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November 12, 2014

Mary Jo White
Chair

Keith Higgins
Director, Corporation Finance Division
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Disclosure Effectiveness Review

Dear Chair White and Mr. Higgins:

I write on behalf of the Sustainability Accounting Standards Board (SASB), a 501c3 organization that develops sustainability accounting standards for the disclosure of material sustainability information in SEC filings. More than 2,100 individuals—affiliated with companies with $9.8T market capital and investors representing $21.7T assets under management—have participated in our standards development process to date. SASB standards, which are grounded in evidence of investor interest and evidence of financial impact, are designed to help companies comply with U.S. securities law. SASB is an American National Standards Institute (ANSI) accredited standards developer.

Thank you for the opportunity to comment on the SEC's Disclosure Effectiveness Review (hereinafter, "Review"). We support the SEC's initiative to review the disclosure requirements in Regulation S-K and Regulation S-X, for the benefit of companies and investors. SASB is a market-driven response to investor demand for standardized disclosure of material sustainability information. As such, SASB's work supports the SEC's efforts to ensure that existing security holders, potential investors, and the marketplace are provided with better and non-duplicative information.

The primary objective of this letter is to urge the SEC to include non-financial disclosure in its Review, for the following reasons:

- **Changing context:** As mentioned by the SEC, the markets have seen significant change since the SEC's Disclosure Review of 1996, such as the collapse of Enron, enactment of the Sarbanes-Oxley Act, financial crisis of 2008, and enactment of the Dodd-Frank Act. Parallel to these events, global megatrends—such as climate change, resource scarcity, and population growth—have intensified, and are increasingly impacting business outcomes. For example, insurance companies must identify the vulnerability of their insured assets to rising sea levels, increasing drought, and harsher winters. Hardware companies must consider how to source rare minerals. Credit card companies must consider how to protect against data breaches. In this environment, the information that is "material" to investors is changing. In today's world, investors need—and are demanding—both financial statements and other material information to make informed decisions.

- **Investor demand:** As investors increasingly recognize the financial impact of sustainability factors, their demand for this information is growing. A recent global survey of institutional investors found that, during the past 12 months, assessment of performance on [environmental, social, and governance] ESG issues "had played a pivotal role in their investment decision-making process" for 90 percent of the responding investors.[1]

  However, there is room to improve the quality and accessibility of the information that is available. Investors are engaging in unproductive and costly means to get the information they need—89 percent of global institutional investors responding to another recent survey say they will request sustainability information directly from the company, and 50 percent report they are "very likely" to sponsor or co-sponsor a shareholder proposal related to sustainability issues.[2] Significantly, two-thirds of these investors say that they would be more likely to consider this type of information when making investment decisions if common standards were used.[3]

- **Corporate disclosure fatigue:** Companies face fatigue from responding to requests for sustainability information from various stakeholders. 71 percent of the top 100 companies in 41 countries now report on ESG,[4] largely in corporate social responsibility (CSR) reports. While these reports communicate sustainability performance to a broad base of stakeholders, the reports vary by company and industry and performance; thus, investors can't compare performance between companies. Corporations need a model for surfacing and disclosing material sustainability factors in a decision-useful way for investors.

- **Legal liability for corporations:** Companies create potential liability for themselves by describing issues as "material" in CSR reports—a common practice—but not including this information in their Form 10-K. This discrepancy is beginning to be brought to the attention of corporate secretaries, securities lawyers, and regulators. Companies would benefit from guidance on which sustainability issues are likely to be material for companies in their industry, and thus, should be considered for disclosure in the Form 10-K.

  In addition to benefitting from guidance on which sustainability issues are likely to be material, companies would benefit from standards on how to disclose on said issues. Companies are at risk for not disclosing material sustainability information in the Form 10-K, as well as for disclosing material sustainability information in boilerplate language. Under the Exchange Act, the officers and directors who cause statements to be made in SEC filings may be liable for materially false or misleading statements contained in

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[1] EY, Tomorrow's investment rules: Global survey of institutional investors on non-financial performance (2014), available at http://www.ey.com/Publication/vwLUAssets/EY-Institutional-Investor-Survey/$File/EY-Institutional-Investor-Survey.pdf.

[2] PwC, "Sustainability goes mainstream: Insights into investor views" (2014), available at http://www.pwc.com/en_US/us/pwc-investor-resource-institute/publications/assets/pwc-sustainability-goes-mainstream-investor-views.pdf.

[3] *Ibid.*

[4] KPMG, "The KPMG Survey of Corporate Responsibility Reporting" (2013), available at http://www.kpmg.com/global/en/issuesandinsights/articlespublications/corporate-responsibility/pages/default.aspx

Commission filings.[5] Shareholders can bring civil actions for damages for violations of Exchange Act Section 10(b) and Rule 10b-5 against the company's executives and board members for alleged material omissions and misrepresentations.[6] In a recent Rule 10b-5 suit alleging that certain boilerplate disclosures about environmental compliance were materially misleading, the Central District of California denied defendants' motion to dismiss.[7] This ruling suggests that boilerplate disclosures about sustainability topics carry legal risks.

SASB research shows that 70 percent of SASB disclosure topics are already being addressed in companies' 10-K filings, but of those disclosures, 37 percent are boilerplate information. There is a need to improve the quality of sustainability disclosure.

