AMERICANS FOR
TaxFairness

November 2, 2016

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

Re: File Number S7-15-16, Business and Financial Disclosure Required by Regulation S-K

Dear Mr. Fields:

Americans for Tax Fairness (ATF) is a coalition of 425 national and state organizations that represents tens of millions of individual members, some with very substantial pension fund holdings. On their behalf, I am writing to comment on the business and financial disclosures required by Regulation S-K, specifically question 62 that asked: "Are there additional income tax disclosures that would be useful to investors?"[1]

Based on our work over the years analyzing multinational corporate tax practices, we urge the SEC to adopt a robust annual country-by-country reporting regime that includes the following for offshore subsidiaries: revenues, profits or loss before taxes, income tax accrued for the current year, 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.

In addition, we believe it is also in the interests of investors and the public for these disclosures to publicly report on the aggregate amount corporations would owe in U.S. taxes should they repatriate their offshore earnings, and to provide a country-by-country estimate as well.

We greatly appreciate this SEC initiative. SEC disclosure is generally based on a materiality standard. The Supreme Court has defined materiality to cover information that would significantly alter the "total mix" of information available to the investor. Basic Inc. v. Levinson, 485 U.S. 224 (1988); see also Matrixx Initiatives, Inc., et al., v. Siracusano et all, 131 S. Ct. 1309 (2011).

Current and potential future taxes are extremely relevant to that—as has been recognized since the adoption of the SEC's disclosure regime in the 1930s. In recent years, international taxation and tax strategies have become increasingly relevant to corporate profitability. At the same time, the international tax world is changing dramatically—posing key opportunities and risks

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[1] Securities and Exchange Commission, "Disclosure Update and Simplification," RIN 3235-AL82, p. 91. https://www.sec.gov/rules/proposed/2016/33-10110.pdf

for companies and investors. Investors are currently unable to assess the impact of these changes based on outdated disclosure expectations.

Any reasonable investor would want to know the information we have proposed be disclosed, especially when tax liability plays such a prominent role in a company's overall financial health. Further, aside from the direct impact, there is significant reputational risks to companies engaged in offshore tax avoidance or evasion, which may indirectly impact the finances of U.S. issuers.[2]

It is estimated that 298 Fortune 500 corporations have a total of $2.5 trillion in untaxed profits offshore, based on company filings with the SEC examined by Citizens for Tax Justice.[3] Just one-fifth (58) of these companies disclose the tax rate they are paying on these offshore profits and how much they would owe if they repatriate the funds. Based on that information, Citizens for Tax Justice estimates these corporations owe more than $700 billion in U.S. taxes. That is an enormous sum of tax owed that could affect the financial health of scores of multinational corporations and their many investors.

Apple alone, one of the 58 disclosing companies, has $215 billion in untaxed profits offshore on which it has paid a foreign tax of about 5%. Such a low tax rate suggests many of the profits are in tax havens. That means it owes $65 billion in U.S. taxes. Next year Congress is likely to take up corporate tax reform and one of the key issues to be debated is whether to require corporations to pay the taxes owed on existing offshore profits as part of a transition to a new regime (so-called "deemed repatriation").

Let me illustrate the importance of the full disclosure of corporate subsidiaries and related financial information that we propose based on three recent case studies by Americans for Tax Fairness.

ATF issued a major investigative report in 2015 on Walmart's web of offshore subsidiaries that revealed the company had placed at least $76 billion worth of assets in 78 subsidiaries located in 15 tax havens in which it had no retail stores.[4] Those assets represented 37% of the company's total assets in 2014. This was the first-ever public documentation of Walmart's tax-haven subsidiaries. Walmart has never openly reported their existence in its SEC filings where subsidiaries are normally disclosed. The company has kept these tax-haven subsidiaries secretive by burying mention of their existence deep inside of SEC filings and financial documents filed by Walmart subsidiaries all around the world, only some of which are available to the public.

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[2] BBC News, "Google, Amazon, Starbucks: The rise of 'tax shaming'" (May 21, 2013). http://www.bbc.com/news/magazine-20560359

[3] Citizens for Tax Justice, et al, "Offshore Shell Games: The Use of Offshore Tax Havens by Fortune 500 Companies" (October 6, 2016). http://ctj.org/ctjreports/2016/10/offshore_shell_games_2016.php#.WBpr2vkrKM8

[4] Americans for Tax Fairness (ATF), "The Walmart Web: How the world's biggest corporation secretly uses tax havens to dodge taxes (June 2015). http://www.americansfortaxfairness.org/files/TheWalmartWeb-June-2015-FINAL.pdf

Compiling this data required hundreds of hours of labor, which unearthed financial records from Washington to Switzerland, London to Luxembourg, and South Africa to Central America. Even then, because of the opacity of information under current rules, we were unable to fully assess the extent of Walmart's network of tax-haven subsidiaries and how Walmart may use it to avoid paying U.S. taxes now and in the future.

