Invested in America

July 21, 2016

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Attention: Mr. Brent J. Fields, Secretary

Re: Business and Financial Disclosure Required by Regulation S-K (File Number S7-06-16)

Dear Secretary Fields:

The Securities Industry and Financial Markets Association ("SIFMA") is writing to respond to the invitation of the Securities and Exchange Commission ("Commission") for public comment on the modernizing of certain business and financial disclosure requirements in Regulation S-K as set forth in the Commission's Concept Release No. 33-10064, 34-77599 (the "Release"). We appreciate the opportunity to provide comments to the Commission on the Release.

In this letter, we suggest the Commission be guided by three overarching considerations when considering how to modernize disclosure requirements. First, we believe there are significant benefits to principles-based versus prescriptive disclosure requirements. Second, we suggest that the concept of materiality continue to be the principal factor underlying disclosure requirements. Third, we ask the Commission not to impose an undue risk of liability on registrants and other offering participants by adding or expanding requirements for forward-looking information. The ultimate goal for the Commission should be a disclosure regime that requires disclosure of material information specific to each registrant, not obfuscated by information an investor may consider irrelevant, and that appropriately takes into account the burdens imposed on a registrant to comply, whether in terms of monetary cost, disclosure of commercially sensitive matters or liability exposure.

*SIFMA brings together the shared interest of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

We also respond below to several of the specific questions posed by the Commission in the Release.

I. Overarching Themes

Principles-Based Versus Prescriptive Rules

The disclosure system under the U.S. federal securities laws has over the years evolved from one based predominantly on principles-based rules to a mix of principles-based and prescriptive rules. We believe the trend toward more prescriptive rules has contributed to disclosure that has come to be characterized by quantity over quality. Prescriptive rules (which govern substance, presentation/format, or both) often result in registrants, driven by a focus on rule compliance, presenting information (or presenting information in such a way) that is boilerplate–not necessarily material, or even relevant, to that registrant's circumstances. In some cases, even Commission and Commission staff guidance (in comment letters, releases and other communications) has over the years become highly prescriptive in nature. And where prescriptive rules require disclosure to be presented in a certain format, registrants often find themselves trying to fit a square peg into a round hole.

As a result, today's investors have to sift through a significant amount of information that may be irrelevant to an investment decision. The Commission acknowledges in the Release that a move toward more principles-based disclosure could reduce the amount of information currently disclosed that is irrelevant, outdated or immaterial, and we agree. We believe the investor community's acceptance of the most recent significant changes to registrant disclosure requirements – as mandated by the JOBS Act and that permit scaled-down disclosure for certain companies meeting the "Emerging Growth Company" ("EGC") test – is evidence that more principles-based, streamlined disclosure can be effective – in fact often more effective – in communicating information required to make an investment decision.

Accordingly, we believe the Commission should keep three things in mind with respect to principles-based versus prescriptive disclosure requirements as it moves forward with its initiative to amend disclosure requirements. First, if new rules are adopted, the Commission should consider whether there is a significant benefit to making those rules prescriptive and, if not, make them principles-based, allowing registrants to tailor their disclosure to their specific circumstances. Second, the Commission should consider which existing prescriptive rules could be replaced with principles-based rules. Third, where certain principles-based rules have evolved into de facto prescriptive rules through Commission and Commission staff guidance, the Commission should consider clarifying that what is intended is a principles-based rule the application of which is highlighted by non-exclusive examples that can vary as circumstances change. A prime candidate for reexamination in this regard is Management's Discussion and Analysis, which, as we discuss further below, has been subject to this phenomenon over the years and could use a significant overhaul.

Materiality

As discussed above, in part due to the expansion of the number of prescriptive disclosure rules over the years, the disclosure of many registrants has grown significantly, becoming in many cases a "kitchen sink" of information rather than a focused discussion of registrant-relevant information important to an investor. In connection with our recommendation that the Commission prioritize principles-based disclosure over prescriptive rules, we also urge the Commission to continue to focus on materiality as the cornerstone of disclosure requirements and registrants' disclosure decisions under the U.S. federal securities laws.

In the leading case interpreting what it means for information to be material (TSC Industries, Inc. v. Northway, Inc. (1976)), the Supreme Court set forth two often quoted articulations of what it means for information to be material. First, the Court held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Second, in a broader formulation, the Court stated that information is material if there is a substantial likelihood that its disclosure would be viewed by a reasonable investor as having "significantly altered the 'total mix' of information made available." These two articulations of the materiality test have been applied to various sets of facts in subsequent cases involving alleged violations of the U.S. securities laws. In Basic v. Levinson (1988), the Supreme Court noted the TSC materiality standard is difficult to apply in the case of contingent and speculative events, and held that materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." These tests must remain the driver of what disclosure rules should mandate.

We support Chair White's recent assertion that"[w]hen disclosure gets to be too much or strays from its core purposes, it can lead to 'information overload' – a phenomenon in which ever-increasing amounts of disclosure make it difficult for investors to focus on the information that is material and most relevant to their decision-making as investors in our financial markets." We urge the Commission not to implement rules applicable to all registrants that may not be relevant, let alone material, for a large subset of registrants. Further, we ask the Commission to consider whether there are rules or guidance not grounded in materiality that it can, and therefore should, change (or eliminate). Lastly, we believe the Commission should consider encouraging all registrants to perform a thorough reevaluation of their disclosure with the goal of streamlining and eliminating unnecessary and immaterial disclosure that is not important to investors under the tests articulated in TSC v. Northway and Basic v. Levinson.

<u>Forward-Looking Information</u>

The Release contemplates requiring registrants to disclose certain additional information related to expectations and trends (including quantifying the potential material effects of these expectations or trends). We suggest the Commission keep in mind the significant liability risk imposed on registrants and other offering participants with respect to the disclosure of forward-looking information when determining whether additional forward-looking information should be required.

Disclosure of forward-looking information certainly was not required under Schedule A of the Securities Act of 1933 and in fact was once prohibited in filings with the Commission. In the 1970s, however, the Commission began permitting voluntary forward-looking disclosure and over time it has imposed requirements for the disclosure of forward-looking information in certain limited circumstances (most notably in Item 303 of Regulation S-K, which is predicated at least on a <u>known</u> trend).

The critical distinction for the Commission to bear in mind is that a requirement for forward-looking disclosure gives rise to potential Section 11 liability if the required forward-looking information is omitted, whereas under Rule 10b-5 the omission of forward-looking information gives rise to liability only if the omission makes what is disclosed materially misleading. In enacting the PSLRA, Congress recognized that the risk of a lawsuit predicated on allegedly misleading forward-looking statements should be mitigated by the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. This is because when a contingency actually happens, its materiality naturally increases, and if a stock drop results, class action litigation challenging the original disclosure often follows. The reality is that if a registrant and other offering participants cannot defeat these “fraud by hindsight” class action lawsuits on motion to dismiss or for summary judgment, they are likely to settle (and settlement amounts may be significant). That risk, shorn of the protections of the PSLRA because plaintiffs could challenge the omission of forward-looking information under Section 11, as required disclosure, is (notwithstanding the recent Supreme Court decision regarding Section 11 liability for opinions in Omnicare, Inc. v. Laborers District Council Construction (2015) and its progeny) simply too great to impose on offering participants.

II. <u>Responses to questions in Release</u>

<u>Questions 24 and 28: General Development of Business</u>

> ***<u>Question 24</u>. Does the current requirement in Item 101(a)(1) to describe the general development of a registrant’s business during the past five years provide useful disclosure that is not available either elsewhere in the current filing (e.g., MD&A or the notes to the financial statements) or in any prior filing, including current reports on Form 8-K? Should we require additional or more specific information under Item 101(a)(1) and, if so, what type of information and why?***

> ***<u>Question 28</u>. Should we permit a summary disclosure of the general development of a registrant's business in all filings except the initial filing?***

We believe the requirement under Item 101(a)(1) to describe the general development of a registrant's business during the past five years is unnecessary. Current investors generally are familiar with the historical development of a registrant's business, and new investors can easily find the information in the filing where the information was initially disclosed (to which a registrant should cross-reference in each subsequent filing). Instead, registrants should be required to disclose in subsequent filings only any material developments in the registrant's business, which will sharpen investor focus on those developments. Where this type of information is required to be disclosed elsewhere (e.g., by Item 1.03 (Bankruptcy or Receivership) or 2.01 (Completion of Acquisition or Disposition of Assets) of Form 8-K), a cross-reference to that filing should be sufficient.[1]

<u>Questions 32, 34, 36, 42, 47 and 53: Narrative Description of Business</u>

> ***<u>Question 32:</u> How could we update Item 101(c) to better reflect changes in the way businesses operate? Are there particular categories or types of registrants for which these disclosure requirements are more or less relevant?***

> ***<u>Question 34</u>: Currently, some registrants include in their business section a general description of their industry. Should industry disclosure be a separate requirement? If so, would this requirement be more useful to investors in the business section or in MD&A?***

> ***<u>Question 36</u>: What is the impact on disclosure of listing the thirteen item requirements in Item 101(c)? In practice, do registrants view Item 101(c) as a checklist? Do the prescriptive items result in disclosure of information that is not important by some registrants?***

First, we believe registrants should be required to include in their business section a general description of their industry. This disclosure will (a) contextualize the narrative description of business and (b) allow investors to better compare the MD&A of registrants in similar industries. Accordingly, MD&A should cross-reference to the industry description in the business section.

Second, we believe the Commission should adopt a principles-based approach to Item 101(c). The thirteen current enumerated items (a) are not relevant to all registrants; (b) are reflective of the way (mostly manufacturing) companies generally operated their businesses in 1973, when

[1] We note in this regard that the Commission acknowledged in its recent Disclosure Update and Simplification Release (No. 33-10110; 34-78310) that certain information (e.g., fixed charge coverage ratios, stock price data and exchange rate data), if readily available to or calculable by investors, need not be included in registrants' periodic reports. The crux of the same release – namely, to eliminate redundant, duplicative and overlapping rules – also supports our suggestions here and elsewhere that, unless and until those rules are eliminated, cross-references rather than repetitive disclosure would be preferable.

the rule was adopted, and (c) do not reflect the breadth of today's registrants and the industries in which they operate (which now overwhelmingly includes online and service-oriented businesses that were not predominant in 1973). We suggest the Commission provide more general, principles-based guidance in Item 101(c) to elicit information material to a registrant's facts and circumstances. The Commission should (a) consider whether certain of the thirteen examples should be eliminated, (b) consider whether other examples should be added (including a description of a registrant's regulatory environment, as discussed below), (c) emphasize that the remaining enumerated categories are examples of the type of disclosure that can be provided but are not a checklist for required disclosure, and (d) specify that registrants should consider whether other items that do not fall into the enumerated examples should nonetheless be disclosed. To the extent these items are disclosed elsewhere in a report, cross-references should suffice.

> ***Question 42**: Should we retain the current scope of Item 101(c)(1)(iv), which requires disclosure of a registrant's patents, trademarks, licenses, franchises and concessions? Should we expand the rule to include other types of intellectual property, such as copyrights? Should we remove the individual categories and instead require disclosure of "intellectual property"? If so, should we define that term and what should it encompass?*

We suggest that the foregoing principles-based approach to the business description generally also be applied to the individual disclosure examples set forth in Item 101(c), and particularly to Item 101(c)(1)(iv). Registrants should be required to disclose what they determine to be the material "intellectual property" for their businesses. The enumerated list of what constitutes "intellectual property" in Item 101(c)(1)(iv) should be eliminated (particularly as we believe it is missing certain items – it does not, for example, capture copyrights or require a registrant to disclose its reliance on trade secrets).

> ***Question 47**: Is disclosure about government contracts important to investors? Why? Is there any additional information about a registrant's contracts with the government that would be important to investors?*

We believe, to the extent one or more government contracts are material to the registrant's business, they should be disclosed to investors and therefore should be included in the enumerated list of business disclosure examples we propose be set forth in Item 101(c). Registrants should also keep in mind, as noted in the Release, that not only the existence of a government contract but also certain terms of a government contract (such as a provision permitting unilateral termination by the government) may be different from a typical commercial contract and may therefore be material to investors.

> ***Question 53**: Foreign regulations, including foreign tax rates and treaties, may have a material impact on a registrant's operations. Should we specifically require registrants to describe foreign regulations that affect their business? If so, what specific information and level of detail should we require? How would any additional*

information inform investment and voting decisions? Would there be challenges for registrants to provide such disclosure?

We believe it would be appropriate to include this type of information in the enumerated list of business disclosure examples we propose be set forth in Item 101(c). Because of the heightened burden this will impose on registrants and to minimize the risk of disclosure overload, disclosure should be required only of foreign regulations material to the registrant's business.

Question 60: Description of Property

Question 60: Should we retain or eliminate Item 102? Why or why not? How could Item 102 be improved?

Item 102, which requires disclosure of the location and character of the principal plants, mines and other materially important physical properties of the registrant, should be eliminated. First, for registrants in many industries, properties, plants and facilities are not material and investors consider them irrelevant. Second, for resource extraction industries such as oil & gas or mining, the Commission has adopted specific disclosure requirements. Finally, to the extent property is otherwise material to a registrant's business, a discussion of its importance is separately required in MD&A and a cross-reference in the business section would suffice.

We suggest adding to the enumerated examples in Item 101(c) a general description of headquarters, including a description of whether owned or leased, and a suggestion that a cross-reference to a discussion of material property elsewhere in the report be included, if applicable. We believe this approach is consistent with how registrants respond to Item 102 today and that it would in many cases eliminate duplicative and irrelevant disclosure.

Questions 69 , 79 and 107: Selected and Supplementary Financial Data; Historical Period-to-Period Comparisons

Question 69: If we retain Item 301, should we modify this requirement and, if so, how? Should we modify the item to require additional disclosure and, if so, what additional disclosure would be important to investors and why?

While we agree that the tabular format required by Item 301 provides investors with a convenient and accessible means of understanding significant trends in the registrant's financial condition and results of operations, we propose that the Commission only require registrants to provide such data for the last three fiscal years. We believe this approach is sensible because, in the majority of cases, the selected financial data for prior years is likely to be stale and of limited value, if any, for investors. To the extent there are material trends over a five-year period that are not reflected in the three-year presentation, separate narrative or footnote disclosure may be provided. Similarly, if there has been a material retrospective revision to the registrant's annual financial statements, the registrant should be required either to summarize any significant resulting trends for the five-year period, or alternatively to present selected financial data for the five-year period.

In addition, once a registrant has presented more than three years of data, selected financial data for prior years is readily available to investors via EDGAR. The Commission therefore should also revise Item 301 to reflect the technological advances that have made historical information readily available and easily accessible and to eliminate a requirement for disclosure that is more extensive than what is required in the registrant's financial statements.

We believe this change should apply to IPO registration statements as well (notwithstanding that the fourth and fifth years in that context will not have been previously filed). We note the Commission already permits foreign private issuers and EGCs to omit the fourth and fifth years otherwise required to be presented in the selected financial data table (in the case of foreign private issuers, if they can show it would be burdensome to present those years). We believe foreign private issuers frequently request, and are generally granted, this accommodation, and EGCs routinely take advantage of it. We do not believe investors or the Commission have viewed the omission of this data by a significant number of foreign private issuers or EGCs as harmful to investors, indicating that three years should suffice for all issuers, regardless of burden.

> ***Question 79**: Should we retain or eliminate Item 302(a)? Why? If we retain Item 302(a), should we modify the item and, if so, how? For example, should we modify the item to require additional disclosure and, if so, what additional disclosure would be important to investors and why?*

We suggest eliminating the two-year quarterly information table required by Item 302(a), including stock price information, because it requires registrants to provide information that was already provided in previous quarterly reports or is otherwise publicly available. As mentioned above, investors have immediate access to previous quarterly information via EDGAR. As a result, other than fourth quarter information, which is readily calculable, Item 302(a) does not elicit any incremental disclosure for investors.

> ***Question 107**: Should we retain, eliminate or modify the period-to-period comparisons provided in MD&A? Why?*

Again, because prior period-to-period comparisons are readily available on EDGAR, we believe the requirement to provide period-to-period comparisons should be limited to the period-to-period comparison for the most recently completed period. While the burden on registrants of simply including previously disclosed information in a new report may not be significant, eliminating the requirement would meaningfully cut back the size of annual and quarterly reports and enable investors to focus on previously unreported information. Item 303(a)(3) should therefore only require a discussion of the most recently completed annual and quarterly period, in each case in comparison to the prior, corresponding period. If, however, there is a significant trend that is only discernible to investors via a multiple period-to-period comparison (e.g., a decrease in cash flow that would not appear material unless compared to previously reported periods), a discussion of the trend, as well as the relevant period-to-period information, should be required in MD&A.

<u>Questions 90, 96 and 139: MD&A Guidance</u>

> ***<u>Question 90</u>*: *There are various sources of Commission and Division guidance on MD&A. These include Commission releases, sections of the Division's Financial Reporting Manual and staff Compliance and Disclosure Interpretations. Given the amount of Commission and staff guidance on MD&A, should we consolidate guidance in a single source? If so, which guidance remains helpful, and is there guidance that we should not include in a consolidation? Would consolidation of this guidance facilitate registrants' compliance with the item's requirements, or is the existing form of this guidance sufficient?***
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> ***<u>Question 139:</u>* *Why do registrants repeat the discussion of accounting policies presented in the notes to the financial statements? How can we encourage registrants to eliminate repetition in MD&A of the discussion of accounting policies provided in the notes to the financial statements?***

We believe Commission and staff guidance on MD&A should be consolidated into a single source. First, doing so would reduce the burden on registrants (and their counsel) of needing to look to multiple sources when drafting MD&A. Second, maintaining a single source would likely increase compliance with all MD&A disclosure requirements. In connection with consolidating MD&A guidance, as noted above under "Principles-Based Versus Prescriptive Rules," we suggest that in creating a single source, the Commission consider which portions of existing MD&A guidance should be expressly restated (or reiterated), generally favoring principles-based guidance with illustrative examples to highlight the intended application of those principles. Third, we believe more organized guidance will result in more streamlined and effective disclosure and as a result benefit investors.

A consolidated framework for MD&A guidance should emphasize that the purpose of the critical accounting estimates section of the MD&A is to highlight those accounting policies that necessarily involve subjective judgments by management that have a material impact on the financial condition or results of operations of the registrant in the periods covered by the MD&A. The consolidated guidance should highlight that registrants should supplement, and not merely repeat, the significant accounting policies described in the financial statement footnotes, with a view to guiding an investor's reading of MD&A.

> ***<u>Question 96</u>*: *Should we require auditor involvement (e.g., audit, review or specified procedures) regarding the reliability of MD&A disclosure, and if so, what should the nature of the involvement be? What would be the benefits and costs to registrants and to investors?***

We do not believe requiring additional auditor involvement regarding the reliability of MD&A disclosure would enhance disclosure sufficiently to outweigh the burden on registrants.

As the Commission highlights in the Release and in its 1989 MD&A Interpretive Release, MD&A is intended to give investors an opportunity to look at a registrant through the eyes of management. Requiring auditor involvement in MD&A disclosure may distance management's voice and result in formulaic, standardized disclosure.

Additionally, we note that AU Section 550 (Other Information in Documents Containing Audited Financial Statements) currently requires auditors to read MD&A disclosure for inconsistencies with the financial statements or material misstatements of fact. We believe this requirement provides a sufficient check by the auditor on inaccurate disclosure and strikes an appropriate balance by requiring the auditor to read and consider the "other information" contained in registrant filings and, if it identifies concerns regarding that information, to report those concerns to management (and if there is a disagreement with management, ultimately to the audit committee). Accordingly, any additional requirement under Regulation S-K is unlikely to result in a significantly better outcome for investors.

Questions 100,101 and 102: Disclosure of Known Trends

> ***Question 100*: Should we revise the two-step test to apply a different standard in the first prong and if so, how? For example, should we require disclosure when a trend, event or uncertainty is more likely than not, probable, or reasonably possible to occur, rather than "reasonably likely" to occur?**
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> ***Question 101*: Should we eliminate the two-step test in favor of a different standard for identifying required and optional forward-looking disclosure and, if so, what test would be appropriate? For example, should we revise Item 303 to incorporate the probability/magnitude standard from Basic v. Levinson? Which standard – the two-part test, Basic's probability/magnitude standard, or some other standard – should we require, and why? Would any particular formulation be more or less burdensome for registrants?**

We propose eliminating the two-step test in favor of the probability/magnitude standard set forth in Basic v. Levinson and described above under "Materiality." Although the two-step test represents a commendable effort by the Commission to mitigate the risk of Section 11 liability to offering participants of requiring forward-looking information by predicating that disclosure requirement on some cognizable measure of likelihood (as further discussed below), that risk continues to be a deterrent to companies deciding whether or not to go public. The concerns we discuss above under "Forward-Looking Information" – i.e., the exposure to class-action, stock-drop litigation that often arises when a contingency ripens into fact – similarly support making 10b-5, rather than Section 11, the predicate for redress for all alleged failures to adequately address forward-looking risks, which the Commission could accomplish by treating trend disclosure in its MD&A guidance. At a minimum, however, modifying Item 303 to incorporate the probability/magnitude standard from Basic v. Levinson would strike a balance for disclosure of contingencies that is consistent with the considerations recognized by the Supreme Court.

If the Commission decides not to eliminate the two-step test in favor of the Basic v. Levinson test, the first prong of the two-step test should remain "reasonably likely" and not be changed to "reasonably possible." A "reasonably possible" threshold (which the Commission has made clear is a lower probability threshold than "reasonably likely") will result in registrants overdisclosing the potential impact of currently known trends, events and uncertainties in order to avoid potential liability. We note the Commission previously considered a similar question when it adopted a "reasonably likely" standard with respect to Item 303(a)(4) of Regulation S-K in lieu of a "more than remote" standard. The Commission noted in its adopting release that the "reasonably likely" standard would reduce the possibility that investors will be "overwhelmed by voluminous disclosure of insignificant and possibly unnecessarily speculative information" under a lower disclosure threshold.[2] We believe the "reasonably likely" threshold will produce more meaningful disclosure of contingencies that really do keep senior management up at night and would avoid overwhelming investors with almost hypothetical "what if" scenarios.

> ***<u>Question 102</u>*: *We have stated previously that quantification of the material effects of known material trends and uncertainties can promote understanding and may be required to the extent material. Should we revise Item 303 to specifically require registrants, to the extent practicable, to quantify the material effects of known trends and uncertainties as well as the factors that contributed to those known trends and uncertainties? Why***?

No, the burden on registrants, and, where applicable, on other offering participants of requiring quantification of the potential material effects of known trends and uncertainties outweighs the incremental disclosure benefit to investors. Although it would be too facile to assert that quantification would be irrelevant to investors, the Commission must, as in many disclosure judgments, strike the right balance between disclosure benefits – particularly required disclosure that imports Section 11 liability consequences – and burdens on the registrant and other offering participants. With regard to the benefits, an important consideration should be the misleading potential of false precision. By definition, disclosure of contingencies is a predictive, and thus speculative, exercise. A range of possible outcomes, with associated probabilities, would be informative, but the burdens of that exercise are patent.

A word about how requiring quantification of risks will adversely affect capital raising is also in order. The Section 11 liability regime imposes a negligence standard principally on underwriters and directors. Notwithstanding mitigants to that liability exposure in the case of forward-looking information provided by the bespeaks caution doctrine, the PSLRA where applicable, and the Supreme Court's Omnicare decision, those offering participants with the burden of establishing a due diligence defense depend on auditors and counsel to provide comfort, typically in the form of negative assurance, on the accuracy of the disclosure. Quantification of the potential impact of various risks, even if limited to known trends and uncertainties, is inherently speculative and thus highly subjective, and cannot be comforted by auditors or counsel. This imposes an undue diligence standard on underwriters and directors that risks deterring their participation in public offerings. Ultimately that will undermine the strength of our capital markets and adversely affect investors as well.

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[2] See SEC Release No. 33-8182 (January 28, 2003) ("we are mindful of the potential difficulty that registrants would have faced in attempting to comply with the "remote" disclosure threshold").

<u>Questions 125 and 131: Off-Balance Sheet Arrangements; Contractual Obligations</u>

> ***<u>Question 125</u>: Does Item 303(a)(4) elicit disclosure that is important to investors? Is this information otherwise available in Commission filings?***
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> ***<u>Question 131</u>: Does the table of contractual obligations present a meaningful snapshot of a registrant's cash requirements for contractual obligations? How could the format of the disclosure in the table be improved?***

We are addressing these questions together because we believe both Items 303(a)(4) and 303(a)(5) require information duplicative of that in other filings and/or in the registrant's financial statements.

With respect to Item 303(a)(4), the categories of off-balance sheet arrangements required to be disclosed are defined by existing accounting standards and are separately required to be disclosed in a registrant's financial statements under U.S. GAAP. The requirement under Item 303(a)(4)(ii)(A) is redundant with ASC 460-10-50, which requires disclosure of the nature and amount of a guarantee. Item 303(a)(4)(ii)(B) overlaps with ASC 860-10-50-3 and ASC 860-20-50 (requiring disclosure relating to retained or contingent interests in assets transferred to unconsolidated entities); Item 303(a)(4)(ii)(C) overlaps with ASC 815-40-50-5 and ASC 505-10-50 (requiring disclosure relating to derivative instruments that are classified as stockholders' equity under U.S. GAAP); and Item 303(a)(4)(ii)(D) overlaps with ASC 810-10-50-4 (requiring disclosure relating to obligations under variable interests in unconsolidated entities).

Because the information required by Item 303(a)(4) is duplicated in the financial statements, we believe eliminating the requirement or permitting a cross-reference to the disclosure in the financial statements would be an appropriate way to eliminate redundant information in registrant filings.

Item 303(a)(5) is also largely redundant with the disclosures required by U.S. GAAP to be included in a registrant's financial statements (evidenced by the fact that four of the five disclosure prongs in Item 303(a)(5) either reference U.S. GAAP or capture long-term liabilities that are reflected on a registrant's balance sheet under U.S. GAAP). With respect to the requirement to include purchase obligations in the contractual obligations table, which goes beyond what is required by U.S. GAAP, we believe such disclosure generally does not add material information regarding a registrant's liquidity. A substantial portion of those obligations typically relates to goods and services provided in the ordinary course of business, and commitments that are outside these ordinary course obligations are required to be disclosed in the notes to the financial statements. Accordingly, we suggest that the Commission rely on principles-based disclosure requirements to highlight material issues regarding registrant liquidity, with the relevant factual information being provided in the financial statements.

<u>Questions 145, 146, 147, 152 and 154: Risk Factors</u>

> ***<u>Question 145.</u> How could we improve risk factor disclosure? For example, should we revise our rules to require that each risk factor be accompanied by a specific discussion of how the registrant is addressing the risk?***
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> ***<u>Question 146.</u> Should we require registrants to discuss the probability of occurrence and the effect on performance for each risk factor? If so, how could we modify our disclosure requirements to best provide this information to investors? For example, should we require registrants to describe their assessment of risks?***
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> ***<u>Question 147</u>. How could we modify our rules to require or encourage registrants to describe risks with greater specificity and context? For example, should we require registrants to disclose the specific facts and circumstances that make a given risk material to the registrant? How should we balance investors' need for detailed disclosure with the requirement to provide risk factor disclosure that is "clear and concise"? Should we revise our rules to require registrants to present their risk factors in order of management's perception of the magnitude of the risk or by order of importance to management? Are there other ways we could improve the organization of registrants' risk factors disclosure? How would this help investors navigate the disclosure?***
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> ***<u>Question 152</u>. Should we require registrants to identify and disclose in order their ten most significant risk factors without limiting the total number of risk factors disclosed? If so, should other risk factors be included in a separate section of the filing or in an exhibit to distinguish them from the most significant risks? Alternatively, should we require registrants to provide a risk factors summary in addition to the complete disclosure? Would a summary help investors better understand a registrant's risks by highlighting certain information? Are there challenges associated with requiring a summary of the most significant risks?***
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> ***<u>Question 154</u>. Risk profiles of registrants are constantly changing and evolving. For example, registrants today face risks, such as those associated with cybersecurity, climate change, and arctic drilling,494 that may not have existed when the 1964 Guides and 1968 Guides were published. Is Item 503(c) effective for capturing emerging risks? If not, how should we revise Item 503(c) to make it more effective in this regard?***

We believe the current approach to risk factor disclosure, which is principles-based rather than prescriptive, generally has served investors well, providing them with an identification of risks based on a registrant's analysis of material contingencies relevant to it from time to time. This is an area where principles-based disclosure is critical because one size certainly will not fit all registrants, or even the same registrant over time.

Registrants should not be required to discuss the probability of occurrence and the effect on performance for each risk factor. Any such elaboration would be even more speculative than the contingency-focused underpinnings of the risk factors themselves. The concerns we expressed in response to Question 102, regarding possible quantification of trend impact, are equally applicable here.

Registrants should not be required to present their risk factors in order of management's perception of the magnitude of the risk or by order of importance to management. Item 503(c) requires the registrant to explain how "the risk affects the issuer" and organize such risks "logically." Adding more prescriptive requirements will eliminate necessary flexibility for different registrants in various industries and markets to adequately describe the risks relevant to them. Further, ordering by potential magnitude would result in a costly process to attempt to quantify magnitude for every risk, and oversimplifies the difficulty of trying to compare mathematically risks that may be very remote but drastic in consequence with those that may be more likely but limited in potential magnitude. It also ignores the qualitative elements of risk evaluation. Finally, any such artificial ranking would be too readily subject to challenge on the basis of 20/20 hindsight.

Registrants should not be required to identify and disclose in order (or in summary form) their ten most significant risk factors. Highlighting an arbitrary limited number of risk factors does not enhance investor disclosure and would likely be misleading. For some registrants, there may be three particularly significant risk factors, while, for other registrants, there may be a multiple of ten. Further, a summary would require registrants to omit the context in which the risk factors arise. It is essential that investors have a contextual understanding of a risk to enable them to take it into account through the prism of their own risk profile. Providing a more prominent but summary description of risks is likely to unduly influence investors and distort their evaluation of the identified risks.

We also believe summarizing the ten most (or any number) of risk factors would not add additional value. Registrants typically provide risk factor disclosure in categories under categorical headings, as well as including headings before each specific risk factor, which themselves, taken together, act as a summary of the types of risks addressed by the registrant. As such, any such summary disclosure would be redundant.

Item 503(c) is effective for capturing emerging risks. As noted at the outset of this section, Item 503(c) is principles-based, rather than prescriptive, which is the only way to address a subject that necessarily changes over time, whether because of a change in a registrant's business model, or industry, or the way macroeconomic factors will affect it. The five examples currently provided may not be cutting edge and could be eliminated, but we believe registrants recognize that the purpose of Item 503(c) is captured in its principles-based requirement to disclose "the most significant factors that make the offering speculative or risky." If the staff believes from time to time that a particular type of risk is not getting appropriate attention, it can issue guidance reminding registrants of the importance of evaluating that risk.

We also believe investors benefit from registrants' current approach to risk factor disclosure, which commonly involves categorization of risk factors based on management's understanding of the business, and accordingly allows investors to focus on different areas of risk through management's lens. Requiring categorization of risks by importance would therefore detract from that current (and we believe effective) approach, and requiring categorization in addition to or before that presentation would only be redundant (and confusing, given the number of risk factors commonly found in a disclosure document).

We do not believe a registrant should be required to disclose how it is addressing each risk. As noted below in response to Question 178, a reasonable paradigm for a registrant to disclose its risk management efforts might include a section that holistically discusses the risk management process, and may also incorporate the application of that process to specific risks in the risk factor section where those risks are discussed. Alternatively, efforts to manage certain risks may be addressed in a more ad hoc manner. Registrants should be allowed to customize their disclosure to best fit their circumstances; risk mitigation and/or management should not be required disclosure.

Question 166: Market Risk Disclosure

> ***Question 166*. Should we eliminate the prescribed disclosure alternatives and allow registrants to discuss market risk according to the methods used by management to manage the risk? Would allowing a "management approach" provide investors with more insight about the way management actually assesses market risks, or would this approach unduly hinder investors' ability to compare market risk disclosures across registrants?**

Yes, we believe market risk disclosure requirements should be more principles-based, and that eliminating the prescribed disclosure requirements would result in a more accurate picture for investors of management's approach to market risk. Because the types of market risk faced by registrants vary, and equally or more importantly how management plans to address those risks also will vary, comparability across registrants is an illusory goal that distorts disclosure by imposing false homogeneity. Additionally, such an approach would be consistent with the approach to MD&A more generally, which is based on management's assessment of the driving factors influencing the registrant's financial results.

Question 178: Approach to Risk Management

> ***Question 178.* Should we require registrants to address mitigation or management of each risk factor as part of the risk management discussion? If so, should we also clarify that, although references to the general risk management discussion will not satisfy this requirement, cross-references to appropriate portions of MD&A or the financial statements will, if disclosure otherwise would be redundant?**

We believe once again that rigidity in a prescribed form of presentation is less likely to produce effective disclosure than a more flexible approach to the subject matter. A reasonable paradigm for a registrant to disclose its risk management efforts might include a section that holistically discusses the risk management process, and may also incorporate the application of that process to specific risks in the risk factor section where those risks are discussed. Alternatively, efforts to manage certain risks may be addressed in a more ad hoc manner. Registrants should be allowed to customize their disclosure to best fit their circumstances; risk mitigation and/or management should not be required disclosure.

Question 184: Disclosure of Share Ownership

> ***Question 184*. As the vast majority of investors now hold their shares in street name, does disclosure about the number of record holders continue to be important to investors? Should we require registrants to disclose the amount of each class of equity securities held in street name? Should we require registrants to disclose the number of beneficial owners? If so, how should we define "beneficial owner" for purposes of Item 201(b)(1)? How would investors benefit from this additional information? What would be the challenges registrants might face in tracking the number of beneficial owners?**

The number of record holders, given today's shareholding structure, does not provide any meaningful indication of a registrant's share ownership; accordingly, we believe the requirement to disclose the number of record holders should be eliminated. While the number of beneficial owners may be meaningful to indicate the depth of the market for the registrant's shares, the Commission should, before making the number of beneficial owners a disclosure requirement, seek comment from registrants and other market participants specifically regarding how burdensome, in terms of cost and accuracy, it is to obtain that information.

Question 203: Purchases of Equity Securities by the Issuer and Affiliated Purchasers

> ***Question 203*. Item 703 disclosure is required on a quarterly basis, while relevant U.S. GAAP disclosure is required on an annual basis. Should we require more frequent Item 703 disclosure? If so, what timeframe for reporting repurchases would be appropriate?**

We do not believe providing Item 703 disclosure more frequently than quarterly would provide any additional material information to investors to justify both the incremental cost to registrants and legitimate commercial concerns they may have that the more frequent disclosure may prejudice their execution of share repurchases. Current disclosure requirements include the maximum amount approved and the expiration date of repurchase programs, which provides investors with enough information about both purchases to date and purchases that may be anticipated to permit investors to assess the potential impact of the program on a registrant's liquidity and capital resources. We believe that appropriately addresses the purpose of this disclosure requirement.

Question 233: Amendments to Exhibits

> ***Question 233.*** ***Should we continue to require registrants to file all amendments or modifications to previously filed exhibits as required under Item 601(a)(4)? Should we instead amend Item 601(a)(4) to exclude immaterial amendments? If so, should we provide guidance to registrants about how to determine whether an amendment is immaterial? Instead of materiality, should we permit registrants to exclude amendments based on a different standard? If so, what standard would be appropriate?***

Item 601(a)(4) should be amended to exclude immaterial amendments to previously filed exhibits. As discussed elsewhere, we urge the Commission to continue to focus on materiality as the cornerstone of disclosure requirements, including with respect to exhibits. Eliminating immaterial amendments will make it easier for investors to focus on the information that is most relevant to their decision-making, particularly since the current rule does not require any form of disclosure differentiating between material and immaterial amendments, often requiring investors to sift through the immaterial amendments to find those that are material. Management should determine, based on the materiality standard, whether an amendment should be disclosed.

Questions 261-263. Legal Entity Identifiers ("LEIs")

> ***Question 261. Should we (SEC) require registrants to disclose their LEIs and the LEIs of their subsidiaries (if available) in the list of subsidiaries filed under Item 601(b)(21)? How would this formation benefit investors? Should the industry in which the company operates or the extent to which the company engages in financial market transactions affect whether disclosure of LEIs is required? What would be the costs of requiring disclosure of this information?***

> ***Question 262. Should our rules encourage registrants to obtain an LEI? If so, how could we structure our rules, consistent with our authority under the Securities Act and the Exchange Act, to achieve this purpose? For example, should we make obtaining and maintaining an LEI a condition of our existing accommodations or alternatives? Why or why not? If so, should such a condition be limited to certain types of registrants, such as those operating in financial services? For registrants that have not obtained an LEI, will these registrants seek to obtain an LEI in the future absent any regulatory incentive to do so? In addition to the fees for obtaining and maintaining an LEI, would there be other costs associated with obtaining LEIs?***

> ***Question 263. Some registrants may have hundreds or thousands of subsidiaries or affiliates operating globally which other registrants have simple corporate structures. If we required registrants to disclose LEIs (if available) in the list of significant subsidiaries, independent of the industry in which the registrant operates, should we limit the requirement to larger registrants or larger subsidiaries, independent of the industry in which the registrant operates? For example, should we limit the requirements to large accelerated filers or well-known seasoned issuers (WKSIs)?***

SIFMA is supportive of the LEI as a single, unified global identification system for legal entities. We believe the lack of a standard identification system for financial counterparties makes it difficult for financial firms and regulators to have a consistent and integrated view of risk exposures. We also believe requiring legal entities to obtain and report their LEIs will enable the financial industry to improve operational efficiencies and customer service.

Regulators globally have played and will play a key role in facilitating the expansion of the LEI system by requiring LEIs to be used in reporting and other contexts. We are supportive of the Commission's recent rules requiring disclosure of an LEI with respect to a rating action involving a credit rating of an obligor as an entity, the LEI disclosure requirement related to credit risk retention for open market collateralized loan obligations and the requirement to maintain an LEI in the context of security-based swap transactions. We also support the proposed mandatory use of LEIs in investment company reporting.

Consequently, we support the Commission in considering the use of the LEI for identifying registrants and their subsidiaries under Item 601(b)(21). We agree with the Commission's statement in the Release that "an open source identifier such as the Legal Entity Identifier…will make it easier for investors to connect other datasets with structured data from the Commission." We do not believe the cost to registrants of obtaining an LEI is significant, as it requires a relatively simple application and a $200 payment ($100 annually thereafter). We also believe disclosure of LEIs will be beneficial to investors in its potential to reveal networks of control, ownership, liability and risk.

<u>Question 266: Financial Disclosure Accommodations</u>

> ***<u>Question 266.</u> Should we allow one or more categories of larger companies, such as companies with a longer reporting history or more readily available public information to benefit from scaled disclosure requirements as a means of reducing compliance costs?***

All IPO companies, regardless of size, should be able to take advantage of the rules that permit EGCs to present only two years of audited financials where providing three years of audited financials would be burdensome. While we recognize that providing a third year of financial statements may allow investors to better identify trends, creating three years of audited financials can be extremely burdensome for certain companies, such as when they have changed auditors or are required to apply the different accounting principles applicable to a public company. Moreover, the Commission's known trend disclosure requirement should result in the disclosure of any trend the third year of financial statements might have demonstrated. Allowing all registrants to present only two years of audited financials in an IPO registration statement where presenting three years of audited financial would be burdensome thus appropriately balances this compliance burden with the disclosure needs of investors.

Question 281: Frequency of Disclosure

> ***Question 281*. Should we require certain registrants to file periodic reports on a more frequent basis such as monthly?**

No, more frequent periodic reports should not be required. The increased burden and costs for registrants would be high, and it would not provide a correspondingly high disclosure benefit for investors. On the contrary, requiring monthly reporting would promote short-term thinking on the part of investors and, therefore, management. The requirement to file Form 8-Ks reasonably addresses the market's need to be updated for specified, material developments on a more frequent basis. Further, the infrastructure and compliance processes and controls a registrant must maintain to comply with periodic reporting requirements (particularly with respect to financial information) are complex and too burdensome (both in terms of monetary cost and diversion of resources) to have to comply with on a more frequent basis.

Question 330: Reporting Format and Structure

> ***Question 330*. How can the quality of structured disclosures be enhanced?**

The Commission should continuously monitor technological advancements and communicate with investors to ensure disclosure requirements and delivery formats integrate and take advantage of new technologies, including those used in structured disclosures. In modernizing EDGAR and potentially allowing for delivery of disclosure through other formats, the Commission should take into account the way investors access information today – increasingly, via smartphones and other mobile devices, and not on paper. The Commission should also take into account the cost of modernization and change and implement a long-term plan to ensure that EDGAR (or, if applicable, any replacements or supplements) remains an effective resource for new generations of investors.

Two concerns should always be taken into account when considering modernization of disclosure requirements and formats: cost to implement and liability exposure. First, the cost to registrants to implement, use and sustain new technologies can be quite significant and should be considered before requiring the use of any such technology. That said, there may be technologies that reduce costs for registrants (for example, those that could offer the ability to update rather than cumulatively re-present all disclosure on a periodic basis) that the Commission should also consider. Second, the application of new technologies inevitably introduces reporting errors, which will be remediated over time as the new technologies are debugged. Accordingly, adequate transition periods should be provided, as has been the case in connection with the introduction of XBRL.

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If you have any questions regarding SIFMA's views or require additional information, please do not hesitate to contact the undersigned at (212) 313-1118, or our counsel on this matter, Leslie N. Silverman of Cleary Gottlieb Steen & Hamilton LLP, at (212) 225-2380.

Very truly yours,

Sean Davy

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