CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000

December 20, 2017

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

Re: **FAST Act Modernization and Simplification of Regulation S-K; 17 CFR Parts 229, 230, 232, 239, 240, 249, 270, 274 and 275; Release Nos. 33-10425, 34-81851, IA-4791, IC-32858; File No. S7-08-17; RIN 3235–AM02**

Dear Mr. Fields:

The U.S. Chamber of Commerce (the "Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.[1] CCMC welcomes the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "SEC" or "Commission"), entitled FAST Act Modernization and Simplification of Regulation S-K (the "Proposing Release").[2]

Since 1996, the number of public companies in the United States has decreased by roughly 50%. Economists are confounded by low productivity, and while unemployment rates have dropped, labor participation has hit all-time lows. The recovery that followed the 2008 financial crisis has also been weak and uneven by historical standards. New business creation has been remarkably low relative to previous recoveries, and those businesses that are being created tend to be concentrated in a small number of areas around the country. All of this is happening while economic growth seems stuck at 2%—a growth rate sufficient to stave off a

---

[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

recession, but not sufficient to provide Americans with the level of prosperity they expect or can pass on to the next generation.

While a variety of economic factors and regulatory policies outside the SEC's control have contributed to these disheartening trends, we believe the SEC should be front and center in the effort to restore the viability of the public company business model. This renaissance can only begin when the disclosure obligations of public companies are aligned with the needs of the 21st century investor.

Over the decades since the securities laws were enacted, and especially in more recent years, the disclosure documents companies file with the SEC have continued to expand and today go on at great length. Our securities disclosure regime has been inundated with disclosure mandates that are unnecessary and frequently duplicative. More information is disclosed than ever before. It should come as no surprise then, that "information overload" has been identified as a leading concern with the current disclosure regime. The end result is that vital disclosure documents go unread, or essential information is lost in the minutiae.

To put this problem into perspective, a 2012 report found that the average number of pages in annual reports devoted to footnotes and Management's Discussion and Analysis (MD&A) had quadrupled over twenty years.[3] And in 2015, Stanford University released a survey which found that only 38% of institutional investors believe disclosures related to executive compensation are "clear and effectively disclosed in the corporate proxy."[4]

In rethinking the disclosure regime, the guiding principle of disclosure reform should be materiality. More specifically, materiality (i.e., what would a reasonable, ordinary investor consider important information for a decision regarding a financial investment) needs to again become the touchstone of our disclosure regime. As investors become inundated with irrelevant information, they struggle to identify what is material. In some instances, investors simply ignore long, dense documents as the process of parsing material information from irrelevant or immaterial disclosure is challenging and time consuming.

---

[3] "Now is the time to address disclosure overload" Ernst & Young, June 2012. The survey was conducted across 20 large well-known public companies.

[4] DAVID F. LARCKER ET AL., STANFORD UNIV., 2015 INVESTOR SURVEY: DECONSTRUCTING PROXY STATEMENTS—WHAT MATTERS TO INVESTORS 1 (FEB. 2015), https:/www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survyey-2015-deconstructing-proxy-statements_0.pdf.

CCMC believes that the SEC should put an end to using SEC disclosure documents to advance policy goals unrelated to the core objectives of the federal securities laws. A disclosure regime more narrowly focused on delivering actionable information to investors will yield immediate benefits, including more efficient allocation of capital, improvement of market discipline and corporate governance, and an easing of the financial and administrative burdens borne by companies when raising capital.

We support the objectives of the Proposing Release and are encouraged that the SEC's Disclosure Effectiveness Initiative appears to be back on track. As the Proposing Release frequently notes, CCMC has been a strong supporter of the Disclosure Effectiveness Initiative and in the past has offered numerous suggestions for advancing its goals. We offer our comments below in the interest of further refining the proposed amendments. In brief:

- We support proposed amendments to Item 102 of Regulation S-K regarding property disclosures, but do not believe the Commission should retain any presumptive materiality thresholds.

- We also support proposed amendments to streamline the MD&A, and believe the Commission could help resolve a split among the circuit courts of appeal resulting from the settlement of the *Leidos* case.

- We support most of the proposed amendments to Item 601 of Regulation S-K, and likewise support the proposed changes to the Commission staff's process for reviewing confidential treatment requests.

- We support many of the other technical amendments discussed in the Proposing Release.

- We urge the Commission to consider more ambitious reforms to the overall delivery of periodic reports, be they a "company file" or other techniques that make more robust use of modern technology.

DISCUSSION

A. Description of Property

CCMC supports the proposed amendments to Item 102 of Regulation S-K. However, at the Commission's open meeting to consider the Proposing Release, several SEC speakers appeared to indicate in their remarks that the relief afforded by these proposed amendments would not be available to certain companies in the real estate and extractive industries. This sentiment also appears in the Proposing Release,[5] and is reflected by the fact that the proposed amendments would leave existing instructions 3 to 9 of Item 102 intact.

While we agree that physical properties will often be material to companies in these industries, we are also aware of many situations where individual properties (or groups of related properties) are not material to particular issuers. We respectfully encourage the Commission to move away from any presumptive materiality determination for particular industries under Item 102, and instead provide a uniform set of instruction for all issuers regardless of industry.

B. Management's Discussion and Analysis

We also support the proposed amendments to Item 303. In particular, because prior years' MD&A are already archived in Edgar and easily accessible to investors, we believe providing issuers with the flexibility to eliminate the third year of comparison when it is no longer material will permit both management and investors to focus their attention on the most recent trends and uncertainties for a particular company. Investors and analysts looking to perform an analysis of a particular company over a longer time horizon need only click through to historical MD&A in Edgar. Under the same rationale, we also support elimination of a mandatory five-year selected financial data chart. Similarly, we support expanding the proposal, with similar conditions, to other SEC forms, such as Form S-1 and Form 8-K.

More broadly, we are encouraged that the Commission has reaffirmed prior guidance on the need for reporting companies to "take a fresh look" at MD&A so that it is devoid of "unnecessary detail or duplicative or uninformative disclosure that

---

[5] See text accompanying footnote 37.

obscures material information." Nevertheless, we are concerned that the recent settlement of *Leidos, Inc., v. Indiana Public Retirement System* on the eve of Supreme Court review has left a split between the circuit courts of appeal that creates uncertainty as to the level of detail that is required in the MD&A. Following an earlier decision,[6] the Second Circuit in *Leidos* held that an omission of material information that must be disclosed in the MD&A section of a quarterly or annual report can provide the basis for a claim for securities fraud even if the omission does not make an affirmative statement misleading.[7] In finding that Item 303 of Regulation S-K imposed a "duty to disclose" the omitted information, the Second Circuit departed from an earlier Ninth Circuit opinion holding that such "pure omissions" are not actionable under Section 10(b) and Rule 10b-5.[8] The amicus brief filed by the United States in *Leidos* supporting the plaintiff-respondents further complicates the analysis for public companies by refuting the Ninth Circuit view.[9] Now would seem to be an appropriate time for the Commission to provide formal clarification of its position on the issues at dispute in *Leidos*.

C. Management, Security Holders and Corporate Governance

We support the proposed amendments to Item 401, 405 and 407. As to Question 16 of the Proposing Release, we do not believe it is necessary to duplicate disclosure in Form 10-K and the proxy statement. Thus, a registrant relying on General Instruction G to Form 10-K to forward-incorporate proxy statement disclosure should not be required to repeat information in the proxy statement that is disclosed elsewhere in the Form 10-K.

D. Registration Statement and Prospectus Provisions

We support the proposed amendments to Items 501, 508, and 512. We also believe that the text of the Item 512 undertakings and the associated instructions would benefit by being recast into plain English. Item 512 has largely escaped the plain English movement over the past two decades, and many of our members report that its dense legalese can often be difficult to decode and apply. We suspect few

---

[6] See Stratte-McClure v. Morgan Stanley, 776 F.3d 94 (2d Cir. 2015).
[7] Indiana Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85 (2d Cir. 2016).
[8] See In re NVIDIA Corp. Sec. Litig., 768 F.3d 1046 (9th Cir. 2014), cert. denied, 135 S. Ct. 2349 (2015)
[9] The amicus brief of the United States is available at https://www.justice.gov/sites/default/files/briefs/2017/09/08/16-581bsacunitedstates.pdf.

investors read Part II of any registration statement, and fewer still understand what the current undertakings require of the companies in which they invest.

E. Exhibits

CCMC supports the proposed amendments to Items 601(a) (5), 601(a) (6), 601(b) (4) and 601(b) (10), and we applaud the Commission for proposing to streamline the confidential treatment request process. In its current form, the confidential treatment request process is overly bureaucratic and imposes unnecessary costs and burdens on issuers with no corresponding benefit to investors. Given the significant concerns around data security, we believe the proposed accommodation for the confidential treatment of personally identifiable information is particularly timely and sensible. Moreover, expanding the circumstances under which an issuer is permitted to exclude schedules and similar attachments to exhibits is also a welcome change.

As to the proposed amendments to Item 601(b)(21), CCMC is less sanguine about mandating the reporting of legal entity identifiers ("LEIs") because we question their utility and are concerned a mandatory reporting regime for LEIs will impose unnecessary costs on issuers without any demonstrable benefit for investors. If the Commission resolves to adopt this proposal, we agree that disclosure of LEIs should be voluntary and required only of registrants and their subsidiaries that choose to obtain these identifiers. Furthermore, we do not support any mandate to disclose LEIs in XBRL or other machine-readable format. We have separate concerns over the never-ending expansion of XBRL tagging requirements, which we detail further below.

F. Incorporation by Reference

We generally support the Commission's proposed amendments to its rules concerning incorporation by reference.

We also support the proposed amendments to Form 10, Form 10-K and Form 20-F to allow registrants to exclude item numbers and captions or to create their own captions tailored to their disclosure. In the future, we would encourage the Commission to explore making similar amendments to the conventions on item numbers and captions in other periodic reports.

G. Manner of Delivery

While CCMC shares the Commission's desire to make information more accessible to investors, we continue to harbor doubts about the efficacy of mandates for XBRL tagging. In our experience, institutional investors typically utilize their own proprietary data analysis systems to assess companies' performance, and retail investors generally do not use XBRL-tagged data to compare companies at all. Yet in a series of recent releases, the Commission continues to propose further expansion of mandatory XBRL reporting. It is worth noting that at multiple SEC Government-Business Forums on Small Business Capital Formation held over the last six years, a top recommendation each year has been to exempt small reporting companies (and, beginning in 2012, emerging growth companies) altogether from the requirement to file financial information in XBRL.

It is clear that the costs of XBRL compliance in many cases outweigh the benefits, yet the XBRL elements of the Proposing Release would again expand the data-tagging obligations of reporting companies. We respectfully urge the Commission to conduct an investor study to determine how investors use XBRL information to inform any further rulemaking on this subject.

H. General Request for Comment

As we noted in our comment letter dated July 29, 2014,[10] which enclosed our report entitled *Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation*, CCMC believes there are additional near-term improvements to Regulation S-K of the same character as those advanced in the Proposing Release. In brief, we also support the following disclosure improvements:

- The disclosure requirement under Item 101(d) (financial disclosure for different geographic areas) is duplicative of other mandated disclosures and should be eliminated. If a company has operations in a particular region that are material to its business, the company typically would discuss those operations as part of MD&A under Item 303. Furthermore, U.S. generally accepted accounting

[10] The full letter is available at https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-11.pdf.

principles require financial disclosures by operating segment. Thus, any disclosures under Item 101(d) that are redundant with other disclosure obligations under Regulation S-K or financial reporting requirements should not be separately required under this item.

- The references in Items 101(e) (2) and 101(e) (4) to viewing documents in the SEC's public reference room are relics of a bygone era. Nowadays, when investors want to find a copy of a document a company has filed with the SEC, they can turn to the company's website, a financial website, or the SEC's Edgar database. It is widely known that historical SEC reports are available through these media free of charge, and for those few investors who do not own a computer; free internet-enabled computers are widely available at public libraries nationwide. Few investors now actually journey to SEC headquarters in Washington, D.C. to use SEC computers to view documents they can easily obtain online elsewhere. Because technology has rendered the requirements under Items 101(e) (2) and (e) (4) obsolete, they should be deleted from Regulation S-K.

- The requirement to disclose frequency and amount of dividends (Item 201(c)) is obsolete. Specifically, the requirement to disclose details about past dividend payments in an annual filing may have been appropriate in the past, but technology has presented investors with faster and easier ways to access and analyze dividend information. Many companies—including those that are eager to show a record of increasing dividends— post on their websites a full history of the frequency and amount of dividends they have paid over the years. Again, a number of websites and smartphone applications also make this information easy to obtain, literally at the click of a button.

- The Item 201(e) performance graph is no longer needed and should not be required. While performance graphs, charts, and tables can be a valuable tool for investors, we believe few investors rely on the dated Item 201(e) performance chart included in SEC filings. Today, a host of websites, smartphone applications, and other technological means allow investors to study the performance of a particular stock over any period of time. In addition, by going online, investors can easily access or create an up-to-date comparison of a company's stock performance against that of other companies

or against an index of the investor's choosing, obviating the need for such a chart in a static SEC report.

- The Commission should eliminate the Item 503(d) requirement to disclose the ratio between earnings and fixed charges. First adopted by the SEC in 1954, this requirement was intended to show a company's ability to cover fixed charges to its business. Over time, however, as the SEC began to require similar disclosures in other filings and financial modeling became more sophisticated, the usefulness of this disclosure to investors has continued to diminish. As long ago as 1980, the SEC issued a concept release asking whether this requirement should be retained. Recognizing the sophistication of financial modeling today and investors' ability to analyze detailed financial information through a multitude of online tools using different data sources, the Item 503(d) disclosure requirement is outdated and should be removed. It already is the case that smaller reporting companies do not have to comply with this item.

- The requirement to disclose recent sales of unregistered securities (Item 701) is duplicative of other disclosure requirements. Variations of this requirement date back to the very first registration forms adopted by the SEC, and the current Regulation S-K requirement was established in 1982. Among other critiques, this requirement has become less useful to investors over time, given that the same disclosure appears elsewhere in a company's SEC filings. Specifically, if a company completes a material sale of securities to investors, companies are required to discuss the transaction as part of MD&A liquidity and capital resources disclosures. In addition, for a company subject to Exchange Act reporting requirements, Form 8-K generally requires prompt disclosure of unregistered sales of equity securities, thus requiring the same basic disclosure as currently is separately required to be included in a company's Forms 10-Q and 10-K.

More fundamentally, while we welcome the progress represented in the Proposing Release, we continue to believe that the Commission should give further consideration to the basic format of how information is presented and delivered to investors. As the Commission is well aware, the current disclosure regime for Exchange Act reports, which is premised on self-contained reports delivered (or made available) at regular intervals, is grounded largely in the past before the proliferation of

modern communications technology. The introduction of the Edgar system over 20 years ago made these reports and other SEC filings more easily accessible in electronic format. However, the basic layout of Form 10-K, Form 10-Q, Form 8-K, and the proxy statement has gone unchanged for decades, even as the number of substantive disclosures in these and other SEC reports has multiplied and technology has advanced.

We therefore believe it is also time to rethink the format of public company reports and the fundamentals of how information is delivered to investors, with the goal of enhancing the usability and value of public company disclosures for investors in the modern technological era. Any effort at enhancing disclosure effectiveness should consider not just what is disclosed but also how information is presented and delivered to investors. Indeed, many elements of the Proposing Release—eliminating duplication, greater use of hyperlinks, rethinking incorporation by reference, enhanced use of LEIs and XBRL—seek to make a 1930s disclosure regime function more like one for 2020 and beyond. Be it a centralized "company file" to replace the current process for delivering investor information or some other forward-looking construct, modern technology allows us to shape a more effective disclosure regime, and the Commission should take full advantage of it.

We also encourage the Commission to continue its efforts to advance its other proposals and initiatives on Disclosure Update and Simplification (File no. S7-15-16), Amendments to Smaller Reporting Company Definition (File no. S7-12-16), and Business and Financial Disclosure Required by Regulation S-K (File no. S7-06-16), among others.

CONCLUSION

In closing, disclosure is the foundation of the federal securities laws. The purpose of disclosure is to provide investors with the material information they need to make informed investment and voting decisions. It is crucial that investors have access to information that will permit them to make fully informed decisions regarding when to invest, hold, or divest a financial asset. An effective disclosure regime provides investors the material information they need to make objective decisions regarding the value of an investment, but does not overwhelm them with extraneous information that can obscure what is material and distract investors from what really matters about a company. We believe that while there is much more work

to be done to bring corporate disclosure into the 21st century, the Proposing Release is, by and large, a positive step towards modernizing the current regime.

We thank you for your consideration of these comments and are available to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

cc: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar