



# Towards a Sustainable Economy

A Review of Comments to the SEC's  
Disclosure Effectiveness Concept Release

*September 2016*

## ABOUT THE REPORT

This Joint Report is written by Tyler Gellasch and is published by the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), Americans for Financial Reform, Center for American Progress (CAP), Ceres, the Financial Accountability and Corporate Transparency (FACT) Coalition, the International Corporate Accountability Roundtable (ICAR), the Patriotic Millionaires, Public Citizen, and US-SIF: The Forum for Sustainable and Responsible Investment.

Each of the organizations has detailed thoughts on how the SEC should best improve its rules on these key issues for investors. For more in-depth analyses of particular substantive disclosures, we encourage readers to contact each organization directly.

In addition, the author and publishing organizations would like to thank Andrew Schwartz and Gregg Gelzini of CAP for their invaluable assistance in the preparation of this Joint Report.



**ABOUT THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS**

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions, representing 12.5 million union members. Union-sponsored and Taft-Hartley pension and benefit plans hold more than \$647 billion in assets. Union members also participate in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. For more information, visit [www.aflcio.org](http://www.aflcio.org).



**ABOUT AMERICANS FOR FINANCIAL REFORM**

Americans for Financial Reform is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, we are working to lay the foundation for a strong, stable, and ethical financial system — one that serves the economy and the nation as a whole. For more information, visit [www.ourfinancialsecurity.org](http://www.ourfinancialsecurity.org).

**Center for American Progress**



**ABOUT THE CENTER FOR AMERICAN PROGRESS**

The Center for American Progress is an independent nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action. Our aim is not just to change the conversation, but to change the country. For more information, visit [www.americanprogress.org](http://www.americanprogress.org).



## ABOUT CERES

Ceres is a non-profit organization that is mobilizing many of the world's largest investors and companies to take stronger action on climate change, water scarcity and other global sustainability challenges. Ceres coordinates the Investor Network on Climate Risk, a group of over 120 institutional investors managing over \$14 trillion assets focused on the business risks and opportunities of climate change. Ceres also engages with 100-plus companies, many of them Fortune 500 firms, committed to sustainable business practices and the urgency for strong climate and clean energy policies. For more information, visit [www.ceres.org](http://www.ceres.org).



## ABOUT FINANCIAL ACCOUNTABILITY AND CORPORATE TRANSPARENCY (FACT) COALITION

Founded in 2011, the *Financial Accountability and Corporate Transparency (FACT) Coalition* is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promotes policies to combat the harmful impacts of corrupt financial practices. More information about the coalition can be found on the FACT Coalition website at [www.thefactcoalition.org](http://www.thefactcoalition.org).



## ABOUT INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE (ICAR)

The International Corporate Accountability Roundtable (ICAR) is a civil society organization working to ensure that governments create, implement, and enforce laws and policies to protect against business-related human rights abuses. For more information, visit [www.icar.ngo](http://www.icar.ngo).

# PATRIOTIC MILLIONAIRES

## ABOUT PATRIOTIC MILLIONAIRES

The Patriotic Millionaires is a group of high-net worth Americans who are committed to building a more prosperous, stable, and inclusive nation. The diverse membership individuals includes entrepreneurs, chief executives, philanthropic leaders, activists, tech innovators, and academics. From Wall Street to Silicon Valley and everywhere in between, the group works at local, state, and national levels to advocate for practical economic policies that will benefit all Americans. For more information, visit [www.patrioticmillionaires.org](http://www.patrioticmillionaires.org).



**PUBLICCITIZEN**

## ABOUT PUBLIC CITIZEN

[Public Citizen's](http://www.citizen.org) mission is to fight on behalf of all Americans to make sure government works for the people. We accept no government or corporate money and have 400,000 members and supporters nationwide. Since our founding in 1971, we have delved into an array of areas, but our work on each issue shares an overarching goal: to ensure that all citizens are represented in the halls of power. For four decades, we have proudly championed citizen interests before Congress, the executive branch agencies and the courts, working on a range of issues, from transparency, to financial reform, to healthcare, to civil justice, to climate change and more. Public Citizen also co-chairs the [Corporate Reform Coalition](http://www.corporate-reform-coalition.org), an organization made up of more than 85 investors, academics, securities experts, and NGOs focused on ensuring that the Securities and Exchange Commission (SEC) promulgates [the most demanded rulemaking](http://www.citizen.org) in its history, the requirement that public companies disclose their political spending. For more information, visit [www.citizen.org](http://www.citizen.org).



The Forum for Sustainable and Responsible Investment

## ABOUT US-SIF: THE FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTMENT

The Forum for Sustainable and Responsible Investment is the leading voice advancing sustainable, responsible and impact investing across all asset classes. Our mission is to rapidly shift investment practices towards sustainability, focusing on long-term investment and the

generation of positive social and environmental impacts. US SIF seeks to ensure that environmental, social and governance impacts are meaningfully assessed in all investment decisions to result in a more sustainable and equitable society, including well-functioning financial markets, which depend on accurate information. US SIF's 300+ members collectively represent more than \$3 trillion in assets under management or advisement and include money managers/mutual funds; foundations and other asset owners; research, data and index providers; financial planners, advisors and investment consultants; community development institutions and non-profit organizations. For more information, see [www.ussif.org](http://www.ussif.org).

