October 3, 2016

Sent via email to rule-comments@sec.gov

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Secretary Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **File Number S7-15-16; Proposed Rule on Disclosure Update and Simplification**

Dear Mr. Secretary:

The purpose of this letter is to provide comments on a rule proposed by the Securities and Exchange Commission (SEC) entitled, "Disclosure Update and Simplification."[1]

The Proposed Rule was issued on July 13, 2016, eight days **before** the July 21, 2016 close of the comment period for a related Concept Release issued more than three months earlier.[2] The timing makes clear that the SEC did not review, consider, or incorporate into the Proposed Rule any of the more than 26,000 comments that it solicited and accepted in connection with the prior Concept Release.[3]

As currently formulated, the Proposed Rule proposes the deletion or modification of numerous SEC disclosure requirements that the Commission describes as identical, similar, or supplemental to existing accounting disclosure requirements promulgated by the Financial Accounting Standards Board (FASB) in U.S. Generally Accepted Accounting Principals (GAAP). Almost all of the changes proposed in the rule would reduce, rather than increase, the information disclosed by issuers to investors and others. The Proposed Rule utterly ignores, without acknowledgement or explanation, all of the Concept Release comment letters recommending additional disclosures on such matters as income tax, subsidiaries, employees, Legal Entity Identifiers, sustainability, environmental impact, and political spending, even though some of those additional disclosures are advocated by tens of thousands of comments.

If the Proposed Rule had combined measures that reduced some disclosures while increasing others, it could have struck a balance between issuers and investors, and strengthened

[1] "Disclosure Update and Simplification," SEC proposed rule, 81 Fed. Reg. 150, at 51608
[2] See "Business and Financial Disclosure Required by Regulation S-K," 81 Fed. Reg. 78, at 23916 (4/22/2016) ("Concept Release").
[3] See "Towards a Sustainable Economy: A Review of Comments to the SEC's Disclosure Effectiveness Concept Release," report by US SIF: The Forum for Sustainable and Responsible Investment and other nonprofits (9/2016) ("2016 Review of Concept Release Comments"), http://www.ussif.org/Files/Public_Policy/Comment_Letters/Sustainable_Economy_Report.pdf.

overall disclosures at no significant overall cost. In addition, by combining reduced and increased disclosure requirements, the Proposed Rule might have won support from issuers willing to accept the increased disclosures in return for the disclosure relief. Instead, in a short-sighted and unbalanced approach, the Proposed Rule presents only measures to reduce disclosures, leaving to a later time the equally pressing need to add disclosures sought by so many investors, analysts, and policymakers.

By ignoring the tens of thousands of Concept Release comments seeking additional disclosures, the Commission has engaged in what can only be seen as an arbitrary and capricious administrative process in developing this disclosure rule. To correct its problematic approach, the best course of action would be for the Commission to withdraw the Proposed Rule as currently drafted and, after taking into account the Concept Release comments, re-issue it in a revised form that includes both disclosure reductions and additions.

The remaining comments apply to specific provisions in the Proposed Rule.

Income Tax Disclosures

Question 62 in the Proposed Rule solicits information similar to that sought in the earlier Concept Release, asking whether there are "additional income tax disclosures that would be useful to investors."[4] Over 26,000 Concept Release letters – more than 95% of those submitted – advocated increasing the existing tax disclosures.[5] Because the Proposed Rule appears to have been developed without taking into consideration any of those comments, this letter will repeat some comments made in my July 2016 letter submitted in response to the Concept Release. That letter recommended strengthening existing disclosures related to tax, a recommendation that is respectfully renewed here.

Today, so many corporations are engaged in aggressive tax strategies, that the tax disclosure issue has captured the attention of investors, policymakers, tax authorities, and academics around the world. For example, a global investors' group with more than $45 trillion in assets under management, under the aegis of the United Nations and known as Principles for Responsible Investment (PRI), recently issued a report entitled, "Engagement Guidance on Corporate Tax Responsibility."[6] The PRI report explains that "[a]n aggressive corporate approach to tax planning" can "create earnings risk and lead to governance problems; damage reputation and brand value; [and] cause macroeconomic and societal distortions."[7] It points out, among other problems, that corporations may make strategic decisions in an effort to dodge taxes rather than produce superior products or services, and that corporations may, by linking earnings

[4] Proposed Rule at 51631.

[5] 2016 Review of Concept Release Comments, at 10, 21.

[6] "Engagement Guidance on Corporate Tax Responsibility: Why and How to Engage with Your Investee Companies," Principles for Responsible Investment (2016) (hereinafter "PRI Report"), https://www.unpri.org/news/pri-launches-engagement-guidance-on-corporate-tax-responsibility. The PRI Report noted that the group had received inquiries on tax issues from over 100 of its members. Id. at 5.

[7] PRI Report at 7.

to tax strategies, render their profits particularly vulnerable to tax rule changes and enforcement efforts. In May 2016, the Forum for Sustainable and Responsible Investment held a U.S. investors' conference with a panel focused on "Corporate Tax Issues and Investor Risk" examining, not only how corporations dodge taxes, but also the business, reputational, and legal risks involved.[8]

Investor concerns about tax-related risks have intensified, in part, due to increased corporate tax investigations and enforcement actions around the globe. Over the past five years, investigations conducted by legislatures, tax administrators, journalists, and non-profit organizations have exposed multiple tax-dodging schemes by well-known corporations.[9] At the Permanent Subcommittee on Investigations, where I was an investigator and, later, staff director and chief counsel for Senator Carl Levin, we conducted year-long investigations that produced case studies involving Microsoft, Hewlett-Packard, Apple, and Caterpillar, among others.[10]

In 2016, the European Commission actually invalidated a number of tax arrangements provided by some member governments, ruling that the arrangements constituted "illegal state aid" that disadvantaged the participating corporations' competitors, and ordering dozens of multinational corporations, including a few U.S. corporations, to pay additional tax.[11] Over a span of four months in 2016, Google's offices in Paris were raided by French tax authorities reportedly seeking a tax assessment in the range of $1.8 billion; its Madrid offices were raided by Spanish tax authorities; and its Tokyo offices paid Japanese tax authorities back taxes totaling

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

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

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

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

$118 million.[12] In Australia, a legislative committee held hearings on multiple instances of corporate tax dodging, while an Australian court issued a judgment against Chevron for unpaid taxes totaling $269 million.[13] In the meantime, U.S. tax authorities took new actions to close tax loopholes being abused by some multinational corporations.[14]

Academic research has also contributed to the focus on corporate tax dodging. A recent IMF Working Paper estimated that the long-run revenue loss from corporations declaring profits in tax havens was approximately 0.6% of GDP for OECD countries and 1.7% of GDP for developing countries.[15] In the United States, a recent academic study estimated that offshore profit shifting has likely cost the U.S. government between $77 and $111 billion in corporate tax revenues from 1983 to 2012, with tax revenue losses increasing substantially in recent years.[16] Another study found that 26 of the largest U.S. corporations, with combined profits of nearly $170 billion, paid no income tax at all over a five-year period from 2008-2012; some actually had negative tax rates due to tax refunds.[17] Studies also found that, overall, the corporate share of the U.S. federal tax burden has dropped by two-thirds, from about 32% in the 1950s to less than 10% today.[18]

Further heightening investor, regulatory, enforcement, and academic concerns are actions

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[12] See, e.g., "Operation Tulip Takes Prosecutors Offline for Google Tax Raid," Bloomberg, Gaspard Sebag (5/30/2016), http://www.bloomberg.com/news/articles/2016-05-30/-operation-tulip-takes-prosecutors-offline-for-google-tax-raid; "Spanish authorities raid Google offices over tax," Reuters, Robert Hetz and Jesus Aguado (6/30/2016), http://www.reuters.com/article/us-google-probe-spain-idUSKCN0ZG1AC; "Apple forced to pay ¥12bn in back taxes to Japan: More controversy over US technology group's international tax arrangements," *Financial Times*, Robin Harding (9/16/2016), https://www.ft.com/content/3e1a7cd2-7be5-11e6-b837-eb4b4333ee43.

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

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

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

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

[17] "The Sorry State of Corporate Taxes: What Fortune 500 Firms Pay (or Don't Pay) in the USA And What they Pay Abroad – 2008 to 2012," Institute on Taxation and Economic Policy and Citizens for Tax Justice (2/2014), at 3, http://www.ctj.org/corporatetaxdodgers/sorrystateofcorptaxes.pdf.

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

taken by the international community to coordinate government efforts to curb multinational corporate tax abuse. Over the last two years, over three dozen countries, including the United States, have contributed to an ongoing OECD Base Erosion and Profit Shifting (BEPS) Project, reaching consensus on 15 action plans to combat multinational corporate tax dodging.[19] Another international effort has focused on compelling corporations in the extractive industries to disclose publicly the payments they make to governments, including taxes.[20] The Commission and the U.S. Treasury Department have issued rules addressing aspects of both initiatives.[21] Perhaps as a result, Goldman Sachs analysts recently recommended that investors "[b]uy stocks with high US sales and high effective tax rates and avoid firms with high foreign sales and low tax rates."[22]

Some corporations, when confronted with intensifying scrutiny of their tax practices, have responded that they have a legal obligation to their shareholders to avoid paying tax. But many shareholders, investors, and their advisors disagree, vigorously opposing aggressive tax avoidance. The PRI report states, for example: "Responsible investors and well-run companies will acknowledge that tax is not simply a cost to be minimised, but a vital investment in the local infrastructure, employee-base and communities in which they operate."[23] An investment advisor managing $1.5 billion in assets put it this way:

> "All corporations and investors depend upon government services funded by tax revenues, including law enforcement, market regulation, judicial systems, infrastructure maintenance, public education, poverty alleviation, environmental protection and national defense. These indispensable services can only be funded by tax revenues. Aggressive tax avoidance measures are self-defeating as they undermine these critical government services."[24]

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

Tax disclosures are important not only in assessing the nature and risks associated with corporate tax strategies, but also in assessing the overall value of many multinational corporations. Without better data on a registrant's tax strategies, effective tax rates, and risk-taking, investors, lenders, business partners, competitors, regulators, and others lack key

[19] "BEPS 2015 Final Reports," OECD, http://www.oecd.org/ctp/beps-2015-final-reports.htm.
[20] See the Extractive Industries Transparency Initiative (EITI), https://beta.eiti.org/; Section 1504 of the Dodd-Frank Wall Street and Consumer Protection Act of 2010, P.L. 111-203.
[21] See Country-by-Country Reporting, Treasury final rule, 81 Fed. Reg. 126 (6/30/2016), at 42482; Disclosure of Payments by Resource Extraction Issuers, SEC final rule, https://www.sec.gov/rules/final/2016/34-78167.pdf.
[22] See "Goldman on how to invest 2016," *Politico*, Ben White (5/23/2016), http://www.politico.com/tipsheets/morning-money/2016/05/goldman-on-how-to-invest-2016-214424 (citing Goldman Sachs Weekly Kickstart email to investors).
[23] PRI report, at 5.
[24] Submission by Domini Social Investments LLC, before the Independent Commission for the Reform of International Corporate Taxation (3/18/2015), at 5, http://www.icrict.org/wp-content/uploads/2015/04/Adam-KANZER-statement.pdf.

information needed to conduct an appropriate valuation of a parent corporation and its constituents.

The role of tax in corporate valuations was recently highlighted in a high-profile legal dispute over the value of Dell Inc., a large U.S. public company.[25] In that case, the Delaware Chancery court found that "two highly distinguished scholars of valuation science, applying similar valuation principles, … generated opinions that differed by 126%, or approximately $28 billion. This is a recurring problem."[26] While the court attributed the $28 billion difference to several factors, one key factor involved a dispute over the projected future tax rate that would apply to Dell's offshore earnings.[27] One expert projected a future effective tax rate of 35%, the other a rate of 21%. The court resolved the dispute, not by using tax information in Dell's publicly available SEC filings, but by evaluating nonpublic information related to Dell's past effective tax rates. The Dell case is powerful evidence that existing tax-related disclosure requirements are inadequate to address even the most fundamental and important of investor concerns — valuing corporate investments.

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

This letter accordingly respectfully suggests that, to respond to the increased concerns of investors and better protect the public interest, SEC disclosures on tax matters be updated and strengthened. At least four actions could be taken to improve disclosures related to corporate tax practices, liabilities, and risks.

Tax Policy Disclosures. First, the Commission should require registrants to include in their annual filings a description of their overall tax policy and principles, including a mandatory description of the extent to which the registrant relies on aggressive tax planning. Mandating that type of disclosure is supported by a number of investor and public interest groups and would help resolve current disagreements over appropriate corporate conduct.[28] It has also long been an element of the OECD Guidelines for Multinational Enterprises, which calls on corporate

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[25] *In re Appraisal of Dell Inc.*, Case No. 9322-VCL, Memorandum Opinion, (Del. Ch. 5/31/2016), http://www.potteranderson.com/media/experience/706_Appraisal%20of%20Dell%205%2011%2016.pdf.
[26] Id. at 99.
[27] Id. at 105-107.
[28] See, e.g., id. at 10; PRI Report, at 17; "Responsible corporate tax practices," report by Nordea Asset Management (3/2014), at 10, https://www.nordea.com/Images/36-70003/responsible_corporate_tax_practices_mar_2014.pdf; tax policy statement template, Fair Tax, a U.K. nonprofit, http://www.fairtaxmark.net/criteria/templates/; "Tax Transparency and Multinational Corporations: Issues for Responsible Investors," Sustainalytics (8/2013), http://www.sustainalytics.com/node/1730/lightbox2.

boards to "proactively adopt appropriate tax policy principles."[29] Some governments, such as the United Kingdom, are already considering proposals to require corporate tax policy disclosures.[30] The SEC should follow suit.

To ensure the descriptions are useful, the Commission should require registrants, as part of their tax policy disclosures, to discuss several specific indicators of aggressive tax planning. One key indicator is the dollar value of any "uncertain tax positions," also known as "unrecognized tax benefits," disclosed in a registrant's financial statements under GAAP.[31] Uncertain tax positions are those which the registrant has determined are more likely than not to fail a challenge by the IRS. Corporations are not prohibited from taking such tax positions, but those positions are, by definition, aggressive. Since GAAP already requires registrants to identify and calculate the dollar value of their uncertain tax positions, discussing the size and nature of those positions in their SEC filings would impose little additional costs on registrants, while providing investors, policymakers, regulators, and law enforcement with useful information about registrants' tax practices and the attendant risks.

Two additional key indicators are the extent to which a registrant uses tax shelters or strategies involving tax havens, and employs confidential tax incentives or sweetheart deals provided by foreign jurisdictions, to limit tax expenditures. Such tax arrangements should be disclosed and discussed in the tax policy statement. A third key indicator is whether the registrant has an effective foreign tax rate that falls far below statutory norms, such as an effective foreign tax rate approaching or below 10%. That type of extremely low tax rate signals the use of aggressive tax planning and should also be acknowledged and explained. Finally, the tax policy statement should describe the internal controls and governance procedures used by the registrant to ensure that its tax practices actually align with its tax policies. Each of those disclosures would provide investors, policymakers, regulators, law enforcement, and the tax-paying public with material information about registrants' tax practices and related risks.

Country-by-Country Reports. Second, the Commission should require registrants to submit a new annual exhibit with basic corporate information on a country-by-country (CbC) basis, including for each jurisdiction, the profits or losses incurred before taxes, number of employees, stated capital, tangible assets, effective tax rate, and taxes accrued and paid. The specific elements to be included in the new exhibit could be modeled after those already set out in a Treasury rule requiring large U.S. multinational corporations to file annual, confidential CbC reports with the IRS.[32] The Treasury rule's required disclosures are modeled after a consensus CbC report template developed by the OECD BEPS Project to curb multinational corporate tax

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

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

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

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

abuse.[33]

CbC reporting is gaining ground around the globe as a way to obtain currently unavailable, basic comparative data about corporate activities and tax practices in individual countries. Financial institutions in the European Union began including mandatory CbC reports in their 2014 public filings, with no negative repercussions.[34] Corporations in the extractive industries have begun providing similar public reports in the European Union and are scheduled to do the same in the United States by 2018, under the Commission's newly finalized extractive industries' rule.[35] In addition, under the new Treasury rule, large U.S. multinational corporations will begin providing annual CbC reports to the IRS on a confidential basis in the next year or two.[36] Large multinational corporations are expected to file similar CbC reports with tax authorities in other countries under the OECD BEPS project. Given this emerging, worldwide patchwork of CbC reporting requirements, the Commission is perfectly positioned to develop a uniform disclosure protocol that could be used by all registrants to provide CbC data.

CbC reports would provide timely, reliable data of tremendous value to investors, policymakers, regulators, law enforcement, and the public. Investors could use the data to evaluate corporations' activities, investments, revenues, and risks over time in a more systematic, low-cost way than is possible today. Policymakers, regulators, and law enforcement could use the data, not just to evaluate individual businesses, but also to analyze issues across a broad range of market concerns, including issues involving tax policy, trade, capital investments, cross-border capital and monetary flows, international development, employment trends, offshore jurisdictions, and more. CbC reports would also provide the private sector, academic community, and the general public with invaluable new analytical tools. Adding CbC reporting requirements to registrants' S-K disclosures would clearly be in the public interest.

Effective Tax Rates. Third, the Commission should strengthen disclosures related to a set of figures now included in registrants' financial statement footnotes specifying their "provisions" to pay U.S. federal and state taxes as well as "foreign" taxes.[37] That data is currently used by many investors and analysts to calculate a registrant's "effective tax rates" both here and abroad and, if the resulting tax rates are especially low, to flag registrants that may be employing aggressive tax strategies.[38]

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[33] See BEPS Project, "Guidance on the Implementation of Country-by-Country Reporting: BEPS Action 13," OECD, (6/2016), http://www.oecd.org/tax/beps/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.htm.

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

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

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

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

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

Several problems affect how the financial statement tax data is currently being used. First, some registrants may be manipulating GAAP reported figures to produce an artificially high or low U.S. effective tax rate or to manipulate earnings.[39] One tactic is for the registrant to designate a large amount of its foreign earnings as likely to be repatriated to the United States, increase its "provision" of funds to pay for the anticipated taxes, and as a result, claim a high U.S. effective tax rate, even though the foreign funds are never actually repatriated and the U.S. tax is never actually paid.[40] The slippage arises, because GAAP requires registrants to report on the funds they've set aside to pay anticipated taxes rather than on the amount of taxes actually paid. A completely different aspect of the problem involves registrants suspected of exaggerating the amount of their offshore earnings "indefinitely reinvested" abroad in order to reduce the amount of money they have to provide to pay U.S. taxes, report an artificially low effective U.S. tax rate, and thereby inflate their earnings.[41] The Commission should fashion its new disclosure requirements to put a halt to those types of misleading reports.

A second set of problems involves the disclosure of combined tax data. Today, GAAP calls for registrants to provide a single figure representing the funds set aside to pay all U.S. and foreign taxes. FASB is currently considering breaking out the totals for the United States,[42] to match what is already called for in SEC filings. But both approaches still contemplate producing

[39] See, e.g., "Offshore Profit Shifting and the U.S. Tax Code – Part 1 (Microsoft and Hewlett-Packard)," U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 112-781 (9/20/2012), testimony of Jack Ciesielski at 14-16, 26, 28, 103-111; "Through a Latte, Darkly: Starbucks's Stateless Income Planning," Edward D. Kleinbard, *Tax Notes* (6/24/2013) at 1515-1535, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264384; "Through A Glass Darkly: What Can We Learn About A U.S. Multinational Corporation's International Operations From Its Financial Statement Disclosures?" Michael P. Donohoe, Gary A. McGill, and Edmund Outslay, 65 *National Tax Journal* 4 (12/2012), at 961–984, https://www.ntanet.org/NTJ/65/4/ntj-v65n04p961-84-through-glass-darkly-what.pdf; "Permanently Reinvested Foreign Earnings, Taxes, and Earnings Management," *The Accounting Review*, Linda K. Krull, Vol. 79, at 745-767 (7/2004), https://www.jstor.org/stable/3203277?seq=1#page_scan_tab_contents; "Foreign Tax Surprise Like Disney's Have SEC Seeking Sunlight," Bloomberg, Dave Michaels and Alan Katz (3/5/2015), http://www.bloomberg.com/news/articles/2015-03-05/foreign-tax-surprises-like-disney-s-have-sec-seeking-sunlight).

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

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

[42] See FASB Exposure Draft: Proposed Accounting Standards Update on Income Taxes (Topic 740), Disclosure Framework—Changes to the Disclosure Requirements for Income Taxes (7/26/2016)("FASB Exposure Draft"), http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176168335332&acceptedDisclaimer=true.

a composite total for the taxes owed in multiple – perhaps dozens – of non-U.S. countries with widely varying tax rates. Analysts currently use that composite total to calculate a single, overall non-U.S. effective tax rate for the registrant. The resulting "foreign effective tax rate" is based upon an amalgam of undisclosed foreign tax data from an unknown number of countries. That amalgamated foreign tax rate is of limited value in analyzing the registrant's actual tax risks, given that taxes are assessed and enforced on a country-by-country basis and vary significantly from jurisdiction to jurisdiction. In addition, it is a poor way to gauge a registrant's non-U.S. tax practices and risk-taking compared to its peers.

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

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

The Proposed Rule does not take a clear stance on whether the SEC's existing tax disclosures should be eliminated in favor of existing GAAP tax disclosures. It simply notes, for example, that Rule 4–08(h) in Regulation S-X requires disclosure of the amount of domestic and foreign pre-tax income as well as the related income tax expense.[43] Both disclosures are important, not only because each provides critical context for the other, but also because the dual disclosures can help analysts gauge whether an issuer is paying disproportionately low taxes compared to the income being earned. The Proposed Rule also notes that the S-X Regulation requires disclosure of the combined total pre-tax income and income tax expenses for all non-U.S. jurisdictions if each exceeds five percent of the respective totals.[44] While composite foreign totals are of limited use as explained above, they still provide more useful information than the existing GAAP approach which aggregates both foreign and domestic figures. In recognition of the SEC's relatively more useful approach, FASB has recently proposed following suit and requiring disaggregated U.S. and foreign totals, but that GAAP proposal may be years from completion.[45] Moreover, compared to either the existing SEC or GAAP tax disclosures, country-

[43] Proposed Rule, at 51631.
[44]

[45] FASB Exposure Draft.

by-country reporting would provide significantly more useful information.

Given widespread corporate tax dodging, the risks involved with intensifying government efforts to halt and punish corporate tax abuses, the role of tax in corporate valuations, and the increasing global focus on corporate tax equity issues, using the Proposed Rule to strengthen existing income tax disclosures would be a wise use of limited Commission resources. The Securities Exchange Act of 1934 states explicitly that one of the key purposes of its system of public reports is "to protect … the Federal taxing power."[46] More than eight decades later, this statutory objective is no less important. Better tax-related disclosures in SEC filings would provide investors, analysts, policymakers, regulators, law enforcement, academics, and the public with key information needed to assess a registrant's tax policies, practices, liabilities, and risk-taking.

Other Disclosure Issues

The Proposed Rule contains a number of measures designed to reduce disclosures by issuers. Those raising the greatest concerns are the following.

Item (C)(4) proposes reducing the disclosure of derivative accounting policies,[47] even though accounting for derivatives can vary widely under existing rules, permit significant discretion on how derivatives are valued, and lead to unexpected losses of billions of dollars.[48] As currently worded, the Proposed Rule seems to be loosening derivative accounting policy disclosures in particular for "derivative commodity instruments such as commodity futures, swaps, and options that are permitted to be settled in cash or with another financial instrument, to the extent such instruments are not within the definition of derivative financial instruments," without explaining why. Derivatives continue to confound analysts, policymakers, regulators, and the public, including by producing unreliable accounting and significant unanticipated losses. The Commission should be increasing disclosures related to derivatives, not reducing them, and giving them more prominence in issuer reports rather than relegating the explanations to financial statement footnotes.

Item (C)(12) proposes eliminating disclosures related to "geographic areas," because the same information is contained in either financial statement footnotes or could be explored in discussions of significant risk factors or trends in foreign operations.[49] But the proposal to reduce information about the geographic segments of a business is occuring at the same time geographic factors are growing in importance, due to the new international consensus that multinational corporate profits should be "taxed where economic activities generating the profits

[46] Securities Exchange Act of 1934, Section 2.
[47] Proposed Rule, at 51619.
[48] See, e.g., "JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses," U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 113-96 (3/15/2013)(describing credit derivative accounting and valuation problems), at 112-181, https://www.gpo.gov/fdsys/pkg/CHRG-113shrg80222/pdf/CHRG-113shrg80222.pdf.
[49] Proposed Rule, at 51623.

are performed and where value is created."[50] In light of that consensus, disclosures of the geographic areas where business is taking place should be increasing, not shrinking. If the Commission nevertheless determines to eliminate Sections 101(d)(1) – (3), it should simultaneously add explicit references to geographic factors in the required discussions of business risk and trends.

Item (C)(15) proposes eliminating disclosures related to "Warrants, Rights and Convertibles."[51] Specifically, it proposes deleting the existing requirement that an issuer disclose the "amount of common equity subject to outstanding options, warrants, or convertible securities, when the class of common equity has no established United States public trading market." Instead, the Proposed Rule says such disclosures can be made in connection with a very different set of GAAP disclosure requirements, which does not explicitly require the same information. Warrants, rights, and convertibles can give rise to accounting confusion and fraud.[52] There is no reason to eliminate the existing straightforward request for basic information about those financial instruments, especially in the context of a discussion of equity arrangements with the potential to dilute an issuer's equity shares.

Items (C)(1) and (E)(9) both propose reducing disclosures related to "repurchase and reverse repurchase agreements."[53] Repurchase and reverse repurchase agreements are complex financial instruments that can have a dramatic impact on the financing and liquidity of financial institutions and other businesses. These agreements should not be relegated to financial statement footnotes; they merit acknowledgement and discussion in an issuer's SEC reports.

Item (E)(14) considers reducing disclosures related to "major customers."[54] For many years, the Commission has resisted pressure from issuers to strike this key information from SEC disclosures, judging that "the identity of major customers is material information to investors and that the disclosure allows a reader to better assess risks associated with a particular customer, as well as material concentrations of revenues related to that customer."[55] Information about major customers is also important to Congressional and other investigations attempting to understand a corporation's business activities, practices, and risks. FASB has already given into corporate pressures on this matter; the SEC should not.

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

[51] Proposed Rule, at 51625.

[52] See, e.g., "SEC Files Offering Fraud Action Centered on Warrants from Private Firm," SEC Actions, T. Gorman (5/4/2016), http://www.secactions.com/sec-files-offering-fraud-centered-on-warrants-from-private-firm/; "SEC Charges Unregistered Brokers with Pocketing Investor Money," SEC Press Release No. 2016-82 (5/4/2016), https://www.sec.gov/news/pressrelease/2016-82.html; "SEC Announces Fraud Charges Against Former Portfolio Manager of the Lipper Convertible Hedge Funds," SEC Press Release No. 2003-143 (10/29/2003), https://www.sec.gov/news/press/2003-143.htm; "Future-Priced Convertible Securities & The Outlook For 'Death Spiral' Securities-Fraud Litigation," Zachary T. Knepper (2004), http://law.bepress.com/cgi/viewcontent.cgi?article=1917&context=expresso.

[53] Proposed Rule, at 51618, 5163_.

[54] Proposed Rule, at 51632.

[55] Id.

Thank you for this opportunity to comment on the Proposed Rule.

Sincerely,

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of the U.S. Senate Permanent Subcommittee on Investigations