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

Subject: File No. S7-06-16

October 3, 2016

Dear Mr. Fields:

I appreciate the opportunity to comment on the Concept Release on Disclosure Effectiveness ("Concept Release"). The comment process has generated significant support for additional disclosure of environmental, social and governance (ESG) matters.[1] For the most part, these letters reflect a consensus on three basic points.

First, the existing reporting regime with respect to ESG disclosure does not adequately meet the needs of shareholders and other investors. While some commenters believe that the problem can be solved through increased guidance and enforcement by the Commission, most do not. Instead, changes to the disclosure regime are needed.

Second, there is general agreement that, in addition to ensuring the disclosure of material information (however defined),[2] SEC requirements should be designed to promote uniformity, reliability and comparability of ESG disclosure.

Third, agreement exists on the need for a more robust regime for the disclosure relating to a company's sustainability.[3] Such analysis should take into account sustainability over a longer term horizon than is typically the case, address ESG issues where relevant, and include a qualitative analysis of efforts to reduce or remediate threats to sustainability.

[1] According to one report, the Commission had received over 26,000 comments as of August 16, 2016. *See* Joint Report, Towards a Sustainable Economy, A Review of Comments to the SEC's Disclosure Effectiveness Concept Release, Sept. 2016, at 8-9 *available at* http://www.citizen.org/documents/SustainableEconomyReport.pdf According to the Report, "Commenters expressed clear support for expanded and enhanced disclosures". *Id.* at 9.

[2] Investors sometimes refer to the disclosure of "non-financial factors." *See* Letter from Calvert Investments, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-245.pdf ("Investors increasingly consider non-financial factors when assessing companies' long-term performance.").

[3] Sustainability involves matters that can impact the long-term success of the company and the economy. These matters relate to corporate governance, international tax strategies, climate change, political spending, derivatives exposures, investments in human capital, and other areas of demonstrated interest for investors and the public. *See, e.g.*, Letter from AFL-CIO, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-305.pdf.

To address these areas of consensus, the Commission should provide additional guidance on the applicability of existing disclosure obligations to ESG matters, adopt a prescriptive regime that requires disclosure of specific ESG matters that are important to broad segments of the investor community and common to all or most public companies, and add an additional Item to Regulation S-K that specifically addresses sustainability primarily through a principles based disclosure regime.

I. ESG Disclosure and the Commission

Largely relying on statements from a Release issued in the 1970s,[4] the Commission has taken the position that ESG disclosure is required if material.[5] Because the periodic reports already mandate disclosure of "material" information,[6] the Commission has generally viewed the existing reporting regime as sufficient with respect to disclosure of these matters.[7] Commission initiatives have therefore been limited to guidance on the applicability of these reporting requirements to particular ESG issues. This approach, however, does not take into account the well-recognized need for comparability of disclosure, a concept not tied to materiality, or the Commission's traditional view that a significant, short term financial impact is not always necessary to establish the materiality of information to investors.[8]

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[4] *See* Securities Act Release No. 5627 (Oct. 14, 1975) ("No showing has been made in this proceeding, particularly in light of the more than 100 areas of social information identified by persons responding to our request for comments, that disclosure of information describing corporate social practices should be specifically required of all registrants. This is not to say, however, that, in specific cases, some information of this type might not be required in order to make the statements in a filing not misleading or to make the filing otherwise complete with respect to information investors appropriately might need to make informed investment or voting decisions.").

[5] *See* Concept Release, Exchange Act Release No. 77599 (April 13, 2016) ("While the Commission [in 1975] concluded that its proceedings did not support a specific requirement for all registrants to disclose information describing 'corporate social practices,' the Commission noted that in specific cases, some information of this type might be necessary in order to make the statements in a filing not misleading or otherwise complete."). *See also* Mary Jo White, Chair, Securities and Exchange Commission, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability, Keynote Address via videoconference International Corporate Governance Network Annual Conference San Francisco, California, June 27, 2016, *available at* https://www.sec.gov/news/speech/chair-white-icgn-speech.html ("I will start with the baseline. Our rules and guidance are clear that, to the extent issues about sustainability are material to a company's financial condition or results of operations, they must be disclosed.").

[6] 17 CFR 240.12b-20.

[7] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 61469 (Feb. 2, 2010) ("This interpretive release is intended to remind companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and provided to investors."). *See also* Securities Act Release No. 5627 (Oct. 14, 1975) ("The Commission's rules already require, in addition to specific disclosures, the disclosure of any other material information.").

[8] In the 1975 Release, the Commission suggested that disclosure of environmental matters would only be required if material. Yet the same release proposed an amendment to Regulation S-K that would have required the disclosure of "a list of the registrant's most recently filed environmental compliance reports which indicate that the registrant has failed to satisfy, at any time within the previous twelve months, environmental standards established pursuant to a federal statute." Securities Act Release No. 5627 (Oct. 14, 1975). The proposal was prescriptive and premised on a finding of materiality. The Commission, therefore, recognized that materiality was not the exclusive basis for mandatory disclosure of environmental matters.

