

Via E-Mail

December 20, 2017

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

*Re: File Number S7-08-17*

Dear Mr. Secretary:

This letter is submitted by the Council of Institutional Investors (Council) in response to the Securities and Exchange Commission's (Commission or SEC) request for comment on the proposed rule: FAST Act Modernization and Simplification of Regulation S-K (Proposed Rule).<sup>1</sup>

The Council is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding \$3 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$20 trillion in assets under management.<sup>2</sup>

We commend and support the Commission's disclosure effectiveness initiatives that have the objective of facilitating "the disclosure of information to investors while simplifying compliance efforts, without significantly altering the total mix information provided to investors."<sup>3</sup> The quality of disclosure at public companies is critical to our members.<sup>4</sup> We believe that the solution

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<sup>1</sup> FAST Act Modernization and Simplification of Regulation S-K, Securities Act Release No. 10,425, Exchange Act Release No. 81,851, Investment Adviser Act Release No. 4,791, Investment Company Act Release No. 32,858, 82 Fed. Reg. 50,988 (Nov. 2, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-11-02/pdf/2017-22374.pdf>.

<sup>2</sup> For more information about the Council of Institutional Investors ("CII"), including its members, please visit the CII's website at <http://www.cii.org/members>.

<sup>3</sup> Disclosure Update and Simplification, Securities Act Release No. 10,110, Exchange Act Release No. 78,310, Investment Company Act Release No. 32,175, 81 Fed. Reg. 51,608, 51,609 (Aug. 4, 2016), available at <https://www.federalregister.gov/documents/2016/08/04/2016-16964/disclosure-update-and-simplification>.

<sup>4</sup> See, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 1 (Sept. 22, 2016) ("The quality of disclosure regarding the public companies in which much of that savings is invested is . . . critical to our members"), [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2016/September%2022%202016%20comment%20letter%20\(final%20with%20letterhead\)%20KAB.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2016/September%2022%202016%20comment%20letter%20(final%20with%20letterhead)%20KAB.pdf).

to improving disclosure effectiveness is, at least in part, improving the delivery and access of the information required to be provided to investors.<sup>5</sup>

Overall, we are supportive of the Proposed Rule, and offer the following comments on several specific areas for your consideration:

### Management’s Discussion and Analysis of Financial Condition and Results of Operations

We generally support the proposed amendments to Item 303(a) of Regulation S-K to allow “registrants to eliminate the earliest of the three years of MD&A in some situations.”<sup>6</sup> We believe, however, that the proposed amendments should be revised to explicitly “*not allow* registrants to exclude discussion of the earliest year if there has been a material change to either of the two earlier years due to a restatement or a retrospective adoption of a new accounting principle.”<sup>7</sup> We agree with the Commission that in those circumstances the “context may be particularly useful in assessing a firm’s financial condition,”<sup>8</sup> and, therefore, we believe those companies should not be allowed to exercise judgment that would result in investors receiving “less comparative discussion about earlier period financial results within a filing.”<sup>9</sup>

As an alternative to the proposed amendments, we would support retaining “the earliest year requirement and instead amend Item 303 to allow registrants to hyperlink to the prior year’s annual report for that disclosure in lieu of repeating the disclosure in the current year’s report.”<sup>10</sup> We agree with the Commission that “this alternative would likely reduce search costs for investors and allow efficient access to previously disclosed information about a firm’s financial condition.”<sup>11</sup>

### Risk Factors

We generally do not support the proposed amendments eliminating “the risk factor examples that are currently enumerated in Item 503(c).”<sup>12</sup> We believe the examples provide useful guidance

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<sup>5</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Counsel of Institutional Investors, to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 4 (Aug. 23, 2017), <http://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf>.

<sup>6</sup> 82 Fed. Reg. at 50,993.

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Id.* at 51,020.

<sup>9</sup> *Id.*; see, e.g., Letter from Mike Gyure & Marc Siegel, Members, Investors Technical Advisory Committee, to Mr. Mike Cook, Chairman, SEC Advisory Subcommittee III: Audit Process and Compliance, SEC Advisory Committee on Improvements to Financial Reporting 2 (Dec. 13, 2007) (“it is important investors be provided corrected financial statements that present all periods in a consistent and comparable manner”), [http://www.fasb.org/jsp/FASB/Page/ITAC\\_Response\\_to\\_CIFiR\\_Subcommittee3.pdf](http://www.fasb.org/jsp/FASB/Page/ITAC_Response_to_CIFiR_Subcommittee3.pdf).

<sup>10</sup> 82 Fed. Reg. at 50,993.

<sup>11</sup> *Id.* at 51,020-21; see Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, to Brent Fields, Secretary, U.S. Securities and Exchange Commission 1 (Oct. 18, 2016) (Generally supporting the use of hyperlinks in public filings as “providing greater ease of use for investors”), <https://www.sec.gov/comments/s7-19-16/s71916-7.pdf>.

<sup>12</sup> 82 Fed. Reg. at 50,999.

that brings focus to the disclosures.<sup>13</sup> While we understand and appreciate the behavioral concept of anchoring, practically speaking, we are concerned that eliminating the examples may not achieve the Commission’s objective of “more specific and relevant risk factor disclosures.”<sup>14</sup>

### Description of the Registrant’s Securities

We generally support the proposed amendment to “require registrants to provide the information required by Item 202(a)-(d) and (f) as an exhibit to Form 10-K, rather than limiting this disclosure to registration statements.”<sup>15</sup> We agree with the Commission that “requiring Item 202 disclosure as an exhibit to annual reports would improve investors’ access to information about their rights as security holders, thereby facilitating more informed investment and voting decisions.”<sup>16</sup> We believe that improving investor access to information about classes of stock with different or preferential voting rights is an important intermediate step to amending existing U.S. listing standards to adopt the core governance principle of “one share, one vote.”<sup>17</sup>

### Redaction of Confidential Information in Material Contract Exhibits

We generally do not support the proposed revisions “to Item 601(b)(10) [that] would permit registrants to omit confidential information from material contracts filed . . . even where the registrant has not submitted a confidential treatment request to the Commission.”<sup>18</sup> We are concerned that this proposed revision would result in an increase in redacted information “that would not otherwise be afforded confidential treatment by the [SEC] staff.”<sup>19</sup> The Commission’s own data reveals that “12% of confidential treatment requests filed were revised prior to the request being granted to limit the number of terms redacted based on likely materiality or over broad redactions.”<sup>20</sup> If company managers were to make this decision themselves without prior staff review, the occurrence of material information being redacted could significantly increase. The result could negatively impact “the substance and quality of the information reaching the marketplace and investors.”<sup>21</sup>

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<sup>13</sup> See, e.g., Letter from Douglas Hoffner, Interim Chief Executive Officer, California Public Employees’ Retirement System, to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission app. 26 (July 21, 2016) (“Eliminating the risk examples could negatively impact the focus, consistency and comparability of disclosures”), <https://www.sec.gov/comments/s7-06-16/s70616-267.pdf>.

<sup>14</sup> 82 Fed. Reg. at 51,019.

<sup>15</sup> *Id.* at 51,001.

<sup>16</sup> *Id.* at 51,022.

<sup>17</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Counsel of Institutional Investors, to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury at 10-12.

<sup>18</sup> 82 Fed. Reg. at 51,003.

<sup>19</sup> *Id.* at 51,021.

<sup>20</sup> *Id.* at 51,022.

<sup>21</sup> Commissioner Kara M. Stein, Statement on Proposal of FAST Act Modernization and Simplification of Regulation S-K 2 (Oct. 11, 2017), <https://www.sec.gov/news/public-statement/stein-statement-101117>.

### Subsidiaries of the Registrant and Entity Identifiers

We generally support the proposed “amendments to Item 601(b)(21)(i) that would require registrants to include in the exhibit the legal entity identifier (‘LEI’), if one has been obtained, of the registrant and each subsidiary listed.”<sup>22</sup> We agree with those commentators cited by the Commission that have observed:

[T]hat improved identifiers would allow investors to link third-party data with structured data from Commission filings to produce more meaningful analysis. As a consequence, a standard identifier of firms and firm subsidiaries has the potential to improve not only individual investment decisions but also the efficiency of the overall market.

Disclosure of LEIs would also facilitate the ability of investors and the Commission to link the information disclosed in Commission filings with data from other filings or sources as LEIs become more widely used by regulators and the financial industry. This could aid in the performance of market analysis studies, surveillance activities, and systemic risk monitoring by the Commission and other regulators.<sup>23</sup>

The Commission acknowledges that because the proposed amendments would require disclosure of LEI’s *only for* those registrants and the subsidiaries that have voluntarily obtained this identifier, the currently low adoption rates and lack of firm incentives to obtain LEI’s “limits its benefits to investors and other users of financial information.”<sup>24</sup> We, therefore, would support, consistent with the view of many investors,<sup>25</sup> the Commission revising the proposed amendments to “require registrants and each subsidiary thereof to be listed in Exhibit 21 to obtain an LEI.”<sup>26</sup> As explained by the Investor as Owner Subcommittee of the SEC’s Investor Advisory Committee:

By requiring registrants to include a LEI in their filings, the identification of a registrant’s subsidiaries and affiliates is facilitated. Through better identification of subsidiaries and affiliates, investors and regulators are better able to evaluate the registrant’s risk, firm interconnectivity, and tax-avoidance strategies.<sup>27</sup>

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<sup>22</sup> 82 Fed. Reg. at 51,005.

<sup>23</sup> *Id.* at 51,022 (footnote omitted); *see* Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 3 (July 8, 2016) (noting that legal entity identifiers could increase “investors’ and regulator’s ability to identify and analyze risks of registrants and their subsidiaries”), [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2016/07\\_08\\_16%20CII%20S-K.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2016/07_08_16%20CII%20S-K.pdf).

<sup>24</sup> 82 Fed. Reg. at 51,022.

<sup>25</sup> *See, e.g.*, Letter from Joseph V. Carcello, Chair, Investor as Owner Subcommittee on behalf of the Subcommittee Members of the SEC’s Investor Advisory Committee, to Division of Corporation Finance, U.S. Securities and Exchange Commission 11 (Nov. 22, 2016), <https://www.sec.gov/comments/s7-18-16/s71816-21.pdf>.

<sup>26</sup> 82 Fed. Reg. at 51,006.

<sup>27</sup> Letter from Joseph V. Carcello at 11.

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Thank you for consideration of our views. If we can answer any questions or provide additional information on this matter, please do not hesitate to contact me at [REDACTED] or [REDACTED].

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney". The signature is written in black ink and is positioned above the typed name.

Jeffrey P. Mahoney  
General Counsel