Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

July 21, 2016

The Honorable Mary Jo White, Chair
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar

Securities and Exchange Commission (SEC)
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Comment on modernizing business and financial disclosure requirements in Regulation S-K (File Number S7-06-16)

Dear Chair and Commissioners:

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, welcomes this opportunity to submit comments on modernizing business and financial disclosure requirements in Regulation S-K. CCSI strongly supports greater disclosure of public policy and sustainability matters. Evidence is emerging that environmental, social, and governance (ESG) concerns are of rising importance for investors,[1] and should be considered material.[2] In this submission, we would like to bring to the SEC's attention a specific public policy issue that is important to informed voting and investment decisions: land tenure risks when investments occur in countries with weak or transitioning land governance systems.

Land acquisition, land tenure risk, and investment

In recent years, high demand for minerals, energy, timber, and agricultural products has resulted in sustained interest in the acquisition and use of land by private companies for natural resource investments.[3] Such investments have the potential to accelerate sustainable

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[1] *See e.g.*, Ernst & Young LLP, *Tomorrow's Investment Rules 2.0*, 2015 ("Tomorrow's Investment Rules 2015"), at 19, available at http://www.ey.com/Publication/vwLUAssets/EY-tomorrows-investment-rules-2/$FILE/EY-tomorrows-investment-rules-2.0.pdf(a survey of more than 200 institutional investors around the world found that "...almost two-thirds of respondents say companies do not adequately disclose information about ESG risks, and nearly 40% call for companies to do so more fully in the future."). The SEC itself has also noted that "[s]ome investors and interest groups also have expressed a desire for greater disclosure of a variety of public policy and sustainability matters, stating that these matters are of increasing significance to voting and investment decisions." Securities and Exchange Commission, "Concept Release" (2016), at 204, available at https://www.sec.gov/rules/concept/2016/33-10064.pdf.

[2] See, for example: International Corporate Accountability Roundtable, "Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure", at 16, available at http://icar.ngo/wp-content/uploads/2013/10/ICAR-Knowing-and-Showing-Report4.pdf.

[3] *See e.g.,* Global Reporting Initiative, "Land Tenure Rights: The need for greater transparency among companies worldwide" (2016), available at https://www.globalreporting.org/resourcelibrary/GRI-G4-Land-

development and provide benefits to countries receiving the investment. But in many recipient countries, conflicts over land tenure[4] and related issues frequently emerge when land occupied by communities is subsequently allocated to an investment project.[5] Such conflicts, which can lead to "land tenure risks" for companies, are particularly prevalent and costly in agriculture, forestry, mining, onshore oil and gas, infrastructure, and some renewable energy and carbon finance projects, owing to the land-dependent nature of those sectors.[6] U.S.-domiciled companies are among the most prominent outward investors in land.[7]

Because tenure-related disputes can greatly increase financial risks for companies in land-dependent sectors,[8] this issue is of great relevance to informed voting and investment decisions. These risks often emerge in the form of opposition to the project from local communities, resulting in losses from delayed operations or even forced withdrawal, as well as loss of reputation that can affect a company's wider operations.[9] These risks may arise from a company's direct acquisition of land, or when a company has acquired a project or operation that is subject to land tenure disputes.[10]

In many documented examples, opposition from local communities based on tenure-related disputes and related land-use conflicts have caused delays, significantly increased project costs, or otherwise affected operations.[11] For example, in 2016, Newmont Mining Corporation—a publicly listed U.S. company—withdrew from a $5 billion copper and gold

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Tenure-Rights.pdf, 5; J.R. Owen and D. Kemp, *Journal of Cleaner Production* 87 (2015), 478-488, 481-486 (explaining characteristics of mining-induced displacement and resettlement); The Munden Project, "The Financial Risks of Insecure Land Tenure: An Investment View", December 2012, 19; Klaus Deininger & Derek Byerlee, "Rising Global Interest in Farmland", *World Bank* (2011), xxv.

[4] Land tenure is defined as "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land". Food and Agriculture Organization, *FAO Land Tenure Studies 3: Land Tenure and Rural Development*, para. 3.1, ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf.

[5] For examples of grievances and conflict that emerge from large-scale land-based investments for agriculture and forestry, see Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, *Land deal dilemmas: Grievances, human rights, and investor protection*, Columbia Center on Sustainable Investment (March 2016), available at http://ccsi.columbia.edu/2016/03/10/land-deal-dilemmas-grievances-human-rights-and-investor-protections/.

[6] *See* GRI, "Land Tenure Rights: The need for greater transparency among companies worldwide" (2016), p. 16; *see also* The Munden Project, "The Financial Risks of Insecure Land Tenure: An Investment View", December 2012, 2; Rachel Davis and Daniel Franks, "Costs of Company-Community Conflict in the Extractive Sector" (2014), https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf, at 37.

[7] For example, according to the Land Matrix, which has documented over 1,000 land deals for "agricultural production, timber extraction, carbon trading, industry, renewable energy production, conservation, and tourism in low- and middle-income countries," the U.S. ranks first for outward investments in large-scale land acquisitions. Land Matrix, "Web of Transnational Deals," available at http://www.landmatrix.org/en/get-the-idea/web-transnational-deals/.

[8] The Munden Project, 2.

[9] Ibid, 9-12.

[10] This might occur through an acquisition of a company or acquisition of an existing operation (including the acquisition of junior miners). For an examination of how land tenure risks can arise in this way in the context of agribusiness investments, see Lorenzo Cotula, Thierry Berger, and Philippine Sutz, *Addressing 'legacy' land issues in agribusiness investments*, LEGEND Analytical Paper 2 (2016), available at https://landportal.info/library/resources/legend-analytical-paper-2/addressing-legacy-land-issues-agribusiness-investments.

[11] Ibid, 2.

operation in Peru following prolonged opposition from the local community on the basis of disputes over land ownership.[12] In 2011, a federal prosecutor in Brazil requested that publicly listed U.S. agribusiness and food company Bunge Ltd cease its operations in Mato Grosso do Sul state due to continuing human rights impacts flowing from a land tenure dispute with the local indigenous community; while the company did not withdraw from the project immediately, it chose not to renew its projects in 2015.[13] Standard and Poor's put metals and mining firm Vedanta[14] on negative outlook in 2012, due in part to "operational risks" flowing from large-scale land disputes, which caused delays and eventual withdrawal from a bauxite-mining project in India.[15]

Land tenure risks can also emerge indirectly—for example, if a publicly listed company procures from suppliers that are themselves experiencing disputes over land tenure. Interest in and understanding of tenure risks throughout the supply chain is growing among companies and other stakeholders.[16] As the Director of Global Workplace Rights for The Coca-Cola Company has explained:

> … there are many factors that can contribute to obtaining or losing [a "social license to operate"]. The respect for land rights (or lack thereof) in the community surrounding supply chain operations, including land acquired by suppliers, [is] one of those factors… respecting local land rights is not corporate philanthropy. It is effective risk management, good business and the right thing to do.[17]

For Tate & Lyle Sugars (T&L), failure to adequately address land tenure risks throughout the supply chain has resulted in legal action being brought against them. In 2013, a group of Cambodian villagers, who claim to have been violently and forcibly relocated from their land to make way for a sugar plantation, brought a case against T&L in the U.K. High Court. They seek compensation from T&L for having purchased and profited from the sugar grown on the property, even though T&L was not involved in the land acquisition.[18] Although T&L is not a U.S. company (it is a subsidiary of major U.S. sugar company

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[12] Catapa, "Background," available at http://www.mining.com/community-opposition-forces-newmont-abandon-conga-project-peru/; http://catapa.be/en/cases/peru/conga/background.

[13] Oxfam Australia, "Still banking on land grabs" (2016), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj238WHhYPOAhUF4yYKHS2RDjEQFggeMAA&url=https%3A%2F%2Fwww.oxfam.org.au%2Fstill-banking-on-land-grabs%2F&usg=AFQjCNHSK1GqEcjNIv1LNu-10TeiJwmoEA&sig2=m7uKS0RTYckBi-8jJ1SR9w, at 2-3.

[14] A subsidiary of Vedanta Resources trades in the U.S. as Vedanta Ltd on the New York Stock Exchange.

[15] The Munden Project, 2.

[16] Global Reporting Initiative, "Land Tenure Rights: The need for greater transparency among companies worldwide" (2016), available at https://www.globalreporting.org/resourcelibrary/GRI-G4-Land-Tenure-Rights.pdf, 11.

[17] Brent Wilton and David Bledsoe, "The role of human rights defenders in promoting corporate respect for land and environment rights" (2015), available at http://www.ishr.ch/news/role-human-rights-defenders-promoting-corporate-respect-land-and-environment-rights.

[18] Business & Human Rights Resource Centre, "Koh Kong sugar plantation lawsuits (re Cambodia)," available at https://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia; Elaine Sun, "Land Grabbing in Cambodia: Redress Found in UK Courts?" (2016), available at http://cjel.law.columbia.edu/preliminary-reference/2016/land-grabbing-in-cambodia-redress-found-in-uk-courts/.

American Sugar Refining (ASR) Group, and is publicly listed in the U.K.), the risk of similar legal actions affecting U.S.-listed companies should be taken seriously.

How land tenure risk should be disclosed

As the above examples demonstrate, tenure-related disputes can create significant financial risks for companies. Due to these risks, investors need consistent, complete, and comparable information about land tenure risks in order to make informed voting and investment decisions.

The importance of land-related issues is reflected in a number of voluntary reporting standards. For example, the Sustainability Accounting Standards Board (SASB) Standards require registrants in the agricultural sector to disclose information relating, among other issues, to Land Use and Ecological Impacts, as well as to the Environmental & Social Impacts of Ingredient Supply Chains.[19] The Global Reporting Initiative (GRI) requires that companies report on operations with significant actual and potential negative impacts on local communities.[20] This involves identifying the "exposure of the local community to the organization's operations due to higher than average use of shared resources or impact on shared resources," which may include land conversion, resettlement from land, and natural resource consumption.[21] Further, GRI has recently released a paper exploring how its G4 Guidelines could be used to support greater reporting on land tenure, given the financial and reputational risks that can arise when land tenure is not adequately addressed, as well as the rising interest of investors in the issue.[22]

Yet voluntary frameworks on public policy and sustainability disclosure have not proven sufficient to ensure that companies disclose the type of information needed for informed investment decisions. **As such, CCSI supports changes to Regulation S-K that would include, among other ESG issues, mandatory line-item reporting on: (1) direct land acquisitions in countries with weak land governance[23] and (2) due diligence regarding land tenure risk tied to supply chains.**

[19] Sustainability Accounting Standards Board, "Agricultural Products", available at https://navigator.sasb.org/consumption/agricultural-products.

[20] Global Reporting Initiative, "G4 Reporting Principles", at 76, available at https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf.

[21] Global Reporting Initiative, "G4 Implementation Manual", at 202, available at https://www.globalreporting.org/resourcelibrary/GRIG4-Part2-Implementation-Manual.pdf.

[22] Global Reporting Initiative, "Land Tenure Rights: The need for greater transparency among companies worldwide" (2016), available at https://www.globalreporting.org/resourcelibrary/GRI-G4-Land-Tenure-Rights.pdf.

[23] Deciding which countries would trigger these new requirements might require development of a prescriptive list of countries, which could be updated periodically. This could potentially be guided by information from the World Bank's Land Governance Assessment Framework (http://goo.gl/PJpiBv) and by using certain dimensions measured in the Worldwide Governance Indicators (http://info.worldbank.org/governance/wgi/index.aspx#home).

Direct land acquisitions in countries with weak land governance

Introducing a mandatory requirement for companies to disclose information on land acquisitions[24] and the circumstances surrounding them[25] in countries with weak land governance, according to a prescriptive threshold, would enable investors to make more informed investment and voting decisions based on comprehensive and comparable information. While CCSI recognizes the importance of the materiality threshold for corporate disclosures, a prescriptive approach is justified for this issue. Prescriptive disclosures can ensure that the information provided by companies is consistent, complete, and comparable, which is essential given the significant financial risks associated with tenure-related disputes.[26]

The design of a disclosure requirement on land acquisition and tenure risks could draw inspiration from how the issue is addressed under the State Department's "Reporting Requirements on Responsible Investment in Burma" issued in 2012.[27] These require U.S. investors in Burma to report on the following:

> 7. Property Acquisition: For any purchase, use, or lease of land or other real property, or rights related thereto, by the submitter (including the submitter's subsidiaries) either (a) valued over $500,000 or (b) larger than 30 acres of land or other real property, provide the information described below. For the purposes of this section, purchase, use, or lease of adjacent or otherwise related land or real property shall be treated as a single transaction and must be reported where the cumulative value of the related transactions exceeds $500,000 or is over 30 acres.
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> a. A concise summary of any policies procedures [sic] used to ascertain land or other real property ownership, use rights, dislocation, resettlement, or other claims and an explanation of how those policies were implemented for each land purchase, use, or lease transaction;
> b. The city/state or province where the land or other real property was purchased, used or leased (e.g., "Myitkyina, Kachin State");
> c. A concise summary of any policies or procedures, including grievance mechanisms, related to the dislocation or resettlement of people with respect to land or other real property and an explanation of how those policies were implemented for each land purchase, use, or lease transaction.
> d. Any financial/material arrangements made to compensate previous users/residents of such land or other real property (other than to the lessor/owner), of which the submitter is aware; and
> e. Any information of which the submitter is aware related to any involuntary resettlement or dislocation of people on land that meets the criteria as specified in question 7.

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24 Land acquisitions would include purchases, leases, or other transactions allowing use of land or real property, either (a) directly transacted by the company with the host government or private property owner or (b) arising through the acquisition of a project or operation for which the use of land is an integral component (such as the acquisition of a mine, plantation, wind farm, or other land-dependent operation).

25 This should include, for example, an explanation of any dispute(s), before or after the land has been acquired, regarding who owns, or has other legitimate tenure rights over, the land in question.

26 Laura Anthony, "SEC Issues Concept Release on Regulation S-K; Part 1" (2016), available at http://securitieslawblog.com/.

27 Department of State, "Responsible Investment Reporting Requirements" (2012), available at http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf.

For Regulation S-K, setting an appropriate threshold for land acquisition that would trigger disclosure requirements would require striking a delicate balance that reflects the substantial risks involved in land acquisitions in countries with weak land governance while also limiting the reporting burden placed on companies.

Land tenure risks arising from supply chains

To ensure that investors have sufficient information regarding land tenure risks that result from a company's indirect use of land through its supply chains, CCSI proposes that companies in land-dependent sectors be required to disclose the due diligence policies they have in place to address such risks. There is precedent for such an approach under U.S. disclosure practice: for example, to address concerns related to certain minerals originating in the Democratic Republic of the Congo, section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* requires "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report…"[28] A requirement to disclose due diligence policies regarding tenure-related risks throughout supply chains of companies in land-dependent sectors would also assist investors in making informed voting and investment decisions.

We commend the SEC on its diligence in reflecting the needs of investors in modernizing business and disclosure requirements under Regulation S-K. We would welcome the opportunity to discuss these issues further at your convenience.

Sincerely,

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[28] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 1502(b).