July 21, 2016

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

RE: *Business and Financial Disclosure Required by Regulation S-K*
File No. S7-06-16, Release Nos. 33-10064, 34-77599

Dear Mr. Fields:

BSA | The Software Association ("BSA"), the Entertainment Software Association ("ESA"), and the Software Information Industry Association ("SIIA") submit this joint letter in response to the Securities and Exchange Commission's *Concept Release on Business and Financial Disclosure Required by Regulation S-K* ("Concept Release").[1] These comments are directed to the questions presented in Section IV(A)(3) of the Concept Release, on disclosure requirements relating to technology and intellectual property ("IP") rights.

Interests of BSA, ESA, and SIIA

The members of BSA,[2] ESA,[3] and SIIA[4] include many of the world's leading developers of business software, entertainment software, digital content, and related services. These industries

---

[1] *Business and Financial Disclosure Required by Regulation S-K*, File No. S7-06-16, Release Nos. 33-10064, 34-77599 (Apr. 13, 2016).

[2] BSA (www.bsa.org) advocates for the global software industry before governments and in the international marketplace. With operations in more than 60 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

[3] ESA (www.theesa.com) is the U.S. association dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices,

are among the most innovative and vibrant sectors of the U.S. economy. Collectively, our member companies invest many billions of dollars annually in research and development ("R&D") and employ millions of software developers, scientists, engineers, and other highly skilled workers throughout the United States and around the world.

Our associations include both privately-owned companies and a number of U.S.-listed companies ("registrants") that are subject to Regulation S-K and other SEC reporting and disclosure requirements. These registrants have extensive experience with these requirements and a strong interest in ensuring that the requirements remain clear, effective, and do not mandate disclosures beyond what is necessary to provide investors with adequate information to evaluate a company's business or financial performance.

Although our members vary significantly in the types of products and services they provide to customers, they all develop innovative software and other digital works and content, and all rely on the major forms of IP—patents, copyrights, trademarks and trade secrets—to protect the fruits of, and commercialize, their investments in the marketplace. Indeed, BSA, ESA, and SIIA member companies collectively own some of the most valuable IP portfolios in the world. They therefore have particularly relevant perspectives on the specific classes of IP assets discussed in Section IV(A)(3) of the Concept Release.

In these comments, we focus on three sets of issues presented in Section IV(A)(3) of the Concept Release:

1. Should the Commission expand the categories of IP subject to the disclosure requirements of Item 101(c)(1)(iv) of Regulation S-K?

2. Should the Commission revise Regulation S-K to require all registered companies to provide more detailed disclosures about their patents?

3. Should the Commission impose different IP requirements on different industries or sectors?

For the reasons described below, we believe no change is warranted to the existing SEC reporting requirements relating to IP assets. The current scope of Item 101(c)(1)(iv) of Regulation S-K already provides investors with the information they need to evaluate the extent to which registrants' IP assets may impact their overall business and financial performance. Expanding the scope of disclosures required by Regulation S-K would not provide significant benefits to investors—on the contrary, it might make it more difficult for investors to determine which information is truly material. Moreover, expanding the scope of disclosures in the ways

---

personal computers and the Internet. ESA represents these industry leaders across the nation and globally and offers a wide range of services to its members, including a global content protection program, business and consumer research, government relations and intellectual property protection efforts.

[4] SIIA (www.siia.net) is the principal trade association for the software and digital content industry. SIIA provides global services in government relations, business development, corporate education and intellectual property protection to the leading companies that are setting the pace for the digital age.

suggested in the Concept Release would impose substantial new costs and demands on registered companies with no off-setting benefits.

I. The Commission should not add trade secrets and copyrights to the categories of IP subject to the disclosure requirements of Item 101(c)(1)(iv) of Regulation S-K

Item 101(c)(1)(iv) of Regulation S-K requires registrants to disclose information about their "patents, trademarks, licenses, franchises and concessions."[5] The introductory language to Item 101(c)(1) clarifies that disclosure is required only "to the extent material to an understanding of the registrant's business taken as a whole."[6]

This materiality standard, and the categories of IP currently set forth in Item 101(c)(1)(iv), guide the current disclosure practices of our member companies. Based on that experience, we believe this standard provides investors with adequate information, and that extending these disclosures to new categories of intellectual property would provide little or no benefit to investors while creating new risks for our members. These risks are particularly high if disclosure were expanded to cover trade secrets and copyrights, for the reasons described below.

A. Trade Secrets

Trade secret protection applies to an extremely wide variety of information. Virtually any commercial information may be protected as a trade secret if it provides a competitive advantage to its owner by being kept secret, and the owner takes reasonable steps to maintain its secrecy.[7] Companies across the economy routinely look to trade secret protection to safeguard many different types of information, including confidential formulae, customer lists, and manufacturing and other industrial techniques.[8]

Companies that develop and distribute software, digital content, and related services, as our members do, rely extensively on trade secret protection. In the video game industry, for example, companies protect as trade secrets a wide variety of information, from ideas for new types of games and gameplay and new ways of developing and delivering games to consumers, to discrete processes for manufacturing game consoles and confidential pricing and supplier information. Likewise, developers of business and consumer software and services rely on trade secret protection to protect confidential information about all aspects of their business, from the results of R&D and product development to plans about new product releases. Information protected as trade secrets can be found in nearly every facet of the businesses and operations of our member companies.

---

[5] Item 101(c)(1)(iv) of Regulation S-K.

[6] *Id.*

[7] 18 U.S.C. §1839(3).

[8] McAfee, *The Economic Impact of Cybercrime and Cyber Espionage*, July 2013, available at http://www.mcafee.com/us/resources/reports/rp-economic-impact-cybercrime.pdf.

Trade secrets differ from patents and trademarks in several ways that make them ill-suited to the disclosure requirements contemplated in the Concept Release:

- First, whereas part of the "bargain" of patents and trademarks is that information about them is publicly available, two key elements of trade secret protection are that the information derives independent economic value from not being generally known, and the owner takes reasonable steps to maintain its secrecy.

- Second, in contrast to patents and trademarks, trade secret protection is not contingent upon registration or other formality.

- Third, trade secret protection is available for a wide variety of information, and the "boundaries" between one trade secret and the next are often entwined.

- Fourth, trade secrets are particularly susceptible to misappropriation, including by business competitors. Just as technological advances have accelerated global growth, these same advances, coupled with greater job mobility, connectivity and globalized supply chains, have also made it easier than ever to unlawfully acquire trade secrets.

These and other distinctive features of trade secrets help to reveal why requiring registrants to disclose information about their trade secrets would likely have many adverse consequences.

First, requiring disclosure about trade secrets is inconsistent with how companies today utilize trade secret protection. Because there is no registration requirement for trade secrets, companies would have to invest substantial resources into itemizing all of their trade secrets. This effort would be complicated by the fact that in many cases there are no clear boundaries between trade secrets. For example, if a company is developing a new method for organizing information in a database, or a new video game controller, it may be unclear whether the confidential information developed in connection with these efforts should be deemed to constitute one trade secret or many. Thus, companies could be drawn into highly subjective line-drawing and definitional exercises solely in order to comply with their SEC disclosure obligations.

Second, requiring registrants to disclose information about their trade secrets could put them in a difficult, Catch-22 situation. As noted, trade secret protection depends upon secrecy and upon the owner taking reasonable steps to maintain its secrecy. If registrants were required to disclose information about their trade secrets, even at a high level, a defendant in trade secret litigation with the company might be able to successfully claim that the registrant voluntarily abandoned the trade secret based on the information provided in its SEC filings. Even if a registrant were able to avoid such risks through a carefully worded disclosure, the mere disclosure that a product or service incorporates features eligible for trade secret protection could be unfairly seized upon by competitors. For instance, if one of our members were working on a new, high-value data visualization program, or a new video graphics rendering engine, and was compelled to disclose these efforts because confidential information generated in the course of these efforts were subject to trade secret protection, this could provide valuable information to competitors and ultimately undermine the commercial value of the registrant's work. It certainly is not in the interests of investors or the public to require companies to imperil the value of their confidential R&D efforts by requiring disclosure of such efforts to competitors.

Finally, requiring companies to continually navigate how much to disclose about their trade secrets would place registrants in the untenable position of facing securities liability if they fail to disclose enough information, and potentially undermining the competitive or commercial value of their trade secrets if they disclose too much. Even if the Commission required disclosure of trade secrets only at a relatively high level, the fact that trade secrets exist in virtually all segments of a company's business would mean that investors would likely be overwhelmed with a large amount of immaterial information. This would make it harder for them to evaluate the company's financial performance and prospects.

In short, the potential costs and risks of requiring registered companies to disclose information about their trade secrets far outweighs any conceivable benefits that such disclosures would provide to investors.

B. Copyrights

Similar challenges would arise if the Commission were to require registrants to make disclosures about their copyrighted works. As with trade secrets, the broad scope of copyright protection means that copyrighted works are ubiquitous in the operations of most companies. Every time an employee drafts an email, sketches a design for a new product, or undertakes any other task in which original expression is fixed in a tangible medium, this results in a work eligible for copyright protection. The standard for protection is not a high one.[9] Moreover, although copyright owners have the option of registering their works with the U.S. Copyright Office, registration is not a pre-requisite to protection—indeed, the majority of works created every day in the modern workplace are never registered (since the cost of doing so would exceed any benefit).

Given the wide variety and large number of works to which copyright protection may apply, it makes sense that copyrights are not included within the scope of disclosure requirements set forth in Item 101(c)(1)(iv). Expanding the disclosure requirement of Item 101(c)(1)(iv) to include copyrights would require registrants to expend enormous new resources in identifying and cataloguing the vast universe of copyrightable works that they create daily across their operations, something that most companies have no commercial need to do today. Moreover, because registrants today already are likely to disclose copyrighted works that are material to the company's business under other SEC requirements (*e.g.*, because the work is embodied in a product that is material to the company's bottom line), the additional disclosures that would result from adding copyright to Item 101(c)(1)(iv) could have little practical effect other than to flood investors with immaterial information. Indeed, to avoid the risk of liability for incomplete disclosures, registrants would have incentives to disclose more rather than less information, irrespective of its materiality, thus making this "excess information" problem even worse.

---

[9] *See generally Feist Pubs v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991); 17 U.S.C. §102(a).

Extending the disclosure requirement in Item 101(c)(1)(iv) to include copyrights could impose unique challenges on companies, like our members, whose businesses focus on developing software, digital content, and related services. In part, that is because digital products—whether business software offerings, video games, databases, or other content—combine many different elements. Each of those elements may be protected by copyright, and each may interact with other elements in copyright-protectable ways. For instance, a single video game may include multiple characters, "worlds" or other scenarios, scripts, and narratives, each of which may be eligible for copyright protection, and the precise boundary between these various works might be far from clear. Untangling these overlapping copyrights and disclosing them in a form that is useful to investors could be a daunting task.

Moreover, the explosive growth in cloud computing, online services, and mobile apps means that the update cycle for software has increased dramatically, and many companies now add new features or otherwise update their software on a monthly or even daily basis. Because each of these new features or updates may be independently eligible for copyright, even requiring software companies to disclose the *number* of copyrighted works they own (let alone their value) could be an enormous undertaking for many companies.

Finally, as with trade secrets, some of these copyrights might apply to unpublished R&D results or other works that our members would legitimately wish to keep secret from competitors. A disclosure requirement could potentially force companies to reveal competitively sensitive information to the marketplace, the disclosure of which would provide little or no value to investors, but would harm the registrant's business and conflict with the interests of shareholders.

II. <u>The Commission should not require all companies to provide more detailed disclosures about their patents</u>

The Concept Release states that registrants with large IP portfolios, including companies in the information technologies and services industries, "often disclose that their products, services and technologies are not dependent on any specific patent" or other IP right and "often provide only high-level discussions of their intellectual property portfolios, which include general statements of a registrant's development, use and protection of its intellectual property."[10] The Release also notes that other registrants, including companies in the biotechnology and pharmaceutical industries, often disclose more detailed information about their patents, including "the jurisdiction in which the patent was filed, year of expiration, type of patent . . . products or technologies to which the patent relates and how the patent was acquired . . ."[11] The Concept Release asks whether Item 101(c)(1)(iv) should be revised to require all registrants to provide disclosures similar to those currently provided by biotechnology and pharmaceutical companies, and if so, whether this level of detail should be required "for all or only some of a registrant's intellectual property."[12]

---

[10] *Concept Release, supra* n. 1, at 68.

[11] *Id.*at 67-68.

[12] *Id*. at 69.

Although the Concept Release implies that companies in the information technologies and services sectors tend to have large patent portfolios, in our experience, the size of companies' patent portfolios in these sectors, and the degree to which companies in these sectors rely on patents to protect their products or services, varies substantially. For instance, while a complex business software program, such as a database program or customer relationship management program, may implement a large number of patented technologies, a video game may implement relatively few patented technologies, and instead rely primarily on copyright to protect elements such as the game's storyline, characters, audio and visual elements, etc. Mobile app developers, in turn, may rely on patents, on copyrights, or a combination of both. In addition, it is not uncommon for companies in the information technology sector to register or acquire patents for defensive purposes (to dissuade infringement suits by competitors or others) rather than to implement in their own products or services. Particularly where such patents have not been asserted in litigation, it might be quite difficult for registrants to place a value on them, and disclosing them in SEC filings would be of virtually no value to investors.

The current disclosure rules, which only require disclosures of certain categories of IP to the extent they are material, are well suited to this broad variation in the extent to which our members rely on different forms of IP protection. The rules allow registrants to disclose the level of detail that is appropriate for their own circumstances and business models, based on their reasoned judgments of materiality and the level of detail that would be important to investors.

Imposing a uniform patent disclosure requirement across the widely varying sectors and circumstances of our member companies would be unworkable and would remove important elements of flexibility and judgment under the current rules. Furthermore, requiring companies with thousands of patents, none of which on its own is material to the company's business, to disclose detailed information about each individual patent—or indeed even a subset of such patents—would risk inundating investors with too much information, leaving investors significantly less informed than they are under the current rules.

III. <u>The Commission should not impose different IP requirements on different industries or sectors</u>

Presumably as an alternative to requiring all registered companies to disclose more information about their patents or other IP assets, the Concept Release asks if the Commission should limit such expanded disclosure "to registrants in particular industries" and, "[i]f so, which industries should we specify and why."[13]

As noted in the preceding section, even among the member companies of our respective associations in the software, database, and content industries, there is tremendous variation in the types of products and services they offer, the markets and customers they serve, and their business models—and, correspondingly, the mix of their IP portfolios and the extent to which they rely primarily on patents, copyrights, trademarks, trade secrets, or other categories of intellectual property. Given the tremendous pace of innovation and change in these sectors, any

[13] *Id.* at 70.

characterization of the "typical" IP portfolios or practices of the industry that arguably hold true today might quickly become obsolete. Moreover, imposing different requirements on different industries will inevitably require both registered companies and regulators to engage in (largely subjective or ad hoc) line-drawing exercises that may not make sense in the case of any specific company, or which might become outdated quickly as companies and industries evolve.

The current disclosure rules set forth in Item 101(c)(1)(iv) of Regulation S-K, which incorporate the standard of materiality, provide a single reporting standard that provides at least some degree of certainty for both companies and investors, while also giving registrants the flexibility they need to adapt this standard to their own unique circumstances. We do not think it would be in the interests of companies or investors to replace the current rules with a variety of different rules for different segments and industries.

*** * * * ***

We appreciate the opportunity to provide these comments on the Concept Release and would be happy to answer any further questions the Commission might have.

Sincerely,

BSA | The Software Alliance
Entertainment Software Association (ESA)
Software & Information Industry Association (SIIA)