July 20, 2016

Mary Jo White, Chair
Securities and Exchange Commission
100 F St NE
Washington, DC 20549
Via Electronic Filing

Comments Regarding: Concept Release, Securities and Exchange Commission, File Number S7-06-16.

Dear Chairman White:

On behalf of the Small Business and Entrepreneurship (SBE) Council, and its project, the Center for Regulatory Solutions (CRS), I am submitting these comments on the Securities and Exchange Commission's (SEC's) Concept Release, published on April 13, 2016.

SBE Council is a nonprofit, nonpartisan advocacy, research and education organization dedicated to protecting small business and promoting entrepreneurship. We work to advance and secure policies, resources, and educational initiatives that encourage entrepreneurship and small business growth. With more than 100,000 members nationwide we work on a range of issues, including those central to capital formation and access, as these are critical to small business growth. For nearly 25 years, SBE Council has positively impacted policies that support an ecosystem enabling greater startup activity and strong businesses. As a project of the SBE Council, the Center for Regulatory Solutions helps inform the American public about the burdens and consequences of excessive and counterproductive regulation, and seeks to improve the rulemaking process so that entrepreneurs and ordinary citizens are treated fairly, and their voices are heard. CRS is working to ensure that regulations are crafted in an open, transparent manner, are subjected to rigorous standards of peer-review and cost-benefit analysis, and based on objective scientific data.

Background

The SEC's Concept Release seeks public comment "on modernizing certain business and financial disclosure requirements in Regulation S-K." At the SEC stated, these disclosure requirements "serve as the foundation for the business and financial disclosure in registrants' periodic reports." The Concept Release is "part of an initiative by the Division of Corporation Finance to review the disclosure requirements applicable to registrants to consider ways to improve the requirements for the benefit of investors and registrants."[1]

The purpose of Regulation S-K ("S-K") was to reduce duplicative and redundant requirements under the separate disclosure regimes established by the Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act"). S-K was designed to "reduce the costs to registrants and eliminate duplicative disclosures while continuing to provide material information." Moreover, as the SEC stated, "Regulation S-K reflects the Commission's efforts to harmonize disclosure required under both the Securities Act and the Exchange Act by creating a single repository for disclosure regulation that applies to filings by registrants under both statutes."[2]

The Concept Release outlines 340 specific requests for comment on a range of disclosure-related issues. The members of SBE Council support review of disclosure requirements to ensure they are protecting investors, contributing to orderly, efficient capital markets, and facilitating capital formation—which is the SEC's mission.[3] These are the essential elements of a growth-based economy, one that fosters innovation, competitiveness, new business startups, and an environment that allows small businesses to prosper.

In this vein, the members of SBE Council object to certain aspects of the Concept Release; specifically, the SEC has requested comment on whether, and if so, how, "environmental, social, and governance" (ESG) issues should be part of a mandatory disclosure regime. It would be inappropriate, and probably unlawful, for the SEC to incorporate ESG issues into the mandatory disclosure regime established by Congress, which has been consistently enforced by the SEC, and the courts, for the past eight decades, and which has effectively protected the financial interests of investors, many of whom are entrepreneurs and employees.

These types of disclosures—in this instance, regarding climate change and its supposed financial impact on public companies—would not be "material," a legal concept that serves as the foundation of the disclosure regime, and which has been defined narrowly by Congress and the courts. This carefully developed definition has provided critical protections to investors, giving them the bedrock assurance that the information public companies disclose is directly tied to their financial condition.

In the event the SEC changes course and forces companies to make non-material disclosures that are highly speculative and ultimately irrelevant to a public company's financial prospects, it would seriously damage the credibility of U.S. financial markets, not to mention the small businesses that rely on them for their economic livelihoods. This would be a grave disservice to the small businesses that manage pension plans and provide 401(k) plans for their employees. It would be a burdensome and complex requirement for small public companies.

[1] Securities and Exchange Commission, Concept Release, April 13, 2016, Release No. 33-10064; 34-77599; File No. S7-06-16 (https://www.sec.gov/rules/concept/2016/33-10064.pdf).
[2] Ibid 1, at p 6. "
[3] Securities and Exchange Commission, "What We Do," (https://www.sec.gov/about/whatwedo.shtml). "

The Central Importance of Materiality

The central importance of materiality, as that term has been understood and implemented for decades, cannot be understated. According to the SEC:

> The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires public companies to disclose meaningful financial and other information to the public. This provides a common pool of knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a particular security. Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.[4]

In *TSC Industries, Inc. v. Northway*, the Supreme Court ruled that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important...Put another way, there must be 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."[5] Some commentators have argued that investors can benefit from getting "too much" information. But the Court dismissed such notions. "Some information," the Court concluded, "is of such dubious significance that insistence on its disclosure may accomplish more harm than good."[6] By the same token, the Court concluded in *Basic v. Levinson* that a materiality determination is an "inherently fact-specific finding" and that such a finding can avoid drowning investors in an "avalanche of trivial information."[7]

Disclosure, Divestment, and "Keep-It-In-The-Ground"

SE Council is concerned that "an avalanche of trivial information" is what investors would get if climate disclosure becomes mandatory. Such information fulfills the whims of extreme environmental interests that are using "climate disclosure" for nefarious purposes. This effort is part and parcel of the irresponsible "divestment" and "Keep-It-In-The-Ground" movements. The goal of these movements is to thwart investment in public companies that produce fossil fuels and, ultimately, to put an end to the use of fossil fuels. Backers of these efforts seek to force companies to release speculative information about climate change, and to do so in the most negative light possible, with the hope of causing "reputational damage" for these companies that "can have serious financial consequences."[8]

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[4] Securities and Exchange Commission website (https://www.sec.gov/about/whatwedo.shtml)
[5] *TSC Industries v. Northway,* 426 U.S. 449 (1976).
[6] Ibid at 10; also, "The Materiality Standard for Public Company Disclosure: Maintain What Works," The Business Roundtable, October 2015 (http://businessroundtable.org/sites/default/files/reports/Materiality%20White%20Paper%20FINAL%2009-29-15.pdf).

[7] *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)
[8] The Guardian, "A beginner's guide to fossil fuel divestment," accessed on July 13, 2016 (https://www.theguardian.com/environment/2015/jun/23/a-beginners-guide-to-fossil-fuel-divestment).

Yet it must be noted that fossil fuels have been, and are, a tremendous asset to the U.S. economy and to humanity at large, as they provide reliable, affordable energy and serve as the basic materials for, among other things, plastics, which are used in a wide variety of applications, cleaning products, and medicine. As the National Academy of Engineering has explained, "The products from petrochemicals have played as great a role in shaping the modern world as gasoline and fuel oils have in powering it."[9]

It goes without saying that small businesses make and use many of these products. Therefore, despite the ostensible target of divestment—i.e., "Big Oil"—the real victims will be small businesses and their employees, which, as the SBE Council has documented, also comprise a significant share of the supply chain for many oil, gas, and petrochemical companies. For instance:

• Among oil and gas extraction businesses, 91.1 percent of employer firms in 2011 had fewer than 20 workers, and 98.5 percent had fewer than 500 employees.
• Among drilling oil and gas wells businesses, 79.8 percent of employer firms in 2011 had fewer than 20 workers, and 97.6 percent had fewer than 500 employees.
• Among support for oil and gas operations businesses, 83.3 percent of employer firms in 2011 had fewer than 20 workers, and 98.7 percent had fewer than 500 employees.
• Among oil and gas pipeline and related structures construction businesses, 65.5 percent of employer firms in 2011 had fewer than 20 workers, and 95.3 percent had fewer than 500 employees.
• Among oil and gas field machinery and equipment manufacturing businesses, 57.6 percent of employer firms in 2011 had fewer than 20 workers, and 91.8 percent had fewer than 500 employees.[10]

Environmental activists have specifically singled out the oil and gas supply chain as being "at risk" in relation to "climate disruption." As the activist investment firm CERES wrote, "Virtually every sector of the economy faces risks from the short- and long-term physical effects of climate change—impacts across the entire business value chain, from raw materials through to the end users."[11]

The SEC encouraged this approach in its 2010 guidance on climate disclosure, in which it wrote, "There may be significant physical effects of climate change that have the potential to have a material effect on a registrant's business and operations. These effects can impact a registrant's personnel, physical assets, supply chain and distribution chain."[12] While it is true that some climate impacts could be material, exactly how to document them is, as the Supreme Court has

[9] National Academy of Engineering, "Petroleum Technology History – Part 1" (http://www.greatachievements.org/?id=3677).
[10] "Benefits of Natural Gas Production and Exports for U.S. Small Businesses," by Raymond J. Keating, Chief Economist, Small Business and Entrepreneurship Council, November 2014 (http://www.sbecouncil.org/wp-content/uploads/2014/11/BenefitsofNaturalGasSBECouncil.pdf).
[11] "Physical Risks from Climate Change: A guide for companies and investors on disclosure and management of climate impacts," prepared by David Gardiner and Associates, Inc. for CERES et al. (https://www.ceres.org/resources/reports/physical-risks-from-climate-change)
[12] Securities and Exchange Commission, "Commission Guidance Regarding Disclosure Related to Climate Change," February 8, 2010 (https://www.sec.gov/rules/interp/2010/33-9106.pdf).

ruled, a “fact-specific” exercise, one that should not be dictated by environmental extremists, whose interests do *not* appear aligned with protecting investors or ensuring the release of material information, but more aligned with putting certain public companies out of business.

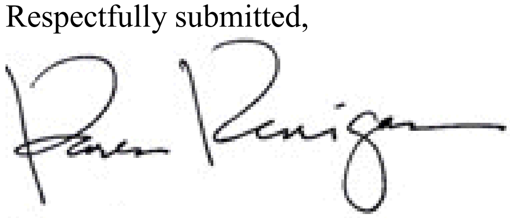
Potential Impacts on Small Firms

Aside from the potential indirect harm, some small firms are public companies, and thus face the direct burden of having to comply with additional regulatory mandates. As SBE Council has extensively documented, small firms have been overwhelmed by new regulatory mandates over the last seven years, covering those in the health care, financial, banking, and energy sectors. Adding more disclosure requirements—especially for an issue as complex as climate change—will only further drain existing resources and budgets for small businesses, a growing share of which is devoted to regulatory compliance, rather than new jobs, business expansion, and innovation. The SEC itself recognized the potential disproportionate burden that additional disclosure requirements can carry:

> The trade-off between the benefits and costs of disclosure requirements may vary across different types of registrants. For example, to the extent that our disclosure requirements impose fixed costs, they may impose a disproportionate burden on smaller registrants. At the same time, these registrants may have relatively simple operations and thus be able to promote an understanding of their business and financial condition with less disclosure than larger, more complex registrants. Accordingly, it may be appropriate to provide disclosure accommodations for certain types of registrants, while remaining cognizant of the potential adverse impacts that reduced disclosure may have on capital formation and the allocative efficiency of the capital markets.[13]

The members of SBE Council urge you and the Commission to take this fact into account as you conduct your review of Regulation S-K. We also strongly urge you to reject mandatory disclosure of climate risks that are not material to a public company’s financial bottom line. Inundating investors with extraneous information will seriously impair U.S. financial markets and undermine critical protections for investors and small businesses. The SEC should continue its very straightforward and honorable mission to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”

Respectfully submitted,



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[13] Ibid at 1, p. 15.