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July 21, 2016

Via Email

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

Re: **File Number S7-06-16, Release Nos. 33-10064, 34-77599**  
**Business and Financial Disclosure Required by Regulation S-K**

Dear Mr. Fields:

The American Federation of State, County and Municipal Employees ("AFSCME") is the largest union in the AFL-CIO representing 1.6 million state and local government, health care and child care workers. AFSCME members participate in over 150 public pension systems whose assets total over \$1.7 trillion. The quality of disclosure for public companies where our members' retirement savings is invested is critical. We are pleased to offer the following comments in response to the Security and Exchange Commission's ("SEC's") Concept Release on Business and Financial Disclosure Required by Regulation S-K ("Concept Release"). Disclosure is a bedrock of federal securities law and is essential for effective long-term investing and the orderly operation of our markets. We appreciate the SEC's recognition of the need for improvement and hope it will take this opportunity to enhance the information available to investors, while at the same time not take any steps that would reduce investors' access to information. Further, we respectfully urge the SEC to prioritize the implementation of mandated unfinished Dodd-Frank rules before undertaking non-mandatory disclosure effectiveness rulemaking.

**Information protects investors**

Many investors in the market have an informational disadvantage, as they are left to rely on public information and what the company discloses directly. Corporate reporting mandated by federal securities laws is the most important source of information, on which investors base investing and proxy voting decisions. Given this disadvantage, we believe the SEC's Disclosure Effectiveness review process should be used to identify and further reduce informational imbalances to enable better investing decisions and improve the overall health and stability of our financial system. We strongly support the comments submitted by the SEC Investor Advisory Committee ("IAC") and echo its positions throughout the following comments.

**American Federation of State, County and Municipal Employees, AFL-CIO**

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First, to meet its mandate of investor protection through provision of information, the SEC must require that companies make information available to the full range of participants in the financial markets. It is critical that the SEC ensure all information used by market participants is retained in Form S-K. We believe any changes and additions to the disclosure requirements should be driven by the needs of the investor community for relevant information that allows investors to reasonably manage risk and impacts investment decisions. If the SEC believes that some data may be repetitive or not useful, we urge a thorough review process, including conduct testing, focus groups and independent research and analysis, before eliminating any data.

We believe a more permanent and systematic process should be implemented to address issues where there is overwhelming investor and public demand for the SEC to take action, such as the case of political spending disclosure. The SEC should be able to leverage communications technology to be responsive to clear demands from the investor community.

Although much has been made of “information overload”, there is no problem with robust disclosure. We do not believe any investors are worse off for access to “too much” information, and we agree with the IAC that the bulk of market participants do not feel that they are inundated with useless information. Instead, the problems with unwieldy corporate reporting lie in the form and style of the disclosure. All investors would be better served if the “plain English”<sup>1</sup> disclosure requirement was more strictly enforced and closely adhered to and if excessive boilerplate disclosures were addressed so that company specific risks and information were easier to identify.

As the IAC points out, this process provides an opportunity for needed improvements in the form of disclosure. Structured data combined with effective layering and cross-referencing can vastly improve access to information and investors’ ability to compare performance between companies and over time. We believe data-tagging facilitates more accurate, less costly extraction and use of information, creating more usable disclosure. These changes could vastly improve the utility of reporting without reducing the information available to investors.

Finally, we believe this review process provides an opportunity to address the problem of short-termism in our markets. Excessive focus on short-term performance metrics naturally subordinates longer-term performance and overall financial stability to the detriment of nearly all investors. Requiring reporting on a broader range of performance metrics can enable investors to better distinguish between business models and strategies that are aimed at long-term value creation and companies pursuing short-term strategies built on financial engineering rather than sustainable growth.

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<sup>1</sup> The “Plain English Rule” requires that information disclosed be presented in a “clear, concise and understandable manner”<sup>1</sup> which begs the question: what currently required disclosures are filers failing to write in an understandable manner and why would any commenter expect the resulting confusion to justify a removal of the original reporting requirement? 17 CFR 230.421 - Presentation of information in prospectuses. Available at: <https://www.law.cornell.edu/cfr/text/17/230.421>.

## **Disclosure frameworks**

The Concept Release seeks recommendations about the type of information that should be required in corporate disclosures. The entire disclosure regime depends on the combination and balance of principles-based reporting and rules-based, specific line-item disclosures. Principles-based requirements provides much needed flexibility and adaptability for companies and the SEC, while rules-based disclosures provide investors with essential consistency and comparability. Both are essential in providing different kinds of necessary information to investors for an effective investing marketplace.

