



July 15, 2016

Via Email

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

Re: *Business and Financial Disclosure Required by Regulation S-K (File No. S7-06-16)*

Dear Mr. Secretary,

I am writing on behalf of the UAW Retiree Medical Benefits Trust (the “Trust”) to submit this comment in response to the Commission’s concept release, “Business and Financial Disclosure Required by Regulation S-K” (the “Concept Release”). The Trust was established in 2010 and is the largest non-governmental provider of retiree health care benefits in the country, with almost 720,000 members and \$61 billion in assets under management. The Trust appreciates the Commission’s several years of work on the Disclosure Effectiveness Initiative and applauds the Commission for undertaking such a comprehensive review.

As long-term investors, we have a keen interest in the quality of corporate disclosure. The Trust engages often with portfolio companies on issues such as proxy access, board diversity, corporate political activities, compensation, and board risk oversight of drug pricing strategies.¹ We rely on registrants’ SEC filings to

¹ For examples of the Trust’s activities, see Ed Silverman, “Gilead and Vertex Shareholders Can Vote on Pricing Resolutions: SEC,” *The Wall Street Journal*, Mar. 12, 2015 (available at <http://blogs.wsj.com/pharmalot/2015/03/12/gilead-and-vertex-shareholders-can-vote-on-pricing-resolutions-sec/>); Press Release, “Walgreens and UAW Retiree Medical Benefits Trust Agree to Multi-Year Collaboration on Political Spending Disclosure,” Jan. 8, 2013 (available at <http://www.uawtrust.org/AdminCenter/Library.Files/Media/501/In%20the%20News/FOR%20IMMEDIATE%20RELEASE%20-%2001-08-13%20-%20Walgreens%20and%20UAW%20RMBT%20Agree%20to%20Multi-Year%20Collaboration%20on%20Political%20Spending%20Disclosure.pdf>); Eleanor Bloxham,

identify companies for those engagements, using disclosures on strategy, risks, corporate governance, and financial performance. The overall level of disclosure in the U.S. market is important to allow us to evaluate risks across industries, monitor trends, and compare registrants to each other; thus, for our purposes, voluntary disclosure can supplement but not substitute for uniform mandated disclosure.

General Questions

The Concept Release asked for comment on a number of overarching questions. Two of those questions—the advantages of moving to a more principles-based system and the desirability of routinely using “sunset” provisions in Commission rules—are of particular interest to the Trust.

The Concept Release describes the advantages and disadvantages of shifting to a more principles-based disclosure system, in which management has discretion to provide disclosure if information is material to investors, and asks for comment on whether disclosure regulation should move in that direction.

In our view, investors need a disclosure system with both principles-based and rules-based requirements. While we appreciate the strengths of principles-based disclosure, prescriptive or rules-based disclosure requirements should not be jettisoned. The consistency and comparability of the disclosure elicited by prescriptive requirements is an important advantage, for investors like the Trust that hold a broadly diversified portfolio.

The two types of disclosure requirements can serve different purposes. For example, advocates of disclosure regarding corporate political activities, usually seek information about specific contributions, as well as a narrative description of the policies covering spending decisions and the board’s oversight process. Standardized, quantitative disclosure allows investors to understand the range of issuer behavior and identify issuers whose habits are outside the norm. The narrative context of who made expenditure decisions and on what criteria they were based can help investors evaluate whether an issuer’s activities raise governance or risk-management concerns. When weighing whether a requirement should be principles-based or rules-based, the Trust urges the Commission to consider factors such as how established the subject matter is and how likely it is that investors will want to compare the information across issuers.

The Concept Release also asks for comment as to whether new Commission disclosure rules should have an automatic “sunset” provision. The Commission can revisit and update rules without a sunset provision if investors’ needs change: the

“McDonald’s Shareholders Win More of a Say on Who gets a Board Seat,” *Fortune*, May 21, 2015 (available at <http://fortune.com/2015/05/21/mcdonalds-shareholder-vote/>).

proxy statement executive compensation disclosure requirements have been revised several times, for instance. A set sunset period is unlikely to coincide with events such as technological change or strategic shifts that can make a disclosure requirement unhelpful or unnecessary. Finally, the Trust fears that having to routinely revisit rules after sunset periods expire will impose a significant burden on investors.

