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Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Concept Release on Business and Financial Disclosure Required by Regulation S-K; 17 CFR Parts 210, 229, 230, 232, 239, 240 and 249; Release Nos. 33-10064, 34-77599; File No. S7-06-16; RIN 3235-AL78**

Dear Mr. Fields:

The U.S. Chamber of Commerce (the "Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy. [1] The CCMC welcomes the opportunity to comment on the concept release issued by the Securities and Exchange Commission (the "SEC" or "Commission") on April 13, 2016, entitled Business and Financial Disclosure Required by Regulation S-K (the "Concept Release") which seeks public comment on modernizing certain business and financial disclosure requirements in Regulation S-K.[2]

The Chamber commends the Commission for undertaking a review of how to modernize the corporate disclosure regime in a manner consistent with the Commission's statutory mission to protect investors, facilitate orderly and fair markets, and promote capital formation. This review of disclosure effectiveness comes at a time when the United States has less than half of the number of public companies than it did in 1996; the number of public companies has gone down 19 of

[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.
[2] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916 (Concept Release proposed Apr. 22, 2016).

the last 20 years.[3] That data should be surprising against the reality that American capital markets are the deepest and most liquid financing source the world has ever known. Regulators, including the Commission, should constantly review the effectiveness of regulation, which means performing *ex ante* and *ex post* analysis on whether the costs of a particular regulation justify its benefits. The disclosure regime should be modernized around and governed by the concept of materiality; this Concept Release is an important first step in that effort.

As discussed in greater detail below, we believe that the Commission's disclosure modernization effort should:

- Focus on materiality to improve Regulation S-K disclosure;
- Not expand special-interest disclosure, which threatens to politicize the disclosure regime to the detriment of the reasonable investor;
- Make greater use of scaled disclosure to encourage capital formation; and
- Consider additional techniques for modernizing the format of disclosure documents.

DISCUSSION

Public companies that are subject to Regulation S-K undertake their duty to disclose material information to the investing public willingly and with great care. After all, disclosure of the type of information a reasonable investor cares about is a fair trade-off for accessing the public markets. Excessive disclosure, however, imposes unnecessary costs on organizations and, ultimately, on shareholders and customers. It also has the tendency to overload investors, especially retail investors, with extraneous information that can confuse or obfuscate material information.

[3] Barry Ritholtz, *Where Have All the Public Companies Gone?* BLOOMBERG, June 24, 2015, https://www.bloomberg.com/view/articles/2015-06-24/where-have-all-the-publicly-traded-companies-gone-.

In 2014, the Chamber released a study on disclosure effectiveness.[4] In that report, we identified 14 regulations that are obsolete and five broad areas that need to be modernized. We made the following observations:

> Information overload strikes a blow to the effectiveness of the disclosure regime that the SEC administers. The essential problem is that investors become inundated with information that is not useful, making it difficult to identify important information about a business. In some instances, investors simply ignore long, dense documents altogether as they find much of the information unhelpful or too time-consuming to go through. . . .
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> To have an effective disclosure regime that promotes transparency and the interests of all investors and American business, we must address the problem of information overload. Even as the SEC makes efforts to address this problem, we recognize that there may be calls for the disclosure of *additional* information in certain areas. It is appropriate for new disclosures to be considered from time to time. That said, when doing so, we must be vigilant in applying the test of materiality to ensure that any expanded disclosure requirements help investors make better-informed investment and voting decisions.[5]

Similarly, many have pointed to the proxy statement and disclosures that have exploded over the past several years as impediments to going or staying public. In 2015, for example, Stanford University released a study of institutional investors, who control over $17 trillion dollars in assets, finding that the majority found the proxy statement to be too long and that only a third of the information was relevant. [6]

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[4] *See generally* U.S. CHAMBER OF COMMERCE, CORPORATE DISCLOSURE EFFECTIVENESS: ENSURING A BALANCED SYSTEM THAT INFORMS AND PROTECTS INVESTORS AND FACILITATES CAPITAL FORMATION (2014), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/07/CCMC_Disclosure_Reform_Final_7-28-20141.pdf.
[5] *Id.* at 3-4.
[6] DAVID F. LARCKER ET AL., STANFORD UNIV., 2015 INVESTOR SURVEY: DECONSTRUCTING PROXY STATEMENTS—WHAT MATTERS TO INVESTORS 1 (FEB. 2015), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survyey-2015-deconstructing-proxy-statements_0.pdf.

The Chamber supports a disclosure regime based on the concept of materiality. Materiality has long been the dividing line for determining what should be disclosed and what should not have to be disclosed under the federal securities laws. Forty years ago, the U.S. Supreme Court refused to find that a fact is material just because an investor "might" find it important.[7] Justice Thurgood Marshall, writing for the court in the landmark case of *TSC Industries v. Northway* explained, "[m]anagement's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision-making."[8] Marshall was concerned about information overload harming investors and therefore set a more demanding test of materiality. A fact is material, the Court held, if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[9]

The Supreme Court again addressed materiality in 1988 with *Basic Inc. v. Levinson*.[10] There, the Court made clear that the *TSC* materiality construct applies not just to voting decisions as were at issue in *TSC*, but also to decisions to buy, sell, or hold a security. The *TSC-Basic* formulation has guided federal securities regulation ever since.[11]

Considering materiality through the eyes of a "reasonable investor" is a critical feature of the Supreme Court's test. Materiality does not turn on the needs of an investor that is not representative of investors more broadly or that is looking to advance some special interest. This approach to materiality mitigates the risk that SEC disclosure documents will become too dense and impenetrable for investors by seeking to be all things to all people. It also helps ensure that the SEC, in fashioning and enforcing the disclosure regime under the federal securities laws, focuses on what

[7] *See* TSC Indus. v. Northway, 426 U.S. 438 (1976).
[8] *Id.* at 448-49.
[9] *Id.* at 449.
[10] *See* 485 U.S. 224 (1988).
[11] The SEC generally interprets its rules in a manner consistent with the Supreme Court's jurisprudence. For example, SEC Rule 405 under the Securities Act of 1933 and Rule 12b-2 under the Securities Exchange Act of 1934 define materiality as relating to those matters where "there is a substantial likelihood that a reasonable investor would attach importance in determining whether to" buy or sell the subject securities. 17 C.F.R. § 230.405 (2016). Rule 12b-20, which is applicable to all reports under the Securities Exchange Act, provides: "In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading." 17 C.F.R. § 230.12b-20 (2016).

is best for investors overall and adheres to the agency's mission as the country's capital markets regulator.

In recent years, there have been efforts to erode this longstanding approach to materiality. This development has complicated and confused what materiality means and will further overload investors with information that few find to be useful when evaluating a company's financial and operational performance. Some special interest activists are pushing conceptions of materiality that would abandon altogether the traditional notion of materiality rooted in the Supreme Court's jurisprudence. These activists want to expand what businesses are mandated to disclose to advance the groups' own parochial agendas and to further goals that are extraneous and contrary to the SEC's mission. The guiding principle for public company disclosure is, and should remain, materiality as viewed by a reasonable investor.

The courts have told us a great deal about the reasonable investor. According to the Supreme Court, one should not ascribe "child-like simplicity" to the reasonable investor.[12] Instead, as courts have subsequently said, reasonable investors are presumed to be able to complete basic mathematical calculations, to comprehend the basic operation of a securities margin account, to understand the time value of money and basic principles of diversification, to know that free cash and securities may be used to earn interest, to be able to read and understand risk factors and other disclosures plainly presented in a prospectus, and generally to be aware of macroeconomic conditions.[13] These characteristics further clarify that materiality centers on the financial and operational performance of companies and on investment returns for investors.

The Chamber supports a system of securities regulation in which investors are provided with decision-useful information to deploy capital efficiently and for businesses to raise the financial resources needed to grow and expand. The concept of "materiality" has played the central role in our American capital markets for decades and has contributed to the formation of the deepest, most diverse, most

[12] Basic, 485 U.S. at 234.

[13] *See, e.g.,* In re Merck & Co., Inc. Securities Litigation, 432 F.3d 261 (3d Cir. 2005); Levitin v. PaineWebber, Inc., 159 F.3d 698, 702 (2d Cir. 1997); In re Donald J. Trump Casino Securities Litigation, 7 F.3d 357 (3d Cir. 1993); Dodds v. Cigna Securities, Inc., 12 F.3d 346 (2d Cir. 1993); Flamm v. Eberstadt, 814 F.2d 1169 (7th Cir. 1987); Zerman v. Ball, 735 F.2d 15 (2d Cir. 1984).

liquid markets the world has ever known. The ability of businesses of all sizes—from young Main Street entrepreneurs to more mature companies that have employed millions of Americans for generations—to seek appropriate forms of investment from investors of all walks of life within our disclosure-based regulatory system is the hallmark of American free enterprise.

A. The Commission Should Focus on Materiality to Improve Regulation S-K Disclosure

Over the many years since the federal securities laws were first enacted, and especially in more recent years, the disclosure documents that companies file with the SEC have continued to expand, as reflected, for example, by the lengthy annual reports on Form 10-K and proxy statements provided to investors. As many have pointed out, disclosure documents are laden with too much information that is obsolete, unnecessarily repetitive, or otherwise not useful to investors.

Requiring public companies to disclose information that is material to investment decisions promotes capital formation and the efficient allocation of capital. Excessive mandated disclosures have the tendency to obfuscate rather than inform. Improving the effectiveness of the Commission's disclosure regime requires us to rethink what information should be disclosed—as well as how it should be disclosed—with this in mind.

In reimagining the disclosure regime, the guiding principle should be materiality. Against this backdrop, below we provide some recommendations for improving the effectiveness of a number of items from Regulation S-K as identified in the Concept Release.

1. General Development of Business (Item 101(a)(1))

We believe the information included under this requirement is generally material. However, in the case of a company that is already subject to the reporting requirements of the Securities Exchange Act, information regarding material acquisitions, dispositions, or bankruptcies should already be disclosed in a Form 8-K or other filing given its materiality to the company's business. Redundant disclosure in reports subsequent to the Form 8-K should not be required. Likewise, the requirement for a five-year look-back for seasoned issuers seems unnecessary. The SEC could choose to make a distinction under this S-K item between new registrants (who may be disclosing the general development of their business, including prior mergers or bankruptcies, for the first time in a registration statement) and established registrants (who would have disclosed such information in a previous filing). As a general matter, we do not believe companies should be required to disclose the same or substantially similar information in multiple filings.

2. Narrative Description of Business (Item 101(c))

Generally, Item 101(c) should be limited to a brief summary of background information on a business. Some of the more substantive information currently required to be disclosed here, such as working capital practices and compliance with environmental laws, would be better addressed in other sections, such as MD&A. Several subsections of Item 101(c) appear to be drafted with the manufacturing firm in mind. While manufacturing is certainly an important sector of the American economy, many SEC registrants do not engage in this activity. Accordingly, presumptively material items that are not broadly applicable to most registrants—such as sources of raw materials, dollar amount of backlog orders believed to be firm and seasonality of the business—should be eliminated in favor of a more principles-based approach.

