National Investor Relations Institute

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August 4, 2016

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

Re: Release No. 33-10064, File No. S7-06-16 (Business and Financial Disclosure Required by Regulation S-K)

Dear Mr. Fields:

This letter is submitted on behalf of the members of the National Investor Relations Institute (NIRI). Founded in 1969, NIRI is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. NIRI is the largest professional investor relations association in the world with more than 3,300 members representing more than 1,600 publicly held companies and $9 trillion in stock market capitalization. NIRI appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC) Concept Release on Business and Financial Disclosure Required by Regulation S-K.

Investor relations (IR) practitioners serve as the "chief disclosure officers" for their companies and help oversee compliance with the Securities Exchange Act of 1934, Regulation S-K, Regulation Fair Disclosure, Regulation G, and other SEC rules. NIRI members play a key role in ensuring that their companies effectively communicate material business and financial information to investors and research analysts in periodic filings and through other means, such as quarterly earnings press releases and conference calls, investor presentations, and corporate websites. In addition, IR practitioners are responsible for making sure that their management team and board members understand investors' concerns about the company's disclosure practices. Many NIRI members work with their companies to provide voluntary disclosure on sustainability, social issues, and other emerging disclosure topics through stand-alone reports, investor presentations, specialized sections on the company's website, or responses to data requests from investors or research firms.

NIRI members have been encouraged by the remarks by SEC Chair Mary Jo White and Corporation Finance Division Director Keith Higgins about the importance of overhauling the SEC's disclosure rules.[1] We also are pleased that Congress has taken a keen interest in this effort by adding a disclosure reform provision to the FAST Act, which directs the Commission to study Regulation S-K to "determine how best to modernize and simplify such requirements in a manner that *reduces the costs and burdens on issuers while still providing all material information"* (emphasis added).[2] NIRI encourages the Commission to keep this Congressional intent in mind as it proposes rules on the topics covered in this Concept Release.

Escaping Disclosure Overload

As Commission officials and disclosure experts have recognized, few investors or analysts have the time or interest to process the increasingly voluminous, repetitive, and costly disclosures that companies are required to prepare each quarter or year.[3] Companies and their advisors have voiced concerns with the SEC and the Financial Accounting Standards Board, and regulators have undertaken various efforts to address these concerns.[4]

While many investors and issuers have complained about "disclosure overload" for years, this problem has only gotten worse as Congress has imposed new disclosure mandates on the Commission. For instance, some of the new disclosure mandates (such as the rule relating to African "conflict minerals") required by the Dodd-Frank Act have resulted in millions of dollars in additional reporting costs for companies while generating non-material disclosures that are of interest to a small minority of investors.

Among the other contributors to disclosure overload has been the fear of shareholder litigation and/or comment letters from SEC staff, which have prompted many companies to insert generic

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[1] See, e.g., Chair Mary Jo White, "Address at 'SEC Speaks 2014,'" February 21, 2014.

[2] Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94, Title LXXII (Dec. 4, 2015), Sec. 72003(a).

[3] See e.g., Keith F. Higgins, Director, Division of Corporation Finance, "Keynote Address at PLI – Thirteenth Annual Institute on Securities Regulation in Europe," March 20, 2014 (noted global interest in disclosure reform); Commissioner Troy A. Parades, "Twelfth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law," October 27, 2011 ("We need to consider the impact on investors as disclosure obligations mount and investors are thus presented with more and more information to work through. It may be better for investors to have shorter, more manageable prospectuses and proxy statements, for example, that contain more targeted information instead of lengthy documents that are not fully digested and that in too many instances are entirely ignored.").

[4] See, e,g., Ernst & Young, "Now Is the Time to Address Disclosure Overload," June 21, 2012, p. 1 ("over the past 20 years, the average number of pages in annual reports devoted to footnotes and Management's Discussion and Analysis (MD&A) has quadrupled").

or boilerplate risk factors that remain in their filings for years.[5] Much of the disclosure that issuers now provide in their periodic filings is written to fend off potential litigation or to address long-ago comment letters, rather than to provide information that is useful to most investors.[6]

As a result of this information overload, many U.S. companies no longer rely solely on their periodic Exchange Act filings to provide detailed information about their businesses to analysts and investors.[7] Instead, many issuers are presenting professionally designed slide decks during investor day events, non-deal road shows, or at industry conferences. Many companies have created extensive IR websites with information on the company's operations, financial metrics, historical stock price performance, company fact sheets, and earnings guidance (where applicable), and to broadcast and replay quarterly earnings calls. In recognition of the importance of these disclosure tools, some companies have hired consultants to improve the readability, visual appeal, and effectiveness of their presentations and/or IR websites. In response to investor requests for data on sustainability, some companies have created special sections of their websites that they update regularly as they collect new data. These companies view these website sections as a superior alternative to printed sustainability reports, which become out of date soon after they are published.