# Contents

Executive Summary .....	8
Background on Companies' Disclosure Requirements .....	13
"Disclosure Overload", "Disclosure Effectiveness", and the Concept Release .....	14
Comment Summary on Selected Issues .....	16
The Two Camps: Those Who Read Disclosures Versus Those Who Make Them .....	17
What Should (or Should Not Be) Disclosed .....	23
Conclusion .....	27

## Executive Summary

Investors, the public, and regulators must be informed and empowered to address the great challenges facing our companies, our country, and the world. Information and transparency are essential.

The federal securities laws administered by the Securities and Exchange Commission (SEC) have brought a level of transparency to U.S. public markets for over eighty years. Yet, our world has changed in that time. Whether these issues are climate change, human rights, tax, political spending, or workforce matters; investors and the public are increasingly demanding transparency on a wider range of environmental, social, and governance (ESG) issues than ever before. Fortunately, modern technologies permit stakeholders to process far more information than ever before. Yet despite this demand for more information, and the increased capabilities of investors to utilize it, the SEC has nevertheless declined to meaningfully update its ESG disclosure requirements for decades.<sup>1</sup>

Change is occurring, though. On the one hand, an array of private efforts to obtain additional information on ESG matters, combined with a growing desire among some corporations to engage in sustainable and responsible practices, has resulted in diverse new channels for the dissemination of ESG information.<sup>2</sup> Albeit, this information is not standardized, balanced, complete, even sometimes reliable. Yet these trends show that some corporations have already put in processes to collect and disseminate a range of ESG disclosures.

---

<sup>1</sup> The primary rule for most companies' disclosure obligations, Regulation S-K, was adopted in 1982. Adoption of Integrated Disclosure System, Securities and Exchange Commission, 47 Fed. Reg. 11380 (Mar. 16, 1982).

<sup>2</sup> See, for example, Governance and Accountability Institute, Inc., *Eighty One Percent (81%) of the S&P 500 Index Companies Published Corporate Sustainability Reports in 2015*, Mar. 15, 2016, available at <http://www.ga-institute.com/nc/issue-master-system/news-details/article/flash-report-eighty-one-percent-81-of-the-sp-500-index-companies-published-corporate-sustainabi.html>; CDP, CDP Climate Report 2015: The mainstreaming of low-carbon on Wall Street, Nov. 2015, available at <https://www.cdp.net/en/research/global-reports/global-climate-change-report-2015>. See also Michael Porter and Michael Kramer, "Creating Shared Value," *Harvard Business Review*, Jan.-Feb. 2011, available at <https://hbr.org/2011/01/the-big-idea-creating-shared-value>.

At the same time, increasing investor interest, growing business complexity, more active public pressure, and other factors have spurred a growth in the volume of disclosure documents. Annual filings that were once dozens of pages may now be hundreds of pages long. Some of this growth relates to ESG issues. But much of the new volume of disclosure has not resulted in more or better information. Instead, many disclosures lack specificity, metrics, and standards, and are not readily comparable across companies, much less industries. Boilerplate language is common.<sup>3</sup>

Unsurprisingly, all sides are frustrated. Companies and their service providers highlight the costs of sprawling disclosure documents and question the utility of them. Investors and the public simultaneously highlight how the patchwork of disclosures means they are still not receiving the information they need.

We can all do better.

Investors and the public would benefit from more and better disclosures to make informed decisions. Companies and their service providers would appreciate a standardized process with a more level playing field. Stakeholders on all sides have pressed the SEC to step into the void.

After taking the helm of the SEC in 2013, Chair Mary Jo White began what has subsequently come to be called the “Disclosure Effectiveness” Initiative to identify and reform corporate disclosure requirements. Since early 2014, the SEC has openly sought public comments on what it should do, and over 9,835 commenters have responded with their thoughts.<sup>4</sup>

---

<sup>3</sup> Letter from Stephen P. Percoco, Lark Research, Inc. to Brent J. Fields, SEC, July 24, 2016, (“Few people have the time to read all of those pages, but it is also true that because many of those pages are boilerplate, regular readers of those reports usually need not read all of those pages. Consequently, there are few calls from professional security analysts to cut pages from SEC filings.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-317.pdf>; see also Letter from Sustainability Accounting Standards Board (SASB) to Brent J. Fields, SEC, July 1, 2016, (“More than 40 percent of all 10-K disclosure on sustainability topics consists of boilerplate language.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-25.pdf>.

<sup>4</sup> SEC, Comments on Disclosure Effectiveness, available at <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml>.

Two years after it formally kicked off its “Disclosure Effectiveness” review, on April 13, 2016, the SEC issued a Concept Release on whether and how it should change its core disclosure rules.<sup>5</sup> In that Concept Release, the SEC asked for public feedback on the frequency and formats of companies’ disclosures, accounting practices and standards, and the substantive areas that should be disclosed, including a section on sustainability. This report briefly walks through the purpose of the Concept Release and the public response to it.

The overwhelming response to the Concept Release seems to reflect an enormous pent up demand by disclosure recipients for more and better disclosure. As of August 16, 2016, the SEC had received 26,512 comments in response to its Concept Release.<sup>6</sup> By way of comparison, of the 161 major proposals by the SEC since 2008, only six (less than 4 percent) have received more than 25,000 comments.<sup>7</sup> In fact, the median number of comments received during this period was just forty-five. The existence of this broad public engagement, including through two public campaigns, is meaningful in showing significant public interest in what many might consider an obscure regulatory topic.<sup>8</sup>

---

<sup>5</sup> Business and Financial Disclosure Required by Regulation S-K, Securities and Exchange Commission, 81 Fed. Reg. 23915, (Apr. 22, 2016) (hereinafter, the “Concept Release”).

