PUBLICCITIZEN Protecting Health, Safety and Democracy

Jan 2, 2018

Chairman Jay Clayton
Commissioners
C/o Brent Fields, Secretary
Securities and Exchange Commission
100 F St, NE
Washington, D.C. 20549

**Re: FAST Act Modernization and Simplification of Regulation S-K**

Dear officers,

On behalf of more than 400,000 members and supporters of Public Citizen, we comment here on the Securities and Exchange Commission's (SEC, Commission) proposed rule titled "FAST Act Modernization and Simplification of Regulation S-K." We welcome the Commission's attention to the fundamental issue of disclosure. When it established the SEC in the 1930s, Congress declared that robust, accurate disclosure policed by a federal agency would form the cornerstone of accountability for investors.[1] As provided in the U.S. Securities Act of 1933, Regulation S-K establishes the core public reporting requirements for various SEC filings used by public companies.

We recognize the SEC's statutory obligation regarding this rule, as provided under Section 72002 of the 2010 Fixing America's Surface Transportation Act. We note, however, that this statute comes from legislation attached to authorization of national transportation funding. Securities disclosure has essentially nothing to do with repairing the nation's highways. Alone, this securities disclosure mandate might never have become law. It became law because business friendly members of Congress attached it to a spending bill that itself enjoyed broad bipartisan support. In other words, the SEC's proposal doesn't truly respond to independent demand for reduced or simplified disclosure, or independent congressional consideration of the issue. We are not aware of any such demand. On the contrary,

[1] Progressives had sought stricter reforms following the frauds leading to the financial crash of 1929, such as a national charter for corporations, instead of state incorporation. A national charter would establish governance and operational rules for all companies, and stop the "race to the bottom" among states who would approve lenient rules in the hopes of attracting incorporation fees. Disclosure, instead, has become the major policing vehicle.

investors keenly demand additional information, in areas ranging from political spending, environmental impacts of company operations, company management of human capital, and granular details of international tax payments. Further, the plain language of the statute does not mandate reduced disclosure. Instead, Section 72002 (2) only directs the SEC "to eliminate provisions . . . that are duplicative, overlapping, outdated, or unnecessary."[2] That is, the SEC must first find that the disclosures to be eliminated meet these criteria.

The SEC's request for comment on disclosure drew numerous comments. From the investor community, there was little if any expressions for less disclosure; on the contrary, many investors and investor coalitions sought additional disclosure. For example, more than 17,000 commenters sought additional disclosure regarding international tax payments.[3] Only from the issuer community did requests come for such reductions. We believe the Commission, mandated to protect investors, should accord primacy to investor opinions.

**Proposed Disclosure Reductions**

We are generally pleased that the Commission has avoided a wholesale retreat from important existing disclosure requirements. The proposed rule makes limited and surgical cuts to existing disclosure requirements.

We offer comment where the SEC rule would:

- Clarify that disclosure regarding properties (under S-K 102) is only required when material to the registrant;
- Provide registrants the option to exclude the earliest year of management discussion and analysis (MD&A) when the information is not material and the registrant has filed the earliest year MD&A as part of the previous year's Form 10-K;
- Allow registrants to omit certain confidential information from contracts filed as an exhibit that is not material and would cause competitive harm without submitting requests for confidential treatment and un-redacted versions of contracts to the SEC;

Regarding disclosure of properties, the rule would allow firms to omit disclosures about such items as the corporate headquarters, other office space, or other proprieties not considered material. The SEC explains that the original rule envisioned properties such as manufacturing facilities or mining operations that were material. As many firms are now in the service sector, office space is less important. We do not object to reducing such disclosures. Where firms have established offices to service markets, we expect they will exercise self-interest and publicize their presence.

[2] FAST Act, UNITED STATES CONGRESS, (website visited Dec. 12, 2017) https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf

[3] See comment file, SECURITIES AND EXCHANGE COMMISSION (website visited December 15, 2017) https://www.sec.gov/comments/s7-15-16/s71516.htm

Regarding management discussion and analysis (MD&A), companies now provide two comparative year-to-year discussions that cover three years. In other words, the most recent year is compared to the year before, and that year is compared to the year before that. The SEC proposes to eliminate that second comparison provided that it is "not material to an understanding of the registrant's financial condition." No hyperlink to the prior Form 10-K would be required. We believe this provides little relief to a company, as the discussions of the earliest year has already been written. Moreover, where circumstances have changed, the fuller comparison helps investors understand the validity of analysis over this longer period. We believe the full three year comparison should be retained.

Separately, the commission should consider a fuller discussion of estimates, assumptions, and judgments under MD&A. Financial statements may appear exacting, but they mask these estimates. For example, banking firms may list a value for so-called Level III securities. By definition, a Level III security is one where there is no ready market price. Other values are difficult to judge, such as environmental liabilities. Listing all range values may prove to be voluminous, but a broader discussion or selected ranges would be useful.

Regarding confidential treatment, the rule would allow firms (under Item 601(b)(10)) to omit or redact confidential information from contract exhibits that is not material and would, in the firm's estimation, cause competitive harm if publicly disclosed. Currently, such omission must follow a request by the company for SEC approval. The commission reports that such requests are granted in 90 percent of the cases. Under the proposal, commission staff would still be permitted to require disclosure where it found that the information is material, despite issues of confidentiality. This would reduce both the effort by companies to draft requests, detailing their rationale, and staff time in reviewing them. We are concerned that some firms may err on the side of omission, and that SEC staff may find it expedient to ignore rather than sample and inspect companies. We believe the current request-and-review system best protects investors and should be maintained.