Substantive Disclosure Issues

Public Policy and Sustainability Matters

The Concept Release recognizes that the “task of identifying what information is material to an investment and voting decision is a continuing one” and seeks comment on whether sustainability and public policy disclosures are important to investors’ decisions.²

The Trust does not endorse the idea that certain issues are “societal” and others financial. Issues such as workplace safety and human rights protections, political spending activity or water scarcity do have financial implications as evidenced by massive changes in the business and investment landscape over the past several decades. Understanding an issuer’s prospects depends increasingly on knowing about not just its past financial performance and physical assets, but also its intangible assets and relationships with key stakeholders.

This view is supported by the Department of Labor’s Interpretative Bulletin of 2015 which states that fiduciary consideration of environmental, social and governance (ESG) factors in making investment decisions is not only consistent with the Employee Retirement Income Security Act (ERISA) but should appropriately consider factors that may influence risk and return. The Bulletin describes such factors as potentially having a direct relationship to the economic value of a plan’s assets.³

As evidence has accumulated, mainstream investors have begun to consider these factors. Nearly 1500 institutions, representing \$60 trillion in assets under management, are members of the U.N. Principles for Responsible Investment (“PRI”). PRI members agree to incorporate ESG issues into investment analysis and decision making processes and to seek appropriate disclosure on ESG issues by entities in which they invest.⁴ A 2015 MIT Sloan Management Review survey of

² Concept Release, at 212.

³ U.S. Department of Labor, IB 2105-1, p. 5, <https://s3.amazonaws.com/publicinspection.federalregister.gov/2015-27146.pdf>.

⁴ See <https://www.unpri.org/about>. PRI members include Goldman Sachs Asset Management, BlackRock, State Street Global Advisors, The Vanguard Group and Northern Trust Asset

3,000 global managers and investors found that 75% of investors characterized improved revenue performance and operational efficiency from sustainability as strong reasons to invest.⁵

Disclosure of sustainability information by issuers in the U.S. market is incomplete and inconsistent. The Sustainability Accounting Standards Board, an organization that formulates voluntary sustainability accounting standards, has found that over 40% of sustainability disclosures in 10-K filings are boilerplate.⁶

The Concept Release seeks comment on which specific sustainability and public policy subjects are important to investors. Information on human capital management, corporate political spending, and board and workforce diversity is important to the Trust and would improve investors' decisions regarding investment and voting.

Human capital management

The Trust leads the Human Capital Management ("HCM") Coalition, made up of 25 institutional investors with over \$2.5 trillion in assets. The HCM Coalition is focused on improving disclosure regarding HCM, a range of practices related to the management of employees, who are a key corporate asset. To that end, the HCM coalition has been engaging with companies to learn about effective HCM practices and refine our understanding of HCM metrics.

A significant body of evidence supports the notion that HCM practices can improve intermediate outcomes such as productivity, as well as firm performance. For example, a study of "high performance work practices" such as employee participation systems and high-quality performance appraisals found that those

Management. (www.unpri.org/signatory-directory.) See also Mozaffar Khan et al., "Corporate Sustainability: First Evidence on Materiality," working paper forthcoming in *The Accounting Review* (Mar. 2015) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575912); Gunnar Friede et al., "ESG and Financial Performance: Aggregated Evidence From More Than 2000 Empirical Studies," *Journal of Sustainable Finance and Investment* 5:4, 210, 213-214 (2015) (listing sample of studies included in meta-analysis) (available at <http://www.tandfonline.com/doi/pdf/10.1080/20430795.2015.1118917>).

⁵ Gregory Unruh et al., "Investing for a Sustainable Future," at 4 (Spring 2016) (available at [http://marketing.mitsmr.com/offers/SU2016/57480-MITSMR-BCG-Sustainability2016.pdf?utm_source=WhatCounts%2c+Publicaster+Edition&utm_medium=email&utm_campaign=surpt16&utm_content=Download+the+Report+\(PDF\)&cid=1](http://marketing.mitsmr.com/offers/SU2016/57480-MITSMR-BCG-Sustainability2016.pdf?utm_source=WhatCounts%2c+Publicaster+Edition&utm_medium=email&utm_campaign=surpt16&utm_content=Download+the+Report+(PDF)&cid=1)).