<sup>6</sup> Numerical calculations in this report were arrived at through a review of the publicly available comments listed on the SEC’s website by the author, with research assistance provided by the Center for American Progress and input from the sponsoring organizations. Comments were subjectively characterized thereafter as for or against expanded or improved disclosures of particular issues based on the author’s best interpretation of the text of the letters.

<sup>7</sup> For the purposes of this Report, we have identified major proposals as rule proposals, Concept Releases, and interim final rules. We have excluded all rule filings by self-regulatory organizations, which total more than 1200 filings per year.

<sup>8</sup> While some may seek to undermine or dismiss these comments due to their more generalized nature, we do not. Rather, the fact that a topic as obscure and complex to investors and the public as SEC disclosure rules garnered significant interest demonstrates the power of these issues. Each individual comment, including those filed through public campaigns, represents a person’s commitment of time, energy, and even reputation. These commenters care enough about these matters to seek to have their voice be heard by a governmental body. The SEC should not simply listen to only commenters who have extremely technical expertise or sufficient wealth to afford sophisticated legal counsel on these matters. That said, we also note similar submissions were not just a result of the public interest campaigns. Significant portions of submissions from various trade associations in opposition to certain disclosure

***Commenters expressed clear support for expanded and enhanced disclosures.*** Support came from a wide range of sources: institutional investment managers, individual investors, public pension funds, research analysts, public interest advocates, individual members of the public, academics, trade associations, standards setting organizations, accountants, Members of Congress, and even other government entities. Overall, these commenters tended to be the recipients of companies' disclosures, those the SEC is institutionally charged to protect.

A handful of commenters called for "streamlining" or eliminating disclosures. These commenters were a small handful of companies,<sup>9</sup> professional services providers<sup>10</sup> or associations representing companies.<sup>11</sup> Not representative of the growing consensus around sustainable corporate practices, these commenters were notable for their connections to a small handful of industries, such as oil and gas, chemicals, financial services, and insurance. These commenters generally tend to be the parties making the disclosures or their representatives.<sup>12</sup>

---

enhancements similarly appear to borrow heavily from one another. While the number of comments on an issue is important to keep in mind, that should also not be the only focus. Rather, the SEC should also note the types of comments, as well as the perspectives being brought by the various commenters. As demonstrated below, when viewed through this lens, a clear pattern emerges. Users of disclosures tended to want more and better disclosures while a handful of companies who are responsible for making disclosures and their service providers and representatives offered resistance.

<sup>9</sup> See, e.g., Letter from Exxon Mobil Corporation to Brent J. Fields, SEC, Aug. 9, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-355.pdf> (hereinafter, "Exxon Mobil Letter"); Letter from PNC Financial Services Group to Brent J. Fields, SEC, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-227.pdf>.

<sup>10</sup> Letter from Davis Polk & Wardwell, LLP, to Brent J. Fields, SEC, July 22, 2016, ("[W]e work regularly with registrants of all sizes and business complexity, often beginning prior to their initial public offerings and continuing long after they have become large accelerated filers. We are often on the front line helping management understand and comply with their disclosure obligations."), available at <https://www.sec.gov/comments/s7-06-16/s70616-313.pdf> (hereinafter, "Davis Polk Letter").

<sup>11</sup> See, e.g., Letter from American Petroleum Institute to Brent J. Fields, SEC, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-203.pdf>.

<sup>12</sup> One notable exception was a letter from fourteen States Attorneys General, who sent a comment urging the SEC to "reject the invitation to allow itself to be used as a tool to promote such special interests." Letter from the Attorneys General of 14 states, to Brent J. Fields, SEC, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-289.pdf>

Some of the most-discussed substantive areas raised by commenters included disclosures related to:

- taxes, which were discussed in 26,287 comments;
- environmental/climate change, which were discussed in 10,113 comments;
- political spending, which was discussed in 9,994 comments;
- human capital and workforce issues, which were discussed in 48 comments;
- human rights, which was discussed in 46 comments; and
- financial stability risks, in particular from derivatives, which were discussed in 20 comments.

Clearly, these issues were important to commenters. In this report, a wide range of organizations focused on empowering investors, improving the economy, and advancing the public interest come together with those thousands of commenters to call on the SEC to modernize its rules. Investors, the public, and regulators need more information about what their companies are doing, and standardization is critical. By modernizing its rules, the SEC can better fulfill its mission and mandate through better aligning the financial markets incentives with the long-term public interest on which our economy, our country, and our world depend.

---

(hereinafter, "States Attorneys General Letter"). Notably, all of the Attorneys General who sent the letter are separately suing the federal government to stop the implementation of Environmental Protection Agency rules.

# Background on Companies' Disclosure Requirements

The federal securities laws and the SEC exist, in large part, to ensure that investors, the public, and regulators have the information they need about how companies are structured, how they operate, and what they do. As such, the antifraud provisions of the federal securities laws demand complete and accurate disclosure of information that would “significantly alter” the “total mix” of information for a “reasonable investor.”<sup>13</sup>

The SEC has adopted specific rules to flesh out this obligation which require companies to disclose selected information when they sell shares to the public and in quarterly, annual, and episodic reports thereafter. Regulation S-K, which was adopted in 1982, provides the general framework for these disclosures.<sup>14</sup> It requires basic disclosures about the business' property, legal proceedings against it, its financial condition, its owners and management, its governance, and other facts. Regulation S-K has not been revised significantly in years.

