

Via Email

October 17, 2019

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-11-19

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to the Proposed Rule on Modernization of Regulation S-K Items 101, 103, and 105 (Proposed Rule).¹

CII is a nonprofit, nonpartisan association of U.S. asset owners, primarily pension funds, state and local entities charged with investing public assets and endowments and foundations, with combined assets of \$4 trillion. Our associate members include non-U.S. asset owners with more than \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management. CII members share a commitment to healthy public capital markets and strong corporate governance.²

Business Description (Item 101)

CII generally supports the proposed principles-based requirements and related revisions to the required description of the general development of the business of the registrant (Item 101(a)). In contrast, we support a combination of principles-based requirements and prescriptive rules for the required narrative description of the business done by the registrant (Item 101(c)) because the existing provisions of that requirement provide for disclosure of quantitative information. We believe the understanding of how that data benefits long-term shareholder value is enhanced by a combined approach that increases the level of consistency and comparability of the information provided. In our view, the required quantitative information should continue to include the amount of backlog orders and the number of a registrant's employees.

¹ Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Release No. 10,668, Exchange Act Release No. 86,614, 84 Fed. Reg. 44,358 (proposed Aug. 23, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-23/pdf/2019-17410.pdf>.

² For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at https://www.cii.org/about_us.

Human Capital Resources (HCR)

CII generally supports the proposed revisions to the required narrative description of the business done by the registrant that include HCR as a listed disclosure topic. We believe institutional and retail investors have a pronounced interest in better information about HCR.

In addition to retaining to the explicit requirement to disclose the number of employees, we would generally support expanding the HCR disclosure to include a breakdown of the numbers of full-time, part-time, and contingent workers and disclosure of employee turnover rates.

We support the SEC encouraging issuers to voluntarily provide additional HCR related disclosures, preferably using a generally accepted, private sector, investor-focused framework. We believe the use of a well-developed framework could facilitate greater consistency and comparability of HCR disclosures for the benefit of investors and the capital markets generally.

Legal Proceedings (Item 103)

CII cannot support the proposed revisions to the required disclosure of material pending legal proceedings. Investors have long demanded better and timelier qualitative and quantitative disclosures related to legal proceedings. Proposing to revise the \$100,000 threshold for disclosure of environmental proceedings to which the government is a party to \$300,000 is not responsive to that demand. We believe a fundamental overhaul of the financial reporting related to legal proceedings is necessary and long overdue.

Risk Factors (Item 105)

CII generally supports the proposed approach to revising the required disclosure of the most significant factors that make an investment in the registrant or offering speculative. Our general support for the proposed approach, however, is subject to the proposal being revised to include an improved definition of “material.”

More specifically, we believe the proposed definition of “material” is too narrow and could exclude risk factor disclosure that, in our view, *is material to investors*. We believe “material” should be defined as information in which there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available in deciding *how to vote or make an investment decision*.

The following are more detailed responses to select questions in the “Request for Comment” contained in the Proposed Rule:

4. When only updated business disclosure is provided in a filing, should we require the incorporation by reference of, and active hyperlink to, the most recently filed disclosure that, together with the update, would present a full discussion of the general development of a registrant’s business, as proposed? Would such an approach, which would enable a

reader to review the updated disclosure and one hyperlinked disclosure, facilitate an investor’s understanding of the general development of a registrant’s business?³

CII generally supports requiring, as proposed, the incorporation by reference of, and active hyperlink to, the most recently filed disclosure that together with the update would present a full discussion of a registrant’s business.⁴ We have in the past supported the use of hyperlinks to reduce redundant disclosures.⁵

Our support for this provision of the proposal is conditioned on “requiring that a registrant use one hyperlink to connect the updated disclosure with the previous disclosure”⁶ We generally agree with the SEC that “[b]ecause the proposed revisions would involve the use of only one hyperlink . . . the increase in retrieval costs for investors would be minimal.”⁷

6. Would principles-based requirements for Item 101(a) effectively facilitate the provision of information that is material to an investment decision? If not, how might Item 101(a) be further improved?⁸

CII generally supports the proposed principles-based requirements for Item 101(a).⁹ We believe the required description of the general development of the business of the registrant may lend itself to a narrative format generally consistent with a principles-based disclosure.¹⁰

We also believe a principles-based disclosure may better support investors in making informed voting and investment decisions, when as proposed, the requirements include “a non-exclusive list of the types of information that a registrant may need to disclose”¹¹ We generally agree with the SEC that the non-exclusive list should “include material changes to a registrant’s previously disclosed business strategy, which is not currently required to be disclosed . . .

³ 84 Fed. Reg. at 44,363.

⁴ *Id.* at 44,362.

⁵ *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa Countryman, Secretary, Securities and Exchange Commission 9 (July 18, 2019), [https://www.cii.org/files/issues_and_advocacy/correspondence/2019/July%2018%202019%20SEC%20Reg%20File%20Letter%20Final\(1\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/July%2018%202019%20SEC%20Reg%20File%20Letter%20Final(1).pdf) (supporting as an alternative to a quantitative reconciliation of such non-GAAP metrics in the Compensation Discussion and Analysis a “hyperlink to such a reconciliation in another document filed with the SEC”).

⁶ 84 Fed. Reg. at 44,362.

⁷ *Id.* at 44,380.

⁸ *Id.* at 44,363.

⁹ *See* Description of Business, 17 C.F.R. § 229.101(a), available at <https://www.law.cornell.edu/cfr/text/17/229.101> (Item 101(a) currently requires, in part, a description of “the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business[] [and] [i]nformation shall be disclosed for earlier periods if material to an understanding of the general development of the business”).

¹⁰ Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 4 (July 8, 2016), <https://www.sec.gov/comments/s7-06-16/s70616-49.pdf> (for example, the “principles-based Compensation Discussion and Analysis . . . describes material elements of executive compensation in a narrative format”).

¹¹ 84 Fed. Reg. at 44,362.

[because] several studies have found that . . . investors may benefit from any increase in the disclosure of material changes to previously disclosed business strategies.”¹²

13. Would the proposed principles-based requirements elicit information that is material to an investment decision? If not, how might Item 101(c) be further improved? Are there any additional disclosure topics that we should include in Item 101(c) to facilitate disclosure? Alternatively, should we exclude any of our proposed disclosure topics?¹³

CII generally supports a combination of principles-based requirements and prescriptive rules for Item 101(c).¹⁴ We note that unlike Item 101(a), the existing Item 101(c) requirements includes the following provisions that explicitly provide for disclosure of quantitative information:

(i) . . . state for each of the last three fiscal years the amount or percentage of total revenue contributed by any class of similar products or services which accounted for 10 percent or more of consolidated revenue in any of the last three fiscal years or 15 percent or more of consolidated revenue, if total revenue did not exceed \$50,000,000 during any of such fiscal years.

...

(viii) The dollar amount of backlog orders believed to be firm, as of a recent date and as of a comparable date in the preceding fiscal year, together with an indication of the portion thereof not reasonably expected to be filled within the current fiscal year, and seasonal or other material aspects of the backlog.

...

(x) Competitive conditions in the business involved including, where material, . . . an estimate of the number of competitors

(xiii) The number of persons employed by the registrant.¹⁵

For those items, we agree with many other commentators¹⁶ that a combined approach may be appropriate where “principles-based and rules-based disclosure requirements can be used together effectively to provide different kinds of information to investors on a subject.”¹⁷

A combined approach permits an appropriate balance between specific rules-based quantitative information that provides for some level of consistency and comparability combined with a more principles-based qualitative information that provides the context for understanding how the data

¹² *Id.* at 44,380 & nn. 229-300.

¹³ *Id.* at 44,371.

¹⁴ See Description of Business, 17 C.F.R. § 229.101(c) (“*Narrative description of business*”).

¹⁵ *Id.*

¹⁶ 84 Fed. Reg. at 44,360 & n.17 (noting commentators, including CII, that support some combination of both principles-based and prescriptive rules).

¹⁷ Letter from Kenneth A. Bertsch at 4.

benefits long-term shareowner value.¹⁸ A consistent set of material quantitative information can be more easily collected and analyzed by investors to identify outliers and detect trends that may be useful in making investment and voting decisions potentially reducing the cost of capital.¹⁹ We find particularly compelling the research of Katherine Schipper referenced in the Proposed Rule finding that increased comparability is a potential advantage of a rules-based requirement.²⁰

For all of the aforementioned reasons, we generally do not support the Proposed Rule's amendments to no longer list the dollar amount of backlog orders²¹ or the number of a registrant's employees.²² For both items, the SEC provides references to studies indicating potential benefits of such data to investors²³ and fails to provide persuasive evidence for removing those disclosures.²⁴

21. Should disclosure regarding human capital resources, including any material human capital measures or objectives that management focuses on in managing the business, be included under Item 101(c) as a listed disclosure topic, as proposed? Should we define human capital? If so, how?²⁵

¹⁸ See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional to The Honorable Jay Clayton, Chairman, Securities and Exchange Commission 2 (Oct. 10, 2017), https://www.cii.org/files/issues_and_advocacy/correspondence/2017/10-6-17%20CII%20letter%20to%20SEC%20on%20HCM.pdf (agreeing with the 2017 petition for rulemaking on human capital management disclosures “that for any new disclosure requirements the Commission would need to ‘find the appropriate balance’ between specific rules-based quantitative information that provides for some level of consistency and comparability and more principles-based qualitative information that provides the context for understanding how HCM benefits long-term shareowner value.”).

¹⁹ See, e.g., Letter from Kenneth A. Bertsch at 4 (noting that under a rules-based approach “consistent data can be collected and analyzed by investors to identify outliers and detect trends”); cf. Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K (Aug. 27, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-lee-082719> (“One concern with principles-based disclosure is that it . . . can produce inconsistent information that investors cannot easily compare, making investment analysis—and, thus, capital—more expensive.”).

²⁰ See 84 Fed. Reg. at 44,379 n.291 (citing “Katherine Schipper, *Principles-based accounting standards*, 17.1 Accounting Horizons 61–72 (2003)”).

²¹ *Id.* at 44,364 (“the proposed amendments would no longer list the following topics: Disclosure about dollar amount of backlog orders believed to be firm.”)

²² *Id.* at 44,381 (“We propose to replace the requirement to disclose the number of employees with a description of the registrant’s human capital resources”).

²³ See *id.* (“In one meta-analysis, which reviewed 66 studies, the authors found that . . . the number of employees, other human capital characteristics, including education, experience, and training, have positive effects on firm performance.”); *id.* at n.306 (“Based on these studies, one could anticipate that availability of material information on . . . dollar amount of backlog orders believed to be firm could benefit investors.”).

²⁴ *Id.* at 44,364 (“Nevertheless, under the proposed principles-based approach, registrants still would have to provide disclosure about [the dollar amount of backlog orders] . . . if they are material to an understanding of their business”); *id.* at 44,381 n.301 (“The current Item 101(c) requirement to disclose the number of a registrant’s employees potentially would be encompassed by the proposed more expansive human capital resources disclosure topic.”).

²⁵ *Id.* at 44,371.

CII generally supports the proposal that HCR should be included under Item 101(c) as a listed disclosure topic. Institutional and retail investors have a pronounced interest in clear and comparable information about how public companies approach HCR.²⁶

We generally agree with the SEC that HCR “may represent an important resource and driver of performance for certain companies,” including those with securities listed on U.S. exchanges.²⁷ That importance is supported by the growing body of research that has found that high quality HCR practices correlate with better corporate performance.²⁸

CII has a broad tent of members, but we are unaware of any segment of our membership that does not consider HCR as important to the long-term valuation of most companies, and critical in particular for certain growth sectors.²⁹ Historically, corporate disclosures on HCR have been limited, in part, because of the importance of intangible factors not easily quantified.

We believe that the time has come to improve disclosure in the area of HCR.³⁰ And we generally agree with Commissioners Robert J. Jackson, Jr. and Allison Herren Lee that the “proposal takes

²⁶ See Recommendation from the Investor-as-Owner Subcommittee on Human Capital Management Disclosure, Investor Advisory Committee 2 (approved Mar. 28, 2019), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac032819-investor-as-owner-subcommittee-recommendation.pdf> (“Institutional and retail investors have a pronounced interest in clear and comparable information about how firms approach HCM”); see also Chairman Jay Clayton, Remarks for Telephone Call with SEC Investor Advisory Committee Members (Feb. 6, 2019), <https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-call-020619> (“for human capital, I believe it is important that the metrics allow for period to period comparability for the company”).

²⁷ See 84 Fed. Reg. at 44,370 & n.183 (noting that many commentators “asserted the importance of human capital management in assessing the potential value and performance of a company over the long term”); see, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, Committee on Financial Services, United States House of Representatives et al. 2 (May 14, 2019), [https://www.cii.org/files/issues_and_advocacy/correspondence/2019/May%2014,%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection,%20Entrepreneurship,%20and%20Capital%20Markets%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/May%2014,%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection,%20Entrepreneurship,%20and%20Capital%20Markets%20(final).pdf) (“Human capital is an increasingly important value driver for companies, including those with securities listed on U.S. exchanges.”).

²⁸ See Mike Krings, Business Professor Examines Why Firms Don’t Use Human Capital Data, UK, Apr. 30, 2019, <https://news.ku.edu/2019/04/17/business-prof-examines-why-firms-dont-use-human-capital-data-recommends-steps-improve> (“Firms that have low turnover rates, high employee satisfaction and other measures of workforce excellence often have an advantage over their competitors.”); Letter from Dr. Anthony Hesketh, Department of Organization, Work & Technology, Lancaster University Management School to Anne Sheehan, Chairman Investor Advisory Committee, U.S. Securities and Exchange Commission 4 (Mar. 21, 2019), <https://www.sec.gov/comments/265-28/26528-5180428-183533.pdf> (summarizing recent research and including relevant citations suggesting “the depth of human capital disclosure is highly associated with high performance”); Mark Huselid, The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance, 18 Acad. of Mgmt. J. 635 (1995), http://www.markhuselid.com/pdfs/articles/1995_AMJ_HPWS_Paper.pdf (indicating that certain human capital management practices “have an economically and statistically significant impact on . . . long-term measures of corporate financial performance”).

²⁹ See 84 Fed. Reg. at 44,370 & n.183 (noting that many commentators “asserted the importance of human capital management in assessing the potential value and performance of a company over the long term.”).

³⁰ See Letter from Jeffrey P. Mahoney at 3 (“We believe that the time has come to seek ways to improve disclosure of both qualitative and quantitative elements of performance in this area.”); see also Leo E. Strine, Jr., A New Deal For This Century: Making Our Economy Work For All 7 (N.Y.U. Constance Milstein & Fam. Global Acad. Center Oct. 3, 2019),

a crucial step forward for investors who have long asked for transparency about whether and how public companies invest in the American workforce.”³¹

24. Should we retain an explicit requirement for registrants to disclose the number of their employees? Alternatively, should we permit registrants to disclose a range of the number of its employees and/or a range for certain types of employees?³²

CII generally agrees with the many commentators who recommend retaining the explicit requirement to disclose the number of employees.³³ As indicated in response to question 13, the SEC provides references to studies indicating potential benefits to the existing disclosure of the number of employees without any persuasive evidence for removing the requirement.

In addition, we would generally support expanding the requirement to disclose the number of employees consistent with the view of the SEC’s Investor-as-Owner Subcommittee on Human Capital Management Disclosure (IACS),³⁴ and many other commentators.³⁵ More specifically, we would generally support a provision adopting the IACS recommendation to disclose:

[B]reakdown of the numbers of:

- Full-time
- Part-time, and
- Contingent workers[.]³⁶

We generally agree with the IACS that such data has “distinct implications for the cost and value [and stability] of a company’s workforce.”³⁷

We would also generally support expanding the explicit requirement to include “employee turnover” rates.³⁸ Generally consistent with the views of the IASC,³⁹ and many other

https://www.law.nyu.edu/sites/default/files/Fair%20and%20Sustainable%20Capitalism%20Proposal%20-%20White%20Paper_09.26.19%20FINAL.pdf (recommending that the “Commission . . . develop rules requiring public companies to disclose in narrative form additional information about their investments in human capital”); Mike Krings (“Both the investment and regulation communities should explore the standardization of human capital information”).

³¹ Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K.

³² 84 Fed. Reg. at 44,371.

³³ *See id.* at 44,369 & n.166 (“Many commentators recommended retaining and expanding the requirement to disclose the number of persons employed by the registrant.”).

³⁴ Recommendation from the Investor-as-Owner Subcommittee on Human Capital Management Disclosure at 4.

³⁵ *See* 84 Fed. Reg. at 44,369 & n.172 (“Numerous commenters further recommended requiring registrants to distinguish among their total employees.”).

³⁶ Recommendation from the Investor-as-Owner Subcommittee on Human Capital Management Disclosure at 4.

³⁷ *Id.*

³⁸ Letter from Jeffrey P. Mahoney at 3 (“Employee turnover is an example of a measurable, comparable statistic that should be considered as a key disclosure at most or all public companies.”).

³⁹ *See* Recommendation from the Investor-as-Owner Subcommittee on Human Capital Management Disclosure at 4 (recommending disclosure of “the stability of the workforce, including voluntary and involuntary turnover and internal hire and promotion rates”).

commentators,⁴⁰ we believe employee turnover rates may be an example of a material, measurable and comparable statistic that should be disclosed by public companies.⁴¹

We support the SEC encouraging issuers to voluntarily provide additional material HCR related disclosures preferably using a generally accepted, private sector, investor-focused framework. We believe the use of a well-developed framework that focuses on the needs and demands of investors could facilitate greater consistency and comparability of HCR disclosures and improve the quality of information available to investors.⁴²

30. Would our proposed revisions to Item 103 improve disclosures required by the item? Are there different or additional revisions we should consider to improve Item 103 disclosure?⁴³

CII does not believe the proposed revisions to Item 103 would improve disclosures required by the item.⁴⁴ More specifically, we cannot support the proposed revision of the “\$100,000 threshold for disclosure of environmental proceedings to which the government is a party to \$300,000 to adjust for inflation.”⁴⁵

Investors have long demanded, and have not received, better and timelier qualitative and quantitative disclosures related to legal proceedings.⁴⁶ Disclosures relating to legal proceedings, including environmental proceedings, may be critical to investors in making buy-sell or hold decisions because frequently they are associated with material cash outflows or events that have the potential to greatly affect a company’s liquidity, capitalization or business prospects. We believe the existing disclosure requirements, including those required by U.S. Generally Accepted Accounting Principles,⁴⁷ simply do not provide sufficient information necessary for investors to understand the nature, and potential magnitude and timing of any loss contingencies relating to legal proceedings.⁴⁸

⁴⁰ See 84 Fed. Reg. at 44,369 & n.171 (“several commenters supported disclosure of employee turnover”).

⁴¹ See Letter from Jeffrey P. Mahoney at 3 (“Employee turnover is an example of a measurable, comparable statistic that should be considered as a key disclosure at most or all public companies.”).

⁴² See generally Rhonda Brauer & Glenn Davis, Sustainability Reporting, A Guide for CIO’s, CII Research & Education Fund 3 (Sept. 2019), <https://www.cii.org/sustainability-reporting-frameworks> (report focusing “on four of the most commonly cited ESG reporting frameworks . . . provid[ing] chief investment officers . . . of U.S. pension funds and investors more generally a basic understanding of the frameworks and their fundamental differences.”).

⁴³ 84 Fed. Reg. at 44,374.

⁴⁴ See Legal Proceedings, 17 C.F.R. § 229.103, available at <https://www.law.cornell.edu/cfr/text/17/229.103> (“Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject.”).

⁴⁵ 84 Fed. Reg. at 44,360.

⁴⁶ See, e.g., Letter from Jeff Mahoney, Member, Investors Technical Advisory Committee, to Technical Director, Financial Accounting Standards Board 1-3 (Aug. 26, 2010), https://www.fasb.org/cs/ContentServer?c=Document_C&cid=1176157297775&d=&pagename=fasb%2FDocument_C%2FDocumentPage (commenting on the need to improve disclosures relating to litigation contingencies).

⁴⁷ Codification Topic 450-20, Loss Contingencies, U.S. GAAP Codification of Accounting Standards (last visited Oct. 17, 2019), <https://accountinginfo.com/financial-accounting-standards/asc-400/450-20-loss-contingencies.htm>.

⁴⁸ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 5 (Sept. 22, 2016), https://www.cii.org/files/issues_and_advocacy/correspondence/2016/September%2022%202016%20comment%20

In addition, we note the SEC acknowledges “research has found that environmental liabilities can influence certain corporate decisions related to managing environmental regulatory risk and that some investors include environmental criteria in their investment strategies.”⁴⁹ We generally agree with the SEC that the proposed upward adjustment of the threshold for disclosure of certain environmental legal proceedings “may have a cost” to investors that use such information.⁵⁰

For all of the aforementioned reasons, we cannot support the proposed revisions that may reduce existing disclosure for legal proceedings when a fundamental improvement to the financial reporting related to legal proceedings is necessary and long overdue.

31. Should we expressly provide for the use of hyperlinks or cross-references, as proposed? Would the use of multiple hyperlinks be cumbersome for investors? Are there alternative recommendations that would more effectively decrease duplicative disclosure?⁵¹

CII generally supports expressly providing for the use of hyperlinks or cross-references, as proposed. As indicated in response to question 4, we support the use of hyperlinks or cross-references to avoid duplicative disclosure. However, as also indicated in our response, our support for the proposed use of hyperlinks is conditioned on provisions that place some limits on a registrant’s use of multiple hyperlinks.

We generally agree with the SEC that the use of multiple hyperlinks may unnecessarily increase costs for investors who “may have to spend more time to retrieve the information through hyperlinks or cross-references.”⁵² As a result, we are open to consideration of alternatives that would provide for reasonable restrictions on the use of multiple hyperlinks.

35. Would our proposed approach to Item 105 result in improved risk factor disclosure for investors?⁵³

CII believes the proposed approach to Item 105⁵⁴ would result in improved risk factor disclosure for investors if the proposal is revised to include an improved definition of “material.” More specifically, we believe the proposed definition of “material” for Item 105 is too narrow and could reduce the amount of risk factor disclosure that, in our view, *is material to investors*.

[etter%20\(final%20with%20letterhead\)%20KAB.pdf](#) (“The existing disclosure requirements in Item 103 and U.S. GAAP simply do not provide sufficient information necessary for investors to understand the nature, and potential magnitude and timing of any loss contingencies relating to legal proceedings.”).

⁴⁹ 84 Fed. Reg. at 44,382 & nn. 309-10.

⁵⁰ *Id.* at 44,382.

⁵¹ *Id.* at 44,374.

⁵² *Id.* at 44,382.

⁵³ *Id.* at 44,376.

⁵⁴ See Risk Factors, 17 C.F.R. § 229.105, available at <https://www.law.cornell.edu/cfr/text/17/229.105> (“Where appropriate, provide under the caption ‘Risk Factors’ a discussion of the most significant factors that make an investment in the registrant or offering speculative or risky.”).

