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Re: Modernization of Regulation S-K Items 101, 103 and 105
Release Nos. 33-10668; 34-86614
File No. S7-11-19

via e-mail: rule-comments@sec.gov

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms. Countryman:

We are submitting this letter in response to the Commission's request for comment on the above-referenced proposed rule. We appreciate the Commission's willingness to solicit comments on its proposal to "modernize disclosure" for business, legal proceedings and risk factor disclosures pursuant to regulation S-K. We generally welcome the changes proposed to modernize disclosure and eliminate duplicative disclosures in public filings.

Item 101 (a) *"General development" of the business*

We agree with the Commission to make the general development of the business disclosure more principles-based, rather than prescriptive, giving a company flexibility to focus on what is important or unique to it, and reflect changes to the economy since the rules were first adopted. Specifically, the Commission is seeking comment on whether the current limited list of items required for disclosure, including (i) bankruptcy proceedings, (ii) merger or consolidation and (iii) acquisition or disposition of material amounts of assets should remain but make this list non-exclusive, and require disclosure of a topic only to the extent such information is material to understanding the general development of the business. We agree with

the Commission that a non-exclusive list is a helpful guide for companies when drafting disclosure.

As for the proposed inclusion of "business strategy" disclosure, we believe that the current disclosure required by item 303 in the MD&A is sufficient and this additional requirement would result in redundancy. We specifically note that item 303 requires companies to disclose trends or uncertainties when implementing a company's strategy will likely cause its most recent financial results to not be indicative of future results. We believe that understanding a company's strategy can be obtained from a description of its business together with the MD&A. In addition, disclosing changes to a company's business strategy in Item 101(a) could require disclosure of proprietary information and potentially impact the company's competitive position before the company can evaluate whether such strategy will materially impact the company's financial results. We are concerned that the Commission's proposal could have an unintended consequence, leading registrants who have not included a strategy section in their prior annual report to conclude that they do not need to provide updates, even when such updates were otherwise required to comply with Item 303 requirements.

The Commission also requests comments to the proposal to eliminate the required five-year timeframe and instead make companies focus on the period over which information would be material. The Commission observed that a five-year timeframe may not elicit the most relevant disclosure for every company. In some cases, a period longer than five years might be appropriate, and in most cases, a shorter period would be better. We note that Form 10-K, Part I, Item 1, requires a discussion of the development of the registrant's business only "since the beginning of the fiscal year for which [the] report is filed." Thus, even though S-K Item 101 says five years, for public companies it is only one year. We agree with the Commission that focusing on a period over which information is material would be most appropriate. Finally, we welcome the Commission's proposal permitting a company to provide only an update of the general development of the business after its IPO filing, with an active hyperlink to the most recent filing.

Item 101(c) "Narrative description" of the business

The Commission makes the observation that the current rule includes a long list of disclosure topics that are applied by companies in a prescriptive manner and certain items, such as disclosure of raw materials and backlog, are outdated in today's economy. We agree with the Commission that certain items on the list are outdated and that retaining a list of topics as a guide for more principles-based disclosure would be helpful. However, we have certain concerns regarding regulatory compliance and human capital disclosure, as discussed below.

We respectfully disagree with the proposal to expand Item 101(c)(1)(xii), which currently requires disclosure of the material effects of environmental regulatory compliance, to encompass non-environmental regulation. We believe that companies are already obligated to disclose these material impacts in their MD&As, financial statements and in any other sections where they are discussing their capital expenditures, earnings and financial condition. Many companies already disclose compliance with governmental regulations in their risk factors to the extent material. If companies are required to also include this disclosure in Item 101(c), we believe that companies in practice will feel obliged to prepare lengthy (and possibly prophylactic) recitations of all laws to which they are subject, material or not, resulting in boilerplate disclosure in future filings with negligible benefits. It may also result in companies feeling obligated to add additional detail to risk factors relating to regulatory risk. This would run counter to one of the goal of this amendment, to improve the readability of disclosure documents.

In addition, the proposal to add human capital resources as a disclosure item in the business section is unnecessary because this information, to the extent material, is already required to be disclosed and is therefore frequently found in risk factor sections of companies' Annual Reports on Form 10-K. For example, in their risk factors, companies often disclose information regarding challenges of integrating, developing, and motivating a rapidly growing employee base" or the need to "attract and retain highly qualified personnel."

With respect to human capital resources matters in particular, we believe that a prescriptive (i.e. bright-line, quantitative thresholds) approach would be inappropriate because there is no one-size-fits all approach to human capital matters, whether across industries or even across companies within a particular industry. We believe that requiring human capital disclosure will add to the compliance burden confronting public companies, which is a significant factor in dissuading private companies from going public.

