



FACTCOALITION

Financial Accountability & Corporate Transparency

October 3, 2016

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-15-16

Dear Mr. Secretary:

We appreciate the opportunity to provide comments on the Securities and Exchange Commission's (SEC) proposed "Disclosure Update and Simplification" rule.

The stated purpose of the rule is "...to facilitate the disclosure of information to investors, while simplifying compliance efforts, without significantly altering the total mix of information provided to investors."ⁱ While we appreciate the goal of the proposal, the following comments raise a number of significant concerns about how the proposal specifically addresses or, in some cases, fails to address the stated interests of investors. We also share our views on the questions pertaining to income tax disclosures in an ever-changing global economy.

Financial Accountability and Corporate Transparency (FACT) Coalition

Founded in 2011, the Financial Accountability and Corporate Transparency (FACT) Coalitionⁱⁱ is a nonpartisan coalition 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.

The Stated Interests of Investors

In April 2016, the SEC issued a Concept Releaseⁱⁱⁱ to gather feedback from stakeholders on the value of the SEC's current disclosure requirements and what, if anything, should be changed, updated, included or removed. The request for information covered a wide variety of topics including the timing and frequency of filings, accounting practices and substantive issues involving sustainability among others. There was significant interest in the Concept Release. According to one outside analysis^{iv} – in which The FACT Coalition participated -- as of August 16, 2016, 26,512 comments were filed – significantly more than all but six of 161 major rulemakings since 2008. For comparison purposes, we note that the median number of comments filed in response to SEC rulemakings in that period is forty-five. By any measure, the response demonstrates heightened interest in this topic.

The analysis, also found:

“Support [for broad or increased disclosures] 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, professional services providers or associations representing companies. 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.”

A full copy of the analysis is attached.

Any fair reading of the responses would lead to the conclusion that investors and consumers of the disclosure information were not burdened by ‘information overload.’ Rather, they almost universally called for increased disclosure to better assess emerging risks – in some instances, risks that may not have existed in a previous rule writing era. The comments represent important and thoughtful insights from stakeholders and consumers of the information that deserve serious consideration.

The proposed Disclosure Update and Simplification rule was issued on July 13, 2016, eight days prior to the close of the comment period for the Concept Release (July 21, 2016). The timing could not have afforded the SEC the opportunity to review, consider and integrate appropriate feedback into the proposed rule.

We strongly urge the SEC to review the comments in response to the Concept Release and consider the concerns of the constituencies that use the information before rulemaking in this area moves further ahead.

Additional Income Tax Disclosures

The proposed rule specifically asks if, “additional income tax disclosures that would be useful to investors?” Also noted in the proposed rule: “Rule 4-08(h) requires disclosure of the amount of domestic and foreign pre-tax income and income tax expense.” This is insufficient to provide investors with the information needed to properly assess investment risk.

On July 6, 2016, The FACT Coalition submitted detailed comments in response to the Concept Release^v demonstrating the need for additional disclosure of tax strategies of multinational corporations. A copy of those comments is also attached for inclusion in the record.

We will not repeat the entirety of our comment but will highlight briefly three issues that present a powerful case for greater disclosure of international tax strategies used by multinational corporations. In a couple of areas there is additional information that has come to light since we filed our comments on the Concept Release.

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1. *The Rise of Offshore Profits*

We noted the growth in offshore profits among U.S. multinational issuers. In our comment we wrote:

“The role played by international tax strategies and rates on the operations and earnings of many U.S. corporations is enormous and growing. In large part, this trend is due to many large U.S. issuers’ increasing reliance on offshore earnings, cash balances, and tax benefits. For example, a recent report by Citizens For Tax Justice found that offshore earnings held by U.S. corporations had in 2015 reached an eye-popping total of \$2.4 trillion.”

On September 29, 2016, the Joint Committee on Taxation released an updated estimate of U.S. corporate profits held offshore. This latest estimate is \$2.6 trillion^{vi} -- \$200 Billion more than the number we cited and \$300 billion more than an earlier estimate from the IRS.

The importance to investors is that, despite increased scrutiny from policymakers and tax authorities both domestic and foreign, companies are increasing their offshore holdings. At the same time, there is reason to believe that they are not adequately disclosing information for investors about the risk of potential tax liabilities. Whether the withholding of information is willful secrecy or poor judgement in assessing risk, the result is that the current rules do not provide the information necessary for investors to properly assess risk and make informed decisions.

2. *Apple’s \$14.5 Billion Miscalculation, Company Dismissed Earlier SEC Inquiry*

On August 30, 2016, the European Commission announced that it had “concluded that Ireland granted undue tax benefits” to Apple and that Ireland must collect approximately \$14.5 billion dollars from the company.^{vii}

A recent review of Apple’s SEC filings suggests that the potential tax liability from \$215 billion in profits held offshore were not adequately disclosed. Even after a 2013 hearing held by the Senate Permanent Subcommittee on Investigations found that the company paid no taxes to any national government on \$30 billion of profit, there was little in Apple’s disclosures to investors about their tax strategy beyond generic, boilerplate language.

The SEC itself found the information uncovered in the hearing enough of a concern that the Commission wrote a letter to the company asking for additional information. In the June 13, 2013 letter^{viii}, the SEC wrote of Apple’s general statement of risk in their filings:

“These appear to be risks that could apply to any registrant with international operations. Please tell us what consideration you have given to including a more tailored discussion of any specific risks associated with your current tax structure, including any agreements or arrangements that provide material tax benefits.”

On the following page of the same letter, the SEC requests information on a country-by-country basis:

*“To the extent that a material amount of such funds are held in certain countries, **tell us the names and tax rates of such countries.**” (emphasis added)*

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In 2013, the Commission made this formal request of Apple recognizing the material nature of the information, disaggregated by country. The materiality of the information, given the continued growth in Apple's offshore funds, is undeniably greater today.

In their response^{ix}, Apple wrote that they believed the risk was sufficiently described:

"...the Company's existing risk factor disclosure specifically explains that its future effective tax rates are subject to "changes in the mix of earnings in countries with differing statutory tax rates, changes in the valuation of deferred tax assets and liabilities, or changes in tax laws or their interpretation."

Apple did agree to better describe in future disclosures its offshore holdings and tax liabilities but then went on to provide draft language. "[F]ilings," they wrote, "[would be] substantially similar to the following":

"If the Company's effective tax rates were to increase, or if the ultimate determination of the Company's taxes owed in the U.S. or foreign jurisdictions is for an amount in excess of amounts previously accrued, the Company's operating results, cash flows, and financial condition could be adversely affected."

This exchange demonstrates two critically important points when considering new rules for disclosing international tax information to investors. First, the SEC already recognizes that country by country reporting by multinationals of certain profit and tax information can be material to investors. Second, the current rules do not require sufficient disclosure and management is unlikely to voluntarily disclose the information, beyond generic statements, necessary for investors to properly assess risk.

3. Dell's \$28 billion Discrepancy in Valuation

In 2013 shareholders of Dell, Inc. approved a management buyout agreement from an investor group led by Michael Dell. A subset of shareholders dissented from the sale, arguing that the share price was too low.

A resulting lawsuit led to the hiring of two highly respected valuation experts to estimate the company's worth. The court found, the "two highly distinguished scholars of valuation science, applying similar valuation principles, thus generated opinions that differed by 126%, or approximately \$28 billion. This is a recurring problem."^x The discrepancy, in large part, was due to the differing estimates of how to appraise the value of the company's offshore profits given potential tax liabilities.

Central to investors' interests is the value of the company and the returns they receive upon selling their interests. If potential tax liability for offshore profits is either not disclosed or disclosed in a cursory or cryptic manner, investors may wrongly assume a company has engaged in low-risk tax strategies. Without proper information, they cannot credibly assess risk.

4. Improve Disclosure

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Aggregated foreign disclosures are of little use to investors who want to assess the risk associated with aggressive tax strategies. As the international community steps up scrutiny of low-tax and no-tax jurisdictions, country-by-country disclosure of revenue, profit and tax information is essential.

The specific information, disaggregated by country, that is important to disclose to investors includes:

- profit or loss before taxes;
- income tax accrued for the current year;
- revenues from unrelated parties, related parties, and in total;
- income tax paid (on a cash basis);
- effective tax rate;
- stated capital;
- accumulated earnings;
- number of employees; and
- tangible assets other than cash or cash equivalents.

As to the question of burdens on issuers and impediments to disaggregating this information by jurisdiction, it should be noted that the IRS recently finalized a rule^{xi} to require country by country reporting of revenues, profits, taxes paid and certain operations by larger multinational corporations. The European Union has also established new country by country reporting requirements for larger firms doing business in any of the member nations.^{xii}

Increasingly, tax authorities have access to the information. Company management already has access to the information. They only ones without access to the information are those putting their money at risk.

There can be little doubt that the growing use of offshore tax strategies, the international response to rein in aggressive tax avoidance and the potential tax liability for corporations engaged in these practices makes the information material for investors. The SEC has already recognized this to be true in the case of Apple. As such, the Commission should take immediate steps to require disclosure of this critically important information.

Thank you for your consideration of our comments. For additional information please contact Gary Kalman at gkalman@thefactcoalition.org.

Sincerely,

The FACT Coalition

ⁱ Securities and Exchange Commission (SEC) Proposed Rule on Disclosure Update and Simplification, [Release No. 33-10110; File No. S7-15-16]

ⁱⁱ For more information and a list of member groups, see website thefactcoalition.org

ⁱⁱⁱ SEC , Business and Financial Disclosure Required by Regulation S-K, <https://www.sec.gov/rules/concept.shtml>, April 2016

^{iv} [Toward a Sustainable Economy: A Review of Comments to the SEC's Disclosure Effectiveness Concept Release](#), September 2016

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^v SEC, Comments on Business and Financial Disclosure Required by Regulation S-K, Financial Accountability and Corporate Transparency (FACT) Coalition [Comments](#), July 6, 2016

^{vi} [Letter](#) to House Ways and Means Chairman Brady and Ranking Member Neal from the Joint Committee on Taxation, September 29, 2016

^{vii} [Press Release: State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion](#), European Commission, August 30, 2016

^{viii} [Letter](#) from SEC to Peter Oppenheimer, Senior VP and Chief Financial Officer, Apple, Inc., June 13, 2013

^{ix} [Letter](#) from Apple's Senior VP and CFO Peter Oppenheimer to the SEC, June 24, 2013

^x [Decision in In Re Appraisal DFC Global Corp Consolidated C.A. No. 10107-CB](#), In the Court of Chancery in the State of Delaware, July 8, 2016

^{xi} [IRS Bulletin 2016-29](#), Country by Country Reporting, July 18, 2016

^{xii} [EY Global Tax Alert](#), ECOFIN formally adopts directive on country-by-country reporting in the EU, May 25, 2016