The SEC's 2010 Guidance Regarding Disclosure Related to Climate Change is an example of why sustainability accounting standards are needed. The Guidance—which set expectations for companies to report on material regulatory, physical, and indirect risks and opportunities related to climate change—represented a forward step for climate change disclosure. However, despite the Guidance, companies continue to disclose boilerplate information on climate change.[8] In order to evaluate climate risk, investors need industry-specific metrics by which they can benchmark and gauge progress. Industry-specific standards could help companies cost-effectively comply with the Guidance.

Given our recommendation to include an assessment of non-financial statement disclosure in the SEC's Review, we'd like to explain how SASB can be of service to the SEC in fulfilling the objectives of the Review.

- **Compatibility with U.S. Securities Law:** SASB standards are developed following the U.S. Supreme Court's definition of material information, defined as presenting "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available."[9] The standards provide a model for reporting material sustainability factors in the MD&A section of the Form 10-K, which "shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported operations and are not expected to have an impact upon future operations."[10] Companies can voluntarily use SASB standards to help them meet the SEC-required disclosure obligation found in the MD&A, which is for management to provide its view of the company's future prospects. Disclosure of material non-financial

[5] The Exchange Act, §§ 13(a) and 18.
[6] The Exchange Act, § 10(b) (15 U.S.C. § 78j) and Exchange Act Rule 10b-5 (17 CFR 240.10b-5). See, for example, Howard v. Everex Systems, Inc., 228 F.3d 1057 (9th Cir. 2000) (a corporate officer who signs a SEC filing containing representations "makes" the statement in the filing and can be liable as a primary violator of Section 10(b) of the Exchange Act).
[7] David M. Loritz et al. v. Exide Technologies et al. No. 2:13-cv-2607-SVW-Ex, General Minutes – Civil (C.D. Cal. August 7, 2014). The court concluded that whether the reasonable investor would consider boilerplate disclosure sufficient such that disclosure about the full extent of environmental issues would not have significantly altered the total mix of information is a question of fact.
[8] Ceres, "Cool Response: The SEC & Corporate Climate Change Reporting" (2014), available at http://www.ceres.org/resources/reports/cool-response-the-sec-corporate-climate-change-reporting/view
[9] TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).
[10] 17 CFR § 229.303, Regulation S-K, Item 303(a) Management's discussion and analysis of financial condition and results of operations, available at http://www.gpo.gov/fdsys/pkg/CFR-2011-title17-vol2/pdf/CFR-2011-title17-vol2-sec229-303.pdf.

information is wholly consistent with SEC guidance on the purpose of the MD&A.[11] While SASB standards identify the sustainability factors likely to be material for companies in an industry, the ultimate determination is the responsibility of the corporation.

- **Decision-useful information for investors**: A stated objective of the disclosure effectiveness review is to "ensure that existing security holders, potential investors, and the marketplace are provided with meaningful and, to the extent possible in the Commission's rules, non-duplicative information upon which to base investment and voting decisions."[12] SASB standards provide investors with standardized information on material sustainability factors—so that they can benchmark and compare companies in an industry—in an accessible format, the Form 10-K. Investors will no longer have to seek out CSR reports, discern the material information from the immaterial information, and try to compare differing metrics between companies.

- **Cost-effective disclosure for companies:** The SEC's stated objective is to streamline and simplify disclosure requirements to reduce the costs and burdens on public companies. SASB standards identify the minimum set of sustainability factors that are likely to be material for companies in an industry. SASB saves companies time and costs by a) performing evidence-based research and industry vetting to identify the likely material issues, and b) identifying metrics that companies can use to disclose performance on these issues. By using SASB standards to disclose material sustainability information in the Form 10-K, companies may avoid the cost of shareholder proposals. SASB standards average five topics and 14 metrics (79% quantitative) per industry.

- **Industry approach**: The Review includes an evaluation of the SEC's industry guides, to assess whether they still elicit useful information and conform to industry practice and trends. As the SEC is considering the usefulness of industry guides as an approach, it's worth noting that SASB standards are industry-specific. Financial analysts cover specific sectors because it is essential to understand basic value drivers, business models, and the regulatory environment if one seeks to compare financial performance. The same idea applies to sustainability performance. Companies that provide similar products and services tend to have similar drivers of financial value, use resources in similar ways, and thus tend to have similar impacts on society and environment. As the price-to-earnings ratio is only understood in the context of the industry, so, too, is energy intensity or carbon emissions data.

In conclusion, SASB is in favor of the SEC's efforts to streamline disclosure requirements for companies and focus on useful and material information for investors. SASB agrees with the importance of maintaining investor confidence in the reliability of public company information, in order to encourage capital formation. SASB standards support all of these objectives. In the recent words of Mr. Higgins, "the time is ripe for reviewing the disclosure regime to make it work better both for investors and companies."[13] Thank you for undertaking the Disclosure Effectiveness Review, and for the opportunity to comment on this important work.

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[11] See, for example, Interpretation: Commission Guidance Regarding Disclosure Related to Climate Change, Securities and Exchange Commission, 17 CFR Parts 211, 231 and 241 (February 2, 2010), Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities and Exchange Commission, 17 CFR Parts 211, 231 and 241 [Release Nos. 33-8350; 34-48960; FR-72] (December 29, 2003), and SEC Docket (1973-2004), 43 SEC-DOCKET 1330-129, Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities and Exchange Commission, (May 18, 1989).

[12] SEC, "Report on Review of Disclosure Requirements in Regulations S-K" (2013), available at http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf

[13] SEC, "Shaping Company Disclosure: remarks before the George A. Leet Business Law Conference" (2014), available at http://www.sec.gov/News/Speech/Detail/Speech/1370543104412#.VF0fVmMYV-V

Sincerely,

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