A. The Need for Comparability

Limiting ESG disclosure to matters deemed material fails to take into account other goals embodied in the periodic reporting process. Regulation S-K, the uniform set of instructions for proxy statements, periodic reports and other SEC filings,[9] seeks to, among other things, promote the ability of investors to make comparisons "across registrants."[10] Comparability requires all companies, or all similarly situated companies, to disclose the prescribed information, irrespective of its materiality to each given issuer.

Comparability allows investors to categorize and sort companies on the basis of commonly reported criteria. Investors can identify outliers or companies that disclose data inconsistent with similarly situated issuers. The information can provide a starting point for additional research that leads to material information.

Comparability has been central in the efforts of the Commission to promote IFRS,[11] develop rules governing disclosure of "pay for performance"[12] and resource extraction payments,[13] and regulate mutual fund disclosure.[14] Disclosure requirements for executive compensation have been built around the principle of comparability[15] as have at least some industry guides.[16] Indeed, the growing effort to more fully integrate structured data into the

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[9] Regulation S-K is a "repository for the uniform disclosure requirements of documents filed with the Commission". Securities Act Release No. 6383 (March 3, 1982).

[10] Exchange Act Release No. 74835 (April 29, 2015) ("Our proposal is designed, in part, to enhance comparability across registrants."). *See also* Exchange Act Release No. 38223 n. 45 (Jan. 31, 1997) ("To facilitate comparison across registrants, however, Item 305(a) requires that registrants describe the model and assumptions used to prepare quantitative market risk disclosures.").

[11] Exchange Act Release No. 58960 (Nov. 14, 2008) ("The Commission has long expressed its support for a single set of high-quality global accounting standards as an important means of enhancing this comparability.").

[12] Exchange Act Release No. 74835 (April 29, 2015) (rejecting suggested approach in pay for performance disclosure that would provide for increased management flexibility; "we believe that such flexibility would limit comparability across registrants, making the disclosure less useful to shareholders.").

[13] Exchange Act Release No. 78167 (June 27, 2016) ("Thus, using a fiscal year reporting period should promote consistency and comparability across payment transparency regimes.").

[14] Exchange Act Release No. 35546 (March 29, 1995) (with respect to mutual funds; "the SEC has taken significant steps designed to improve the understandability and comparability of fund disclosure of performance and expenses.").

[15] Exchange Act Release No. 53185 (Jan. 27, 2006) ("Improved disclosure under the proposals of certain forms of compensation, such as stock-, option- and incentive plan-based compensation, as well as retirement and other post-employment compensation, combined with the ability of investors to track the elements of executive and director compensation and the relative weights of those elements over time (and the reasons why companies allocate compensation in the manner that they do), would enable investors to make comparisons both within and across companies. ").

[16] *See* Exchange Act Release No. 20068 (August 11, 1983) ("A significant change in the amended guidelines for disclosure of nonaccrual, past due and restructured loans is the exclusion of certain instructions present in the current Guide which allowed for the use of different criteria, and permitted exclusion of certain loans. This change has the effect of enhancing comparability of disclosures among registrants. Users of this information, particularly financial analysts, have stressed the importance of comparability in this area."). *See also* Exchange Act Release No. 20186 (Sept. 16, 1983) ("The Commission was concerned that the extensive diversity in current practice created serious problems of comparability among companies which are in essentially similar circumstances and ostensibly use the same method of accounting for their oil and gas producing activities.").

disclosure regime is at least in part designed to facilitate comparisons across registrants on a cost-effective basis.[17]

The goal of comparability does not necessarily result in the disclosure of excessive amounts of unimportant data. Prescriptive disclosure requirements can include di minimis thresholds that reduce the amount of disclosure. Item 404 of Regulation S-K, for example, includes a di minimis threshold that allowed issuers to eliminate the disclosure of transactions totaling less than \$120,000.[18]

B. Concept of Materiality

In determining the materiality of ESG matters, the definition is not limited to matters that can have a significant short term financial impact on a company's earnings or operations. Materiality has been defined as information important to a reasonable investor or shareholder.[19] Shareholders have often viewed information that does not have an immediate financial impact on the company as important. Information related to managerial integrity is one example.[20] Similarly, qualitative factors can render information material even when having little or no impact on a company's earnings.[21]

Nor is materiality limited to the impact on the earnings or operations of a single company. Information may be important to a reasonable investor through a relative assessment across issuers. This is particularly true with respect to risk assessment. Companies with high greenhouse gas emissions relative to other companies may be at greater risk of regulation[22] or loss of government contracts.[23] Expenses relating to cybersecurity may or may not have a significant financial impact on a particular company but, when compared to other similarly

