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I am an attorney in private practice. I formerly worked at the SEC in the Division of Enforcement (1973-81). I have counseled issuers and auditors on disclosure matters. I have extensive experience representing issues and auditors in SEC investigations and securities litigation. I also represent plaintiffs on such matters.

I have several comments.

First, the questions are too narrowly focused on seeking responses from issuers and their CPAs, and, as to them, on lightening the burden of making disclosure decisions. There is no recognition in these questions that users of financial statements (including investors, regulators and others, such as policy-makers and the citizenry interested in policy decisions) also have a stake in the process by which issuers make disclosure decisions.

Second, there is no reason to believe that disclosure overall will improve--that is to say, provide more useful and comprehensible information to users--by this Proposed Update. Instead, the Proposed Update, expressly focused, as it is, on issuers' "discretion" in determining whether disclosures are required, is likely to be perceived by issuers and their advisors and independent public accountants as providing nothing more than an attempt to afford issuers a safe harbor against unwelcome SEC Staff comments, SEC investigations or litigation about the possible improper omission or misstatement of facts. This conclusion is strengthened by reference in the release to the "obstacles" supposedly faced by issuers in seeking to omit immaterial information. These "obstacles" are the means by which issuers' disclosures are policed. These are not obstacles; they are counter-balances to natural tendencies of issuers to attempt to omit or soft-soap harmful information.

Third, as to the substance of the Proposed Update itself, the statement that materiality is a "legal concept" is a mischaracterization of the meaning of materiality. Yes, ultimately, whether Fact A is material is definitively decided in a court of law, but the reality is that determining whether a fact is material or not is, in the words of the seminal Supreme Court decision on materiality, TSC Industries, Inc. v. Northway, "a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts." As the Court stated, "the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976). This means that there is an cannot be any magic formulaic test of whether footnote information is "material" or not. Issuers are required to exercise judgment, but "discretion" is not the central concept. Discretion strongly suggests freedom from suffering the consequences of a challenged decision. It therefore connotes a safe harbor, such as the "business judgment" rule in corporate law. There is plenty of room in the securities law for affording issuers protection against liability for an honest, bona fide disagreement over a particular disclosure decision. This protection need not be provided by the FASB. It will be viewed as a "green light" for less meaningful disclosure.

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