American Federation of Labor and Congress of Industrial Organizations

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aflcio.org

AFL-CIO

AMERICA'S UNIONS

September 22, 2017

The Honorable Jay Clayton, Chairman
U.S. Securities and Exchange Commission
110 F Street, N.E.
Washington D.C. 20549

The Honorable Kara M. Stein, Commissioner
U.S. Securities and Exchange Commission
110 F Street, N.E.
Washington D.C. 20549

The Honorable Michael S. Piwowar, Commissioner
U.S. Securities and Exchange Commission
110 F Street, N.E.
Washington D.C. 20549

***Re: Human Capital Management (HCM) Disclosures Rulemaking Petition
File 4-711 – 07/06/2017***

Dear Chairman Clayton,

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to express our strong support for the Human Capital Management Petition filed with the U.S. Securities Exchange Commission (the "SEC" or "Commission") by the Human Capital Management Coalition on July 6, 2017.

The AFL-CIO is the umbrella federation of U.S. labor unions, including 56 unions representing 12.5 million members. Union-sponsored and Taft-Hartley pension and employee benefit plans hold more than $667 billion in assets. Union members also participate directly in the capital markets as individual members and as participants in pension plans sponsored by corporate and public-sector employers. Altogether, US workers' pension plans hold over $7 trillion.

The retirement security of our members depends heavily on the efficient functioning of our markets, robust investor protections and strong capital formation. Each of those priorities, in turn, depend on investors having access to the information necessary to make informed decisions.

We have submitted comments to the Commission in the past regarding the importance of clear, consistent and comprehensive disclosure to investors and markets.[1] We have also reported extensively on the importance of strategic Human Capital Management (HCM) as a key driver of corporate performance and an essential indicator of value creation strategy and long-term viability.[2] There is both significant and growing research demonstrating this link as well as clear and growing investor demand for this information, most recently in the form of the petition for rulemaking.

Given the connection to performance and the broad call for disclosure, the Commission should require robust human capital disclosures including, but not limited to, the nine fundamental HCM issue areas identified in the petition. Investors need HCM data to make informed decisions about their investments. HCM data supports identifying long-term investment strategies, stabilizing markets and encouraging employers to invest in their workforces. The Commission should, in the interests of capital formation and efficient markets, as well as for the protection of investors, begin the rulemaking process immediately.

We appreciate the opportunity to comment on this important rulemaking. If the AFL-CIO can be of further assistance, please contact Corey Klemmer at [redacted] or ([redacted].

Sincerely,

Heather Slavkin Corzo, Director
Corporations and Capital Markets
AFL-CIO

[1] See letter to Mr. Brent J Fields, July 21, 2016. Attached as Appendix A; also available at: http://bit.ly/2fxdcLh.
[2] See "Valuing America's Greatest Asset: Corporate Disclosure of Human Capital Management" September 20, 2016. Attached as Appendix B; also available at: http://bit.ly/2ycaDFh.

APPENDIX A

AFL-CIO
AMERICA'S UNIONS

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July 21, 2016

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

Re: File Number S7-06-16, Release Nos. 33-10064, 34-77599
Business and Financial Disclosure Required by Regulation S-K

Dear Mr. Fields,

I am writing to you today on behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO") to provide comments on the Concept Release regarding Business and Financial Disclosure Required by Regulation S-K (Release Numbers 33-10064, 34-77599, the "Release") issued by the Securities and Exchange Commission (the "Commission" or the "SEC") earlier this year. We appreciate the opportunity to add to our previous comments[1] on this important topic and echo the importance of disclosure and the need to protect investors' access to information.

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions, representing 12.5 million union members. Union-sponsored and Taft-Hartley pension and benefit plans hold more than $647 billion in assets. Union members also participate in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. Our members, like many American working families whose retirement savings are invested in the financial markets, share deep exposure to U.S. capital markets and accordingly have a serious interest in the form and content of corporate disclosures.

The SEC's mandate calls on it to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[2] Yet today there is a significant trust deficit between investors and their financial

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[1] Letter to SEC re: Comments on Disclosure Effectiveness Initiative (November 20, 2015). Available at: https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-65.pdf

[2] Securities and Exchange Commission, "What We Do" Available at: https://www.sec.gov/about/whatwedo.shtml

service providers, especially among retail investors.[3] As the federal agency dedicated to investor protection, the SEC must help to restore investor confidence by improving investors interactions with the financial markets. This can, and must, be achieved through better disclosure, enforcement and prevention of abuse.

The Securities Act of 1933 and the Securities Exchange Act of 1934 form the statutory foundation of our capital markets regulation in large part by imposing reporting obligations on issuers. This mandatory reporting is a primary tool by which the government is able to monitor and manage market actors and provides a principal source of liability and enforcement authority. Likewise, it provides the basis on which we as investors are able to make informed investment decisions. The theoretical underpinnings of our economic system depend on investors receiving and utilizing that information when making our investment decisions.

In a disclosure-based regime such as this, quality, quantity and form of disclosure are paramount in establishing its efficacy. Broad-based disclosure can also improve transparency, combat short-termism and build public trust, confidence and understanding of capital markets. Thus this review process provides an opportunity for the Commission to better fulfill each of its mandates. [Q23]

We urge the SEC to consider and incorporate the ideas and specific areas of disclosure discussed below, leverage the full power of available technology to facilitate reporting and access to information, resist efforts to reduce disclosures and redouble its commitment to the protection of investors and to the efficient and productive operation of our capital markets. For all of these reasons, we respectfully submit the following recommendations.

I. ***Disclosure is of paramount importance as a tool for investor protection, corporate transparency and the fair and orderly operations of our markets.***

Most investors come to the market with a considerable informational disadvantage, left to rely on public information and what the company discloses directly. Corporate reporting mandated by federal securities laws is the most important source of information on which we base our investing and proxy voting decisions. Mandatory corporate reporting also largely defines the data set available in the full market ecosystem and, as such, plays a crucial role in a variety of market and social functions. This review process should be used to identify and further reduce informational

[3] CFA Institute & Edelman, "Investor Trust Study" (2013) Available at: https://www.cfainstitute.org/learning/future/getinvolved/Documents/cfa_institute_edelman_investor_trust_study.pdf

asymmetries to enable better investing decisions and improve the overall health and stability of our financial markets. [Q23][4]

A. Disclosure for Whom?

First, the notion that effective disclosure should only be designed for one subset of investors is not supported by common sense, good policy or the law. Many of the prompts in the Release asked about what level of investor sophistication disclosures should be designed for; however, capital markets are public and invite the participation of every type of investor. To protect the full range of investors the Commission should focus, as suggested in the statement submitted by the SEC Investor Advisory Committee (the "IAC"), on retail investors.[5] We are not concerned about excessive disclosure and believe that the effective use of layering, cross-referencing and the like can help any investor easily navigate large amounts of information.[6] By ensuring the least sophisticated investors have the information they need and leveraging effective new methods of accessing, formatting and displaying information the Commission can ensure that all investors, and indeed the market itself, is protected. [Q14, Q16]

Second, the process of price discovery is a complex and essential function in our financial ecosystem on which all market participants rely. To fulfill its mandate of investor protection (as well as its other mandates) through provision of information, the SEC must require disclosure designed for the full range of actors in the financial markets, including investors, academics, analysts, media, and any other party that interacts with disclosure data to enable and support price discovery. Importantly, the effectiveness of various disclosures does *not* depend on every investor reading every piece of information disclosed. Minutia that may be noticed by only a few analysts may nonetheless enter the public discourse by means of that analyst and their reports or publications. [Q17, Q19, Q20, Q23]

Third, our members engage in capital markets significantly through their pension plans. Pensions, with investing horizons that can extend for a generation, have among the strongest mandates for long-term investing. It's clear from practice and outcomes,

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[4] Please note, to facilitate navigating this comment we have included reference to the numbered requests for information as [Q#]; however, these notations are not comprehensive and the comment may be responsive to more questions than are identified by those notations.

[5] Investor Advisory Committee letter to the SEC "Re: File No. S7-06-16, Release No. 33-10064, Disclosure Effectiveness" (June 15, 2016), p.2. ("IAC letter")Available at: https://www.sec.gov/comments/s7-06-16/s70616-22.pdf.

[6] Note, however, that any investor still receiving hard copy disclosure must receive all referenced information. Additionally, any information incorporated by reference or cross-referenced should be treated as "filed with the SEC" for legal and liability purposes.

however, that long-term investing strategies are not supported or incentivized by our system. While there are myriad root causes, the disclosure system offers a real opportunity to shift these dynamics. As the adage goes, "what gets measured gets managed." Excessive focus on short-term performance metrics naturally subordinates longer-term performance and overall financial stability to the detriment of nearly all investors. By including more and better measures of long-term performance, including several discussed below, the SEC can enable us as investors to support and reward long-term value creation and avoid investments that carry hidden risks or create systemic risks.

To be clear, we are not suggesting that quarterly data is not necessary – quite the opposite. Quarterly reporting is vital to identifying trends in these longer-term performance metrics over time. A single annual report would provide far too little information to build a reliable picture of companies' operations. It could also lead to excessive volatility around annual performance reporting as investors, blind-sided by unexpected annual results, rebalance their portfolios in response to unexpected performance reports. Thus quarterly reporting is essential to long-term investing strategies and must be maintained, likely with additional long-term performance metrics such as those discussed throughout this comment. [Q278, Q282, Q283]

B. No Information Overload

Although much has been made of "information overload" there is no problem with excessive disclosure.[7] We do not believe any investors are worse off for access to too much information. Conversely, we believe that additional disclosures tend to provide useful information. The problems with unwieldy corporate reporting lie in the form and style of the disclosure. There is absolutely no need to eliminate data useful to one class of investor for the sake of unburdening issuers. The SEC's mandate is to protect investors, *not* avoid inconveniencing issuers. [Q9, Q16]

The risks of removing potentially important information are significant. It could put uninformed investors at risk, exclude investors from the market entirely for lack of information, disrupt the price discovery process, diminish transparency and confidence in the markets, and increase systemic risk. [Q14, Q15, Q16, Q28]

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[7] CFA Institute, "Financial Reporting Disclosures: Investor Perspectives on Transparency, Trust and Volume," (2013), p.8. Available at: https://www.cfainstitute.org/ethics/Documents/investor-perspectives-on-disclosures.pdf; see also EY, "Disclosure Effectiveness: What Investors, Company Executives and Other Stakeholders Are Saying," (November 2014), p.2. Available at: http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectivenessnovember-2014/$FILE/EY-disclosure-effectiveness-november-2014.pdf

Furthermore, there is already a legal requirement that disclosures be made in "plain English" that requires information disclosed to be presented in a "clear, concise, and understandable manner".[8] All investors would be better served if that requirement was more strictly enforced and closely adhered to and if excessive boilerplate disclosures were addressed so that company-specific risks and information were easier to identify.

There are plenty of possible solutions to the barrage of boilerplate language that bury the useful and unique detailed disclosure that help investors differentiate between potential investments. Item 305, the Quantitative and Qualitative Disclosures about Market Risk, in particular should be required to be tailored to the specific, unique attributes of the business. [Q16, Q149, Q153, Q145-53, Q168]

C. Need for Ongoing Feedback

Engaging with investors and other users of corporate reporting on an ongoing basis would enable the Commission to better understand and manage how corporate reporting works and doesn't work. This could be achieved through instituting a formal system to solicit feedback from users and encouraging those users to raise issues as they occur in real time, as suggested by the Investor Advisory Committee ("IAC").[9] Such a system could also address investor demand for new information on an ongoing basis, as in the case of political spending disclosure. The Commission should also conduct more direct outreach, engagement, focus groups and testing. The "Know Before You Owe" project described below provides a good model. [Q18]

D. Robust Process Required Before Removing Information

We believe any reduction in information available to investors, on the other hand, presents serious threats to investor protection, confidence in our public markets, and the health of our financial system. Because of this, we believe a public notice and comment period is inadequate review for any proposal to reduce required corporate disclosures. Instead we believe there must be a robust process of review before any information is removed. [Q18, Q60, Q79, Q151, Q183, Q191, Q197]

Such a robust process would include testing of new methods and styles of reporting, focus groups on their effectiveness, and independent research and analysis into the market impacts of any changes. Multiple independent focus groups should be assembled to address the various and particular needs of different investor groups, e.g.

[8] 17 CFR 230.421 - Presentation of information in prospectuses. Available at: https://www.law.cornell.edu/cfr/text/17/230.421.
[9] IAC letter, p 9. Available at: https://www.sec.gov/comments/s7-06-16/s70616-22.pdf

retail investors, institutional investors, analysts, etc. Micro- and macro-economic studies are also essential before the Commission moves to, in any way, reduce or eliminate the information available to investors through mandatory corporate reporting.

An example can be found in the "Know Before You Owe" project undertaken by the Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") conducted a review to develop new disclosure forms. That process engaged diverse stakeholders, tested alternatives and solicited feedback through multiple channels from multiple audiences over the course of years.[10] It yielded a "statistically significant improvement" over the original forms.[11] The SEC has the ability to conduct a comparably robust review process before removing any information to achieve "statistically significant" results, and in our view, it must.

The risks associated with the potential removal of critical information do not exist when the consideration is about adding new information. As a result, we do not believe it would be appropriate for the SEC to require further studies and reporting when adopting new disclosure requirements. The Commission already struggles with limited resources and should not create additional demands on those resources when simply requiring additional information from issuers. [Q4]

The same rationale applies to the questions raised about sunset provisions. While it is important to address and adapt to changing market conditions, we do not believe sunset provisions would be appropriate or effective in achieving that. There are already significant hurdles to finalizing a rule at the SEC as evidenced by the still outstanding Dodd-Frank rulemaking provisions. Once a rule is adopted it must be final. Adding obstacles or sunset provisions would unacceptably encumber this process. [Q1, Q2, Q3]

II. Regulation S-K should be revised to ensure that investors and the public receive information that is important to them

The federal securities laws authorize the SEC to adopt disclosure rules to protect investors, promote fair and efficient markets, as well as promote the public interest. This statutory mandate is distinct from the Supreme Court's interpretation of the antifraud provisions of the federal securities laws as requiring disclosure of information that a

[10] *Know Before You Owe,* CFPB (2015) available at: http://www.consumerfinance.gov/knowbeforeyouowe/#2.
[11] *Know Before You Owe,* CFPB (2015) available at: http://www.consumerfinance.gov/knowbeforeyouowe/#20; see also: *Know Before You Owe: Quantitative Study of the Current and Integrated TILA-RESPA Disclosures,* CFPB (2013) available at: http://files.consumerfinance.gov/f/201311_cfpb_study_tila-respa_disclosure-comparison.pdf.

"reasonable investor" could find would "significantly alter the total mix of information" available.[12]

Regulation S-K is an attempt by the SEC to standardize the requirements for production of a significant portion of this information. However, in the several decades since it was first adopted, investors' demands for information have changed. Reasonable investors, more than ever before, want and need broad swaths of information that are simply inadequately addressed by the current Regulation S-K framework. We strongly encourage the SEC to revise Regulation S-K to expand and modernize issuers' disclosure obligations for the 21st Century.

A. Investor Demand—Not Issuer Discretion—Must Determine What Disclosures Are Required

While a conception of materiality is necessary for the functioning of any system of securities disclosure, the definition of what is material under the '33 and '34 Act disclosure system must be driven by the reasonable needs and interest of investors and by the public interest, *not* by issuers' interests. By definition, if investors consider something to be material, the SEC must require its disclosure by registrants.

We are deeply concerned by those who would misconstrue or seek to weaken this obligation.[13] SEC Chair Mary Jo White seems to have offered conflicting definitions of what must be disclosed in her speech to the International Corporate Governance Network earlier this year. She first stated that, using the "'materiality' lens" the Commission must "ensure that our disclosure regime evolves to continue to provide the total mix of information necessary for the 'reasonable investor' whose priorities and investing behavior also continue to evolve." By the end of the speech, however, she suggested that sustainability disclosures are only required if it is "material" to "a

[12] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), at 449. See also, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); see also *Matrixx Initiatives, Inc., et al., v. Siracusano et al*, 131 S. Ct. 1309 (2011).
[13] The Sustainability Accounting Standards Board ("SASB") has done remarkable work engaging issuers to identify "material" industry- and sector-specific key performance indicators. However, SASB has misconstrued what "material" means. Further, we note that adopting SASB's approach wholesale would allow issuers to decide for themselves year-to-year whether SASB's enumerated key performance indicators ("KPI") were material and thus needed to be disclosed. This would leave investors with spotty and inconsistent data and make it more difficult to track a company's performance on those indicators over time.

company's financial condition or results of operations."[14] This narrower definition is far less than what the law plainly requires,[15]

In general, Regulation S-K structures a disclosure system where issuers have general obligations to disclose material information, and specific requirements to disclose information whose disclosure the Commission finds to be *per se* in the interests of investors and the public.

However, this system has not kept pace with developing investor understanding of what information is relevant to investor decisions. One area where the disclosure system has not kept up with investor demand for information that is of particular importance both from an investor and a public interest perspective is the area sometimes referred to as "environmental, social and governance" or "ESG" issues. In this area, unlike other areas of issuer disclosure, the decision as to what to disclose is left almost entirely up to issuers to determine. The lack of *per se*, line item disclosure requirements in the area of ESG has meant, in effect, that issuers have excessive discretion to determine what information is disclosed to investors.

In the ESG area, and in other disclosure categories, the Commission should make a greater effort to seek to understand what investors consider to be material. The Commission should do so by soliciting direct input from diverse investors, among other things. This should hold true with issues ranging from international tax obligations, to human capital disclosures, to corporate political spending, and beyond.

B. The SEC Should Retain the Existing Framework for Required Reporting Pursuant to Item 303 (Management Discussion and Analysis)

The Release also sought information about the different, and relatively narrow, materiality standard specifically in the context of Item 303, Management Discussion and Analysis ("MD&A"). We do not believe it is appropriate or necessary to change the

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[14] SEC Chairwoman Mary Jo White, "Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability" (June 27, 2016). Available at: https://www.sec.gov/news/speech/chair-white-icgn-speech.html.

[15] For example, the total cost of fines for safety violations at Massey Energy may have seemed immaterial relative to their bottom line but more comprehensive disclosure of those violations may have alerted investors to the company's general disregard for workplace safety and the significant risk of a disaster like the mine explosion that occurred in 2010 precipitating a collapse in the company's stock price. Parker and Mider, "Alpha Natural Agrees to Buy Massey Energy for $7.1 Billion" *Bloomberg* (January 29, 2011). Available at: http://www.bloomberg.com/news/articles/2011-01-29/alpha-natural-agrees-to-buy-massey-energy-for-8-5-billion-in-cash-stock.

current two step test which provides first that disclosure is unnecessary if the relevant trend "is not reasonably likely to occur" and then, second, to the extent that management cannot make that determination, disclosure is required "unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur".

We concur once again with the Investor Advisory Committee in saying that the Commission should not apply the "probability/magnitude" test used by the Supreme Court in Basic v. Levinson to Item 303 as such a change would raise the threshold and thus inappropriately reduce the information available to investors in the MD&A section of corporate reporting.[16] [Q99-102] [Q103, Q104, Q105, Q106]

C. ***The SEC Should Continue with a Mix of Principles and Rules-Based Obligations.***

The Concept Release seeks input about whether reporting obligations should be revised to be more principles or rules-based. Regulation S-K is currently a mix of principles and rules-based obligations. We strongly disagree with commenters who advocate for an exclusively principles-based approach.

"Materiality," the dominant principle in our disclosure regime, defines the floor below which reporting becomes fraudulent. It is the catchall, a backstop, the "at a minimum" safety provision. It is *not* the driving force of our disclosure regime. The '33 and '34 Acts charge the Commission with establishing a disclosure regime to protect investors and our markets. It cannot achieve this by focusing merely on what would constitute fraud.

Instead, the Commission should incorporate the needs of investors and the public in establishing a disclosure framework that requires issuers to provide the information that investors deem important to effectively analyze both the company's current and future performance prospects as well as its impact on broader risk and return considerations within the markets.

Line-item disclosures are irreplaceable tools that allow investors to sort through complex information and measure a company's performance over time and against its peers. Without it, we would be left with a patchwork of incomparable and inconsistent data that would need to be analyzed on a case-by-case basis, far exceeding the

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[16] See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); IAC letter p 8, Available at: https://www.sec.gov/comments/s7-06-16/s70616-22.pdf

resources and capacity of even the most sophisticated investors. Line-item disclosures are necessary to make information provided useable.