We understand that some investors view this information as important and as a result, many companies are discussing specific aspects of human capital matters that are relevant to them in their engagements with investors. Companies also voluntarily provide detailed disclosures relating to their human capital resources in publicly-available non-SEC reports or other written materials that address their investors' requests. This investor interest is likely to prompt companies to provide even more information regarding human capital resources, which benefits those investors interested in company-specific aspects of this type of disclosure. These "privately ordered" voluntary disclosures are available to all investors who wish to access them. Currently, over 60% of Fortune 50 and Dow 30 companies provide in their proxy statements a hyperlink to voluntary human capital disclosures published on their corporate websites. While these hyperlinks typically state that the reports are not incorporated in these proxy statements, they illustrate company efforts to facilitate information flow to interested investors. We note that part of the rationale

that these human capital-related hyperlinks are typically not incorporated by reference in SEC filings, is because companies often do not view the information to be that which a reasonable investor would rely upon to base any decisions relating to the company's stock. Therefore, we respectfully request that, in lieu of including human capital resources disclosures in Item 101(c), the Commission allow for "private ordering" to address this evolving investor interest. In this regard, we note that key SEC staff has warned that regulatory prescriptions for market-driven solutions, while those solutions are evolving, need to be managed "with the utmost care."

Issues such as human capital, where investor interest is dynamic and relevant company information is highly variable, would benefit from the issuance of interpretive guidance similar to the SEC's 2010 guidance on climate change. In the Commission Guidance Regarding Disclosure Related to Climate Change ("SEC Climate Guidance"), the SEC sought to "provide clarity and enhance consistency for public companies and their investors" on an issue (i.e., climate change) that "investors, analysts and public at large have expressed heightened interest in". This is similar to the current dynamics regarding human capital resources. Because of the swiftly evolving and highly company-specific nature of human capital resources disclosure, the issuance of interpretive guidance seems particularly appropriate. As the SEC noted with respect to Item 303, the periodic guidance on MD&A disclosure "has resulted in disclosures that keep pace with the evolving nature of business models without the need to continuously amend the text of the rule." We believe that the issuance of interpretive guidance resulting in the ability for the SEC to respond to investor and company interests and practices is clearly preferable to promulgating new requirements prematurely.

If the Commission, however, ultimately determines that Item 101(c) must include a human capital disclosure requirement, we agree that a principles-based, as opposed to prescriptive, approach is necessary. Human capital disclosure of public companies varies substantially across and within industries. Given the more qualitative nature of human capital disclosures, a principles-based approach would be more appropriate than a static, more prescriptive regime that will be rendered less relevant or obsolete by market trends and/or evolving investor understanding of the most probative aspects of human capital management.[1]

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[1] [1]We are aware of one commenter, a provider of ISO certifications, that recommends the SEC require all public companies to disclose nine quantitative metrics derived from the ten-month old ISO 30414, voluntary standards released by the International Standards Organization. standards released by the International Standards Organization. (https://www.sec.gov/comments/s7-11-19/s71119-5994756-190369.pdf). We disagree. First, ISO 30414, from which these metrics are taken, is not itself publicly-available without purchase. Second, it was designed not just for companies, but for governmental entities alike. Third, it has not been, to our knowledge, adopted or even road tested by any public company (even in their voluntary disclosures). Fourth, most importantly, the metrics extend beyond the SEC's proposed rule to cover not just employees, but also customers and communities. On this latter point, if the purpose of providing human capital disclosures in SEC filings is to focus on employees not as a salary liability, but as an asset, this request seems to be unhelpfully pushing the

Item 103 - Legal Proceedings

With the goal to modernize disclosure, we agree with the Commission that companies should be permitted to disclose information about material legal proceedings by including hyperlinks or cross-references to disclosure located elsewhere in the document, such as the risk factor or business sections.

We believe that the Commission should revise the $100,000 threshold in instruction 5.C. to Item 103 regarding environmental proceedings involving a governmental authority. The entirely quantitative, one-size-fits-all threshold in existence since 1982 is arbitrary and results in disclosure that may not be material to investors and instead can obscure other, more meaningful information about a company's material legal proceedings. The resulting disclosure also does not assist investors in assessing whether a company has significant environmental compliance problems. A materiality threshold would provide this clarity for investors. Further, subjecting such environmental proceedings, which, like many other legal proceedings, are inherently uncertain, to an arbitrary threshold necessarily requires companies to engage in "guesswork" to determine whether potential monetary sanctions will equal or exceed $100,000 and, therefore, whether disclosure of a matter involving a potential fine is required in an SEC filing. Applying a materiality standard will address these shortcomings.