It is worth remembering that many of these disclosure innovations are happening on a voluntary basis with the overriding objective of providing the most relevant and current information to investors and analysts, rather than to comply with a long checklist of disclosure requirements. As part of this process, IR professionals are soliciting feedback from their investors, analysts, and other stakeholders and working continually to refine their websites, presentations, and earnings call scripts.

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[5] As the law firm of Wachtell, Lipton, Rosen & Katz (Wachtell Lipton) observed in its comment letter on this Concept Release, "many companies feel compelled to sacrifice usefulness and accessibility in favor of protection from legal risk through overdisclosure and standardized disclosure such as 'boilerplate' risk factors. Such overdisclosure not only burdens corporate resources -- at the expense of all shareholders -- but often buries shareholders in an avalanche of information that ultimately limits the practical utility of Exchange Act filings." See Comment Letter of Wachtell, Lipton, Rosen & Katz on Release No. 33-10064, May 16, 2016, pp. 2-3.

[6] In a 2011 survey of Financial Executives International members, 83 percent of public company respondents said a potential objection by the SEC or another regulator may cause them to include disclosure that is not material. In addition, 74 percent said that "once disclosure is included in a public filing in response to an SEC staff comment, it is rarely or never omitted from future filings." KPMG-Financial Executives Research Foundation, "Disclosure Overload and Complexity: Hidden in Plain Sight" (2011), pp. 21-22.

[7] NIRI agrees with this observation by Wachtell Lipton: "Put simply, many companies and investors do not view Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q as an effective means of communicating. This is partly because companies understand that investors do not want to wade through all of the information in an Exchange Act filing in order to find the information that is most relevant to them. Over time, Exchange Act periodic reports have become ever more prescriptive, with increasing line-item disclosure requirements and Commission guidance as to content." See Comment Letter of Wachtell Lipton, pp. 2-3.

As the Commission proceeds with its Disclosure Effectiveness initiative, NIRI urges the SEC to keep these trends in mind and seek to overhaul Regulation S-K so it will be more accommodating to innovations in disclosure and technology. NIRI believes that the current rules can be streamlined in a way that would reduce costs for issuers, while still ensuring that investors receive material information that is easy to understand. Issuers should have greater flexibility to utilize modern technology to deliver information (such as by including hyperlinks in filings that go outside the EDGAR system to access exhibits and materials on corporate websites).

While some commenters have called on the SEC to use the Disclosure Effectiveness process to adopt new one-size-fits-all disclosure mandates on political spending, climate change and sustainability, workforce concerns, and other public policy matters that are not material for all companies and their investors, we urge the Commission to proceed cautiously before adding to corporate disclosure burdens.[8] It is better to wait to see how companies respond voluntarily to investor requests on emerging disclosure issues before mandating new disclosures that likely would be buried in a lengthy 10-K and only read by the company's securities counsel. Investor priorities evolve over time, so the Commission shouldn't mandate a new disclosure obligation that may be irrelevant to investors in five years.[9]

Importance of Materiality

In response to Question 6, NIRI urges the Commission to proceed carefully before expanding disclosure obligations. Before adopting any new marketwide standards, there should be clear evidence that the requested disclosure meets the materiality standard outlined by the U.S. Supreme Court's *TSC Industries v. Northway* decision, in which Justice Thurgood Marshall wrote, "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a *reasonable investor*." NIRI concurs with the point that Commissioner Michael Piwowar made about materiality in his statement on this Concept Release: "This is an objective legal standard, not a subjective political one. While certain shareholders may have their own particular pet interests, the reasonable investor standard

[8] As Wachtell Lipton points out, "simply adding more line items to Forms 10-K and 10-Q—even on topics that companies and investors may want to communicate about in the new paradigm—may be counterproductive. Disclosures added to these periodic filings pursuant to new mandates may end up being written with a view to minimizing legal risk rather than maximizing informativeness. Periodic filings will become even lengthier, and even less likely to be reviewed by investors." See Comment Letter of Wachtell Lipton, p. 3.

[9] As discussed on pages 32-33 of the Concept Release, NIRI agrees that the SEC should consider including automatic sunset provisions before adopting new disclosure mandates. While the appropriate period may vary by disclosure topic, NIRI believes that a sunset period of five to seven years after a rule's effective date should be enough time for companies, investors, and the Commission to assess whether a particular disclosure item is generating material information.

prevents an individual investor from hijacking corporate resources to serve their own specific agenda."[10]

NIRI believes that the SEC should continue to rely on the Supreme Court's definition of materiality when issuing rules or new guidance on disclosure. Issuers and investors are familiar with this definition, which was adopted more than 40 years ago, and the "reasonable investor" standard should continue to guide materiality determinations. This standard is flexible enough to allow the Commission to provide new guidance as investor priorities change if it obtains clear evidence that a significant number of issuers are not providing information that would impact the investment decisions of a reasonable investor.

When considering new disclosure mandates, the Commission should carefully weigh whether the potential improvements to a reasonable investor's decision-making process would outweigh the costs to issuers to gather and disclose such information. As the law firm of Davis Polk & Wardwell argued in its comment letter, proponents of new mandates should have to affirmatively demonstrate that the benefits to investors would outweigh the costs of disclosure.[11]

Preference for Principles-Based Disclosure

In response to Question 7, NIRI believes the SEC should opt for materiality-based principles-based disclosure rules whenever possible. While prescriptive requirements that are based on specific dollar amounts may make disclosure decisions easier for some companies, quantitative thresholds typically become obsolete within a few years of issuance because of inflation, and eventually will lead to costly disclosure of trivial information, unless the threshold is continually updated.[12]

Permit Issuers to Create Online "Company Profiles"

To eliminate duplication and to streamline periodic filings, NIRI endorses the suggestion of Davis Polk and other commenters that the Commission should allow issuers to create online "company profiles" that would contain general information about a company's business that is not likely to change significantly from quarter to quarter.[13] These profiles, which could be updated annually, would include information on the issuer's directors and senior management team, industry-specific value drivers and risks, outstanding securities, and governance and

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[10] See Commissioner Michael S. Piwowar, "Statement at Open Meeting on a Concept Release on the Business and Financial Disclosure Required by Regulation S-K," April 13, 2016.

[11] See Comment Letter of Davis Polk & Wardwell (Davis Polk) on Release No. 33-10064, July 22, 2016, p. 3.

[12] One example of such an amount is the $100,000 amount in Instruction 5.C to Item 103. There are very few SEC registrants with a market capitalization so small that such a sum would be viewed as material.

[13] See Comment Letter of Davis Polk, pp. 4-5 (described a "company profile" that would include tabs or folders "to present information by topic").

engagement policies. Such profiles could be hosted on the SEC's EDGAR site or on each company's website. Under such a regime, companies would be able to produce much shorter periodic filings that would focus on recent financial results, material changes to its risk factors, and other new developments. If the SEC were to adopt a company profile approach, it could eliminate Item 101(a), which requires a description of the general development of each issuer's business over the past five years.

Disclosure on Impact of Environmental Regulation

In Questions 49-50, the Concept Release asks whether the SEC should increase or reduce the required disclosures on the impact of environmental regulation or require registrants to present that information in a specified format.

The Concept Release specifically asks about Item 101(c)(1)(xii), which requires disclosure of the effects that environmental regulations have on a company's capital expenditures, earnings, and competitive position. These disclosures should not be increased, because they may give outsized importance to the effect of such regulations. They are of the same character as every other regulation that impacts a company's expenditures and earnings. Requiring additional disclosure places greater emphasis on environmental regulation, even if not material, when other forms of regulation may be of more material importance to a particular company. It is also potentially confusing to investors, who may believe that such expenditures are irregular, when in reality they are no different from any other expenditure for compliance with regulations.

Many companies already are disclosing pertinent information on environmental impacts outside of their SEC reporting and this approach allows greater flexibility to accommodate what investors want (e.g., what they have requested vs. what the SEC has decided to require).

Streamline Disclosure of Risk Factors

As other commenters have observed, many companies and investors do not view periodic filings as helpful shareholder communications precisely because they are laden with overdisclosure, particularly in the risk discussion section. The risk of liability for failure to disclose information encourages this disclosure overload, as many companies write with a view to minimize legal risk rather than maximize information. Given these concerns, many companies include disclosure about common or generic risks, such as inflation or rising interest rates, which impact the whole U.S. economy. Inclusion of these general risk factors would only lengthen written disclosures without shedding light on the specific risks faced by a company.

As Davis Polk has suggested (in response to Question 150), the Commission should amend Item 503(c) and provide specific examples about generic risk factors that do not need to be included in periodic reports. The SEC should make clear that companies should only have to provide

industry- and company-specific risks.[14] The SEC also should provide safe harbor protection for companies that fail to disclose common risks, so investors can better focus on the risks that are directly relevant to a particular company.[15] In addition, NIRI supports the suggestion by Wilson Sonsini Goodrich & Rosati that the SEC "can motivate companies to avoid generic and boilerplate disclosures by creating a safe harbor from litigation for those disclosures that are clearly defined."[16]

In response to Question 147, NIRI believes that the SEC should refrain from adding new prescriptive requirements on specificity and the context of risk. Instead, the Commission should focus on paring down the required risk disclosures so that investors are left only with succinct information pertinent to their investment decisions. As noted by Wachtell Lipton, "risk factor disclosure could be streamlined if registrants were given more comfort that their disclosure obligations truly are limited to the actual line item requirement for risk factors, which provides for the 'most significant factors that make an investment in a registrant's securities speculative or risky.'"[17]

Facts about the company and its specific circumstances are already disclosed to investors, both inside and outside of SEC filings. Requiring repetition of these facts in the risk disclosures is unnecessarily duplicative and onerous, and merely serves to inflate the volume of the filings further.

The Concept Release also asks whether companies should be required to present their risk factors in order of management's perception of the magnitude of the risk, or by order of importance to management. Question 152 asks whether issuers should list their ten most significant risk factors (without limiting the total number of factors disclosed) or provide a summary highlighting their most significant risks.

We are concerned that these proposals would result in arbitrary disclosures that vary significantly from company to company. The result would be confusing to investors comparing companies that may assess the magnitude of a given risk in different ways. Additionally, ranking risk factors by magnitude of the risk would be of marginal value, and could potentially bury important information. Some of the largest risks a company faces will be the same as the largest

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[14] For the electric utility industry, for example, those risks might include the potential impacts of abnormal weather or regulatory commission decisions on utility operating and financial results.

[15] See Comment Letter of Davis Polk, p. 14.

[16] See Comment Letter of Wilson Sonsini Goodrich & Rosati on Release No. 33-10064, July 21, 2016, p. 15 ("a safe harbor for meaningful and descriptive risk factor disclosures would likely motivate companies to disclose the specific facts of each risk and, in turn, will provide investors with the necessary information to thoroughly understand such risk").

[17] See Comment Letter of Wachtell Lipton, p. 4.

risks many other companies face. For instance, the risk of a global economic downturn would be high on the ranking of nearly every company. Requiring the ranking proposed here would result in lists where the top is populated by generic, boilerplate risk factors, while information about company-specific risks that an investor might actually find valuable would be buried.

Finally, the SEC should seek to eliminate the duplicative discussion of risk factors within periodic filings. As other commenters have noted, issuers are required to address risk factors in various items under Regulation S-K, such as Item 101 (description of business), Item 103 (legal proceedings), Item 303 (MD&A), Item 305 (disclosure about market risk), and Item 503 (risk factors).[18] We suggest consolidating these various items into a single disclosure item that would ask issuers to discuss their specific business, financial, and regulatory risks and their approach to risk management. Companies should have the flexibility to organize their discussion of risk factors as they see fit, based on materiality and their understanding of investors' needs.

Frequency of Financial Reporting

Assuming that the Commission moves to streamline periodic filing requirements, NIRI doesn't believe that there is a consensus among U.S. companies and investors that the SEC should change the quarterly frequency of reporting of financial reporting.

In a May 2016 survey of NIRI members, 62 percent of U.S.-based IR practitioner respondents stated that the SEC *should not* change its rules regarding the frequency of financial reporting. Another 28 percent said the SEC should make quarterly reporting voluntary for all public companies and require reporting just twice per year. The remaining 10 percent stated the SEC should make quarterly reporting voluntary only for emerging growth companies and smaller reporting companies.

The lack of broad support from NIRI members for exempting all (or just small or emerging companies) from quarterly reporting appears to be based on their belief that investors will continue to expect (and demand) quarterly updates about a company's financial condition, and that need may be even greater for investors who invest in small or emerging issuers.[19]

Before reducing the frequency of financial reporting, the Commission should also consider if less frequent reporting would increase the risk of insider trading. IR professionals play a key role in helping to ensure that their companies have policies and procedures (such as authorized trading

[18] See Comment Letter of Davis Polk, pp. 13-15.

[19] When asked what they would do if the SEC were to exempt companies from quarterly reporting, almost 50 percent of U.S. IR practitioner respondents stated they would advise their company (or clients) to continue filing quarterly reports on a voluntary basis, according to NIRI's May 2016 survey. Twenty-two percent stated they would consult with their largest investors and follow their recommendation, 19 percent said they were unsure or didn't know, and 9 percent said they would cease quarterly reporting all together. NIRI, "NIRI Advocacy Issues Survey – 2016 Results" (May 2016), p. 6.

windows for executives and employees) in place to deter insider trading. Less frequent reporting may create an untenable accumulation of material, non-public information in the hands of more employees, advisors, vendors, etc., in between reporting periods and increase the risk of a person trading on that knowledge and may increase the difficulty of enforcing insider trading restrictions. Quarterly reporting allows for the timely "purging" of material, non-public information that serves the purpose of equalizing the information available to investors.

Improve Readability and Navigability of Disclosures
In response to Questions 297-301, NIRI encourages the Commission to provide companies greater flexibility to improve the "readability and navigability" of corporate disclosures by taking advantage of innovations in information technology. The SEC should continue to permit (and encourage) issuers to include cross references, incorporation by reference, and hyperlinks to reduce repetition and disclosure overload. Many companies already are using hyperlinks to allow investors to more easily navigate through lengthy filings.

To further reduce the length of disclosures, companies should be allowed to include hyperlinks to sources outside of EDGAR, such as documents on company websites.[20] Many investors already are using company websites to find SEC filings as well as information on governance practices, earnings calls, or industry conference appearances, so it would not be a significant imposition to ask investors to visit these corporate sites to find supporting information for Regulation S-K disclosures.[21] In particular, the SEC should allow companies to post exhibits on company websites, so they don't need to be attached to company filings as required by Item 601.

The SEC should also explore the feasibility of allowing companies to submit their filings in PDF format. That technology would enable retail investors to quickly search for key words within company filings, which can't be easily done on the current EDGAR site.

Finally, the SEC should resist requests to expand XBRL requirements to other disclosure mandates, such as proxy materials, until the Commission fully examines whether a significant number of investors are using this technology and if the benefits outweigh the compliance costs.

Duplicative Requirements That Should Be Removed
NIRI endorses the following recommendations by other commenters to remove disclosure requirements that are duplicative or have become outdated:

[20] NIRI agrees with the suggestion of Wachtell Lipton that these supplemental online materials should not be deemed "filed" for liability purposes. See Comment Letter of Wachtell Lipton, p. 4.

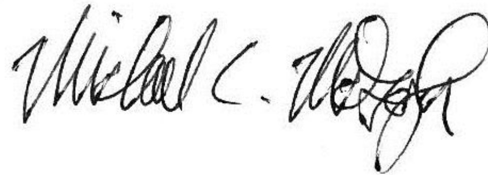
[21] In a 2012 NIRI survey, an overwhelming majority of IR practitioner respondents said their corporate websites include recent press releases (93 percent), archived press releases (91 percent), and corporate governance information (89 percent). A majority said their sites also included SEC filings, company financials, and archived investor presentations and webcasts. Given the increasing attention to alternative disclosure channels, it appears very likely that a larger percentage of U.S. companies now routinely post their SEC filings on their company sites.

- Item 101(a) (general description of business): A company should not have to provide this same information quarter after quarter. Instead, the SEC should allow the creation of company profiles that are updated annually and would be hosted on company websites or the SEC's EDGAR platform.
- Item 201(b)(1) (number of equity holders): This figure is no longer relevant to most investors as most company shares are held in street name.[22]
- Item 302 (supplemental financial information): The information provided in this section is contained in earlier periodic reports and does not need to be repeated. Requiring companies to provide this redundant information leads to longer and more complex filings.[23]
- Item 701(f) (use of proceeds from registered securities): Companies already are providing information on their use of net proceeds from offerings in response to Item 504.[24]

Conclusion

NIRI appreciates this opportunity to comment on the Concept Release on Business and Financial Disclosure Required by Regulation S-K. We remain hopeful that the Commission will overhaul Regulation S-K in a manner that fulfills the intent of the FAST Act without burdening companies with additional disclosure requirements that would not be material to most investors.

Sincerely,



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[22] See Comment Letter of Davis Polk, p. 15.

[23] See Comment Letter of the Corporate Governance Coalition for Investor Value on Release No. 33-10064, July 20, 2016, p. 8.

[24] See Comment Letter of Davis Polk, p. 17.