Standardized mandatory line-item disclosures also improve competition in the markets by leveling the playing field. Currently high-road companies that provide robust voluntary disclosures may find themselves at a competitive disadvantage to their peers who elect to disclose nothing. For example, consider voluntary reporting on the impacts of climate change. In many cases, the more comprehensive the disclosure, the larger the company's footprint might appear. In this way, the system of voluntary reporting may have the perverse effect of disincentivizing good reporting and disadvantaging rather than rewarding the high-road companies that voluntarily disclose anyway. [Q11, Q37]

Finally, in determining when line-item requirements must be disclosed, thresholds may be useful as a rule of thumb but they should not be available as an absolute exemption or excuse for nondisclosure. As the Staff Accounting Bulletin No. 99 on materiality pointed out nearly 17 years ago, "exclusive reliance on [] any percentage or numerical threshold has no basis in the accounting literature or the law."[17] This must continue to be the case when determining materiality or disclosure requirements. [Q11]

Given the diverse nature of investor and public needs, we urge the Commission to continue to utilize principles-based disclosure obligations where flexibility and adaptability may be more appropriate, and line-item disclosures where consistency and comparability may be more readily necessary. Rather than a one-size-fits-all approach, this combination is far more likely to provide investors and the public with the types of information they seek, in a manner that is most useful to them.

D. The Commission is obligated to promote the public interest.

Beyond and besides whatever is determined to be material, the Commission has the authority and an obligation to require disclosures to protect investors and promote the fair, orderly and efficient operations of our markets. To fulfill those missions, the Commission must go beyond materiality considerations and demand broader disclosures that may be necessary to promote the public interest.

The Securities Act of 1933 (the "'33 Act"), first directs the Commission to "consider or determine whether an action is necessary or appropriate in the public

[17] SEC Staff Accounting Bulletin No. 99 – Materiality (August 12, 1999). Available at: https://www.sec.gov/interps/account/sab99.htm

interest," and then, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[18]

Likewise the Securities Exchange Act of 1934 (the "'34 Act"), which compels issuers to make regular reports, provides that "transactions in securities… are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto… in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions".[19]

The Release itself recognizes that both Acts authorize the Commission to regulate registrant disclosure "as necessary or appropriate in the public interest or for the protection of investors.[20] That language appears throughout several statutes that each endow the Commission with the authority to act.[21]

Consideration of the public interest is thus a statutory obligation that is often overlooked. This review process provides an opportunity to consider how disclosure affects the public interest and how the Commission can better fulfill that part of its mission.

This issue has taken on increased salience as a result of the Supreme Court's decision in Citizens United, in which the Court's majority pointed to the Commission's ability to require public corporations to disclose political spending as a way of protecting the public interest in honest and open elections.

III. There are specific areas where current reporting requirements are insufficient and the SEC should consider issuing new line-item disclosure requirements.

The issues discussed below are of significant importance to the protection of investors, yet are subject to no or inadequate disclosure requirements. The public discourse has also become increasingly concerned with "quarterly capitalism" and the

[18] The Securities Act of 1933, §2(b) Consideration of Promotion of Efficiency, Competition, and Capital Formation. 15 U.S.C. §77b(b). Available at: https://www.sec.gov/about/laws/sa33.pdf.
[19] The Exchange Act of 1934, §2 Necessity for Regulation as Provided in this Title. 15 U.S.C. §78b. Available at: https://www.sec.gov/about/laws/sea34.pdf.
[20] "Business and Financial Disclosure Required by Regulation S-K," File No. S7-06-l 6, 81 Fed. Reg. 78, at 23921 (4/22/2016). Available at: https://www.sec.gov/rules/concept/2016/33-10064.pdfe
[21] "Business and Financial Disclosure Required by Regulation S-K," File No. S7-06-l 6, 81 Fed. Reg. 78, at 23921 (4/22/2016). Available at: https://www.sec.gov/rules/concept/2016/33-10064.pdf.

great costs it extracts from our society and our markets.[22] True long-term investors like pension funds and retirement savers, with investing horizons that extend beyond twelve months, need greater, better and more consistent information in order to effectively manage their investments whether as principals or on behalf of their clients and beneficiaries.

First, additional disclosure is needed on financial strategies that involve stock buybacks, exposure to swaps and derivatives, aggressive tax planning and executive compensation practices, all of which can promote financial engineering over investment in the growth of the company. Second, in view of the growing body of evidence that human capital management strategies can have significant impacts on the economy, the public interest and company performance, we believe new line-items disclosure requirements related to these risks and opportunities are necessary.[23] Third, given the clear and growing demand from investors for environmental, social and governance ("ESG") information, the Commission must begin requiring ESG related line-item disclosures as well as a process to incorporate emerging ESG metrics into disclosure in the future. Finally, investor and public demand for corporate political spending disclosure is unprecedented, the Commission should begin the process of this rulemaking immediately.

Better disclosure of the aforementioned issues, among others, can enable investors to distinguish between investments built on growth and value creation that will perform over the long-term and companies that rely on short-term strategies, financial engineering, externalizing costs and market manipulation. This would provide immeasurable benefits to our financial system and empower investors to play their appropriate role in the markets.

A. Tax strategies and Foreign Subsidiaries

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[22] Neil King Jr, "Hillary Clinton Is Not the Only Critic of 'Quarterly Capitalism'" *Wall Street Journal* (July 31, 2015), available at: http://blogs.wsj.com/washwire/2015/07/31/hillary-clinton-joins-al-gore-prince-charles-and-etsy-in-criticizing-quarterly-capitalism/.

[23] Bernstein and Beeferman, "The Materiality of Human Capital to Corporate Financial aPerformance," Investor Responsibility Research Center Institute (IRRCi) and Labor and Worklife Program at Harvard Law School (April 2015). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605640. See also Zeynep Ton, "The Effect of Labor on Profitability: The Role of Quality" Harvard Business School Technology & Operations Mgt. Unit Research Paper No. 09-040 (July 27, 2009). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269523.

The '34 Act specifically calls on the SEC to "[protect] the Federal taxing power,"[24] yet aggressive tax strategies are responsible for diverting hundreds of billions of dollars in tax revenues from the American public.[25] Additionally, these tax strategies and the use of foreign subsidiaries may be among the biggest and most immediate risks to investors and threats to the public interest today. Companies that rely on tax strategies to drive revenue rather than product development or expansion may face great challenges to their long-term growth and risks to their near term profitability. In spite of this, disclosure in this area is wholly inadequate to distinguish which companies are using what strategies. Additional disclosure must be required.

The scope of this problem cannot be overstated. The amount of U.S. corporate profits held offshore increased from $434 billion in 2005 to $2.4 trillion in 2015.[26] Although the corporate income tax rate in the U.S. is 35%, by shopping for favorable jurisdictions some companies pay as little as 9.8%; an individual company can avoid up to $2.4 billion in U.S. taxes in a single year.[27] Additionally, many companies have pushed for tax breaks when repatriating profits on the grounds that they will create jobs back in the U.S., although those job creation numbers also cannot be verified, even by regulators.[28]

First, we as investors face real, hidden risks related to tax practices; aggressive tax strategies can allow a company to appear profitable while, in reality, its underlying business is unsound. In addition to the questions these strategies raise about long-term viability, companies with aggressive and questionable tax practices likely face near-term threats to their profitability. Potential liability related to changes in tax rules could be massive and could happen very quickly given the intense focus of both U.S. and foreign regulators on this issue.[29] A Credit Suisse report found that for many major companies,

[24] The Exchange Act of 1934, §2 Necessity for Regulation as Provided in this Title. 15 U.S.C. §78b. Available at: https://www.sec.gov/about/laws/sea34.pdf.
[25] Americans for Tax Fairness, "Chart Book: Offshore Corporate Taxes, Profits & the Competitiveness of the U.S. Tax System" (May 2016) p.3. Available at: http://www.americansfortaxfairness.org/files/ATF-Chartbook-Offshore-Corporate-Taxes-Corporate-Profits-Competitiveness-of-U.S.-Tax-System-May-2016-5-5-16-1.pdf.
[26] Americans for Tax Fairness, "Chart Book: Offshore Corporate Taxes, Profits & the Competitiveness of the U.S. Tax System" (May 2016) p.3. Available at: http://www.americansfortaxfairness.org/files/ATF-Chartbook-Offshore-Corporate-Taxes-Corporate-Profits-Competitiveness-of-U.S.-Tax-System-May-2016-5-5-16-1.pdf.
[27] Duhigg and Kocieniewski, "How Apple Sidesteps Billions in Taxes" New York Times (April 28, 2012) available at: http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html?_r=0.
[28] Michelle Leder, "The $104 Billion Refund: The most absurd corporate tax giveaway of 2005" Slate, (April 13, 2006). Available at: http://www.slate.com/articles/business/moneybox/2006/04/the_104_billion_refund.html.
[29] See, for example, Heath Aston, "Chevron hits out at 'tax dodger' claims at fiery Senate inquiry" The Sydney Morning Herald, (November 18, 2015). Available at: http://bit.ly/29LoKYL.

their potential offshore tax liability represents over 10% of the company's total market cap.[30]

There are efforts currently underway in the U.S. to regulate and rein in these practices. International bodies like the OECD and the G20 are actively working on international frameworks to deal with tax dodging.[31] The European Union is already requiring member countries to begin disclosing cross-border tax deals with multinationals, and is considering proposals to require country-by-country reporting of existing and potential tax liability and risks among the 28 member nations and designated tax havens.[32]

Foreign governments are already cracking down. Chevron was hit with a $269 million tax assessment that was upheld in Australian court.[33] The French government is seeking approximately $1.8 billion in taxes from Google's French operations.[34] Existing tax disclosures reveal none of this and in some cases may actually be used to obscure a company's tax arrangements and potential liabilities.

The SEC's mandates compel it to require tax planning and foreign subsidiary related disclosures. Specifically, we believe these must include, though should not be limited to: [Q52, Q53]

- a list of each country of operation and the name of each entity of the issuer group domiciled in each country of operation;
- the number of employees physically working in each country of operation;
- the total pre-tax gross revenues of each member of the issuer group in each country of operation;

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[30] Zion, Gomatam and Graziano "Parking A-Lot Overseas" Credit Suisse, (March 17, 2015). Available at: http://bit.ly/1dzsUSj.

[31] OECD Press Release "G20 leaders endorse OECD measures to crack down on tax evasion, reaffirm its role in ensuring strong, sustainable and inclusive growth" (November, 16, 2015). Available at: http://www.oecd.org/g20/meetings/antalya/g20-leaders-endorse-oecd-measures-to-crackdown-on-tax-evasion-reaffirm-its-role-in-ensuring-strong-sustainable-and-inclusive-growth.htm.

[32] European Commission Press Release "Introducing public country-by-country reporting for multinational enterprises – Questions and Answers" (April 12, 2016). Available at: http://europa.eu/rapid/press-release_MEMO-16-1351_en.htm.

[33] Heath Aston "Chevron hits out at 'tax dodger' claims at fiery Senate inquiry" The Sydney Morning Herald, (November 18, 2015). Available at: http://bit.ly/29LoKYL.

[34] Chris Arnold, "Google's Paris Offices Raided in Tax Investigation" NPR, (May 24, 2016). Available at: http://n.pr/1sOgoGZ

- the total amount of payments made to governments by each member of the issuer group in each country of operation, without exception, including, and set forth according to—
    - total Federal, regional, local, and other tax assessed against each member of the issuer group with respect to each country of operation during the covered period; and
    - after any tax deductions, tax credits, tax forgiveness, or other tax benefits or waivers, the total amount of tax paid from the treasury of each member of the issuer group to the government of each country of operation during the covered period; and
- all corporate subsidiaries, providing the name, location, LEI number, and relation to the parent entity. [Q153, Q200, Q209]

This information reflects some of the best thinking by advocates and experts[35] and is critical for investors to understand how companies are structured and operate and to assess a company's actual potential tax liability, including any operations in jurisdictions with a high likelihood of reforming its tax code in the near future. It also has tremendous implications for the public interest and efficiency and competition in our markets. We concur with both the IAC, the FACT Coalition and Americans for Tax Fairness in calling on the SEC to take immediate action to require disclosure on tax related issues, and specifically the disclosures laid out above.

B. Stock Buybacks

Stock buybacks are another area in need of expanded disclosure. We see them as a symptom of the short-termism discussed throughout this comment and a serious source of risk to our investments. Instead of investing in research, new technologies or a skilled workforce for long-term growth, companies are spending hundreds of billions of dollars each year to prop up their stock prices artificially.[36] [Q199-204]

In 2015, the S&P 500 spent a combined $955 billion on stock repurchases and dividends compared to $763 billion in earnings, meaning these companies returned

[35] The Financial Accountability and Corporate Transparency (FACT) Coalition letter to the SEC, "Re: File No. S7-06-16, Business and Financial Disclosure Required by Regulation S-K" (July 6, 2016). Available at: https://www.sec.gov/comments/s7-06-16/s70616-28.pdf.

[36] David Trainer, "How Stock Buybacks Destroy Shareholder Value" Forbes, (February 24, 2016). Available at: http://www.forbes.com/sites/greatspeculations/2016/02/24/how-stock-buybacks-destroy-shareholder-value/#2c2de0b0800d.

more capital to their shareholders than they earned, leaving no retained earnings for investment.[37] This raises serious questions about long-term shareholder value creation.

Laurence Fink, chairman and CEO of Blackrock Inc., the largest asset manager in the world, shares this concern. In an April 14, 2015 letter to the CEOs of the S&P 500 companies he said large stock buybacks "sends a discouraging message about a company's ability to use its resources wisely and develop a coherent plan to create value over the long-term."[38]

Although Item 703 of Regulation S-K currently requires disclosure of stock repurchases, that information is so minimal that it does not explain how repurchases fit into a company's strategic capital allocation decisions.[39] The relationship between stock buybacks and executive compensation performance metrics such as earnings per share and return on equity is also key information for investors, as these performance metrics may motivate companies to undertake repurchases instead of investing for the long-term.[40] More than half of the S&P 500 companies use earnings per share as a performance metric for incentive-based executive compensation.[41]

For these reasons, we urge the Commission to require expanded disclosure in the following areas:

- the source of funding for the repurchases, including the impact on a company's cash holdings, debt and credit ratings;
- the time frame over which the company expects to buy back its stock and an explanation of the objective of the stock repurchases;

[37] S&P Dow Jones Indices press release dated June 22, 2016: S&P 500 Q1 Buybacks Jump 12%, Available at: http://us.spindices.com/documents/index-news-and-announcements/20160622-buyback.pdf; See also, Wilson, David "S&P 500 Spending on Buybacks, Dividends Exceeds Operating Profit" *Bloomberg* (June 26, 2015). Available at: http://www.bloomberg.com/news/articles/2015-06-26/s-p-500-spending-on-buybacks-dividends-exceeds-operating-profit

[38] "Blackrock CEO Larry Fink tells the world's business leaders to stop worrying about short-term results," Business Insider, from the BlackRock Blog (April 14, 2015). Available at: http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4.

[39] Letter from William J. Klein and Thomas J. Amy to the Division of Corporation Finance (May 12, 2015). Available at: https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-42.pdf.

[40] Alex Barinka, "This Chart Shows How CEOs Get Rich by Dumping on You," Bloomberg News, (July 7, 2015). Available at: http://www.bloomberg.com/news/articles/2015-07-07/ceos-get-pay-boost-too-when-they-give-back-cash-to-shareholders.

[41] Brettell, Gaffen and Rohde, "Stock Buybacks Enrich the Bosses Even When Business Sags," Reuters, (December 10, 2015). Available at: http://www.reuters.com/investigates/special-report/usa-buybacks-pay/.

- an analysis of their expenditures on stock repurchases compared to their spending on research and development and capital expenditures in the management discussion and analysis section of their annual 10-k filings;
- an explanation of the rationale for the stock buybacks when the cost of the repurchases exceeds their net income or cash generated from operating activities during that period; and
- executive compensation performance metrics and their weightings and if those metrics are affected by repurchases.[42]

C. ***Derivatives and swaps exposures***

Derivatives and swaps are yet another source of risk we face as investors and an area in need of expanded disclosure. Many practitioners consider derivative and swaps to be tools to reduce risk; however, in practice these tools more often create and obscure risk. There are too many examples in recent history of apparently stable companies facing massive financial problems over exposure to derivatives. [Q157-Q163]

For example, in 1994, Procter & Gamble, a consumer product company, suffered a $157 million loss upon liquidating two swap contracts, in total a $102 million loss after taxes on its quarterly profits.[43] That same year swaps caused major losses for Gibson Greetings, Inc. and were a critical factor in the outright bankruptcy for Orange County resulting in the largest municipal bankruptcy filing in American history to that point.[44]

In spite of these failures and the multiple governmental investigations that ensued[45] swaps continued to play a major role in companies' portfolios until they again wreaked havoc in the collapse of AIG and Lehman Brothers. Enhanced disclosure would not only provide useful information to investors and parties to swaps but would also ensure that issuers, on a regular basis, were analyzing their exposures.

One potential disclosure item would be credit triggers, i.e. when banks require companies to fully collateralize credit exposures under certain conditions. These

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[42] In a November 2015 letter to the SEC, Sen. Tammy Baldwin, D-Wisconsin urged the SEC to require this disclosure Sen. Tammy Baldwin letter to SEC Chair Mary Jo White, (November 16, 2015). Available at: https://www.baldwin.senate.gov/imo/media/doc/111615%20Letter%20to%20SEC.pdf.
[43] Lawrence Malkin, "Procter & Gamble's Tale of Derivatives Woe," NY Times (April 14, 1994). Available at: http://www.nytimes.com/1994/04/14/business/worldbusiness/14iht-procter.html.
[44] "Two Early Derivatives Blow Up," PBS Frontline (October 20, 2009). Available at: http://www.pbs.org/wgbh/pages/frontline/warning/etc/warnings.html.
[45] Holland, Himelstein and Schiller, "The Bankers Trust Tapes," Businessweek (October 16, 1995). Available at: http://www.businessweek.com/1995/42/b34461.htm

triggers can result in extraordinary cash demands in an instant, creating large liquidity risk. Moreover, because banks enjoy bankruptcy priority on collateral in support of swaps, they are incentivized to exercise rights under credit triggers even if doing so puts the counterparty out of business. Credit triggers have famously resulted in massive, swap-induced bankruptcies, from AIG, to Jefferson County, Alabama, to Enron.[46]

Such risks are highly significant and we as investors, along with companies and regulators, need to understand them. That understanding is virtually impossible when disclosure surrounding a company's derivatives contracts is lacking and when there is limited standardization. Comprehensive disclosure would improve the understanding and pricing of derivatives-related risks by all stakeholders.

D. Sustainability & Public Policy [Q216-223]

Sustainability and public policy are additional areas where there exists significant and growing investor demand for disclosure. This is evidenced by the vast number of signatories to the UN Principles for Responsible Investment as well as the growing adoption of sustainability reporting frameworks like the Global Reporting Initiative.[47]

Environmental, social and governance ("ESG") issues increasingly appear to be useful and important indicators of performance. ESG issues often have material impacts based on quantitative measures like expenditures required or effects on earnings as well as qualitative measures like reputational impacts or impacts on the issuer's consumers' purchasing decisions.[48]

In spite of ESG metrics and issues being a serious source and predictor of risk and returns, there are no standardized required disclosures. That information is essential for both the public interest and the protection of investors. We concur with the recommendation of the Investor Advisory Committee that the Commission should establish an analytical framework to provide guidance to companies trying to conduct this analysis on material ESG issues in their operations.[49] In the interim, the Commission must at least treat ESG sources of risk and return with the same standard of materiality it applies to other sources of risk and return. We note, however, that given

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[46] Wallace C. Turbeville, "Derivatives Innovation in the Era of Financial Deregulation," Demos, p 16. Available at: http://www.demos.org/sites/default/files/publications/Innovation%20in%20the%20Era%20of%20Financial%20Deregulation-%20Derivatives%20report.pdf.

[47] The UN PRI includes 1,500 signatories who collectively manage assets of more than U.S.$60 trillion. These signatories commit to, inter alia, incorporate environmental, social and governance factors into their investment decision-making, https://unpri.org/about

[48] The Commission has noted this possibility in vague terms. See Exchange Act Release No. 61469 (Feb. 12, 2010).

[49] IAC letter, p 8. Available at: https://www.sec.gov/comments/s7-06-16/s70616-22.pdf.

the limited impact of the Staff's 2010 guidance on climate change, this approach will be insufficient over the long-term.

Additionally, we believe the Commission needs dedicated staff trained and tasked to work on these issues. That staff could be instrumental in identifying emerging risks and trends, whether general or specific to an industry. Further, as certain indicators become more established and more widely accepted as material, the Commission would be in a position to move those indicators from "guidance" to specific, mandatory line-item disclosures.

Finally, it is clear that enforcement is crucial. The Commission must review disclosures and take action when reporting is deficient. The negligible impact of the Commission's 2010 Staff Bulletin on the disclosure of climate-related risk demonstrates this without question. In spite of clear guidance from the Commission outlining how climate change may be material to any kind of company, little has changed in the reporting on the issue.[50]

Establishing such processes would help the Commission keep up with evolving market conditions and trends. It would keep the Commission at the forefront of emerging ESG issues rather than trying to catch up once a material risk or trend has already manifested in the market place. Most importantly, this process would help ensure effective disclosure of ESG issues, which in turn can help investors make better investing and proxy voting decisions. [Q220]

E. Political Spending and Lobbying

A diversity of investors has been calling for political spending disclosure for years with substantial and growing evidence of its importance. A rulemaking petition submitted in 2011 by a committee of prominent law professors garnered unprecedented levels of public and investor support, with over 1.2 million comments submitted to date almost entirely supportive of increased disclosure.[51] Those comments came from a range of stakeholders far broader than retail investors; it includes institutional investors, State Treasurers, Members of Congress, Former SEC Chairs and Commissioners, major endowed foundations, public pension funds, and more.[52]

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[50] Gelles, David, "S.E.C. Is Criticized for Lax Enforcement of Climate Risk Disclosure" *NYTimes* (January 23, 2016). Available at: http://www.nytimes.com/2016/01/24/business/energy-environment/sec-is-criticized-for-lax-enforcement-of-climate-risk-disclosure.html?_r=0.

[51] *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities*, available at: https://www.sec.gov/comments/4-637/4-637.shtml.

[52] Comments to the record assessed on 5/3/16. https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.

There is a growing body of research that demonstrates the importance of corporate political spending for investors. One study of over 1,000 S&P firms concluded, "that firms' political spending, in particular contributions to policy makers, at best has an insubstantial impact on their bottom line and more often results in a negative effect on financial performance."[53] Another paper found that "in most industries, political activity correlates negatively with measures of shareholder power, positively with signs of agency costs, and negatively with shareholder value."[54]

Furthermore, the landmark Supreme Court Case *Citizens United vs Federal Election Commission* 558 U.S. 310 (2010), which permitted the flow of unlimited corporate dollars into U.S. elections specifically envisioned a system in which disclosure of political spending protected shareholder interests. "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[55]

Yet disclosure of these issues is still voluntary and leaves us as investors with only a patchwork of information. It is incumbent upon the Commission to take action and require disclosure of corporate political spending. Such disclosure should include, though not be limited to:

- Direct contributions to state-level political candidates, political parties, judicial races, ballot initiatives;
- Contributions to a range of tax-exempt entities such as trade associations and 527 organizations that engage in political activity; and
- Spending on political advertising on public policy issues or to advocate for or against the election of particular candidates.

The disclosure requirements should also be structured to evolve and keep pace with emerging practices around political spending. Countless new vehicles and mechanisms have emerged in recent years to facilitate corporate influence over the governance of public institutions. The rules must ensure that transparency is required even as novel schemes emerge.

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[53] Professor Michael Hadani, SEC comment to file 4-637 submitted 10/13/2011, https://www.sec.gov/comments/4-637/4637-8.pdf.

[54] John C Coates, "Corporate Politics, Governance, and Value Before and After Citizens United," Harvard Law School, Journal of Empirical Legal Studies (July 6, 2012). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128608.

[55] *Citizens United vs Federal Election Commission,* 558 U.S. 310 (2010) at 55.

Investors need this information in order to "hold directors and executives accountable when they spend corporate funds on politics in a way that departs from shareholder interests."[56] Investors also need consistent and comparable disclosures to distinguish between potential investments and monitor ongoing risks. Mandatory disclosure is also important for best-in-class issuers in that it would level the playing field and address any concern that disclosing political spending activities might put the high-road reporter at a competitive disadvantage to its peers.

Although the Commission can't finalize this rule until the next budget cycle, it must begin the preliminary work now.

IV. ***Human Capital Management is an area of great importance to evaluating companies and potential investments but is subject to virtually no disclosure requirements.***

Human capital management ("HCM") is yet another area where we are increasingly finding a significant impact on corporate performance.[57] HCM refers to a set of practices and strategies for how a company recruits, manages and develops its human capital (i.e. workforce). Executives are always quick to say that their workforce is their greatest asset yet rarely offer information on how that asset is maintained, cultivated or grown. Likewise, many companies describe the cost of labor as one of their biggest expenses, yet still offer precious little information on what that cost is comprised of or how it is managed.

Presently, companies must only disclose a single metric regarding their human capital: the number of workers, which is often accompanied by generic statements about the need to attract and retain the best employees. Furthermore, any investment in human capital is buried in the Selling, General and Administrative Expenses ("SG&A") disclosure, undistinguishable from money spent on office supplies or corporate lunches.

That is to say, any investment in human capital is essentially viewed as overhead and not an investment in the firm.

In today's companies, intangible assets like human capital are more important to performance than ever. Over the last century physical assets played a far greater role in creating value and driving performance and thus received substantial attention in

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[56] *File No. 4-637, Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities* (August 3, 2011) https://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

[57] "$2.6 Trillion Investor Coalition Sees Link Between Human Capital Management and Shareholder Return" Engagement Strategies Media. Available at: http://www.enterpriseengagement.org/articles/content/8472962/26-trillion-investor-coalition-sees-link-between-human-capital-management-and-shareholder-return/.

financial reporting. Today, however, intangible assets drive a much greater share of value creation and accordingly require far greater attention in mandatory corporate disclosures.

For all of these reasons, we urge the Commission to require disclosure of HCM related metrics, to consider the various metrics and frameworks being developed by stakeholders and practitioners, and specifically to require metrics including but not limited to:

- Investment in workforce training and education;
- Annual employee turnover, voluntary and involuntary;
- Total amount spent on third-party human resources, both third-party contracts and independent contractor expenditures;
- Labor standards in the supply chain;
- Health and safety violations;
- Gender pay disparities;
- Percentage of employees that are represented by a union;
- Benefits and incentive structures available to employees;
- Strategies and goals related to HCM; and
- Legal or regulatory proceedings related to employee management.

This information would enable investors to make informed investment decisions based on the trends in a company's workforce, and to better assess the competitiveness and productivity of companies. Currently, company disclosures vary greatly, making it virtually impossible to compare employment trends between companies in the same industry.

A. __Number of Employees__

The Commission could address some of the issues raised in this section by expanding on the existing requirement to disclose the number of employees. Specifically, we believe the SEC should require companies to disclose the breakdown of their workforce between foreign and domestic workers (including any countries where it employs a significant percentage of their foreign workers) as well as between full time, part time, contract and seasonal workers, and an explanation of the changes from year to year distinguishing between changes due to attrition, layoffs or outsourcing. [Q54, Q55, Q57, Q58]

The issue of job creation is also significant to us as investors.[58] The U.S. Commerce Department's Bureau of Economic Analysis's data shows that overall, large U.S. corporations shed 655,900 domestic jobs between 1999 and 2013, while creating 4,453,00 overseas.[59] In addition to the systemic risks this creates for the U.S. economy and labor market, many companies receive special tax treatment in exchange for a promise to create U.S. jobs.[60] Thus a company's success in creating jobs in the U.S. may also directly impact that company's tax status and rate. [Q59]

Current reporting is inconsistent and offers little useful comparable information to investors. For example, Microsoft breaks down the total number of employees between domestic and international employees as well as by function.[61] Google and Apple, on the other hand, list only their total worldwide employees.[62] Although Apple used to disclose the breakdown between full-time and contractors, it has elected to stop providing that important information.[63]

Each of these pieces of information would allow us as investors to better assess the scale and viability of a company's operations, track the impact of outsourcing as well as trends in the workforce and the relative competitiveness and productivity of companies. Further, it would allow us to see the impact of subcontracting on a company's operations and identify which companies are creating jobs in the U.S.

B. Diversity and Gender Pay Equity

Diversity and gender pay equity are additional areas where a lack of disclosure has been met with increasing public interest, growing investor demand and research demonstrating the information's importance to corporate performance. For these

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[58] Jia Lynn Yang, "Proposed jobs bill would target foreign outsourcing by U.S. companies" The Washington Post, (February 1, 2012). Available at: https://www.washingtonpost.com/business/economy/proposed-jobs-bill-would-target-foreign-outsourcing-by-us-companies/2012/01/31/gIQAPLHOhQ_story.html.

[59] Employment of U.S. Multinational Enterprises, U.S. Parents and Foreign Affiliates of the Department of Chamber's Bureau of Economic Analysis, (August 2015) p 3. Available at: http://www.bea.gov/scb/pdf/2015/08%20August/0815_activities_of_multinational_enterprises.pdf

[60] Michelle Leder, "The $104 Billion Refund: The most absurd corporate tax giveaway of 2005" Slate (April 13, 2006). Available at: http://www.slate.com/articles/business/moneybox/2006/04/the_104_billion_refund.html

[61] Microsoft 2015 Annual Report. Available at: https://www.microsoft.com/investor/reports/ar15/index.html#investor-relations.

[62] Google 2015 annual report, page 23. Available at: https://www.sec.gov/Archives/edgar/data/1288776/000165204416000012/goog10-k2015.htm. See also Apple 2015 10-k. Available at: http://investor.apple.com/secfiling.cfm?filingid=1193125-15-356351&cik=320193.

[63] Apple 2012 10-k. Available at: https://www.sec.gov/Archives/edgar/data/320193/000119312512444068/d411355d10k.htm.

reasons, we believe this is another subject matter where the Commission should consider required line-item disclosures.

First, public awareness of the problem with a lack of diversity and unequal treatment of women and minorities in corporate boardrooms, management and leadership has grown along with calls for action. Currently women represent less than 20% of directors on the boards of the S&P500 companies.[64] Even Chairwoman Mary Jo White identified broadening diversity on company boards as an important priority.[65] In 2015, women continue to make only 79% of what their male counterparts are made.[66] In spite of public attention to the issue, companies have still done little to correct the wage gap.

Second, investor demand has been building over recent years. Current reporting is seriously lacking and investors are left to rely on spotty and dissimilar information. In response, many coalitions and actions have emerged. The Thirty Percent Coalition was formed to pursue the goal of women, including women of color, holding 30% of the board seats across public companies.[67] The Coalition's members include institutional investors, corporate leaders and public sector allies.[68] Another group of large public pension funds submitted a rulemaking petition seeking uniform disclosures directly from issuers. The petition sought a "chart/matrix" in the proxy statement to show the skills, experiences and attributes required for all directors, plus the qualifications one or more directors must possess to facilitate identification of diverse nominees.[69] Another group of investors petitioned the SEC earlier this year to require companies to disclose the gender pay gap.[70] The Diverse Governance Initiative is yet another example with

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[64] Rachel Feintzeig, "Another Study Shows Little Progress Getting Women on Boards," Wall Street Journal, (June 14, 2016). Available at: http://www.wsj.com/articles/another-study-shows-little-progress-getting-women-on-boards-1465876862.

[65] U.S. Securities and Commission Chair Mary Jo White speech, "Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability," U.S. Securities and Exchange Commission (June 27, 2016). Available at https://www.sec.gov/news/speech/chair-white-icgn-speech.html.

[66] AAUW, "The Simple Truth about the Gender Pay Gap" (Spring 2016). Available at: http://www.aauw.org/files/2016/02/SimpleTruth_Spring2016.pdf.

[67] Thirty Percent Coalition, Homepage, http://www.30percentcoalition.org/

[68] Thirty Percent Coalition, "Who We Are" http://www.30percentcoalition.org/who-we-are

[69] "Petition for Amendment of Proxy Rule Regarding http://www.30percentcoalition.org/who-we-are#faqnoanchorBoard Nominee Disclosure: Chart/Matrix Approach," File No. (March 31, 2015). Available at https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.

[70]PAX Ellevate petition to the SEC, (February 1, 2016). Available at: https://www.sec.gov/rules/petitions/2016/petn4-696.pdf.

growing support aimed at uniform disclosures around diversity in the boardroom and the workplace.[71]

Finally, there is a well-established and growing body of evidence that diversity can positively impact corporate performance. A diversity of perspectives and skill sets on a corporate board can strengthen a companies' financial performance and improve the quality of board decision making.[72] Other studies have shown that companies that empower and advance women are likely to reap the benefits in terms of improved performance and profitability.[73] A Credit Suisse report mapped out management at over 3,000 companies, the "Credit Suisse Gender 3000," and demonstrated that companies with higher female representation at the board level or in top management exhibit higher returns on equity and higher valuations.[74] Conversely, poor performers on the diversity front may face greater risks of law suits, employee turnover, and reputational risk.

Given the clear investor and public interest at stake, we urge the SEC to consider requiring disclosure of the following items:

- Women and minorities on the board or in management;
- Policies or programs on sexual harassment and respecting diversity;
- EEO-1 data;
- Company policy on board diversity;
- Diversity policies and how they are enforced;
- Gender pay gap;
- How search firms are instructed on diversity; and
- Strategies or plans to address diversity issues.

This information would enable us to track progress on expanding diversity and measure companies against their stated goals. It would also allow us to do peer-to-peer

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[71] See UAW Trust Letter to SEC re: Business and Financial Disclosure Required by Regulation S-K (July 15, 2016). Available at: https://www.sec.gov/comments/s7-06-16/s70616-130.pdf.

[72] Carter and Wagner, "The Bottom Line: Corporate Performance and women's Representation on Boards (2004-2008)," New York, Catalyst, (2011). Available at: http://perma.cc/BEE2-ZJMU. See also Rhode and Pakel, "Diversity on Corporate Boards: How Much Difference Does Difference Make?" Delaware Journal of Corporate Law 39 (2014): 377, 394.

[73] Catalyst, The Bottom Line: Corporate Performance And Women's Representation On Boards (2004–2008), accessed July 12, 2016. Available at: http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008.

[74] Credit Suisse Research Institute, "The CS Gender 3000: Women in Senior Management" (2014). Available at https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=8128F3C0-99BC-22E6-838E2A5B1E4366DF.

comparisons to see if there are any high-performers in this space or any companies that fall far outside/behind the norm.

V. Format and Technology

The format of corporate reports and the tools available for accessing them are ripe for progress. We support the continued improvement of tagging and coding of all financial reporting. Effective treatment of data on the back end should enable investors to search, sort and compare data within and between companies, industries and sectors over time. Good data management will also support the Commission's ability to aggregate and analyze data. This builds on the recommendations of the 2007 Advisory Committee on Improvements to Financial Reporting.[75]

As a preliminary matter, it is essential to establish first, that any investor still receiving and relying on paper delivery of corporate disclosures receives all the relevant information whether cross-referenced, incorporated, or otherwise; and second, that all information that is incorporated or referenced is treated as filed with the SEC for legal and liability purposes. With those caveats in place, we believe that there is much to be gained by deploying technology throughout the disclosure system.

Cross-referencing can be a useful tool for organizing disclosures and reducing duplicative information. Any cross-referencing used should be precise, hyperlinked in any electronic version, and use consistently so that the location of information, as much as possible, does not change between issuers or reports. Cross-referencing should also be used where disclosure is not required or duplicative but provides relevant information to a different section of reporting. Use of cross-referencing, however, should never obscure information or detract from readability. And precautions must be taken to ensure that any investor relying on hard copy disclosures can still find all the relevant information in a reasonable manner.

Hyperlinks can also vastly improve the navigation of corporate filings but it is essential that any linked information is treated as "filed with the SEC" for the purposes of legal liability. Additionally, any information that is linked within corporate filings must be stored in EDGAR and readily accessible to investors. External websites and servers are subject to changes outside of the control of the Commission, thus linking to them would jeopardize the reliability and fidelity of the Commission's records. For the same reasons, the SEC should not allow "filed" information to be housed solely on company websites.

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[75] *Report on Review of Disclosure Requirements in Regulation S-K*, Staff of the U.S. Securities and Exchange Commission (December 2013) p26. Available at: https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

Structured data perhaps offers the greatest potential to improve access to information and analysis of our markets. The Commission should increasingly drive registrants towards submitting data in a structured or tagged format. This would enable analysis by investors and third parties that could provide entirely new insights into our markets. It could provide regulators and investors alike with new warning signals or signs of abuse or fraud. The potential of "big data" should not be underestimated and cannot be fully leveraged without consistent line-item disclosures and structured or tagged data.

We also support the Center for Audit Quality's suggestions for improving the search functions on EDGAR.[76] Increasing searchability will improve investors' access to information by providing additional avenues for investors to reach that information. Ensuring that investors have the best possible access to relevant information is essential to the proper functioning of our capital markets.

There is much efficiency to be gained through use of the internet and electronic delivery. However, to protect the interests of investors who rely on paper delivery, the SEC should allow for investors to opt-in to e-delivery. This has the potential to save companies money without jeopardizing the interests or access of investors who depend on non-electronic access to information.

While some steps have been taken to facilitate the presentation of interactive data on SEC.gov, there are substantial opportunities to deliver continued improvement. Understanding and incorporating the growing body of scholarship around user experience would dramatically improve the utility of corporate reporting.

As others have noted, some information lends itself well to graphic presentation. Where possible, reporting companies should use graphics to communicate key trends and practices to investors quickly and clearly. However, those infographics must also be searchable. All reporting companies should be encouraged to present information in alternative formats to support reaching (and effectively communicating with) the broadest possible set of investors.

The potential for technology, properly leveraged, to revolutionize corporate reporting is real. We urge the SEC to embrace this opportunity and seek out new,

[76] Center for Audit Quality letter to the SEC, "Re: The SEC's Disclosure Effectiveness Initiative – EDGAR Modernization Suggestions" (May 29, 2015). Available at: https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-40.pdf.

creative approaches to presenting information. Investors and regulators alike would benefit greatly from real time access to comparable, searchable and sortable data.

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In conclusion, we urge the SEC to take this opportunity to improve the quality and quantity of information available to investors and to push back on efforts from the issuer community to reduce the information available to investors. If we can provide any other information please contact Corey Klemmer at (202)xxx-xxxx.

Sincerely,

Heather Slavkin Corzo, Director
Office of Investment

HSC/sdw
opeiu #2, afl-cio

APPENDIX B

Valuing America's Greatest Asset:

Corporate Disclosure of Human Capital Management

AFL-CIO

AMERICA'S UNIONS

September 20, 2016

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September 20, 2016.

Introduction

"Our people are our greatest asset." The phrase has been repeated by countless executives across corporate America.[1] The practical reality is obvious: given rising productivity across all sectors, the human capital of any firm is increasingly responsible for creating value for the company and its customers and generating returns for its shareholders. Simultaneously, companies frequently identify the cost of labor as one of their biggest expenses.

Human capital management ("HCM") – which includes talent attraction and retention, training, compensation, safety and health, and workforce composition, among other things – addresses the management and allocation of these significant resources with the attendant opportunities and risks.[2] In spite of this, corporate reporting requirements on HCM are virtually nonexistent. There is only one relevant metric: the number of workers a company employs.[3] Wages are incorporated into accounts payable and any investment in the workforce is rolled into "Selling, General and Administrative Expenses", indistinguishable from overhead expenses like corporate lunches and office supplies. In 2018, pay ratio disclosure will begin to provide a window into some additional HCM practices.[4] This will provide useful information for investors to evaluate pay practices but much more is needed.[5]

The available information is insufficient for investors to distinguish companies strategically and effectively managing their human capital. Investors need this information to make fully informed investment decisions, minimize HCM-related risks and drive long-term value creation at their portfolio companies.

A growing body of evidence demonstrates that HCM is integral to company performance. Disclosure will help develop best practices, which may yield a motivated workforce likely to be more productive and innovative, which, in turn drives down costs related to recruitment, training and retention.[6] Conversely, companies less effective at HCM are likely to have additional recruitment costs, less committed and effective workers who leave more often, and increased operational, reputational and legal risks.[7]

Given the evidence, many institutional investors are seeking more information about how companies manage their human capital. These investors view employees as assets worth developing, as opposed to costs in need of containment and recognize the risks and opportunities embedded in HCM and thus the need for greater disclosure. The Securities and Exchange Commission (the "SEC") has an important opportunity to address these information gaps as part of its ongoing Disclosure Effectiveness Review.

This report will consider HCM disclosure in the context of the current US disclosure regime and the SEC's Disclosure Effectiveness Review, examine why HCM is important to investors, review the current state of HCM analysis and disclosure, and finally consider a set of proposals and potential metrics for tracking HCM.

US Disclosure Regime

SEC Authority and the Disclosure Effectiveness Review

Mandatory corporate reporting underpins the entire US securities regulation regime. Compelled by both The Securities Act of 1933 and the Securities Exchange Act of 1934 (together the "Acts"), reporting is the principal tool by which the government is able to monitor and manage public companies, and in turn the fairness and efficiency of our markets. Reporting is also one of the primary sources of liability and enforcement authority. Furthermore, the theoretical underpinnings of our economic system depend on investors receiving and utilizing relevant information to make informed investment decisions.

The SEC's ongoing Disclosure Effectiveness Review is ostensibly aimed at "modernizing" our disclosure regime; however, at times it appears intended to limit investors' access to information, which undermines the Commission's core purposes of investor protection and facilitation of capital formation. Broad-based disclosure improves transparency and builds public trust, confidence and understanding of capital markets. Furthermore, minutia found in corporate disclosures may enter the public discourse and support the process of price discovery through many diverse channels.

Currently, the determination of what must be disclosed is based on a hybrid system. It is principally a rules-based system, while the principle of materiality acts as a catch-all by setting a floor below which reporting becomes fraudulent.[8] Line-item disclosures provide investors with vital consistency and comparability between companies and over time. Without line-item disclosures, investors would be left with a patchwork of data that would need to be analyzed on a case-by-case basis. In an increasingly data-driven world, the importance of consistent and comparable data points cannot be understated. Applying big-data analytics to robust, structured corporate disclosures would introduce a new era of insight and understanding of our public markets.

Materiality, on the other hand, provides essential flexibility to the disclosure framework. As defined by the Supreme Court, material information includes anything that would "significantly alter the total mix of information" available to a "reasonable investor".[9] This definition appropriately determines what information must be disclosed with reference to the needs and interests of reasonable investors.[10] It also allows information not yet recognized by the rules to be identified and included in reporting by the issuer community in a way that protects investors and may help the SEC organically identify new areas in need of specific disclosure requirements.

In order for materiality to fulfill this important function, however, the concept must be applied equally to financial and non-financial information. There are some who would narrow the focus to metrics and information that directly impact "a company's financial condition or results of operations".[11] Restricting the definition in this way impermissibly and substantially changes the definition laid out by the Supreme Court and excludes information that has serious implications for investment outcomes.

For example, large institutional investors (i.e. "universal owners"[12]) may need disclosures necessary to allow them to assess the systemic impact of corporate practices. Investors use ESG information to identify risks and opportunities for their businesses as well as to assess management's judgement and performance. These issues impact their valuation calculations, their buy/sell decisions and their voting decisions.[12b]

Further, the growing market for "socially responsible investing" strategies relies on environmental, social and governance information for making investment decisions. By 2014, more than one in six dollars – over $6.5 trillion – under professional management in the US was invested according to SRI strategies.[12c] Additionally, more than 1,500 investors, representing more than $60 trillion in assets under management, have signed onto the United Nations Principles for Responsible Investment.[12d]

As a final example, information that may not result in an immediate financial impact for an issuer may still serve as important risk indicators, as was the case with the Massey Energy Upper Big Branch disaster, discussed below, which precipitated a total collapse in stock price. [13]

Both materiality and line item disclosures are essential to an effective disclosure regime. Materiality provides invaluable flexibility and adaptability and allows management the discretion to ensure disclosures provide investors the "total mix of information." There is some information, however, that is too important to be left to ad hoc, discretionary determinations by individual companies. Line item disclosures are necessary to ensure such information is consistently and reliably available to investors. There are currently several areas of disclosure that should be subject to increased line item disclosures, some of which are discussed below.

In order to fulfill its mission to protect investors, promote the fair, orderly and efficient operations of US markets, facilitate capital formation and act in the public interest, the SEC has both the authority and the obligation to require disclosures that support informed investment decisions by all types of investors.[14]

ESG Disclosures: Important but Lacking

Although the SEC has always struggled with the treatment of environmental social and governance data ("ESG"), the demand for and importance of that type of disclosure has grown for decades. ESG issues have repeatedly been shown to affect firm performance as well as provide useful indicators of risk and opportunities not revealed by more traditional financial metrics.[15]

Environmental disclosures provide a good model for how ESG metrics can enter mainstream investments. For decades, socially concerned investors and advocates have sought better disclosure of environmental performance as the risks and opportunities posed by climate change have become more apparent. [16] Investor advocates paved the way for the SEC guidance issued in 2010, which stated explicitly that climate change is material, companies must report on how climate change may affect their business, and offered several examples of how this might be the case.[17] It is worth noting here, however, that without meaningful allocation of SEC resources, here in the form of staff education and enforcement of disclosure requirements, the impact of the SEC's guidance has been minimal.

This report seeks to elevate consideration of HCM information and metrics. Social indicators often receive the least attention of ESG issues. The attention social indicators do receive is typically focused on human rights violations in the supply chain, safety and health violations that result in substantial payouts, and, perhaps, major labor disputes.[18] This overlooks the considerable scope of a robust HCM strategy. HCM involves the significant outlay of firm resources, both in the form of wages and benefits as well as the allocation of human capital. As such, it is an area where investors have a growing need to understand how those assets are being managed and developed.

The next section will examine the case for HCM disclosure, what is being done currently and where the disclosure framework might go from here.

The Importance of HCM Disclosure

As defined by one investor group, HCM includes, but is not limited to, "hiring and retention, employee engagement, training, compensation, fair labor practices, health and safety, responsible contracting, ethics, desired company culture, and diversity, both with respect to a company's direct employees and to the employees of vendors throughout the company's supply chain."[19]

Intangibles like human capital have increased consistently as a percentage of overall company value.[20] Furthermore, a growing body of research demonstrates the correlation between superior human capital management and improved firm performance and/or shareholder value.[21]

Given this importance, investors need comprehensive disclosure on human capital and how it is being valued, managed and developed to drive long-term value creation. HCM disclosures will enable investors to make better and more informed decisions by identifying companies strategically building value within the firm and positioned for sustainable success.

A Growing Share of Firm Value

Intangible assets have been growing both as a proportion of firm value and as a target for corporate investments. [22] The value of a firm's human capital comprises an important part of this intangible value not captured by corporate balance sheets. The Financial Accounting Standards Board ("FASB") recognized this when it issued Financial Accounting Statement No. 142: "Analysts and other users of financial statements, as well as company managements, noted that intangible assets are an increasingly important economic resource for many entities and are an increasing proportion of the assets acquired in many transactions. As a result, better information about intangible assets was needed."[23]

The statement itself addressed intangibles like "acquired good will" but clearly fell short. In 2003, 2 years after Statement 142 became effective, "the market value... of US publicly traded companies was five time larger than their balance sheet value... thus, about 3/4 of the value of public companies, as perceived by investors, reflects nonphysical and nonfinancial assets. Much of this huge value constitutes intangibles that are absent from the balance sheet."[24]

Driving Performance

Investors and academics have sought to understand how human capital affects firm value and share performance. In doing so, they have contributed to a growing body of evidence that effective HCM does, in fact, drive performance and financial outcomes.

Dozens of studies have focused on returns on investment in training. Last year, Beeferman and Bernstein contributed substantially to this area of scholarship with a meta-review of 36 studies that analyzed links between training and investment outcomes. Of those, 22 studies concluded that training correlates with superior investment outcomes. The findings extended over multiple decades, countries and industries.[25]

Other studies have found correlations between gender diversity and firm performance. The Peterson Institute for International Economics, for instance, analyzed over 21,000 firms around the world and found that the presence of women in leadership positions corresponded to improved firm performance. "This correlation could reflect either the payoff to nondiscrimination or the fact that women increase a firm's skill diversity."[26] In either case, the upside was statistically significant.

The costs and benefits of employee satisfaction and talent attraction and retention have also been documented. Edmans et al found that employee satisfaction in flexible labor markets, like the US (i.e. where there are low barriers to moving between firms), delivers important benefits in terms of attracting and retaining employees.[27] Further, in 2011 Edmands found that firms with high employee satisfaction - as defined by those on the list of the "100 Best Companies to Work For in America" - outperformed their peers by 2-3% over a 26 year period.[28]

Others have focused on the downside risks of poor HCM. Davis-Blake, Broschak and George found that workplaces that integrated temporary workers with their standard workforce saw worsening relationships with managers, decreased loyalty and increased interest in leaving the company among the standard workforce.[29]

Although this is only a sampling of the research into HCM impacts on corporate performance, the field is limited by the paucity of data available. This reinforces the need for the SEC to mandate better disclosure. Furthermore, given the apparent impact on firm performance and other challenges firms grapple with, like talent attraction and retention, investors need more and better HCM information in order to properly evaluate the management of their investments.

Identifying Risk

Improved disclosure of HCM metrics can also help investors identify serious risks before they materialize. Although the information may not affect share price in the near-term, it could put investors on notice ahead of a serious problem coming to fruition.

Take, for example, the mining disaster at Massey Upper Big Branch where an explosion in one of their mines on April 5, 2010 killed 29 people. It was the worst coal mining disaster in 40 years and precipitated a total collapse in Massey's stock price: shares fell 35 percent in the six months following the accident.[30] Any disclosure of the mine's abysmal safety record would have put discerning investors on notice but there was essentially none.

Leading up to the disaster, Massey's safety violations were egregious. The mine had a history of onsite fatalities,[31] was cited for 1,342 safety violations in the 5 years preceding the accident,[32] including 57 infractions in the months leading up to the disaster.[33] Massey also had a higher than average rate of safety violations categorized as "unwarrantable failures to comply" which indicates willful or gross negligence with respect to mine safety.[34] In 2009 the company paid out $382,000 in fines for "serious unrepentant violations for lacking ventilation and proper equipment plans as well as failing to utilize its safety plan properly." [35]

Altogether, this information illustrates a clear culture of disregard for safety and obvious risks to operations, yet the prospectus filed less than two weeks before the explosion described safety as a top priority:

> "Maintaining focus on high safety standards. We believe a safe mine is a profitable mine. We strive to maintain safe operations and continue to develop and implement new safety improvement initiatives that exceed regulatory requirements... We continually review and update our safety procedures and equipment, and we believe our focus on high safety standards has resulted in fewer injuries and accidents and cost savings related thereto."[36]

Their 2009 10-K, filed just one month before the disaster, made only the following references to worker related safety risks:

> "Relations with employees are generally good, and there have been no material work stoppages in the past ten years."[37]

> "Collectively, federal and state safety and health regulation in the coal mining industry is perhaps the most comprehensive and pervasive system for protection of employee health and safety affecting any segment of industry in the United States... We measure our success in this area primarily through the use of occupational injury and illness frequency rates. *We believe that a superior safety and health regime is inherently tied to achieving productivity and financial goals, with overarching benefits for our shareholders, the community and the environment."*[38]

A few additional sections provided boilerplate disclosures of risks related to the costs and liabilities created by regulation, legal proceedings "incident to [] normal business activities," and the impact of potential closures on existing contracts.[39] These disclosures obscured significant and known risks in Massey's operations. A reasonable investor may not necessarily have engaged the company or divested but any investor armed with the relevant information would have demanded a higher risk premium relative to industry peers with superior safety and HCM practices. Effective HCM disclosure would thereby support improved price discovery and enable investors to better distinguish between potential investments.

Investor Advocacy

In the absence of SEC action, investors, civil society and academia have stepped up to fill the void. These actors have employed a variety of strategies to develop a scholarship specific to HCM and investing, build a framework for reporting and accountability, and actually engage with companies around their HCM practices.

The Human Capital Management Coalition, for example, an investor group led by the UAW Retiree Medical Benefits Trust with over $2.5 trillion in aggregate assets under management, has been working to educate themselves, other investors and the companies they invest in about HCM. The Coalition engages companies with the aim of understanding and improving how human capital management contributes to the creation of long-term shareholder value.[40]

One of its most successful engagements to date has been its discussions with Gap, which have been "constructive and have helped [the Gap] surface new ways of thinking about [its] ongoing investment in [its] people."[41]

In the UK, institutional investors have been pursuing similar goals. This year, a shareholder proposal calling on the board of Sports Direct International PLC to commission an independent review of the company's human capital management strategy and report back to shareholders within six months has already garnered broad support.

In an almost unprecedented public campaign, major asset managers and investors have publicly announced their support for the proposal. Those include L&G Aberdeen Asset Management,[42] Legal & General Investment Management,[43] and the Local Authority Pension Fund Forum,[44] as well as proxy advisory groups such as the Pensions and Investment Research Consultants (PIRC)[45] and Institutional Shareholders Services (ISS).[46]

Other investor groups are getting involved by integrating HCM metrics into their investment models. Socially responsible investment funds that have always engaged on ESG issues are now working to better engage around human capital issues. Traditional investor services firms are also building new algorithms and data sets to scale up their integration of HCM metrics.[47]

Civil society has also been working to fill the void in HCM reporting and accountability. The Society for Human Resource Management has developed a full framework for measuring human capital practices (which go beyond human resource practices to encompass "other work practices and people management strategies that increase organizational performance") and released a report last year benchmarking over 1,200 organizations.[48]

As another example, the Sustainability Accounting Standards Board has worked with key stakeholders to develop comprehensive sector- and industry-specific metrics to report on the full range of sustainability issues, including human capital.

Academics and advocates have also contributed significantly. There are more than can be mentioned here but, by way of example, Zeynep Ton of Massachusetts Institute of Technology, has coined the term and written extensively on the "good jobs strategy." This approach treats employees as an investable asset rather than a cost to be minimized. Her research documents the connection between improved performance, higher profits and the use of good jobs strategies.[49]

Additionally, a report by the Center for American Progress, "Workers or Waste," identified a significant reduction in employer investment in training its employees across corporate America and called for reporting specifically in four areas: training investment, full-time employees, turnover, and third-party contracts.[50]

These diverse actors have been leading the way on understanding and developing clear methods to measure and report on HCM. In order to scale to the level necessary to protect American investors, companies and markets, however, the SEC must get involved.

HCM Recommendations

The SEC has an important opportunity as part of the Disclosure Effectiveness Review (and beyond) to improve the information available to investors in the area of human capital management.

A broad range of information and potential metrics could be included in the area of HCM. As the field develops and disclosures improve, the best form and content of disclosure will become clearer. Some information merits immediate line-item disclosure requirements, while other information should be subject to principles-based standards.

Disclosures should be as consistent and comparable as possible to facilitate benchmarking, peer-to-peer comparisons and tracking of performance over time. Furthermore, whenever possible the data should be structured and tagged to facilitate greater research, analysis, and integration into investment models.

Below we offer several categories of HCM disclosure and explore potential metrics within them.

Workforce Composition

The only presently disclosed metric related to the workforce is "number of employees". This area of disclosure should be expanded to provide more robust data on the composition of the workforce to allow investors to track trends within companies and industries. Specific metrics should allow investors to identify or distinguish between full-time, part-time and seasonal workers, contract workers, and skilled versus unskilled workers as well as the geographic distribution of those workers. Many companies make statements and claim benefits based on job creation numbers; it is important for investors to be able to see where those jobs were created,[51] the types of jobs created, and the tax implications for the company.[52]

The data should also include information regarding pay, benefits and union representation as well as information about violations, fines, settlements and work stoppages. Evidence of improved performance, reduced absenteeism and savings to the company in connection with benefits like onsite child care, for instance, continues to emerge.[53] Expanded disclosure will improve both understanding of these impacts as well as investor's ability to identify companies reaping the benefits of superior strategies.

Workforce composition should also provide demographic data to allow investors to track diversity and pay inequities. Public scrutiny[54] of these issues has increased dramatically as has advocacy and investor engagement. The research and advocacy conducted to date around board diversity is instructive for consideration of diversity across the full workforce.

Evidence increasingly demonstrates that diversity of perspectives and skill sets on a corporate board can strengthen a companies' financial performance and improve the quality of board decision making.[55,56,57] The Thirty Percent Coalition, a group of institutional investors, corporate leaders and public sector allies, was formed to advocate for increasing the number women on corporate boards.[58] Multiple investor groups have petitioned the SEC in recent years seeking better information on board diversity and the gender pay gap. [59]

These are examples of the types of information regarding the composition of the workforce that investors need in order to effectively evaluate the strategy, outlook, and performance of the companies in which they invest.

Talent Attraction, Development and Retention

Talent attraction, development (i.e. training) and retention may be the clearest opportunity to measure return on investment in the workforce. Human resource departments have long recognized the costs associated with attracting a qualified talent pool, high turnover and repeating trainings. The threat of knowledge-drain is often addressed at the executive level through succession planning, non-compete clauses, and delayed vesting of incentives, yet investors receive no information about a company's risks or mitigation strategies for losing key talent at the firm-wide level.

Metrics in this area should include, though not be limited to, recruitment costs, applications per position, investment in workforce training and education, training participation rates, promotion rates (with demographic information included), absenteeism rates, and voluntary and involuntary annual employee turnover. Investors equipped with these disclosures would be better able to pick companies and investments with stable and sustainable staffing.

Employee Engagement

Employee engagement has gained increasing attention from the corporate world in recent years.[60] According to a Gallup research report that examined nearly 50,000 work units, units in the top quartile for employee engagement outperformed units in the bottom quartile by 10% on customer ratings, 22% in profitability, and 21% in productivity. The highly engaged units also showed reduced turnover (25% in high-turnover organizations, 65% in low-turnover organizations), shrinkage (28%), absenteeism (37%), safety incidents (48%), and quality defects (41%).[61]

Metrics in this area could include employee assessment of leadership, employee engagement scores, survey participation rates, incentive structures for employees and management awards for employee engagement or satisfaction. As disclosure in this area improves and companies compete on these metrics, best practices will emerge.

Health

Better and more consistent, comparable disclosure of the traditional areas of concern – workplace health and safety, recordable injury rates, job related injuries and illnesses, past fines, settlements and violations – would help investors to spot the kinds of issues identified in the Massey example above. Additionally, programs that promote work-life balance and stress reduction may support talent retention, engagement and productivity. Disclosures in this vein will similarly aid investors in identifying companies strategically managing their human capital.

Returns on HCM Investments

Finally, investors need metrics that show the strategy, goals and oversight of HCM programs and identify the intersection of these indicators with productivity and performance. These metrics might include a statement of HCM strategy and goals, the role of the board of directors in overseeing HCM risks and the strategy, the data collection processes, operational integration of that information and the overall HCM strategy, and financially focused outcomes like revenue per employee, gross profit per employee, customer satisfaction and loyalty, and cost savings.

Conclusion

The area of human capital management concerns the management and allocation of considerable firm assets and liabilities. Effective strategies can yield considerable advantages and drive improved performance while poor HCM can result in significant risks to the firm. It is thus an area in which investors need far greater information in order to make informed investment decisions.

As in other areas of ESG disclosure, the HCM information addressed in this report would enable investors to identify risks and opportunities at their portfolio companies and assess management's judgment and performance, as well as improve their valuation calculations, buy and sell decisions and voting decisions.

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[2] See, for example, Beeferman, Bernstein "The Materiality of Human Capital to Corporate Financial Performance" IRRC and the Kennedy School (April 2015). Available at: http://www.law.harvard.edu/programs/lwp/pensions/publications/FINAL%20Human%20Capital%20Materiality%20April%2023%202015.pdf.

[3] See Item 1 of Form 10-K. In 2018, disclosures will also include CEO-to-Worker pay ratios

[4] Securities and Exchange Commission Press Release "SEC Adopts Rule for Pay Ratio Disclosure" (August 5, 2015). Available here: https://www.sec.gov/news/pressrelease/2015-160.html.

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[8] 17 C.F.R. 240.10b-5 Employment of manipulative and deceptive devices. Available here: https://www.law.cornell.edu/cfr/text/17/240.10b-5. See also, TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), at 449.

[9] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), at 449. See also, Basic Inc. v. Levinson, 485 U.S. 224 (1988); see also Matrixx Initiatives, Inc., et al., v. Siracusano et al, 131 S. Ct. 1309 (2011).

[10] Past some threshold, investor demand for information should qualify certain disclosures as material per se as in the case of political spending disclosure. With over one million comments submitted in support of increased political spending disclosure, the information must be material by definition. See: Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities, available at: https://www.sec.gov/comments/4-637/4-637.shtml.

[11] SEC Chairwoman Mary Jo White, "Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability" (June 27, 2016). Available at: https://www.sec.gov/news/speech/chair-white-icgn-speech.html.

[12] "Universal owners" refers to investors who are so large and diversified that their portfolios better represent the entire global economy than any particular market or sector. See: Rocer Urwin, "Pension Funds as Universal

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