented as a lengthy, chronological history of the issuer's activities from inception that continually gets longer as new material is added and nothing is removed. Very often, it contains redundant language taken verbatim from a business description presented in the financial statement notes or elsewhere in the filing. This is not an overview. Although the overview may make judicious cross-references (discussed below) to more detailed information elsewhere, it should consist only of highly summarized information that focuses primarily on the present and the future—but not the past.

Critical accounting policies and estimates. The SEC's definitions of these terms overlap considerably, making it difficult (and unnecessary) to distinguish between the two. (The former is generally considered to be broader, encompassing everything in the latter along with nonquantitative but nevertheless critical judgments made with regard to the selection of accounting policies from among available alternatives, rather than judgments made solely in their application.) Accordingly, the terms are commonly combined in MD&A captions as critical accounting policies and estimates. The terms are interpreted by the SEC as follows:

- *Critical accounting policies.* Accounting policies that management believes are most "critical"—that is, they are both most important to the portrayal of the company's financial condition and results, and they require management's most difficult, subjective or complex judgments, often as a result of the need to make estimates about the effect of matters that are inherently uncertain. (FR-60, Release 33-8040)
- *Critical accounting estimates.* Accounting estimates and assumptions that may be material due to the levels of subjectivity and judgment necessary to account for highly uncertain matters or the susceptibility of such matters to change, and that have a material impact on financial condition or operating performance … [and] that supplements, but does not duplicate, the description of accounting policies in the notes to the financial statements and provides greater insight into the quality and variability of information regarding financial condition and operating performance. (FR-72, Release 33-8350)

The important consideration is that critical threshold is on a higher plane than significant threshold. Accordingly, merely copying or cross-referencing the significant accounting policies in the financial statement notes fails to meet the objectives of this requirement, in that it neither identifies nor provides any greater insight into the critical items.

Recently issued accounting standards. SEC Staff Accounting Bulletin (SAB) 74 effectively requires the disclosure of new pronouncements issued but not yet adopted that are reasonably likely to have a material effect on future financial statements. Unless made pursuant to PCAOB Interim Auditing Standards AU section 9410.15–.18, which effectively requires disclosure of matters likely to result in retroactive financial adjustments, these disclosures need not be in the financial statements, but may be in the MD&A. Nevertheless, undesirable practices have led many issuers to go beyond the requirements and intent of SAB 74 by: discussing new accounting standards that will not have any significant effect on their future financial statements, reciting the entire summary published by FASB with the standard, including these disclosures in the financial statement notes, or including standards that are merely proposed but have not yet been issued or that have already been adopted as accounting changes. Issuers should review the language in SAB 74 and reduce their disclosures to conform to this language, relocating them to the MD&A if appropriate.

Comparative variance analysis—operations and cash flows. The primary excess seen in this area is the line-by-line comparison of immaterial items or items with immaterial period-to-period changes. Other common deficiencies include explaining the detailed composition of the changes experienced without explaining the reasons for the changes.

Liquidity and capital resources. This section of the MD&A should provide insight into the issuer's cash management and capital resources needs. It should emphasize primarily forward-looking information about its short- and long-term plans for meeting those needs. Although it should also contain some summarized information about historical sources of liquid capital, it should not (though it often does) focus heavily on the past nor should it repeat information from the statement of cash flows.

The Financial Statements and Notes

To achieve greater disclosure effectiveness, issuers might consider organizing notes in a way that emphasizes important matters, for example, "layering" information about each area by starting with a summary of the key points, then expanding into the details necessary to satisfy those who are interested. Items might be arranged so that those most significant to the company's financial position and results of operation are presented first, rather than strict financial statement order. In the spirit of ASC 235-10-50-6, issuers might place related disclosures in one place. The following are other potential improvements:

- Avoid generic "boilerplate" disclosures not specific to the issuer and other lengthy information, such as descriptions of accounting standards that are not applicable followed by mitigating words like "no material effect on the Company." (This also applies to the MD&A.)
- Reduce lengthy text with effective use of graphic/tabular presentations.
- Avoid the use of long, complex sentences laden with unnecessary legal or technical language.
- Exercise judgment and discretion in recognizing that "required" disclosures are required only if material.

The readability of the financial statements themselves can often be improved by combining immaterial line items and eliminating redundant captions on subtotals. Required details of limited significance may be presented in the notes instead of on the face of the statements. For example, ASC 230-10-45-31 expressly enables the reconciliation of net cash flows from operating activities to net income to be presented in a separate schedule (which may, at least for now, be in the notes).

Legal Matters and Risk Factors

Issuers often duplicate disclosures about ongoing litigation in both the financial statement notes and in the legal matters section of the filing. Although the disclosure requirements applicable to legal matters provided by Regulation S-K (item 103) may often be met merely by cross-referencing the financial statement note, those requirements are clearly different from U.S. GAAP (ASC 450-20-50). In no event, however, is a detailed, motion-by-motion chronology of the legal proceedings (as is often encouraged or even drafted by legal counsel) either necessary or recommended.

