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Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

April 28, 2020

Subject: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information Exch. Act Release No. 33-10750; 34-88093; IC-33795; (File No. S7-01-20)

Dear Secretary Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), we write to object to the Securities and Exchange Commission's (SEC or Commission) proposed rule entitled Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information (Proposed Rule or Release). As the largest public defined-benefit pension fund in the United States, we manage approximately $370 billion in global assets on behalf of more than 1.9 million public employees, retirees, and beneficiaries. Our duty to pay benefits decades into the future requires that we take a long-term view when assessing whether the companies that we hold in our portfolio are effectively managed.

While the Release suggests that the Proposed Rule is meant to benefit investors and registrants,[1] there has been no investor demand for it, and we do not believe that the proposed changes would benefit investors. For years, the investor community has asked for more access to high-quality, comparable, and timely information about the securities in which we invest. In 2016, when the Commission issued the Concept Release on Business and Financial Disclosure Required by Regulation S-K (2016 Concept Release), we provided a 41-page response[2] highlighting the need for such information in order to fulfill our responsibilities as a fiduciary. Tens of thousands of investors and commenters echoed the calls for more detailed and better disclosures in response to that 2016 Concept Release.[3]

Despite the overwhelming investor consensus, there are some that have opposed such requests. These businesses, accountants, lawyers, and the trade associations representing those groups (Corporate Interests) view such disclosures as burdensome, unnecessary, and

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[1] Release at 7.
[2] Letter from Douglas Hoffner, CalPERS, to Brent J. Fields, Sec. and Exch. Comm'n, July 21, 2016, available at https://www.sec.gov/comments/s7-06-16/s70616-267.pdf.
[3] Comment file available at https://www.sec.gov/comments/s7-06-16/s70616.htm.

restrictive on management. Unfortunately, it appears that the Proposed Rule responds substantially to Corporate Interests even when addressing what is in the best interests of investors.

We believe the Proposed Rule would make it harder—if not impossible—for investors to obtain essential information and could make the existing information less available, reliable, and comparable. It appears that investor comments receive much attention in the footnotes of the Release[4] but are summarily rejected in the body of the document, which ultimately leads to the conclusions and changes that would hurt investors. Furthermore, the expressed rationale for removing much-needed information seems thin. The Commission has not provided sufficient and relevant economic analysis, nor has it quantified the negative impact on investors, generally or by categories.

Lastly, we are troubled that the Commission would take this action during a time of broad economic crisis. Like many investors, CalPERS is navigating the unprecedented health care crisis and broad economic collapse brought on by Covid-19. We are facing enormous challenges and implementation of the Proposed Rule would make this effort substantially more difficult for all participants. The proposed changes would make it harder and increase the costs for us to fulfill our fiduciary responsibilities to our beneficiaries. The proposed changes are very significant. The need for accurate information is never more important than during times of economic stress. And yet, the changes would dramatically alter CalPERS' investment process and consumption of essential information. Investors do not have the time or money to dedicate the significant additional resources necessary to attempt to replicate this information, nor would those efforts fill this new informational void created by the Proposed Rule.

We urge the Commission to abandon this effort in total; but, if the Commission nevertheless proceeds with the Proposed Rule, it should only do so once the Covid-19 crisis has ended and its effects have passed.

I. CALPERS' CONCERNS WITH THE PROPOSED RULE

The Release is written as if disclosures are important only to short-term equity investing. There is little consideration given to decision-making for longer-term equity investments, corporate debt investments, or corporate governance. Materiality places a central role in disclosures generally and in this Release in particular, but the concept lacks clarifying definitions and consistent treatment in the Release. For example, when addressing the potential materiality of a future event, the Release often places an additional qualifier such as "reasonably likely" on forward looking statements. At first glance, it appears appropriate, except that the materiality definition already has a probability component. For example, materiality in the *Basic*[5] case states that materiality is determined by calculating probability *times* magnitude. This

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[4] See, e.g., Release at 18, highlighting investor support for retaining Item 301; Release at 60, providing investor support for maintaining disclosure of off balance sheet arrangements; Release at 75, supporting prescriptive disclosure requirement of accounting estimates. Curiously, the Release appears to have adopted the position of Corporate Interests as representing the best interests of investors while rejecting investors' input.

[5] *Basic v. Levinson* 485 U.S. 224 (1988).

construction allows for disclosure of items that may be unlikely to occur but are potentially very costly or profitable if they do occur to be deemed material. Adding the "reasonably likely" requirement creates greater emphasis on the probability portion and could allow a registrant to fail to report every item that has a low probability regardless of its potential impact on the company (magnitude). The Release attempts to provide consistency by emphasizing the two-step-test,[6] but when the additional probability qualifier is added to a term that already contains probability, this test produces no reporting as well. For example, the Release would have allowed AIG to not report the risks embedded in its insurance hedging program heading into the 2008 financial crisis because the adverse occurrence was not reasonably likely even when the program placed almost all the assets of the company at risk.

The Covid-19 crisis will likely highlight numerous supply-chain, demand, human capital, and other important risks for investors. Many of these risks are now threatening entire companies, and few, if any, were meaningfully shared with investors. This is a problem that we would like addressed, but the Proposed Rule makes this problem worse because it hides off-balance sheet items and contractual obligations, while eliminating the need to report anything because of the new materiality construction.

The Proposed Rule gives rise to several significant questions that must be addressed, including:

- How would the loss of specific, comparable information impact investors' ability to analyze and compare investments?
- How would investors replace the missing information, if at all? The Release provides no specific guidance on how the volumes of lost information could be obtained. Interestingly, the Release is even inconsistent in its approach as to where the information may be found.
- What additional risks would investors have to incur? And, at what additional costs and burdens?[7]
- What would the impact be on our investment returns across different asset classes? We make investment decisions–including in unregistered offerings of debt securities and other financial instruments–based on this information.
- How would the loss of information and lack of comparability impact different types of investors? For example, what would be the impact on longer-term holders, like CalPERS, versus more short-term investors?
- How would the loss of specific information impact investors of different sizes (e.g., institutional versus retail)? For example, some larger, better-funded investors may be able to invest in systems and alternative data sources to help replace the lost information, while others are unlikely or unable to do so.
- What would be the impact on overall investment in different asset classes and for corporate governance purposes?

[6] Release at 49, Footnote 139.
[7] The Release appears to envision the investment in just a few companies. This implied assumption is inaccurate. CalPERS, for example, is invested in thousands of companies.

- What would be the impact on investment in specific types of companies or industries? For example, given the rising costs and risks, some investors may further concentrate holdings. Such divestment will most often adversely impact smaller companies and the Release should have analyzed the impact on investments in smaller companies subject to full reporting.

None of these questions are addressed in the Release, and their absence seems inconsistent with the requirements of the Administrative Procedures Act.

Furthermore, the Release provides no specific examples of how the information can be replaced by investors. The Corporate Interests suggest that the process would be easy for investors because some of it currently exists in EDGAR. However, the Proposed Rule does not adequately examine or confirm that assertion, but it makes clear that EDGAR does not cover all registrants and does not include all information being eliminated.[8] For the first time, investors become responsible for knowing everything a company has ever reported to the Commission and for adjusting such reports without the benefit of registrant input.[9] Since the Proposed Rule would shift the entire market for information on selected five-year financial data, off-balance sheet information, and contractual obligations, the Commission should provide greater detail regarding the processes that investors are expected to use to replace the disclosures being eliminated.

Additionally, the Release does not define the term "duplication," but implies that if a company ever provided certain information in any filing that providing the same information in a different context or format is still "duplication." Context matters. We acknowledge that some Corporate Interests have historically advocated for eliminating certain disclosures,[10] but few, if any, investors have supported this view. We would prefer that the Commission standardize and expand the information provided in Item 301.

Lastly, the Release appears to strategically target items that are important to investors without establishing a sound reason or purpose, and without establishing that the information lost can be recaptured efficiently by other means. CalPERS makes use of the information required by Items 301, 302, 303(a)(4), and 303(a)(5). Because the information has been presented for years and registrants already have the necessary reporting processes, there is no additional cost to registrants for continued reporting of information that company managers already possess. In

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[8] Release at 67, 123 and 126.

[9] See, e.g.; Statement to Investor Advisory Committee by Zach Gast of CFRA; highlighting the following: "In the case of quarterly data, our pushback would be even stronger. It is absolutely not true that quarterly line items—particularly income statement items—are available elsewhere in the same form. Any financial statement user can tell you about the difficulties associated with fourth quarter data, which are frequently presented in a separate format in press releases than in the SEC filing. This means that to calculate the fourth quarter income statement for official financial statement data, you must subtract the first three quarters from full year results, which are presented in the 10-K. The issue here is that with financial statements, four minus three does not always equal one. There are several corporate events that can change prior quarters' results – as presented – and make this calculation method completely inaccurate. Put simply, this is not duplicative information and is essential in the edge cases where careful analysis is most important."

[10] See e.g., Release at 15, where companies, accountants and lawyers recommend eliminating Item 301.

fact, registrants have geared their technological systems to efficiently respond to these items. The suggestion that technological developments make these disclosures unnecessary is neither supported in the Release nor is it stated who has this technology, other than the registrants and their auditors. Investors have not developed such systems because such systems have never been necessary. Transparent reporting of five years of selected financial data, two years of quarterly data, contractual obligations, and off-balance sheet arrangements remain important in making investment decisions because of the lack of adequate alternatives. While we recognize that the Release makes references to getting information from EDGAR[11] or XBRL,[12] we also noticed that the Release makes clear that EDGAR and XBRL currently have substantial limitations impairing investors' ability to rely on the information, including the fact that certain information like fourth quarter data is not included, XBRL tagging would need to be enhanced, and not all registrants are covered.

In conclusion, there is no existing system that would allow investors to replicate the data for all registrants and the Release does not explain where investors will find reliable and comparable information. Further, the analysis in the Release does not consider what it means to have thousands of investors attempting to replicate information that can be easily and continuously provided by registrants and, as noted earlier, nearly impossible for investors to replicate the data for some registrants. It is important to note that some of the disclosures being eliminated were developed because of economic crisis, and as such those disclosures appear more critical during a financial crisis, yet the Proposed Rule would eliminate them while the nation struggles with the Covid-19 crisis.

II. ECONOMIC ANALYSIS

As explained above, the economic analysis contained in the Release is incomplete and does not adequately support the Proposed Rule. The Release fails to include any relevant information on additional explicit costs and burdens for investors. It does not attempt to identify who uses the disclosures, why, and what the impact is upon them from the loss of that information. It does not attempt to explain how missing information can be replaced, nor does it reflect how different investors would fare in meeting the new challenge. It makes no effort to examine the impacts on investors seeking to compare different issuers. It does not attempt to examine any impacts on investment decisions in different asset classes, or on different types and sizes of investors.

While the Proposed Rule fails to address, in detail, investors' current use of the information, reliance on it for making investment and voting decisions, or the direct and indirect impacts of having to adjust to operating without that information, we want to highlight one particular provision where a rudimentary analysis shows a problem with the proposed approach: the elimination of the five-year financial disclosure requirements of Item 301.

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[11] Release at 16, 18, 26, 87, 123, 126 (highlighting missing fourth quarter data), 147, 171 (investors become responsible for tracking all registrant disclosures regardless when disclosed in official filing), and 176.
[12] Release at 67 (identifies need for enhanced tagging to meet requirements), 121, and 123 (establishing not all registrants are covered so huge gaps may be created).

The Commission has expressly sought comment on changes to Item 301 in the past. And we have explicitly urged the Commission not to change this information. In response to the 2016 Concept Release, we explained:

> No changes should be made. Companies do not appear to have an issue presenting Item 301 information in a single table. Companies routinely use simple techniques to show differences and changes such as providing footnotes. Having the information in one place prevents a shareowner from having to review multiple sources to get basic information. Technology will make it easier to fulfill the requirements.[13]

We further noted that while there was an argument for more than five years of financials, the five-year requirement was a "reasonable compromise."[14]

CalPERS uses the information in both equity and fixed income investments, as well as corporate governance activities. Losing or seeking to replicate this information would impact our investment decisions across a wide swath of assets and investments. The Release makes clear that the Proposed Rule provides limited economic benefits,[15] which would require that the costs of the changes be even more limited. Unfortunately, the Release never quantifies the costs to investors. Lacking a quantified amount for comparison and analysis, it appears that the Release assumes the costs are outweighed by the benefits. However, we believe that the costs, when quantified, would not justify the changes in the Proposed Rule.

This is easy to demonstrate by simply obtaining the Item 301 data on 100 companies using the current reported information and then acquiring the exact same information on the same sample without using the information reported in Item 301. The first step would be to compare the time that it takes to conduct each of the two compilations. Next, compare the information obtained from the two processes and add the time it takes to reconcile the discrepancies in the second process. In this exercise, the second step would not take place because an investor would not know there are mistakes in the data, and there would be no way to cross-check or compare. It is unclear why the Commission favors a more time-consuming, costly, and less accurate process to provide information that is used by investors.[16]

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[13] 2016 Comment Letter, at 11.

[14] 2016 Comment Letter, at 12.

[15] Release at 122, "Overall, we expect the net effect of the proposed amendment on a registrant's compliance burden to be limited." Although there is limited effect on registrant's compliance burden, the Release makes clear that the impact on investors, especially retail investors, will be higher costs.

[16] Gast, "There are also several audiences for the information presented in the SEC filing. One of those audiences is investors and users that never actually access the filing itself. Presenting data in a consistent tabular format allows those firms and individuals to access information with little or no friction. Increasingly, they are the primary users of financial statement information and their needs should be assessed carefully.

III. CONCLUSION

The Proposed Rule is unsupported by the record and should be abandoned. Its adoption would undermine CalPERS' efforts to fulfill our fiduciary duty and adversely impact our ability to make investment and governance decisions. Although it claims to benefit investors, the Proposed Rule would make the process more complicated and expensive without materially improving the quality, quantity, or timeliness of information provided to investors. At a minimum, the Commission should provide a supplement containing complete details on costs to investors when thousands of investors must use self-help to get information currently provided by registrants.

Furthermore, the Proposed Rule offers no data indicating that registrants will continue to provide material information to investors that the Proposed Rule eliminates under its framework. Such registrants are required to provide such information under the existing rule.[17] It is not clear that any of the potential changes to wording in the Proposed Rule will have any impact on registrant actions. In sum, investors lose existing transparency and get nothing in return. There is no promise that companies will make the necessary disclosures absent a specific requirement, and the construction would allow most companies, especially large ones to avoid disclosing information investors believe to be material.[18]

As fiduciaries, we must be more cautious in our decisions whenever the pool of information is diminished. Enhanced informational costs promote modifications to investment decisions and the Commission should analyze the impact on the market given such forced changes, especially the effect on smaller companies' access to capital. As written, the Proposed Rule hurts investors that seek to make informed investment decisions. We recommend that the Commission abandon the Proposed Rule and reverse course. The Commission should instead propose ways to expand investors' access to more detailed, comparable, and timely information.

If the Commission nevertheless proceeds, it must clearly state its objective, collect the relevant data, and provide an appropriate analysis to show the relevant costs and benefits of its approach, with an added emphasis on the impact to investors. This would include addressing the issues outlined above, including clarifying the definition of materiality and narrowing the definition of duplication such that it is not so expansive that an investor is required to have detailed historical knowledge of every prior filing by a registrant and the ability to place the data in different contexts.

At the very least, further action should be delayed. Under the current macroeconomic environment resulting from the Covid-19 crisis, we are disappointed that the Commission is considering eliminating the disclosure of basic information upon which investors rely. The

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[17] Fenwick West LLP (Aug. 1, 2016) at 9, stating that Item 303 already requires trend disclosure information, thus supporting the proposition that registrants are already required to report certain information that the Commission suggests are new requirements, yet they do not.

[18] See, Georgiev, George S.. *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation.* UCLA Law Review, Vol. 64, 2017. The materiality standard can lead to the under disclosure of information because very little individual items are material to large companies.

middle of the worst economic crisis in a decade is not an appropriate time to limit transparency and access to information put in place in response to previous economic other crises. Accordingly, we strongly urge the Commission to postpone final action on the Proposed Rule until the Covid-19 crisis ends and further analysis can be conducted based on lessons learned.

We welcome the opportunity to discuss this release in more detail. Please contact Anne Simpson, Investment Director, at [redacted] if you have any questions or wish to continue this discussion.

Sincerely,

Marcie Frost
Chief Executive Officer