[17] *See* Concept Release, Exchange Act Release No. 77599 (April 13, 2016) ("Some investors seek structured data as it enhances their ability to use technology to process and synthesize information, allowing for more timely and granular analysis of financial information, including comparative and trend analysis.").
[18] Item 404(a), 17 CFR 229.404(a) (defining as di minimis any transaction where "the amount involved exceeds \$120,000"). The di minimus threshold has gradually been increased, most recently in 2006. *See* Securities Act Release no. 8732A (Aug. 29, 2006) (increasing the threshold from \$60,000 to \$120,000 "to adjust for inflation").
[19] *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.")
[20] *See* Securities Act Release No. 5949 (July 28, 1978) ("The Commission believes that information reflecting on the integrity of management is material to investment and corporate suffrage decision-making. The Commission believes that an evaluation of management is an important part of those decision making processes."). Likewise, slight impacts on earnings can be materials. In the 1970s, the Commission took the positon that violations of material campaign financing laws by issuers were material, even though they typically involved nominal amounts. *See* Exchange Act Release No. 8265 (March 8, 1974).
[21] *See* SAB 99, August 12, 1999 ("Qualitative factors may cause misstatements of quantitatively small amounts to be material"), *available at* https://www.sec.gov/interps/account/sab99.htm Courts have agree with this approach. *See* J. Robert Brown, Jr., 2A.03 Management's Discussion and Analysis, **The Regulation of Corporate Disclosure** (3rd Edition) (updated in 2016).
[22] *See infra* note 77.
[23] Comments from the EPA, July 20, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-176.pdf ("EPA anticipates that the demand for products and services sold by publicly traded companies in the federal government supply chain will be impacted by new or updated sustainability requirements as part of the new federal Common Acquisition Platform").

situated companies, may be important in assessing risk.[24] The likelihood of regulatory action with respect to overseas tax liability may depend at least in part on the amount of overseas income relative to other companies.

II. Reforms

A. The Importance of "Investor's Judgement"

Exclusive reliance on materiality leaves disclosure entirely to "management's judgment."[25] Thus, management determines the relative importance of information to reasonable investors and shareholders. Yet as the comment letters to the Concept Release indicate,[26] companies often views ESG information as immaterial on a categorical basis. The information is

[24] *See* Letter from Senator Warner, Sept. 26, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-371.pdf

[25] *See* Concept Release, Exchange Act Release No. 77599 (April 13, 2016) ("Some of our rules employ objective, quantitative thresholds to identify when disclosure is required, or require registrants to disclose information in all cases. These requirements are sometimes referred to as 'prescriptive' or 'rules-based' because they rely on bright-line tests rather than management's judgment to determine when disclosure is required.").

[26] At least one commenter tacitly admitted that the information could affect investor decisions but objected to the perceived consequences. The letter contended that the disclosure could "drive investors" in the wrong direction or produce "regrettable actions" by the financial community. Letter from American Chemistry Council, July 19, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-225.pdf ("An unfair comparison could drive investors towards firms that appear to have minimal ESG impacts, while failing to recognize firms that appear to have broader impacts also provide essential products, including to the less impactful firms. A one-size-fits-all mandated reporting structure may lead to regrettable actions by the financial community, thereby defeating the purpose of such reporting.").

not important to "reasonable" investors[27] but is sought by "special interest"[28] or "fringe" investors[29] or those convinced by "thought leaders" to act against their economic self-interest.[30]

Reliance on "management's judgment" in these circumstances has therefore resulted in an underreporting of important and meaningful information on ESG matters.[31] Moreover, the

[27] Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-257.pdf ("While such matters may be increasingly significant to voting and investment decisions of certain groups of investors - i.e. special interest groups, they are, for the most part, not material to an investment decision made by a 'reasonable investor' - i.e., based on an investor's economic interest."); Letter from Davis Polk, July 22, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-313.pdf ("In this regard, we note that a reasonable investor makes investment and voting decisions based upon maximizing financial value."); Letter from Business Roundtable, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-208.pdf (with respect to "mandatory disclosures related to sustainability and public policy issues" the disclosure "may be of interest to some investors, but would not be material to reasonable investors as a group").

[28] *See* Letter from Exxon Mobil, August 9, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-355.pdf ("The concept of 'reasonable investor' should govern the SEC's consideration of disclosure requirements, which necessarily should exclude disclosures promoted by narrowly -focused special interest groups. The SEC should avoid promoting political, social, and public policy objectives, or attempting to drive related corporate behavior advocated by special interest groups."). *See also* Letter from American Chemistry Council, *supra* note 26 ("the concept of the 'reasonable investor' should govern the SEC"s consideration of disclosure requirements, which necessarily should exclude those promoted by narrowly-focused special interest groups").

