



Via Email

July 8, 2016

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

Re: File No. S7-06-16

Dear Mr. Secretary:

The purpose of this letter is to provide you with the Council of Institutional Investors' ("CII" or the "Council") comments on the Commission's concept release entitled "Business and Financial Disclosure Required by Regulation S-K" (the "Concept Release"). The Concept Release is the product of a staff review of the Commission's disclosure requirements required by the Jumpstart Our Business Startups Act; CII provided some feedback to the Commission in advance of that review.¹

The Council is a nonprofit, nonpartisan association of public, corporate and union pension funds, and other employee benefit plans, foundations and endowments with combined assets that exceed \$3 trillion.² The Council also has associate (non-voting) members, including asset management firms with more than \$20 trillion in assets under management. Our member funds are major, long-term investors committed to protecting the retirement savings of millions of American workers. The quality of disclosure regarding the public companies in which much of that savings is invested is thus critical to our members.

CII believes that investors and other stakeholders benefit when regulations "ensure that important information is promptly and transparently provided to the marketplace."³ The Council agrees with the SEC's Investor Advisory Committee ("IAC") that "the current degree, quality and frequency of disclosure for U.S. issuers overall is appropriate and a source of strength for the U.S. capital markets."⁴ CII also shares the IAC's view that simply reducing the

¹ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, in response to SEC's Request for Public Comments on Title I of the JOBS Act (Aug. 9, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/08_09_12_cii_letter_to_sec_title_1_jobs_act.pdf

² For more information about the Council, including its members, please visit the Council's website at <http://www.cii.org/about>

³ See CII Statement on Value of Corporate Governance, http://www.cii.org/policies_other_issues#value_corp_gov

⁴ Letter from SEC Investor Advisory Committee on Regulation S-K Concept Release and Disclosure Effectiveness, at 1 (June 15, 2016) ("IAC Letter"), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf>

volume of disclosure should not be the Commission's goal;⁵ we note that 80 percent of respondents to a 2012 survey of investors by the CFA Institute saw reduction of financial statement disclosure volume as unimportant.⁶ It would therefore be inappropriate to prioritize volume reduction and forego the opportunity to adopt new or enhanced disclosures necessary to give investors a full picture of companies' businesses. CII encourages the Commission to primarily focus on protecting investors—the owners of public companies—when considering appeals for reduced or scaled disclosure under the mantra of disclosure effectiveness.

Six years after Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), final rules remain unfinished for 20 of the SEC's 66 mandatory rulemaking provisions under the Act.⁷ In light of the Commission's limited resources, we respectfully urge the SEC to prioritize the implementation of Dodd-Frank before non-mandatory rulemaking related to disclosure effectiveness.

Information Delivery

The Concept Release seeks comment on how the Commission can improve the “readability and navigability” of filed documents.

The Council agrees that repetitive disclosures may be distracting and impede investors' ability to locate information within a filing, although we do not view the current requirements as generally eliciting large volumes of immaterial disclosure. Similar but not identical disclosures may also give rise to confusion. CII therefore supports measures such as cross referencing to eliminate repetition within filings. Care should be taken, however, to ensure that investor understanding is not reduced due to excessive fragmentation.

The Council commends the Commission for its ongoing efforts to enhance the functionality of the EDGAR system. We note that the data on use of EDGAR cited in footnote 49 of the Concept Release, which suggest that the system has few frequent users, describe only direct searches and are likely incomplete. (The authors of the study cited in that footnote acknowledge that their data “provide, at best, a lower bound estimate.”⁸) The limited search functionality on the Commission's website leads more sophisticated users to pay for third-party vendors providing such functionality. A more robust search function, allowing both Boolean and natural language searches within and across filings, for example, would make disclosure documents more

⁵ See IAC Letter, at 1.

⁶ CFA Institute, “Financial Reporting Disclosures: Investor Perspectives on Transparency, Trust and Volume,” at 8 (2013), <https://www.cfainstitute.org/ethics/Documents/investor-perspectives-on-disclosures.pdf>; see also EY, “Disclosure Effectiveness: What Investors, Company Executives and Other Stakeholders Are Saying,” at 2 (Nov. 2014), reporting on series of roundtables and relating that “investors said they are less concerned about reducing the volume of disclosures than they are in obtaining more meaningful information,” including emphasis on the most important information (“EY Report”), [http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-november-2014/\\$FILE/EY-disclosure-effectiveness-november-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-november-2014/$FILE/EY-disclosure-effectiveness-november-2014.pdf)

⁷ “Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act”, <https://www.sec.gov/spotlight/dodd-frank.shtml#>

⁸ Michael S. Drake et al., “The Determinants and Consequences of Information Acquisition via EDGAR,” at 12 (Mar. 2014).

accessible to a wider range of investors in addition to facilitating in-depth research and comparisons among registrants.

CII has long supported expanded use of data-tagging to facilitate more accurate and less costly extraction and use of data in filings.⁹ As Commissioner Stein noted in a recent speech, machine-readable data allows users to select only those data elements they want and present it in a format they find useful, regardless of the particular format used by registrants.¹⁰ Given the various audiences for disclosure and the increasing diversity of investor strategies, such customization would make disclosure documents—both individually and across registrants—more usable. As well, structured data platforms could reduce costs for registrants.

We believe the Commission should explore the idea of a Legal Entity Identifier (“LEI”) raised in the Concept Release with the goal of increasing investors’ and regulators’ ability to identify and analyze risks of registrants and their subsidiaries. We agree with the IAC that financial firms are not the only registrants using complex structures and that LEIs should not be limited to those firms.

CII concurs with Commissioner Stein regarding the importance of testing potential changes in disclosure formatting and delivery.¹¹ The ability of investors and interested organizations to envision how proposed changes would operate is limited. As well, many of the measures discussed in the Concept Release are interdependent; as a result, different combinations of changes could have varying effects. User testing would help the Commission understand the impact of choices it is considering both individually and in the aggregate. User testing would also help identify unintended consequences.

The Content of Disclosure—General Approach

The Concept Release poses several questions relating to the Commission’s overall approach to regulating disclosure. The first involves the appropriate audience for disclosure. We concur with the assertions in the Concept Release that the intended audience influences both the form and substance of required disclosures.

The Council believes that disclosure documents should be understandable to anyone with a general knowledge of accounting and finance. Investors may focus on different parts of those documents, with more sophisticated investors extracting and manipulating data elements in their own platforms. The claim has been made that having to cater to less sophisticated investors leads to an excessive volume of immaterial information,¹² but CII is unaware of any quantitative analysis supporting that position. Some observers contend that the Commission’s plain-English

⁹ See Letter from Glenn Davis, Senior Research Associate, CII, on Concept Release on the US Proxy System, at 5 (Oct. 14, 2010), <https://www.sec.gov/comments/s7-14-10/s71410-80.pdf>

¹⁰ Commissioner Kara M. Stein, “Disclosure in the Digital Age: Time for a New Revolution,” speech before the 48th Annual Rocky Mountain Securities Conference (May 6, 2016)(“Stein Speech”), <https://www.sec.gov/news/speech/speech-stein-05062016.html>

¹¹ See Stein Speech, *supra*.

¹² See Concept Release, at 51.

initiative, which was undertaken to improve comprehension by less sophisticated investors, has led issuers to produce clearer and more thoughtful disclosure for all investors and potentially benefited issuers by keeping markets better informed about their prospects.¹³

The Commission asked for comment on the advantages and disadvantages of shifting to a more principles-based disclosure regime. The Council appreciates the flexibility and responsiveness of principles-based disclosure, which may reduce the drafting burden on the Commission and necessitate less frequent updating.¹⁴ We also believe that principles-based requirements encourage more fulsome disclosure. While we view this generally as an advantage to investors, we recognize that it can translate into greater costs for issuers.¹⁵ The company-specific disclosures elicited by principles-based requirements generally are not drafted or formatted in a standardized way, making extraction and comparison difficult or impossible.

More specific rules-based disclosure requirements, by contrast, promote consistent, comparable reporting, which is well-suited to extraction, analysis and comparison. However, rules-based requirements become obsolete more quickly, which is a particular concern if the disclosure relates to a subject that is continually evolving, such as technology or regulation.

The Council believes that principles-based and rules-based disclosure requirements can be used together effectively to provide different kinds of information to investors on a subject. For example, the Commission requires quantitative, tabular disclosure of specific elements of top executive compensation such as salary, bonus, equity-based compensation and perquisites. Such consistent data can be collected and analyzed by investors to identify outliers and detect trends. In the principles-based Compensation Discussion and Analysis (“CD&A”), an issuer describes material elements of executive compensation in a narrative format. The CD&A does not lend itself to the kind of analysis investors can perform on the tabular compensation data, but provides a deeper understanding of the how and why behind executive compensation decisions. Together, these two kinds of disclosure support investors in making informed voting and investment decisions.

Relatedly, the Concept Release addresses materiality, seeking comment on whether the current definition should continue to be used for principles-based disclosure standards. The Council supports retaining the current definition, which deems information material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable

¹³ See, e.g., Tim Loughman & Bill McDonald, “Plain English, Readability and 10-K Filings,” at 24, 26-27 (Aug. 4, 2009), finding that plain English rule not only “encourage[ed] engagement by average investors,” with the largest increases in plain English readability corresponding to increased numbers of small (presumably retail) trades, but also more generally reduced information asymmetries between managers and investors, leading to more seasoned equity issuances, http://www3.nd.edu/~tloughra/Plain_English.pdf; Lois Yurow, “Four Reasons to Use Plain English in Your Securities Disclosure Documents” (2007), <http://www.securitieseditor.com/documents/fourreasonswithlinks.pdf>.

¹⁴ We note that issuers may request Staff guidance, both formal and informal, to help them comply with principles-based requirements.

¹⁵ See Lawrence A. Cunningham, “A Prescription to Retire the Rhetoric of ‘Principles-Based Systems’ in Corporate Law, Securities Regulation and Accounting,” *Vanderbilt Law Review* 60 (2007), noting increased compliance cost of principles-based standards.

investor as having significantly altered the total mix of information available.¹⁶ Interpretive guidance can assist registrants in making materiality determinations by providing additional detail and examples. Such guidance can respond to specific challenges registrants are facing, based on the Staff's experience reviewing filings and responding to registrant inquiries.

Specific Disclosure Issues

MD&A: The Concept Release raises a number of questions regarding the Management's Discussion and Analysis ("MD&A") disclosure, which is intended to give investors additional information allowing them to see the company through the eyes of management and evaluate the likelihood that past performance will persist.¹⁷ The MD&A provides valuable information on a company's strategy, risks and performance, both historical and going forward. The Council believes that certain elements of the specific non-MD&A items of Regulation S-K, especially those related to risk, may be more useful to investors if incorporated into the MD&A, and we urge the Commission to explore the feasibility of such a synthesis. As well, consolidation of the MD&A guidance issued to date would eliminate confusion for issuers.

Item 303 of Regulation S-K requires disclosure in the MD&A of known trends that have had, or that the registrant "reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." Instruction 3 to that item explains that this discussion "shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."

The Staff's guidance on this item requires management to engage in a two-step inquiry with respect to known trends: "(1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required. (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur."¹⁸

The Concept Release seeks comment on the two-part test, asking whether a different standard should be used for the first part of the test, such as "more likely than not" or probable. The Council concurs with the IAC that the test should be retained in its current form. Given the uncertainties associated with predictions, it would be inappropriate to move to a more precise standard such as "more likely than not." As well, the current test encourages registrants to adopt

¹⁶ *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) ("Basic" or "Basic v. Levinson") at 231, quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) ("TSC Industries") at 449.

¹⁷ See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations," Release No. 33-8350 (Dec. 19, 2003).

¹⁸ Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Release No. 33-6835 (May 18, 1989) [54 FR 22427 (May 24, 1989)].

measures designed to identify a trend before it becomes a *fait accompli*, including procedures to collect and analyze relevant data.

Changes to the External Auditor: Item 304 of Regulation S-K pertains to disclosure surrounding changes to and disagreements with the external auditor. The existing rule requires companies to disclose their reasons for changing the auditor only when there is a disagreement, or in certain other limited circumstances. The Council supports requiring companies to provide a plain-English narrative of the reasons for the change in *all* cases. As described in CII’s petition for rulemaking, “obscurity surrounding the reasons for the switch encourages speculation and precludes investors from differentiating between legitimate reasons for the change and those that raise a red flag.”¹⁹

Non-GAAP Financial Measures: Although the use of non-GAAP financial measures to describe performance can be appropriate and useful to investors, it can also obscure a company’s financial condition and mislead investors. We agree with Chair White that “[i]n too many cases, the non-GAAP information, which is meant to supplement the GAAP information, has become the key message to investors, crowding out and effectively supplanting the GAAP presentation.”²⁰ CII applauds the guidance recently issued by the Staff²¹ regarding the use of non-GAAP measures, including specific examples of inappropriate adjustments to GAAP measures and concrete illustrations of presentations giving greater prominence to non-GAAP measures.

The Concept Release asks whether external auditor review should be required of the measures used to portray financial performance in response to Item 301 of Regulation S-K (selected financial data). Instruction 2 to Item 301 requires certain measures but allows registrants to “include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations.”

The Council favors requiring such external auditor review, given the potential for non-GAAP measures to distort a registrant’s portrayal of financial results and the external auditor’s deep knowledge of the registrant’s financial condition. Additionally, the Council supports SEC exploration of quarterly reports preceding their related earnings release and earnings call, providing investors with time to review GAAP financials before being inundated with non-GAAP information.

Sustainability/Public Policy Disclosures: CII’s members look to registrants’ disclosure documents for information about the full range of material risks facing registrants, including environmental, social and governance (“ESG”) risks. These risks have assumed greater

¹⁹ See Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, in support of “rulemaking to amend SEC rules to require public companies to provide a plain English descriptive narrative for all departures or dismissals of their external auditors” (Jan. 25, 2008), <https://www.sec.gov/rules/petitions/2008/petn4-555.pdf>

²⁰ Speech by Chair Mary Jo White, “Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability,” Keynote Address, International Corporate Governance Network Annual Conference (June 27, 2016), <https://www.sec.gov/news/speech/chair-white-icgn-speech.html>

²¹ See Staff of Division of Corporation Finance, Compliance and Disclosure Interpretations, Non-GAAP Financial Measures (May 17, 2016), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>

importance in recent years from the perspective of mainstream investors. For example, BlackRock, the world's largest asset manager, recently noted, "Following the COP21 Paris climate conference, more and more investors are integrating carbon emissions data across their traditional investing, sustainable investing, and investment stewardship functions."²² More broadly, evidence is emerging associating ESG factors with improved corporate performance.²³

Despite these factors, the Council has found that disclosures on ESG risks too often consist of boilerplate risk identification without adequate discussion of how those risks apply to the individual registrant. As with risk factors more generally, most registrants' disclosure relating to ESG risks provides no basis for investors to understand the scope of the risks or the likelihood of their coming to fruition. More structured risk factor disclosure, such as an executive summary setting forth the most important factors or an ordering of factors based on magnitude or likelihood, would be useful to enable investors to cut through these disclosures.²⁴

On a specific matter: CII policy favors full disclosure of corporate political spending. CII's member-approved policy states: "The board should develop and disclose publicly its guidelines for approving charitable and political contributions. The board should disclose on an annual basis the amounts and recipients of all monetary and non-monetary contributions made by the company during the prior fiscal year. Any expenditures earmarked for political or charitable activities that were provided to or through a third-party should be included in the report."²⁵

The Council has commented in support of the "Petition to require public companies to disclose to shareholders the use of corporate resources for political activities" (File No. 4-637). In that comment letter, we emphasized the importance of disclosure in allowing shareholders to evaluate whether corporate political spending serves their interests, as contemplated by the majority opinion in the Citizens United Supreme Court case invalidating certain limitations on corporate political spending. Our comment also expressed the view that uniform disclosure requirements are preferable to reliance on voluntary disclosure, which is inconsistent.²⁶

Human Capital Disclosure: Many companies tout their employees, or "human capital," as among their most valuable assets. Executives surveyed in 2011 by The Conference Board ranked risks related to human capital fourth out of 11 categories of risks, above supply chain, IT and reputational risks.²⁷

²² See BlackRock Viewpoint, "Exploring ESG: A Practitioner's Perspective" (June 2016), <http://www.blackrock.com/corporate/en-fi/literature/whitepaper/viewpoint-exploring-esg-a-practitioners-perspective-june-2016.pdf>

²³ Stein Speech, *supra*, *passim* and n. 11 (citing studies).

²⁴ We note that a structured approach may avoid resistance from legal counsel associated with efforts to simply reduce the number of disclosed risk factors. See EY, *supra*, at 6.

²⁵ Policies on Corporate Governance, 2.14, http://www.cii.org/corp_gov_policies

²⁶ See Letter from Glenn Davis, Senior Research Associate, Council of Institutional Investors, in support of "Petition to require public companies to disclose to shareholders the use of corporate resources for political activities" (Oct. 19, 2011), <https://www.sec.gov/comments/4-637/4637-9.pdf>

²⁷ See "Human Capital: Leveraging Your Company's Greatest Asset," Russell Reynolds (undated), <http://www.russellreynolds.com/newsroom/human-capital-leveraging-your-company%E2%80%99s-greatest-asset>

Although registrants may disclose general human-capital-related material risks in their filings, the Commission’s only specific disclosure requirement on human capital is Item 101(c)(1)(xiii)’s mandate to disclose the registrant’s number of employees. Given the importance of employee engagement, knowledge and organization to corporate performance, the Council believes that this is an area the Commission should evaluate for enhanced disclosure.

Share Buybacks: Item 703 of Regulation S-K currently requires 10-Q and 10-K disclosure of certain information regarding share repurchases, including the number of shares repurchased, the average price paid and the maximum number of shares that may be bought back under existing repurchase programs. Item 703 also requires footnote disclosure of details regarding share buyback plans or programs. The Concept Release recognizes the significant increase in share repurchases in recent years, and seeks comment on whether different or additional disclosures would be valuable to investors.

Boards and the managers they supervise rightly hold the authority and flexibility to make capital allocation decisions in the firm’s best interest. At the same time, investors should have the tools necessary to monitor the impact of repurchases. Returning cash to shareholders instead of reinvesting in the business may impact overall leverage, incentive-based compensation and long-term profitability.²⁸ CII supports disclosure enhancements to improve investor awareness of the effect of share repurchases on per-share measures including earnings per share.

Disclosure Effectiveness beyond Regulation S-K

The Concept Release indicates that the Commission “welcome[s] and encourage[s] comments on any other disclosure topics not specifically addressed in the Concept Release.”²⁹ The Council wishes to share certain additional matters, while acknowledging that they are outside the scope of Regulation S-K.

Disclosure on 10b5-1 Trading Plans: CII supports rulemaking or guidance on Rule 10b5-1 trading plans to require the adoption of certain protocols including the disclosure of 10b5-1 program adoptions, amendments, terminations and transactions.³⁰ We note a recent survey found that only one-third of companies voluntarily disclose the adoption of 10b5-1 plans.³¹

²⁸ See Karen Brettell et al., “Stock Buybacks Enrich the Bosses Even When Business Sags,” Reuters (Dec. 10, 2015), for coverage of on buybacks’ impact on compensation, <http://www.reuters.com/investigates/special-report/usa-buybacks-pay/>. See Lahart, Justin, “Share Buybacks: The Bill is Coming Due” Wall Street Journal (Feb. 28, 2016) for coverage of leverage stemming from buybacks, <http://www.wsj.com/articles/share-buybacks-the-bill-is-coming-due-1456685173>

²⁹ See Concept Release at 7.

³⁰ See letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, regarding Rule 10b5-1 Trading Plans (May 9, 2013), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/05_09_13_cii_letter_to_sec_rule_10b5-1_trading_plans.pdf

³¹ See Society for Corporate Governance press release (June 23, 2016), <http://www.marketwired.com/press-release/society-corporate-secretaries-governance-professionals-survey-on-rule-10b5-1-finds-2137143.htm>.

Disclosure of Board Candidates in Contested Director Elections: CII supports rulemaking to require universal proxy cards for contested director elections. We believe the inclusion of all board candidates on the same card would improve investors' ability to support the candidates they truly support, and thereby bolster the legitimacy of all serving board members.³²

Disclosure of Vote Results: CII supports rulemaking to improve disclosure surrounding the outcome of voting items at shareholder meetings, as outlined in previous Council correspondence.³³ We believe investors and the capital markets are better served when market participants have a clear understanding of the outcome of shareholder meetings.

We appreciate the opportunity to provide the Council's investor-focused perspective on this important initiative. If you have any questions or need additional information, please do not hesitate to contact me at [REDACTED] or [REDACTED]

Sincerely,



Kenneth A. Bertsch
Executive Director

³² See letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, regarding Proxy Voting Roundtable, File Number 4-681 (May 5, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/03_05_15_cii_letter%20to%20SEC%20on%20universal%20proxy.pdf. See also letter from Glenn Davis, Director of Research, Council of Institutional Investors, regarding petition for rulemaking (Jan. 8, 2014), <https://www.sec.gov/rules/petitions/2014/petn4-672.pdf>.

³³ See letter from Glenn Davis, Director of Research, Council of Institutional Investors, regarding request for staff guidance and rulemaking (June 12, 2015), http://www.cii.org/files/issues_and_advocacy/correspondence/2015/06-12-15%20CII%20Letter.pdf