In determining where the appropriate balance lies, the SEC must consider the public interest. The Securities Act of 1933, the enabling legislation for Regulation S-K, first directs the SEC to “consider or determine whether an action is necessary or appropriate in the public interest,” and then, “in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”<sup>2</sup>

The Release asks whether a principles-based approach is appropriate and whether materiality is the best principle by which to design the framework. We support the IAC’s position that “Regulation S-K is and should remain primarily rules based, with the antifraud provisions and Rule 12b-20 adding a principles based component.”<sup>3</sup> If specific line-item, rules-based disclosures are in the public interest, then the SEC has an obligation to require them as part of corporate reporting.

Additionally, as the IAC has commented, “It is clear that a significant, and growing number, of investors utilize sustainability and other public policy disclosures to better understand a company’s long-term risk profile.”<sup>4</sup> It is also clear that environmental, social and governance issues can have both a quantitative and qualitative impact on company performance. Despite this, the SEC has left disclosure of these significant matters to the discretion of issuers. There is a great need for clear rules-based, line-item disclosures in this area – investors need comparable and consistent information and issuers need definitive guidance and a level playing field. Until such disclosures can be mandated, however, the SEC needs to treat these issues with at least the same materiality standards that are applied to other sources of financial risk and return. We support the IAC’s recommendation that SEC should develop an analytical framework to clearly define the qualitative factors that can affect analysis in this area.

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<sup>2</sup> Securities Act of 1933, available at: <https://www.sec.gov/about/laws/sa33.pdf>.

<sup>3</sup> SEC Investor Advisory Committee Letter on Regulation S-K (June 15, 2016). Available at: <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf>. Citing 17 CFR 240.12b-20.

<sup>4</sup> SEC Investor Advisory Committee Letter on Regulation S-K (June 15, 2016). Available at: <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf>.



## **New disclosures**

Information relating to public policy and sustainability matters have consistent and serious implications for the performance of companies and markets, and we believe the SEC should require them to be regularly reported. Today's investors care about a number of issues that are not adequately captured or disclosed by the existing regulatory disclosure framework. These include areas such as human capital, stock buybacks, sustainability, tax practices, political spending and human rights. Allowing such information to be disclosed at the discretion of each issuer's "materiality determination" undermines transparency and accountability, exacerbates informational asymmetries and injects risk into the investing process. The SEC must look to the evolving needs and demands of the investing community to keep these disclosure requirements up to date. We urge the SEC to consider some of the needs and demands for disclosure requirements in the following areas.

There are a number of financial strategies that companies pursue, largely outside the view of investors that can impact share price in the short-term and create risks in the long-term. Strategies that involve stock buybacks, exposure to swaps and derivatives, aggressive tax planning and executive compensation practices can promote financial engineering over investment in the growth of the company. For example, we support increased disclosure of share repurchases to allow investors to better understand the effects on per-share measures and earnings per share. Better disclosure of these issues would enable investors to identify risks that might otherwise be masked by short-term performance and the extent to which a business's success depends on financial engineering rather than long-term growth strategies.

We believe the SEC should revise the current tax disclosure framework to require corporations to publicly report their profits, taxes, revenues and employees on a country-by-country basis. Additionally, we believe companies should also be required to disclose their full list of their subsidiaries, rather than the current standard for "significant" subsidiaries. Because current rules do not require full disclosure of all subsidiaries, investors have no way to know how many subsidiaries there are, or any potential risks associated with them. The current standard fails to capture all subsidiaries, including those located in tax havens, which leaves a blind spot for investors. For example, a 2013 study looking at this issue found that from 2009 to 2010, 98 percent of Google's and 99 percent of Oracle's subsidiaries disappeared from the Exhibit 21s filed with their SEC Form 10-Ks, yet a search of available public company registries revealed that at least 65 percent of the missing subsidiaries remained active as of Google and Oracle's 2010 filing dates.<sup>5</sup>

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<sup>5</sup> Gramlich, Jeffrey and Whiteaker-Poe, Janie, Disappearing Subsidiaries: The Cases of Google and Oracle (March 6, 2013). Available at SSRN: <http://ssrn.com/abstract=2229576> or <http://dx.doi.org/10.2139/ssrn.2229576>

The SEC should require additional human capital management metrics to be disclosed by companies. Although many executives refer to the company's workforce as its greatest asset, companies typically disclose nothing about how they manage that asset. Considering the growing body of evidence that human capital management strategies can have material impacts on financial performance,<sup>6</sup> we believe new line-item disclosure requirements related to these risks and opportunities are necessary. Information about voluntary and involuntary turnover, employee engagement, workplace health and safety, and money spent on training, for instance, could help investors distinguish between potential investments where one company will be better positioned for long-term growth while another will face knowledge and talent losses over the long-term.

We also favor increased disclosure of human rights information. Human rights can present risks in a company's operations, and the management of those risks is relevant information for an investor in assessing a company's performance. When companies fail to comply with applicable human rights standards, there can be a direct negative effect on shareholder value, as companies with negative human rights records are exposed to operational risks, legal and regulatory risks and reputational risks.<sup>7</sup> There are some resources for investors to gauge a company's human rights practices, but these typically rely on publicly disclosed information from companies. Because there are not uniform reporting standards, the quality of this information varies, is not comparable and is not always reliable. Furthermore, current resources fail to assess all companies, which is a limitation for investors with a diversified portfolio. Accordingly, we support mandatory disclosure of key elements of human rights issues and risks.

Finally, the SEC should require corporate political spending disclosure. The investor and public demand for this disclosure is unprecedented. We believe corporate political spending disclosure is necessary to enable investors to evaluate any risks associated with such spending, and there is abundant evidence that investors put a high value on political spending disclosure. The benefits of disclosure would substantially outweigh the costs, which would be minimal. The SEC has received more than 1.2 million comments in support of a rule to require corporate political spending disclosure, including from AFSCME,<sup>8</sup> institutional investors, members of Congress, state treasurers, former SEC chairs and commissioners, foundations, pension funds and individual investors. And it is not only investors that believe disclosure of political spending is needed. A 2015 survey found that a majority of public company board members believe that the SEC needs to develop mandatory disclosure rules for corporate political contributions.<sup>9</sup> Additionally, there are empirical studies that show a direct and negative correlation between political spending and shareholder value.<sup>10</sup> While we recognize there are some current constraints on issuing rulemaking, the SEC must begin the preliminary work now.

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<sup>6</sup> Bernstein, Aaron, and Beeferman, Larry, The Materiality of Human Capital to Corporate Financial Performance (May 12, 2015). Investor Responsibility Research Center Institute (IRRCi) and Labor and Worklife Program at Harvard Law School. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2605640](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605640).

<sup>7</sup> "Investor Guide to the Human Rights Landscape: The UN Guiding Principles and Beyond," *Institute for Business and Human Rights*, June 26, 2012, p. 3.

<sup>8</sup> AFSCME Comment Letter (February 1, 2012), available at: <https://www.sec.gov/comments/4-637/4637-175.pdf>.

<sup>9</sup> "The 2015 BDO Board Survey," *BDO*, Oct. 2015, p. 4, available at: <https://www.bdo.com/insights/assurance/client-advisories/2015-board-survey>.

<sup>10</sup> Professor John Coates, Harvard University, 12/17/2015, <http://www.uspirg.org/sites/pirg/files/resources/SEC%20Rider%20Legal%20Opinion%202015-12-17.pdf>; Corporate Politics, Governance, and Value Before and After Citizens United, John C Coates, Harvard Law School, 7/6/12, *Journal of Empirical Legal Studies*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2128608](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128608); In search

### Who should report

We also encourage the SEC to consider those financial companies and issuers that are not covered in this process. Many parties have expressed concern over the transparency of private fund advisers. From the lack of consistency in valuation methods and performance metrics, to the improper shifting of fees and expenses, to the lack of disclosure about derivatives exposure, the private fund market creates considerable risks for investors and the stability of our financial system. The confluence of private funds' expanding marketing permissions, minimal transparency, and the SEC's own reporting of rampant abuse in the industry<sup>11</sup> should propel this issue to the top of the agenda. We believe that any fulsome review of regulatory disclosures must reach these private funds.

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In closing, we appreciate the opportunity to share our views on this important review. We urge the Commission to protect investors' access to information and expand current disclosure requirements to meet the evolving needs of the investing community. The efficient and orderly operation of our markets depends on investors being able to make informed decisions. We hope the Commission will use this opportunity to improve our disclosure regime for the benefit of investors and our financial system as a whole. If you have any questions, or need additional information, please do not hesitate to contact John Keenan at (202) 429-1232.

Sincerely,



Steven Kreisberg  
Director, Department of Research and  
Collective Bargaining Services

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of El Dorado: The elusive financial returns on corporate political investments, Michael Hadani and Douglas Schuler, Strategic Management Journal, Volume 34, Issue 2, pages 165–181, 2/5/2013, <http://onlinelibrary.wiley.com/doi/10.1002/smj.2006/abstract>.

<sup>11</sup> Andrew J. Bowden, "Spreading Sunshine in Private Equity" (May 6, 2014), available at: <https://www.sec.gov/news/speech/2014--spch05062014ab.html>.