[29] US Chamber of Commerce, July 20, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-173.pdf ("The SEC disclosure regime should not be an avenue for special interest activists to impose their agenda on shareholders at large."); Letter from Wilson Sonsini, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-256.pdf ("ultimately only a small number of niche investors would alter an investment or voting decision based on ESG matters not clearly tied to demonstrable financial risks"); Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, *supra* note 27 ("there are practical concerns to starting down the slippery slope of requiring ESG disclosure for societal reasons. The Commission cannot possibly adopt rules that address the disclosure desires of every special interest group."); *see also* FedEx, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-259.pdf ("ESG issues are often promoted by or relevant to only a small subset of investors or other stakeholders.").

[30] Letter from Wilson Sonsini, *supra* note 29 ("we have concerns that the purported increase in investor interest in environmental, social or governance ("ESG") matters and calls for additional ESG disclosure have been amplified more by socially and ideologically-driven thought leaders than driven by actual demonstrable analysis of the materiality of ESG matters to a company's financial performance or value of securities.").

[31] Letter from Domini Social Investments, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-221.pdf ("We can no longer afford to rely exclusively upon management's judgment of risk, management's definition of materiality, and issuer-focused disclosure in a world where investors are broadly diversified and subject to a variety of portfolio-level risks. A proper report should aim to provide investors with sufficient information to make truly sustainable capital allocation decisions."). *See also* Letter from Oblate Investment Pastoral Trust, July 19, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-164.pdf ("The current framework, which leaves it up to the corporation to determine when such an item is material, however, has not produced the comprehensive and comparable information that we are seeking.").

disclosure that does occur typically lacks uniformity,[32] reliability[33] and comparability.[34] Mandatory disclosure of at least some ESG matters would, therefore, provide for much needed consistency and would allow "investors' judgment" to determine the importance of the information.

B. Commission Guidance

Additional SEC guidance could certainly improve the level of disclosure.[35] ESG issues can affect a company's business or constitute a "trend" that can have a material effect on a company's operations. Risk factors relating to ESG matters could be more meaningful and specific to each company and should include an explanation of efforts by management to address or remediate the risks.[36] As past practice has demonstrated,[37] however, guidance may be helpful

[32] Letter from Bloomberg LP, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-264.pdf ("Voluntary sustainability or corporate responsibility reporting often lacks standardization and comprehensive reporting and is less likely to enable a meaningful analysis of the company's operations. Investors are hesitant to trust the veracity of data that is restated historically without methodological explanation and unaudited.").

[33] Letter from US SIF, July 14, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-107.pdf ("Investor efforts to comprehensively incorporate ESG information into investment decisions are hindered by a lack of comprehensive, comparable and reliable data. The voluntary nature of corporate sustainability reporting means that the information available to investors remains inconsistent and incomplete. There needs to be more robust and effective disclosure, not less disclosure."); *see also* Letter from Dominican Sisters of Hope, July 13, 2026, *available at* https://www.sec.gov/comments/s7-06-16/s70616-140.pdf ("Voluntary reporting frameworks provide information on many companies but they do not provide consistency across companies and sectors, nor do they provide the checks on accuracy and completeness that are inherent in securities filings.")

[34] Letter from Westpath Investment Management, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-272.pdf (Regulation S-K "does not currently provide investors with the structured, comparable information needed to fully evaluate existing and potential investments."). *See also* Letter from Trillium Asset Management, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-276.pdf ("The current disclosures by registrants, however, do not satisfy the needs of investors such as Trillium. While voluntary reporting frameworks are better than nothing at providing ESG information at participating companies they do not provide the consistency, accuracy and completeness that is inherent in securities filings.").

[35] *See* Letter from Sullivan & Cromwell, August 9, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-354.pdf (recommending that the staff provided "targeted guidance" on matters of "topical interest" with priority given to "sustainability disclosure"); Letter from Senators Whitehouse, Markey & Boxer, August 8, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-356.pdf ("We ask you to use the Disclosure Effectiveness Initiative as an opportunity to provide investors with greater clarity about investment risks that pertain to climate change.").

[36] Nonetheless, use of risk factors as a source of ESG disclosure would raise concerns over comparability. As a principles based system of disclosure, risk factors are determined by companies on a case-by-case basis. *See* Exchange Act Release No. 77969 n. 9 (June 1, 2016) (describing Item 503 as "principles based").

[37] Guidance with respect to climate change has not worked. In the aftermath of the SEC's 2010 release, disclosure did not significantly improve. *See* Jim Coburn & Jackie Cooks, Cool Response: The SEC & Corporate Climate Change Reporting, Ceres, Feb. 2014, *available at* https://www.ceres.org/resources/reports/cool-response-the-sec-corporate-climate-change-reporting/ ("As this report shows, over the last four years the state of corporate climate reporting in response to the SEC's Guidance has improved—at best—marginally").

but standing alone is unlikely to result in disclosure adequate to meet investor needs,[38] particularly with respect to comparability.[39]

C. Mandatory Disclosure Requirements

Mandatory ESG disclosure in the form of specific, prescriptive requirements will promote the goal of comparability "across registrants" and will allow investors, rather than management, to determine the importance of the information.[40] Such disclosure would need to identify issues of importance to investors that are applicable to most public companies[41] or industries.[42] Examples include greenhouse gas emissions, political contributions and lobbying expenses,[43] certain tax matters,[44] and information relating to workforce quality and diversity.[45]

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[38] For example, while Item 303 requires disclosure of known trends, it does not require disclosure of "anticipated" trends or events. *See* Securities Act Release No. 6835 (May 18, 1989) (noting that "forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty" were optional).

[39] In part this is because of the structural and systemic difficulties in obtaining adequate disclosure under Item 303. Despite the characterizing the "purpose of MD&A" as "not complicated", see Exchange Act Release No. 48960 (Dec. 19, 2003), the Commission has noted a lack of compliance with the requirements of the provision. *See* Exchange Act Release No. 77599 (April 13, 2016) ("Despite Item 303(a)'s instruction to the contrary, many registrants simply recite the amounts of changes from year to year which are readily computable from their financial statements."). See also Exchange Act Release No. 48960 (Dec. 19, 2003) ("the presentation of the MD&A of too many companies also may have become unnecessarily lengthy, difficult to understand and confusing."). Providing additional guidance will not change these systemic incentives to minimize compliance.

[40] *See* Letter from State Street Global Advisors, July 20, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-160.pdf ("in the absence of relevant, quantifiable and comparable data on key ESG performance indicators (KPIs), we are limited in our ability to consider these factors on a systematic basis in our initial investment decision-making process and on a going forward basis."); *see also* Letter from The Nathan Cummings Foundation, July 19, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-171.pdf ("While the Foundation and other institutional investors have been successful in using private ordering to increase disclosure of risks stemming from social and environmental (E&S) issues, disclosure is uneven across companies and topics and is often not comparable, even among companies in the same industry.").

[41] Letter from CALPRS, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-267.pdf ("Additionally, there are some issues that are common to all firms, for example, gender, diversity and the impact of climate change.").

[42] Letter from AFL-CIO, *supra* note 3 ("given the clear and growing demand from investors for environmental, social and governance . . . information, the Commission must begin requiring ESG related line-item disclosures as well as a process to incorporate emerging ESG metrics into disclosure in the future."). *See also* Letter from Bloomberg LP, July 21, 2016, *supra* note 32 ("Any potential line-item requirements or guidance should be industry-specific."); Letter from Ceres, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-214.pdf ("In some cases, line item disclosure rules that apply to a range of industries may be appropriate. . . . In some cases, industry specific rules may be appropriate.").

[43] Letter from The Sustainability Group, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-232.pdf ("We acknowledge that the number of sustainability or public policy issues where individual investors may seek increased disclosure is nearly limitless. However, there are two specific issues that warrant immediate, universal, and mandatory disclosure: political and lobbying spending and greenhouse gas ("GHG") emissions.").

[44] *See* Letter from The Financial Accountability and Corporate Transparency (FACT) Coalition, July 6, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-28.pdf; Elise J. Bean, July 6, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-32.pdf

[45] *See* Letter from eRevalue, August 19, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-363.pdf ("social topics regarding employee and customer welfare are the most emphasised topics."). *See also* Letter

Mandatory disclosure obligations can be designed to reduce the amount of unimportant data through the inclusion of di minimis thresholds.[46]

Each specific requirement should mandate disclosure of standardized, objective data. In some cases, companies will have already produced the relevant data.[47] In other cases, there may be a need to resort to external standards developed by third parties, with companies given flexibility in the selecting the appropriate metrics. Disclosure should also include a narrative discussion of the implications of the data, any company policies that are relevant to the data, and any strategies or plans with respect to the data.

D. Sustainability

Some ESG matters are important only to particular companies or categories of companies. Often, these issues are relevant to the sustainability of a company's business model. Sustainability has been defined as the "capacity to endure."[48] The topic can include any matter that may destabilize a business model or otherwise impose significant risk to the company.[49]

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from AFL-CIO, *supra* note 3 (arguing for disclosure of information on diversity and gender pay equity"); Letter from TIAA, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-265.pdf ("The Commission should develop additional disclosure requirements for climate change matters as a universal indicator that would ensure the accuracy and comparability of climate change data provided by issuers."). Human capital investment is another area of possible disclosure. *See* Letter from Amalgamated Bank, et. al, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-293.pdf ("We believe increased disclosure related to diversity practices and human capital investments will substantially assist shareholders in making informed investment and voting decisions.").

[46] *See* Letter from the National Partnership for Women & Families, August 8, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-353.pdf (seeking increased mandatory disclosure of diversity governance indicators for companies with more than specified number of employees). This would address concerns that prescriptive requirements would result in the disclosure of "a large volume of information that is immaterial to investors." Letter from American Gas Association, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-287.pdf Nor would such an approach be unique to the disclosure requirements already in Regulation S-K. *See supra* note 18,

[47] For example, companies already file information on their workforce with the EEOC. *See* Letter from the Office of the Comptroller, NYC, July 21, 2016, available at https://www.sec.gov/comments/s7-06-16/s70616-239.pdf ("Federal law already requires companies with I 00 or more employees to annually submit an EEO-I Report to the Equal Employment Opportunity Commission, so the cost is minimal."). Relevant international tax information is also likely prepared by issuers on a regular basis. *See* Letter from Citizens for Tax Justice, Jul 16, 2016, available at https://www.sec.gov/comments/s7-06-16/s70616-209.pdf ("Requiring the country-by-country disclosure specified above would require little if any additional cost to companies because all of this information is already collected for internal accounting purposes."). The same is likely true for political contributions and lobbying expenses. *See* Post by Lucian Bebchuk, Harvard Law School, and Robert J. Jackson, Jr., Columbia Law School, Monday, June 24, 2013, Harvard Law School Forum on Corporate Governance, *available at* https://corpgov.law.harvard.edu/2013/06/24/responding-to-objections-to-shining-light-on-corporate-political-spending-7-claims-about-the-costs-of-disclosure/ ("Most companies already collect detailed information about their political spending for the company's key decision makers").

[48] *See, e.g.* Nancy S. Cleveland, Sustainability, Share Value, and Reporting Friday, Sept. 12, 2014, Sustrana LLP, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_sac/written_materials/13_ps_2015_business_law_sustainability-disclosure.authcheckdam.pdf

[49] Letter from Oblate Investment Pastoral Trust, *supra* note 31 ("There are several examples where this has manifested with respect to our engagement with companies, including: OIP's concerns over abusive and risky practices in the financial services industry leading up to the 2008 financial crisis and subsequent economic

Destabilization can occur from alterations to the regulatory environment or government policies, shifts in technology, evolving labor markets, changes in social attitudes, or advances in scientific research.[50] Reputational harm can threaten a company's sustainability.[51]

The Commission should, therefore, amend Regulation S-K to add an additional Item that provides for principles based disclosure on issues of sustainability.[52] The Commission has experience with requiring the disclosure of risks that may affect a company's operations. Item 305 of Regulation S-K, which addresses the disclosure of market rate instruments, provides a conceptual model that could apply to sustainability disclosure.[53] The provision is designed to put investors on notice about possible market risks[54] by requiring quantitative disclosure, with issuers having some choice on the appropriate standards, and qualitative disclosure, including the methods used by companies to manage the exposure.[55] The provision contains a safe harbor for forward looking information that is broader than the one contained in the PSLRA.[56] Finally, Item 305 promotes reliability by encouraging the use of third-parties to review, compile, and test the information.[57]

As with Item 305, discussions of sustainability should include both quantitative measures

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recession; early concerns raised in the 1990s around climate change impacts; urging companies to recognize the need to address public health threats, from global health risks of antibiotics in meat supply chains, which is now an issue that companies must address in their product development, to the unaffordability of basic life-saving medicines; and to address risks around water sustainability, which is now seen as a significant risk for corporations.").

[50] Letter from Bloomberg LP, *supra* note 32 ("Because some of these changes are already causing certain market disruptions (as only a few examples, decline of the coal industry, rapid transformation of the energy industry, increasing use of artificial intelligence in financial information and product development), we believe it is consistent with the SEC's authority and mission to integrate these considerations in rulemaking.").

[51] The Commission has noted this possibility. Exchange Act Release No. 61469 (Feb. 12, 2010) ("Another example of a potential indirect risk from climate change that would need to be considered for risk factor disclosure is the impact on a registrant's reputation."). *See also* Letter from Oblate Investment Pastoral Trust, *supra* note 31 (noting that ESG disclosure "may not be deemed 'material' in the short-term, but has a clear and direct impact on financial performance, and when taken together with other information, may have the potential to damage or strengthen a company's reputation, impact its social license to operate, or affect its sales and business relationships.").

[52] Letter from the Office of the Comptroller, NYC, *supra* note 47 ("We encourage the SEC to formulate line-item requirements to elicit clear and detailed disclosure of fundamental public policy and sustainability risks, . . . and to develop principles-based rules requiring disclosure of additional sustainability-related risks to supplement these disclosures where appropriate.").

[53] 17 CFR §229.305.

[54] In adopting the Item, the Commission noted that "[a] primary objective of the quantitative disclosure requirements is to provide investors with forward looking information about a registrant's potential exposures to market risk." Exchange Act Release No. 38223 (Jan. 31, 1997).

[55] *See* Item 305(a), 17 CFR 229.305(a).

[56] *See* Section 27A of the 1933 Act and Section 21E of the Exchange Act. The Commission made clear that the safe harbor was broader than the statutory provisions. *See* Exchange Act Release No. 38223 (Jan. 31, 1997) ("The safe harbors are available with respect to the specified information, regardless of whether the issuer providing it or the type of transaction otherwise is excluded from the statutory safe harbors. For example, first-time Commission registrants and those making initial public offerings are covered by the safe harbors with respect to this specific information if all other conditions are satisfied.").

[57] *See* Exchange Act Release No. 38223 (Jan. 31, 1997) ("registrants may need assistance from third parties with respect to compiling the required information, assessing the reasonableness of management's assumptions, or testing the mathematical computations that translate the assumptions into the required disclosures. Moreover, some registrants may wish to have outside third parties review the information prior to its disclosure.").

and qualitative analysis. In the latter case, this would require a discussion of threats to sustainability and the efforts by the company to manage and reduce the threats.[58] Instructions would assist issuers in identifying the types of factors that could affect sustainability,[59] whether threats to the supply chain, dependency on water supplies,[60] or the consequences of a "carbon constrained economy."[61] Moreover, sustainability analysis should have a longer term horizon than is typically case under the current system of disclosure.[62] As with Item 305, the Commission could consider the application of a safe harbor to the information disclosed with respect to sustainability.[63]

III. Conclusion

The adoption of mandatory ESG disclosure standards will benefit investors by providing uniform, reliable, and comparable information.[64] The approach will increase the role of "investor judgment" in the disclosure process.[65]

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[58] Some investors have sought this type of disclosure but as part of the discussion of risk factors. *See* Letter from CALPRS, *supra* note 41 ("CalPERS believes that comprehensive disclosure of risk factors should clearly reveal how registrants identify and manage risks, in order to generate sustainable economic returns. For that reason, both a detailed explanation as to how each risk affects the registrant, as well as disclosure of exactly how the registrant is addressing the risk are needed to provide greater context to shareowners' assessment of risk and risk management.").

[59] Letter from Calvert Investments, *supra* note 2 ("we recommend that the Commission require registrants to report annually in SEC filings on a uniform set of sustainability factors that include both universal and industry-specific indicators.").

[60] Letter from Oblate Investment Pastoral Trust, *supra* note 31 ("An additional example exists related to management of water risk throughout corporate supply chains. While some companies publicly disclose a water management policy that applies to their operations and supply chain, others will only have a policy that applies to their operations, and others will include only sparse information in a Supplier Code of Conduct that is difficult to locate within their public website.").

[61] Letter from Oblate Investment Pastoral Trust, *supra* note 31 ("Companies must be prepared to operate in a carbon constrained economy and additional disclosure about their strategies to do so is necessary.").

[62] Letter from TIAA, *supra* note 45 ("To accurately forecast long-term industry and company trends, investors must have an in-depth understanding of material ESG factors and their potential impact."); Letter from AFSCME, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-269.pdf ("There are a number of financial strategies that companies pursue, largely outside the view of investors that can impact share price in the short-term and create risks in the long-term."); Letter from CALPRS, *supra* note 41 (noting that companies have a "safe harbor" from disclosing the impact of climate change in the MD&A since the "adverse impact" is "well into the future.").

[63] Some commentators have noted that the use of a safe harbor would encourage ESG and sustainability disclosures. *See* Letter from Wachtell Lipton, May 16, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-9.pdf ("Disclosure of risk management, sustainability and ESG-related information also could be encouraged if the Commission makes clear that such disclosure does not create incremental liability risk, for example, by similarly providing that such disclosures are eligible for the forward-looking statement safe harbors").

[64] Letter from PwC, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-258.pdf ("ESG reporting in standalone corporate sustainability reports has become routine for larger companies. 81% of the S&P 500 issued such reports in 2015 compared to 20% in 2011. We believe enhanced ESG disclosure guidance could help provide investors with high-quality information with which to make informed investment and voting decisions."). *See also* Mary Jo White, *supra* note 5 ("In 2015, 75% of the S&P 500 companies published a sustainability or corporate responsibility report and over 90% of the world's 250 largest companies did so.").