The definition of “material” for purposes of Item 105, as proposed, is information in “which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security.”⁵⁵ In contrast, our preferred definition of “material” is information in which there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available *in deciding how to vote or make an investment decision*.⁵⁶ We note that our preferred definition is generally consistent with a definition the SEC included in its 2010 Climate Change Release and for which the Proposed Rule indicates that “[o]n several occasions, the Commission has reiterated.”⁵⁷

To summarize our concern: the proposed definition of “material” for Item 105 excludes consideration of voting decisions and decisions to sell a security. The basis for those omissions have been explained in the Proposed Rule.

36. Would our proposal to require summary risk factor disclosure if the risk factor discussion exceeds 15 pages result in improved risk factor disclosure for investors?⁵⁸

CII generally supports the proposal to require summary risk factor disclosure if the risk factor discussion exceeds 15 pages. We believe a summary risk factor disclosure setting forth the most important factors would be useful for investors.⁵⁹

We generally agree with the SEC that “[i]f lengthy risk factor disclosure contains information that is less meaningful to investors, such as generic risks that could apply to any investment in securities, a summary of risk factors should benefit investors, especially those who have less time to review and analyze registrants’ disclosure, by enabling them to make more efficient investment decisions.”⁶⁰ Moreover, we also generally agree with the SEC that “[i]f registrants determine that it is appropriate to provide risk factor disclosure that exceeds 15 pages, summary risk factor disclosure highlighted in the forepart of the document should enhance the readability and usefulness of this disclosure for investors.”⁶¹

42. Would our proposal that registrants organize their risk factors under relevant headings improve disclosures for investors?⁶²

CII generally supports the proposal that registrants organize their risk factors under relevant headings. We are particularly supportive of the proposed provision that “if a registrant chooses to

⁵⁵ 84 Fed. Reg. at 44,376.

⁵⁶ See Letter from Kenneth A. Bertsch at 4-5 (“The Council supports retaining the current definition, which deems information material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available.”).

⁵⁷ 84 Fed. Reg. at 44,359 n.11.

⁵⁸ *Id.* at 44,376-77.

⁵⁹ See Letter from Kenneth A. Bertsch at 7 (“More structured risk factor disclosure, such as an executive summary setting forth the most important factors or an ordering of factors based on magnitude or likelihood, would be useful to enable investors to cut through these disclosures.”).

⁶⁰ 84 Fed. Reg. at 44,376.

⁶¹ *Id.*

⁶² *Id.* at 44,377.

disclose a risk that could apply to other companies or securities offerings and the disclosure does not provide an explanation of why the identified risk is specifically relevant to an investor in its securities, . . . the registrant [is required] to disclose such risk factors at the end of the risk factor section under the caption ‘General Risk Factors.’”⁶³

As indicated in response to question 36, we generally support more structured risk factor disclosure. In our view, that would include proposed discussion of general risks at the end of the risk factor section, discussing factors that pose the greatest risk first, or some combination that focuses on “ordering of factors based on magnitude or likelihood” of the risk.⁶⁴ We generally agree with the SEC that such “further organization within risk factor disclosure will improve the effectiveness of the disclosures.”⁶⁵

43. Should we require registrants to prioritize the order in which they discuss their risk factors so that the risk factors that pose the greatest risk to the registrant are discussed first? Would this improve disclosures for investors or be unduly burdensome for registrants?⁶⁶

See response to question 42.

If you have any questions regarding this letter or need additional information, please do not hesitate to contact me at 202.822.0800 or jeff@cii.org.

Sincerely,



Jeffrey P. Mahoney
General Counsel

⁶³ *Id.* at 44,376.

⁶⁴ See Letter from Kenneth A. Bertsch at 7.

⁶⁵ 84 Fed. Reg. at 44,376.

⁶⁶ 84 Fed. Reg. at 44,377.