In October 2015, Pfizer announced it was going to merge with Allergan, a prescription drug company headquartered in Ireland, a tax haven. News reports at the time indicated the primary purpose of the merger was tax savings. The merger ultimately failed because of draft Treasury department rules announced in April 2015, which effectively killed the enormous tax benefits Pfizer was counting on.

ATF opposed the merger and issued two reports (here and here) showing how little taxes Pfizer was already paying on its offshore profits due its extensive use of tax havens, and how much it stood to gain in tax avoidance from the merger. [5] We estimated that Pfizer held twice the amount of profits offshore as it claimed in its SEC filings – about $150 billion in 2014, rather than just $74 billion in Permanently Reinvested Earnings it reported. We also estimated that Pfizer owed $35 billion in U.S. taxes on those profits.

The company more or less confirmed the accuracy of these estimates when questioned by the media. Both reports required a considerable amount of research piecing together a puzzle. And while we know the topline numbers, we have no idea where these profits are located, whether the company has employees and real business in those locations, what tax rate has been paid, etc.

Perhaps more significant for the purposes of this SEC disclosure initiative, ATF was inundated by phone calls from investment firms who wanted to know more details about our findings and what the implications would be for their investments in Pfizer.

ATF recently issued a report about Gilead Sciences, the sixth most valuable pharmaceutical company in the world, with a market value of $146 billion last year.[6] Gilead's enormous profits come primarily from two life-saving Hepatitis C (HCV) medications. Gilead's sales and profits have soared since the drugs launched, while its tax rate has plummeted. Gilead's worldwide revenues recently *tripled*—from $11.2 billion in 2013 to $32.6 billion in 2015. Corporate pre-tax profits soared even more: rising from $4.2 billion to $21.7 billion from 2013 to 2015, a *five-fold* increase. But, over the same period Gilead's worldwide effective tax rate plummeted by 40%—dropping from 27.3% in 2013 to 16.4% in 2015.

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[5] ATF, "Pfizer's Tax Dodging Rx: Stash Profits Offshore" (November 2015).
http://www.americansfortaxfairness.org/files/Pfizers-Tax-Dodging-Rx-Stash-Profits-Offshore-Final1.pdf
ATF, "Pfizer: Price Gouger, Tax Dodger" (February 2016). http://americansfortaxfairness.org/files/FINAL-2.pdf
[6] ATF, "Gilead Sciences" Price Gouger, Tax Dodger" (July 2016).
http://www.americansfortaxfairness.org/files/ATF-Gilead-Report-Finalv3-for-Web.pdf

A tax loophole has facilitated Gilead's three-fold increase in untaxed offshore profits during the same period, which rose from $8.6 billion in 2013 to $28.5 billion in 2015. The profits are most likely in Ireland, a tax haven, because the key HCV drug from which Gilead derives so many profits has been "domiciled" there since 2013 even though the patent is registered in the United States. Gilead reports to the SEC that it would owe $9.7 billion in taxes if it brought the $28.5 billion in profits home, which means it is paying a foreign tax rate of only 1%.

The significance of the Gilead case example for the purposes of the SEC's disclosure initiative is that it is possible Gilead and the Irish government are engaged in a case of state aid, which could have significant ramifications for the company's investors. In August, the European Commission (EC) found that Ireland's tax arrangements with Apple were illegal and provided up to a 13-billion-Euro subsidy ($14.5 billion) plus interest, or "state aid," to Apple through various forms of tax avoidance. Ireland's special tax treatment of Apple allowed the corporation to pay an effective tax rate of less than 1% between 2003 and 2014.[7]

It is possible that Gilead is benefitting from a similar sweetheart tax deal; if so the company, and its investors, could possibly face a large tax assessment should an EC case be brought against it.

In conclusion, to protect investors' material interests ATF recommends that the SEC adopt a strong regime requiring corporations to disclose each year on a country-by-country basis their subsidiaries' revenues, profits or loss before taxes, income tax accrued for the current year, 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. In addition, corporations should be required to report on the aggregate amount they would owe in U.S. taxes should they repatriate their offshore earnings, and provide a country-by-country estimate of those taxes owed.
Thank you for the consideration of our comments.

Sincerely,

Frank Clemente
Executive Director

[7] European Commission "State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion" (August 30, 2016). http://europa.eu/rapid/press-release_IP-16-2923_en.htm