CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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International Integrated Reporting Council
Submitted via website: www.theiirc.org/consultationdraft2013

Re: Consultation Draft of the International <IR> Framework

To Whom It May Concern:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

To achieve this objective it is an important priority of the CCMC to foster transparency in public companies' public disclosures, in order to provide investors with useful information for making decisions about their investments or potential investments. The CCMC welcomes this opportunity to comment on The International Integrated Reporting Council's ("IIRC") Consultation Draft of the International <IR> Framework (the "Framework").

Capital follows confidence, and investor confidence is generally highest in companies and markets that provide investors with accurate, timely, relevant, and decision useful information. Therefore, CCMC appreciates the IIRC's efforts to reconsider the current state of public company reporting, with an eye toward improving investors' access to information that is useful to them in making investment decisions. Ultimately, we believe that efforts to improve investors' access to critical information about their investments will ensure that capital will be put to its highest and best use, and that investors will retain confidence in the efficiency and integrity of the public company capital markets.

The CCMC agrees with the Framework's acknowledgement that investors themselves can and should help companies to determine which information is most

useful to them. Because reporting should reflect the legitimate needs of the broad base of investors, we agree that companies should engage in robust communications with investors and should regularly assess their reporting practices in relation to investors' needs.

We have concerns and considerations that we believe the IIRC should keep in mind in order to ensure that the Framework's central mission is furthered in an effective manner:

1. The Framework should be sensitive to companies' need to comply with existing laws and applicable regulations, including existing legal definitions and usage of "materiality," in evaluating their disclosure obligations;

2. The Framework is comprised primarily of amorphous statements of principle in setting out disclosure guidelines, with the resulting ambiguity in reporting requirements potentially exposing companies to liability for failing to live up to vague disclosure obligations;

3. Consistent with the central goals of the Framework, as well as with the current requirements under the law in the US, reporting should fulfill the legitimate needs of a company's investor base, and should not be dictated by a narrow, outspoken minority of investors or small group of special interest activists, who may seek to further interests other than those of the company and its shareholders generally; and

4. Any new approach to overhauling public company disclosures should be implemented with the goal of keeping information timely and relevant and resolving the existing problem of "regulatory overload." Over the course of time, the size of proxy statemetns has exploded with the effect that investors are bombarded with too much information for investors to evaluate or digest. Some of this overload is caused by obsolete disclosure requirements and irrelevant information that should be removed during periodic reforms to ensure transparency that is useful and clear for decision making by investors.

These issues are discussed in greater detail below.

Discussion

1. **The Framework should be sensitive to companies' need to comply with applicable regulations, including existing definitions of "materiality," in evaluating their disclosure obligations.**

Companies are subject to existing legal standards for public disclosure, including definitions of "materiality" developed over time by the courts and by regulators. For example, under the current public company reporting regime in the United States, information is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of the information made available" (emphasis added).[1] Further, the U.S. Securities and Exchange Commission has provided substantial guidance on "materiality" as it applies to both financial and non-financial disclosures.[2] Any new approach to corporate disclosure should take into account existing legal requirements that apply to companies. Further, while we believe it is appropriate for disclosure requirements, including concepts of "materiality" to evolve, it is important that it does so in an effective manner to retain its focus on information that is important to shareholder investment decisions. It is equally important to avoid applying multiple and potentially conflicting definitions of "materiality," which could lead to investor confusion.

2. **The Framework is comprised primarily of amorphous statements of principle, with the resulting ambiguity in reporting requirements potentially exposing companies to liability for failing to live up to vague disclosure obligations.**

The Framework's aspirational approach to reporting provides companies with little certainty concerning what amount of disclosure would be considered sufficient to meet the requirements of the Framework, and when their obligations have been

[1] *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[2] *See* Staff Accounting Bulletin No. 99 – Materiality. 17 CFR Part 211 (Amended) Staff Accounting Bulletin Series § M, Topic 1.

met. While it appears that the IIRC has taken this approach in order to solicit a holistic presentation of the company, its business, and its relationship to the six capitals defined in the Framework, we believe that companies must be given some certainty about the extent of disclosure that will be required in order to achieve compliance with this Framework. If boundaries are not established, companies that agree to adopt this reporting Framework will not be able to confirm that they have met their obligations, opening them up to ever-expanding demands from self-proclaimed stakeholders. This exposes reporting companies to potential liability for failing to adhere to fulfilling amorphous disclosure obligations contemplated by the Framework. Thus, the lack of practical targets will ultimately undermine the Framework's mission to increase the availability of information about companies and their ability to create value.

3. **Consistent with the central goals of the Framework, as well as with the current requirements under the law in the U.S., reporting should fulfill the legitimate needs of a company's investor base, broadly, and should not be dictated by a narrow outspoken minority of investors or stakeholders.**

A relatively small number of narrowly interested shareholders in the U.S. have in recent years sought drastically increased corporate disclosure on narrow issues and interests, which are not shared by investors broadly. For instance, between 2006 and 2013 (through June 2013), 261 votes on companies' political spending and/or companies lobbying practices disclosure and related actions have been held among Fortune 250 companies. These proposals have averaged only 19.95% support.[3] Moreover, with the exception of an outlier 2006 vote at one company that was supported by the company's management, not a single one of these 261 proposals has been supported by a majority of votes cast.[4] Likewise, 60 proposals during the same period on animal use practices reporting and related actions have achieved average vote support of 4.53%, with no single such proposal gaining the support of 10% of shareholders.[5] We believe that these examples effectively illustrate that shareholders, broadly, do not find information of the sort described above to be decision useful

[3] Source: Manhattan Institute Proxy Monitor Data, available at http://www.proxymonitor.org/

[4] *Id.*

[5] *Id.*

information. Accordingly, a reporting regime that would compel all companies to report this type of information, would not appear to be advancing legitimate shareholder interests.

A related issue concerns the requirements of Sections 3.16[6] and 4.28[7] of the Framework, which appear to provide that companies' compliance with the Framework will be judged in large part by their responsiveness to stakeholders' "legitimate needs, interests and expectations." As demonstrated above, many stakeholders view companies' communications to be a forum for stakeholders that have little or no interest in investment decision making. We are concerned, in particular, that narrowly interested constituencies may seek to exploit these requirements and companies' efforts to respond to legitimate information needs to the detriment of shareholders broadly. Given that the Framework is intended primarily for shareholders, it is important that the Framework explicitly reflect that disclosures—whether or not they are requested by or useful to another stakeholder group—must benefit shareholders broadly. In doing so, the Framework must accept that there are limits to what constitutes a "legitimate" stakeholder advancing "legitimate" expectations or interests, and that a given stakeholder must not be able to simply assert the legitimacy of its interests.

4. Any new approach should be implemented with the goal of improving the existing problem of "regulatory overload," by keeping information timely and relevant and avoid bombarding investors with irrelevant or obsolete information that investors may be unable to digest or evaluate.

Even under current requirements in the U.S., some disclosure documents—noteably the proxy statement—already suffer from "information overload." For instance, in the five years between 2006 (when the SEC drastically expanded proxy statement disclosure requirements) and 2011, the average length of proxy statements

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[6] Framework Section 3.16 ("An integrated report enhances transparency and accountability, which are essential in building trust and resilience, by disclosing…How key stakeholders' legitimate needs, interests and expectations are understood, taken into account and responded to." (emphasis added))

[7] Framework Section 4.28 ("An integrated report contains qualitative and quantitative information about performance, including… The state of key stakeholder relationships and how the organization has responded to stakeholders' legitimate needs, interests and expectations" (emphasis added))

filed by Dow 30 companies in the United States increased 54%, from 46 pages to 71 pages.[8] In some cases, there is simply too much information for investors to digest. Accordingly, it is important that the Framework is developed and implemented in a way to ensure that corporate disclosures focus on the most important information, and avoid piling on additional reporting requirements, which are not considered material to the "reasonable investor," or broader investor base.

Along the same lines, under regulatory requirements in the U.S., companies are not permitted to bury or obscure information deemed material by regulators and the courts amid other, non-material disclosures. Specifically, under the "buried facts" doctrine, a disclosure is deemed inadequate if it is presented in a way that conceals or obscures the information that is required to be disclosed, as may occur when a fact is hidden in a voluminous document or is disclosed in a piecemeal fashion.[9] To the extent that reporting in accordance with the Framework would result in companies disclosing large amounts of information that are not considered material under the existing disclosure regime,[10] companies may have inconsistent compliance obligations.

Conclusion

The CCMC shares the IIRC's interest in overhauling the outdated public company reporting regime, in an effort to improve investors' access to information that they, the investors, believe is useful to their investment decisions. We believe it is critical that the concerns and considerations discussed above be addressed for the Framework to adequately address companies' and shareholders' legitimate investment information needs without adding further unnecessary complication to the public company reporting regime, making public company disclosures a forum for narrow interests, and potentially subjecting companies to liability.

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[8] *See* Gregory, Holly "Innovations in Proxy Statements" Weil Gotshal and Manges LLP Opinion (July/August 2012). *Available at* http://www.weil.com/files/upload/July-August2012_Opinion.pdf.

[9] *See Werner v. Werner*, 267 F.3d 288, 297 (3rd Cir. 2001) *citing Kas v. Financial Gen. Bancshares, Inc.*, 796 F.2d 508, 516 (D.C.Cir. 1986).

[10] The Framework's allowance in Section 3.29 and elsewhere that disclosures should be "concise" does not reduce this concern, as the Framework is calling for disclosure of a large volume of information that is not "material" as that term is applied in the current US reporting regime.

We thank the IIRC for this opportunity to provide comments on the Draft Framework and would be happy to discuss our comments further with the appropriate staff.

Sincerely,

Tom Quaadman