⁶ Comment of Sustainability Accounting Standards Board on Concept Release on Business and Financial Disclosure Required by Regulation S-K, at 8 (July 1, 2016) (available at <https://www.sec.gov/comments/s7-06-16/s70616-25.pdf>). See also IRRC Institute, "The Corporate Risk Factor Disclosure Landscape," at 3 (Jan. 2016) ("IRRC Institute Study") (available at <http://irrcinstitute.org/wp-content/uploads/2016/01/FINAL-EY-Risk-Disclosure-Study.pdf>).

practices were associated with significantly significant better corporate financial performance.⁷

At present, the only specific human capital management disclosure requirement contained in the Regulation S-K is Item 101(c)(xiii)'s requirement to disclose the number of persons employed by the registrant. The IRRC Institute study of risk factor disclosure found that few registrants made disclosures regarding human capital-related risks.⁸

Minimal disclosures about human capital may have been sufficient in a prior era, when value was created primarily through physical assets, which are well represented in financial statements as well as narrative disclosures. Given the substantially greater role human capital and other intangible assets now play, investors do not have enough information on issuers' human capital management practices to make informed decisions on investment and voting.

Therefore, the Trust urges the Commission to evaluate the role of HCM in value creation, the type of information investors would find to be useful in decision making and the feasibility of adopting additional disclosure requirements to provide investors with a fuller picture of issuers' HCM practices and risk factors. The Trust notes that certain quantitative metrics, such as those measuring productivity and turnover, are widely used by practitioners, while other aspects of HCM such as incentive structures exhibit greater variation and may be better suited to principles-based narrative disclosure.

Political spending

In 2011, a group of law professors (the "Committee on Disclosure of Political Spending" or the "Committee") submitted a petition⁹ asking the Commission to adopt rules requiring disclosure of corporate political spending. The petition argued that complete and uniform disclosure is vital to the operation of accountability mechanisms designed to allow shareholders to monitor spending to ensure it is in companies' best interests. The Commission has received a record-setting number of comments on the petition.¹⁰

⁷ Mark A. Huselid, "The Impact of Human Resource Management Practices on Turnover, Productivity and Corporate Financial Performance," *Academy of Management Journal* 38:3, 635-672 (1995).

⁸ IRRC Institute Study, *supra*, at 18.

⁹ Petition of The Committee on Disclosure of Corporate Political Spending, File No. 4-637 (Aug. 3, 2011) (available at <https://www.sec.gov/rules/petitions/2011/petn4-637.pdf>).

¹⁰ Lucian Bebchuk & Robert Jackson, "Hindering the SEC from Shining a Light on Political Spending," *The New York Times* (Dec. 21, 2015) (available at http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html?_r=0).

In the Trust's view, the case for political spending and lobbying disclosure has been affirmed by our own experience in engaging with companies on this important issue.

Significant gaps in information make it difficult for investors to fully assess the adequacy of boards' oversight of political spending as well as the alignment of that spending with shareholder interests, both potentially relevant factors in the quality of boards' overall stewardship of companies.

Board diversity

Since 2011, the Trust has actively engaged with its portfolio companies at both the state and national levels to explore ways of increasing gender and racial/ethnic diversity on corporate boards because board diversity is associated with better firm performance. By bringing broader perspectives and more varied skill sets, board diversity is shown to strengthen a companies' financial performance and improve the quality of board decision making.¹¹

The Trust has contributed to the election of 79 diverse candidates to corporate boards through its own statewide shareholder engagements and through the coordinated efforts of the national 30% Coalition.¹² These efforts reflect investors' views that diversity is an important factor in driving long-term shareholder value. Nevertheless, data on director nominees' genders, races and ethnicities are not reported by companies in their proxy statements. As a result, data gathered by investors and third-party data providers interested in assessing board diversity are spotty and error-prone.

The Trust supports the efforts of nine large public funds that last year submitted a rulemaking petition aimed at obtaining uniform data directly from issuers.¹³ The petition asked the Commission to adopt a "chart/matrix" approach to director qualification disclosure in the proxy statement. The matrix approach would inform shareholders of the skills, experiences and attributes required for all directors, plus the qualifications one or more directors must possess. A shareholder viewing the matrix could thus easily identify diverse nominees.

The Trust also supports the Diversity Governance Indicators ("DGI") initiative, spearheaded by attorney Cyrus Mehri. This initiative promotes disclosure of common metrics for companies of greater than 5000 employees as to ensuring diversity in the board and in the workplace. DGI also calls on boards of directors to support diverse candidate pools in the search process and to appoint board level committees on human capital management that would include diversity issues.

¹¹ Nancy M. Carter and Harvey M. 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>) and Deborah L. Rhode and Amanda K. Pakel, "Diversity on Corporate Boards: How Much Difference Does Difference Make?" *Delaware Journal of Corporate Law* 39 (2014): 377, 394.

¹² 30% Coalition list of board directors related to investor engagements (Available at <http://www.30percentcoalition.org/who-we-are#faqnoanchor>).

¹³ "Petition for Amendment of Proxy Rule Regarding <http://www.30percentcoalition.org/who-we-are#faqnoanchor> Board Nominee Disclosure: Chart/Matrix Approach," File No. (Mar. 31, 2015) (Available at <https://www.sec.gov/rules/petitions/2015/petn4-682.pdf>).

Regulatory Risks

The Trust has found that the quality of disclosure by issuers in highly-regulated industries describing regulatory risks, and the steps they are taking to manage or mitigate those risks, often lacks specificity. As the Commission considers changes to risk factor disclosure, we urge the Commission to consider how risk factor disclosure can be integrated with more general disclosure on issuers' strategies and financial results.

In our view, such integration would promote a more fulsome and company-specific discussion of risk factors. The board oversight of compliance and internal controls of companies in highly regulated sectors, including those in the financial, energy and healthcare sectors, are of particular importance to investors.

One example would be when there are incomplete and misleading disclosure on regulatory matters by drug companies. A 2015 study analyzed Food and Drug Administration ("FDA") Complete Response Letters ("CRLs"), non-public letters¹⁴ the agency issues when it declines to approve an application to market a drug, with press releases and SEC filings by the drug's sponsor. The study found gaps between the information included in the CRLs and that provided by some companies in press releases as well as 10-K filings.

In addition to considering new and enhanced disclosure requirement, the Trust encourages the Commission to explore ways that it can work collaboratively with agencies whose regulation of issuers has potentially material financial effects. Such collaboration could produce useful research to inform the Commission's rulemaking process and Staff review of periodic filings.

Share Repurchases

The Concept Release requests comment on whether additional information should be disclosed regarding share purchases. Currently, Item 703 of Regulation S-K requires quarterly disclosure of the number of shares repurchased, the average price paid and the maximum number of shares that can be repurchased under plans.

The Commission asks whether additional information would be important to investors. In the Trust's view, share buybacks have assumed much greater importance in recent years, and we share with other investors concerns about the impact of repurchases on investment in projects and initiatives that build long-term value, including investments in human capital. Returning cash to shareholders at the expense of reinvestment in the business may harm an issuer's long-term profitability.

¹⁴ The author obtained the Complete Response Letters directly from FDA sources. See Peter Laurie et al, "Comparison of Content of FDA Letters Not Approving Applications for New Drugs and Associated Public Announcements from Sponsors: Cross-Sectional Study," *BMJ*350; h; 2758 (2015) (Available at <http://www.bmj.h2758>).

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At the same time, we are aware that repurchases may be used to improve per-share financial metrics such as earnings per share that are used in incentive compensation arrangements for executives. It can be difficult to calculate the impact of repurchases on these metrics from existing disclosures, so the Trust favors a requirement that issuers disclose these effects. To allow investors to better understand the impact of repurchases on an issuer's financial condition and leverage, issuers should disclose the source of funds, including the terms of any indebtedness incurred in connection with repurchases.

We are pleased to have this opportunity to make our views known to the Commission.

Respectfully submitted,

Sincerely,

A handwritten signature in cursive script that reads "Meredith Miller".

Meredith Miller

Chief Corporate Governance Officer