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Director, Tax Policy

July 21, 2016

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
VIA Internet Comment Form (http://www.sec.gov/rules/concept.shtml)

RE: Business and Financial Disclosure Required by Regulation S-K, File Number S7-06-16

Dear Mr. Fields:

The National Association of Manufacturers (NAM) – the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states – appreciates the opportunity to provide comments in response to the Securities and Exchange Commission (the Commission or SEC) concept release on modernizing certain business and financial disclosure requirements in Regulation S–K. Manufacturers support the need for streamlined and modernized disclosure requirements to help reduce the time and compliance costs for manufacturers, while also benefitting shareholders.

The disclosures that public companies currently must file are lengthy and burdensome, often overwhelming both the issuer and their shareholders. In some cases, required disclosures are outdated, duplicative and confusing as well as extremely costly for public companies to comply. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) added numerous additional disclosure requirements that add to the reporting burden without producing a comparable benefit for shareholders. Manufacturers agree with the SEC's Disclosure Effectiveness Initiative objective to improve the disclosure regime for both registrants and shareholders, and encourage the SEC to streamline and modernize disclosures to help reduce the burden for manufacturers while also benefitting shareholders.

The Increasing Disclosure Burden

Overview

Disclosure requirements have increased in recent years, particularly as policymakers add to the information overload by mandating new—and many times unnecessary—disclosure requirements. For example, the Dodd-Frank Act mandated new disclosure requirements on all public companies, including manufacturers. During Congressional consideration of the Dodd-Frank Act, the NAM urged lawmakers to focus their efforts on strengthening the U.S. financial system rather than imposing new regulations that could be costly and hinder job creation for manufacturers and other non-financial companies that had nothing to do with the financial crisis. The NAM continues to have strong concerns about several SEC proposed and finalized rules and regulations implementing Dodd-Frank provisions that create significant costs for manufacturers without providing any significant benefit to shareholders or companies.

The Pay-Ratio Rule

In particular, the NAM has serious concerns with the pay-ratio rule finalized by the SEC under Section 953(b) of the Dodd-Frank Act requiring public companies to disclose the ratio of the compensation of their CEOs to the median compensation of other employees beginning on or after January 1, 2017. Manufacturers reject the idea that a single statistic, like the pay ratio, is a valid indicator of a company's approach to compensation practices, business strategy, or hundreds of other decisions that comprise a company's business plan.

This misleading ratio disclosure requirement is expensive and very difficult for companies to calculate. Indeed, one NAM member estimates it will cost as much as $18 million to comply with a rule that does not provide any clear benefit for shareholders. Moreover, even the SEC acknowledged the rule lacks a clear benefit, stating that, "neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision or a specific market failure, if any, that is intended to be remedied."[1] The NAM commented twice to the SEC raising concerns with the proposal before the rule was finalized in 2015. The NAM supports full repeal of this rule, a prime example of a disclosure requirement that imposes a costly and onerous administrative burden on companies that will not produce useful information for investors.

Pay v. Performance

Manufacturers also have serious concerns with the SEC's proposed pay-versus-performance rule implementing Section 953(a) of the Dodd-Frank Act, which requires companies to disclose the relationship between executive pay and a company's financial performance. Under the proposal, companies would have to disclose executive compensation as the amount "actually paid" to the principal executive officer and the average compensation paid to the remaining executive officers as well as performance information, which must be stated in the form of total shareholder return, both for the company and companies in a peer group.

The NAM submitted comments pointing out that the rule is overly prescriptive and imposes a one-size-fits-all measurement of executive compensation and performance of the issuer company that will impose significant and unnecessary compliance and cost burdens on public companies while not providing issuer companies the flexibility to present information they believe is most useful to their shareholders or in a manner that they conclude would best serve their investors. Since companies must already disclose certain executive compensation and performance metrics, the new proposal adds an additional and duplicative layer of disclosure and burden to manufacturers without providing any significant benefit to shareholders.

The "Clawback" Requirement

The NAM also has raised concerns with the SEC's proposal implementing Section 954 of Dodd-Frank Act, also known as the "clawback" requirement. The proposal requires issuers to develop, disclose and implement policies to recover the incentive-based compensation of current and former executive officers in excess of what would have been received under an accounting restatement.

The NAM understands that Section 954 of the Dodd-Frank Act is intended to ensure that executive officers do not retain incentive-based pay received in error, but manufacturers are concerned that the application of the clawback requirement under the proposed rule is overly

[1] Pay Ratio Disclosure, Release Nos. 33-9452 and 34-70,443; 78 Fed. Reg. 60,560 (proposed Oct. 1, 2013).

broad, sweeping in executives who may have little to do with the issuer's financial reporting and thus not at fault for a financial misstatement. The NAM is concerned the proposal will also require complex calculations that will come with additional compliance costs.

Conflict Minerals

Additionally, the conflict minerals disclosure requirements laid out in Section 1502 of the Dodd-Frank Act pose a huge financial and reporting burden, and potentially a huge auditing burden, on reporting manufacturers. Studies on Section 1502,[2] by Tulane University Law School found that it would cost industry almost $8 billion to comply with the requirement, and that publicly traded companies "worked a combined 6,139,983 hours" on the first annual filing alone.[3] These costs stem from the breadth of use of the 3TG minerals throughout the manufacturing process and the depth, complexity, and constantly evolving nature of modern supply chains. Many companies have thousands of multi-tier suppliers for their products. These supply chains are dynamic, as companies continuously seek new suppliers with better products or more competitive prices or delivery terms to deliver value for their customers. The requirements also affect thousands of small- and medium-sized companies not subject to SEC reporting because they supply large, publicly traded companies and are asked by those issuers to conduct the due diligence required by the rule.

In August 2015, U.S. Court of Appeals for the D.C. Circuit again ruled in the NAM's favor in our challenge to the SEC's conflict mineral disclosure requirement relating to certain products from the Democratic Republic of the Congo (DRC) and surrounding countries. The compelled disclosure requirement that products are "DRC conflict free" or not conflict free violates the First Amendment's guarantee against government compelled speech. We believe it is unreasonable for companies to continue to spend substantial resources implementing the rule when its central feature has been invalidated on constitutional grounds, and we believe the SEC and Congress should reexamine the statute and rule.

Extractive Industry Provision

Finally, the Dodd-Frank extractive industry provision in Section 1504 requires resource extraction issuers to disclose publicly payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas or minerals. Again, this requirement adds to manufacturers' compliance and reporting burden.

Additional Disclosure Requirements

Overview

The NAM believes shareholders should have access to information that is material to their investment decisions, consistent with applicable law. The definition of what is material should be consistent with the Supreme Court's standard of information needed for the "reasonable" investor. Business entities should not be unnecessarily burdened by government regulation or required to disclose information that might be advantageous to competitors while not of significant benefit to

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[2] Economic Impact Analysis on Dodd-Frank Section 1502 Concerning Conflict Minerals, http://www.payson.tulane.edu/economic-impact-analysis-dodd-frank-section-1502-concerning-conflict-minerals (April 8, 2016).

[3] "A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model in view of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act." Tulane University. http://www.payson.tulane.edu/sites/default/files/3rd_Economic_Impact_Model-Conflict_Minerals.pdf (Oct. 17, 2011). "Dodd-Frank Section 1502: Post-Filing Survey 2014," Tulane University. http://www.payson.tulane.edu/sites/default/files/content/files/TulanePaysonS1502PostFilingSurvey.pdf (2014).

shareholders. Importantly, manufacturers should not be required to disclose duplicative information or information that seeks to advance a particular policy but does not contain information necessary for the reasonable investor to make investment decisions.

Along these lines, the NAM feels strongly that the additional disclosure requirements the SEC considers in the concept release are unnecessary. These types of additional policy issues typically fall into the environmental, social and governance (ESG) categories. In the SEC's concept release, the Commission acknowledges that historically, after reviewing a number of environmental and social matters, the Commission concluded that it generally is "not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws."[4] The Commission also noted that it would only require social and environmental disclosures "if such information…is important to the reasonable investor–material information."[5] The NAM believes that many of the additional disclosure requirements the SEC considers in the concept release do not meet the standard of being material to the reasonable investor, including, but not limited to: environmental and sustainability reporting; political spending; cybersecurity; intellectual property (IP) assets disclosures; and risk factors.

Environmental and Sustainability Reporting

Discussions involving environmental and sustainability reporting have increased in recent years among certain groups within the investor community. While more shareholder proposals are emerging on environmental and sustainability issues, there is not a correlating acceptance among investors that these types of proposals should be adopted. According to the Manhattan Institute's Proxy Monitor 2016 database findings, even though a majority of shareholder proposals in 2016 involved environmental concerns "not a single environment-related shareholder proposal has received majority shareholder support over board opposition".[6] The NAM does not believe environmental and sustainability issues are material for mandatory SEC reporting given that a majority of shareholders do not see them as necessary for their investment decisions, and that collecting, analyzing and generating the data needed for such environmental and sustainability disclosures would create additional compliance burdens and costs on manufacturers—many of whom already participate in voluntary sustainability reporting programs. With that in mind, the NAM opposes any additional mandatory disclosures of these non-material issues.

However, if SEC does consider making changes requiring additional environmental and sustainability disclosures, the Commission should provide ample opportunity for significant and meaningful involvement from all stakeholders through an open and public process with a rigor consistent with a federal rulemaking. To date, many existing voluntary protocols have failed to adequately meet this standard.

Political Spending

The SEC's concept release cited requests from some commenters for a rule to require political spending disclosures. The NAM strongly opposes such disclosure requirements, as the reasonable investor does not need this type of information for making investment decisions. In addition, this type of requirement would encroach on public companies' First Amendment freedoms. Our nation remains strong when job creators exercise their Constitutional rights and speak out about public policies that impact growth and U.S. job creation. Some activists aim to

[4] Securities and Exchange Commission, Federal Register/Vol. 81, No. 78 / April 22, 2016 / Proposed Rules, 23971.
[5] Securities and Exchange Commission, Federal Register/Vol. 81, No. 78 / April 22, 2016 / Proposed Rules, 23971.
[6] James R. Copeland and Margaret M. O'Keefe. http://www.proxymonitor.org/Forms/2016Finding2.aspx

target political activities guaranteed under the First Amendment with the aim of hindering groups that give voice to their members' views and priorities. The Supreme Court repeatedly has recognized that voluntary associations are key participants in the public debate and that the government's attempt to stifle their voice violates the First Amendment. Therefore, the SEC should not add further disclosure requirements that are intended to unnecessarily target organizations for their political beliefs or to prevent groups from engaging in protected First Amendment speech.

Cybersecurity

Through comprehensive and connected relationships with customers, vendors, suppliers, and governments, manufacturers are entrusted with vast amounts of highly sensitive data and intellectual property. They hold the responsibility of securing this information, the networks on which it runs, and the facilities and machinery they control at the highest priority level. The SEC concept release considers whether disclosures should be revised to include information about cybersecurity risk. The NAM has advocated for increased coordination between the government and private sector to better share cyberthreat information in real-time. The NAM supports allowing the private sector to continue to lead the development of appropriate general and industry-specific best practices for improved security in coordination with the public sector. In this vein, the NAM opposes unnecessary prescriptive regulatory and reporting frameworks that will have little or no impact on improving the cybersecurity of the manufacturing sector.

Intellectual Property (IP) Assets

The concept release also seeks comment on whether the SEC should require more detailed disclosure from all companies on their patents and trademarks, and whether this disclosure obligation should be extended to copyrights and/or trade secrets. Currently, registrants are required to describe the "importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held."[7] Such disclosure, however, is only applicable "to the extent material to an understanding of the registrant's business taken as a whole."[8] In our view, the current scope of Item 101(c)(1)(iv), including the materiality threshold set forth in the introductory language of Item 101(c)(1), provides investors with adequate information about registered companies' IP assets. We believe that no revision to this item is required and that imposing additional IP disclosure requirements would impose enormous new burdens, costs, and risks upon manufacturers while providing limited if any benefits to investors.

In particular, we are concerned with the potential impact of imposing new disclosure requirements with regard to copyrights and trade secrets. Copyright and trade secret protections extend to a wide variety of creative works and confidential information. Since copyright and trade secret protection is not contingent upon registration (in contrast to patents and trademarks), a company may have thousands of valid copyrights and/or trade secrets that have never been systematically identified or catalogued by the company. If Item 101(c)(1)(iv) were revised to require manufacturers to disclose information about all or even some of their copyrighted works or trade secrets, companies would be faced with the enormous burden of having to identify and catalogue everything in their operations that might be eligible for protection. This would impose tremendous costs and other burdens and would require the time and attention of a number of employees, distracting them from the financial and business operations of the company.

[7] Item 101(c)(1)(iv) of Regulation S-K.
[8] *Id*.

Requiring disclosure of a company's trade secrets would be particularly problematic given that trade secret protection requires that the owner has taken reasonable measures to keep the information secret. Thus, it is unclear what kind of disclosure the Commission could require about trade secrets that would not risk destroying, or at least endangering, the value of these assets. Moreover, even knowing that a company has or is developing trade secrets in a certain area of technology or manufacturing process could allow competitors to "free ride" on such information and use it to their commercial advantage, without having to bear any of the associated costs or risks. Although virtually all companies have trade secrets, they tend to be particularly important in the manufacturing sector, where much of a company's competitive advantage may depend on unique expertise and know-how that might not be eligible for other forms of IP protection, or where the disclosure of that information (e.g., in a patent application) would render the information less valuable.

Moreover, given the substantial financial and other liabilities that could arise from incomplete or inaccurate disclosure, and the complexities associated with making materiality judgments regarding assets whose commercial value may be difficult to ascertain, companies may be inclined to be over-inclusive in any required disclosure of copyrighted works or trade secrets. This would result in investors being inundated with floods of information which would make it difficult to discern information that a company actually considers to be material.

For these reasons, we believe it would be contrary to the interests of both registrants and investors to expand the scope of Item 101(c)(1)(iv) to require disclosure of copyrights or trade secrets.

Risk Factors

In the concept release, the Commission asks whether risk factors should be further described and disclosed – including probability of occurrence, specific context, management's perception of the risk, and even a top ten list of risks for the company. Companies must already disclose information about their most significant risk factors. Manufacturers appreciate the flexibility provided in disclosing these factors, given that risk factors can vary widely from company to company. Adding prescriptive or specific requirements on these disclosures would only add to manufacturers reporting burden, and may even create confusion for investors. An overly prescriptive approach may give the impression that risk factors are easily comparable from company to company, when in many cases there is no comparability at all given the company's geographic location, history, industry, and many other variables. Additional requirements may also create more overdisclosure as companies attempt to minimize legal risk of failure to disclose certain SEC-required information instead of having the intended effect of maximizing information that may be useful to investors. Instead, the SEC should focus on paring down the required risk disclosures so that investors are left only with succinct information pertinent to their investment decisions.

Recommendations for Reducing Burden

As discussed, there are a number of existing disclosures that are overly burdensome to manufacturers but do not provide any great value or even a corresponding benefit to shareholders. The NAM recommends that the SEC review existing disclosure requirements and streamline and modernize these disclosures. This effort would require the Commission to evaluate where there are duplications or where the benefits of the requirement do not exceed the costs, and consider eliminating or reforming these requirements using a more principles-based approach. In general, the NAM opposes one-size-fits-all requirements that do not fully consider the unique situation of

each issuer, and therefore may result in higher compliance costs and other unintended consequences.

Moving forward, when considering the adoption of regulations that require disclosure of information, the Commission also should consider the cost of compliance and the likelihood that the disclosure will be effective, in addition to whether the additional requirement is material to the reasonable investor. Manufacturers will continue to oppose proposals where the cost of compliance outweighs the benefits of disclosure or where the additional requirement is not likely to achieve the desired effect. The SEC should do a full cost versus benefit analysis of any additional disclosure requirements under consideration and fully engage stakeholders, including manufacturing companies, in the process before a proposal is implemented. In the event there are additional disclosure, audit or other requirements, the SEC may need to consider extending due dates of Exchange Act filings. Taking these steps may help to lessen the cost and burdens of new disclosure requirements.

Conclusion

The NAM appreciates the opportunity to provide comments in response to the SEC concept release on the need to modernize certain disclosure requirements in Regulation S–K. As discussed, manufacturers already face significant burdens in complying with existing and proposed disclosure requirements, which can be overwhelming for both issuers and shareholders. The NAM believes that a streamlined and modernized disclosure framework that removes duplicative and overly costly requirements and also promotes a more principles-based disclosure system will help reduce the time and compliance costs for manufacturers, while also benefitting shareholders.

Moving forward, the SEC should consider whether any additional disclosure requirements are material for the reasonable investor to make investment decisions and fully consider the costs versus the benefits of such a disclosure. Manufacturing supports an estimated 18.5 million jobs in the United States – about one in six private-sector jobs – and more than 12 million Americans (or 9 percent of the workforce) are employed directly in manufacturing. The NAM urges the SEC to ensure that the cost of complying with disclosure requirements do not divert company resources from needed investment and job creation without providing any significant benefit to shareholders, companies or the broader economy. On behalf of the NAM and the 12 million men and women that work in manufacturing, thank you for your attention to these concerns.

Sincerely,

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