Domini
SOCIAL INVESTMENTS®

Investing for Good℠

November 1, 2016

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

Via email to: rule-comments@sec.gov

Re: File Number S7-15-16: "Disclosure Update and Simplification" rule proposal

Dear Mr. Fields:

Domini Social Investments LLC is an SEC-registered investment adviser and the manager of a family of mutual funds that incorporate environmental, social and governance ("ESG") factors. We manage $1.6 billion for individual and institutional investors that wish to incorporate ESG factors into their investment decisions.

We are pleased to provide these comments in response to the Commission's request for comments on the above-referenced proposed rule ("the Proposal"). We also thank the Commission for the extension of the comment period on this particularly voluminous and technical rule proposal. We encourage the Commission to consider the numerous comments received from investors in response to the Commission's Concept Release on Regulation S-K, many of which may be directly relevant to the Proposal. Due to the highly technical nature of the Proposal, we are concerned that otherwise interested investors will not have had the time or expertise to provide additional comments.

We are pleased to see the Proposal's request for comment on corporate tax disclosures. In response, please find attached our response to the Commission's Concept Release on Regulation S-K, which includes a detailed section on the need for enhanced tax and subsidiary disclosures (pages 18-23), as well as a discussion of our views on materiality. Please consider that letter as a formal part of our response to the Proposal.

We note that the Proposal seeks to reduce redundancies by eliminating requirements that are substantially similar to disclosures required by other bodies, including FASB and GAAP. The FASB, however, is currently proposing to change its definition and approach to materiality, a proposal that raised serious concerns by the Commission's Investor Advisory Committee.[1]

In addition to changing its definition of materiality, it would also appear that the FASB would interpret the *TSC v. Northway* definition of materiality more narrowly than the Commission. In its *Notes to Financial Statements (Topic 235): Assessing Whether Disclosures are Material* ("Notes"),[2] issued in conjunction with its proposed amendments (*Statement of Financial*

[1] https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-letter-fasb-materiality-012116.pdf
[2] http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176166402325&acceptedDisclaimer=true

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Accounting Concepts, Statement No. 8, Conceptual Framework for Financial Reporting),[3] the FASB reports that:

> The Board also considered including guidance that would have stated that when an entity cannot determine whether the information is material (that is, a close call), the information should be included. The Board decided not to include that additional guidance because the Board believes that such decisions are made most appropriately by preparers of financial statements in the context of the regulatory, legal, and governance environment in which they operate.[4]

By contrast, the Commission has been quite clear that the *TSC v. Northway* standard calls for the *inclusion* of such information, for the benefit of investors:

> In the articulation of the materiality standards, it was recognized that doubts as to materiality of information would be commonplace, but that, particularly in view of the prophylactic purpose of the securities laws and the fact that disclosure is within management's control, "it is appropriate that these doubts be resolved in favor of those the statute is designed to protect."[5]

We are concerned that the FASB's decision to be silent on this critical point may encourage issuers to utilize a "when in doubt, leave it out" standard in place of today's "when in doubt, leave it in" approach, to the clear detriment of investors.

We believe that the Commission's proposal to eliminate certain disclosures because they are "substantially similar" to disclosures overseen by FASB is premature, in light of the FASB proposal to change its approach to materiality and the serious concerns that have been expressed about that proposal. Until that proposal is adopted or rejected and, if adopted, implemented, it is not possible to determine the impact of the Commission's Proposal on the quantity or quality of disclosures. We cannot support any elimination of current requirements in reliance upon such an uncertain external standard.

Thank you again for the opportunity to comment. I can be reached at [redacted] or at [redacted] if we can be of any assistance.

Respectfully submitted,

Adam Kanzer, Esq.
Managing Director, Director of Corporate Engagement and Public Policy

Encl.

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[3]http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176166402450&acceptedDisclaimer=true

[4] *Notes* at 13,
http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176166402325&acceptedDisclaimer=true

[5] *Commission Guidance Regarding Disclosure Related to Climate Change* at 11, citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976), available at https://www.sec.gov/rules/interp/2010/33-9106.pdf

July 21, 2016

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

Via email to rule-comments@sec.gov

Re: Concept Release on Business and Financial Disclosures Required by Regulation S-K ("Concept Release")
File Number S7-06-16
Release Number 33-10064; 34-775599

Dear Mr. Fields:

Domini Social Investments LLC is an SEC-registered investment adviser and the manager of a family of mutual funds that incorporate environmental, social and governance ("ESG") factors. We manage \$1.6 billion for individual and institutional investors that wish to incorporate ESG factors into their investment decisions.

We are pleased to provide these comments in response to the Commission's Concept Release on Regulation S-K, and thank you for the opportunity to provide our perspective. We are particularly pleased to see the series of questions relating to disclosure of sustainability information and join others in strongly supporting the need for mandatory, comprehensive sustainability disclosures from registrants, a request that we have reiterated in various forms for many years.

We believe the Commission has an important opportunity to review its disclosure regime in the light of several critical developments that occurred over the latter portion of the 20th century, including the growth of the modern multinational corporation, the wide scale adoption by institutional investors of Modern Portfolio Theory, leading to broad diversification of assets, and a series of growing systemic risks, including climate change, resource scarcity and biodiversity loss. As a result, societal expectations of corporations have changed dramatically.

We can no longer afford to rely exclusively upon management's judgment of risk, management's definition of materiality, and issuer-focused disclosure in a world where investors are broadly diversified and subject to a variety of portfolio-level risks. A proper report should aim to provide investors with sufficient information to make truly sustainable capital allocation decisions.

A number of our comments come back to these developments. There has been a sea change in investment, globally, over the course of the past twenty years. Several other comment letters detail these dramatic changes, which we will not recount here. Today's investors are casting a wider net to understand risk and opportunity, and are seeking information to understand corporate impact on society and the environment, in addition to information to allow them to price risk to the issuer.

Thankfully, the SEC's approach to materiality is flexible, designed to respond to these kinds of dramatic changes. What was material to the reasonable investor in 1975 is dramatically different than what is material to today's reasonable investor.

We encourage the Commission to consider how these developments might inform more effective disclosures for investors, in the public interest.[1]

Our comments are focused around the questions relating to sustainability reporting, although we also address questions regarding materiality and principles vs. rules-based disclosures, among others.

Our Rationale for the Use of ESG Factors

A company's social and environmental record can speak volumes about its resiliency, its future prospects and its ability to produce value for investors and society over the long-term. Since the inception of the Domini Social Equity Fund in 1991, Domini has sought out information to assess corporate performance on a broad range of social and environmental factors, including predatory lending practices, use of toxic chemicals, hazardous waste liabilities, advancement of women and minorities in the workplace, working conditions in corporate supply chains, product safety, business ethics and numerous other crucial social and environmental areas.

We apply environmental, social and governance ("ESG") standards to all of our investments, believing they help identify opportunities to provide strong financial rewards to our fund shareholders while also helping to create a more just and sustainable economic system.

Our approach enables us to capture sources of risk and opportunity often overlooked by conventional financial analysis. Our use of sustainability indicators also provides us with insight into the quality of corporate management teams, a key component of future success.

We submit that sustainability information is *particularly useful* in assessing quality of management. A management team that can consistently ensure healthy relations with its customers, suppliers, employees, local communities and investors while maintaining a clean environmental record, is a team that is likely to be highly skilled in a range of areas, with its eye on the future. A company that can go even further by anticipating societal needs is likely to prosper far into the future. Companies that mismanage these relationships will face obstacles to their future growth.

ESG factors may have company-specific implications that can affect portfolio performance. These factors can help us avoid certain risks, such as large environmental fines or discrimination lawsuits, and can also identify more resilient companies led by forward-looking management teams.

ESG factors can also have more general systemic or market-level implications that can also affect portfolio performance.

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[1] For an overview of the value of sustainability disclosures, see http://iri.hks.harvard.edu/files/iri/files/on_materiality_and_sustainability_-_the_value_of_disclosure_in_the_capital_markets.pdf

Domini's Utilization of ESG Factors

Our process begins with our Global Investment Standards, which cover a broad range of sustainability issues, across asset classes.[2] Our ESG standards are designed to identify companies that are responsibly addressing the key sustainability challenges and rewards presented by their business model.

We use Key Performance Indicators ("KPIs") — a set of factors we have defined for each industry—to guide our analysts toward the most important issues, and to create an approved universe of companies for our financial submanager to use to manage our equity and fixed-income portfolios. Our indicators focus on the most pressing sustainability issues each company faces, within the context of its business model and its industry. For example, safety and average fleet fuel efficiency are key indicators for the automotive industry. These factors may override other aspects of a company's performance. Our focus on safety for the oil and gas sector led us to avoid investment in BP, years before the disaster in the Gulf of Mexico, just as our attention to a string of recalls in the Japanese automotive press led us to avoid investment in Toyota, before that company faced another string of financially material recalls in the United States. A string of serious governance concerns helped us to avoid investment in Volkswagen, prior to the recent emissions scandal. We are very interested in long-term patterns of behavior. The "total mix of information," for us, can build up over time, indicator by indicator.

We tailor our KPIs by subindustry, making meaningful company-to-company comparisons possible. Domini has identified four to seven subindustries for each of the 24 major industry categories. We focus on a relatively small number of KPIs—typically five to ten—for each industry because we believe that if companies cannot align their conduct in their most challenging areas with our Global Investment Standards, we are unlikely to be comfortable with the alignment of their overall conduct.

We utilize both quantitative and qualitative KPIs, such as percentage of revenues derived from a particular line of business, or management of labor rights issues in corporate manufacturing supply chains. Some basic information can be found in the 10-K, but we must go elsewhere for the bulk of the information we need to make our investment decisions.

Our KPIs, and our approach generally, is focused on each company's external impact on its key stakeholders and the environment, as opposed to direct impact to the company's finances. We take this approach for several reasons. First, we are seeking to build long-term value through our investment decisions and to avoid financing value-destructive behaviors, such as human rights abuses or environmental degradation. Second, risks to issuers begin out in the world. By focusing on a company's sustainability *performance*, we get a better understanding of the health of its relations with its key stakeholders. This helps us to flag problems before they become financially material.

We also use corporate reporting to inform our proxy voting and our corporate engagement. Our engagement efforts with companies are generally directed towards the mitigation of social and environmental impacts, as well as improved public reporting, because we believe that meaningful sustainability reporting provides substantial benefits to both companies and the general public. We are helping companies to identify and manage long-term risks to their reputations and their bottom lines.

Voluntary reporting, however, fails to provide us with the consistent, comparable and reliable information we need.

[2] http://domini.com/sites/default/files/_files/Global_Investment_Standards.pdf

Below, in response to questions presented in the Concept Release, we provide our views on the importance of the Commission's current definition of materiality and Regulation S-K's balance of principles and rules based requirements, and provide a number of suggestions for disclosure on sustainability, tax, corporate subsidiaries and share buybacks.

The Concept Release covers a lot of critically important ground. Most investors, including Domini, do not have the resources to respond to all of the questions presented. We strongly encourage the Commission to follow this comment period with outreach to investors, including roundtable discussions on discrete issues, to obtain a better understanding of investor views. We also encourage more frequent reviews of discrete concepts or portions of Regulation S-K, perhaps every five years, to ensure that the SEC's framework develops as the market changes, and as investor views evolve.

A number of comment letters have informed our response, and should be read in conjunction with our letter. In particular, we support comments submitted by the Investor Advisory Committee[3], US SIF[4], the Interfaith Center on Corporate Responsibility[5], the International Corporate Accountability Roundtable (ICAR)[6], Ceres[7], the Investor Environmental Health Network[8] and the FACT Coalition.[9] We believe that you will find that there is a strong degree of consistency among the investors and coalitions of investors that support enhanced sustainability disclosures, and we urge the Commission to focus on those commonalities, all of which strongly support some form of mandated sustainability reporting.

We hope that these comments are useful to the Commission as it works through this very important project and would be pleased to serve as a resource to the Commission on any of the matters addressed by our letter.

Respectfully submitted,

Adam Kanzer, Esq.
Managing Director
Director of Corporate Engagement and Public Policy

[3] https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf
[4] https://www.sec.gov/comments/s7-06-16/s70616-107.pdf
[5] https://www.sec.gov/comments/s7-06-16/s70616-103.pdf
[6] http://icar.ngo/wp-content/uploads/2016/07/ICAR-Submission-S7-06-16.pdf
[7] https://www.ceres.org/files/sec-concept-release-letter/at_download/file; In addition, we reviewed a draft of a longer letter to be submitted to the Commission, which we strongly support. A link to this letter was not available at the time of our submission.
[8] https://www.sec.gov/comments/s7-06-16/s70616-133.pdf
[9] https://www.sec.gov/comments/s7-06-16/s70616-28.pdf

<u>Response to Specific Questions Posed in the Concept Release</u>

We have re-ordered some of these questions to address general principles first, followed by sustainability reporting and then more specific areas of disclosure, including business strategy, employees, tax, subsidiaries and share buybacks.

Materiality, Principles vs. Rules-Based Disclosures (*Requests for Comment 6 and 7*)

In order to capture the broad scope of risks and opportunities presented, the Commission's framework must continue to balance principles and rules-based disclosures, as well as inward and outward looking indicators. Information that the reasonable investor considers important in the total mix of information should not be conflated with management's view of risk to the issuer. We recommend that the Commission retain its current definition of materiality.

Investors benefit from Regulation S-K's balance of principles and rules-based requirements and we recommend that the Commission retain this important balance. Principles-based rules provide management with some flexibility to provide investors with what they deem to be the most important information to understand the business, while more prescriptive, rules-based disclosure requirements can ensure that information that the Commission believes to be important (in the public interest or for the benefit of investors), regardless of management's view, is also disclosed. These two types of rules each provide unique benefits. We would be particularly concerned if registrants were permitted to override a rules-based requirement because they did not deem the disclosures to be material. One category of disclosures is subject to a materiality threshold; the other is *per se* material and, of course, some line item disclosures are a mix of both, to permit greater flexibility and ensure relevance to the registrant. Principles-based rules can provide investors with important insight into management's thinking, while rules-based requirements allow for greater specificity and comparability over time and between peers.

One of the primary shortcomings of voluntary reporting is not necessarily the lack of quality indicators or frameworks, but its discretionary nature. In a voluntary report, investors cannot be assured that a company will provide consistent, comparable information each year, or that the information provided will be complete, balanced and in context. This deficiency should not be replicated in Regulation S-K by permitting registrants a "materiality override" of *per se* requirements.

Item 103's requirement to disclose environmental regulatory liabilities that exceed $100,000 is an excellent case in point. Registrants are required to disclose environmental regulatory liabilities exceeding $100,000, unless "the registrant believes that the proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interests and costs, of less than $100,000." First, as the Commission may be aware, academic research suggests that the vast majority of companies that receive such sanctions, do not disclose them to investors[10], presumably because they did not believe they would exceed $100,000. When management was proven wrong, and the liabilities did exceed that threshold, they were no longer required by the rule, because they were no longer "pending." Rather than abandon this rules-based requirement, we recommend that the Commission strengthen the rule by requiring *actual and* anticipated liabilities. If the rule is rewritten as subject to a materiality threshold, very little will be

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[10] See, e.g., http://www.csmonitor.com/Environment/Bright-Green/2009/0224/study-most-companies-lie-to- sec-about-environmental-fines

disclosed, as it would be exceedingly rare for an environmental fine or liability to rise to the level of financial materiality for a large corporation. Presumably, a liability of that magnitude would already be well-known to the marketplace by the time it was disclosed.

We do not judge the importance of such liabilities based on their material impact on a corporation's finances. For one reason, the size of many potential environmental fines are capped by regulation. We are seeking disclosures to help us answer the following questions:

- Is this fine significant, *according to the regulator?* For example, is this a standard EPA fine, or this a large fine?
- Do companies in this industry tend to receive these kinds of violations, or is this unusual?
- Does this company have a pattern of fines in this area?
- In aggregate, how large are the overall fines that have been assessed?

These are critical questions to answer if one wants to understand a company's regulatory compliance record and avoid – or mitigate – future risk. Such disclosure requirements, therefore, must be *calibrated to the regulatory environment, not to the registrant's finances,* and must not be discretionary. A financial materiality threshold would, in essence, exempt the largest companies from the disclosure requirement, and the largest companies tend to have the most significant environmental footprint.

Management's view of risk to the registrant is useful, but inadequate. Investors are casting a wider net to understand the full scope of risks and opportunities to their portfolios. The companies that are the most likely to experience avoidable catastrophic disasters are the least likely to provide advance warnings. A reasonable investor needs something more than management‘s perception of risk.

In the midst of a series of systemic crises—financial, ecological and social—we can no longer afford a reporting system that fails to take a holistic approach. And yet, investors who are responsible for decision-making that drives the largest capital allocation mechanism on the planet do not receive systemic information. They receive issuer-focused, inward-looking reports. Because current rules focus on financial risks to the issuer, there are very few rules that help investors understand each issuer's impact on its competitors, the environment, customers, employees, or communities. Broadly diversified investors, therefore, do not have access to sufficient information to adequately gauge these portfolio-level risks.

There is an implicit assumption that the "reasonable investor" is solely concerned with risk to the issuer, and if the Commission were to move to an exclusively principles-based disclosure regime, there is a high risk that investor needs will be conflated with "foreseeable financial risks to the registrant." Modern investors, however, are broadly diversified. They are far more concerned with risk *to the portfolio.* This, of course, encompasses risk to the issuer, but also extends more broadly to include so-called "externalities" - costs that corporations impose on third parties. These costs are often carried by a fiduciary's clients, by other companies, or by the economy, but are not explicitly captured by current rules, unless the issuer believes these issues present a material financial risk to the company. Prudent investors wish to understand and mitigate these risks before they become systemic, or before they become reputational or legal risks to the issuer that created them.

Prudent investors are also interested in measuring corporate performance against multiple performance benchmarks in order to obtain a clearer view of risks and opportunities.

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Investor support for the *UN Guiding Principles Reporting Framework* provides a clear demonstration of how investor interests have changed. The Framework was developed to provide corporations with clear guidance on how to report their compliance with the UN Guiding Principles on Business and Human Rights, which were endorsed by the UN Human Rights Council in 2011, establishing, for the first time, an internationally recognized framework for understanding corporate human rights obligations and a new expectation that companies will remediate certain human rights impacts. The Reporting Framework is built upon the concept of "salience," rather than materiality, in order to make it clear that its focus is on risks to the individual whose rights have been violated, rather than to the corporation. One would think that such an explicit divergence from financial materiality would fail to gain investor support. To the contrary, the Reporting Framework has been endorsed by a growing coalition of investors, currently managing $4.8 trillion.[11] An independent investor-led effort to benchmark corporate performance against the Guiding Principles was also welcomed by this coalition of investors.

This support is a recognition that today's reasonable investor considers corporate human rights performance to be material to their investment decisions as well as confirmation that modern investors need externally focused disclosures to evaluate risk and opportunity. These points are reinforced again and again when reviewing investor-developed or supported voluntary reporting frameworks, including the Global Reporting Initiative, which uses an externally-focused definition of materiality, focusing on corporate impacts to society and the environment, rather than impacts to the company, and the CDP, which is supported by investors managing more than $100 trillion, and includes numerous line-item disclosures relating to corporate responses to climate change, deforestation and water scarcity.

In March 2014, Ceres/Investor Network on Climate Risk produced an "*Investor Listing Standards Proposal: Recommendations for Stock Exchange Requirements on Corporate Sustainability Reporting*" after an extensive international consultation with investors and the consideration of more than "100 institutional comments from six continents."[12] There was unanimous consensus on the Proposal's inclusion of a "materiality assessment":

> *They felt strongly that at a minimum, companies should have robust processes for identifying, discussing, and determining which sustainability issues were most material for them—**not just from a financial materiality standpoint, but also for those issues that posed significant reputational, ethical, legal, and other harm**. Secondly, investors felt strongly that companies should have robust programs and systems in place for gathering information to determine these material issues. Those systems include stakeholder engagement and a process for identifying the company's most important stakeholders. Thirdly, investors want companies to report on the issues that were determined to be material, the processes or programs for stakeholder engagement, and WHY companies determined certain issues to be material over others. (emphasis added)*

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[11] http://www.ungpreporting.org/early-adopters/investor-statement/ This author was a member of the Eminent Persons Group that advised on the development of the Framework.

[12] http://www.ceres.org/resources/reports/investor-listing-standards-proposal-recommendations-for-stock-exchange-requirements-on-corporate-sustainability-reporting In the interest of full disclosure, this author represented Domini as a member of the drafting committee that produced the listing standard. The full drafting committee included representatives from Rockefeller & Co., Boston Common Asset Management, Pax World Management, BlackRock, F&C Asset Management, British Columbia Investment Management Corporation and the AFL-CIO Office of Investment.

This critical information is generally not available in corporate securities filings. Further, the Proposal noted that:

> *Current practice in financial reporting generally fails to capture many ESG-related risks and externalities that would help investors gauge risks and opportunities to individual companies, as well as understand each company's contribution to or impact from systemic risks. Reporting that focuses exclusively on risks and opportunities to the issuer usually omits any discussion of risks and opportunities issuers present to others. Institutional investors, many of which have long-term investment horizons and are often invested across the economy, are particularly exposed to the systemic risks that result from short-term thinking and undisclosed externalities.*

Further, investors should not have to rely upon management's discretion to obtain information about objectively verifiable, widely recognized risks:

- For the past eleven years, the World Economic Forum has produced a "Global Risks Report", describing and ranking the most significant risks facing the world: "After its presence in the top five most impactful risks for the past three years, the failure of climate change mitigation and adaptation has risen to the top and is perceived in 2016 as the most impactful risk for the years to come, ahead of weapons of mass destruction, ranking 2d, and water crises, ranking 3d."[13] Strikingly, although many of the risks addressed by the report can be tied, in part, to corporate activity, and certainly have potentially significant financial import, Regulation S-K does not currently require companies to discuss their contribution to them unless management believes they may present risk to the business. Again, this perspective is still valuable, but should be supplemented with clear disclosures that elicit a registrant's contribution to these risks, as well as their impact on the registrant.
- The Consumer Goods Forum has acknowledged its corporate members' impact on global deforestation, which is driving climate change, biodiversity loss and human rights abuses.[14] Registrants that are CGF members, however, are not required to provide investors with any information on how they are managing these contributions to systemic risk, and generally do not do so.

How can the MD&A be improved? (*Requests for Comment 88, 89, 103*)

The MD&A provides investors with a uniquely valuable lens on their investments – management's view of risk and opportunity to the issuer. This can help to surface information known only to management as well as provide insight into the quality of management teams, a key indicator of future success. Investors cannot rely solely upon management's view of risk, but management's view of risk will always be critically important to investment decision-making.

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[13] The Global Risks Report 2016 features perspectives from nearly 750 experts on the perceived impact and likelihood of 29 prevalent global risks over a 10-year timeframe. The risks are divided into five categories: economic, environmental, geopolitical, societal and technological. http://www3.weforum.org/docs/GRR/WEF_GRR16.pdf

[14] http://www.theconsumergoodsforum.com/sustainability-strategic-focus/climate-change/deforestation ("Deforestation accounts for 20% of all greenhouse gas emissions. Every minute, tropical rainforest of the size of 50 football fields is destroyed. Whilst the causes of deforestation are complex, it is generally acknowledged that the biggest drivers are the cultivation of soya and oil palm, logging for the production of paper and board and the rearing of cattle. All of these commodities are major ingredients in the supply chains of most consumer goods companies. Our member companies drive the demand for these commodities and have an opportunity to ensure that the sourcing of these ingredients does not contribute to deforestation. Therefore, in 2010, our Board approved a resolution to achieve zero net deforestation by 2020.")

