July 6, 2016

VIA EMAIL (rule-comments@sec.gov)

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

RE: Concept Release on Regulation S-K Disclosures
File No. S7-06-16

Dear Mr. Fields:

The purpose of this letter is to respond to a request by the U.S. Securities and Exchange Commission (SEC or Commission) for comments on its Concept Release to improve the business and financial disclosure requirements in Regulation S-K.[1] The Concept Release offers a valuable opportunity to modernize, strengthen, and streamline existing S-K disclosure requirements.

This letter respectfully recommends: (1) revitalizing the SEC's statutory obligation to design its S-K disclosure rules, not only to protect investors, but also to protect the public interest by taking into consideration the concerns of policymakers, regulators, law enforcement, and other public servants who utilize S-K disclosures; (2) requiring registrants to provide basic information about all of their subsidiaries rather than just "significant" ones; (3) mandating that Legal Entity Identifiers (LEIs) be provided for registrants and each of their subsidiaries; (4) maintaining or improving disclosures related to employees, principal properties, off-balance sheet arrangements, and stock repurchases; (5) strengthening registrants' tax-related disclosures, including by requiring a tax policy statement, country-by-country reporting, and more accurate effective tax rates; (6) limiting the use of scaled disclosures; and (7) mandating new disclosures related to corporate political spending.

The comments and suggestions in this letter arise from my fifteen-year tenure at the U.S. Senate Permanent Subcommittee on Investigations, from 1999 to 2014, initially as an investigator and later as the staff director and chief counsel. During that time, the Subcommittee conducted numerous bipartisan inquiries into complex financial issues. As part of its investigative efforts, the Subcommittee frequently drew upon Regulation S-K disclosures. We found the SEC filings typically provided reliable, timely, detailed, and useful information on a wide variety of issues related to a corporation's organization, activities, finances, and operations. Because we could access filings for consecutive years, they also provided us with historical context and comparative information for multiple registrants. We rarely found that the SEC filings contained extraneous or low value information. At the same time, the filings sometimes failed to include important

[1] "Business and Financial Disclosure Required by Regulation S-K," File No. S7-06-16, 81 Fed. Reg. 78, at 23916 (4/22/2016)(hereinafter "Concept Release").

information that would have contributed to a better understanding of the corporation and key policy issues. Due to the critical role that S-K disclosures play in corporate, financial, and securities investigations and policymaking, this letter supports maintaining and enhancing the S-K disclosure requirements.

Considering the Public Interest. The Concept Release states early on: "The Securities Act and the Exchange Act authorize the Commission to promulgate rules for registrant disclosure as necessary or appropriate in the public interest or for the protection of investors."[2] The phrase "as necessary or appropriate in the public interest or for the protection of investors" is derived from several statutes that contain that same phrase and help form the legal foundation for the Commission's authority to act.[3] Despite the dual focus of the phrase, the Concept Release often concentrates its analysis on whether various disclosure proposals are necessary or appropriate to protect investors and rarely on whether they are necessary or appropriate to protect the public interest.

This letter respectfully urges any proposed rule following the Concept Release to take direct notice of the Commission's statutory obligation to protect the public interest – in addition to protecting investors – when designing S-K disclosures. Pursuant to that legal obligation, the rule should acknowledge and take into account the fact that the Commission's primary audience includes, not only investors, but also elected officials, regulators, law enforcement, and other public servants who utilize S-K disclosures in SEC filings. They include Members of Congress, executive branch officials, auditors, investigators, prosecutors, regulators, licensing officials, and other government personnel on the federal, state and local level. As one academic study put it after noting how the IRS analyzed and reacted to tax data in S-K financial disclosures, "one regulator's disclosure requirement" can become another regulator's valuable "information source."[4]

At the Senate Subcommittee where I worked, we routinely examined the business and financial disclosures in SEC filings as part of our investigations into corporate activities and often found detailed, contemporaneous, and relevant factual information.[5]

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[2] Id. at 23921.

[3] See, e.g., Section 7 of the Securities Act [15 U.S.C. 77g(a)(1)]; and Sections 12, 13, 14, and 15(d) of the Exchange Act [15 U.S.C. 78l, 78m, 78n, 78o].

[4] "IRS Attention," University of Oxford Said Business School conference, Zahn Bozanic, Jeffrey L. Hoopes, Jacob R. Thornock, and Braden M. Williams, (2/2016), at 1, http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Events/conferences/symposia/2016/williams.pdf.

[5] See, e.g., hearings before the U.S. Senate Permanent Subcommittee on Investigations, "JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses," S. Hrg. 113-96 (3/15/2013)(examining, in part, disclosures related to Values At Risk and credit derivatives trades); "Wall Street Bank Involvement with Physical Commodities," S. Hrg. 113-501 (11/20-21/2014)(examining, in part, disclosures related to physical commodity activities); "Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts," S. Hrg. 113-397 (2/26/2014)(examining, in part, Credit Suisse disclosures related to net new assets); "Executive Stock Options: Should the Internal Revenue Service and Stockholders Be Given Different Information," S. Hrg.

In addition, the disclosures often provided data helpful in analyzing a wide array of policy issues, including issues related to taxation, corporate offshore activities, accounting practices, risk management, executive compensation, conflicts of interest, internal controls, corporate governance, and more. In short, during my tenure, S-K disclosures contributed important information to most of the investigations and policy analysis undertaken by the Subcommittee.

When designing S-K disclosure rules in the public interest, the Commission should take into account the policymakers, regulators, law enforcement, and other public servants who routinely rely on the information in SEC filings to inform their work. They, like investors, merit the Commission's consideration.

The rest of this letter offers comments and recommendations on a number of specific issues raised in the Concept Release.

Strengthening Subsidiary Disclosures. Currently, Item 601 of Regulation S-K specifies a list of exhibits that registrants must file with the SEC, including Exhibit 21 which requires registrants to list their subsidiaries. The Concept Release requests comment on whether Exhibit 21 should require registrants to list all of their subsidiaries, rather than just "significant" ones, and whether registrants should provide additional information about each such subsidiary.[6] All subsidiaries should be listed.

Due to cross border activities, differing legal requirements in various countries, and global business, tax, and financial planning, many corporations now operate with highly complex structures involving subsidiaries in multiple jurisdictions. Additional complexity arises from corporate participation in joint ventures, general and limited partnerships, syndicates, and other business enterprises involving a variety of corporate entities. As a result, some corporations now operate with hundreds or even thousands of subsidiaries. In 2008, for example, at the time of its bankruptcy, according to one analysis, Lehman Brothers had over 8,000 legal entities in 40 countries.[7]

While many subsidiaries perform legitimate functions that contribute to profitable business operations, evidence is also plentiful that some subsidiaries are used to hide assets or engage in ill-understood or troubling conduct. Enron, for example, which engaged in abusive accounting, financial, and tax practices, formed 441 subsidiaries in the Cayman Islands alone.[8] Apple Inc. directed $74 billion in revenues over a four-year

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110-141 (6/5/2007)(examining disclosures related to stock options); "Tax Haven Abuses: The Enablers, The Tools and Secrecy," S. Hrg. 109-797 (8/1/2006) (examining, in part, disclosures related to stock sales by corporate insiders, stock options, and related parties).

[6] Concept Release at 23984.

[7] "The Lehman Brothers Bankruptcy E: The Effect on Lehman's U.S. Broker-Dealer," Rosalind Z. Wiggins and Andrew Metrick, (10/1/2014), Yale Program on Financial Stability Case Study No. 2014-3E-V1, at 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588556.

[8] "Cayman Islands: Business and Tax Advantages Attract U.S. Persons and Enforcement Challenges Exist," Government Accountability Office, Report No. GAO-08-778 (7/24/2008), at 33, http://www.gao.gov/products/GAO-08-778.

period from a network of Apple subsidiaries around the world to three Apple subsidiaries in Ireland, each of which was constructed to have no tax residency anywhere.[9] A 2015 study discovered that Walmart had 78 subsidiaries in tax havens, almost none of which were disclosed in its Exhibit 21, even though documents filed by Walmart outside of the United States reported those same subsidiaries collectively owned $76 billion in assets.[10] Another recent study determined that 358 of Fortune 500 companies reported 7,622 subsidiaries in tax havens alone.[11]

In today's world, understanding a company's corporate structure and subsidiaries is critical to understanding the company's operations, investments, and risks. For that reason, a corporation's own directors, officers, managers, accountants, and shareholders need accurate and comprehensive information about its subsidiaries. So do its existing and potential business partners and lenders. The same is true for investors, policymakers, regulators, and law enforcement who, for different reasons, may need to identify and analyze a corporation's many subsidiaries.

In an effort to reduce the reporting burden on registrants, Regulation S-K currently allows the listing of only "significant" subsidiaries.[12] Unfortunately, increasing numbers of registrants appear to be using that accommodation to dramatically decrease their disclosures, reporting far fewer subsidiaries in their SEC filings than they did just a few years ago. According to a report by Citizens for Tax Justice, for example, "Citigroup reported operating 427 tax haven subsidiaries in 2008 but disclosed only 41 in 2014," while "Bank of America reported operating 264 tax haven subsidiaries in 2013 but disclosed only 22 in 2014."[13] An academic study found that, from 2009 to 2010, 98% of Google's and 99% of Oracle's subsidiaries disappeared from each company's Exhibit 21, even though a search of available public company registries showed that at least 65% of the missing subsidiaries remained active as of the companies' 2010 filing dates.[14] Then there's Walmart, which reported almost no tax haven subsidiaries on its 2014 Exhibit 21, the same year public interest groups examining non-U.S. records identified 78.[15]

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[9] "Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple Inc.)," hearing before the U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 113-90 (5/21/2014), at 3, https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf.

[10] "The Walmart Web: How the World's Biggest Corporation Secretly Uses Tax Havens to Dodge Taxes," Americans for Tax Fairness (6/2015) (hereinafter "Walmart Report"), http://www.americansfortaxfairness.org/files/TheWalmartWeb-June-2015-FINAL1.pdf.

[11] "Offshore Shell Games 2015: The Use of Offshore Tax Havens by Fortune 500 Companies," Citizens for Tax Justice and U.S. PIRG Education Fund (10/2015), at 1, http://ctj.org/pdf/offshoreshell2015.pdf (hereinafter "Offshore Shell Games 2015").

[12] Concept Release, at 23983.

[13] "Offshore Shell Games 2015, at 3.

[14] "Disappearing Subsidiaries: The Cases of Google and Oracle," Jeffrey Gramlich and Janie Whiteaker-Poe (3/6/2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229576.

[15] "Offshore Shell Games 2015, at 3.

Additional disturbing data can be found in another Citizens for Tax Justice report examining subsidiary disclosures by 27 financial firms to two different regulators using different disclosure standards. The report shows that, overall, the firms reported substantially more subsidiaries to the Federal Reserve than to the SEC.[16] Goldman Sachs, for example, reported 3,057 subsidiaries to the Federal Reserve, but only 76 to the SEC, while JPMorgan Chase reported 2,051 subsidiaries to the Federal Reserve, but only 43 to the SEC. Altogether, the 27 financial firms reported over 16,300 subsidiaries to the Federal Reserve and only about 2,200 to the SEC. Those stark differences raise unavoidable questions about the reliability and utility of existing Exhibit 21 disclosures.

Because some registrants appear to be disclosing only a small percentage of their subsidiaries in their SEC filings and deeming even subsidiaries with billions of dollars in reported assets as insignificant, Regulation S-K must be strengthened to require registrants to list all of their subsidiaries, without exception. In addition, due to the large numbers of subsidiaries, registrants should be required to provide basic information about each one to enable users of the disclosures to accurately identify and track each entity.

The listed information should include the full legal name of the subsidiary, its Legal Entity Identifier number as discussed below, the country where it was formed, the country where it is managed as discussed below, the nature of the parent's ownership interest, the number of employees as discussed below, and its primary business activity. That information could be provided in a chart similar in format to a chart now required by a recently finalized rule issued by the U.S. Treasury Department for large U.S. corporations operating in multiple countries.[17] Using a chart similar to the one mandated by the Treasury rule would also reduce the reporting burden for corporations subject to that rule's confidential, country-by-country reporting requirements.

The Concept Release also requests comment on whether registrants should provide diagrams of their corporate structures. On our Subcommittee, we found diagrams very helpful and routinely requested them. We also found that, due to the large number of entities and their structural complexity, most diagrams for multinational corporations had to be produced as a wall-sized poster in order to be legible.

Mandating Legal Entity Identifiers. The Concept Release seeks comment on whether Regulation S-K should require registrants to provide Legal Entity Identifiers (LEIs) for themselves and each of their subsidiaries.[18] It should.

As already discussed, many corporations have highly complex structures with hundreds or even thousands of subsidiaries. Some subsidiaries have very similar names, making them difficult to identify and distinguish. Other subsidiaries have confusing

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[16] "Lax SEC Reporting Requirements Allow Companies to Omit Over 85 Percent of Their Tax Haven Subsidiaries," Citizens for Tax Justice (6/30/2016), http://ctj.org/pdf/fedsecsubs2016.pdf.

[17] See Country-by-Country Reporting, Treasury final rule, 81 Fed. Reg. 126 (6/30/2016), at 42482, and Form 8975.

[18] Concept Release at 23985.

names, such as a subsidiary that features one country in its name, but operates in another. Still others have names with no apparent connection to their parent entity, necessitating time-consuming research to confirm that a particular subsidiary is properly associated with an alleged parent.

The LEI system offers a cost-effective, efficient mechanism to reduce the time, expense, and confusion involved with connecting subsidiaries to their parents. Each LEI number is unique to a particular business entity, while related LEI registration data identifies the entity's parent. LEIs are inexpensive to obtain and maintain, are freely accessible on the Internet with no proprietary data constraints, and can be used to identify business entities around the globe. Including LEIs in S-K disclosures would help investors, as well as policymakers, regulators, and law enforcement, to accurately and inexpensively identify and analyze a public company's subsidiaries.

Disclosing Physical Locations. The Concept Release requests comment on whether it should continue to require information on the location of a registrant's principal properties.[19] It should.

Item 102 of Regulation S-K requires disclosure of the "location and general character of the principal plants, mines and other materially important physical properties of the registrant and its subsidiaries."[20] Data on the physical location of a registrant's major properties offers concrete information about the nature and extent of its business activities. The location of its headquarters helps to determine where the corporation's key decisionmakers manage and control the corporation's business operations. At the Permanent Subcommittee on Investigations, we frequently used that type of data to gain a deeper understanding of a corporation's activities and investments.

Physical location data is also of increased importance in tax matters, given the recent international agreement by members of the Organization of Economic Cooperation and Development (OECD) to ensure that multinational corporate profits "are taxed where economic activities generating the profits are performed and where value is created."[21] If a registrant has a major plant, warehouse, research center, or sales office in a particular country, that physical property may provide reliable evidence about where the registrant's economic activities and value creation are taking place. In addition, some countries tax corporations according to where their key managers and decision-makers are physically located, making the site of the corporate headquarters an important data point.

Because the physical location of a registrant's principal properties contributes to a deeper understanding of a registrant's economic activities, management, investments, and tax liabilities, benefiting not only investors, but also policymakers, regulators, and law enforcement, Regulation S-K should continue to require those Item 102 disclosures.

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[19] Id. at 23937.
[20] Id. at 23936.
[21] See "About Base Erosion and Profit Shifting (BEPS)," OECD, http://www.oecd.org/ctp/beps-about.htm.

Disclosing Employees. The Concept Release requests comment on whether Regulation S-K should require better disclosures regarding the number of employees at registrants and their subsidiaries.[22] It should.

Data on the number of employees at a corporation's parent entity and subsidiaries provides an easily comprehended and useful indicator of the size, location, and viability of the corporation's major operations and investments. Changes in employee numbers over time are also good indicators of alterations or trends in a corporation's activities. At the Permanent Subcommittee on Investigations, we frequently used employee data to gauge and track a corporation's activities, investments, and risk-taking.

The Subcommittee found that the absence of employees at a particular corporate subsidiary or worksite was also of interest. A subsidiary with no employees often signified that it was a shell entity that was a function of the parent corporation's financial or tax planning, rather than the result of an actual business investment in the jurisdiction. In particular, subsidiaries that operated in tax havens with few or no employees often served as red flags of aggressive tax planning. Today, employee data has gained even more significance in light of the OECD agreement to tax multinational corporate profits "where economic activities generating the profits are performed and where value is created."[23] Employees, like physical offices, offer convincing evidence of where a registrant's economic activities and value creation are actually taking place.

Right now, registrants vary significantly in the quality of employee data included in their SEC filings. Some provide the total number of their employees worldwide, but offer little or no breakout data. Some disclose the number of their employees in the United States, while others do not. Some disclose the number of employees in major business divisions, but many do not. Few disclose employees on a systematic, country-by-country or subsidiary-by-subsidiary basis. In addition, registrants vary according to whether they include full-time, full-time equivalent, or part-time employees and independent contractors in their totals.

This letter respectfully recommends that registrants be required to report employee data on a country-by-county and subsidiary-by-subsidiary basis using a chart as indicated in the above discussion on subsidiary disclosures. Because corporations already keep track of their employees internally for payroll, business, and tax purposes, disclosing that data should require minimal additional effort. Allowing reasonable rounding or an approximation of the number of employees would further reduce the reporting burden, although to enable investors, policymakers, regulators, law enforcement, and others to accurately evaluate a corporation's activities, investments, and risk-taking, any rule should require registrants to clearly specify when the employee total for a particular subsidiary equals zero.

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[22] Concept Release at 23936.

[23] See "About Base Erosion and Profit Shifting (BEPS)," OECD, http://www.oecd.org/ctp/beps-about.htm.

A second key issue is how to treat independent contractors. Currently, the U.S. tax code has a detailed body of law distinguishing between employees and independent contractors for tax purposes, with multiple court cases addressing how to distinguish between the two. Regulatory requirements and corporate practices also differ in how they treat the two groups for purposes of employment benefits, overtime pay, and other matters. Given those differences, S-K disclosure requirements should be careful not to commingle the two, such as by directing corporations to treat "independent contractors" as "employees" when presenting "employee" data. That approach would invite confusion over the two terms, introduce unnecessary uncertainty into the data, and allow widely divergent employee totals depending upon whether independent contractors are counted.

A related problem, of particular significance for multinational corporations, involves subsidiaries organized or operated in tax havens. Many multinationals hire corporate service providers, law firms, or financial institutions to provide their tax haven subsidiaries with officers, directors, or managers. Allowing parent entities to treat those hired individuals as "employees" would not only artificially inflate their employment figures in tax havens, but also distort the meaning of the word "employee." The same would be true if a parent entity were to hire, for example, a local, self-employed accountant to prepare a subsidiary's financial statements and deem the accountant to be an "independent contractor." Allowing the parent entity to claim that accountant as an "employee" would further distort the meaning of the word, inflate the parent's employee numbers, and create a misleading picture of its tax haven operations.

To avoid creating that type of misleading data, an S-K disclosure rule should allow registrants to count as "employees" only those individuals for whom the registrant pays social security, payroll, or other employment taxes. That approach would provide a bright line rule for defining "employees" versus "independent contractors," and ensure SEC reporting is consistent with federal tax requirements. The rule could also permit, but not require, registrants to provide separate totals for independent contractors.

Maintaining Off-Balance Sheet Disclosures. The Concept Release requests comment on whether it should maintain current disclosure requirements related to off-balance sheet arrangements.[24] It should, at a minimum, maintain the existing standards, but also consider expanding the reporting of off-balance sheet arrangements.

Item 303(a)(4) requires disclosure, in a separately-captioned section, of a registrant's "off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors."[25] The required disclosures apply to certain guarantees and derivatives as well as certain retained, contingent, or variable interests in unconsolidated entities, each of which may be mentioned in a financial statement's footnotes.

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[24] Concept Release, at 23951.
[25] Id. at 23949.

That off-balance sheet arrangements can endanger the financial viability of even a large U.S. corporation was established beyond doubt by the collapse of Enron Corporation, whose off-balance sheet exploits were detailed in reports and hearings by the Permanent Subcommittee on Investigations.[26] It is also clear that off-balance sheet activities continue today via corporate use of derivatives, guarantees, and unconsolidated entities. The risks created by such arrangements need to be understood, not only by investors, but also policymakers, regulators, and law enforcement. The key issue, then, is whether the recently enhanced off-balance sheet disclosures in corporate financial statements can take the place of the disclosures now mandated by Regulation S-K.

This letter respectfully recommends continuing the existing S-K off-balance sheet disclosures for two reasons. First, the separately captioned section mandated by Regulation S-K stands in stark contrast to the financial statement disclosures which permit off-balance sheet arrangements to be described in multiple entries scattered across a financial report. The consolidated S-K section more effectively draws attention to the nature and extent of a registrant's off-balance sheet arrangements and subjects them to appropriate scrutiny. Second, by requiring off-balance sheet arrangements to be discussed in one designated place, the S-K disclosure encourages registrants to provide a coherent explanation of those arrangements and related liabilities, including their business purpose and importance in the registrant's overall operations.

During my tenure there, the Permanent Subcommittee on Investigations made regular use of S-K disclosures on off-balance sheet arrangements when reviewing corporate SEC filings. We found the S-K disclosures provided more comprehensible and useful information than the more technical, disjointed disclosures in corporate financial statements.

The Commission should also consider extending the disclosure requirement to all off-balance sheet arrangements, rather than just those which registrants determine are "material to investors." During the recent financial crisis, many financial institutions ultimately absorbed significant, unexpected losses arising from off-balance sheet arrangements.[27] Many of those arrangements were not then, nor would they be likely now, viewed by company management or accountants as "reasonably likely to have a current or future effect on a registrant's financial condition … that is material to investors." Nevertheless, the arrangements ended up having profound, negative, material

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[26] See, e.g., "The Role of the Board of Directors in Enron's Collapse," S. Hrg. 107-511 (5/7/2002); "The Role of the Board of Directors in Enron's Collapse," S. Prt. 107-70 (7/8/2002); "The Role of the Financial Institutions in Enron's Collapse," S. Hrg. 107-618 (7/23, 30/2002), Volumes 1-2; "Oversight of Investment Banks' Response to the Lessons of Enron," S. Hrg. 107-871 (12/11/2002), Volumes I-II.

[27] See, e.g., "Test Case on the Charles: State Street Bank and the Volcker Rule," Rortybomb blog, Mike Konczal (6/15/2010), https://rortybomb.wordpress.com/2010/06/15/the-volcker-rule-and-the-saga-of-state-street-bank/ (examining State Street Bank's voluntary bailout of several off-balance sheet conduits with multi-billion dollar losses that threatened the bank's viability and eventually required a taxpayer-funded rescue).

impacts on even large registrants. Because the impacts of off-balance sheet arrangements are often difficult to predict, the Commission should consider requiring registrants to disclose all such arrangements, other than those deemed to be *de minimus*.

Because off-balance sheet arrangements continue to create corporate risks warranting scrutiny by investors, policymakers, regulators, and law enforcement, Regulation S-K should continue to mandate, and consider expanding, Item 303(a)(4) disclosures.

Maintaining Stock Repurchase Disclosures. The Concept Release requests comment on whether it should maintain current disclosure requirements related to stock repurchases.[28] It should.

Item 703 of Regulation S-K currently requires registrants to disclose all purchases of registered equity securities made by the registrant or an affiliated purchaser. The data must include "the total number of shares repurchased; the average price paid per share; the total number of shares purchased as part of publicly announced plans or programs; and the maximum number (or approximate dollar value) of shares that may yet be purchased under the plans or programs."[29]

In recent years, SEC registrants have engaged in extensive stock repurchasing, involving hundreds of billions of dollars each year. In 2014 alone, for example, U.S. corporations were reported to have spent about $700 billion on stock buybacks.[30] One study found that, from 2003 to 2012, stock buybacks consumed 54% of the earnings of corporations in the S&P 500 index.[31] Another study calculated that, from 2004 to 2014, corporate spending on stock buybacks totaled more than $6.9 trillion.[32]

Stock analysts keep close track of stock repurchasing activity, noting when corporations announce stock buyback plans, the extent to which they execute those plans, the impact on stock prices, and the extent to which corporate insiders buy or sell shares. Analysts also examine the extent to which stock buybacks may be propping up the price of particular stocks or affecting earnings per share. Others examine the tradeoffs between stock buybacks, dividend payouts, and corporate investments. Still others worry about the impact on the overall stock market if corporations were to reduce their buyback activities. Still another focus is whether corporate executives use buybacks to benefit themselves by increasing the value of their stock and stock option holdings.

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[28] Concept Release at 23967.
[29] Id. at 23965.
[30] "Stock Buybacks Are Killing the American Economy," *The Atlantic*, Nick Hanauer (2/8/2015)(citing data from Mustafa Erdem Sakinç of The Academic-Industry Research Network), at 1, http://www.theatlantic.com/politics/archive/2015/02/kill-stock-buyback-to-save-the-american-economy/385259/.
[31] "Profits Without Prosperity," Harvard Business Review, William Lazonick (9/2014), https://hbr.org/2014/09/profits-without-prosperity.
[32] Id.

Those issues are of interest to investors, financial analysts, academics, policymakers, regulators, and law enforcement, among others, all of whom likely make use of S-K disclosures on stock repurchasing. At the Permanent Subcommittee on Investigations, for example, we used stock repurchasing information when analyzing the consequences of a 2004 policy decision to allow U.S. corporations to repatriate offshore funds at an extremely low tax rate of 5.25%.[33] We found, as did many others, that the repatriated funds were used, not to increase employment, research and development, or corporate investments within U.S. borders, but primarily to repurchase shares of stock which, in turn, benefited corporate executives and other stockholders.[34]

Given the materiality of stock repurchasing activity, the Commission may want to consider enhancing the information provided by registrants. Possible enhancements include identifying the decision-making process and criteria used to determine the amount of stock buybacks in a given year, the source of funds used to make large stock repurchases, any impact on corporate indebtedness, and an annual comparison of the amounts spent on buybacks versus investments in corporate operations.

Due to the hundreds of billions of dollars involved with stock buybacks each year and the impact of that activity on investors, capital markets, and corporate investment activity as a whole, Regulation S-K should continue to require registrants to provide detailed information about stock repurchasing activities.

Strengthening Tax-Related Disclosures. The Concept Release requests comment on whether additional disclosures should be required for "[r]egistrants with tax strategies involving foreign jurisdictions."[35] At another point, it requests suggestions to improve disclosures related to risk.[36] At still another point, the Concept Release solicits recommendations for disclosures related to "public policy issues that are important to informed voting and investment decisions."[37] In response to all three requests, this letter respectfully recommends updating and strengthening the S-K disclosures related to tax.

Today, so many corporations are engaged in aggressive tax strategies, that the issue has captured the attention of investors, policymakers, tax authorities, and academics around the world. For example, a global investors' group with more than $45 trillion in assets under management, under the aegis of the United Nations and known as Principles for Responsible Investment (PRI), recently issued a report entitled, "Engagement Guidance on Corporate Tax Responsibility."[38] The PRI report explains that "[a]n

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[33] "Repatriating Offshore Funds: 2004 Tax Windfall for Select Multinationals," U.S. Senate Permanent Subcommittee on Investigations Majority Staff Report (10/11/2011), S. Prt. 112-27, https://www.gpo.gov/fdsys/pkg/CPRT-112SPRT70710/pdf/CPRT-112SPRT70710.pdf.
[34] Id. at 4, 20-27.
[35] Concept Release at 23935.
[36] Id. at 23956, 23960.
[37] Id. at 23972.
[38] "Engagement Guidance on Corporate Tax Responsibility: Why and How to Engage with Your Investee Companies," Principles for Responsible Investment (2016)

aggressive corporate approach to tax planning" can "create earnings risk and lead to governance problems; damage reputation and brand value; [and] cause macroeconomic and societal distortions."[39] It points out, among other problems, that corporations may make strategic decisions in an effort to dodge taxes rather than produce superior products or services, and that corporations may, by linking earnings to tax strategies, render their profits particularly vulnerable to tax rule changes and enforcement efforts. In May 2016, the Forum for Sustainable and Responsible Investment held an investors' conference with a panel focused on "Corporate Tax Issues and Investor Risk" examining, not only how corporations dodge taxes, but also the business, reputational, and legal risks involved.[40]

Investor concerns about tax-related risks have intensified, in part, due to increased corporate tax investigations and enforcement actions around the globe. Over the past five years, investigations conducted by legislatures, tax administrators, journalists, and non-profit organizations have exposed multiple tax-dodging schemes by well-known corporations.[41] At the Permanent Subcommittee on Investigations, we conducted year-long investigations that produced case studies involving Microsoft, Hewlett-Packard, Apple, and Caterpillar.[42]

In 2016, the European Commission actually invalidated a number of tax arrangements provided by some member governments, ruling that the arrangements

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(hereinafter "PRI Report"), https://www.unpri.org/news/pri-launches-engagement-guidance-on-corporate-tax-responsibility. The PRI Report noted that the group had received inquiries on tax issues from over 100 of its members. Id. at 5.

[39] PRI Report at 7.

[40] "Investing for the Next Generation," conference sponsored by the Forum for Sustainable and Responsible Investment (5/23-25/2016), http://www.cvent.com/events/investing-for-the-next-generation/event-summary-86564425a4e4472abcaebaad41c845ec.aspx.

[41] See, e.g., "Tax Avoidance – Google," London: House of Commons, Committee of Public Accounts, 9th Report 2013-14, http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/112/112.pdf; "Special Report: How Starbucks avoids UK taxes," UK Parliament Committee on Public Accounts, Minutes of Evidence, HC 716, Session 2012-13, Tom Bergin, (10/15/ 2012), http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm; "Explore the Documents: Luxembourg Leaks Database," International Consortium of Investigative Journalists, Matthew Caruana Galizia et al. (12/9/2014), https://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database; 2015 Walmart Report, http://www.americansfortaxfairness.org/files/TheWalmartWeb-June-2015-FINAL1.pdf.

[42] U.S. Senate Permanent Subcommittee on Investigations reports and hearings, "Offshore Profit Shifting and the U.S. Tax Code – Part 1 (Microsoft and Hewlett-Packard)," S. Hrg. 112-781 (9/20/2012), https://www.gpo.gov/fdsys/pkg/CHRG-112shrg76071/pdf/CHRG-112shrg76071.pdf; "Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.)," S. Hrg. 113-90 (5/13/2013), https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf; "Caterpillar's Offshore Tax Strategy," S. Hrg. 113-408 (4/1/2014), https://www.gpo.gov/fdsys/pkg/CHRG-113shrg89523/pdf/CHRG-113shrg89523.pdf.

constituted "illegal state aid" that disadvantaged the participating corporations' competitors, and ordering dozens of multinational corporations, including a few U.S. corporations, to pay additional tax.[43] In May 2016, France raided Google's premises in Paris, after lodging a tax assessment reported to be in the range of $1.8 billion; in June, Spain conducted a similar raid on Google's premises in Madrid.[44] On the other side of the world in Australia, a legislative committee held hearings on multiple instances of corporate tax dodging, while an Australian court issued a judgment against Chevron for unpaid taxes totaling $269 million.[45] In the meantime, U.S. tax authorities took new actions to close tax loopholes being abused by some multinational corporations.[46]

Academic research has also contributed to the focus on corporate tax dodging. A recent IMF Working Paper estimated that the long-run revenue loss from corporations declaring profits in tax havens was approximately 0.6% of GDP for OECD countries and 1.7% of GDP for developing countries.[47] In the United States, a recent academic study estimated that offshore profit shifting has likely cost the U.S. government between $77 and $111 billion in corporate tax revenues from 1983 to 2012, with tax revenue losses increasing substantially in recent years.[48] Another study found that 26 of the largest U.S. corporations, with combined profits of nearly $170 billion, paid no income tax at all over a five-year period from 2008-2012; some actually had negative tax rates due to tax refunds.[49] Studies also found that, overall, the corporate share of the U.S. federal tax

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[43] See, e.g., "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules," European Commission press release, No. IP/15/5880 (10/21/2015), http://europa.eu/rapid/press-release_IP-15-5880_en.htm.

[44] See, e.g., "Operation Tulip Takes Prosecutors Offline for Google Tax Raid," Bloomberg, Gaspard Sebag (5/30/2016), http://www.bloomberg.com/news/articles/2016-05-30/-operation-tulip-takes-prosecutors-offline-for-google-tax-raid; "Spanish authorities raid Google offices over tax," Reuters, Robert Hetz and Jesus Aguado (6/30/2016), http://www.reuters.com/article/us-google-probe-spain-idUSKCN0ZG1AC.

[45] See, e.g., "Corporate tax avoidance," report by Australian Senate Committee on Economics References, No. ISBN 978-1-76010-274-6 (8/18/2015), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report_part_1; "Chevron hits out at 'tax dodger' claims at fiery Senate inquiry," *Sydney Morning Herald*, Heath Aston (11/18/2015), http://www.smh.com.au/business/the-economy/chevron-hits-out-at-tax-dodger-claims-at-fiery-senate-inquiry-20151118-gl21v8.html.

[46] See, e.g., Inversions and Related Transactions, Treasury interim and proposed rule, 81 Fed. Reg. 68, at 20857 (4/8/2016); Treatment of Certain Interests in Corporations as Stock or Indebtedness, Treasury interim and proposed rule, 81 Fed. Reg. 68, at 20912 (4/8/2016).

[47] "Base Erosion, Profit Shifting and Developing Countries," IMF Working Paper WP/15/118, Crivelli, E., De Mooij, R., and Keen, M. (2015).

[48] "The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond," Kimberly Clausing (1/11/2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685442.

[49] "The Sorry State of Corporate Taxes: What Fortune 500 Firms Pay (or Don't Pay) in

burden has dropped by two-thirds, from about 32% in the 1950s to less than 10% today.[50]

Further heightening investor, regulatory, enforcement, and academic concerns are actions taken the international community to coordinate government efforts to curb multinational corporate tax abuse. Over the last two years, over three dozen countries, including the United States, have contributed to an ongoing OECD Base Erosion and Profit Shifting (BEPS) project, reaching consensus on 15 action plans to combat multinational corporate tax dodging.[51] Another international effort has focused on compelling corporations in the extractive industries to disclose publicly the payments they make to governments, including taxes.[52] The U.S. government has issued rules addressing aspects of both initiatives.[53] Perhaps as a result, Goldman Sachs analysts recently recommended that investors "[b]uy stocks with high US sales and high effective tax rates and avoid firms with high foreign sales and low tax rates."[54]

Some corporations, when confronted with intensifying scrutiny of their tax practices, have responded that they have a legal obligation to their shareholders to avoid paying tax. But many shareholders, investors, and their advisors disagree, vigorously opposing aggressive tax avoidance. The PRI report states, for example: "Responsible investors and well-run companies will acknowledge that tax is not simply a cost to be minimised, but a vital investment in the local infrastructure, employee-base and communities in which they operate."[55] An investment advisor managing $1.5 billion in assets put it this way:

> "All corporations and investors depend upon government services funded by tax revenues, including law enforcement, market regulation, judicial systems, infrastructure maintenance, public education, poverty alleviation, environmental protection and national defense. These indispensable services can only be funded by tax revenues. Aggressive tax avoidance measures are self-defeating as they

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the USA And What they Pay Abroad – 2008 to 2012," Institute on Taxation and Economic Policy and Citizens for Tax Justice (2/2014), at 3, http://www.ctj.org/corporatetaxdodgers/sorrystateofcorptaxes.pdf.

50 See "Revenue Statistics 2015 - United States," OECD (12/3/2015), http://www.oecd.org/tax/revenue-statistics-united-states.pdf; "Reasons for the Decline in the Corporate Tax Revenues" Congressional Research Service (12/8/2011), at 1.

51 "BEPS 2015 Final Reports," OECD, http://www.oecd.org/ctp/beps-2015-final-reports.htm.

52 See the Extractive Industries Transparency Initiative (EITI), https://beta.eiti.org/; Section 1504 of the Dodd-Frank Wall Street and Consumer Protection Act of 2010, P.L. 111-203.

53 See Country-by-Country Reporting, Treasury final rule, 81 Fed. Reg. 126 (6/30/2016), at 42482; Disclosure of Payments by Resource Extraction Issuers, SEC final rule, https://www.sec.gov/rules/final/2016/34-78167.pdf.

54 See "Goldman on how to invest 2016," *Politico*, Ben White (5/23/2016), http://www.politico.com/tipsheets/morning-money/2016/05/goldman-on-how-to-invest-2016-214424 (citing Goldman Sachs Weekly Kickstart email to investors).

55 PRI report, at 5.

undermine these critical government services."[56]

This disconnect between corporate managers and many shareholders and investors makes accurate, useful tax disclosures even more important to inform the ongoing debate.

S-K tax disclosures are important not only in assessing the nature and risks associated with corporate tax strategies, but also in assessing the overall value of many multinational corporations. Without better data on a registrant's tax strategies, effective tax rates, and risk-taking, investors, lenders, business partners, competitors, regulators, and others lack key information needed to conduct an appropriate valuation of a parent corporation and its constituents.

The role of tax in corporate valuations was recently highlighted in an ongoing, high-profile legal dispute over the value of Dell Inc., a large U.S. public company.[57] In that case, the Delaware Chancery court found that "two highly distinguished scholars of valuation science, applying similar valuation principles, … generated opinions that differed by 126%, or approximately $28 billion. This is a recurring problem."[58] While the court attributed the $28 billion difference to several factors, one key factor involved a dispute over the projected future tax rate that would apply to Dell's offshore earnings.[59] One expert projected a future effective tax rate of 35%, the other a rate of 21%. The court resolved the dispute, not by using tax information in Dell's publicly available SEC filings, but by evaluating nonpublic information related to Dell's past effective tax rates. The Dell case is powerful evidence that existing S-K tax-related disclosure requirements are inadequate to address even the most fundamental and important of investor concerns — valuing corporate investments.

The combined impact of aggressive corporate tax dodging, international condemnation of corporate tax abuses, intensifying tax-related investigations and enforcement actions, the increased role of tax in corporate valuations, and heightened investor focus on a variety of tax issues has substantially increased the importance of tax-related disclosures in SEC filings. Better tax-related disclosures would help investors, policymakers, regulators, law enforcement, and the tax-paying public to analyze and understand corporations' tax practices, liabilities, and risk-taking.

This letter respectfully suggests that, to respond to the increased concerns of investors and better protect the public interest, S-K disclosures on tax matters be updated and strengthened. At least four actions could be taken to improve disclosures related to

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[56] Submission by Domini Social Investments LLC, before the Independent Commission for the Reform of International Corporate Taxation (3/18/2015), at 5, http://www.icrict.org/wp-content/uploads/2015/04/Adam-KANZER-statement.pdf.
[57] *In re Appraisal of Dell Inc.*, Case No. 9322-VCL, Memorandum Opinion, (Del. Ch. 5/31/2016), http://www.potteranderson.com/media/experience/706_Appraisal%20of%20Dell%205%2011%2016.pdf.
[58] Id. at 99.
[59] Id. at 105-107.

corporate tax practices, liabilities, and risks.

Tax Policy Disclosures. First, Regulation S-K should require registrants to include in their annual filings a description of their overall tax policy and principles, including a mandatory description of the extent to which the registrant relies on aggressive tax planning. Mandating that type of disclosure is supported by a number of investor and public interest groups and would help resolve current disagreements over appropriate corporate conduct.[60] It has also long been an element of the OECD Guidelines for Multinational Enterprises, which calls on corporate boards to "proactively adopt appropriate tax policy principles."[61] Some governments, such as the United Kingdom, are already considering proposals to require corporate tax policy disclosures.[62] The SEC should follow suit.

To ensure the descriptions are useful, Regulation S-K should require registrants, as part of their tax policy disclosures, to discuss several specific indicators of aggressive tax planning. One key indicator is the dollar value of any "uncertain tax positions," also known as "unrecognized tax benefits," listed in a registrant's financial statements under Generally Accepted Accounting Principles (GAAP).[63] Uncertain tax positions are those which the registrant has determined are more likely than not to fail a challenge by the IRS. Corporations are not prohibited from taking such tax positions, but those positions are, by definition, aggressive. Since GAAP already requires registrants to identify and calculate the dollar value of their uncertain tax positions, discussing the size and nature of those positions would impose little additional costs on registrants, while providing investors, policymakers, regulators, and law enforcement with useful information about registrants' tax practices and the attendant risks.

Two additional key indicators are the extent to which a registrant uses tax shelters or strategies involving tax havens, and employs confidential tax incentives or sweetheart deals provided by foreign jurisdictions, to limit tax expenditures. Such tax arrangements should be disclosed and discussed in the tax policy statement. A third key indicator is whether the registrant has an effective foreign tax rate that falls far below statutory norms, such as an effective foreign tax rate approaching or below 10%. That type of

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[60] See, e.g., id. at 10; PRI Report, at 17; "Responsible corporate tax practices," report by Nordea Asset Management (3/2014), at 10, https://www.nordea.com/Images/36-70003/responsible_corporate_tax_practices_mar_2014.pdf; tax policy statement template, Fair Tax, a U.K. nonprofit, http://www.fairtaxmark.net/criteria/templates/; "Tax Transparency and Multinational Corporations: Issues for Responsible Investors," Sustainalytics (8/2013), http://www.sustainalytics.com/node/1730/lightbox2.

[61] OECD Guidelines for Multinational Enterprises (2011), at 61, ¶ XI.10, http://www.oecd.org/daf/inv/mne/48004323.pdf.

[62] See U.K. Finance Bill 2016, Clause 149, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510732/Volume_2_Clauses_82_to_179.pdf.

[63] See FASB Interpretation No. 48, "Accounting for Uncertainty in Income Taxes," (6/2006), http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820931560&blobheader=application/pdf.

extremely low tax rate signals the use of aggressive tax planning and should also be acknowledged and explained. Finally, the tax policy statement should describe the internal controls and governance procedures used by the registrant to ensure that its tax practices actually align with its tax policies. Each of those disclosures would provide investors, policymakers, regulators, law enforcement, and the tax-paying public with material information about registrants' tax practices and related risks.

Country-by-Country Reports. Second, Regulation S-K should require registrants to submit a new annual exhibit with basic corporate information on a country-by-country (CbC) basis, including for each jurisdiction, the profits or losses incurred before taxes, number of employees, stated capital, tangible assets, effective tax rate, and taxes accrued and paid. The specific elements to be included in the new exhibit could be modeled after those already set out in a recently finalized Treasury rule requiring large U.S. multinational corporations to file annual, confidential CbC reports with the IRS.[64]

CbC reporting is gaining ground around the globe as a way to obtain currently unavailable, basic comparative data about corporate activities and tax practices in individual countries. Financial institutions in the European Union began including mandatory CbC reports in their 2014 public filings, with no negative repercussions.[65] Corporations in the extractive industries have begun providing similar public reports in the European Union and are scheduled to do the same in the United States by 2018, under the Commission's newly finalized extractive industries' rule.[66] In addition, under the new Treasury rule, large U.S. multinational corporations will begin providing annual CbC reports to the IRS on a confidential basis in the next year or two.[67] Additional countries are expected to require similar corporate reports to their tax authorities in accordance with the OECD BEPS project. Given this emerging, worldwide patchwork of CbC reporting requirements, the Commission is perfectly positioned to develop a uniform disclosure protocol that could be used by all registrants to provide CbC data.

CbC reports would provide timely, reliable corporate data of tremendous value to investors, policymakers, regulators, law enforcement, and the public. Investors could use the data to evaluate corporations' activities, investments, revenues, and risks over time in a more systematic, low-cost way than is possible today. Policymakers, regulators, and

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[64] See Country-by-Country Reporting, Treasury final rule, 81 Fed. Reg. 126 (6/30/2016), at 42482.

[65] See EU Capital Requirements Directive, Directive No. 2013/36/EU, Article 89, "Country-by-country reporting" (requiring banks and investment firms to publicly disclose certain information for each country in which they operate, including the "type of activities, turnover, full-time employees, profit/loss before tax, tax paid, public subsidies received"), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.176.01.0338.01.ENG.

[66] Disclosure of Payments by Resource Extraction Issuers, SEC proposed rule, 80 Fed. Reg. 246 at 80058 (12/23/2015).

[67] See Country-by-Country Reporting, Treasury final rule, 81 Fed. Reg. 126 (6/30/2016), at 42482.

law enforcement could use the data, not just to evaluate individual corporations, but also to analyze issues across a broad range of market concerns, including issues involving tax policy, trade, capital investments, cross-border capital and monetary flows, international development, employment trends, offshore jurisdictions, money laundering activities, and more. CbC reports would also provide the private sector, academic community, and the general public with invaluable new analytical tools. Adding CbC reporting requirements to registrants' S-K disclosures would clearly be in the public interest.

Effective Tax Rates. Third, Regulation S-K should strengthen disclosures related to a set of figures now included in registrants' financial statement footnotes specifying their "provisions" to pay U.S. federal and state taxes as well as "foreign" taxes.[68] That data is currently used by many investors and analysts to calculate a registrant's "effective tax rates" both here and abroad and, if the resulting tax rates are especially low, to flag registrants that may be employing aggressive tax strategies.[69]

Several problems affect how the financial statement tax data is currently being used. First, some registrants may be manipulating the reported figures to produce an artificially high U.S. effective tax rate. One tactic is for the registrant to designate a large amount of its foreign earnings as likely to be repatriated to the United States, increase its "provision" of funds to pay for the anticipated taxes, and as a result, claim a high U.S. effective tax rate, even though the foreign funds are never actually repatriated and the U.S. tax is never actually paid.[70] The slippage arises, because GAAP requires registrants to report on the funds they've set aside to pay anticipated taxes rather than on the amount of taxes actually paid. A completely different aspect of the problem involves registrants suspected of exaggerating the amount of their offshore earnings "permanently reinvested" abroad in order to reduce the amount of money they have to set aside to pay U.S. taxes, report an artificially low effective U.S. tax rate, and thereby inflate their earnings.[71]

A second set of problems involves registrants' non-U.S. tax data. GAAP calls for registrants to provide a single figure representing the funds set aside to pay all "foreign" or non-U.S. taxes. That figure necessarily reflects the taxes owed in multiple – perhaps dozens – of countries with widely varying tax rates. The composite total is virtually the only data available for analysts to calculate a single, overall non-U.S. effective tax rate for the registrant. The resulting "foreign effective tax rate" is based upon an amalgam of undisclosed foreign tax data from an unknown number of countries. That amalgamated

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[68] See Income Tax Note to registrants' financial statements.

[69] See, e.g., PRI Report, at 15.

[70] For more explanation of this tactic, see PRI Report, at 16.

[71] See, e.g., "Permanently Reinvested Foreign Earnings, Taxes, and Earnings Management," *The Accounting Review*, Linda K. Krull, Vol. 79, at 745-767 (7/2004), https://www.jstor.org/stable/3203277?seq=1#page_scan_tab_contents; "Foreign Tax Surprise Like Disney's Have SEC Seeking Sunlight," Bloomberg, Dave Michaels and Alan Katz (3/5/2015), http://www.bloomberg.com/news/articles/2015-03-05/foreign-tax-surprises-like-disney-s-have-sec-seeking-sunlight)(describing SEC review questioning Disney's tax disclosures).

foreign tax rate is of limited value in analyzing the registrant's actual tax risks, given that taxes are assessed and enforced on a country-by-country basis and vary significantly from jurisdiction to jurisdiction. In addition, it is a poor way to gauge a registrant's non-U.S. tax practices and risk-taking compared to its peers.

The best solution to these problems would be to require country-by-country reporting, as described earlier. The CbC approach would require registrants to specify, not the amount of funds set aside to pay anticipated taxes as required by GAAP, but the amount of taxes actually accrued and paid in each jurisdiction. It would provide analysts with much more accurate data about a registrant's tax practices in a specific country, placing the registrant's tax payments in context with other information about its in-country operations, and facilitating analysis of whether the registrant's taxes match where its economic activities and value creation occur. If profits are declared in tax havens where the registrant has few employees and little capital, the CbC disclosures would also raise red flags about aggressive tax practices.

A less effective alternative would be to require registrants to calculate and publicly disclose their effective federal, state, and foreign tax rates, rather than compel analysts to derive those rates using the data now available in registrants' financial statements. If Regulation S-K were to standardize the methods used by registrants to calculate those three effective tax rates, the result would be more accurate data with increased comparability among peers. While that approach would not remedy the problems inherent in using an amalgamated foreign tax rate, it would still represent an improvement over the status quo and provide more useful information than is currently available to investors, policymakers, regulators, law enforcement, and the tax-paying public.

Foreign Regulatory Disclosures. Finally, the Concept Release asks whether registrants with "tax strategies involving foreign jurisdictions" should be required to describe the "foreign regulations that affect their business."[72] Such disclosures would not only be complex, time-consuming, and expensive to prepare, it is unclear how much regulatory descriptions would help users of S-K filings to understand or analyze a registrant's foreign tax risks.

A better approach would be to revise Item 103 to require prompt disclosure of any foreign tax audits with negative findings or any actions by foreign tax authorities that might result in tax assessments or penalties over a specified amount.[73] That type of concrete information on actions taken by foreign tax authorities would provide a better sense of the tax risks actually facing the registrant in other countries.

[72] Concept Release, at 23936.

[73] By way of analogy, the SEC currently requires registrants to disclose government actions involving environmental laws that the registrant "reasonably" believes may result in penalties of $100,000 or more. C.F.R. 229.103, Instructions to Item 103, ¶ 5.

Given widespread corporate tax dodging, the risks involved with intensifying government efforts to halt and punish corporate tax abuses, the role of tax in corporate valuations, and the increasing global focus on corporate tax equity issues, taking this opportunity to update and strengthen S-K disclosures on tax-related matters would be a wise use of limited Commission resources. The Securities Exchange Act of 1934 states explicitly that one of the key purposes of its system of public reports is "to protect … the Federal taxing power."[74] More than eight decades later, this statutory objective is no less important. Better S-K tax-related disclosures would provide investors, policymakers, regulators, law enforcement, academics, analysts, and the public with key information needed to assess a registrant's tax policies, practices, liabilities, and risk-taking.

Limiting Scaled Disclosures. The Concept Release requests comment on how it should handle its longstanding policy of "scaling" disclosure requirements to reduce reporting requirements for smaller registrants.[75] The Commission is to be commended for taking a more thoughtful approach to this issue than simply calling for even less disclosure by some registrants.

Charts included in the Concept Release document the reduced disclosure rules that now apply to various types of corporations.[76] The Concept Release describes how the Commission has properly refused to allow reduced disclosures by registrants with track records marred by late filings, fraud, or other misconduct. The Commission is correct to consider expanding the categories of registrants barred from providing reduced disclosures in order to prevent those registrants from taking advantage of investors.

Smaller corporations are not immune to fraud or misconduct. Neither are they immune to the need for internal controls that ensure their financial reports accurately reflect their activities. U.S. capital markets have flourished, in part, because the investing public trusts S-K disclosures to guide their investment decisions. Allowing smaller registrants to cut corners or omit important information simply to avoid reporting costs is a short-sighted strategy that risks tarnishing the trustworthiness of U.S. capital markets. If smaller registrants want to be able to use the United States to solicit funds from investors worldwide, they should be required to provide the type of data investors need to protect their investments and that policymakers, regulators, and law enforcement need to protect market integrity.

Expanding the use of scaled disclosures for registrants would be unwise. Reducing the exceptions to SEC disclosures, including for emerging corporations, would be a better use of Commission resources.

Mandating Disclosure of Political Spending. The Concept Release requests comment on whether Regulation S-K should address "specific sustainability or public

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[74] Securities Exchange Act of 1934, Section 2.
[75] Concept Release at 23987.
[76] Id. at 23986, 23989.

policy issues that are important to informed voting and investment decisions" and, if so, what issues should be addressed.[77]

This letter recommends one additional area of disclosure -- on political spending, meaning corporate expenditures to lobby for or against government actions or policies, to advocate for or against ballot initiatives or bond issues, or to elect officials on the federal, state, or local level.

Right now, it is extremely difficult to find out when and to what extent registrants spend corporate funds on political objectives. That registrants are making such expenditures is clear. The Chamber of Commerce, which is funded by corporations across the country, reported spending $124 million on lobbying activities in 2014, but will not disclose which corporations funded which initiatives.[78] Between 2009 and 2015, Coca-Cola, Pepsico, the Dr. Pepper Snapple Group, and the American Beverage Association reportedly spent at least $106 million to defeat legislative and ballot initiatives to tax sugar drinks or require warning labels on containers.[79] Between 2005 and 2014, Verizon, AT&T, Google, Comcast, and the National Cable and Telecommunications Association reportedly spent at least $84 million advocating for or against proposed net neutrality rules.[80] During the 2014 Congressional election cycle, anonymous donors contributed $173 million to 501(c) nonprofits for federal campaign spending, but no information is publicly available about whether those funds came from businesses, unions, or others.[81] In 2014, according to one media report, funding for ballot initiatives came primarily from corporations that provided more than three-quarters of the $266 million spent by the top 50 donors.[82]

Business owners have a right to know if their business is spending their funds to help elect politicians or pursue political objectives. Investors have made clear that they, too, want access to that information as part of their investment decisionmaking process. So do policymakers, regulators, and academics as shown by the over 1.2 million comments that the SEC has already received on Petition 4-637 to require S-K disclosures on the use of corporate resources for political activities. Those comments were filed by

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[77] Id. at 23972.
[78] See Center for Responsive Politics, 2014 analysis of Chamber of Commerce, https://www.opensecrets.org/lobby/clientsum.php?id=D000019798&year=2014.
[79] "Big Soda vs. Public Health How the Industry Opens Its Checkbook to Defeat Health Measures," report by Center for Science in the Public Interest (2015), https://cspinet.org/new/pdf/big-soda-vs-public-health-report.pdf.
[80] "Who's putting the most money against net neutrality?" Daily Dot Politics, Lee Drutman and Zander Furnas from the Sunlight Foundation (9/5/2014), http://www.dailydot.com/politics/lobbyists-net-neutrality-fcc/.
[81] "Corporations Open Up About Political Spending," *New York Times*, Eduardo Porter (6/9/2015), http://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html?_r=0.
[82] "Citizen Ballot Initiatives no Match for Corporate Counter-Spending," Allgov, (2/9/2015), http://www.allgov.com/news/where-is-the-money-going/citizen-ballot-initiatives-no-match-for-corporate-counter-spending-150209?news=855612.

not only retail and institutional investors, but also by Members of Congress, former SEC Chairs and Commissioners, State Treasurers, and prominent scholars.

Ensuring that political spending decisions are made transparently, involve reasonable amounts, and align with reasonable business objectives, while enabling investors, employees, and society as a whole to hold management accountable for their spending decisions, is important not only for corporate governance, but also to protect our capital markets, economy, and functioning democracy.

When the Supreme Court ruled in the 2010 *Citizens United* case that corporations may spend shareholder money to influence politics, a key proposition underpinning its analysis was that shareholders and the broader society would have timely and reliable information about how that money was spent, so they could hold corporate executives and elected officials accountable. The Court wrote:

> "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are ''in the pocket' of so-called moneyed interests.'"[83]

Six years later, however, the Commission has failed to issue any rules mandating the necessary corporate disclosures, and few corporations have provided them on their own. The Concept Release provides a critical opportunity to remedy the SEC's failure to act.

Thank you for this opportunity to comment on the Concept Release to improve Regulation S-K business and financial disclosures.

Sincerely,

Elise J. Bean
Former Staff Director and Chief Counsel
U.S. Senate Permanent Subcommittee on Investigations

[83] *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).