[65] The approach will help make the system of disclosure more investor focused, something that has not always been the case. *See* Securities Act Release No. 8896 (Feb. 14, 2008) ("The current system of financial reporting, including the process by which financial reporting standards are developed, attempts to balance the interests of relevant parties

Likewise, companies will benefit. Disclosure will allow issuers to assess their relative progress with respect to ESG matters "across registrants," something that may provide competitive advantages.[66] Mandatory disclosure of sustainability will encourage long term corporate planning, a trend already underway.[67]

Disclosure needs are not static but "evolve."[68] Improving disclosure of ESG matters will promote efficient capital markets and price transparency.[69] As the comment letters demonstrate, broad segments of the investor community support improved disclosure of at least some ESG matters. Others noting the importance of these matters include stock exchanges,[70] accounting firms,[71] securities attorneys and corporate governance experts,[72] pension consulting firms,[73] and at least one former commissioner of the SEC.[74]

The next appropriate step is for the Commission to move ahead with rule proposals in this area. The notice and comment process is the appropriate vehicle to address any remaining issues

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such as preparers, auditors, and investors. In practice, however, the system has sometimes been more responsive to the interests of preparers and auditors than to the needs of investor groups.").

[66] Letter from Calvert Investments, *supra* note 2 ("measuring and managing sustainability issues can provide the company with a competitive advantage and improve its financial performance.").

[67] Letter from PwC, *supra* note 65 ("Our 2015 Annual Corporate Directors Survey found that since 2011, the proportion of directors stating that their strategy horizon was five years or more increased by 20%.").

[68] *See* Remarks of Kara Stein, Commissioner, SEC, July 13, 2016, *available at* https://www.sec.gov/news/statement/stein-statement-open-meeting-071316-disclosure-update.html ("Undoubtedly, there are new topics such as sustainability considerations, which may materially impact the financial disclosure that a company provides and also reflect the evolving concept of materiality.").

[69] S. REP. NO. 73-1455 (June 6, 1934) ("The concept of a free and open market for securities necessarily implies that the buyer and seller are acting in the exercise of an enlightened judgment as to what constitutes a fair price. Insofar as the judgment of either is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of the law of supply and demand.").

[70] Letter from London Stock Exchange, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-294.pdf ("we believe that investors are increasingly viewing ESG information as material to investment decision making.").

[71] Letter from PwC, *supra* note 65 ("We believe enhanced ESG disclosure guidance could help provide investors with high-quality information with which to make informed investment and voting decisions.").

[72] Letter from Corporate Reform Coalition, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-142.pdf (group consisting of 85 organizations including "institutional and retail investors, corporate governance experts, securities attorneys, civil society organizations, and more.").

[73] Letter from Pension Consulting Alliance, June 30, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-23.pdf ("From PCA's perspective, ESG risks have become a growing concern among our clients. PCA clients increasingly request more ESG information related to their investments.")

[74] Letter from Bevis Longstreth, May 29, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-11.htm ("Issues of sustainability can be, and often are, highly material to investor choice.").

and concerns.[75] In doing so, it will be the Commission, rather than Congress[76] or other agencies,[77] that will determine the appropriate disclosure standards with respect to these matters.

With regards.

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cc: Investor Advisory Committee

[75] Some have raised concerns that the costs of disclosure outweigh the benefits. *See* Letter from National Investor Relations Institute, August 4, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-350.pdf These concerns are better addressed as part of the rulemaking process. *See* Section 3(f) of the Exchange Act, 15 USC 78c(f) (requiring Commission to consider in any rulemaking "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."). Others have referenced the potential compliance burdens. *See* Letter from PNC, July 21, 2016, *available at* https://www.sec.gov/comments/s7-06-16/s70616-227.pdf ("Disclosure to meet the desires of one interest group or another, no matter how noble or societally desirable, takes away from the core mission of the Commission, clutters disclosure with information of limited or narrow usefulness to investors and imposes unnecessary and disproportionate compliance burdens on registrants, particularly those for whom the disclosed matter is not particularly meaningful."). Whether these issues are significant in all cases is doubtful. *See supra* note 47. Nonetheless, the issues can be appropriately considered as part of the notice and comment process with respect to any proposed rulemaking.

[76] Legislation has been introduced to require the updating of industry guides for oil and gas companies to better reflect the risks of climate change. *See* Statement by Senator Reed, March 17, 2016 (noting that legislation would "enhance climate-related disclosures to ensure publicly-traded companies are providing investors with the information necessary to make informed investment decisions."), *available at* https://www.reed.senate.gov/news/releases/reed-seeks-to-improve-disclosure-about-climate-change-risks-in-sec-filings

[77] *See* Public Disclosure of Greenhouse Gas Emissions and Reduction Goals-Representation (FAR Case 2015-024), May 24, 2016, *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-05-25/pdf/2016-12226.pdf (rule proposals requiring certain vendors to "indicate if and where they publicly disclose greenhouse gas emissions and greenhouse gas reduction goals or targets.").