Disclosure of risk factors is important for any entity, and particularly those issuers with high-volume trading, a large public float, or whose share value is otherwise more likely to be affected. But the SEC staff has observed that these disclosures have tended to become an area of overkill— too extensive, full of boilerplate, and redundant. Such excess is often viewed as a risk management device and based upon the advice of legal counsel. But the staff (and most likely readers) would like to see these disclosures more focused and tailored, and limited to those items that have the most probable and significant future effect on the issuer's business and its share value. Perhaps risk factors would best be presented in a descending order of significance. This is the one area where this author has ever seen an SEC comment letter request a reduced disclosure—albeit not until 2015.

What Else Can Issuers Do?

Issuers would be well advised to avail themselves of the opportunities presented to provide authorities with their views about disclosure overload versus effectiveness in thoughtful and well-articulated comments regarding proposed changes in rules and standards—perhaps prepared in consultation with their professional advisors.

Effecting meaningful change will require a substantial investment in time and effort on the part of issuers. Everything need not be done all at once, but it can be done effectively over time; also, it can be addressed in between reporting periods so as not to be hindered by deadline pressure. But issuers have to start somewhere. Clearing out some of those extra trees in financial disclosures so that readers can begin to focus on the forest will be well worth the time and effort. ❑

Howard B. Levy, CPA, *is a principal and director, technical resources, of Piercy Bowler Taylor & Kern, Las Vegas, Nevada. He is a former member of the AICPA's Auditing Standards Board and its Accounting Standards Executive Committee, and currently a member of the Center for Audit Quality's Smaller Firms Task Force.*

FOR FURTHER READING

The following selected publications and speeches are recommended to those who wish to read more on the subject of disclosure effectiveness.

Publications

• Tim Kolber and Joe DiLeo, "SEC Staff Suggests Ingredients for Effective Disclosures," *Heads Up*, Deloitte & Touche, Oct. 16, 2014 (http://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us_aers_hu_101614.pdf)

• "Disclosure Effectiveness: What Companies Can Do Now," *EY Link*, Ernst & Young, October 2014 (http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-what-companies-can-do-now/$FILE/EY-disclosure-effectiveness-what-companies-can-do-now.pdf)

• "Disclosure Overload and Complexity: Hidden in Plain Sight, *Issues and Insights*, KPMG, 2011 (https://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/disclosure-overload-complexity.pdf)

• "Financial Statement Disclosures: Enhancing Their Clarity and Understandability," *Point of View*, PricewaterhouseCoopers, April 2014 (http://www.pwc.com/en_US/us/cfodirect/assets/pdf/point-of-view-financial-statement-disclosures.pdf)

• "Financial Statement Disclosure Effectiveness: Forum Observations Summary," FASB and Center for Audit Quality, Oct. 16, 2012 (http://www.thecaq.org/docs/audit-committees/caq_fasb_fsde.pdf?sfvrsn=0)

• "Toward Greater Transparency: Modernizing the Securities and Exchange Commission's Disclosure System," SEC 21st Century Disclosure Initiative, January 2009 (http://www.sec.gov/spotlight/disclosureinitiative/report.pdf)

Speeches

• Keith F. Higgins, director, SEC's Division of Corporation Finance, remarks at PLI's Thirteenth Annual Institute on Securities Regulation in Europe, Mar. 20, 2014 (http://www.sec.gov/News/Speech/Detail/Speech/1370541190424)

• Keith F. Higgins, director, SEC's Division of Corporation Finance, remarks before the American Bar Association Business Law Section Spring Meeting, Apr. 11, 2014 (http://www.sec.gov/News/Speech/Detail/Speech/1370541479332)

• Keith F. Higgins, director, SEC's Division of Corporation Finance, remarks before the George A. Leet Business Law Conference, Oct. 3, 2014 (http://www.sec.gov/News/Speech/Detail/Speech/1370543104412)

• Troy A. Paredes, SEC Commissioner, remarks at "The SEC Speaks in 2013," Feb. 22, 2013 (http://www.sec.gov/News/Speech/Detail/Speech/1365171492408)

• Leslie F. Seidman, executive director of the Center for Excellence in Financial Reporting, Lubin School of Business, Pace University, remarks at the 40th Annual Meonske Professional Development Conference, Ohio Regional Council of the Institute of Management Accountants, Kent State University, Apr. 25, 2014 (http://www.pace.edu/lubin/sites/pace.edu.lubin/files/WFO/Images/CEFR/DisclosureEffectivenessApril2014.pdf)

• Mary Jo White, SEC Chair, "The Path Forward on Disclosure" remarks at National Association of Corporate Directors Leadership Conference. Oct. 15, 2013 (http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#.VOPbhP50xoA)

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Summary Matrix and Checklist — Best Practices for the MD&A

By Howard B. Levy

Do	Do Not

General tone, style and format:

Do	Do Not
❑ Open with a brief *overview* containing only a thumbnail description of the Company's current activities and future plans.	Include in the *overview* a detailed, lengthy and redundant chronological summary of the Company's history.
❑ Reflect thoughts and creativity of top management, include an executive summary that contains top management's goals and passions, key strategies and tactics, perceived risks and challenges, trends and uncertainties, key performance metrics and past successes and failures (balanced).	Appear reflective of upper management's disinterest and overdelegation to middle management.
❑ Start with a clean slate, emphasize what's timely and relevant, de-emphasize or omit the dated/meaningless boilerplate.	Update last year's disclosures thoughtlessly and mechanically.
❑ Discuss all matters deemed significant and necessary to an understanding of *why* things happened (or are likely to happen).	Limit discussion only to ***what*** happened.
❑ Use plain English, first person pronouns (we, us, our), active voice and readily understood terms.[1]	Use third person (the Company) passive voice, jargon, "legalese," stilted or other difficult language without explanations.
❑ Discuss matters in descending order of importance and desired emphasis ("macro-to-micro" form and structure).	Organize topics and thoughts poorly.
❑ Use graphic and tabular presentations such as pie charts of quantitative data when useful.	Place distracting computations inside sentences.
❑ Use concise, direct sentences, short paragraphs, captions, subcaptions and bullets, as appropriate.	Use long, rambling or unreadable sentences and paragraphs.
❑ Explain/expand upon, cross reference to information elsewhere in the MDA or in financial statements.[2]	Duplicate (in text or tables) quantitative or qualitative information from different parts of the MDA or from financial statements or notes.

Critical accounting policies and estimates:

Do	Do Not
❑ Recognize the substantial difference between *critical* (as defined) and *significant* accounting policies, discuss only the *critical* ones, including revenue recognition method details to augment and provide greater insight into the financial statements.	Thoughtlessly repeat (or cross-reference to) the summary of significant accounting policies in the financial statement notes.
❑ For each *critical estimate* (as defined), including all significant fair value estimates and deferred tax assets and other valuation allowances (or lack thereof), discuss (a) how it affects or could affect the financial statements and its basis, key "drivers" and significant assumptions and related judgments and uncertainties, (b) how accurate it was in the past and/or the extent to which it has changed, and (c) the probable variability of the estimate in the future, and present a sensitivity analysis and alternate valuation methods when warranted.	Limit the discussion merely to identifying the estimates or to providing only general, thoughtless, qualitative and/or nonspecific information, or discuss estimates that are not *critical*.

Recently issued accounting standards:

Do	Do Not
❑ Disclose[3] new pronouncements issued but not yet adopted that are reasonably likely to have a material effect on future financial statements. Discuss briefly (and tailored to the circumstances) the likely effect when adopted, quantified if known, of such pronouncements.	Discuss new pronouncements merely proposed but unissued or already adopted, those that are disclosed in the financial statement notes[4] or those deemed unlikely to have a material effect on future financial statements.
❑ Exercise judgment consistent in determining the nature, extent, and location of the disclosure.[4]	Thoughtlessly repeat the entire FASB summary that accompanied the new pronouncement.

Comparative variance analysis ─ operations and cash flows:

Do	Do Not
❑ Focus on material changes in material financial statement and segment reporting line items, including material gross changes hidden in items presented net in the financial statements.	Explain variances in immaterial/insignificant items.
❑ Explain reasons for changes, including recent economic conditions, and factors that caused or may cause future changes in results of operations[5] and cash flows. Distinguish clearly between recurring and nonrecurring causes.	Merely describe the composition of line items or the changes.
❑ Discuss any "triggering event" for any material asset impairment charge or the cause(s) of any restructuring adjustment (and any exit plan adopted), and related facts and circumstances. Include the current and likely future quantitative effects on the business. Identify any significant elements of historical income or loss that will or will not continue following a discontinuance of operations, reverse merger or similar transaction.	Emphasize quantitative and minimize qualitative discussion of impairment or restructuring charges.

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1 Also applies to financial statement notes.

2 But not from the financial statements to the MD&A.

3 Pursuant to SAB 74.

4 Best if included in the MD&A and not the financial statement notes unless a retroactive adoption is probable.

5 Although Item 303 of Reg. S-K references only *continuing* operations, discontinued operations (and extraordinary items) should be discussed if deemed necessary to an understanding of changes in financial condition, operations or cash flows, *i.e.*, they have had, or are reasonably likely to have, a material effect thereon.

Do	Do Not
Liquidity and capital resources:	
❑ Emphasize primarily (but not exclusively) forward-looking information, short- and long-term. Discuss material commitments for, including targeted capital structure, include prominently a discussion of current economic conditions, risks and uncertainties.	Include details of "ancient" history, limit discussion to historical information, or repeat information that is in the financial statements or notes.
❑ Present details of *how* management plans to remedy any current or probable future liquidity shortfall and, if audit firm (and/or management[6]) expresses substantial doubt about going concern, say so.	Include weak or meaningless and self-serving language about management's hopes and objectives (such as "we will try to obtain additional financing"), rather than detailed plans.
Impact of climate change:	
❑ Consider discussing recent and potential effects on operations and financial condition of climate change (commonly called "global warming"), including: direct effects of changes in weather, water availability and greenhouse gas emissions, and indirect effects of legal, regulatory, and political reactions to climate changes, both domestic and international.	Omit if significant.

6 After related FASB standard is effective.