August 8, 2016

The Honorable Mary Jo White
Chair
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Terminating the Disclosure Effectiveness Initiative and Withdrawing the related Concept Release (RIN 3235-AL78) ("Concept Release").

Dear Chair White:

The Commission's previously announced "Disclosure Effectiveness Initiative" ("Disclosure Initiative"), being led by the Division of Corporate Finance for the stated purpose of broadly reviewing the effectiveness of public company disclosure requirements, raises a number of very serious concerns:

- It has no statutory or factual basis;
- It threatens to harm rather than help investors; and
- It diverts scarce SEC resources from more pressing regulatory priorities, including Congressionally mandated rulemakings.

These concerns are in fact fatal flaws that require the Disclosure Initiative to be terminated for the reasons set forth below and in a July 21, 2016 comment letter filed by Better Markets[1] in connection with the Concept Release entitled "Business and Financial Disclosure Required by Regulation S-K" (RIN 3235-AL78) ("Concept Release") (a copy of the comment letter is enclosed). Because the Concept Release is an integral part of the Disclosure Initiative, it too should be withdrawn and terminated.

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

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Notwithstanding the Chair's statements and testimony to the contrary,[2] the Disclosure Initiative is based on two fundamentally false premises: that it is Congressionally-mandated and that there is a "disclosure overload" crisis requiring that the Commission make the initiative a priority and dedicate vast time, attention and resources to it. However, there is no Congressional mandate or statutory basis for the Disclosure Initiative and the Commission has not detailed any data evidencing that there is a "disclosure overload" problem, much less a crisis meriting the Commission's extraordinary actions.

The Commission's comprehensive review of disclosure requirements pursuant to the Disclosure Initiative goes far beyond the limited disclosure review prescribed by the JOBS Act. In fact, neither the JOBS Act nor any other statute compels the Commission to conduct an exhaustive review of disclosure requirements in Regulation S-K. As detailed in the attached comment letter, this entire initiative appears to have been nothing more than a staff decision to undertake a massive review of the entire disclosure regime without any evidence of need or consideration of other priorities, including mandatory rulemakings that continue to languish. While this is apparently consistent with the wishes of the industry and their powerful representatives on key American Bar Association (ABA) committees, remarkably it has been undertaken without Commission review, deliberation, or decision.

Even more troubling, the Disclosure Initiative and Concept Release seem to be based on the myth of "disclosure overload." The Commission has produced no evidence whatsoever that investors stand to benefit from a so-called disclosure effectiveness review or that they desire such a review in the first place. This represents a serious breakdown in the policymaking process. Unless they are expressly mandated by Congress, rulemakings should be supported by credible evidence of a current or potential problem threatening the interests of investors. Not only has the Commission failed to produce empirical evidence of a purported "disclosure overload" problem for investors, it has not even provided anecdotal evidence of such a problem (although anecdotes would be insufficient by themselves to justify the sweeping review undertaken here). Moreover, Better Markets has been unable to find evidence of retail or institutional investors clamoring for relief from "disclosure overload." Given that the Disclosure Initiative appears likely to result in less disclosure to investors, such an initiative should only be undertaken after very careful consideration by the Commission and only if it is based on robust data that clearly evidences a genuine problem.

Finally, the entire undertaking is decidedly inappropriate in light of the Commission's vastly more important priorities—including unfinished mandatory rulemakings—that will continue to suffer if the Disclosure Initiative continues to consume the SEC's limited time, resources, and attention.

Given these facts, including in particular that there is no statutory or factual basis for the Disclosure Initiative, the Commission should promptly terminate the Disclosure Initiative,

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2 Statement of Mary Jo White, The Path Forward on Disclosure https://www.sec.gov/News/Speech/Detail/Speech/1370539878806 (Oct. 13, 2013). Testimony of Mary Jo White, Hearing entitled "Oversight of the United States Securities and Exchange Commission," U.S. Senate Banking Committee. Webcast and written testimony available at http://www.banking.senate.gov/public/index.cfm/hearings?ID=5651071F-FC14-48FB-B126-413A3971099C (Jun. 14, 2016).

withdraw the Concept Release, make Congressionally mandated rulemakings a priority, and focus on investors' interests above all else. We look forward to your reply.

Sincerely,

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cc: The Honorable Kara Stein, Commissioner
cc: The Honorable Michael Piwowar, Commissioner

July 21, 2016

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street Northeast
Washington, D.C. 20549

Re: Business and Financial Disclosure Required by Regulation S-K; Concept Release (RIN 3235-AL78)

Dear Secretary Fields:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Business and Financial Disclosure Required by Regulation S-K; Concept Release ("Concept Release") by the Securities and Exchange Commission ("SEC" or "Commission"). The Concept Release is part of what the Commission calls a "Disclosure Effectiveness Initiative" led by the Division of Corporate Finance purportedly to review the effectiveness of public company disclosure requirements and to consider ways to improve them for the benefit of registrants and investors.

However, as clearly evidenced by Chair Mary Jo White's testimony and other public statements, the so-called Disclosure Effectiveness Initiative is based on a fundamentally mistaken premise. Moreover, it lacks a statutory basis, is unsupported by evidence or data, was unauthorized by the Commission itself, and conflicts with other unfinished mandatory work of the Commission. Therefore, given that the Concept Release is an integral part of the disclosure review, the Concept Release should be promptly withdrawn and a thorough investigation should be commenced to determine how this Concept Release was conceived and has become so flawed.

Contrary to the claims and suggestions by Chair White in testimony before the Senate Banking Committee, and statements in the Concept Release, there is in fact no statutory mandate for the Commission to undertake a comprehensive review of the SEC's disclosure regime. There is also no indication that the Commission itself even considered or

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

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authorized such a sweeping review. In fact, it appears that the staff unilaterally and sue sponte decided to undertake this resource-intensive and far-reaching review. Moreover, there is no evidence suggesting that such a review is necessary or appropriate to help the SEC achieve its core mission of protecting investors.

This is decidedly inappropriate in light of the Commission's vastly more important priorities – including unfinished mandatory rulemakings – that will continue to suffer if the unwarranted but massive disclosure review continues to consume the SEC's limited time and attention. Finally, to the extent that the SEC is confronting well-known, long-standing, and clear disclosure deficiencies in **issuer** filings, there are a number of relatively obvious, easy, and straightforward steps that the SEC can take under existing authorities to address them (as we point out below). However, under no circumstances do those deficiencies provide a basis or justification for the massive, sweeping, and time-consuming review and potential overhaul of the SEC's disclosure regime, particularly when there is no statutory or evidentiary basis for doing so.

In view of all these remarkable circumstances, including inaccurate and misleading public statements by the SEC as to the basis and need for this undertaking, the Commission must promptly withdraw the Concept Release and, only if the Commission can satisfy certain specific conditions, re-release a new concept release on this subject. First, the Commission must accurately, clearly, and completely set forth any purported statutory basis that is in fact mandatory and applicable to such a proposed disclosure review. Second, the Commission must explain how its portrayal of its statutory obligation, including Chair White's public statements, deviated so markedly from clear, straightforward statutory language, which plainly provides no basis for the sweeping, comprehensive disclosure review the Commission is undertaking.

And finally, before a new concept release is re-issued, if any is determined to be appropriate, the Commission must describe in detail the actual basis for the Commission's proposed action. That analysis must include a review of any evidence and data that clearly demonstrates the need for such an undertaking. In addition, it must explain how such a disclosure review would serve the interests of investors, **and** how such an allocation of extensive resources would be appropriate and consistent with all the Commission's other priorities and pending matters, including mandatory rulemakings.

INTRODUCTION AND SUMMARY

Securities regulation is at its core a disclosure regime. Its bedrock premise is that reporting companies must disclose publicly and in a timely fashion all material information investors needs to make informed decisions. Our securities laws and the rules by which we administer them have been built on that foundation. Unfortunately, the approach taken in this Concept Release represents a genuine threat to the Commission's disclosure regime.

In this letter, we focus on five specific concerns about the Release:

I. The SEC's comprehensive review of disclosure requirements goes far beyond the limited disclosure review prescribed by the JOBS ACT and is an inappropriate use of agency resources.

II. The Commission has failed to provide any evidence that a disclosure effectiveness review is needed, and some evidence suggests its purpose is to alleviate purported compliance burdens on reporting companies, not to prioritize investor protections.

III. A basic premise of the approach reflected in the Release is flawed, since "disclosure overload" is a myth.

IV. There are relatively simple ways to address genuine disclosure deficiencies without reducing substantive disclosure obligations for public companies.

V. There is a fundamental asymmetry of interests between investors and registrants that the Commission's proposal fails to recognize.

COMMENTS

I. The SEC's comprehensive review of disclosure requirements goes far beyond the limited disclosure review prescribed by the JOBS ACT and is an inappropriate use of agency resources.

A. Contrary to the public statements of Chair White and the statements in the Concept Release, neither the JOBS Act nor any other statute compels the Commission to conduct an exhaustive review of disclosure requirements in Regulation S-K.

In December 2013, the Commission announced a comprehensive review of the disclosure requirements contained in Regulation S-K (which lays out reporting requirements for SEC filings and registrations used by public companies) and Regulation S-X (which prescribes the specific format and content of financial reports). This review is part of an overarching Commission-initiated project called the "Disclosure Effectiveness Initiative," and it has initially focused on the business and financial disclosures required by Forms 10-K, 10-Q, and 8-K. The stated goal of the review is to generate recommendations on how to facilitate material disclosures in financial statements for the benefit of companies and investors.[2]

Chair White has frequently described this disclosure review as stemming from a congressional mandate. For example, in a 2013 speech to the National Association of Corporate Directors, Chair White said: "Section 108 of the [JOBS] Act **requires** us to

[2] Securities and Exchange Commission, Disclosure Effectiveness (Jul. 21, 2016) https://www.sec.gov/spotlight/disclosure-effectiveness.shtml.

comprehensively analyze the rules that form the underpinnings of our disclosure regime."[3] And just last month, while testifying before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Chair White claimed that the comprehensive review of disclosure requirements resulted from "a Congressional **mandate** to do a report that reviewed our **entire** S-K concept."[4]

However, this testimony and characterization are inaccurate.[5] As former Commissioner Daniel Gallagher observed in a 2013 speech: "So, where would I place disclosure reforms on the Commission's overall list of priorities? There is no external mandate that tells us this is a problem we need to address any time soon."[6] And indeed, contrary to Chair White's pronouncements, no requirement to "comprehensively analyze" the Commission's disclosure regime appears in Section 108 of the JOBS Act (or any other statute).[7]

Section 108(a) of the Jumpstart Our Business Startups Act of 2012, or JOBS Act, requires that the Commission:

"conduct a review of its Regulation S-K to—

(1) comprehensively analyze the current **registration requirements** of such regulation; and

(2) determine how such requirements can be updated to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements **for issuers who are emerging growth companies**."[8]

Section 108(b) further instructs the Commission to submit a report to Congress on "how to streamline the registration process in order to make it more efficient and less

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[3] Statement of Mary Jo White, The Path Forward on Disclosure https://www.sec.gov/News/Speech/Detail/Speech/1370539878806 (emphasis added).

[4] Statement of Mary Jo White, Hearing entitled "Oversight of the United States Securities and Exchange Commission," U.S. Senate Banking Committee. (Jun. 14, 2016) (emphasis added).

[5] Indeed, it would be curious to find a provision mandating a comprehensive evaluation of the Commission's disclosure requirements for all public companies in a law designed to facilitate capital formation for a narrow swath of businesses in the U.S. seeking access to the public equity markets.

[6] Statement of Daniel Gallagher, 2nd Annual Institute for Corporate Counsel (Dec. 6, 2013)

[7] Nothing in the "Fixing America's Surface Transportation Act of 2015" ("FAST Act") alters this conclusion. The FAST Act requires the Commission to (1) permit issuers to submit summary pages on Form 10-K; (2) revise Regulation S-K to reduce burdens on emerging growth companies, accelerated filers, and other smaller issuers; and (3) conduct a study of Regulation S-K in consultation with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies and report to Congress. Such a review remains expressly and decidedly narrow in scope and applies only to a small subset of companies, in sharp contrast with the exhaustive review of all disclosure requirements for all reporting companies that the Commission is now pursuing. Further, the FAST Act is irrelevant to the serious concerns raised in this letter, since it had not been adopted when the SEC decided to undertake an all-encompassing review of the form and substance of the disclosure requirements of Regulation S-K and Regulation S-X, well beyond the scope of the JOBS Act mandate.

[8] Sec. 108(a), JOBS Act (emphasis added).

burdensome for the Commission and for prospective issuers **who are emerging growth companies**."[9]

Thus, there is no dispute that the JOBS Act only requires the Commission to conduct a review of **registration requirements** with the goal of modernizing and simplifying the **registration process** for "emerging growth companies" and submit a corresponding report to Congress. Put another way, the JOBS Act mandates review of a *narrow* subset of registration requirements for a *narrowly* defined category of companies. There is simply no basis for Chair White's testimony and characterization of the JOBS Act as requiring the Commission to "comprehensively analyze the rules that form the underpinnings of our disclosure regime" which go far beyond registration simplifications and modernization to include periodic and non-periodic disclosures.

In fact, it appears that it was the SEC's own staff that chose – seemingly unilaterally and sue sponte – to dramatically expand the scope of the disclosure analysis from a statutorily mandated narrow review to a virtually unlimited sweeping review without statutory basis, as it stated in the report to Congress required by Section 108(b) of the JOBS Act:

> "[I]n conducting its review of the requirements of Regulation S-K, **the staff** evaluated the requirements for public companies generally, as a first step towards addressing Section 108's focus on the impact of the requirements on issuers who are **emerging growth companies**. In this regard, **the staff's** review is intended to facilitate the improvement of disclosure requirements **applicable to companies at all stages in their development, not only for companies that qualify as emerging growth companies**."[10]

In so doing, the Commission staff acknowledged that they unilaterally widened the scope of the Commission's disclosure review well beyond the requirements of Section 108 of the JOBS Act. The problem with this decision runs deeper than the lack of a statutory basis: It has no logical foundation. It makes little sense to evaluate **all** disclosure requirements for **all** public companies as a "first step" towards addressing a narrow Congressional mandate expressed in Section 108, which is focused on streamlining registration requirements for emerging growth companies. Moreover, there is no indication that the Commission itself sought this expanded review or that the staff properly considered the decision in light of the agency's resources, priorities, and other statutory mandates.

As with Chair White's statements and testimony, the Concept Release incorrectly suggests that the JOBS Act mandates a comprehensive review of disclosure requirements for public companies. The Concept Release inaccurately claims that it is "part of a comprehensive evaluation of the Commission's disclosure requirements recommended in

[9] Sec. 108(b), JOBS Act.

[10] Report on Review of Regulation S-K Disclosure Requirements, Securities and Exchange Commission (Dec. 2013), *available at* https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf (emphasis added).

the staff's Report on Review of Disclosure Requirements in Regulation S-K, which was **mandated** by Section 108 of the Jumpstart Our Business Startups Act."[11]

In short, and contrary to Chair White's public statements and the Concept Release, the staff's decision – apparently with the Chair's acquiescence, but without Commission review, deliberation, or decision – to undertake a massive review of the entire disclosure regime has no statutory, logical, evidentiary, or practical foundation or basis. This alone mandates that the Concept Release be promptly withdrawn and an investigation undertaken.

B. The staff's decision to undertake an unauthorized sweeping review of disclosure requirements is inappropriate in light of the considerable collection of mandatory Dodd-Frank Act rulemakings that are still languishing unfinished and other disclosure-related projects that would better serve investors' interests.

The staff's decision to pursue an exhaustive review of disclosure requirements under Regulation S-K and S-X as part of what it called "the first phase" of an even broader disclosure effectiveness initiative was not only baseless, but also imprudent. The staff's choice to undertake a multi-year and resource-intensive disclosure effectiveness project reflects priorities that are out of order with actual statutory requirements as well as the Commission's mission. This is certainly no minor decision for the staff to undertake unilaterally. Given the wide-ranging implications of such a decision and undertaking, only the Presidentially-appointed and Senate-confirmed Commission itself should make such a decision and only after due deliberation and consideration of evidence, data, competing priorities, and limited resources.

First, the Commission has nineteen unfinished mandatory Dodd-Frank Act rulemakings[12] that demand immediate attention and commitment of resources. Remarkably, the sixth anniversary of the Dodd-Frank Act coincides with the day that the comment period for this Concept Review ends: July 21, 2016. It is unacceptable that the Commission has failed to fulfill its statutory obligations by leaving a substantial number of rulemakings unfinished for six full years. That inexcusable failure is compounded by the staff's decision to undertake a massive project that is not required and lacks a statutory basis or Commission authorization.

Second, even in the disclosure arena, there are more investor-focused projects that the Commission could and should prioritize and pursue. For example, on August 3, 2011, the Committee on Disclosure of Political Spending filed a petition for rulemaking to require public companies to disclose the use of corporate resources for political activities. In the intervening years, the Commission has received more than 1.2 million positive comments on the petition from retail investors and the general public. The petition has also garnered the strong support of forty-four U.S. senators,[13] a bipartisan collection of former SEC Chairs and

[11] 78 Fed. Reg. 23917 (emphasis added).

[12] According to the Commission's website: https://www.sec.gov/spotlight/dodd-frank.shtml#.

[13] Letter From 44 U.S. Senators to Chair Mary Jo White, (Aug. 31, 2015), *available at* https://www.merkley.senate.gov/imo/media/doc/20150831_SECLetter.pdf.

Commissioners, and countless other experts and luminaries in the financial regulation community.

Investors deserve to know how the companies in which they invest are spending their money, and they are demanding that the Commission act accordingly. The veritable outpouring of support for a political disclosure rule contrasts sharply with the silence from the investing public on the issue of so-called disclosure effectiveness. Either a political disclosure rule or concrete progress on mandatory Dodd-Frank Act rulemakings would represent a much more worthwhile investment of Commission resources than a broad, baseless, and unnecessary disclosure effectiveness review.

II. The Commission has failed to provide any evidence that a disclosure effectiveness review is needed, and some evidence suggests its purpose is to alleviate compliance burdens on reporting companies, not prioritize investor protections.

Chair White has often invoked the specter of "information overload" as a justification for a sweeping review of disclosure requirements. For example, in a 2013 speech, Chair White said:

> "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."[14]

Other Commissioners have raised similar concerns.[15] The word "overload" does not appear in the Concept Release. Nevertheless, Chair White's words are reason to believe that concerns by some over purportedly excessive disclosure is a principal motivating factor behind a potential revamping of disclosure requirements. Indeed, in the same speech, Chair White noted that:

> "We must continuously consider whether information overload is occurring as rules proliferate and as we contemplate what should and should not be required to be disclosed going forward."[16]

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[14] Statement of Mary Jo White, The Path Forward on Disclosure, National Association of Corporate Directors - Leadership Conference 2013 in National Harbor, Md. (Oct. 15, 2013).

[15] Statement of Troy A. Paredes, Remarks at The SEC Speaks (Feb. 22, 2013) ("Disclosure is powerful, but that does not mean that more disclosure is always better than less. So I want to take this chance to emphasize a concern that I have discussed on other occasions. My concern is 'information overload,' a risk of mandatory disclosure that has been present for some time and that is exacerbated as disclosures become more complex.").

[16] Statement of Mary Jo White, The Path Forward on Disclosure, National Association of Corporate Directors - Leadership Conference 2013 in National Harbor, Md. (Oct. 15, 2013).

Chair White went on to expressly acknowledge that she is "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." [17]

Conspicuously absent from Chair White's public remarks and the SEC's disclosure effectiveness materials is any evidence that "disclosure overload" is, in fact, a burden for any investors. Similarly, the Commission has produced no evidence whatsoever that investors stand to benefit from a disclosure effectiveness review or that they desire such a review in the first place. This represents a serious breakdown in the policymaking process. Unless they are expressly mandated by Congress, rulemakings should be supported by credible evidence of a current or potential problem particularly when such rulemakings are highly resource-intensive and diverting resources away from more pressing and Congressionally mandated priorities.

Not only has the Commission failed to produce empirical evidence of a purported "disclosure overload" problem, they have not even provided anecdotal evidence of a disclosure overload problem for investors (although anecdotes would be insufficient by themselves to justify the sweeping review undertaken here). Indeed, Better Markets has been unable to find evidence of even a single retail or institutional investor who is clamoring for relief from "disclosure overload." Given that this review is not required, and given the press of other requirements and priorities, the Commission should provide substantial evidence that "disclosure overload" is a genuine problem for investors before continuing to press a major review of its disclosure regime.

Moreover, Keith Higgins, the current Director of the Division of Corporate Finance and former Chair of the Federal Regulation of Securities Committee of the American Bar Association, with talk about going "big game hunting," has repeatedly gone so far as to describe the Commission's disclosure review primarily in terms of serving the interests of financial statement issuers. For example:

- "Our goal is to review specific sections of Regulation S-K and S-X to determine if the requirements can be updated to reduce the **costs and burdens on companies** while continuing to provide material information and eliminate duplicative disclosures."[18]

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17 *Id.*

18 Statement of Keith Higgins, Disclosure Effectiveness: Remarks before the American Bar Association Business Law Section Spring Meeting (Apr. 11, 2014) (emphasis added), citing, among others, his predecessor John W. White, now a partner at the law firm of Cravath, Swaine & Moore LLP, and his speech "Don't Throw Out the Baby with the Bathwater," Keynote Address at the ABA Section of Business Law (November 21, 2008).

- "A review of all requirements of Regulation S-K would have a **benefit for issuers** beyond the period that they may qualify for emerging growth company status."[19]

Director Higgins has stated that "Our efforts will involve both 'small ball' and 'big game hunting' — apologies for the mixed metaphors — and we will seek to reduce the burdens on companies, consistent with our mission of investor protection, wherever we can."

Further, the Commission has not come close to demonstrating that "disclosure overload" represents a genuine burden for preparers and issuers. It is certainly true that complaints of onerous reporting requirements and unwieldy financial statements are so common in the preparer community that they run the risk of being accepted as dogma. But widespread complaints about disclosure requirements are not the same as actual evidence that proves a problem actually exists regarding overly burdensome disclosure requirements.

"Disclosure overload" is itself a loaded phrase that connotes a state of affairs that is nearing a dangerous breaking point. Trade groups representing issuers and preparers have worked diligently to promote the notion of "disclosure overload."[20] This is perhaps not surprising given the generic "anti-regulation" attitude of the Chamber of Commerce, some trade groups, and others in the business community. However, that makes the need for substantial proof all the more necessary to distinguish between generic anti-regulatory claims and empirical evidence of a genuine public problem.

The Commission's task here is not to be swayed by opportunistic and self-interested advocacy, but to make policy based on evidence that serves the public interest and is grounded in reality. At this point, the Commission has not met that burden. Indeed, it appears that the Commission has spent years trying to address a problem without first demonstrating that the problem even exists.

Of course, the inaccurate claims discussed above to the effect that such a project was "required" by statute conveniently relieved the Commission of the need for such basic diligence. However, given there is no such requirement the Commission must now carefully assess evidence regarding whether investors, issuers, or preparers are in fact unduly burdened by disclosure requirements before plowing ahead with a sweeping review of the substance of its disclosure regime. This assessment should be undertaken by the SEC once the Concept Release is withdrawn and while the Commission considers whether it would be appropriate to re-release it.

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19 *Id.* (emphasis added).

20 See, e.g., Chamber of Commerce Center for Capital Markets, *Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation* (Jul. 28, 2014), *available at* http://www.centerforcapitalmarkets.com/wpcontent/uploads/20-14/07/CCMC_Disclosure_Reform_Final_7-28-20141.pdf

III. A basic premise of the approach reflected in the Release is flawed, since "disclosure overload" is a myth.

There are many reasons to believe that investors are not overwhelmed by the contents of financial disclosure statements. First, the SEC's own Investor Advisory Committee has made it plain that investors believe the amount of disclosure in financial statements is "generally appropriate"[21] and that "investors, as a general rule, want more disclosure, not less."[22] And the SEC has not demonstrated that there is an outcry from any part of the investor community for reduced disclosure. Indeed, Better Markets is unaware of even a single retail or institutional investor that has identified excessive disclosure as a genuine problem, much less an urgent one.

Secondly, even a cursory analysis of financial statements reveals that they are far from overwhelming. Better Markets reviewed the 2015 10-Ks for the top 50 companies in the Fortune 500. Our findings follow:

Page Number Totals for 10-Ks for the Fortune 50	**Total Number of Pages**	**Number of Pages in Item 8 on Form 10-K: Financial Statements and Supplementary Data**	**Number of Pages in Item 7 on Form 10-K: Management's Discussion and Analysis of Financial Condition and Results of Operations**
Average number of pages	210	57	46
Median number of pages	168	51	30

It bears emphasizing that these are the annual disclosure statements for the fifty largest public companies in the United States. They average 210 pages in length, a number that is skewed high by a small subset of companies with anomalously long financial statements, as the median length of 168 pages indicates.

Of course, the majority of people who review financial statements do not read them from cover to cover, scrutinizing every detail. Most investors focus on the actual "Financial Statements" portion (Item 8 on Form 10-K) and the "Management's Discussion and Analysis

[21] Statement of Damon Silvers, Investor Advisory Committee (Sep. 24, 2015).
[22] Investor Advisory Committee Letter to Mary Jo White (Nov. 24, 2015).

of Financial Condition and Results of Operations" section (Item 7 on Form 10-K). These sections comprise 57 and 46 pages on average, respectively, among the Fortune 50.[23]

Despite explicit authorization in the Dodd-Frank Act[24], and despite Commissioner Kara Stein's calls[25], there is no evidence that the SEC or the staff has engaged in any investor testing to determine how investors consume disclosures currently filed by issuers. It seems obvious that the SEC would have benefited by hearing directly from the investors through such testing and engagement.

For example, Walmart is the largest public company in the world, and its 10-K is 138 pages long, with 28 pages devoted to Financial Statements and 23 pages devoted to Management's Discussion and Analysis ("MD&A"). Apple checks in with a 73-page 10-K, with 33 pages for Financial Statements and 15 pages of MD&A. Walmart, Apple, and their peers in the Fortune 50 are among the largest companies in the world, with complex and sprawling global operations. And while the Fortune 50 represents a small subset of all public companies, it stands to reason that an average public company's 10-K is unlikely to be longer than the average Fortune 50 behemoth's 10-K—and may well be substantially shorter.

All this to say, 10-Ks are only issued once a year; the key parts of 10-Ks that most investors consult span no more than a few dozen pages; and these instruments purport to convey all the financial and operational facts that are material to investors in large and complex enterprises. It is difficult to believe that this amount of disclosure is excessive and ultimately burdensome to investors.

This is all the more true when you consider how the investor community divides in terms of reviewing financial statements. The vast majority of ordinary retail investors spend little or no time poring over 10-Ks. There are innumerable other tools available, including research platforms, benchmarking tools, analysts' reports, screening reports, and news reports, all of which retail investors tend to use to gather information. Sophisticated institutional investors, on the other hand, are more than well-equipped to review financial statements of even considerable length on a quarterly and annual basis.

Finally, with the advent of technology that allows rapid electronic text searches, even the most unsophisticated investor can effortlessly navigate even the lengthiest financial statements to find relevant data quickly. It goes without saying that we are no longer in a

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[23] These averages are also deceptively high, as they are skewed by several companies that issued unusually long statements, and correspondingly lengthy Financial Statements and MD&A sections.

[24] Section 912 of the Dodd-Frank Act authorized the Commission – for "the purposes of considering, proposing, adopting, or engaging in any rule or program or developing new rules or programs" – to "(1) gather information from and communicate with investors or other members of the public; (2) engage in such temporary investor testing programs as the Commission determines are in the public interest and would protect investors."

[25] In 2014, in a speech before the Consumer Federation of America, Commissioner Stein suggested that the matter of disclosure effectiveness would be a prime subject for the Commission to engage in investor testing. *See* https://www.sec.gov/News/Speech/Detail/Speech/1370543593434.

world where financial statements are printed on paper and mailed to investors, who then must engage in exhaustive review procedures.

If the Commission has substantial evidence showing that investors are truly overwhelmed by excessive disclosure in financial statements, it should detail it in any re-issued future Concept Release. Otherwise, it should abandon its disclosure effectiveness review altogether and focus its limited resources on more pressing priorities.

IV. There are relatively simple ways to address common disclosure deficiencies without reducing substantive disclosure obligations for public companies.

If the Commission nevertheless forges ahead with a sweeping disclosure effectiveness review – without any statutory requirement or Commission authorization – instead of first completing mandatory rulemakings or responding to actual investor concerns with a rule on political disclosure review, then it should consider adjustments to the formatting and content of financial disclosure statements that could better serve investor's interests and actually **increase** the amount of material information they receive. Indeed, these comparatively simple and obvious remedies for disclosure deficiencies further support our view that any form of comprehensive disclosure review is simply unwarranted. In any case, absent a compelling justification, which does not appear to exist, the Commission must not reduce companies' substantive disclosure obligations and reduce the amount or type of information to investors.

A. Duplicative disclosures

The Concept Release explains that registrants often repeat information within a single filing about different item requirements in Form 10-K—for example, repeating the same information in the MD&A section, the business section, the risk factors section, and the footnotes to the financial statements. The Concept Release also emphasizes that an introduction or overview section should include high-level information rather than duplicating a more detailed discussion that follows.

These recurring duplicative disclosure problems are relatively easy to identify and solve. First and foremost, the Commission must instruct registrants more clearly to avoid repeating information in a single filing. These instructions should remain as a part of the general instructions for Form 10-K and should also be concisely recapitulated in places on the form where duplicative disclosures have been found likely to crop up. For example, reminders should appear in the introductory section and in MD&A section where duplicative discussions of risk factors tend to appear.

Second, the Commission should encourage the use of cross-references if companies are determined to mention information in more than one place on a single filing. Cross-referencing through hyperlinks is a particularly valuable and space-saving method of reducing duplicative disclosures, but cross-referencing through footnotes is also a reasonable method.

Third, if registrants persist in filing disclosure statements with repetitive information, the Commission should send the statements back to the registrants for corrective editing. If registrants continue to make redundant disclosures, the Commission should consider rejecting their financial statements outright, levying fines, or initiating other enforcement actions necessary to deter the behavior.

One thing is clear: The remedy for the problem of duplicative disclosure should not be a reduction in information to investors or in registrants' substantive disclosure obligations. Reducing disclosure obligations would prove ineffective and counterproductive, it would not solve the problem of redundant disclosure, and it would undermine the interests of investors who are entitled to full issuer disclosure of material information.

B. Unnecessary Disclosure of Generic Risk Factors

The Commission has identified another disclosure problem in the form of superfluous disclosure of generic risk factors. Even though Item 503(c) instructs filers not to list risks that are applicable to any and all registrants, the Commission explains that registrants nonetheless frequently disclose risks that are not tailored to their particular financial and operational profile. The Commission has identified several examples of commonly disclosed generic risk factors, among them:

- Changes in regulation;
- The effect of general economic conditions on a registrant's business;
- The registrant's failure to compete successfully; and
- High levels of dependence on a registrant's management team.

In many ways, this problem is reminiscent of the problem of redundant disclosure; for whatever reasons, registrants are taking it upon themselves to disclose more than is necessary. In response, the Commission should expressly and specifically proscribe the disclosure of the risks listed above and any other risk factors that the Commission identifies as prone to unnecessary disclosure in the specific areas on Form 10-K where such disclosure has been found to occur.

If registrants continue to disclose generic risks, the Commission should provisionally deny their financial statements and send them back to the registrant for corrective editing. If registrants insist on maintaining generic risks even after a round of corrective editing, the Commission should consider rejecting them outright, levying fines, or pursuing enforcement actions consistent with a deterrent purpose.

Again, punishing investors with less disclosure because issuers provide unnecessary disclosure contrary to the express SEC guidance fails to address the problem at hand and, accordingly, should not be considered. Instead, the SEC should enforce its guidance against the issuers.

C. Four areas where improved disclosures are needed

The Commission identifies four additional problems with specificity in the Concept Release, including:

- Lack of Detailed Analysis in MD&A;
- Inadequate Disclosure of Critical Accounting Estimates in MD&A;
- Failure to Discuss Stock Repurchases in MD&A; and
- Failure to Include Footnotes to the Contractual Obligations Table to Promote Understanding of Tabular Data.

In particular, the lack of analysis in the MD&A is a matter of real concern. Despite Item 303(a)'s instructions to engage in detailed analysis relevant to the company's financial condition, registrants often simply recite numerical year-over-year figures – information that is readily ascertainable from the financial statements elsewhere on Form 10-K. Similarly, registrants recite line items from statements of cash flows in purporting to discuss liquidity and capital resources; more detailed analysis is critical here. Finally, registrants rarely discuss or analyze financial trends beyond the three-year timeframe with which Item 303 is largely concerned, even though the instructions to Item 303 specify that analysis over longer timeframes is often relevant.

With respect to accounting estimates, despite SEC guidance in an MD&A interpretive release, registrants often repeat the discussion of significant accounting policies from the footnotes to their financial statements in the MD&A description of critical accounting estimates and, most crucially, provide limited additional discussion. The Concept Release further observes that registrants often fail to analyze the impact of stock repurchases with specificity in MD&A, even in cases where the stock repurchase represents a greater amount than the registrant's net income. Finally, the Concept Release observes that registrants rarely supplement the contractual obligations table with narrative disclosure to promote greater understanding of the tabular data.

The Commission can solve these and similar problems by creating space on Form 10-K for "detailed analysis of the company's financial condition," with express instructions immediately adjacent that proscribe a mere recitation of financial figures. Alternatively, the Commission could reject submissions that fail to provide detailed analysis or pursue enforcement actions. Put differently, most of the problems the SEC identifies in the Concept Release can be quickly and efficiently remedied by the SEC simply enforcing its own pre-existing guidance and rules.

In general, when registrants act contrary to the instructions, Better Markets recommends that the Commission follow the following steps:

- Make instructions more specific when possible;

- Create more specific fields on the forms that request specific disclosures when particular information is desired;

- Send redundant or incomplete disclosures back to registrants for edits; and

- Levy penalties for incomplete disclosure and take other appropriate enforcement action as necessary.

In short, the Commission can address these relatively straightforward problems expeditiously, under existing authority, and without undertaking a sweeping review of its disclosure requirements.

V. There is a fundamental asymmetry of interests between investors and registrants that the Commission's proposal fails to recognize.

Generally speaking, investors operate at a considerable informational disadvantage in the marketplace. The federal securities laws provide an important corrective to this dynamic by mandating corporate reporting, recognizing that companies have a natural inclination to withhold embarrassing and damaging information from investors. This is the fundamental dynamic underlying the Commission's disclosure regime: Investors generally want more information about public companies, and public companies want to disclose less information.

The Commission's proposal treats registrants and investors similarly, asking at every turn if disclosure should be reduced for the benefits of registrants or enhanced for the benefit of investors. This approach has a built-in bias and will likely produce one-sided outcomes that will not serve the public interest or the Commission's mission. Further, since compliance costs and the substantive burdens of compliance with disclosure rules fall in concentrated fashion on issuers and preparers, and the benefits of disclosure are widely diffused among the investor community and the public at large, issuers and preparers are likely to be more motivated to advocate for reduced disclosure. If the Commission determines that reviewing and updating its disclosure regime really is appropriate based on substantial evidence, then the Commission must take this asymmetry into account and correct for it by protecting the interests of investors above all. That is, after all, the Commission's primary mission.

CONCLUSION

Due to the misleading and inaccurate statements regarding the unauthorized so-called Disclosure Effectiveness Initiative, of which the Concept Release is a part, the Commission must immediately withdraw the Concept Release. It should only be re-released after due deliberation by the Commission itself and only upon a substantial evidentiary basis and consideration of other requirements and priorities. If, at the conclusion of that thorough process, the Commission votes to re-release such a concept release, then it must clearly acknowledge that such a review is not required by any statute and that it dramatically exceeds the requirements outlined in the JOBS Act. It must further demonstrate that there

is a substantial evidentiary basis, set forth in the re-release, that justifies the Commission's determination to undertake such an initiative.

The Commission must also explain in any re-release how and why Chair White and the Concept Release could have mischaracterized the JOBS Act statute as requiring a comprehensive review of all disclosure requirements in light of the clearly expressed and very narrow scope set forth in that statute. This is imperative in light of the Commission's mandate to police compliance with the securities laws and regulations, including Rule 10(b)5 and others.

Further, the public has a right to know why and how the Commission allowed the staff to undertake such an important and resource-intensive initiative without a statutory requirement or Commission authorization, especially at a time when the agency is confronting so many other challenges. Without this disclosure, the public will not be able to properly evaluate the basis, merits, and wisdom of such a decision, the actual objectives, the methodology it uses, or the quality and utility of the results. For example, does this initiative represent in some measure a concession to the relentless pressure on the Chair, the Commission, or the staff to de-regulate the financial markets in the supposed name of capital formation and job growth? Could it have resulted from the revolving door or industry capture, cognitive or otherwise? Or, is it a genuine attempt to improve disclosure for the benefit of investors based on thorough deliberation, independent analysis, and substantial evidence? Or, was this all attributable to other factors? The public is entitled to detailed information sufficient for it to answer those questions. And, in light of the facts set forth above regarding the purported Disclosure Effectiveness Initiative and the Concept Release, the Commission is obligated to provide that information in any re-release.

Because there is in fact no statutory directive to conduct a sweeping review of disclosure requirements for public companies, and because the Chair and the Concept Release have misstated the genesis of the disclosure review, it is incumbent on the SEC to promptly withdraw the Concept Release and provide a full and accurate explanation of the basis for its actions. Better Markets has no objection to enhancing readability, eliminating duplication, and generally improving the format and/or content of disclosure statements, but such objectives cannot justify a fundamental overhaul of the disclosure regime aimed at reducing substantive disclosure obligations applicable to public companies.

Sincerely,

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