---

<sup>13</sup> *TSC Industries Inc., v. Northway, Inc.*, 426 U.S. 438 (1976).

<sup>14</sup> Adoption of Integrated Disclosure System, Securities and Exchange Commission, 47 Fed. Reg. 11380 (Mar. 16, 1982).

## “Disclosure Overload”, “Disclosure Effectiveness”, and the Concept Release

Shortly after taking leadership of the SEC, Chair Mary Jo White began efforts with the SEC to review and overhaul the agency’s disclosure requirements for companies. In a speech to corporate directors in late 2013, Chair White explained that, as a former corporate director herself, she believed that the agency should peel back companies’ disclosure obligations and reduce “information overload”<sup>15</sup> for investors. As Chair White put it:

I am raising the question here and internally at the SEC as to whether investors need and are optimally served by the detailed and lengthy disclosures about all of the topics that companies currently provide in the reports they are required to prepare and file with us.

When disclosure gets to be “too much” or strays from its core purpose, it could lead to what some have called “information overload” – a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant.<sup>16</sup>

A few months later, the SEC formally announced its “Disclosure Effectiveness” Initiative and began seeking public comments on its corporate disclosure rules. Since early 2014, over 9,835 commenters have responded with their thoughts.<sup>17</sup>

On April 13, 2016, the SEC issued the Concept Release outlining several potential disclosure reforms. The Concept Release, while ostensibly limited to just the business and financial disclosure elements of Regulation S-K, is nevertheless quite lengthy,

---

<sup>15</sup> Speech before the National Association of Corporate Directors, The Path Forward on Disclosure, Chair Mary Jo White, Oct. 15, 2013, available at <https://www.sec.gov/News/Speech/Detail/Speech/1370539878806>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Comments on Disclosure Effectiveness, SEC, available at <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml>.

composed of 341 pages and 340 enumerated questions.<sup>18</sup> Comments were ostensibly due within sixty days, but are still trickling in.

The Concept Release covers everything from companies' accounting practices to substantive disclosures on a wide swath of areas, including international taxes, corporate structuring, human resources practices, environmental and climate issues, and corporate stock buybacks. Although it includes a section on sustainability, it strangely does not specifically address executive compensation or political spending disclosures (except for acknowledging in a footnote that more comments have come in on the petition calling for political disclosures than received in agency history, 1.2 million). Nevertheless, many commenters sought to address those issues.

Because the Concept Release is not a rule proposal, there is no immediate action pending. At the same time, the "Disclosure Effectiveness" project, and the Concept Release in particular, have provided the first formal opportunity in years for both disclosing parties and disclosure recipients to publicly offer their broad views on what should be disclosed and how. While the Concept Release covers most disclosure issues, several other proposed rulemakings arising out of the SEC's "Disclosure Effectiveness" initiative are currently pending.<sup>19</sup>

---

<sup>18</sup> Concept Release.

<sup>19</sup> For example, on July 13, 2016, the SEC proposed to reduce and eliminate a number of specific disclosure requirements, largely based on the assumption that those requirements would be captured by rules promulgated by the Financial Accounting Standards Board (FASB). Disclosure Update and Simplification, SEC, 81 Fed. Reg. 51608 (Aug. 4, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-16964.pdf>. In addition, FASB is actively engaged in its own "Disclosure Effectiveness" project that would change the accounting definition of materiality and make several other significant changes to what would need to be disclosed in the financial statements. See generally, Disclosure Framework, FASB, available at <http://www.fasb.org/cs/ContentServer?c=Page&pagename=FASB%2FPage%2FBridgePage&cid=1176163875549>.

## Comment Summary on Selected Issues

In response to its Concept Release, the SEC received 26,512 comments. In addition to 348 unique posted comments, the public also weighed in more broadly in response to two distinct public campaigns. As a result of one public interest campaign, 9,859 individual members of the public submitted copies of one form letter expressing support for enhanced disclosures on taxes, political spending, and environmental/climate sustainability issues.<sup>20</sup> As a result of a separate public interest campaign, another 16,302 individual members of the public submitted copies of another form letter expressing support for enhanced international tax disclosures.<sup>21</sup> Taking these campaigns into account, more than 99 percent of commenters supported expanding ESG disclosures.

With 26,512 comments, the Concept Release garnered more public comments than all but 5 of the 161 major proposals issued by the SEC since 2008.<sup>22</sup> This does not even count the thousands of rules changes filed by self-regulatory organizations (e.g., FINRA) for which the SEC solicits input each year — more than 90 percent of which receive no comments all.

Interestingly, four of those other five major proposals that received more comments related to enhancing disclosures for key areas, such as extraction payments to governments and executive compensation, while the fifth regarded the implementation of the so-called Volcker Rule, one of the highest profile parts of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

In fact, during this period that covers rulemakings for the Dodd-Frank Act and the Jumpstart Our Business Startups (JOBS) Act, the median number of total comments received by the SEC was just forty-five. Clearly, this Concept Release struck a chord with the both investors and the public.

---

<sup>20</sup> See Public Citizen, “Tell the SEC Disclosure is Critical”, available at [https://action.citizen.org/p/dia/action/public/index.sjs?action\\_KEY=13225](https://action.citizen.org/p/dia/action/public/index.sjs?action_KEY=13225).

<sup>21</sup> See Americans for Tax Fairness, “Demand Transparency from Tax Dodgers,” available at [https://actionnetwork.org/petitions/demand-transparency-from-tax-dodgers?clear\\_id=true&referrer=&source=email-we-can-win-this](https://actionnetwork.org/petitions/demand-transparency-from-tax-dodgers?clear_id=true&referrer=&source=email-we-can-win-this).

<sup>22</sup> We determined “major proposals” to include all proposed rules, interim final rules, and concept releases. Calculations were made based on comments posted to the SEC’s website.

# The Two Camps: Those Who Read Disclosures Versus Those Who Make Them

Generally speaking, the comments can be broken down into two buckets: (1) arguments for expanded and enhanced disclosures (such as by providing tax reporting on a country-by-country basis), and (2) arguments for “streamlining” or reducing perceived burdensome disclosures (such as by narrowing the definition of “materiality” or providing greater “flexibility” for companies).<sup>23</sup>

***Comments overwhelmingly expressed support for more or better disclosures in one or more areas.*** Commenters identifying themselves as institutional investment managers,<sup>24</sup> public pension funds or trustees,<sup>25</sup> private pension funds and trustees,<sup>26</sup> religious investors,<sup>27</sup> professional investment advisers,<sup>28</sup> research

---

<sup>23</sup> Several disclosure recipients and disclosure makers expressed objections to many companies’ use of “boilerplate” disclosures. See, e.g., Letter from Andrew Friedman, AJF Financial Services, Inc. to SEC, June 3, 2016, (“Boiler plate Disclosure will not suffice, nor is it trustworthy.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-16.pdf>; see also, Letter from Tom Quaadman, U.S. Chamber of Commerce, to Brent J. Fields, SEC, July 20, 2016, (“[T]he SEC should use this opportunity to encourage registrants to eliminate boilerplate, immaterial information.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-173.pdf>, (hereinafter, “Chamber of Commerce Letter”),

<sup>24</sup> See, e.g., Letter from British Columbia Investment Management Corporation to Brent J. Fields, SEC, July 21, 2016, (managing 121 billion Canadian dollars), available at <https://www.sec.gov/comments/s7-06-16/s70616-288.pdf>.

<sup>25</sup> See, e.g., Letter from Thomas DiNapoli, New York State Comptroller, to Brent J. Fields, SEC, July 21, 2016, (overseeing \$178 billion), available at <https://www.sec.gov/comments/s7-06-16/s70616-205.pdf> (hereinafter, “NYS Comptroller Letter”); Letter from California Public Employees Retirement System, to Brent J. Fields, SEC, July 21, 2016, (managing \$295 billion), available at <https://www.sec.gov/comments/s7-06-16/s70616-267.pdf>, (hereinafter, “CalPERS Letter”).

<sup>26</sup> See, e.g., Letter from UAW Retiree Medical Benefits Trust to Brent J. Fields, SEC, July 15, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-130.pdf>.

<sup>27</sup> See, e.g., Letter from Wespath Investment Management to Brent J. Fields, SEC, July 21, 2016, (managing \$20 billion in pension assets for The United Methodist Church), available at <https://www.sec.gov/comments/s7-06-16/s70616-272.pdf>; see also Letter from Priests of the Sacred Heart, US Province, to SEC, July 2, 2016 (representing religious groups investing \$600 million), available at <https://www.sec.gov/comments/s7-06-16/s70616-177.pdf>.

analysts,<sup>29</sup> public interest advocates,<sup>30</sup> individual members of the public,<sup>31</sup> academics,<sup>32</sup> individual policy experts,<sup>33</sup> broad-based investor organizations,<sup>34</sup> investor organizations dedicated to improving disclosures,<sup>35</sup> standards setting organizations,<sup>36</sup> accountants,<sup>37</sup>

---

<sup>28</sup> See, e.g., Letter from Trillium Asset Management to Brent J. Fields, SEC, July 21, 2016, (managing over \$2 billion) available at <https://www.sec.gov/comments/s7-06-16/s70616-276.pdf>.

<sup>29</sup> See, e.g., Letter from MSCI ESG Research Inc. to SEC, July 21, 2016, (noting that it works with 47 of the top 50 global asset managers), available at <https://www.sec.gov/comments/s7-06-16/s70616-285.pdf>; see also Letter from Cornerstone Capital Group to Brent J. Fields, SEC, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-308.pdf>.

<sup>30</sup> See, e.g., Letter from Consumer Federation of America to Brent J. Fields, SEC, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-318.pdf>; see also Letter from Americans for Financial Reform to Brent J. Fields, SEC, Aug. 10, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-358.pdf>; see also Letter from the Financial Accountability and Corporate Transparency Coalition to Brent J. Fields, SEC, July 6, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-28.pdf>, (hereinafter, "FACT Coalition Letter").

<sup>31</sup> See, e.g., Letter from John McCarter to SEC, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-281.htm>; see also, Letter from Paul Linzmeyer to SEC, July 19, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-162.pdf>.

<sup>32</sup> See, e.g., Letter from Tom C.W. Lin to Brent J. Fields, SEC, July 18, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-146.pdf>; see also Letter from Dr. Janice Denoncour to SEC, July 31, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-346.pdf>.

<sup>33</sup> See, e.g., Letter from Elise J. Bean to Brent J. Fields, SEC, July 6, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-32.pdf>.

<sup>34</sup> See, e.g., Letter from Council of Institutional Investors, to Brent J. Fields, SEC, July 8, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-49.pdf>, (hereinafter, "CII Letter").

<sup>35</sup> See, e.g., Letter from CERES to Brent J. Fields, SEC, July 20, 2016, (representing asset owners and investment managers with more than \$1.15 trillion in assets under management), available at <https://www.sec.gov/comments/s7-06-16/s70616-174.pdf>; Letter from US-SIF: The Forum for Sustainable and Responsible Investment to Brent J. Fields, SEC, July 14, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-107.pdf> (hereinafter "US-SIF Letter"); see also Letter from the Corporate Reform Coalition, to SEC, July 18, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-142.pdf>.

<sup>36</sup> Letter from Sustainability Accounting Standards Board to Brent J. Fields, SEC, July 1, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-25.pdf>.

<sup>37</sup> See, e.g., Letter from the American Institute of Certified Public Accountants to SEC, July 20, 2016, (arguing that any new disclosure requirements be subject to auditor assurance obligations), available at <https://www.sec.gov/comments/s7-06-16/s70616-194.pdf>.

and Members of Congress<sup>38</sup> generally supported expanded and enhanced disclosures. These parties are typically recipients of disclosures.

Several of these commenters explained that they use environmental, social, and governance (ESG)-related information to make investment decisions, and need more information than the SEC currently requires.<sup>39</sup>

Although investors have made these demands for years,<sup>40</sup> recent interest likely reflects the dramatic increases in number, size, and diversity of investors concerned with ESG issues: from 2012 to 2014, professionally managed assets engaged in one or more SRI strategies grew from \$3.74 trillion to \$6.57 trillion to account for more than one out of every six dollars under professional management in the United States.<sup>41</sup> But that is just a fraction of the total number of investors who have expressed their interest in more and better disclosures. In fact, more than 1500 investors from around the world (managing more than \$60 trillion in assets) have signed onto the Principles for Responsible Investment.<sup>42</sup>

---

<sup>38</sup> See, e.g., Letter from Sen. Al Franken et al, to Mary Jo White, SEC, July 20, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-342.pdf>; see also Letter from Matt Cartwright, et al, to Mary Jo. White, SEC, July 20, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-175.pdf>.

<sup>39</sup> See, e.g., NYS Comptroller Letter (“The Fund considers sustainability issues in our investment process because they can influence both risk and return.”); see also, Letter from California State Teachers Retirement System (CalSTRS), to Brent J. Fields, SEC, July 21, 2016 (“Sustainability disclosures are necessary for CalSTRS in our consideration of ESG risks and opportunities within our portfolio companies and in determining initial and continued capital allocation decisions. CalSTRS utilizes a company’s sustainability disclosures in our assessment of management quality, efficiency and whether boards have fully assessed and mitigated ESG risks, as well as taken opportunities of possible rewards, which may be applicable to a company’s industry.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-226.pdf>.

<sup>40</sup> Letter from US SIF (formerly the Sustainable Investment Forum) to SEC Chair Mary Schapiro, July 21, 2009, available at [http://www.ussif.org/files/Public\\_Policy/Comment\\_Letters/SIF\\_SEC\\_ESG\\_Disclosure\\_Policy\\_Letter\\_and\\_Submission%2008142009.pdf](http://www.ussif.org/files/Public_Policy/Comment_Letters/SIF_SEC_ESG_Disclosure_Policy_Letter_and_Submission%2008142009.pdf).

<sup>41</sup> Additional information can be found in the US SIF Foundation’s Report on US Sustainable, Responsible and Impact Investing Trends 2014.

<sup>42</sup> United Nations: Principles for Responsible Investment, to SEC, July 19, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-149.pdf>.

Not surprisingly, comments from investors and investor organizations did not reflect the opinion that they were somehow “overburdened.”<sup>43</sup> In fact, investors and investor organizations generally asserted the opposite.

*“Although much has been made of information overload we do not believe any investors are worse off for access to too much information.”*

—Legal & General Investment Management<sup>44</sup>

*“The Fund considers sustainability issues in our investment process because they can influence both risk and return.”*

—New York State Comptroller

Several commenters focused on the Supreme Court’s definition of “materiality” as information that a “reasonable investor” would think “significantly alter[s]” the “total mix” of information available.<sup>45</sup> These commenters argued that investors and the public have come to seek more and better information from companies that is material to them as “reasonable investors”, and the SEC should therefore require the disclosure of the information they seek.<sup>46</sup>

On the other end of the spectrum, commenters arguing to reduce disclosures (such as by limiting them to only financially “material” information) or to relieve the perceived burdens, tended to be companies<sup>47</sup> and their service providers<sup>48</sup> or representatives.<sup>49</sup>

---

<sup>43</sup> Contrast, Exxon Mobil Letter, (“[E]xcessive disclosure can overload investors with immaterial information that can render more material information difficult to find and evaluate.”).

<sup>44</sup> Letter from Legal & General Investment Management to Brent J. Fields, SEC, at 1, July 20, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-184.pdf>.

<sup>45</sup> See, e.g., Letter from American Federation of Labor and Congress of Industrial Organizations to Brent J. Fields, SEC, at 7, July 21, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-305.pdf>, (hereinafter, “AFL-CIO Letter”); see also FACT Coalition Letter.

<sup>46</sup> See, e.g., AFL-CIO Letter, at 7.

<sup>47</sup> See, e.g., Exxon Mobil Letter, at 1.

<sup>48</sup> See, e.g., Davis Polk Letter, (“[W]e work regularly with registrants of all sizes and business complexity, often beginning prior to their initial public offerings and continuing long after they

These commenters argued that current disclosures are overwhelming the disclosure recipients<sup>50</sup> or that disclosure obligations should be narrowed (such as by tying disclosures to a narrow definition of “materiality”).<sup>51</sup>

*“[E]xcessive disclosure can overload investors with immaterial information that can render more material information difficult to find and evaluate.”*

—Exxon Mobil Corporation

*“Such overdisclosure not only burdens corporate resources—at the expense of all shareholders—but often buries shareholders in an avalanche of information that ultimately limits the practical utility of Exchange Act filings.”*

—Wachtell, Lipton, Rosen & Katz

---

have become large accelerated filers. We are often on the front line helping management understand and comply with their disclosure obligations.”); see also Letter from Wachtell, Lipton, Rosen & Katz to Brent J. Fields, SEC, May 16, 2016, available at <https://www.sec.gov/comments/s7-06-16/s70616-9.pdf> (hereinafter, “Wachtell Lipton Rosen & Katz Letter”).

<sup>49</sup> See, e.g., Letter from Tom Quaadman, U.S. Chamber of Commerce, to Brent J. Fields, SEC, July 20, 2016, (“Excessive disclosure, however, imposes unnecessary costs on organizations and, ultimately, on shareholders and customers. It also has the tendency to overload investors, especially retail investors, with extraneous information that can confuse or obfuscate material information.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-173.pdf>.

<sup>50</sup> See, e.g., Exxon Mobil Letter, at 1, (“Excessive disclosure, however, imposes costs on us that ultimately are borne by both shareholders and those who use our products. In addition, excessive disclosure can overload investors with immaterial information that can render more material information difficult to find and evaluate.”); Wachtell, Lipton, Rosen & Katz Letter, (“Such overdisclosure not only burdens corporate resources—at the expense of all shareholders—but often buries shareholders in an avalanche of information that ultimately limits the practical utility of Exchange Act filings.”); see also Chamber of Commerce Letter.

<sup>51</sup> See, e.g., Sullivan & Cromwell, LLP, to Brent J. Fields, Aug. 9, 2016, (“We think that the best and most efficient way the Commission could drive improvement in the overall quality of registrants’ disclosure would be to (1) subject all of Regulation S-K line-item disclosure requirements to an over-arching materiality standard...”), available at <https://www.sec.gov/comments/s7-06-16/s70616-354.pdf> (hereinafter, “Sullivan & Cromwell Letter”).

Further, many of these commenters expressed the view that the substantive areas about which disclosure is frequently sought were “not material,” and thus should be excluded from the SEC’s requirements.<sup>52</sup> One prominent law firm went so far as to assert that the SEC should “confirm” its view that “‘materiality’ is an economic standard, relating solely to matters that could ultimately be thought to bear on firm value and thus the value of the issuer’s securities.”<sup>53</sup> Several of these commenters suggested that the SEC should not cater to “certain investors” or “special interests” when crafting its disclosure requirements.<sup>54</sup>

---

<sup>52</sup> See, e.g., Davis Polk Letter (“For example, we are mindful that some parties seek information in areas of corporate sustainability, including issues such as conflict minerals, environmental matters and climate change, workforce diversity and labor conditions, among others. Although these types of issues are often considered by registrants’ boards and management as part of broader strategy and business profile reviews, *they are not in most cases material to an understanding of a registrant’s operating results and financial performance, and, accordingly, are not appropriate for inclusion in periodic and current reports.*”) (emphasis added).

<sup>53</sup> Sullivan & Cromwell Letter.

<sup>54</sup> See, e.g., Letter from the Business Roundtable to Brent J. Fields, SEC, at 4-5, (“The Commission has, in our judgment, historically resisted disclosure requirements that are relevant only to a small subset of investors, recognizing that it would be impossible, and in any case undesirable, to require disclosures sufficient to satisfy discrete interests of every investor group. We urge the Commission to continue this measured approach as it considers a number of specialized disclosure additions submitted for public comment in the Concept Release. ... [D]isclosures [mandated by Congress in the Dodd-Frank Act] are designed to promote laudable societal goals but are largely unrelated to the investing and proxy voting decisions of the investing public. The use of securities disclosures for non-investment goals obscures material information in periodic reports and often delivers only speculative improvements on the societal issue.”), available at <https://www.sec.gov/comments/s7-06-16/s70616-208.pdf>; see also, States Attorneys General Letter, (“[T]he Commission should reject the invitation to allow itself to be used as a tool to promote such special interests.”).

# What Should (or Should Not Be) Disclosed

With 350 distinct letters submitted by more than twenty-six thousand separate commenters, the responses to the Concept Release demonstrate both substantive depth and broad support for enhancing disclosures in multiple areas. We focused on the following areas: (i) international tax practices or corporate structuring; (ii) environmental or climate change; (iii) political spending; (iv) human capital or employee training, compensation, or rights; (v) human rights; and (vi) financial stability.

## *Taxes and Corporate Structuring*

In recent years, corporate structures and international tax planning strategies have had increasingly dramatic impacts on companies, their shareholders, and governments. As the public and governments have increasingly focused on these issues, so have investors.

Taxes and corporate structuring disclosures were the single most commented on area of the Concept Release, where 99 percent of all comments received raised the issue, and nearly all of them expressed clear support for expanded disclosures. This issue was raised in both of the public interest campaign letters, as well as in more than 120 other unique comments. Not a single commenter clearly objected to expanded tax disclosures.

## *Environmental, Climate and other ESG Issues*

Addressing climate change is a global imperative. Companies, investors, the public, and governments are all wrestling with how to adapt and move forward. To do that, investors and the public need to know what their companies are (and are not) doing to address this new reality.

With 10,113 comments on climate, environmental, and other ESG disclosures, this was a priority for investors. Here, 10,070 commenters expressed clear support for enhanced disclosures, while just 43 commenters expressed oppositional or more ambiguous views. As with the other enhanced disclosures generally, supporters covered a wide

swath of investors and the public. Again, opponents tended to be a small number of companies, their service providers, and their representatives.<sup>55</sup>

### ***Political Spending***

Following the Supreme Court's decision in *Citizens United*,<sup>56</sup> the public has become increasingly concerned with companies' political spending. Investors want to make sure that their companies' funds are being used in manners that are prudent, and consistent with their beliefs.<sup>57</sup> With 9,994 comments on political spending disclosures, this was clearly a hot-button issue for investors. Here, 9,984 commenters expressed clear support for enhanced disclosures, while just 10 commenters expressed opposition or raised the issue in a neutral manner.

As with enhanced tax disclosures, supporters for increased disclosure on political spending covered a wide swath of investors and the public. On the other hand, the clear opponents to enhanced disclosures included just one company, and six industry organizations.

### ***Human Capital***

The development, utilization, and compensation of the human capital — that is, the workers — of a company may be one of the most important factors in its long-term success. And while this issue did not garner the broad public support of either of the public interest campaigns, professional investors clearly expressed their strong support for enhancing human capital disclosures. Some of the recommended disclosures related to the number of employees and independent contractors, as well as the categories of workers, and information related to outsourcing.<sup>58</sup>

With 48 unique comments raising the issue, this area received about the same amount of comments as the median SEC proposal since 2008. Of these comments, 34 expressed clear support for enhanced disclosures, most of which were from investors

---

<sup>55</sup> But see, State Attorney Generals Letter.

<sup>56</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>57</sup> See, e.g., Richard Valdmanis and Grant Smith, *U.S. companies tout climate policies, fund climate skeptics*, Reuters, Sept. 6, 2016, available at <http://www.reuters.com/article/us-usa-election-climate-donations-idUSKCN11C0ED>.

<sup>58</sup> See, e.g., US-SIF Letter.

and investor-based organizations. The eight comments that clearly opposed enhanced disclosures were filed by one company, two law firms, and five trade groups.

### ***Human Rights***

Human rights are a key area of interest for many investors given the substantial financial and reputational risks that can be incurred when companies fail to appropriately manage human rights concerns. In recent years, many companies have responded to investors' increased demands for more and better human rights information by dramatically increasing their voluntary human rights reporting.<sup>59</sup> Forty-six unique comments raised the issue of human rights reporting, and while some other commenters there was no direct opposition to enhanced disclosure of human rights policies, practices, or impacts.

### ***Financial Stability***

In the aftermath of the financial crisis of 2008-2009, companies, investors, the public, and regulators all learned a great deal about the risks to our economy and well-being from an unstable financial sector. During the crisis and the recession that followed, companies incurred billions of dollars in losses as derivatives risks manifested themselves in ways never before disclosed to investors. Investors and the public have since pressed for enhanced disclosures of derivatives risks, to limited avail.

These issues were raised by 20 commenters, with some limited opposition to expanded or enhanced derivatives disclosures coming from a financial services firm, and accounting firm, and a financial services trade associations. That said, some

---

<sup>59</sup> For example, 78 percent of reporting companies and 82 percent of the Global 250 companies use the Global Reporting Initiative's G4 reporting standards as the basis for their corporate responsibility reporting and six global companies and over eighty investors representing over \$4.25 trillion in assets under management support the UN Guiding Principles Reporting Framework. KPMG, *KPMG Survey of Corporate Social Responsibility Reporting 2013*, (2013) at 10, <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/corporate-responsibility-reporting-survey-2013-exec-summary.pdf>; UN Guiding Principles Reporting Framework, FAQ, <http://www.ungpreporting.org/resources/faq/> at Q6.

commenters recommended targeting any enhanced disclosures on particularly impacted industries, such as financial firms, as opposed to all issuers.

## Conclusion

The challenges facing our world require active partnerships of investors and regulators, markets and communities, and workers and executives. Those companies and executives that want to do the right thing face an unlevel playing field and additional risks from going it alone.

Unfortunately, the SEC's current disclosure obligations fail to ensure that these stakeholders have the information they need about what companies are — or are not — doing. This creates misaligned incentives for all involved. Now that the SEC is considering modernizing its rules, the demand is clear: Investors and the public overwhelmingly seek more and better disclosures on a range of topics so that they can better support the long-term sustainability of our economy. It's time for the SEC to act.