



**MICHAEL P. WALLS**  
VICE PRESIDENT  
REGULATORY & TECHNICAL AFFAIRS

July 19, 2016

Mr. Brent J. Fields  
Office of the Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

Submitted via Internet comment form: <http://www.sec.gov/rules/concept.shtml>

RE: Business and Financial Disclosure Required by Regulation S-K, File Number S7-06-16

Dear Mr. Fields:

The American Chemistry Council (ACC)<sup>1</sup> appreciates the opportunity to submit the following comments for consideration in response to the Securities and Exchange Commission (SEC) Concept Release on modernizing certain business and financial disclosure requirements in Regulation S-K (Federal Register Notice SEC-2016-0704-0001). ACC supports the SEC's mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation, and appreciates the SEC's effort to provide useful information, and streamline disclosure requirements. Unfortunately, the proposed disclosure requirements add considerable burden, duplication and costs to corporate reporting to the SEC, and ACC does not support the current proposal.

The current SEC disclosures are already lengthy and burdensome, both financially and in human resources, for public companies to comply with. The expansion of secondary requirements, as proposed in the Concept Release, is a distraction to users of financial statements and management, and would impose enormous costs upon U.S. companies. In

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<sup>1</sup> ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$770 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for twelve percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and safety.



many cases, the proposed additional requirements would be duplicative, as there are already existing reporting mechanisms to address topics. Consistent with the SEC's Disclosure Effectiveness Initiative objective to improve the disclosure regime for both registrants and shareholders, SEC needs to consider the costs and benefits of expanding its disclosure requirements and whether doing so would add to the reporting burden of companies without producing a corresponding benefit for stakeholders. Moreover, SEC should be wary of implementing requirements which promote political, social, or public policy objectives outside its mandates.

### **Increasing Disclosure Burden**

In recent years, the number of SEC disclosure requirements has increased significantly. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 added numerous SEC disclosure requirements that increased the reporting burden on companies without producing a comparable benefit for shareholders. For example, the conflict minerals reporting requirements under Section 1502 of the Dodd-Frank Act pose a significant burden to companies throughout the supply chain, not only to those that are required to report to the SEC. Despite significant burdens on reporting companies, the impact and benefits to shareholders remain unclear.

### **Reducing & Streamlining Reporting Requirements**

ACC recommends SEC pursue efforts to streamline and modernize existing disclosures. For example, SEC could remove duplicative reporting requirements that currently exist. Furthermore, to help reduce duplicative reporting, ACC suggests the Commission use a principles-based approach in all of its reporting requirements since prescriptive, one-size-fits-all approaches typically do not work, especially for smaller companies. Principles-based approaches allow companies to tailor reports based on their unique situations and include the most relevant information to investors.

ACC also recommends SEC consider a periodic review process to assess the cost and benefits of disclosure requirements and whether there is an impact on investors. Such a process would help SEC continuously improve and streamline reporting, while continuing to benefit shareholders.

### **Additional Reporting Requirements**

In the comments attached (Attachment 1), ACC provides detailed comments regarding the disclosure burden of the proposed requirements, and responds to four specific topics proposed in the Concept Release for additional reporting requirements:

- Risk and Risk Management Disclosures;
- Disclosure of Information Relating to Public Policy and Sustainability Matters;
- Political Spending; and,
- Cybersecurity

In addition to these comments, ACC supports the comments submitted by the National Association of Manufacturers (NAM), of which ACC is a member.

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ACC appreciates this opportunity to provide comments on the SEC Concept Release and we welcome continued dialogue. Please do not hesitate to contact me

( [REDACTED] ) or my colleague, Alexa Burr

( [REDACTED], [REDACTED] ), should you have any questions or comments, or require additional information.

Sincerely,

A handwritten signature in black ink that reads "Michael P. Walls". The signature is written in a cursive style and is set against a light blue rectangular background.

Michael P. Walls

Vice President

Regulatory & Technical Affairs

## **Attachment 1 – ACC Comments on SEC Concept Release Regarding Business and Financial Disclosure Required by Regulation S-K**

### **Risk & Risk Management Reporting**

ACC agrees that risk-related disclosure provides investors with important context for evaluating a registrant’s financial potential. However, expanding requirements for such reporting will not enhance investor protections and will only increase burden on registrants. Risk factor disclosure can only be improved by SEC providing a more concise format for requirements. Requiring additional, redundant information, such as a registrant’s discussion of performance effects, materiality, or efforts to address any particular risk factor, will detract from the readability and brevity necessary in each disclosure to enhance an investor’s ability to gain important information and understand which risks are most significant.

The Commission’s proposal to require registrants to include a certain number of significant risks will only serve to dilute or mislead the true nature of factors already disclosed. Lengthy disclosures are a burden to registrants, and simply because a risk is common in an industry does not mean the Commission should overgeneralize and mark specified risks as unnecessary for disclosure. As stated in previous SEC communication, SEC has purposefully not adopted proposals to either limit the number of risk factors included in a filing or require registrants to list risk factors in the order of priority due to comments received from investors (see Concept Release Footnote 493).

Finally, the [Plain English Rules](#) and Item 503© examples of general risk factors remain helpful guides, and serve as building blocks for disclosure of emerging risks and evolving risk profiles. Administrative and compliance costs of disclosure today under 503© are high, and amending the requirements to demand additional or redundant information will serve only to raise those costs.

### **Materiality, ESG, and Sustainability Reporting**

#### *Materiality & the Reasonable Investor*

ACC believes shareholders and investors should have access to information that is material to their investment decisions, consistent with applicable law. The SEC definition of “materiality” should be consistent with the longstanding Supreme Court definition, which considers information material if there is 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.”<sup>2</sup> Business entities should not be unnecessarily burdened by mandated government regulation or requirements to disclose information that might be advantageous to competitors while not of significant benefit to shareholders. Moreover, manufacturers should not be required by the SEC to disclose information that seeks to advance any social policy or political agenda and may not contain information necessary for the reasonable investor to make investment decisions.

ACC is strongly opposed to the SEC expanding its reporting requirements to include these types of policy issues, which pertain to certain environmental, social, or governance (ESG) areas. As

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<sup>2</sup> Basic v. Levinson, 485 U.S. 224 (1988)

stated in the Concept Release, the SEC previously concluded that it generally is “not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws.”<sup>3</sup> Wholesale determinations that certain ESG factors are material to investors, while others are not, will extend far beyond the current definition of materiality. ESG information is highly subjective in nature, and as stated in the 1978 U.S. Securities and Exchange Commission Disclosure Study – otherwise known as the Sommer Report – disclosures of this kind are too diverse and “unique to various industries” to be standardized across the board.<sup>4</sup>

Materiality is an evolving entity-specific concept that requires intensive review, and already requires sustainability-related disclosures. As stated in the Supreme Court definition, materiality hinges on the concept of the “reasonable investor,” an objective viewpoint that is sensitive to market changes and thus demands for certain kinds of disclosures. For one entity, disclosure of the same ESG information may not be material to investors of another entity. In the past, SEC has responded to the evolving concept of the reasonable investor, but also recognized the need to allow individual entities to decide on their own whether certain ESG information is material. For instance, in 2010, SEC issued guidance on climate change disclosure, stating that companies should make certain climate-related disclosures only if that information would have a material effect on the company.<sup>5</sup>

Furthermore, the concept of the “reasonable investor” should govern the SEC’s consideration of disclosure requirements, which necessarily should exclude those promoted by narrowly-focused special interest groups. The SEC should avoid promoting political, social, and public policy objectives, or attempting to drive related corporate behavior advocated for by special interest groups. Existing disclosure requirements aimed at satisfying the needs of reasonable investors are adequate. As an example, sustainability-related information that is material under securities laws is already required to be disclosed, and no expansion of requirements is necessary.

The Commission should not declare any category of information material to investors. As the Sommer Report noted, SEC should not “compel disclosure concerning, for instance, social or environmental matters, hiring practices, and the like, unless it could be shown that such matters were material to investors.”<sup>6</sup> Materiality is a fact-specific inquiry to be taken from the perspective of a reasonable investor. To ignore these principles will undermine the process of disclosure in its entirety.

### *ESG & Sustainability Reporting*

As stated previously, ACC strongly opposes the Commission expanding its reporting requirements to include public policy issues, including Environmental and Sustainability Reporting. Accelerating the timing to include these data will create additional cost and burden on both SEC and registrants to develop more timely reporting solutions. Additional work processes and controls need to be developed to ensure the reliability and accuracy of the data. As detailed below, requiring these disclosures will undermine the Commission’s mission to

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<sup>3</sup> Securities and Exchange Commission, Federal Register/Vol. 81, No. 78 / April 22, 2016 / Proposed Rules, 23971.

<sup>4</sup> Sommer Report, 150.

<sup>5</sup> Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 34-6149 (Feb. 8, 2010)

<sup>6</sup> Sommer Report, 149.

protect investors and maintain fair and efficient markets. ACC believes that any Corporate Sustainability Reporting (CSR) should remain voluntary for three main reasons.

First, due to its subjective nature, it is very difficult to define ESG and sustainability issues in a way that allows for comparability across industries and sectors. Sectors such as services may appear to have minimal impact, whereas manufacturing impacts may be viewed as significant. Even within the chemicals sector, there may be impacts that can be viewed as negative, such as natural resource and energy consumption, but there are also those that can be viewed as positive, such as the production of medicines and energy saving materials – with large variability among individual firms depending on their product mix. Due to its diversity, the chemical industry is continuously working to utilize the unique aspects of their operations and make sustainability contributions through new, innovative and more sustainable processes, products and technologies. An unfair comparison could drive investors towards firms that appear to have minimal ESG impacts, while failing to recognize firms that appear to have broader impacts also provide essential products, including to the less impactful firms. A one-size-fits-all mandated reporting structure may lead to regrettable actions by the financial community, thereby defeating the purpose of such reporting.

ESG and sustainability reporting can be very subjective for auditing purposes as well and it will be very difficult for SEC to ensure fairness in the auditing process. This type of information is best published in separate sustainability reports that are not subject to audit requirements of an SEC filing. Furthermore, adding this type of mandatory reporting to SEC filings has the potential to create significant additional exposure to the company by requiring sensitive information to be disclosed to competitors and adding significant costs with little obvious investor value.

Second, there are already a number of existing sustainability reporting mechanisms, such as the Carbon Disclosure Project, the Global Reporting Initiative (GRI), The International Integrated Reporting Council, and the U.N. Global Compact, among others. Considering the list of existing reporting mechanisms for such information, there is no need for SEC to create a new or different mechanism. Creating a further reporting burden would only create more reporting – rather than true action, improvement, and available resources to leverage and find solutions for market or operational efficiency drivers. Since this type of information is already widely available, it is also unclear if such reporting will actually benefit investors. For many companies, CSRs are already incorporated by reference into SEC filings so the reader can understand where to obtain the information. Ultimately, adding to the existing SEC and CSR reporting will significantly increase registrant's costs.

Third, the requiring reporting will also have a negative impact on other existing, non-required disclosures in the ESG/Sustainability reporting arena. Companies may limit disclosures to the required reporting questions and disengage from the robust existing dialogue that occurs with Non-Governmental Organizations (NGO's) on the topic.

### *Climate Risk*

ACC believes the existing disclosure requirements to evaluate material Climate Risks, in accordance with the 2010 SEC Guidance Regarding Disclosure Related to Climate Change, are sufficient. Adding to the current disclosures would duplicate the existing Guidance and the existing Risk & Risk Management Reporting requirements, and will undermine the Commission's efforts to streamline the reporting process. Requiring additional disclosures may also distort or dilute the information provided to investors and not reflect the whole picture of a company. Such reporting can be very speculative and much of the data may not currently be available in the timeline used for SEC filings. Adding to these disclosure requirements would only add to the registrant's burden while having a minimal benefit for investors.

### **Political Spending**

Similar to the ESG topic, the SEC Concept Release discusses adding political spending disclosures to the S-K requirements. ACC strongly opposes such requirements since the reasonable investor does not require this type of information for making investment decisions, and such a requirement would encroach on public companies' First Amendment rights. Additionally, political spending disclosures clearly reflect actions to advance a social policy or a political agenda, and it is not at all clear that the information is essential to the reasonable investor.

As significant job creators and contributors to the U.S. economy, it is essential for private industry to participate in public policy debates. Such disclosures will have a significant potential to target organizations for their political beliefs, or stifle protected First Amendment speech.

### **Cybersecurity**

With cybersecurity threats continuing to evolve in complexity and sophistication, ACC and our members fully recognize the importance of addressing this growing threat. Protecting technology that helps run facilities and the valuable information regarding chemical formulas, processes, and customer databases from a potential cyber incident are a primary focus for the chemical industry.

As part of our commitment under the [Responsible Care® Security Code](#), ACC member companies must assess and address cybersecurity vulnerabilities. Additionally, unlike many other critical infrastructure sectors, the federal government regulates cybersecurity for the chemical sector. Under the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards (CFATS), chemical facilities must meet comprehensive cybersecurity requirements that address the protection of business networks and process control systems. Beyond CFATS, the chemical sector has also been actively engaged with the federal government as the National Institute of Standards and Technology moves forward with implementing a cybersecurity framework in response to Executive Order 13650.

Considering the many existing voluntary programs and regulations the chemical industry must comply with to prevent cybersecurity incidents, ACC strongly opposes any additional SEC reporting provisions, which would only create duplicative and burdensome requirements without any marginal benefit or improved security.