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November 6, 2019

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

Re: File No. S7-11-19

Dear Ms. Countryman:

I appreciate the opportunity to comment on the Commission's proposed amendments to modernize the description of business, legal proceedings and risk factor disclosures that registrants are required to provide pursuant to Regulation S-K. I would like to commend on the proposed amendments of risk factor disclosure (Item 105) based on academic research.

In our research ("An Unintended Benefit of the Risk Factor Mandate of 2005," coauthored by Allen Huang, Jianghua Shen and Amy Zang, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219712), we find that registrant firms use the risk factor disclosure mandated by Regulation S-K to satisfy the "meaningful cautionary language" required by the safe harbor provision of the Private Securities Litigation Reform Act (hereafter, PSLRA). As a result, registrants perceive lower litigation risk and increase their willingness to provide forward-looking information. Specifically, we find that registrants became more willing to provide forward-looking statements in MD&A and management forecasts after being required to disclose risk factors. We further find that these registrants experience an improvement in the information environment. Last, we find that registrants providing longer risk factor disclosure have greater increases in forward-looking disclosures in MD&A.

These findings show that even though Regulation S-K requires registrants to supply investors with information of corporate risk, registrants prepare risk factor disclosures in a manner that helps exploit its legal benefits. While such incentive has led registrants to include large, seemingly boilerplate, passages in their filings, it induces them to provide a greater amount of forward-looking information. Therefore, we caution that amendments to the risk factor disclosure should not draw inferences exclusively from the information content of risk factor disclosures.

The PSLRA provides litigation immunity—the safe harbor provision, for forward looking statements, when they are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement" (15 U.S.C. §§ 77z-2(c)(1)(A)(i)). This provision can significantly lower companies' potential litigation costs because it facilitates dismissal of plaintiff challenges at the pleading stage, prior to the costly and time-consuming discovery process (i.e., the Stay of Discovery, 15 U.S.C. §§ 78u-4(b)(3)(b)).

Subsequent to the PSLRA, judicial decisions on whether safe harbor provision should apply in lawsuits related to forward-looking statements often hinge on whether the cautionary language is meaningful. That is, judges take a hard look at the cautionary language and dismiss plaintiffs' complaint only if the cautionary language is truly meaningful (LaCroix [2015]). While there is no explicit definition of meaningfulness in the statute, legislative history and court decisions provide some guidance. For example, during the passage of PSLRA, Congresswoman Eschoo said that "*there is no liability for forward-looking statements as long as these statements are accompanied by specific warnings that their predictions may not come true*" (141 Congressional Record 35,569 [1995]). Courts usually require cautionary language to be specific, updated, and tailored to the risks of the projections to trigger safe harbor provision; firms may fail to ward off lawsuits when their cautionary language is too generic.[1]

Our concern with requiring registrants to disclose generic risk factors at the end of the risk factor section separately is that registrants would be concerned that classifying some risk factors as generic risk factors disqualifies them as "meaningful cautionary language" in securities class action lawsuits. This reduces registrants' defense in securities class action lawsuits and increases their perceived litigation risk. As a result, if registrants are required to disclose generic risk factors at the end of the risk factor section separately, they may either become overly conservative in classifying any risk factors as generic risk factors (i.e., captioning most or all risk factors as specific risk factors), or curtail their forward-looking disclosure in MD&A due to higher securities class action lawsuit risks.

I thank you for the opportunity to comment on this important Commission initiative.

Sincerely,

Allen Huang

[1] For example, in Julianello v. K-V Pharmaceutical Co. (791 F.3d 915 2015), the 8th Circuit dismissed the lawsuit by concluding that K-V Pharmaceutical's statement fell within the PSLRA's safe harbor provision. The court credited the company's risk factor disclosure in its 2010 10-Ks, and stated that "*[c]autionary language must be extensive, specific, and directly related to the alleged misrepresentation.*" Also see *Harris v. Ivax Corp.*, 182 F.3d 799, 807, 11th Cir. 1999. On the other hand, the D.C. Circuit declined the safe harbor protection in *re Harman International Industry Inc. Securities Litigation* (D.C. Circuit, June 23rd, 2015), holding that the company's precautionary language is too general.