

Via Email

September 22, 2016

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

Re: File Number S7-15-16

Dear Mr. Secretary:

The purpose of this letter is to provide you with the Council of Institutional Investors' (CII or Council) comments on the Securities and Exchange Commission's (SEC or Commission) proposed rule entitled "Disclosure Update and Simplification."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. 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.² The quality of disclosure regarding the public companies in which much of that savings is invested is thus critical to our members.

CII generally supports the proposal's objective of facilitating "the disclosure of information to investors, while simplifying compliance efforts, without significantly altering the total mix of information provided to investors."³ However, the interpretation of "significantly altering" potentially is highly subjective.

Moreover, the devil is in the details, and we are concerned that there are a great many details in this proposal, many of a highly technical nature, such that it can be difficult to assess reductions in disclosure that may significantly impact the mix of information available to investors, particularly in the limited comment period provided. We would be very concerned if this proposal, which is put forward as technical, results in reduction in disclosure of interest to particular investors and other users if those individuals and institutions do not have the

¹ Disclosure Update and Simplification, 81 Fed. Reg. 51,608 (proposed rule Aug. 4, 2016), *available at* <https://www.federalregister.gov/documents/2016/08/04/2016-16964/disclosure-update-and-simplification>.

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

³ 81 Fed. Reg. at 51,609.

appropriate opportunity to fully evaluate what is being eliminated. We offer some initial comments in this letter, but may return with further commentary as we review comment letters and hear further from our members and the investor community more generally on particular concerns.

Disclosure Rulemaking Priorities

Consistent with the view we expressed in our recent comment letter to the Commission in response to the Concept Release on “Business and Financial Disclosure Required by Regulation S-K,”⁴ we believe that pursuing a final rule in connection with the proposal should not be a high priority given the SEC’s limited resources and the limited benefits the proposal is likely to provide to investors and the capital markets generally.⁵ Indeed, in its economic analysis, the SEC seems to suggest that the proposed changes “may make the U.S. capital markets more competitive relative to markets in other countries,”⁶ but the Commission’s own IAC “is of the view 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.”⁷

We believe there are a number of other SEC disclosure-related projects are far more likely to benefit investors and the capital markets than the proposal. Those alternative disclosure related projects we strongly support include the following:

- Issuance of final rules to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act proposals on:
 - Section 953(a): Disclosure of Pay Versus Performance
 - Section 954: Recovery of Erroneously Awarded Compensation
 - Section 955: Disclosure Regarding Employee and Director Hedging,⁸ and

⁴ See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 2 (July 8, 2016), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2016/07_08_16%20CII%20S-K.pdf.

⁵ See *id.* at 2 (“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.”); see also 81 Fed. Reg. at 51,651 (apparently indicating that the anticipated beneficial effects on efficiency, competition, and capital formation are not expected “to be substantial”).

⁶ 81 Fed. Reg. at 51,651.

⁷ Letter from SEC Investor Advisory Committee, to Division of Corporation Finance, U.S. Securities and Exchange Commission 1 (June 15, 2016), *available at* <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf>.

⁸ See, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Mr. Vikash Mohan, Program Analyst, Office of Financial Management, Securities and Exchange Commission 2 (Mar. 11, 2014) (supporting initiative to improve the quality and usefulness of disclosure by implementing Sections 953(a), 954, and 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_11_14_CII_letter_to_SEC_strategic_plan.

- Issuance of proposals for comment in response to CII rulemaking petitions or requests to improve disclosures relating to:
 - Changes to the external auditor⁹
 - Rule 10b5-1 trading plans¹⁰
 - Board candidates in contested director elections—universal proxy cards,¹¹ and
 - Preliminary¹² and final vote results.¹³

Overlapping Requirements

We generally support the Commission’s proposals in sections II.C. and II.D. that would delete or integrate certain identified topics that are “overlapping.”¹⁴ However, for those topics that overlap with U.S. GAAP, we would be concerned if U.S. GAAP were to change in such a way that useful information previously required by SEC disclosure requirements is no longer provided under U.S. GAAP.¹⁵

For those topics that would result in relocation of disclosures, we generally do not support relocation of disclosures from inside to outside the financial statements. Many investors place

⁹ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Christopher Cox, Chairman, Securities and Exchange Commission 3 (Jan. 25, 2008) (request for rulemaking to improve “existing SEC rules to require public companies to provide a plain English descriptive narrative for all departures or dismissals of their external auditors”), *available at* <https://www.sec.gov/rules/petitions/2008/petn4-555.pdf>.

¹⁰ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission 3 (Dec. 28, 2012) (“request that . . . SEC . . . consider pursuing interpretative guidance or amendments to Rule 10b5-1”), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%2010b5-1_trading_plans.pdf.

¹¹ Letter from Glenn Davis, Director of Research, Council of Institutional Investors, to Ms. Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 1 (Jan. 8, 2014) (“Petition for Rulemaking to Amend Section 14 of the Securities Exchange Act of 1934 to Facilitate the Use Universal Proxy Cards in Contested Elections”), *available at* <https://www.sec.gov/rules/petitions/2014/petn4-672.pdf>

¹² Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission 3 (May 22, 2014) (“respectfully request that the SEC respond to Broadridge’s invitation and our repeated requests by promptly pursuing a limited scope amendment to 14a-2(a)”), *available at* http://AVAI/www.cii.org/files/issues_and_advocacy/correspondence/2014/05_22_14_letter_to_SEC.pdf.

¹³ Letter from Glenn Davis, Director of Research, Council of Institutional Investors, to Keith F. Higgins, Director, Division of Corporation Finance 6 (June 12, 2015) (“We request rulemaking to amend [Form 8-K] Item 5.07 to require the disclosure [of certain specified information about the vote tally].”), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2015/06-12-15%20CII%20Letter.pdf.

¹⁴ 81 Fed. Reg. at 51,615.

¹⁵ See Letter from Amy Borrus, Interim Executive Director, Council of Institutional Investors, to Technical Director, Financial Accounting Standards Board 1 (Dec. 3, 2015) (“object[ing] strongly to the [FASB’s] . . . proposal to radically change the definition of materiality”), *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2015/12_03_15_CII_letter_to_FASB.pdf; see also Commissioner Kara M. Stein, Statement on the Disclosure Update and Simplification Proposing Release 2 (July 13, 2016) (“depending on how the FASB completes its project to redefine materiality, movement could actually, result in elimination of the disclosure”), *available at* <https://www.sec.gov/news/statement/stein-statement-open-meeting-071316-disclosure-update.html>.

significant value on having required disclosures subject to “annual audit and/or interim review, internal control over financial reporting, and XBRL tagging requirements.”¹⁶ Many investors also place significant value on having required disclosures not subject to the “safe harbor under the Private Securities Litigation Reform Act of 1995.”¹⁷ Thus, for example, we would oppose the proposed amendments discussed in section III.C.1 that “would result in the elimination of disclosures about an issuer’s status as a real estate investment trust . . . in the audited notes to the financial statements, in reliance on disclosures within the same filing, but outside the audited financial statements.”¹⁸

Finally, we believe the Commission should “mandate a cross-reference in the prior location of the disclosures [that are relocated] to assist investors in navigating the issuer’s disclosures and help maintain the prominence and/or context of the disclosures.”¹⁹ Cross-referencing can be a useful tool in eliminating “repetition within filings [and better ensuring] . . . that investor understanding is not reduced due to excessive fragmentation.”²⁰

Equity Compensation Plans

We support the proposed revision of Item 201(d) of Regulation S-K, but believe that all companies should continue to report on the aggregated data provided in the table. U.S. GAAP and SEC disclosure rules do not otherwise require disclosure of the number of securities remaining available for future issuance.

We agree with the Commission that the existing required disaggregation of information between equity compensation plans approved by security holders and those not approved by security holders is no longer useful to investors due to exchange listing requirements that now mandate, “with limited exceptions, shareholder approved plans.”²¹

Repurchase and Reverse Repurchase Agreements

The lack of transparency regarding repurchase agreements was viewed as a contributing factor to the global financial crisis.²² As described in the proposal, “[i]n response to constituency concerns in the wake of the global crisis . . . [i]n 2014, the FASB issued amendments to the accounting and disclosure for repurchase agreements and similar transactions.”²³ Those amendments did not become effective until last year for most companies.

¹⁶ 81 Fed. Reg. at 51,616; *see, e.g.*, Letter from Kenneth A. Bertsch at 3 (“CII has long supported expanded use of data-tagging to facilitate more accurate and less costly extraction and use of data in filings.”).

¹⁷ 81 Fed. Reg. at 51,616.

¹⁸ *Id.* at 51,615-16 n.112.

¹⁹ *Id.* at 51,616.

²⁰ Letter from Kenneth A. Bertsch at 2.

²¹ 81 Fed. Reg. at 51,626.

²² *See, e.g.*, Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report 30-31 (Jan. 2011) (noting that the shadow banking market in repurchase agreements had “severe consequences in 2007 and 2008”), *available at* <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

²³ 81 Fed. Reg. at 51,618.

As indicated in the proposal, there are some differences in the form and content of the disclosure requirements for repurchase agreements under U.S. GAAP versus Rule 4-08(m) of Regulation S-X.²⁴ Given the importance of these disclosures, the relative newness of the U.S. GAAP amendments, and the existence of differences in the form and content of the respective requirements, we cannot support the proposed revision to Rule 4-08(m) at this time.

Legal Proceedings

We do not oppose the proposed incorporation of Item 103 of Regulation S-K into U.S. GAAP.²⁵ We, however, believe that such an action would fall far short of the long-standing needs and demands of investors for better and more timely qualitative and quantitative disclosures related to legal proceedings.²⁶

Disclosures relating to legal proceedings may be critical to investors in making buy-sell or hold decisions because frequently they are associated with material cash outflows or events that have the potential to greatly affect a company's liquidity, capitalization or business prospects. The existing disclosure requirements in Item 103 and U.S. GAAP simply do not provide sufficient information necessary for investors to understand the nature, and potential magnitude and timing of any loss contingencies relating to legal proceedings. We, therefore, would support standard-setting activities by the Financial Accounting Standards Board to resolve this gaping hole in disclosure requirements. Finally, we do not believe that revisions "to the standards of the Public Accounting Oversight Board . . . or the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information," are a precondition to improving disclosures on this important topic.²⁷

²⁴ See *id.* at 51,618 (indicating "differences in form and content" of the requirements"); see also Commissioner Kara M. Stein at 2 ("The SEC disclosure requirements require a greater amount of information and specify how the information should be presented.").

²⁵ 81 Fed. Reg. at 51,633.

²⁶ See, e.g., Letter from Jeff Mahoney, Member, Investors Technical Advisory Committee, to Technical Director, Financial Accounting Standards Board 1-2 (Aug. 26, 2010), available at http://www.fasb.org/cs/ContentServer?site=FASB&c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176157297775.

²⁷ 81 Fed. Reg. at 51,635.

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Thank you for considering these views. We would be very happy to discuss our perspective on these issues in more detail at your convenience. I am available at [REDACTED] or by telephone at [REDACTED].

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeffrey P. Mahoney
General Counsel