3. Technology and Intellectual Property Rights (Item 101(c)(1)(iv))

We recommend maintaining the current scope of Item 101(c)(1)(iv) relating to certain intellectual property assets.[14] The role intellectual property plays in a registrant's operations can vary widely depending on the industry, a company's business model, and other factors. Considering the nature and use of these intangible assets, Regulation S-K's current focus on materiality allows registrants to disclose information about technology and intellectual property that is important to their business in a way that is beneficial for their investors. By contrast, the potential expanded disclosure on which the Concept Release seeks comment would more likely obfuscate rather than enhance a reasonable investor's understanding of risk. For example, a catalog or tally of registered intellectual property, such as patents or trademarks, is both of limited importance in many cases and already available in the

[14] *See* 17 C.F.R. § 229.101(c)(1)(iv).

public record. Unlike other forms of property, the existence of an asset does not convey its value or usefulness.

We further do not support broadening this item to cover copyrights. If Item 101(c)(1)(iv) were revised to require registrants to disclose all their copyrighted works, especially if such requirement were without regard to materiality, companies would be faced with the enormous burden and substantial cost of having to identify and catalogue everything in their operations that might be eligible for copyright protection. Copyright protection extends to software, designs, drawings, technical instructions, documents, and a wide range of other works that are routinely created by companies in their day-to-day operations. Even minor revisions are eligible for protection, thus requiring disclosure of these assets would be both enormously burdensome and of minimal benefit to the reasonable investor. Such specificity could also adversely impact the interests of American companies by requiring them to disclose commercially sensitive information that their foreign competitors would not be required to reveal.

Similarly, we strongly caution against the mandated disclosure of trade secrets in this item. The commercial impact of requiring trade secrets to be detailed would be detrimental to U.S. competitiveness. The entire value of a trade secret stems from its confidential nature. Trade secrets are ubiquitous—they are held by nearly every company in virtually every sector of the economy to protect a wide variety of details, from business strategies to manufacturing techniques and source code. Trade secrets tend to be particularly important in innovation and knowledge-based industries; a company's entire value may be protected by trade secrets. Even if the regulation did not require trade secrets to be divulged in detail, a mere intimation may be enough for a knowledgeable competitor to gain the upper hand. Moreover, since companies may rely on trade secrets to protect incipient technologies that are not yet on the market, it could be extremely difficult to determine whether certain trade secrets are material and/or to quantify their value. Since the value of a trade secret resides in its not being generally known, any SEC-mandated disclosure of trade secrets could result in forfeiture of trade secret protection and cause irreparable competitive harm to companies. Registrants should not be put in the position of risking the value of core corporate assets if they disclose too much information about their trade secrets, while risking significant SEC penalties and other civil liability if they disclose too little information.

4. Government Contracts and Regulation, including Environmental Laws (Items 101(c)(1)(ix) and (c)(1)(xii))

The current disclosure requirements related to government contracts and regulation are sufficient. This item as it currently exists with its focus on materiality has been effective in eliciting useful information from registrants. Changing this item to include additional detailed requirements would likely lead to an abundance of immaterial information, which would run counter to the goal of improving disclosure. In fact, we believe this item, with its emphasis on materiality as the disclosure threshold, should be a model for other Regulation S-K items.

5. Number of Employees (Item 101(c)(1)(xiii))

We do not believe that disclosing the number of a company's employees provides material information to investors, particularly as many companies nowadays rely on a large seasonal or part-time workforce, as well as consultants, independent contractors and others who do not neatly fit into the traditional "employee" definition. This skews year-to-year comparisons and comparisons within industries. To the extent this item remains qualified by "to the extent material to an understanding of the registrant's business taken as a whole," however, we do not object to its continued disclosure. But, in any event, Item 101(c)(1)(xiii) should not be expanded to require additional disclosure related to employees, such as distinguishing between unionized and non-unionized employees or actual employees and independent contractors, unless those distinctions are material to the registrant's business.

6. Description of Property (Item 102)

We believe the Commission should consider eliminating this disclosure except to the extent disclosure of property provides material information for investors or is necessary to make other disclosures not misleading. If this disclosure is retained, however, Item 102 should not be expanded to include additional disclosure, and the SEC should clarify that for registrants who do not have material physical properties, disclosure about their corporate headquarters, office space, and other facilities is optional, not required.

7. Selected Financial Data (Item 301)

Given the availability of data online and in previous filings, the Commission should consider eliminating the requirement to provide prior years' financial data unless providing it would be necessary to make the present financial data not misleading. Alternatively, the Commission should consider simplifying the time periods used in disclosure to require financial data for only the past fiscal year or, at most, the past two fiscal years instead of the past five fiscal years, unless additional years are necessary to not be misleading. Prior years' data is easily obtainable for investors who desire information not disclosed in the present filing. Investors would still receive necessary information, but the change would bring more consistency to the required disclosure.

Moreover, we do not believe that the Commission should require auditor involvement (e.g., audit, review, or specified procedures) for this disclosure. We note that extant Public Company Accounting Oversight Board auditing standards (AS 2710) provide guidance for an auditor to read and consider other information in documents containing audited financial statements for material inconsistencies with information appearing in the financial statements and material misstatement of facts.

Item 301 should not be modified to be more prescriptive. Mandating use of additional metrics would lead to many registrants being forced to make disclosures that are immaterial to their business. This would result in bogging down investors with irrelevant information, which would perpetuate some of the current pitfalls of the existing Regulation S-K disclosure regime. We believe that eliminating or limiting this requirement while still requiring registrants to provide additional information that is material to their business is the best approach.

8. Supplementary Financial Information (Item 302)

Because the disclosure required by Item 302(a) is required in prior quarterly reports, we believe Item 302(a) can safely be eliminated. Thus, the disclosure required under Item 302(a) is yet another example of duplicative information that unnecessarily complicates and lengthens disclosure documents, while increasing burdens for registrants and offering little value to investors. As with Item 301, we do not believe that the SEC should require auditor involvement for this disclosure.

9. MD&A (Item 303)

We support a more principles-based approach to Item 303 that emphasizes materiality as seen through the eyes of a reasonable investor. Currently, Item 303 is often duplicative of other required disclosure and, from a cost-benefit perspective, should be revised to eliminate redundancy. For example, the discussion of "off-balance sheet arrangements" and "contractual obligations" is required in a registrant's financial statements under GAAP, and thus, should be removed from Item 303. We also believe that the required tabular disclosure of contractual obligations should be removed for similar reasons. We agree that consolidating the various Commission and Staff guidance on MD&A into a single place would be helpful to preparers of MD&A disclosure.

In addition to removing duplicative disclosure, the SEC should also consider revising the time periods required to be discussed as part of a registrant's MD&A. The disclosure should only include information from the most recently completed quarterly or annual period. Information about prior periods can easily be obtained by investors in previous filings. Repetition of previously disclosed information can distract investors from new data and lead to confusion. We do not believe that the SEC should require auditor involvement for this disclosure.

As suggested in the Concept Release, providing an executive-level overview to MD&A that emphasizes the most important information may be helpful for investors and allow registrants to highlight material information so it does not get buried among a large volume of required disclosure. Registrants should have the option to decide whether an overview would be helpful to investors. However, we would oppose the addition of industry-specific prescriptive disclosure to MD&A, because such a requirement could quickly lead to unwieldy disclosure requirements across industries and potentially impose an additional burden on registrants within a particular industry by adding mandatory metrics that are not required for other registrants. We believe that registrants should be encouraged to provide relevant industry information, provided that it is material, but rigid requirements would add unnecessary disclosure that is of limited use to investors.

Although registrants receive the benefit of a forward looking statement disclaimer for information included in MD&A, this is not necessarily the case for similar information provided in the financial statements, including any footnotes thereto. We urge the Commission to explore ways in which it can harmonize the treatment of forward looking statements in MD&A and financial statements, perhaps using its rulemaking or exemptive authority.

10. Risk Factors (Item 503(c)) and Consolidating Risk-Related Disclosure

We support the consolidation of disclosure related to risk, legal proceedings, and risk management so that it is discussed in a single item, as opposed to the current practice of piecemeal discussion of risk in various items throughout a filing. This would eliminate duplicate discussions of risk and eliminate the need for cross-referencing entire sections of filings and provide investors with succinct information in one location.

While the Commission appears concerned by the possibility that registrants include some risk factors out of an abundance of caution, we do not believe that the Commission should amend this requirement in a way that makes disclosure of risk factors any more prescriptive. Presently, the Regulation S-K instruction requires the registrant to disclose the "most significant factors that make the offering speculative or risky." The risk factors must also be "organized logically." Risks vary from company to company and industry to industry; registrants should be afforded flexibility in the manner in which they communicate material risk factors to investors. Neither do we favor revising the disclosure rules to require registrants to discuss how they intend to address or remediate individual risks, as doing so may not be possible in certain cases and could reveal competition-sensitive information. The way a company manages risk it typically discussed in a more holistic fashion in other disclosures.

11. Disclosure of Approach to Risk Management and Risk Management Process

With regard to risk management, information about a registrant's risk management process may be useful for investors to know how the identified risk factors are being addressed. However, because the details of a registrant's risk management process may be confidential, required disclosure of such information runs the risk of placing registrants at a competitive disadvantage. Thus, we support encouraging registrants to voluntarily disclose risk management information that is material, but only to the extent that it does not require them to disclose competitively sensitive information. Therefore, any regulation in this area should not be prescriptive.

12. Number of Equity Holders (Item 201(b))

Because most investors now hold equity securities in street name through nominees or other intermediaries, providing the number of holders of a class of common equity does not provide meaningful information to investors. Thus, this item can safely be eliminated.

13. Description of Capital Stock (Item 202)

Item 202 disclosure should not be expanded to be included in periodic reports on Form 10-Q or Form 10-K. Investors can easily look to a registrant's organizational documents or registration statement to determine the terms and conditions of particular securities, and the current practice of reporting changes on Form 8-K and Schedule 14A is sufficient to keep investors informed. Repeating this information in other periodic filings is therefore unnecessary.

14. Recent Sales of Unregistered Securities (Items 701(a)-(e))

We believe this disclosure requirement is not useful to investors because substantially the same disclosure appears elsewhere in a company's SEC filings. Specifically, if a company completes a material sale of securities to investors, companies typically discuss the transaction as part of MD&A liquidity and capital resources disclosures, if material. In addition, for a company subject to Securities Exchange Act reporting requirements, Form 8-K generally requires prompt disclosure of unregistered sales of equity securities, thus requiring the same basic disclosure as currently is separately required to be included in a company's Forms 10-Q and 10-K.

The information in Item 701 is already disclosed elsewhere, in MD&A and on Form 8-K. We do not believe there is a compelling reason to require repetition of this disclosure. Therefore, Item 701 should be eliminated as duplicative with these other disclosure requirements. In connection with the elimination of Item 701, the SEC should also increase the one percent threshold (five percent for smaller reporting companies) in Item 3.02 of Form 8-K, or better still, key it off of what is material to a given company.

15. Purchases of Equity Securities by the Issuer and Affiliated Purchasers (Item 703)

We believe current disclosure requirements under Item 703 are sufficient and should not be modified to be more granular or to require more frequent disclosure. The current quarterly disclosure (which provides a monthly breakdown of repurchase activity) is sufficient to provide material information to investors. Requiring disclosure more frequently, such as on a monthly basis, or requiring disclosure about the incurrence of indebtedness to fund repurchases or the impact repurchases had on performance measures would be impractical and overly burdensome for registrants without providing investors with decision-useful information.

16. Exhibits (Item 601)

Item 601 of Regulation S-K could be improved through the greater use of materiality filters. Along these lines, the Commission should review the item and eliminate all categories of documents that are presumptively material in favor of a materiality test that is dependent on each registrant's unique facts and circumstances under the *TSC-Basic* test.

For example, under Item 601(b)(10)(ii)(c), the Commission should not presume that any contract calling for the acquisition or sale of any property, plant or equipment is material when such contract exceeds 15 percent of consolidated fixed assets. A 15 percent threshold is both overinclusive for some companies and underinclusive for others. Instead, the Commission should only require that such acquisition contracts be filed as exhibits to the extent material to an understanding of a particular registrant's business taken as a whole.

Similarly, with regard to the requirement under Item 601(b)(10)(ii) to file contracts upon which the registrant's business is substantially dependent, we generally oppose any absolute qualitative or quantitative disclosure thresholds for "substantial dependence." Modifications to Regulation S-K and requirements for exhibits should move away from one-size-fits all disclosure and emphasize materiality. Use of standardized qualitative or quantitative thresholds runs counter to the goals of modernization of Regulation S-K by leading to immaterial disclosure that is unhelpful to investors and burdensome to registrants.

Item 601(b)(12) requires the preparation of a ratio of earnings to fixed charges, a metric that has fallen out of favor with most investors such that few (if any) investors currently make investment decisions on the basis of this ratio. Those that do can simply perform the calculation themselves. Thus, this antiquated exhibit can be eliminated.

Item 601(b)(21), which requires lists of subsidiaries, is another provision that produces little useful information for investors. Whether a particular registrant elects to conduct its business through one or a thousand subsidiaries is largely irrelevant to investors insofar as the registrant reports its results on a consolidated basis. Yet companies expend a great deal of effort each year to update the list as organizational structures change. We believe Item 601(b)(21) should be eliminated.

As a more general proposition, the SEC should explicitly allow registrants to omit personal confidential information in exhibits without applying for confidential treatment of information. Personal confidential information should be defined to include a specific list of items that may be automatically omitted, such as social security numbers and bank account numbers.

Finally, registrants should not be required to file immaterial annexes, appendices and schedules to contracts, nor should registrants be required to file immaterial amendments to material contracts. We also note that we support the use of hyperlinks for ease of finding exhibits incorporated by reference.

17. Critical Accounting Estimates

We believe the existing discussion of accounting policies provided by registrants in MD&A is sufficient. Accordingly, Item 303 should not be revised to require additional disclosure about critical accounting estimates. If the SEC has found that registrants merely repeat the discussion of accounting policies contained in the notes to the financial statements, then it should provide illustrative guidance regarding the type of disclosure it is seeking in MD&A. However, we would oppose the addition of strict definitions of "critical accounting estimates". We believe that clarification on the part of the SEC, such as through a revised interpretive release, should be sufficient to provide more meaningful disclosure related to accounting policies.

18. Industry Guides

We do not object in principle to the modernization of the industry guides to the extent doing so focuses on the disclosure of material information. We would oppose any effort to use the industry guides to expand special interest disclosure of one kind or another. We are surprised, however, that the Commission would propose the substantive revision of mining industry guide while it also seeks comment on this broader issue in the Concept Release.[15] We would also urge the Commission to better coordinate its industry-specific disclosures with other regulators and accounting standard-setters who oversee those industries. For example, Guide 3 concerning bank holding companies has begun to diverge from requirements of the Federal Reserve Board, and Guide 6 concerning insurance companies includes tabular disclosure rendered duplicative by recent amendments to US GAAP by the Financial Accounting Standards Board.

19. Frequency of Interim Reporting

We do not believe the Commission should change the current disclosure regime with respect to the frequency of reporting. We strongly urge the Commission not to impose more frequent reporting requirements on issuers because the cost of more frequent reporting would be unduly burdensome and there is no evidence to suggest that there is a corresponding benefit for investors or that the reasonable investor has requested more frequent disclosure in order to make an investment decision. If the Commission were to increase the frequency of interim reporting, it should do so only after undertaking a comprehensive study to understand the costs of making existing disclosures. Further, changing the roll-up process associated with creating quarterly reports would be administratively impractical for public companies. We don't believe that investors would benefit in any way by more frequent interim reports especially since issuers are required to make public disclosure upon the occurrence of certain material events on a more frequent basis. Therefore, we urge the Commission to maintain the current frequency of reporting regime.

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[15] *See* Release No. 33-10098, *Modernization of Property Disclosures for Mining Registrants* (June 16, 2016).

B. The Commission Should Not Expand Special-Interest Disclosure

In recent years, various special interest activists have increasingly pressured public companies to provide more information about topics other than their financial performance, operations, and strategy. For example, activists continue to call for public companies to disclose more concerning climate change, environmental impacts, political spending, social policy, and management of their internal affairs. These topics are often referred to by the acronym "ESG" for environmental, social, and governance issues; sometimes the euphemisms "sustainability" or "socially-oriented investing" are also used.

In a thinly-disguised effort to make their efforts appear more palatable to the general public, special interest activists have implemented an aggressive marketing campaign to brand ESG disclosure as "mainstream," "good governance," and with similar superlatives. The truth is quite the contrary. When put to an actual vote of shareholders at large, proposals made under Rule 14a-8 on ESG topics regularly and routinely are voted down by wide margins, demonstrating that investors as a whole do not support the use of the federal securities laws, or the corporate ballot box, to advance these causes.[16]

Nevertheless, a multitude of materiality formulations now widely circulate from various ESG special interest activists. Notwithstanding their differences, the various approaches to materiality that ESG advocates support all lead toward a common endpoint: requiring public companies to make additional disclosures concerning sustainability and other ESG topics. Each of these approaches to ESG disclosure expands the scope of materiality under the federal securities laws, such as by considering disclosure from the viewpoint of a wide range of stakeholders other than the reasonable investor, by using disclosure to advance social or political goals outside the SEC's mission, or by developing specific disclosure metrics that go well beyond what the courts or the SEC has endorsed in assessing materiality. Portions of the target audience may literally own no securities at all. Whatever each ESG proponent's exact purpose and intentions might be, we believe the effect would be to change what materiality means.

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[16] *See* JAMES R. COPLAND & MARGARET O'KEEFE, MANHATTAN INST., PROXY MONITOR 2016 FINDING 3—POLITICAL SPENDING AND LOBBYING (2016), http://www.proxymonitor.org/Forms/2016Finding3.aspx; JAMES R. COPLAND & MARGARET O'KEEFE, MANHATTAN INST., PROXY MONITOR 2016 FINDING 2—ENVIRONMENTAL ISSUES (2016), http://www.proxymonitor.org/Forms/2016Finding2.aspx.

We note that many public companies presently publish detailed sustainability reports that contain ESG information for a variety of audiences and for a variety of reasons. But, the fact that a company publishes communications to various stakeholders who want to learn more about the company does not mean such communications material under the federal securities laws. The Supreme Court has been careful not to set the threshold for materiality too low, citing concerns that "a minimal standard might bring an overabundance of information within its reach."[17] Mandating formal disclosure of information that wider circles of stakeholders merely find interesting or relevant would erode the use of the materiality standard for Commission-mandated disclosures.

While public companies should remain free to disclose ESG information on a voluntary basis, some policymakers, non-governmental organizations, and private-sector groups have focused in on public company disclosure documents filed with the SEC as the preferred place to include new mandatory disclosures on a wide range of ESG topics. Whether these proposed new disclosures seek to reveal material information to the reasonable investor for purposes of the federal securities laws and are consistent with the SEC's mission is very much a matter of debate. No matter the topic or the merit of the proposed disclosure's objective, the Supreme Court's traditional materiality standard should be the benchmark as the SEC and other policymakers consider whether to impose new disclosure obligations on reporting companies. The federal securities laws should not be used to require public companies to disclose information that does not pass this test.

We do not believe that SEC-mandated disclosures should be used to further social, cultural or political motivations that the federal securities laws were not designed to advance. The SEC disclosure regime should not be an avenue for special interest activists to impose their agenda on shareholders at large. The difficulties associated with implementation of the "conflict minerals" rule, for example, should be a cautionary tale for all.[18] The objective of many calling for new public company ESG disclosures is primarily to obtain some social impact or achieve a political goal. These goals, if met, would in many cases contribute to an environment that makes it more difficult for businesses to innovate, compete, and grow. The Commission should instead test its disclosure regime against the concept of materiality and its tripartite

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[17] Basic, 485 U.S. at 231-32.
[18] *See* 17 C.F.R. § 240.13p-1 (2016).

mission to protect investors, facilitate orderly markets, and promote capital formation. If a piece of information does not fit within that rubric, it should not become a mandated disclosure.

Moreover, special interest disclosures risk politicizing the federal securities laws and the SEC while fostering regulatory uncertainty that is detrimental to investors and businesses alike. To the extent securities regulation becomes an instrument of social or political change, it becomes unmoored from its longstanding purposes as reflected in the SEC's mission. In turn, the bounds within which securities regulation is fashioned become porous, which in turn facilitates political and other types of opportunism. The federal securities laws—and thus the SEC as the agency that crafts, administers, and enforces the regulatory regime—become fair game to be used however those with the most influence would like.

The SEC's expertise centers on the operation, practices, and regulation of securities markets. The agency is not an expert about topics outside its mission, such as how to resolve difficult issues of a social or political nature. The SEC is not well-positioned, for example, to address concerns relating to things like supply chain management, the environment, labor relations, the political process, and foreign affairs. While the agency's eighty-plus years as a capital markets regulator does well-position it to address emerging and persistent issues in that arena, the SEC understandably struggles when asked to craft disclosures that are designed to achieve goals other than protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

Likewise, the SEC's expertise is not implicated simply because disclosure is involved. The SEC's expertise is only implicated when the goals of the disclosure are within the scope of the SEC's mission. The CCMC believes that goals outside the SEC's mission should be left to other governmental bodies, civil society organizations, and the private sector to address by means other than the federal securities laws. Thus, we believe the SEC should tread lightly when it comes to compelling so-called sustainability disclosure.

C. The Commission Should Make Greater Use of Scaled Disclosure to Encourage Capital Formation

Registrants of different sizes and seasoning face disparate burdens in complying with the Commission's many disclosure obligations. A growing body of economic research demonstrates that young, dynamic companies spur a disproportionate amount of job creation in the United States.[19] These companies often need growth capital in the form of equity investments. But an overly burdensome disclosure regime (particularly under Regulations S-K and S-X) can serve to discourage capital formation for these companies in the public markets. Likewise, even mature companies can be hamstrung if the costs and burdens of compliance outweigh the benefits of a public listing.

When investment does not occur because of these regulatory burdens, a wide range of stakeholders are impacted beyond the individual managers and shareholders of a particularly company. Potential employees are affected because new employment opportunities will not be created. Additionally, consumers may not see new products brought to market, and new firms may not enter markets to create competition. And growth will slow, harming not just investors but also the broader economy.

Scaling disclosure commensurate with the size and seasoning of an issuer has proved to be an effective tool for encouraging participation in the public capital markets while at the same time providing investors with material information. It is also wholly consistent with the congressional intent expressed in the JOBS Act and the securities law provisions of the FAST Act. Accordingly, the Commission should continue to consider additional opportunities to expand the use of scaled disclosure beyond the current classification of smaller reporting companies and emerging growth companies. We do not recommend, however, tying eligibility for scaled disclosure to a certain proportion of companies, such as a percentile of market capitalization. Such a measure would not be as easy to determine as established metrics, and could result

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[19] *E.g.*, EWING MARION KAUFFMAN FOUND., THE IMPORTANCE OF YOUNG FIRMS FOR ECONOMIC GROWTH 1(SEPT. 2014; UPDATED SEPT. 2015), http://www.kauffman.org/~/media/kauffman_org/resources/2014/entrepreneurship%20policy%20digest/september%202014/entrepreneurship_policy_digest_september2014.pdf ("New and young companies are the primary source of job creation in the American economy. Not only that, but these firms also contribute to economic dynamism by injecting competition into markets and spurring innovation.").

in difficulty and increased uncertainty regarding a particular registrant's eligibility for scaled disclosure.

Although we intend to comment separately on the Commission's recent proposal to increase the financial thresholds in the "smaller reporting company" definition,[20] we believe such efforts are a step in the right direction. We welcome the recent unanimous recommendations of the SEC's Advisory Committee on Small and Emerging Companies as a starting point for these discussions. In its report delivered to the Commission on September 23, 2015,[21] this committee made a series of very sensible suggestions, including the following:

- revising the definition of "smaller reporting company" to include companies with a public float of up to $250 million;
- providing smaller reporting companies with the same disclosure accommodations that are available to emerging growth companies, including:
  - exemption from the requirement to conduct "say on pay" and "say when on pay' votes;
  - exemption from pay versus performance disclosure;
  - allow compliance with new accounting standards on the date that private companies are required to comply;
- revising the definition of "accelerated filer" to include companies with a public float of $250 million or more, but less than $700 million;[22] and
- exempting smaller reporting companies from XBRL tagging and from filing immaterial attachments to material contracts.

[20] Release No. 33-10107, *Amendments To Smaller Reporting Company Definition* (June 27, 2016).
[21] The full report is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-expanding-simplified-disclosure-for-smaller-issuers.pdf.
[22] As a result of such revision, the requirement to provide an auditor attestation report under Section 404(b) of the Sarbanes-Oxley Act would no longer apply to companies with public float between $75 million and $250 million.

D. The Commission Should Consider Additional Techniques for Modernizing the Format of Disclosure Documents

Whatever the substantive content of Regulation S-K's disclosure requirements may be, information should be disclosed in a way that makes it easier for investors to access the information and understand it. Accordingly, as the Commission evaluates disclosure effectiveness, we urge it to consider how technology can be used to improve the way information is presented and delivered to investors.

The Commission's basic system of delivering reports on a periodic basis to investors originated decades ago in a pre-Internet era in which receiving company reports via the postal service, print media and the SEC's public reference rooms were the primary ways of obtaining detailed information about public companies. The launch of EDGAR in the early 1990s introduced the public reporting process to the computer age, but EDGAR's virtual file cabinet of documents has also become a relic of an earlier time. Both companies and investors have become far more sophisticated in their use of technology to prepare and review disclosure documents, and we believe it is high time for the Commission to begin a process for likewise modernizing the fundamental format of document delivery.

As you know, the Commission's 21st Century Disclosure Initiative produced a detailed report on the topic of disclosure modernization,[23] and many of those recommendations are still worthy of further pursuit. The "company file" discussed at length in this report is one possible solution, but we believe the Commission should consider other alternatives that incorporate new technology as well. In the meantime, below we provide some comments on a series of stop-gap measures for improving the current document delivery system.

1. Cross-Referencing

Cross-referencing should be encouraged as a method of avoiding repetitious disclosure. For disclosure that contains numerous instances of cross-referencing, the addition of a summary page including a list of cross-references with hyperlinks would be helpful for investors to more easily navigate through filings.

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[23] *See* SEC STAFF, TOWARD GREATER TRANSPARENCY: MODERNIZING THE SECURITIES AND EXCHANGE COMMISSION'S DISCLOSURE SYSTEM (JAN. 2009), https://www.sec.gov/spotlight/disclosureinitiative/report.pdf.

Despite its convenience, the use of extensive cross-referencing does highlight a problem inherent in Regulation S-K and the SEC's periodic reports, which is the requirement to disclose substantially similar information in multiple places. We recommend that the SEC work toward consolidating and eliminating duplicative disclosure requirements to decrease the need for frequent use of cross-referencing in the first place.

2. Incorporation by Reference

The SEC should continue to permit and encourage incorporation by reference in order to avoid repetition of information. This technique is also useful because it can signal to investors items that have not changed since the previous filing, which can be helpful in noting updated information. Incorporation by reference can be facilitated through the expanded use of hyperlinks, as discussed below.

3. Hyperlinks

We support the current permitted use of hyperlinks to make disclosure more user-friendly for investors. It is relatively easy for registrants to utilize available technology for including hyperlinks to increase the readability of filings. The Commission should continue to encourage the use of hyperlinks to allow investors to navigate throughout a filing and to easily access other documents referenced within a filing.

We also urge the Commission to permit a greater use of hyperlinks to information outside the EDGAR system. For example, most registrants maintain websites that are very useful sources of information for investors. Indeed, several SEC rules now require registrants to post information to their websites and make the corresponding website addresses available in their SEC reports.[24] Recognizing the increasingly important role that registrants' websites play, the SEC should permit hyperlinks to additional information on those company websites. Because of the dynamic nature of websites, including changes in URLs and ongoing removal of historical information, we would not object if, as a condition to hyperlinking to a source outside EDGAR, the SEC were to require registrants to maintain separate

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[24] For example, Item 407 of Regulation S-K permits or requires registrants to disclose information about corporate governance on their corporate websites.

records of hyperlinked information so that an archive would be available should SEC personnel wish to see it.

4. Company Websites

Consistent with our earlier comments advocating for increased ability to hyperlink to external sources, we also encourage the Commission to give registrants the option of satisfying more of their disclosure obligations through the use of incorporation by reference to company websites. We do not believe that making this accommodation would present any undue burden on investors, since SEC rules already require website disclosure of some company information and many investors have become accustomed to using company websites to obtain other company information, such as bylaws, committee charters, and business descriptions. Permitting this practice should also produce cost savings for registrants by permitting them to avoid duplication of effort.

5. Specific Formatting Requirements

We support granting registrants increased flexibility with regard to the order, numbering and captioning of items so that they can tailor the overall format of their disclosure documents in a way they determine is most useful to their investors. Likewise, we request that the Commission permit the greater use of charts, tables and other graphics to satisfy individual disclosure items. In these ways, we believe registrants could then more effectively communicate information that is material to understanding their particular companies.

6. Layered Disclosure

We support the greater use of layered disclosure, in a method that balances providing clear information to investors with avoiding repetition. The addition of a summary introduction highlighting key events and updates from the most recent fiscal period could provide investors with a helpful overview before reviewing the details contained in lengthy disclosure. Again, we believe registrants best understand their own investor bases and should have the flexibility to provide decision-useful information to them.

However, while registrants should have the option of providing layered disclosure if they elect, we do not support requiring numerous methods of presenting information that is tailored toward different investors of varying levels of sophistication. Requiring the same information to be presented in a myriad of ways would be burdensome for registrants to prepare and would create confusion for investors by making information more difficult to find and increasing the length of filings.

7. Structured Disclosures

While we understand the potential usefulness of standardized markup languages such as XBRL for investors to be able to compare data across registrants, the SEC should be mindful of the significant cost and time burden it presents for registrants. In particular, scaled requirements for emerging growth companies and smaller reporting companies should be maintained and expanded.

It would also be advisable for the SEC to examine empirically how many investors actually use this data. While XBRL tagging may seem beneficial in theory, if the data is not actually being used by a significant number of investors, then these requirements may place an undue burden on registrants. Several recent SEC pronouncements make the basic assumption that investors widely use XBRL data, but our own experience is contrary to this assumption. We do not support the further expansion of XBRL or similar requirements without a thorough study of the actual cost of XBRL tagging to issuers and the scope of investors that use XBRL and find it helpful.

The Chamber has urged the SEC and Congress to undertake a modernization of information delivery to make disclosures and reports more usable for investors and companies. This effort should be broader and wider than a simple discussion of the current state and future of XBRL. The SEC should also look into finding a system that is easier for registrants to use. As noted in the Concept Release, the current system involves much complexity, which involves a need for registrants to outsource the task of tagging data. Accordingly, the SEC should examine the usefulness of the current system and whether there is a better, more user-friendly system available.

Conclusion

The CCMC believes that Regulation S-K should be modernized in a way that streamlines disclosure and emphasizes materiality, to ensure that investors are provided with meaningful, non-repetitive information and registrants are not burdened with overwhelming disclosure requirements. In the SEC's effort to modify Regulation S-K, we caution against the use of rigid, one-size-fits-all disclosure methods, which we believe would perpetuate existing problems with lengthy disclosure that is of limited use to investors. Requiring controversial disclosures intended only to satisfy the idiosyncratic needs of special-interest groups should not become a routine feature of SEC rules. Additionally, the SEC should use this opportunity to encourage registrants to eliminate boilerplate, immaterial information that has increasingly crept into filings as a result of fear of liability. Finally, we also believe that it is incumbent for the SEC to perform an analysis on how any proposed modifications will impact capital formation and competition prior to releasing proposed rules.

We thank you for your consideration of these comments and would be happy to discuss these issues further with the Commissioners or Staff.

Sincerely,

Tom Quaadman

cc: The Honorable Mary Jo White
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar