The Reardon Firm
ATTORNEY-AT-LAW

Patrick A. Reardon
Attorney-at-Law

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File Via Email

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

Re: **File No. S7-06-16; Rel. Nos. 33-10064; 34-77599**

Dear Mr. Fields:

I am writing to comment on the Commission's Concept Release titled *Business and Financial Disclosure Required by Regulation S-K* (File No. S7-06-16; Rel. Nos. 33-10064; 34-77599) (the "Release).[1] I will comment on select topics with the hope that my ideas will be of interest to the Commission and the staff.

I. General

What to disclose? The principal securities laws, the Securities Act of 1933 and the Securities Exchange Act of 1934, were written when the automobile was a relatively new invention. Since then, Congress has appended various amendments to these laws in an attempt to keep them current. The Commission has pursued the same goal through rulemaking.

Now, changes are happening faster than ever. Fundamental shifts have occurred in investments. Individuals look for companies with good business prospects for their portfolios and self-directed retirement accounts. Professional portfolio managers conduct all sorts of traditional and quantitative analyses. Arbitrageurs and private equity funds look for likely acquisition targets. Certain investors look for volatility, while others seek to correlate stock prices to moves in commodities, other indicators, or stock prices of competitors. Still others seek profits through trades made in milliseconds based on changes in information and market condition.

The question presented is, "Does one size fit all?" Frankly, I do not know, and I think Commissioner Kara Stein's suggestion of a task force to consider what is the appropriate disclosure is a good idea.[2] Any such task force needs to be long on real-life investors and traders, with fewer regulators and academics.

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[1] I am a member of the Commission's Advisory Committee on Small and Emerging Companies. The opinions expressed here are my own and do not reflect the opinions or recommendations of this Committee, its members, the Commission or any other person.

[2] Speech titled *Disclosure in the Digital Time: Time for a New Revolution*, May 6, 2016, available at https://www.sec.gov/news/speech/speech-stein-05062016.html .

6224 Genoa Road • Fort Worth, Texas 76116
817.348.8801 • patrick.reardon@reardonfirm.com • www.reardonfirm.com

The possibility exists that the Commission-required disclosure will not be able to accommodate all needs. Detailed disclosure with the current level of detail may be obsolete because so many investors are sophisticated. And some traders may not even care what the disclosure is, so long as the securities meet their trading needs.

Compliance Costs for Public Companies. The Commission noted that issuances of securities exempt from the registration requirements of the Securities Act of 1933 now equal the dollar volume of securities sold by registration under Section 5 of that act.[3]

Costs I believe have been a key factor driving the growth of fund-raising in the private sectors. In light of the growth in private transactions, the Commission should reduce the costs of being a reporting company. Although this might not bring issuers back to the public markets, reduced costs might staunch the loss of transactions to exempt offerings. For this reason, I applaud the numerous requests in the Release for comments relating to costs.

In addition, the SEC and corporate issuers need to know what are the average annual costs of being a public company? While the costs of filing and bringing to effectiveness a registration statement filed under Section 5 of the Securities Act of 1933 are disclosed, there is no similar disclosure for annual costs compliance under the Securities Exchange Act of 1934.

Therefore, I recommend that the Commission amend Regulation S-K and the instructions to the appropriate forms (such as Form 10-K) to include the reported year's unaudited periodic reporting costs. Their disclosure would appear along the lines of the following table:

Direct costs (audit, time of staff time using a reasonable hourly costs, outside counsel, printing and mailing costs, etc.)	$XXX
Indirect costs (transfer agent fees, proxy agent and solicitation)	$YYY
TOTAL	$ZZZ

This table will include some estimates, such as estimates of the value of time spent by executives and staff in preparing the filing and otherwise complying with the 1934 Act. Therefore, this requirement should provide that the information filed is not deemed "filed" under the 1934 Act. Also, specific audit costs, fees of outside counsel, etc. may be confidential, and Regulation S-K should not require disclosure of the detail of these costs.

II. Specific Questions.

Now I will respond to a few of the specific questions in the Release. For the sake of brevity, I will respond without repeating the question.

Question 14. In general, I embrace the concept of principles-based disclosure. A huge investment community already uses principles-based disclosures. These are the Rule 506 offerings

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[3] SEC Staff Report, *Report on the Review of "Accredited Investor"*, December 18, 2015, p. 1.

made only to accredited investors.[4] While some private placement disclosures may be based on Regulation S-K, the guiding light is often merely materiality. Some issuers eschew formal disclosure documents and make their disclosure through access to whatever the investors want to receive. These disclosures may be made at company-investor meetings or may involve virtual data rooms full of documents with material and non-material information. Access to information works best when the parties are sophisticated and have similar advisers.

With public companies, I believe in principles-based disclosure as an effective tool to restrain excessive disclosure requirements. However, there are two concerns that the Commission should keep in mind.

First, principles-based disclosure relies heavily on professionals, experienced certified public accountants and lawyers (in-house or outside), who can advise what is material. Frankly, the standard stated in the *Basic Inc. v. Levinson* case (cited in the Release, n. 107) is not that helpful without a review of subsequent cases applying the judicial standard. The professional must have the knowledge and experience to put himself or herself in the position of the investor and try to discern what the investor expects to see.

Second, use of principles-based disclosure opens the door to management arguing that unfavorable disclosures are not material and therefore are not required. For these people, checklist requirements are better. "There, Reg. S-K says you must disclose this." One can only hope that issuers using principles-based disclosure to evade disclosure of unfavorable information does not occur too often.[5]

Question 21. Please see my comments above on public issuers disclosing a summation of their routine '34 Act compliance costs. I believe this information would facilitate an interesting cost-benefit discussion, particularly as the information relates to smaller companies.

Question 145. Permitting (not requiring) the issuer to write a description of what it is doing to respond to or prevent a risk would produce greater candor. Companies do not like stating risks if they cannot say what they are doing regarding that concern.

Questions 146, 147, 152. The world in general moves with greater velocity than in the past. World trade, foreign affairs, the U.S. battle over small or large government all affect what are risks to a company. Aside from the occurrence of a Black Swan, anticipated risks are hard to rank or describe with too much specificity.[6] Why subject a company to liability because no one foresaw that a minor risk would leapfrog over other risks to become a large problem?

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[4] Of course, these offerings only require disclosure of all material information pursuant to the case law finding a private cause of action for violations of Commission Rule 10b-5.

[5] I know from a similar experience that resulted in my ending the professional relationship on the spot, these discussions/arguments can occur.

[6] Nassim N. Taleb, *The Black Swan: The Impact of the Highly Improbable*, Random House 2007. The velocity of changes discussed above affects how a seemingly minor risk becomes a big problem very quickly.

Question 150. Increasingly political, international, and economic risks are affecting companies. For example, it would be easy to dismiss domestic political risks as being generic, but I think an investor in a coal mining company would expect to read a discussion of the government efforts to shut down the U.S. coal industry. A workable solution might be to exclude domestic political and economic risks and international risks unless they unusually affect the company or its industry.

Questions 216-217. The answer to the questions posed in the release is that public policy and sustainability issues is that the information is not material to investors.

The Commission exists to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The Commission has plenty of work fulfilling those purposes. Although advocates can argue that some of the public policy and sustainability issues pushed on the Commission are consistent with these goals, those arguments are attenuated. Also, the public disdain for the Internal Revenue Code of 1986 (and the Internal Revenue Service) is due in part to the effects of social and political goals unnecessarily complicating routine taxation. The Commission does not want to become another IRS.

Unfortunately, public company disclosures have become a target for political agendas. Disclosures such as conflict mineral sourcing, amounts energy companies pay to governments, sustainability and other political agenda topics are not material. Making these disclosures imposes a cost (or indirect tax) on public companies and their owners that is not necessary. The Commission should urge Congress not to divert the agency from its intended goals. Likewise, the Commission should restrain itself from regulatory enactment of these distractions on its own initiative.

As a young lawyer, a seasoned mentor cautioned me not let myself be distracted by issues that are only tangential to the matter at hand. "Don't go chasing rabbits!" he said. The Commission had plenty to do without being distracted by rabbits.

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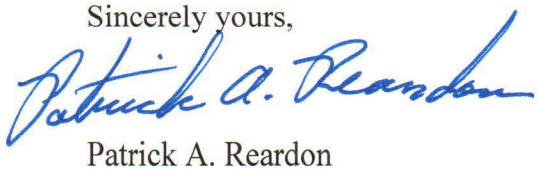
Thank you for reading my comments. Please feel free to contact me if anyone at the Commission has any questions or comments.

Sincerely yours,



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