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Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
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RE: SEC Concept Release on Business and Financial Disclosure Required by Regulation S-K

Release No. 33-10064; 34-77599; File No. S7-06-16

The following comments are submitted on behalf of the American Petroleum Institute ("API") in response to the Securities and Exchange Commission's (the "SEC" or "Commission") Concept Release on Business and Financial Disclosure Required by Regulation S-K (the "Concept Release").

API is a national trade organization representing over 600 companies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution and marine activities. API member companies participate in an industry that is essential to the economic health of the United States and a vital part of U.S. trade.

API and its member companies support the SEC's efforts to ensure disclosure requirements provide investors with the information needed to make informed investment and voting decisions. However, the API and its member companies encourage the SEC to move cautiously as it evaluates whether to increase existing disclosure requirements. Preparers, investors, and other users of disclosures have voiced concerns of "disclosure overload" as the size of issuers' Form 10-K or 20-F filings has expanded rapidly over the past two decades. API and its member companies recommend that the SEC seek to rationalize current disclosure requirements, move to a more principles-based model, and avoid unwarranted reactions to narrow special interest group requests that simply add to the extensive list of current requirements. The SEC must ensure that any costs imposed upon preparers are indeed justified by the net benefit to all investors. Compliance with changes to the existing requirements can be costly, and these costs are borne indirectly by the investors in a company.

Our comments below respond broadly to those areas in the Concept Release that are most relevant to API and its member companies.

Materiality and Reasonable Investor Considerations

API and its members support the definition of materiality as set forth by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.* and *Basic, Inc. v. Levinson*.[1] In part, that definition holds information to be material if there is a substantial likelihood that disclosure of an otherwise omitted fact would be viewed by a reasonable investor as significantly altering the total mix of information available. We urge the Commission to consider any new disclosure requirement in the context of that definition. It is not sufficient for a proposed disclosure simply to be a matter of interest to reasonable investors, or even to be material to a narrow set of special interest investors – rather, information must meet a higher threshold to be considered "material." Furthermore, regulations that require disclosure of immaterial information can diminish the prominence of those disclosures that are material. Finally, we do not believe the Securities Act of 1933, as amended, and Securities Exchange Act of 1934, as amended (the "Acts") were intended to require the SEC to continually monitor the business environment for emerging social issues that are not material and to respond with narrow new disclosure rules. The Acts set out principles for disclosure that are flexible, resilient, and well-understood, and that continue to serve stakeholders well. Preparers who in good faith make disclosures consistent with the existing definition of materiality, and reasonable investors whose primary interest is the financial condition and prospects of a company, do not require further specificity from prescriptive disclosure regulations. Of course, the Commission retains the discretion to provide guidance to issuers regarding when additional disclosures might be warranted, a facility that it has used periodically over the years to good effect, an example of which is guidance from the Division of Corporation Finance on cybersecurity issued in 2011.

Risk Disclosure Perspective

Our member companies believe current SEC requirements surrounding disclosure of Risk Factors work reasonably well and do not require additional prescriptive rules. While the Commission's regulations and guidance in this area have evolved over time, and perhaps have become more prescriptive than the ideal, management is allowed the discretion to articulate those areas of greatest risk to the ongoing operation of the enterprise. We see little incremental benefit that reasonable investors could gain by the SEC requiring either the quantification of the magnitude or probability of risks disclosed.[2] Due to the uncertainties inherent in many risk factors, we believe such quantification would be exceedingly difficult or impractical to generate, or to meaningfully compare across companies within an industry or across industries. Such attempted quantification could potentially mislead investors. In addition, the further new requirements move from a principles-based disclosure framework for Risk Factors, the more likely users will be forced to wade through irrelevant and immaterial disclosures. Finally, we do not support a limit on the number of, or a forced ranking of, risk factors that a company might disclose (such as a "top 10" list). Again, attempting to rank risk factors in this matter would, we believe, be impractical and potentially misleading. Moreover, an arbitrary limit on disclosure that could prevent information management views as material from being clearly communicated to users does not serve stakeholders' needs.

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[1] See 426 U.S. 438 (1976) and 485 U.S. 224 (1988)

[2] Management may reasonably conclude that investors should be alerted to the existence of a potential risk factor even though the likelihood of occurrence is not possible to predict and the magnitude of impact, should the risk occur, could vary widely depending on unknown future events and circumstances. In this regard, risk factors are to be distinguished from known trends and uncertainties more properly discussed in the MD&A.

Disclosure Overload Warrants Principles-Based Disclosure

The sheer volume of information currently required to be filed with the SEC is overwhelming. We attribute this situation, in part, to "mission creep" by the SEC over the years. While the SEC's mandate includes promoting capital formation, protecting investors, and overseeing capital markets, too often the SEC has tended to respond to a particular emerging issue with additional disclosure requirements that are too prescriptive in order to appease a narrow range of stakeholders or groups that are not stakeholders. On the other hand, too seldom has the SEC examined its complex regulations to cull out duplicative or outdated requirements. The result is a disclosure regime that is a confusing mix of principles-based standards and prescriptive requirements, resulting in both material and immaterial disclosures. Many of our member companies report that their most sophisticated investors admit to using very little of a company's Form 10-K or 20-F filing. With this disclosure initiative, the SEC has the chance to slow down and reverse the complexity and expansion of disclosure requirements by removing unnecessary prescriptive requirements and ensuring any new requirements are principles-based.[3]

Costs of Implementation

API supports the establishment of a process to periodically review new regulations to determine if the original cost-benefit analysis findings supporting adoption of the regulation have in fact been achieved. This type of look-back process would undoubtedly improve the precision of cost-benefit estimates computed by the Commission in association with the future development of any new regulations. We and our stakeholders are mindful of the ever increasing cost of new disclosure and process requirements. For example, Title XV of the Dodd-Frank Wall Street Reform and Consumer Protection Act mandates additional disclosure with respect to conflict minerals and resource extraction. The Commission itself estimated an average initial compliance cost, per registrant[4], for the conflict minerals disclosure of between $503,000 and $688,000[5] and annual ongoing compliance costs of between $46,000 [6]- $135,000.[7] Regarding resource extraction disclosures, the SEC estimated the initial compliance cost, per registrant, of between $560,000 and $1.7 million [8]while annual ongoing compliance costs are expected to be between $225,000 - $1.3 million[9].

We also remind the Commission of significant ongoing costs incurred to comply with prior mandates, such as The Public Accounting Reform and Investor Protection Act (otherwise known as the Sarbanes-Oxley Act). We take note of a study conducted by the Commission's Office of Economic Analysis in September 2009 entitled Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements. The study acknowledged that "…the cost of complying with the

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[3] One example that the SEC cites in its Concept Release as a current prescriptive disclosure requirement (pp. 37-38) is one that we would argue supports the move to a more principles-based disclosure model. The enumerated disclosure threshold under Legal Proceedings (Item 103 of Regulation S-K) relating to environmental proceedings (i.e., requiring disclosure of such proceedings to which a governmental authority is a party unless it is reasonably believed that it will result in no monetary sanctions or monetary sanctions of less than $100,000) requires disclosure of matters in an amount not material for many registrants.

[4] Tulane University conducted a study on the conflict minerals cost and determined that, per registrant, the SEC was within 10% of its estimate for the initial compliance cost – but the number of issuers impacted was almost 80% less than the SEC's initial estimate (6000 vs 1300).

[5] SEC Conflict Minerals – pgs. 310-312

[6] SEC Conflict Minerals – SEC estimate of $207 MM per pg 313; $207 MM based on 4495 issuers affects per pg 256; 207 MM / 4495 = $46k. This estimate was created by a commenter referred to as the University Group and adopted by the SEC in its final cost estimate

[7] SEC Conflict Minerals – SEC estimate of $609 MM per pg 313; The $609 MM estimate is based on 4500 issuers affected per pg 249; 609 MM / 4500 = $135k. This estimate was created by a commenter referred to as the Manufacturing Industry Association and adopted by the SEC in its final cost estimate

[8] SEC Disclosure of Payments by Resource Extraction Issuers – pg. 188

[9] SEC Disclosure of Payments by Resource Extraction Issuers – pg. 192

requirements of Section 404 of the Act has been generally viewed as being unexpectedly high…”.[10] In its final rule, the Commission estimated that the initial compliance costs for adopting Section 404(a) (management’s assessment) would be $91,000 per company. The September 2009 study concluded that the mean compliance costs (immediately prior to the 2007 reforms) for companies that only reported on Section 404(a) were $526,000 per issuer, almost 6x higher than the Commission’s original estimate.[11] While the Commission explicitly declined to estimate the cost of the external auditor’s attestation report required as per Section 404(b), the 2009 study concluded that the total Section 404 costs, for the Section 404(b) companies were $2.87 million[12] per issuer.

With just the three examples cited above, the mean issuer incurred at least $4 million for initial compliance costs and continues to incur between $3.6 million - $4.3 million for ongoing compliance costs. This further underscores the need to carefully consider the cost-benefit analysis of any new rule as well as the accuracy of those analyses on a post-implementation basis. Collectively, these actions could allow the SEC to re-establish the Form 10-K or 20-F filing as a relevant, meaningful, concise document that is useful to the majority of reasonable investors.

Disclosure of Information Relating to Public Policy and Sustainability Matters

“Sustainability” is a broad term used to cover various matters ranging from climate change to supply chain and manufacturing practices to water and energy efficiency, and even by some to seek information on trade association memberships, social investment, philanthropic efforts, and other topics.

To the extent the Commission or staff believe a sustainability risk or issue that is material to investors under traditional principles is not adequately disclosed by some companies, effective tools already exist to address those situations, such as the 2010 Interpretive Guidance on Climate Change Disclosure and the staff comment letter process under which comments can be tailored to an individual company’s specific circumstances. SEC rules also require disclosure of sustainability information, as applicable, under the Rule 14a-8 shareholder proposal process.

We also note the issue raised by some interest groups and referenced in the Concept Release relating to “stranded assets” in the context of oil and gas reserves. This is another good example of how existing securities laws already require disclosure of any material risk a company may determine to exist. To the extent an issue is material, a company is already required to include disclosure of that item. In this context, we also note the Commission’s rules regarding proved reserves, which specifically require companies to have “reasonable certainty” that oil and gas resources can be economically produced under existing circumstances before those reserves can be recorded as “proved” in SEC filings.

The Concept Release asks which of various current voluntary sustainability reporting initiatives should serve as models should the Commission determine to develop additional disclosure requirements. Many of these initiatives have useful elements, but for the reasons explained above, we strongly believe the interests of companies and stakeholders are best served by allowing multiple initiatives, many of which are tailored to very specific and detailed stakeholder interests, to continue to evolve through a

[10] Study of the Sarbanes-Oxley Act of 2002 Section 404 – 2009 – pg. 1
[11] Study of the Sarbanes-Oxley Act of 2002 Section 404 – 2009 – Table 8 – pg. 44
[12] Study of the Sarbanes-Oxley Act of 2002 Section 404 – 2009 – pg. 4

flexible process of dialogue among interested persons, and that none of these initiatives should become legal mandates under Regulation S-K.

API and its member companies recognize the relevance of sustainability issues to a number of persons including certain investors, NGOs, local communities, and interested members of the public. Recognizing this interest and the value that can accrue to companies through dialogue with interested stakeholders and disclosure of company policies and practices in these areas, most of our larger members have long published sustainability or "corporate citizenship" reports in addition to their SEC filings and financial disclosures. This voluntary reporting has the advantage of being highly flexible and tailored to the particular circumstances of each company and the interests of its particular stakeholders.

The ongoing, multi-stakeholder evolution of voluntary sustainability reporting has led to many useful third-party initiatives. For example, many of our members are also members of IPIECA[13], a global oil and gas association for social and environmental matters, which works to promote transparency for the sustainability audience, including through its recently adopted *Climate Change Reporting Framework.*[14] Many of our member companies also participate in targeted third-party initiatives for providing information on specific sustainability topics, such as *FracFocus,*[15] a website providing well-by-well information on chemicals used in hydraulic fracturing. These initiatives have been effective because they have been developed by experts in the field over many years and are continually evolving to help harmonize, set standards and provide comparability under voluntary frameworks.[16]

The above-described information is disclosed outside of company SEC filings precisely because the information is important to certain stakeholders but not "material" under the long-standing U.S. Supreme Court definition of that term.

This is not to say that sustainability-related information is never material under the traditional definition. But to the extent sustainability information is material within the long-standing meaning of the securities laws, disclosure of that information is already required (for example, in *Management's Discussion & Analysis* and/or the *Risk Factors* sections of Form 10-K or 20-F).

Against this background, under which sustainability information that is material to a reasonable investor under existing law is already required to be disclosed in SEC filings, we strongly urge the Commission not to adopt additional prescriptive rules for disclosure of sustainability-related information under Regulation S-K.

[13] http://www.ipieca.org/
[14] See generally http://www.ipieca.org/paris-puzzle
[15] http://fracfocus.org/
[16] Chair White recently commented on the "constructive efforts [that] continue to mature sustainability reporting" in her address to the International Corporate Governance Network Annual Conference on June 27, 2016.

First, the sustainability issues and information relevant to a particular company and its stakeholders will vary greatly depending on the company's industry, size, area of operations, and business model. Any "one-size-fits-all" prescriptive approach to sustainability disclosure will almost certainly be a poor fit for many companies, resulting both in the disclosure of information of little interest to a company's stakeholders and the non-disclosure of information of which that company's stakeholders may be most interested. [17]

Second, the codification of rapidly evolving voluntary sustainability disclosures into Regulation S-K would change the dynamic of such disclosures from one of healthy, iterative dialogue between companies and stakeholders into a compliance exercise, likely stunting the ongoing development of voluntary disclosures. Moreover, if the Commission effectively "defines materiality down" by, for example, making specific sustainability metrics line item disclosure requirements in Forms 10-K and 20-F, companies will face difficult questions as to whether continued participation in voluntary reporting initiatives – not to mention direct dialogue with interested stakeholders on sustainability topics – remain consistent with company obligations under Regulation FD and other securities laws dealing with selective disclosure. Thus, incorporating additional sustainability disclosure requirements into Regulation S-K could well result in *less* sustainability-related information being disclosed overall.

Third, the promulgation of line-item sustainability disclosures will lead to significant costs of compliance for companies across the board, without providing any incremental useful information to stakeholders. For instance, companies will be required to expend considerable amounts to enhance their data collection and validation methods for the purpose of providing any required sustainability disclosures in '34 Act reports. We expect these costs to further increase as companies may be required to incur additional audit fees and costs to implement new internal controls relating to such disclosures. We respectfully submit that the Commission should weigh the significant incremental burden and cost of compliance to companies of any prescriptive disclosures that it considers adopting.

Finally, we believe Congressional mandates such as Sections 1502, 1503, and 1504 of the Dodd-Frank Act have already taken the Commission too far away from its foundational mission of protecting investors; maintaining fair, orderly and efficient markets; and promoting capital formation into the realm of promoting political, social, and public policy objectives. We believe it would be a serious mistake for the Commission to move further into the arena of using the securities laws, through disclosure requirements, to promote public policy objectives or to drive corporate behavior toward ends preferred by certain special interest (but not necessarily representative) stakeholders. Respectfully, we submit that the Commission and the Federal securities laws are ill-suited vehicles for carrying out social and public policy objectives. The more the Commission shifts from its core mission to become a platform for policy debates, the less effective it will be in carrying out that core mission. As we have also noted in other letters, such as our comments on the Commission's prior versions of rules under Dodd-Frank Section 1504, we believe any compelled speech directed to political ends must meet the very high strict scrutiny standard under the First Amendment of the U.S. Constitution in order to pass muster.

[17] We note that this contributes further to the issue of disclosure overload for investors, as discussed previously. A prescriptive disclosure approach may also result in the unintended consequence of requiring companies to disclose information that, although not material to them or of importance to the reasonable investor, is competitively harmful to them.

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We appreciate the opportunity to comment on the Concept Release. We urge the SEC to maintain focus on its core mission, which is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation, and to follow a principles-based approach – grounded in the bedrock concept of materiality – to disclosure reform.

Thank you.

Stephen Comstock
Director
The American Petroleum Institute

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