We do support several other proposals in this rule. We agree that registrants should disclose "legal entity identifiers" for the company and subsidiaries, if available. We also applaud the commission's promotion of hyperlinks when referencing other documents.

**Enhanced disclosure**

Meanwhile, the FAST Act does not supplant the SEC's mandate to protect investors and promote meaningful disclosure. As the Commission reviews the efficacy of S-K as the primary platform for informing investors, we urge consideration for additional disclosure in a number of areas. Among the areas investors have voiced demands for greater information are political spending, environmental impacts, human capital management, and improved international operations disclosure.

A petition outlining investor interest in political spending disclosure has drawn more than 1.2 million comments.[4] As explained in the petition, public company investors have become increasingly interested

[4] Petition for Rulemaking, COMMITTEE ON DISCLOSURE OF CORPORATE POLITICAL SPENDING, (August 3, 2011) https://www.sec.gov/rules/petitions/2011/petn4-637.pdf

in receiving information about corporate political spending. A sizeable number of public companies have voluntarily adopted disclosure policies. Such disclosures serve corporate accountability. The Supreme Court in *Citizens United v. FEC* presumes that shareholders control the spending of their funds on political issues, which is only possible through disclosure.

Investors also express interest in enhanced environmental disclosures. Existing SEC guidelines require companies to disclose material risks that result from climate change. But such disclosure is often broad with little detail. The Commission's Investor Advisory Committee urges greater disclosure, including recognition of an outside standards setter, similar to the Financial Accounting Standards Board (FASB).[5] One candidate may be the Sustainability Accounting Standards Board (SASB). Established in 2011, SASB attempts to foster material sustainability information, covering 79 industries.[6]

A firm's human capital also deserves more detailed disclosure. Currently, the only discrete disclosure is the number of employees. Even compensation is part of a larger figure that includes marketing and other expenses. A survey by PricewaterhouseCoopers in 2015 of CEOs showed they identified "availability of key skills" as the second most worrying risk, ahead of geopolitical uncertainty, tax burden and shift in consumer spending and behaviors.[7] Leading investors from the California state pension funds to BlackRock favor increased human capital management disclosure. BlackRock chief Larry Fink urged CEOs to develop a strategic framework for long-term value creation and disclose more about their vision and plans for the future, including how they are "developing [their] talent."[8] Specifically, the Commission should require that firms report on workforce demographics (number of full-time and part-time workers, number of contingent workers, policies on and use of subcontracting and outsourcing), turnover, diversity, training, union representation, and injuries.

Investors also seek more granular disclosures for international operations, particularly with respect to tax payments. Investors representing some $70 trillion worth of assets under management organized as Principles for Responsible Investment (PRI) have established model guidelines for corporate reporting broadly on environmental, social and governance issues. They argue that "major tax-related regulatory changes that are occurring around the world" require attention, yet companies fail to disaggregate country-by-country revenue, income and tax payments. [9]

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[5] Joseph Carcello, *Letter to SEC Division of Corporate Finance,* INVESTOR ADVISORY COMMITTEE, SUBCOMMITTEE ON INVESTOR AS OWNER (Nov. 22, 2016) https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-letter-investor-as-owner-subpart-400reg-sk-112216.pdf

[6] Standards Board, SUSTAINABILITY ACCOUNTING STANDARDS BOARD (website visited Dec. 13, 2017) https://www.sasb.org/

[7] *18th Annual Global CEO Survey,* PRICEWATERHOUSECOOPERS, (2015) (http://www.pwc.com/gx/en/ceo-survey/2015/assets/pwc-18th-annual-global-ceo-survey-jan-2015.pdf).

[8] Matt Turner, *Here is the Letter the World's Largest Investor, BlackRock CEO Larry Fink, Just Sent to CEOs Everywhere*, BUSINESS INSIDER, (Feb. 2, 2016) http://www.businessinsider.com/blackrock-ceo-larry-fink-letter-to-sp-500-ceos-2016-2

[9] Fiona Reynolds, *Letter to Financial Accounting Standards Board*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (Dec. 4, 2017)
http://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175835773506&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=1592810&blobheadervalue1=filename%3DDISFR_TAX.ED.054.PRINCIPLES_FOR_RESPONSIBLE_INVESTMENT_FIONA_REYNOLDS.pdf&blobcol=urldata&blobtable=MungoBlobs

We urge the Commission to undertake steps to incorporate these needed additional disclosures. For example, one of the Commission's advisory committees might take up the issue of environmental or political spending disclosure at a regular meeting. We note that the Investor Advisory Committee has already submitted fulsome comment on the SEC's S-K exercise. A robust examination into these areas, especially where investors have signaled broad support, would help emphasize the SEC's commitment to its primary mandate.

Again, we appreciate the Commission's careful analysis and reasoned approach to S-K modifications. We look forward to the Commission's attention to investor interests in improved disclosure.

For questions, please contact Bartlett Naylor at [redacted].

Sincerely

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