We would encourage the Commission to consider improving the disclosures provided in the MD&A in the following areas:

- Sustainability issues are generally not discussed, except through legal boilerplate, which is not useful to investors. This may be due to several factors, including a lack of awareness by management or a mismatch between the timeframe generally contemplated in MD&A disclosures relative to the generally longer time frame when sustainability issues tend to play out. Indicators developed by the Sustainability Accounting Standards Board (SASB) may be particularly useful in this area, as they provide management with key performance indicators tailored to their industry. We recommend the Commission study indicators developed by SASB, the Global Reporting Initiative (GRI) and CDP, and consider providing guidance to registrants recommending their use. Ultimately, we believe industry-specific indicators should be mandated and not left to management's discretion.

- Consider ways to elicit broader and longer-term discussions of risk and opportunity. For example, the Commission might consider creating specific line items within the MD&A to elicit a discussion of short-term risks and opportunities and a separate line item designed to elicit longer-term risks and opportunities, with specific time frames provided.

- We encourage the Commission to carefully consider the comment letter submitted by the Investor Environmental Health Network, which includes a variety of important observations about materiality and improvements to the MD&A that we strongly support.

Sustainability Disclosures (*Requests for Comment 216-221*)

At the outset, we support US SIF's comments that "sustainability" and "public policy" issues are independent categories. Sustainability disclosures target a company's ongoing management of its impacts to society and the environment, and the various ways these issues affect the company. Many of these issues surface in public policy debates, but they do not generally originate in policy circles. They arise in a company's daily operations and interactions with multiple stakeholders, around the world. In short, there may be significant overlap between these sets of issues, but they are not the same. Because corporations depend upon multiple stakeholders to operate profitably, including employees, investors, suppliers, communities, governments and a range of eco-system services, the health of these stakeholder relations is not a peripheral consideration for any successful company – it is core to business operations.

It is also important to recognize that registrants are already required to disclose sustainability issues that present a material risk to the business. However, in our experience, sustainability is rarely discussed in securities filings and when it is discussed, it appears in a cursory or boilerplate fashion. The Commission should provide clear guidance to issuers to clarify that financially material social and environmental risks already fall within existing requirements, and should follow that guidance with clear enforcement.

In the Investor Stock Exchange listing standard proposal referenced above[15], there was strong consensus on the following ten categories of sustainability information, across all corporations:

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[15] http://www.ceres.org/resources/reports/investor-listing-standards-proposal-recommendations-for-stock-exchange-requirements-on-corporate-sustainability-reporting

- *Governance and Ethical Oversight*
- *Environmental Impact*
- *Government Relations and Political Involvement*
- *Climate Change*
- *Diversity*
- *Employee Relations*
- *Human Rights*
- *Product and Service Impact and Integrity*
- *Supply Chain and Subcontracting*
- *Communities and Community Relations*

Additional detail on each category is provided in that proposal.

Sustainability issues affect different industries in different ways. A paper company faces different sustainability challenges from an Internet company or an airline. Industry-specific indicators, therefore, are needed to understand each company's key sustainability challenges, within the context of its industry and business model. The MD&A, Risk Factors and Industry Guides might be the most appropriate places for these disclosures, using a combination of principles-based and more prescriptive requirements.

There are also numerous cross-cutting issues that affect virtually every company, in each of the areas noted above. These areas may be most appropriate for line-item disclosures, which can be crafted to ensure long-term relevance to a broad range of companies. For example, an indicator requesting information on the policies and procedures utilized to address the human rights and environmental impacts that arise in a registrant's supply chain, accompanied by narrative disclosure on key efforts and challenges, would be broadly applicable whether the issue the company faces is forced labor in the production of pig-iron, excessive working hours at electronics manufacturing factories, child labor in the sourcing of cotton or sugar, or deforestation and biodiversity loss from palm oil production. The basic components of these disclosures are generally the same, although the particulars vary as issues change over time and by industry.

At Domini, we utilize a proprietary set of quantitative and qualitative KPIs at the sub-industry level to determine which companies meet our standards for investment, based on our assessment of how each company is managing its key sustainability challenges. Once we invest, however, as responsible stewards of capital, our scope of interest is even broader.

What is material to us changes depending on whether we are making a threshold decision to approve or disapprove a company for our portfolios, or whether we are evaluating a company's performance for possible engagement, or to cast a proxy vote.

Many of these corporate engagements are targeted at risk mitigation, because mismanagement of the issue could present reputational, legal or operational risks to the company, or severe harm to external stakeholders or the environment. When these issues are well managed, they can also contribute to long-term value creation, including improved employee and customer loyalty, decreased resistance from local communities and broader, long-term benefits to society.

There is nothing unique about this view of materiality. There are many financial and governance factors that are currently required to be disclosed, that investors consider to be material, but may not independently determine an investment decision. Many investors choose long-term engagement to address these issues rather than sell their shares. Sustainability disclosures, therefore, should not be required to pass through a narrow financial materiality filter that is not required of other types of disclosures.

There is a significant need for mandatory reporting on sustainability impacts. Although many of these issues are currently financially material, investors are not finding the information they need in the 10-K, relying instead on a wide range of voluntary reports (see discussion below).

We recommend the Commission consider the following approaches:

- Develop guidance for the MD&A to clarify for registrants that sustainability issues may be material. We note that many companies already produce quality sustainability information, but are reticent to include this information in their securities filings without clear guidance from the Commission. In a recent conversation with a Fortune 500 company, we asked why information on capital allocations for climate change was provided, piecemeal, in three different locations – the 10-K, the company's CDP report and the company's sustainability report. We commented that to get the whole picture, in context, we needed to review three different reports that were not cross-referenced. We were told that the company was pleased to continue to provide this information to investors, and to post it on its website, but would not incorporate it into its securities filings without clear guidance from the Commission. We also note in this context, however, that the Commission provided very clear guidance in 2010 on climate change, a systemic risk that affects virtually every registrant, and this guidance did not result in improved disclosure. We believe that this experience supports the development of line-item disclosures.

- Consider mandatory industry-specific sustainability indicators, for use in the MD&A and industry guides. A number of organizations, including Global Reporting Initiative, SASB and CDP have developed such indicators. In the interim, companies should be required to disclose which set of standards they use. Ultimately, we think that there is merit in the recognition of an independent third party standard-setting body (or bodies) in this area.

- Consider adopting line-item disclosures to address the most important sustainability issues presented, across industries. Climate change and supply chain human rights risks are two areas of significant import that do not receive sufficient attention in current securities filings.

- Permit registrants to furnish their sustainability report to the Commission, along with their 10-K.

- Consider requiring companies to provide an index of widely used sustainability indicators, disclosing whether the company reports against each indicator and, if so, where this information can be found. The Ceres/INCR listing standards proposal included the following recommendation: "Every company shall provide a hyperlink in its annual financial filings to an ESG Disclosure Index, utilizing the Global Reporting Initiative's Content Index OR its functional Equivalent, which will inform investors about the availability and location of a company's existing ESG data and/or Key Performance Indicators."

Outside of Regulation S-K, we recommend the Commission consider the following:

- Last year, the World Federation of Exchanges' Sustainability Working Group produced sustainability disclosure guidance, including 'material ESG metrics' to include in disclosure guidance and 34 indicators as measures of best sustainability practice.[16] The WFE took this action in recognition of the fact that numerous stock exchanges around the world currently require some form of sustainability reporting. We recommend that the Commission study these efforts and encourage broad-based sustainability disclosures at the exchanges.

- Domini, and many other investors, utilize government agency-provided data to inform our investment decisions, including information on regulatory fines and investigations. These data, although generally financially immaterial due to statutory limits on the size of many agency's fines, are material to our investment decisions as they can serve as an early warning system for catastrophic risk, and are strong indicators of quality of management. In addition, these are reliable and comparable indicators, as they are not filtered through the corporate legal department, which has a strong incentive not to disclose. In particular, we utilize data from the Environmental Protection Agency, the Department of Labor, OSHA, the NLRB, the NHTSA (National Highway Traffic Safety Administration), the Federal Aviation Administration, the EEOC and state-level departments of environmental protection, among others**.** Gathering this information and tying it back to individual registrants, however, can be time consuming and difficult. We are concerned that these technical obstacles, as well as a lack of general awareness of the availability of some of this information, may be preventing its wide scale use by investors. We believe that investors would benefit from a central database, ideally provided by the SEC. This would reduce reporting burden for registrants and provide investors with substantial decision-useful information.

- We also support the following comment from Ceres: "Meaningful disclosure can be elicited if appropriate disclosure rules and/or guidance is in place, staff are trained to understand the material business risks presented by sustainability issues, staff issue comment letters to issuers with inadequate or questionable disclosure, staff open investigation or pursue administrative enforcement proceedings where appropriate, and staff have regular dialogues with issuers and investors about their mutual disclosure concerns. Also, to respond to developments in the field and investor and issuer concerns, the SEC should utilize tools such as investor and issuer education, supplemental staff or interpretive guidance, speeches, public roundtables, conferences and other means to engage with key market participants on potentially material ESG issues."

Specific issues:

With respect to specific issues that should be addressed, the list above describes the general areas that are generally encompassed by a sustainability report. We recommend the Commission review the leading standards and reporting frameworks, including GRI, SASB, CDP, and the UN Guiding Principles Reporting Framework.

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[16] http://www.world-exchanges.org/home/index.php/news/world-exchange-news/world-exchanges-agree-enhanced-sustainability-guidance

In particular, we would highlight the following areas:

Human Rights: We have devoted substantial efforts over the years to engage with companies in our portfolio to encourage and improve the state of human rights reporting, with particular emphasis on issues that arise in corporate manufacturing supply chains. In its comment letter to the Concept Release, the Interfaith Center on Corporate Responsibility (ICCR)[17] requested the following disclosures, which we strongly endorse:

- Whether an issuer has a Human Rights Policy that applies to direct operations and throughout its supply chain that includes prohibition of child and forced labor, and how it is auditing the human rights policy.
- Governance and Board responsibility for human rights issues.
- Data from an independent Human Rights Risk Assessment to define the primary human rights challenges to inform the company's approach to human rights issues in its operations and value chain.
- Existence and effectiveness of Remediation and Grievance mechanisms.
- The company's approach to stakeholder engagement.
- Reporting on traceability, purchasing practices, recruitment, worker voice, and monitoring

We also strongly recommend a close reading of the detailed submission by ICAR.[18]

Political spending and lobbying: We have also devoted significant efforts, over the course of more than ten years, to encourage companies to disclose their political contributions and lobbying expenditures. Although roughly 150 major corporations have voluntarily agreed to provide some level of political transparency, in recognition of its materiality to investors and its importance to the business, these disclosures are inconsistent and incomplete due to their voluntary nature.[19] Only a regulatory solution can provide the consistency needed by investors. We will not reiterate the numerous strong arguments for corporate political transparency here, but would encourage the Commission to take another look at this issue in light of its connection to the Commission's historic role in combatting corruption and strong interest from investors and the general public.[20]

Climate change**:** We recommend that the Commission consider a focused project to adopt a mandatory set of disclosures focused on corporate responses to climate change, a critical systemic risk with significant financial implications. At a minimum, investors would benefit from a clear line-item requiring disclosure of capital allocations for climate adaptation and/or mitigation.

Chemicals management: As a member of the Investor Environmental Health Network, and an investor that incorporates toxic chemical concerns into our investment decisions and has engaged with companies on a variety of chemicals management issues, including parabens in cosmetics and the sale of neonicotinoid-containing products, we support IEHN's comments relating to the need for improved disclosures around corporate chemicals management policies and procedures.

[17] https://www.sec.gov/comments/s7-06-16/s70616-103.pdf
[18] http://icar.ngo/wp-content/uploads/2016/07/ICAR-Submission-S7-06-16.pdf
[19] https://www.sec.gov/comments/4-637/4637-2227.pdf
[20] https://www.sec.gov/comments/4-637/4-637.shtml

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Line-Item requirements for Sustainabilty Disclosures

Without line-item disclosures, investors are left with management's view of risk in the MD&A. To date, this has not produced meaningful sustainability disclosures, despite the Commission's very clear guidance on climate change in 2010.

Management's view of risk is critically important, but not sufficient. Investors should be able to supplement management's view with sustainability information that is widely recognized to be relevant and material to an industry, or to public companies generally, just as investors today rely on line-item disclosures for certain financial and governance information. Line-item disclosures help to ensure comparability between companies and over time.

It is important for investors to be able to evaluate management's view of risk – this is essential to evaluating the quality of management – but investors also need specific information on objectively recognized areas of risk, including areas that management may not view as foreseeable or likely to be financially material.

For example, CDP's climate change questionnaire asks companies to describe whether their greenhouse gas emission reduction plans include absolute or intensity targets. Intensity targets refer to reductions relative to revenues or other financial metrics. A company that has set an intensity reduction goal may, upon completion of its goal, increase its absolute emissions as the company grows. CDP follows this question with the following: "Direction of change anticipated in absolute Scope 3 emissions at target completion?"[21] If a company answers "increase," an investor will immediately understand that this company's climate goals may result in certain operational efficiencies, but will increase the company's contribution to global greenhouse gas emissions. This may provide an opportunity to engage with management on the need to set absolute reduction goals, in keeping with the Paris Agreement's target of a maximum two degree Celsius increase in global temperatures over pre-industrial levels. This critical distinction is unlikely to surface in response to a principles-based disclosure requirement.

Line item requirements also allow investors to evaluate trends over time, eliciting disclosures that management may have withheld subject to a materiality determination. These trends, however, are material to investor decision-making and can serve as early warnings of risk.

Line item disclosure requirements may be particularly appropriate for understanding a registrant's contribution to various forms of systemic risk, as these indicators would be externally relevant and consistent across all industries. Line item disclosures are also particularly appropriate for corporate political or lobbying contributions, in order to ensure consistency and comparability year over year and across peer groups.

The Shortcomings of Voluntary Reporting

Companies around the world have produced numerous high-quality voluntary reports on a wide variety of sustainability issues. We agree with the following observations by Ceres:

> *"Registrants provide sustainability information outside of SEC filings for a variety of reasons, such as an understanding that sustainability issues affect short and long term financial results, and measuring and managing the impact of these issues and the company's response thereto can*

[21] https://www.cdp.net/CDP%20Questionaire%20Documents/CDP-Climate-Change-Information-request-2016.pdf (Question CC3.1c)

improve their financial and sustainability performance. Such information is also provided in response to investor, stakeholder, and data provider requests, and in response to government and market regulators' guidance or rules related to sustainability disclosure. Finally, some companies that are leaders in sustainability performance and reporting believe that superior management of sustainability risks and opportunities and reporting on the same to investors, customers and other stakeholders provides a competitive advantage."

Voluntary reporting, however, has significant shortcomings.

For many important issues, there is an insufficient amount of comparable, reliable disclosure in the marketplace to permit consistent investment decisions. One company, for example, may report extensively on its efforts to address human rights issues in its manufacturing supply chain, while its direct competitor may say nothing at all.

Many voluntary reports lack balance and context, serving as vehicles for companies to tell a good story about their performance, as opposed to serving as an accurate measure of performance against recognized standards. Investors can never be assured that a quality report will utilize consistent indicators year after year.

Mandatory requirements should foster higher-quality reporting, with senior and Board level attention, subject to meaningful internal controls. One anecdote should help to clarify the distinction. In a recent dialogue with a U.S. bank, we asked why the risk section of their CDP report was so limited, and the opportunities section so detailed. We were told that the company's legal department advised the preparer of the CDP report to stick to the risks disclosed in the 10-K, but did not provide any limitation on the opportunity section. Had this information been provided in a securities filing, we would imagine that the company would have ensured that it provided a more balanced discussion of risks and opportunities, and investors would have benefited from SEC oversight to ensure the information was presented in a balanced manner that was not misleading.

Integrated Reporting and Website Disclosures

In our view, integrated reporting adds a unique element that is not present in current sustainability reporting or financial reporting – a discussion of the sustainability factors that drive the business. This is a new and valuable addition to sustainability-related disclosures. We do not see integrated reporting as a substitute for meaningful sustainability reporting, but it can provide improvements on current financial reporting.

Although there may be some disclosures that can appear on a website and be appropriately cross-referenced in the 10-K, investors should not have to scour a company's website for material information. Sustainability information should be treated equally with financial information.

Voluntary Reporting Frameworks to Consider

We agree with the comments submitted by the Investor Environmental Health Network, and others, that the Commission should not favor one independent reporting initiative over another. There are a number of valuable reporting frameworks, and new ones will emerge. This is a valuable process.

Each of the leading voluntary sustainability disclosure frameworks include useful elements that SEC staff should consider when enforcing existing rules and guidance, issuing interpretive guidance or proposing new line-item disclosure requirements. We recommend that SEC staff review the sustainability and climate-related reporting frameworks developed by the Global Reporting Initiative (GRI), CDP, the Sustainability Accounting Standards Board (SASB) and the sector-specific climate risk management and disclosure guides developed by members of the Global Investor Coalition on Climate Change (Ceres/INCR, IIGCC and IGCC), which cover oil and gas and mining companies' reporting on carbon asset risks, and electric power and automotive companies' climate risk disclosure, and the UN Guiding Principles Reporting Framework for human rights disclosures.

Ultimately, however, we do see merit in the Commission formally recognizing an independent standard-setting body (or bodies).

Climate Change Risk and the Commission's 2010 Climate Guidance (*Request for Comment 223*)

The SEC's 2010 climate change guidance very helpfully outlines the various risks climate change presents to a range of industries, and details the type of disclosures that issuers should be providing. Taken seriously, the guidance could have prompted companies to conduct internal risk assessments, and put in place mitigation measures. The Guidance was extremely well done, and we commend the Commission and, in particular, the Division of Corporate Finance, for undertaking this critically important effort. Unfortunately, it did not result in improved disclosures.

This experience should help to clarify both the benefits and limits of the MD&A, and the need for line-item disclosures in certain key areas.

It is important to step back and question why the Guidance was needed in the first place. Why did the Commission see the need to thoroughly explain to issuers that the most significant sustainability crisis humanity has ever faced might be material to their businesses? We would submit the Guidance was necessary because the MD&A leaves it up to each company to define the material risks it faces. The Guidance may have also been difficult for Staff to enforce, because it is difficult to second-guess management's view of risk without access to inside information.

By contrast, the Global Framework for Climate Risk Disclosure,[22] developed by a significant coalition of institutional investors, as well as the CDP, seeks targeted performance disclosure, including baseline greenhouse gas emissions, strategy discussions and targeted carbon pricing scenarios, regardless of their financial materiality to the issuer. This information provides investors a deeper understanding of each company's approach to climate change and the actual risks presented, in a comparable format and allows investors to understand trends over time, a critical analytical need that the MD&A does not address.

Broadly diversified investors, therefore, do not have access to sufficient information to adequately gauge portfolio-level risks of these issues. CDP is an investor-driven response to that critical gap and the $100 trillion of assets backing its annual surveys should be viewed as decisive proof that this information meets the Commission's investor-focused definition of materiality.

We strongly encourage the Commission to enforce its 2010 guidance and to also consider line-item disclosures on climate change.

[22] http://www.unepfi.org/fileadmin/documents/global_framework.pdf

Business Description (*Request for Comment 27*)

It has become common in good voluntary sustainability reporting for corporations to describe their sustainability goals, the steps they have taken to implement these goals and their progress level. This is material information that is currently siloed in a voluntary report, often with little explicit connection to the company's core business objectives. The Commission should consider ways to include these core strategic initiatives, while avoiding boilerplate disclosures ("we seek to be the global leader in our industry"). As part of this discussion, management should describe its process for setting these goals, including how it identified its key stakeholders and key challenges. The work of the International Integrated Reporting Council may be particularly useful in this area.

Employees (*Requests for Comment 54-59*)

We strongly support US SIF and ICCR's comments in this area.[23] In addition to number of employees, the following would be particularly useful information for investors:

- Employee turnover rate; significant layoffs
- A breakdown between domestic and foreign employees
- Breakdown of full-time, part-time, seasonal and sub-contracted employees
- Diversity information (see US SIF's letter for further details, including EEO-1 data and gender pay ratio data)
- Percentage of employees that are represented by a union. Unionization is a key indicator for us in several industries. Although we can often obtain basic information on the percentage of a company's workforce that is unionized in the 10-K, this information is not currently required and is therefore provided in an inconsistent manner. In addition, it would be helpful for the registrant to identify the name of the union(s) and, for companies with significant union representation, provide a narrative discussion of the company's process for engagement with the union, noting any significant disputes.
- A description of benefits and incentive structures available to all full-time employees
- A discussion of the company's goals regarding diversity, employee training and retention, and efforts to implement these goals
- Significant pending legal proceedings, or regulatory investigations, including fines or judgments awarded, relating to employee management.

Environmental Regulatory Disclosures (Item 101) (*Requests for Comment 49 – 51*)

The Commission should maintain, and strengthen these requirements. It is important to recognize that "environment" is no longer simply a legal compliance function, as it may have been viewed in the 1970s. Environmental risks do not stem solely from compliance with environmental laws and regulations. As discussed in the Commission's Climate Guidance, climate change presents regulatory and compliance risks as well as physical and operational risks, as do a number of other environmental issues from water scarcity to deforestation to pollinator declines.

At present, environmental liabilities and trends are often perfunctorily addressed in the MD&A, or not even disclosed. Broader disclosure should include trends in complaints, accidents, or scientific literature that suggests that the company's operations, products, or services cause serious harm to the environment

[23] https://www.sec.gov/comments/s7-06-16/s70616-107.pdf; https://www.sec.gov/comments/s7-06-16/s70616-103.pdf

or human health. Such disclosure should also include significant environmental impact caused by the normal use of the company's product.

We would also like to see a specific line item requiring registrants to disclose their capital allocations for climate adaptation and mitigation.

We support Ceres' recommendations in this area, and also encourage the Commission to look to third-party standards, including SASB, CDP, GRI and the Investor Environmental Health Network.

International Tax Issues (*Requests for Comment 52-53*)

Aggressive corporate tax planning can create earnings risk, damage corporate reputation and brand value and cause significant harm to local and national economies. As practiced by large multinational companies, we believe that aggressive tax strategies have become a key systemic risk that can impact the profitability of a company and have broader impacts on portfolio returns. Current rules do not provide investors the information needed to evaluate and address these substantial risks.

As citizens and long-term investors, we require resilient economies and societies that can stand up to the inevitable shocks the future will bring. Large-scale tax avoidance weakens societies, creating vulnerabilities where we need strength. It threatens long-term wealth creation.

Our concern is not that companies are taking allowable deductions or accepting tax incentives to locate manufacturing operations. We are most concerned about efforts to artificially shift profits out of countries where they are earned. For example, according to *Citizens for Tax Justice* and the *U.S. PIRG Education Fund*, in 2010, the amount that American companies told the IRS they actually earned in Bermuda was 1,643% of that country's entire yearly economic output.[24]

This global shell game not only hides taxable revenues from governments, it also hides the true sources of corporate value from investors. Investors are currently unable to answer the following threshold questions:

- What portion of future profits are dependent upon creative accounting, and what portion can be expected to flow from superior products and services?
- How sustainable is a company's effective tax rate?
- What strategies were utilized to reduce that rate, and what risks do these strategies carry?

In addition, these opaque strategies may mask significant potential off-balance sheet liabilities. This risk is particularly acute in a shifting regulatory and policy landscape. It is difficult to know, based on current disclosures, which companies are most at risk as tax rules and interpretations change.

We are also concerned that investors have insufficient information to judge whether corporate tax strategies are resulting in the most productive allocations of capital by corporations. There is good reason to believe that this is not the case, with the largest companies in the world keeping substantial assets "permanently reinvested offshore" in financial instruments, including U.S. Treasuries, as opposed to using these substantial funds to build stores or factories, invest in research and development, supply chain resiliency or employee training and development. Some multinationals have more than 50% of their

[24] http://ctj.org/ctjreports/2015/10/offshore_shell_games_2015.php#.V5A69lfMl2U

assets 'permanently reinvested' offshore.[25] These dramatic sums present substantial opportunity costs, as well as impacting corporate borrowing decisions and mergers and acquisitions.

Companies are not currently required to disclose their foreign effective tax rate to investors and, from our experience engaging with companies, are sometimes reluctant to disclose it upon request. Although this figure can be calculated from the 10-K, companies should be required to provide it along with an explanation of significant differentials between the foreign effective rate and the average effective tax rate in the countries in which they do business.

An article published by *Bloomberg* explained the issue:

> *"Many of the companies operate in dozens of countries, yet typically report a single, consolidated overseas tax figure in their public filings. That makes it difficult to predict how political developments and changing business conditions in specific countries could affect profits.*
>
> *'The reasons these disclosures are not sufficient and certainly cannot be called transparent is that many of the items included in that foreign tax line are subject to different trends and uncertainties,' Nili Shah, a deputy chief accountant in the SEC's Corporation Finance division, which is responsible for examining company filings, said at an accounting conference in December."*[26]

Companies are already required to disclose material risks related tax strategy, but generally provide boilerplate statements or brief references that are of little use. Investors do not have adequate information to assess the risks of multinational tax strategies, to understand the long-term sustainability of corporate effective tax rates, including the mechanics and associated risks of that rate, or, arguably, to accurately value companies with significant potential tax liabilities.[27]

In an effort to remedy these significant disclosure gaps, we have engaged with companies in our portfolio about their global tax strategies and collaborated with other investors. In 2013, the UN Principles for Responsible Investment convened a group of global investors, including Domini, to explore the issue of corporate tax planning and produce a guide on how to engage with companies on this topic. We would commend this report to the Commission's attention, to gain a better understanding of the range of concerns raised by investors.[28] We would also commend to the Commission's attention our testimony to the *Independent Commission for the Reform of International Corporate Taxation,*[29] and comment letters submitted to the Commission in response to the Concept Release by the FACT Coalition, a coalition of

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[25] According to a *Wall Street Journal* investigation, 93% of the money Microsoft has officially "offshore" was invested in U.S. assets, like Treasuries. Arguably, this is not a productive use of 50% of one of the world's largest company's assets, and may represent significant opportunity costs to investors.
http://www.wsj.com/articles/SB10001424127887323301104578255663224471212 and
http://www.nytimes.com/2014/07/06/business/when-taxes-and-profits-are-oceans-apart.html?_r=0

[26] http://www.bloomberg.com/news/articles/2015-03-05/foreign-tax-surprises-like-disney-s-have-sec-seeking-sunlight

[27] For one perspective on this, see Gretchen Morgenson, When Taxes and Profits are Oceans Apart (New York Times, July 5, 2014), http://www.nytimes.com/2014/07/06/business/when-taxes-and-profits-are-oceans-apart.html?_r&_r=0

[28] The report is available at: https://www.unpri.org/download_report/8531. RESOURCES ALSO

[29] http://www.icrict.org/wp-content/uploads/2015/04/Adam-KANZER-statement.pdf

tax-justice organizations[30] and by Elise Bean, Former Staff Director and Chief Counsel, US Senate Permanent Subcommittee on Investigations.[31]

Recommendations

The recommendations below are drawn from these letters and the UN PRI's comment letter.

Enhanced disclosure on corporate tax practices should allow investors to understand how corporate boards identify tax related risks and respond to government and other stakeholders' expectations. It should also allow investors to identify a potential aggressive approach to tax planning. At a minimum, this requires companies to disclose meaningful information on the following areas:

- Corporate tax policy and principles, governance and oversight frameworks, and management systems for tax-related risks.[32]

- What drives the gap between effective tax rate shown on income statement and the weighted average statutory rate based on the firm's geographic sales mix.

- Explanation of the difference between the foreign effective tax rate and the average statutory rate of the countries where companies do business, particularly the key tax strategies employed and the risks of those strategies, including regulatory risks; currently, this figure is not explained within the tax footnote. Currently, companies are not required to disclose their foreign effective tax rate. This would also be an important indicator to signal to investors whether a company is engaged in aggressive tax avoidance in other countries.

- An overview of what is driving unrecognised tax benefit (UTB) changes; UTBs display the tax positions being taken by companies that management believes are less than 50% likely to be upheld by a tax authority.

- Investors are seeking to understand whether multinationals are shifting profits between subsidiaries in order to avoid tax, or for appropriate business purposes. Disclosure on intercompany debt, including the countries where the debt is held, the amount of intercompany debt, and the average interest rate paid by other subsidiaries on that debt would help investors

[30] https://www.sec.gov/comments/s7-06-16/s70616-28.pdf

[31] https://www.sec.gov/comments/s7-06-16/s70616-32.pdf

[32] The OECD Guidelines for Multinational Enterprises (http://www.oecd.org/daf/inv/mne/48004323.pdf) call on companies to "comply with both the spirit and the letter of the tax laws and regulations of the countries in which they operate" (XI.2), and provide guidance on tax strategies that are consistent with good corporate citizenship. The Guidelines call specifically for the development of tax policy principles:

> "Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated."

The commentary to this provision states: "Enterprises' commitments to co-operation, transparency and tax compliance should be reflected in risk management systems, structures and policies. In the case of enterprises having a corporate legal form, corporate boards are in a position to oversee tax risk in a number of ways. For example, *corporate boards should proactively develop appropriate tax policy principles*, as well as establish internal tax control systems so that the actions of management are consistent with the views of the board with regard to tax risk." (XI.102)(*emphasis added*) understand these arrangements. Recently proposed U.S. regulations dealing with intercompany interest would require, among other things, greater contemporaneous documentation of the debt (is it at "arms-length"? can the borrower really repay the debt?). These regulations will effectively disallow interest expense deductions for certain debt by reclassifying it as equity. Other jurisdictions are considering similar changes. Investors will need to understand the location and purpose of intercompany debt to fully understand tax risk.

- The most financially material tax incentives across jurisdictions; information on expiries of all incentives, investment requirements and commentary regarding the likelihood that such incentives will not be renewed should be provided.

We also recommend that the SEC's disclosure requirements be aligned with evolving international standards on country by country reporting (e.g. the OECD- Base Erosion and Profit Shifting project and relevant template for Country by Country reports). The following information should be disclosed on an annual, country-by-country basis:

- profit or loss before taxes;
- income tax accrued for the current year;
- revenues from unrelated parties, related parties, and in total;
- income tax paid (on a cash basis);
- effective tax rate;
- stated capital;
- accumulated earnings;
- number of employees; and
- tangible assets other than cash or cash equivalents.

We believe that such information would not be onerous to produce, and would provide valuable information to the marketplace. In addition to meeting investor needs, we also note that the Commission may have an independent basis for requiring this information, as Section 2 of the Securities Exchange Act of 1934 notes the need to impose disclosure requirements, in part, to protect "the Federal taxing power." The U.S. Treasury loses in revenues per year as a result of aggressive corporate tax avoidance, with potentially significant implications for our economy, our clients, and portfolio returns.

Subsidiaries, Legal Entity Identifiers *(Requests for Comment 257-260)*

We support the disclosure of all of a registrant's subsidiaries, along with additional information to allow us to understand their significance, and recommend the use of the Legal Entity Identifier system.

It is impossible for an investor to understand a company's tax strategy without understanding its global structure and the business purpose of existing subsidiaries, including those located in so-called secrecy jurisdictions, or "tax havens." Currently, however, a number of large companies are failing to disclose their subsidiaries, presumably because they do not deem them to be "significant" under the SEC's current rules. According to one academic paper, "From 2009 to 2010, 98 percent of Google's and 99 percent of Oracle's subsidiaries disappeared from the Exhibit 21s filed with their SEC Form 10-Ks. However, a

March 2012 search of available public company registries revealed that at least 65 percent of the missing subsidiaries remained active as of the companies' 2010 filing dates."[33]

Current rules allow companies to omit subsidiaries that, when viewed as a single subsidiary, wouldn't meet the definition of "significant." A subsidiary isn't considered "significant" unless it exceeds a 10% threshold under any one of three tests based on assets, investment or income.[34] For example, Google discloses subsidiaries in Delaware and Ireland. According to the *Financial Times*, however, "Google Netherlands Holdings, which represents the 'Dutch sandwich' part of the tax structure … received €8.6bn in royalties from Google Ireland Ltd and €232.8m in royalties from Google's Singapore operation. All but €10.4m of this was paid out to Google Ireland Holdings, a company that is incorporated in Ireland but controlled in Bermuda."[35] The SEC's test for 'significance' does not appear to be sensitive to these tax arrangements and may allow companies to omit disclosure of in*significant* but financially material subsidiaries.

These material omissions prevent investors from accurately assessing corporate structure and tax strategy and the attendant contingent liabilities, as well as exposures to other risks in these countries, including human rights, environmental and political risks.

The Commission's current test of "significance" for subsidiary disclosure was undoubtedly intended to produce the most material information to investors. In our view, however, this test is in practice often used to hide material information. Removal of the "significance" test, combined with the addition of a few key points of information for each subsidiary, would dramatically improve disclosure to investors without imposing additional burdens on issuers. Companies are already obliged to keep accurate records on the operations of subsidiaries, and we do not believe that reporting on those operations would impose a substantial additional burden. In addition, the need to assess "significance" may also create unnecessary legal expenses for issuers.

We recommend that the Commission:

- Require disclosure of *all subsidiaries*, rather than only "significant" subsidiaries. Several commentators have pointed to the Commission's four-part test of "significance" as the reason for the recent trend of "vanishing" or undisclosed subsidiaries.[36]

- Require disclosure of additional information for each subsidiary, such as profits earned and number of employees in each in order to provide investors with sufficient information necessary to understand the structure of the company and its international strategy. A subsidiary in a known tax haven with zero employees and billions in profits, for example, would signal to investors the use of particularly aggressive and potentially risky strategies to hide profits from regulators. For instance, it was reported that prior to its infamous accounting scandals and collapse, Enron used

[33] Jeffrey D. Gramlich and Janie Whiteaker-Poe, "Disappearing subsidiaries: The cases of Google and Oracle," *Social Science Research Network,* March 6, 2013, available at http://ssrn.com/abstract=2229576.
[34] Jessica Holzer, From Google to FedEx: The Incredible Vanishing Subsidiary (Wall Street Journal, May 22, 2013), available at http://online.wsj.com/news/articles/SB10001424127887323463704578497290099032374?mg=reno64-wsj
[35] Vanessa Houlder, 'Dutch sandwich' grows as Google shifts €8.8bn to Bermuda (Financial Times, October 10, 2013), available at http://www.ft.com/cms/s/0/89acc832-31cc-11e3-a16d-00144feab7de.html#axzz3UTidsXZl
[36] Jessica Holzer, "From Google to Fedex: The Incredible Vanishing Subsidiary," *Wall Street Journal,* May 22, 2013, available at http://online.wsj.com/news/articles/SB10001424127887323463704578497290099032374?mg=reno64-wsj(Vanishing subsidiaries are not the result of asset sales or corporate restructurings. Rather, companies say they are taking advantage of Commission rules that demand disclosure only when subsidiary operations are "significant.")

off-balance-sheet special purpose vehicles to hide mountains of debt and toxic assets from investors and creditors.[37]

- We support the use of Legal Entity Identifiers in order to ensure an objective, consistent registration of all entities. This would be useful in understanding a company's tax strategy, as well as evaluating counter-party risk.

We would also support a requirement to provide an organization or corporate structure chart or similar graphic depicting a registrant's subsidiaries and their basis of control.

Share Buybacks *(Requests for Comment 199-204)*

We share other investors' concerns that the rising tide of corporate share buybacks may be undermining the long-term value of U.S. companies and, by extension, the U.S. economy. A joint statement by a coalition of public pension fund fiduciaries issued last year noted that

> ***"****95 percent of corporate earnings are being distributed to shareowners, prompting us to question whether companies are adequately reinvesting for sustainable returns over the long-term. If the pendulum swings too far in favor of returning capital to shareowners, the future viability of the companies in which we invest may be placed at risk.*
>
> *Trillions of dollars have been spent on share buyback programs in recent years. Buyback programs are one effective means to return capital to shareowners. However, in order to maximize shareholder value for the long-term, companies must also adequately invest in the future. Growth requires investment."*[38]

In light of these concerns, we have begun to engage with companies in our portfolio, including the submission of two shareholder proposals this past proxy season on the topic. We have come to the conclusion that investors simply do not have sufficient information to judge whether these investments are appropriate, and when buybacks should be categorized as 'excessive.'

We encourage the Commission to consider the following additional disclosure requirements regarding capital allocation and share buybacks:

1. A description of the company's capital allocation policy and priorities, including share buybacks. This discussion should identify the source of the funds used for buybacks, the impact on corporate indebtedness, the relation between the amounts spent on buybacks and reinvestment.

2. A discussion of how the capital allocation policy is governed and implemented, including the scope of possible investments considered. For example, consideration of the overall level of investments believed necessary to achieve strategic goals, including investments in the workforce, the alignment of management's investment plans with the Company's strategy, and performance of those investments over time. A discussion of how longer-term investments are

[37] How did Enron use off-balance-sheet items to hide huge debts and toxic assets? Investopedia, accessed June 8, 2015, http://www.investopedia.com/ask/answers/060815/how-did-enron-use-offbalancesheet-items-hide-huge-debts-and-toxic-assets.asp.
[38] http://comptroller.nyc.gov/newsroom/coalition-of-pension-fund-fiduciaries-release-joint-letter-on-excessive-buybacks/

considered should be included. We are not seeking disclosure of possible investments that are considered but ultimately not made.

3. How the share repurchase program is managed, including oversight by the Board to monitor its impact, if any, on executive compensation. This discussion should include a discussion of incentives and how they relate to long-term performance. A discussion of how the board monitors the impact that extraordinary or unplanned share repurchase activity has on the company's relative performance, with discretion to adjust payouts if the circumstances require.

4. As noted in the UAW Trust's comment letter, it would be helpful for investors to have a better understanding of how share repurchases impact per share financial metrics, such as earnings per share that are used in executive compensation arrangements.

5. Discussion of the independent rationale for the share repurchase program.

In response to a Domini shareholder proposal, 3M provided a table in its Statement in Opposition comparing its spending on research and development, strategic acquisitions, dividends and buybacks for the preceding five year period. This type of disclosure is helpful to allow investors to put these programs into context.[39]

It has been suggested that Rule 10b-18 has led to a form of legalized insider trading.[40] The Commission should explore the costs and benefits of aligning corporate reporting with insider reporting requirements.

[39] At page 78 http://s2.q4cdn.com/974527301/files/doc_financials/2016/ar/2016-3M-Company-Proxy.pdf
[40] https://hbr.org/2014/09/profits-without-prosperity

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