Adopting a materiality standard would fulfill the SEC's mandate under the FAST Act to modernize and simplify the requirements in Regulation S-K in a manner that reduces the costs and burdens on companies while still providing all material information and to discourage disclosure of immaterial information. Further, such an approach would accord with the recommendation made more than two decades ago by the 1996 Task Force on Disclosure Simplification to replace the $100,000 standard "with a general materiality standard to ensure that companies will not be required to disclose non-material information."

To address concerns about eliminating a quantitative threshold, we believe that Item 103 could include a non-exhaustive list of qualitative factors that a company would be encouraged to consider when assessing the materiality of a particular environmental proceeding. Such factors could include, for example, whether a fine brought by a governmental authority is indicative of potentially significant environmental compliance problems and whether the fine relates to conduct with

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discussion far away from the core purpose. In addition, many of the recommended metrics appear quite difficult to produce, such as "expenditures in Corporate Social Responsibility" and "customer retention" which could result in misleading disclosure. The commenter further requests that the SEC require a written statement from all CEOs relating to human capital practices on the theory that it would put investors and other stakeholders in a position "to ask the right questions of CEOs in securities analysts and other [investor] meetings." This engagement, however, is already happening without ISO 30414 reporting. For these reasons, we believe that requiring ISO 30414 disclosure as part of Item 101(c) it would be unhelpful to investors and companies alike.

respect to which the company previously has been sanctioned. Enumerating such factors would provide a consistent approach to determining disclosure of environmental actions brought by governmental authorities that involve fines.

If, however, the Commission decides to include a quantitative threshold, as an alternative to the approach described above, we believe that the Commission should consider adopting a quantitative threshold of at least $300,000, indexed to inflation, above which a company would be required to affirmatively consider the materiality of an environmental action brought by a governmental authority that involves a fine by taking into account, among other things, the above-described non-exhaustive list of factors.This alternative approach would retain a "bright-line" standard while also helping to ensure that companies assess the overall materiality of such environmental matters above the specified dollar amount, even if relatively small from a quantitative perspective. This approach would also enable companies to avoid disclosing non-material information and obscuring meaningful information in their disclosures for investors. Such approach would also align with other instances in which the Commission imposes a reporting obligation based on a specific quantitative threshold. For example, Item 404(a) requires disclosure of related person transactions that exceed $120,000 if the transaction is material to investors. In this manner, the disclosure called for by Item 404(a) is only that which is material, rather than requiring disclosure any time a related person transaction exceeds $120,000. Under this alternative approach, while a company may ultimately determine that an environmental action brought by a governmental authority that involves a fine exceeding the threshold is not required to be disclosed by Item 103 because it is not material to investors, the company would still need to consider, among other things, the qualitative factors to first assess their materiality for investors.

Virtually any quantitative threshold is arbitrary and may not be large or small enough to elicit information meaningful to investors. To that end, if the Commission decides to maintain a quantitative standard, an alternative to the modified materiality approach described above is to correlate the minimum quantitative threshold requiring disclosure of environmental proceedings to an issuer's market capitalization or some other benchmark that may be more indicative of materiality on a company-specific basis. Such an approach makes it more likely the relevant threshold bears a reasonable relationship to amounts that are, in practice, material to that issuer.

If the SEC determines to retain a quantitative threshold that is not based on a company-specific formula (whether subject to the Modified Materiality Standard described above or otherwise), the Society supports the proposal to increase the disclosure threshold for environmental proceedings from $100,000 to at least $300,000, and to periodically index the threshold for inflation.

Item 105 – Risk Factors

The current risk factor disclosure requirement is principles-based and mandates disclosure of "the most significant factors that make an investment in the registrant or offering risky." The proposal would replace "most significant" with "material" factors, because "materiality" for disclosure is tied to what is important from the investor's perspective. In addition, the proposal would also require summary risk factor disclosure if the risk factor section exceeds 15 pages. While we do not oppose the emphasis on materiality from the investor's perspective, we do not believe that a summary section of risk factors enhances the readability of the document and in fact, it could potentially distract investors from reading all risk factors carefully.

Finally, given that preparations for and drafting of Registration Statements, Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q begin well in advance, we respectfully request that the Commission provide for a phase-in period when adopting final rules such that companies are not obligated to comply with the updated rules for any relevant filings for fiscal year ending in 2020 to allow companies sufficient time to prepare these disclosures.

We appreciate the opportunity to participate in the process, and would be pleased to discuss our comments or any questions that the Commission or its staff may have, which may be directed to Michael Kaplan, Joseph A. Hall, Maurice Blanco, or Richard D. Truesdell, Jr., of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP