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Incorporating the Supply Chain into the SEC's Human Capital Disclosure Requirements

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I. Introduction

In HBO's dramatic series *Succession*, one of the world's most powerful business tycoons, Logan Roy, could not prevent the fallout and reputational harm to the Waystar Royco company, a fictional multimillion dollar American conglomerate in the business of media, entertainment, parks, cruises and more, when news broke about a cover-up of worker harassment and assault in its cruise division.[1] In the immediate aftermath of the investigative piece about the worker harassment in the cruise division, a precarious deal by Waystar Royco to acquire another company fell through.[2] The mounting pressure on Logan Roy after the revelation of the company's cruise line scandals did not stop with the failed merger: higher-ups in the company eventually had to testify before Congress about the allegations against the company.[3] With the company's reputation at stake, a shareholder demanded that Logan Roy step down as CEO.[4]

While the events that transpired in *Succession* are fictional, they are not divorced from reality. When news stories break about company wrongdoing, either directly in the company or in its suppliers' workplaces, the reputational damage impacts investors.[5]

The U.S. Securities and Exchange Commission ("SEC"), whose mission is to protect investors,[6] took steps in 2020 to address this area

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1. *Succession*: *Argestes* (Gary Sanchez Productions and Hyperobject Industries broadcast Sept. 15, 2019).

2. *Id.*

3. *Succession*: *DC* (Gary Sanchez Productions and Hyperobject Industries broadcast Oct. 6, 2019).

4. *Succession*: *This Is Not for Tears* (Gary Sanchez Productions and Hyperobject Industries broadcast Oct. 13, 2019).

5. *See e.g.*, Mica Rosenberg & Kristina Cooke, *Investor Group, Unions Push Hyundai to Address Child Labor at U.S. Suppliers*, REUTERS (Oct. 19, 2022, 4:59 PM), https://www.reuters.com/business/autos-transportation/investor-group-unions-push-hyundai-address-child-labor-us-suppliers-2022-10-19/ [https://perma.cc/H8FY-K47K] (reporting on an investment group that demanded Hyundai assess labor rights risks in its supply chain after reports of child labor at one of its suppliers in Alabama).

6. *About the SEC*, U.S. SEC. & EXCH. COMM'N (modified Nov. 22, 2016) [hereinafter *About the SEC*], https://www.sec.gov/about.shtml [https://perma.cc/ZX3G-KWDS] ("The

by amending Item 101 of Regulation S-K—the description of a company's business in its disclosure requirements.[7] Under the amended principles-based rule, registrants now have to include a description of material information about their human capital resources to investors on Form 10-K.[8] Former SEC chairman Jay Clayton supported the addition of human capital disclosures to Item 101(c), arguing that human capital "can be an important driver of long-term value."[9]

While human capital disclosure requirements in Regulation S-K Item 101(c) is a step forward in the SEC's mission of keeping investors informed, it ultimately falls short by failing to define human capital.[10] Investors face an information gap with human capital disclosures in the absence of prescriptive rules about what information needs to be disclosed about human capital resources.[11] In 2022, the SEC demonstrated efforts to improve human capital disclosure requirements to address this information gap.[12] The SEC indicated in its 2022 regulatory agenda that it is also considering a proposed rule about human capital management disclosures.[13]

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mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.").

7. *See SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K*, U.S. SEC. & EXCH. COMM'N (Aug. 26, 2020) [hereinafter *SEC Adopts Rule Amendments*], https://www.sec.gov/news/press-release/2020-192 [https://perma.cc/UAJ4-XZHP] (announcing that SEC voted to amend items on Regulation S-K).

8. 17 C.F.R. § 229.101(c)(2), (2)(ii) (2022) ("Discuss . . . to the extent material to an understanding of, the registrant's business taken as a whole . . . . [a] description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business . . . .").

9. *SEC Adopts Rule Amendments*, *supra* note 7.

10. *See* John D. Frey, *Striving for Simplicity: Updates to Regulation S-K Items 101 and 105*, 81 LA. L. REV. 999, 1031–32 (2021) (explaining how including human capital in Regulation S-K 101(c) without specific categories within human capital does not provide investors with enough information about companies' human capital resources).

11. *See id.* ("Merely including an unorganized mess of human capital disclosure within Item 101(c) will not allow for coherent disclosure given the amount and complexity of human capital disclosure that investors are seeking.").

12. Erin Martin & Celia A. Soehner, *How to Respond to SEC's Focus on Human Capital Disclosures*, BLOOMBERG L. (Oct. 14, 2022, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/esg/X80M8ONK000000?bna_news_filter=esg#jcite [https://perma.cc/D7AN-ACBD] (describing SEC Chair Gary Gensler's actions, such as talking about revisions to the human capital disclosure rule and directing SEC staff to improve human capital disclosures).

13. U.S. Gen. Servs. Admin., *Agenda View Rule*, REGINFO.GOV, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM88 [https://perma.cc/7D9E-ZCHL] (last visited Dec. 19, 2022); *see also* Cydney S. Posner, *A*

Since the SEC is now considering the need for revisions to the 2020 rule,[14] the agency should also consider the breadth of human capital disclosures. The SEC should prescribe that issuers include information about labor conditions in the supply chain in its human capital disclosures.[15] When stories about poor and unsafe working conditions in companies' supply chains emerge, it is costly to investors, running counter to the mission of the SEC.[16]

This Note examines why Regulation S-K Item 101(c) should be amended to include prescriptive disclosure requirements about human capital in companies' supply chains.[17] Such an approach would be more consistent with the SEC's mission of protecting investors and building public trust.[18] Regulation S-K filings since November 2020 indicate this mission might be compromised because of confusion among companies about compliance with the new human capital disclosure requirements.[19] While the confusion is about human capital disclosures within the company itself, the SEC is presented with an opportunity to broaden the scope of human capital disclosure requirements, which will ultimately protect investors.

Jam-Packed Spring 2022 Agenda for the SEC, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 17, 2022), https://corpgov.law.harvard.edu/2022/07/17/a-jam-packed-spring-2022-agenda-for-the-sec/ [https://perma.cc/2LQL-GQS9] (describing the SEC regulatory agenda for spring 2022).

14. Martin & Soehner, *supra* note 12 (detailing SEC Chair Gary Gensler's efforts to revise the 2020 human capital disclosure rule).

15. *See* Comment Letter from Hum. Cap. Mgmt. Coal., to William Hinman, Dir. & Brent J. Fields, Sec'y, U.S. Sec. & Exch. Comm'n 9 (July 6, 2017) [hereinafter Hum. Cap. Mgmt. Coal. letter], https://www.sec.gov/rules/petitions/2017/petn4-711.pdf [https://perma.cc/6VV2-XVLV] (explaining how companies' human capital risks in its supply chains can have financial consequences for investors and shareholders).

16. *See id.* at 9–10 (describing two instances making national news that involved human capital risks in companies' supply chains and how the consequences of companies' lack of oversight in its supply chains ultimately cost shareholders).

17. *See id.* at 27 (describing how prescriptive rules and principles-based disclosure requirements would adequately inform investors about companies' human capital resources).

18. *About the SEC*, *supra* note 6.

19. *See* Jessica Mach, *Will New SEC Disclosure Rules on 'Human Capital' Further Befuddle Companies?*, LAW.COM: CORP. COUNS. (Mar. 15, 2022, 1:55 PM), https://www.law.com/corpcounsel/2022/03/15/will-new-sec-disclosure-rules-on-human-capital-further-befuddle-companies/ (noting that the full article has now been archived on Bloomberg Law, which can be accessed by clicking permalink) [https://perma.cc/4LSK-3ZTU] (reporting on results of survey which analyzed early human capital disclosures and revealed inconsistent disclosures between companies).

This Note proceeds in six parts. Part II provides background on the mission of the SEC, the purpose behind Regulation S-K, and how the language of Item 101(c) changed pursuant to the 2020 amendments.[20] Part III examines critiques of the amended rule and looks at investor interest in Environmental, Social, and Governance ("ESG") generally, human capital disclosures in filed 10-K forms, and comments to the SEC criticizing the principles-based approach.[21] Part IV focuses on why work conditions and labor relations within a company's supply chain constitute material information about human capital resources.[22] This is done in two parts: considering legislative efforts to address work conditions in the supply chain and analyzing recent labor issues in companies' supply chains.[23] Part V considers the practical challenges with disclosure requirements about human capital in the supply chain.[24] Part VI summarizes the argument and concludes this Note.[25]

II. BACKGROUND ON SEC REGULATION S-K

The requirements within Regulation S-K trace back to the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("Exchange Act").[26] The 1933 Act sets forth reporting requirements for the "registration of public offerings."[27] The 1933 Act requires an "issuer who offers or sells securities" to register with the SEC and provide information to investors, including "a description of the business of the issuer . . . and the financial condition of the issuer."[28]

20. *See infra* Part II; *see also* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63728 (Oct. 8, 2020), https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-19182.pdf [https://perma.cc/P4WU-4RWK] (comparing previous requirements under Regulation S-K Item 101(c) and how the 2020 amendments have changed disclosure requirements).

21. *See infra* Part III.

22. *See infra* Part IV; *see also* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 9 (explaining how labor is often contracted throughout a company's suppliers with little oversight).

23. *See infra* Part IV.

24. *See infra* Part V.

25. *See infra* Part VI.

26. *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 9:38 (Westlaw ed., updated Dec. 2022) (noting the reporting requirements of the 1933 Act and the Exchange Act, which often resulted in "duplicative disclosures" from the "repetitive nature of the dual filing system").

27. *Id.*

28. Securities Act of 1933 ("1933 Act") §4A, 15 U.S.C. § 77d-1(b)(1)(C)-(D).

Under the Exchange Act, regulation of securities is necessary "to remove impediments to and perfect the mechanisms of a national market system for securities . . . and to insure the maintenance of fair and honest markets in such transactions."[29] Pursuant to this provision of the Exchange Act, securities transactions must include a registration statement that is "effective as to such security for such exchange in accordance with the provisions of this chapter and the rules and regulations thereunder."[30] The Exchange Act vests the SEC with the authority to set forth rules and regulations for securities registration "as necessary or appropriate in the public interest or for the protection of investors."[31]

Regulation S-K was created to streamline the disclosure requirements of the 1933 Act and the Exchange Act into one form that satisfied the disclosure requirements of the two acts.[32] An amendment to the Exchange Act in 1964 expanded reporting requirements for securities.[33] A report was issued in 1977 that advocated for combining disclosures from the 1933 Act and the Exchange Act into one form for companies to file.[34] After this report, the SEC enacted Regulation S-K, which was later expanded in 1982.[35] The history leading up to Regulation S-K has always centered investor protection through registration reporting requirements.[36]

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29. Securities Exchange Act of 1934 ("Exchange Act") § 2, 15 U.S.C. § 78b.

30. Exchange Act §12(a), 15 U.S.C. § 78l(a).

31. Exchange Act §12(b)(1), 15 U.S.C. § 78l(b)(1).

32. Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23918 (proposed Apr. 22, 2016) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240 & 249), https://www.govinfo.gov/content/pkg/FR-2016-04-22/pdf/2016-09056.pdf [https://perma.cc/S5LJ-ABDK] ("Regulation S-K reflects the Commission's efforts to harmonize disclosure required under both the Securities Act and the Exchange Act by creating a single repository for disclosure regulation that applies to filings by registrants under both statutes."); *see also* HAZEN, *supra* note 26 (describing the reporting requirements under the 1933 Act and the Exchange Act as "parallel systems" that led to "duplicative filings and superfluous paperwork").

33. Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. at 23918.

34. *Id.*

35. *Id.*; *see also* HAZEN, *supra* note 26 (stating that the regulation reflected an "integrated disclosure system").

36. 81 Fed. Reg. at 23919 (stating the purpose behind disclosure requirements is to ensure investors have the necessary information "to make informed investment and voting decisions"); *see also* HAZEN, *supra* note 26 (describing the SEC's efforts to "ease the burden of duplicative disclosures").

Prior to the amended rule in November 2020, Regulation S-K Item 101(c) only required companies to provide material information about their business for investors to understand the business as a whole.[37] Human capital was not included in the language of Item 101(c) prior to the 2020 amendment.[38] At the heart of SEC regulations is the protection of investors,[39] and such protection necessitates that investors are fully informed about material information of a company's human capital.[40] The Supreme Court addressed the issue of materiality in *TSC Industries v. Northway, Inc*.[41] The Court held that an omission of a statement is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[42]

After the SEC amended Regulation S-K Item 101(c) in November 2020, companies were required to disclose material information about human capital in their annual 10-K reports.[43] The regulation requires companies to include "[a] description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business."[44] However, this provision does not define human capital or lay out

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37. *See* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63728 (proposed Oct. 8, 2020) (codified at 17 C.F.R. pt. 229, 239, and 240), https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-19182.pdf [https://perma.cc/P4WU-4RWK] (Item 101(c) previously required registrants to provide a "narrative description of the business done" and to disclose specific information that would be "material to an understanding of the registrant's business taken as a whole.").

38. *See id.* ("Revises Item 101(c) to . . . . [i]nclude, as a disclosure topic, a description of the registrant's human capital resources to the extent such disclosures would be material to an understanding of the registrant's business.").

39. *About the SEC*, *supra* note 6 ("The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.").

40. *See* Jay Clayton, Remarks at the Open Meeting of the United States Securities and Exchange Commission Discussing Regulation S-K (Aug. 26, 2020), https://www.sec.gov/news/public-statement/clayton-regulation-s-k-2020-08-26 [https://perma.cc/GW9Q-ZGZA] ("[C]ompanies must incorporate the key human capital metrics, if any, that they focus on in managing the business, again to the extent material to an understanding of the company's business as a whole.").

41. At issue in this case was a joint proxy statement that had been published after National Industries acquired TSC Industries. The respondent alleged that the joint proxy statement, which had encouraged shareholders to approve a proposal, was misleading. TSC Indus. v. Northway, Inc., 426 U.S. 438 (1976).

42. *Id.* at 449.

43. 17 C.F.R. § 229.101(c)(2)(ii) (2022).

44. *Id.*

specific categories within human capital that companies should disclose.[45]

The 2020 amendment to Regulation S-K Item 101(c) reflects a principles-based disclosure requirement.[46] A principles-based approach gives discretion to businesses to decide what to disclose, thus encouraging more flexibility with disclosure requirements.[47] In *Securities & Exchange Commission v. Chenery Corp.*, the United States Supreme Court acknowledged the SEC's authority to implement a principles-based approach in its regulation.[48] *Chenery Corp.* recognized the need for flexibility that a principles-based approach provides because agencies cannot foresee every problem and should not expend resources attempting to create an exhaustive list of bright-line rules.[49] As former SEC Chairman Jay Clayton explained, the purpose behind the principles-based language in the updated disclosure requirements is to provide companies the flexibility to disclose information about human capital that is unique to their business.[50] Prescriptive disclosure requirements, however, impose bright-line rules and provide issuers with a more "predictable regulatory" framework.[51]

45. *See generally id.* § 229.101 (failing to define human capital in any part of the regulation); *see also* Mach, *supra* note 19 (describing frustration with the uncertainty about what human capital information needs to be disclosed under the amended rule).

46. *See* Clayton, *supra* note 40 (explaining how SEC principles-based disclosure requirements consider the various needs of companies across industries).

47. *See* William Hinman, Dir., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Remarks at the 18th Annual Institute on Securities Regulation in Europe (Mar. 15, 2019) (transcript available on the SEC website), https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519 [https://perma.cc/N8DW-ZGRM] ("The flexibility of our principles-based disclosure requirements should result in disclosure that keeps pace with emerging issues . . . .").

48. *See* James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 640–41 (2007) ((describing the origin of SEC principles-based regulation) (*citing* Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 202 (1947))).

49. *Chenery Corp.*, 332 U.S. at 202 ("Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations . . . . [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

50. *See* Clayton, *supra* note 40 (explaining that the principles-based disclosure requirements allow for flexibility).

51. *See* Park, *supra* note 48 (explaining the differences between the rules-based and principles-based approaches to securities regulation).

III. CRITIQUES OF THE HUMAN CAPITAL DISCLOSURE RULE

A. Investor Interest in ESG

Investors are requesting more information from companies about ESG factors.[52] ESG factors look at companies' impact and allow investors to measure companies' performance.[53] Environmental and social-focused shareholder proposals have increased in the past ten years.[54] For example, BlackRock Inc., State Street Corp, and Vanguard Group supported a board challenge in 2021 against Exxon Mobile Corp because of Exxon's reluctance to transition to a cleaner energy strategy.[55] These institutional investors supported board candidates who were nominated by an activist hedge fund.[56] Placing emphasis on the "S" in ESG, shareholders of Sturm Ruger and Co.—a gun manufacturer—urged the company in 2022 to release a report on human

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52. *See* Kevin Eckerle et al., *ESG and the Earnings Call*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 17, 2020), https://corpgov.law.harvard.edu/2020/06/17/esg-and-the-earnings-call/ [https://perma.cc/CXU2-H7PU] (stating that companies are beginning to host more calls to discuss ESG topics in response to more demands from investors for ESG information); Greg Iacurci, *Money Invested in ESG Funds More than Doubles in a Year*, CNBC (Feb. 11, 2021, 1:15 PM), https://www.cnbc.com/2021/02/11/sustainable-investment-funds-more-than-doubled-in-2020-.html [https://perma.cc/W9TU-A49C] (reporting on how investors put $51.1 billion into ESG funds).

53. *See* E. Napoletano & Benjamin Curry, *Environmental, Social and Governance: What Is ESG Investing?*, FORBES (Feb. 24, 2022, 10:15 AM), https://www.forbes.com/advisor/investing/esg-investing/ [https://perma.cc/Q8VQ-9V32] (explaining how companies are evaluated for ESG investing).

54. *See ISS Releases Annual Outlook Report on Top Governance and Stewardship Issues in 2022*, ISS INSIGHTS (Mar. 31, 2022), https://insights.issgovernance.com/posts/iss-releases-annual-outlook-report-on-top-governance-and-stewardship-issues-in-2022/ [https://perma.cc/9RQ6-5L3Q] ("The number of E&S-related shareholder proposals filed in the U.S. has increased in the past decade, with 2022 shaping up to be another record year. In 2021 in the U.S. there were a record number of 535 E&S-related proposals filed.").

55. *See* Jessica DiNapoli & Ross Kerber, *New Blood at Wall Street's Old Guard Rattles Corporate America*, REUTERS (June 3, 2021, 3:57 PM), https://www.reuters.com/business/new-blood-wall-streets-old-guard-rattles-corporate-america-2021-06-03/ [https://perma.cc/SU6A-FHL2] ("[T]he three largest index fund firms . . . backed a successful board challenge against Exxon Mobil Corp [*sic*] . . . over dissatisfaction with its efforts to diversify away from fossil fuels.").

56. Ross Kerber, *Top Exxon Investors State Street, Vanguard Backed Activist Nominees*, REUTERS (May 27, 2021, 7:06 PM), https://www.reuters.com/business/energy/state-street-backed-two-activist-hedge-fund-nominees-exxon-board-2021-05-27/ [https://perma.cc/X38G-CPTN].

rights.[57] Social factors also include conditions in a company's workforce and supply chain.[58]

Investors want more information about companies' workforce and workplace conditions. For example, in 2021, Tesla shareholders expressed support for disclosure about Tesla's arbitration process with 46% of votes cast for the shareholder resolution in comparison to 27% in favor of a similar proposal the previous year.[59] The shareholder resolution sought information about how Tesla uses mandatory arbitration in response to employee complaints about harassment and discrimination in the workplace.[60] That same year, Microsoft shareholders voted in favor of a proposal that requested a review of the company's workplace sexual harassment policies.[61]

Additionally, investor-led proposals requesting disclosure on work conditions and workers' rights are becoming more prevalent.[62] In 2022, investors proposed fifteen resolutions to Amazon shareholders to address Amazon's workplace conditions and its treatment of workers.[63] Even though most Amazon shareholders voted against the resolutions,[64]

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57. Ross Kerber, *Investors Call for Human Rights Report at Gunmaker Sturm Ruger*, REUTERS (June 1, 2022, 1:09 PM), https://www.reuters.com/business/sustainable-business/investors-call-human-rights-report-gunmaker-sturm-ruger-2022-06-01/ [https://perma.cc/8ALE-CCHE].

58. *See* Paul A. Davies et al., *Environmental, Social, and Governance Matters: The Rapidly Evolving ESG Reporting Landscape— Part I*, 43 SECS. & FED. CORP. L. REP. (2021) (describing support for social proposals in 2021, which included "human rights in operations and supply chains").

59. Ross Kerber & Hyunjoo Jin, *Tesla Directors Get Softer Support, Shareholder Proposal Gains Traction*, REUTERS (Oct. 13, 2021, 7:18 PM), https://www.reuters.com/business/shareholder-support-rises-arbitration-review-tesla-2021-10-13/ [https://perma.cc/MAR5-FU4S].

60. *Id.*

61. Jordan Novet, *Microsoft Shareholders Vote for the Company to Publish Sexual Harassment Report, in Rare Win for Activists*, CNBC (Nov. 30, 2021, 3:56 PM), https://www.cnbc.com/2021/11/30/microsoft-shareholders-vote-for-sexual-harassment-report.html [https://perma.cc/SD52-NVZU].

62. *See, e.g.*, Kari Paul, *Amazon Shareholders Reject 15 Motions on Worker Rights and Environment*, THE GUARDIAN (May 25, 2022, 6:51 PM), https://www.theguardian.com/technology/2022/may/25/amazon-shareholder-proposal-worker-health-safety [https://perma.cc/7KCX-JCG7] ("The increase in the number of resolutions underscores the rise of environmental, social and corporate governance (ESG)-based investing, which is spurring more shareholders to push for corporate accountability.").

63. Ross Kerber et al., *USA: Amazon Shareholders Vote Against Investor-Led Resolutions on Working Conditions & Wages*, BUS. & HUM. RTS. RES. CTR. (May 25, 2022), https://www.business-humanrights.org/en/latest-news/usa-amazon-shareholders-vote-against-investor-led-resolutions-on-working-conditions-wages/ [https://perma.cc/85ZD-QC4Y].

64. Paul, *supra* note 62.

an increase in worker-focused proposals shows how these social issues are becoming more prominent among investors.[65] Similarly, investors filed a shareholder proposal requesting an independent review of Apple's commitment to workers' rights.[66] This shareholder proposal came after reports of Apple engaging in unfair labor practices.[67]

Critics of the principles-based approach to human capital disclosure requirements argued that the SEC should adopt the Sustainability Accounting Standards Board ("SASB") standards for disclosure framework.[68] The SASB human capital disclosure standards are tailored to industries and may provide comparable data across companies and industries about ESG factors.[69] The SASB standards are designed to generate information that allows investors to understand how companies create long-term value.[70] Investment managers also use the SASB standards to hold companies accountable for more transparency about ESG issues.[71]

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65. *See supra* notes 51–56, 58 and accompanying text.

66. Ben Maiden, *Apple Faces Workers' Rights Shareholder Proposal*, CORP. SEC'Y (Sept. 8, 2022), https://www.corporatesecretary.com/articles/esg/33152/apple-faces-workers%E2%80%99-rights-shareholder-proposal [https://perma.cc/TXN5-92GH].

67. *Id.*

68. *See, e.g.*, Comment Letter from Marcie Frost, Chief Exec. Officer, Cal. Pub. Emps.' Ret. Sys., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 3 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324067-194727.pdf [https://perma.cc/SJ3A-F9QN] (arguing that the SEC should require line-item disclosures on human capital by industry using the SASB standards as a framework); Comment Letter from Jonathan Grabel, Chief Inv. Officer, L.A. Cnty. Emps. Ret. Ass'n, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Oct. 22, 2019), https://www.sec.gov/comments/4-711/4711-6403561-198430.pdf [https://perma.cc/6WGL-2S98] (arguing that SASB framework would provide "investment-useful information" that is tailored to specific industries); Comment Letter from Chandra Taylor & Nick Jimenez, Att'ys, S. Env't L. Ctr., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 7 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324051-194701.pdf [https://perma.cc/8YVQ-TKKG] (arguing that the SEC should adopt a prescriptive-based approach to disclosure requirements modeled after other frameworks, such as the SASB standards).

69. *See Standards Overview*, SASB STANDARDS, https://www.sasb.org/standards/ [https://perma.cc/47RH-SZ6H] (last visited Dec. 30, 2022) (describing how the SASB standards include ESG issues that are material information to the financial performance of companies across 77 industries).

70. *See SASB Standards & Other ESG Frameworks*, SASB STANDARDS, https://www.sasb.org/about/sasb-and-other-esg-frameworks/ [https://perma.cc/6A8G-ULN2] (last visited Oct. 27, 2022) ("SASB Standards identify the sustainability information that is financially material, which is to say material to understanding how an organization creates enterprise value.").

71. *See, e.g.*, Letter from Cyrus Taraporevala, President & Chief Exec. Officer, State St. Glob. Advisors, to Bd. Members 1 (Jan. 11, 2021), https://www.ssga.com/library-

B. *Review of Human Capital Disclosures Since the 2020 Rule*

Since the SEC adopted its new rule requiring companies to disclose information about human capital, there have been a variety of approaches with regard to 10-K disclosures.[72] One review of S&P 500 companies' human capital disclosures following the SEC rule change showed that several companies disclosed quantitative data on human capital.[73] This particular review found that 94% of disclosures included information about the total number of employees working in the company.[74] In the same analysis of a set of companies' 10-K disclosures, the next largest category to be quantitatively reported was gender representation.[75] In this same review, workplace incidents accounted for only 12% of the quantitative disclosures made on human capital.[76]

Another common theme among 10-K human capital disclosures following the 2020 amendments was the discussion of diversity, equity, and inclusion efforts.[77] The 10-K filings in this review reflected a

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content/pdfs/asset-stewardship/combined-proxy-guidance-letters.pdf [https://perma.cc/A26A-UK5E] (describing how SSGA used an ESG scoring system based on the SASB framework to hold companies accountable for ESG risks); ABERDEEN STANDARD INVS., OUR LISTED COMPANY STEWARDSHIP GUIDELINES 6 (2019), https://www.proxyinsight.com/members/Investor_DOCs/Aberdeen%20Standard%20Voting%20Policy%202019.pdf [https://perma.cc/DLE8-GDDW] (stating that companies should use the SASB framework in disclosure of material information to investors); MORGAN STANLEY INV. MGMT., PROXY VOTING POLICY AND PROCEDURES 7 (2022), https://www.morganstanley.com/im/publication/resources/proxyvotingpolicy_msim_en.pdf [https://perma.cc/S3YZ-TXKC] (describing support for shareholder proposals that are in accord with SASB standards).

72. *See* Steve Seelig & Lindsay Green, *Initial 10-K Disclosures Provide Limited Data on Human Capital Metrics*, WILLIS TOWERS WATSON (Jan. 28, 2021), https://www.wtwco.com/en-US/Insights/2021/01/Initial-10-K-disclosures-provide-limited-data-on-human-capital-metrics [https://perma.cc/6MZL-ZA79] (describing human capital disclosures made from the first thirty-six S&P 500 companies to file 10-K forms since Nov. 9, 2020).

73. *See id.* (analyzing the first thirty-six S&P 500 10-K disclosures that were filed since Nov. 9, 2020 when the new SEC requirements came into effect).

74. *See id.* (describing the quantitative human capital disclosures made in the first thirty-six S&P 500 10-K filings since Nov. 9, 2020).

75. *See id.* (referring to the human capital metrics of the first thirty-six S&P 500 10-K filings since Nov. 9, 2020).

76. *See id.* (showing workplace incidents as the least common metric reported in human capital disclosures of the first thirty-six S&P 500 10-K filings since Nov. 9, 2020).

77. *See* Marc Siegel, *The SEC's New Human Capital Disclosures: Year 1*, FEI (May 10, 2021), https://www.financialexecutives.org/FEI-Daily/May-2021/The-SEC%E2%80%99s-New-Human-Capital-Disclosures-Year-1.aspx [https://perma.cc/G8E8-

qualitative approach over a quantitative approach.[78] While some filings included metrics about human capital resources—such as employee retention rates, injury incident rates, and the number of part-time and full-time employees—[79] a lot of the narrative descriptions included only boilerplate language.[80] This boilerplate language in early filings looked like companies providing vague descriptions about their commitment to diversity and inclusion, or how companies value employee wellness and safety,[81] but did not provide substantive information to investors about worker conditions or statistics.[82]

Many human capital disclosures since 2020 also reflected a positive tone.[83] In fact, a review of a large sample of filed 10-K forms

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RDVE] (stating that most10-K filings included "at least a qualitative discussion" about diversity, equity and inclusion efforts).

78. *See id.* (describing how the majority of filings in this analysis incorporated narrative descriptions of human capital resources as opposed to quantitative metrics).

79. *See id.* (analyzing the different metrics companies included in human capital disclosures).

80. *See* AMIT BATISH ET AL., HUMAN CAPITAL DISCLOSURE: WHAT DO COMPANIES SAY ABOUT THEIR "MOST IMPORTANT ASSET"? 2 (2021) https://www.gsb.stanford.edu/sites/default/files/publication/pdfs/cgri-closer-look-90-human-capital-disclosure_0.pdf [https://perma.cc/9KHJ-KLG7] (analyzing early disclosure statements about human capital within companies in filed 10-K forms). For an example of boilerplate language in 10-K filings, see Vicor Corp, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) 12 (Mar. 1, 2022), https://vicorcorporation.gcs-web.com/static-files/6dfee421-c112-4d3b-8d15-556ad08a77f3 ("High-caliber employees are important to achieving Vicor's mission of providing the highest performance power solutions to meet the requirements of the most demanding applications . . . . Accordingly, we offer compelling compensation and benefits, foster a culture of innovation in which employees are empowered to do (and are rewarded for) their best work, and seek to establish Vicor as a meaningful contributor to the communities in which we operate, further strengthening the bonds between employees and the Company.").

81. *See, e.g.*, Johnson & Johnson, Annual Report Pursuant to Section 13 of the Securities Exchange Act of 1934 (Form 10-K) 6 (Feb. 22, 2021), https://johnsonandjohnson.gcs-web.com/static-files/e2a329b4-aeb6-438d-a449-f0e282cf8ee0 ("The Company's investment in employee health, well-being and safety is built on its conviction that advancing health for humanity starts with advancing the health of its employees. With the right awareness, focus, practices and tools, the company ensures that all its employees around the world, as well as temporary contractors and visitors to the Company's sites, can work safely. The Company has continuously expanded health and well-being programs throughout the Company and across the globe, incorporating new thinking and technologies to keep its offerings best-in-class and to help employees achieve their personal mind and body health goals."). This description of employee health, wellness, and safety fails to provide quantitative metrics and adequate details about how exactly Johnson & Johnson invests in workplace health and safety.

82. *See* BATISH ET AL., *supra* note 80, at 3 (explaining how limited quantitative metrics about human capital do not help investors understand a company's performance).

83. *See* Elizabeth Demers et al., Corporate Human Capital Disclosures: Early Evidence from SEC's Disclosure Mandate 14 (Aug. 2022) (unpublished manuscript) (on file

revealed that companies included nearly four times as many positive words as negative words in human capital disclosures.[84] The substantive value of these disclosures to investors is unclear and posits the question of whether companies are only disclosing qualitative descriptions that make their company look good to investors.[85]

Disclosures about human capital resources also reflected common themes across companies and industries.[86] Many disclosures included information about employee benefits, employee learning and development programs, employee safety, COVID-19 response, and compensation.[87] However, the human capital disclosures about compensation focused on the higher management level, leaving a gap in disclosures about human capital throughout all levels of a company's workforce.[88] Investors want to understand how companies treat their most valuable resource—their workers—[89] and a lack of transparency about compensation for workers conflicts with the mission of protecting investors.

Early 10-K filings also showed differences in length of human capital disclosures and topics addressed in disclosures.[90] In a study of a set of early 10-K filings, the length of human capital disclosures ranged

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with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4153845 [https://perma.cc/3SRR-F76A] (describing the optimistic tone in human capital disclosures from a large sample review of disclosures filed in the first year of the amended S-K regulations).

84. *Id.*

85. *See id.* (explaining how the positive tone in the human capital disclosures shows either that companies truly believe treatment of employees is satisfactory or that companies only want to create this appearance for investors).

86. Siegel, *supra* note 77 (reporting on the recurring themes that appeared in early human capital disclosures).

87. *See id.* (describing common themes in 10-K filings of approximately 150 S&P 500 companies from Nov. 8, 2020 – Feb. 15, 2021).

88. *See id.* (explaining the human capital disclosures about companies' employee compensation).

89. *See* BATISH ET AL., *supra* note 80, at 4 (describing the discrepancy between companies alleging that employees are a valuable asset and failing to disclose information that would allow investors to understand a company's workforce).

90. *See* MARGARET ENGEL, NEW HUMAN CAPITAL DISCLOSURE REQUIREMENTS: AN EARLY READ ON DEVELOPING BEST PRACTICES 2–3 (2021), https://s3.us-east-2.amazonaws.com/capartners.production/wp-content/uploads/2019/07/15125840/CAPintel-21-01-07-New-Human-Capital-Disclosure-Requirements-An-Early-Read-on-Developing-Best-Practices-v5.pdf [https://perma.cc/43F3-AW4W] (analyzing the length of early human capital disclosures and the information companies include in their description of human capital resources).

from fewer than 75 words to as much as 6,800 words.[91] Some human capital disclosures included information about the geographic breakdown of the workforce around the world.[92] The variation in length of human capital disclosures among companies suggests potential problems for investors with comparability among companies since companies can choose what information to disclose about their human capital resources.[93]

For example, Rockwell Automation's 10-K filing from November 2020 included information about the number of employees in different geographic regions.[94] The Starbucks 10-K filing from November 2020 also included the number of employees it employed worldwide in its human capital disclosure.[95] Starbucks, however, did not include quantitative data about its representation by unions and instead said union representation "is not significant."[96] Tyson Foods included more quantitative data about labor relations in its global operations in its human capital disclosure from November 2020.[97] Tyson Foods disclosed that an estimated 31,000 workers in the United States "were subject to collective bargaining agreements with various labor unions."[98] The range of topics being disclosed and approaches to human capital disclosures in this set of 10-K filings illustrates the shortcomings of a principles-based approach to human capital disclosures.[99]

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91. *Id.* at 2.

92. *See id.* at 4 (providing an example of human capital disclosures on Rockwell Automation's 10-K filing from November 2020).

93. *See* BATISH ET AL., *supra* note 80, at 4 ("[C]ompanies tend to cherry pick the categories of HCM that they disclose.").

94. *See* ENGEL, *supra* note 90, at 4 (emphasizing how Rockwell Automation's 10-K is an example of "effective" human capital disclosures).

95. *See id.* (("As of September 27, 2020, Starbucks employed approximately 349,000 people worldwide. In the U.S., Starbucks employed approximately 228,000 people, with approximately 220,000 in company-operated stores and the remainder in corporate support, store development, roasting, manufacturing, warehousing and distribution operations.") (quoting Starbucks, Annual Report (Form 10-K) (2021))).

96. *Id.* (quoting Starbucks, Annual Report (Form 10-K) (2021)).

97. *See id.* (describing Tyson Foods' workforce and labor relations in the United States and around the world).

98. *Id.* (quoting Tyson Foods, Annual Report (Form 10-K) (2021)).

99. *See id.* at 2 (describing company concerns about complying with the new SEC requirement about human capital disclosure and how the different metrics disclosed are not standardized).

What these initial filings show since the enactment of the new SEC rule is that investors are not getting the information they need.[100] Overall, the disclosures do not provide descriptive information to investors about how a company treats its workforce.[101] Investors are also unable to ascertain the value of a company without total workforce costs.[102] Company disclosure of workforce costs would help investors distinguish company investments in its workforce from maintenance expenses for its workforce.[103] Since the 2020 amendment to Regulation S-K, SEC Chair Gary Gensler has even proposed different metrics for human capital disclosure because investors want to understand the people who work in a company—the company's most valuable resource.[104] Ultimately, disclosures about human capital help "investors place their money in the companies that fit their investing needs."[105]

C. SEC Comment Letters Criticizing Principles-Based Approach

The update to Regulation S-K Item 101(c) has received significant criticism from SEC commissioners to chief executive officers to unions. Commissioner Allison Herren Lee criticized the new rule because of its principles-based approach to disclosures about

100. *See* BATISH ET AL., *supra* note 80, at 2 (explaining how review of early 10-K filings show that companies' human capital disclosures, while lengthy, are not as informative).

101. *See* Demers et al., *supra* note 83, at 13 (explaining how an initial review of human capital disclosures shows a lack of comparability for HR-related practices between companies).

102. *See* Comment Letter from Working Grp. on Hum. Cap. Acct. Disclosure, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 2 (June 7, 2022) [hereinafter Working Grp. on Hum. Cap. Acct. Disclosure letter] https://www.sec.gov/rules/petitions/2022/petn4-787.pdf [https://perma.cc/B5HH-562Y] ("[A]n increasing proportion of public companies derive much of their value from intangible assets, including human capital—yet roughly only fifteen percent of those firms even disclose their labor costs.").

103. *Id.* at 5.

104. *See* Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n, Prepared Remarks at London City Week (June 23, 2021) (transcript available on the SEC website), https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321 [https://perma.cc/QXK9-7UWG] (suggesting that the SEC might include metrics such as compensation, workforce diversity, and retention rates in human capital disclosures); Working Grp. on Hum. Cap. Acct. Disclosure letter, *supra* note 102, at 9 (describing an increase in "human capital firms" and how such firms "generate value due to the knowledge, skills, competencies, and attributes of their workforce").

105. Gensler, *supra* note 104.

companies' human capital.[106] Though many investors consider ESG necessary to make informed decisions, the updated rule fails to specify standardized categories for measuring such risks and thus fails to consider investors' needs.[107] Further, SEC Commissioner Caroline Crenshaw criticized the amended rule for its exclusion of clear guidelines in human capital disclosure requirements.[108] Commissioner Crenshaw's criticism also focused on how the updated requirements do not sufficiently address climate change risk, human capital, and diversity.[109] Further, the updated requirements to Regulation S-K Item 101(c) lack standardized categories that would provide investors with information about how companies invest in its people.[110]

The SEC received hundreds of comments criticizing the updated human capital disclosure requirements and asking for more prescriptive requirements in Regulation S-K Item 101(c).[111] The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") criticized the principles-based disclosure requirement because, under such an approach, companies have more discretion in choosing what information to disclose about human capital resources.[112] This

106. *See* Public Statement, Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 [https://perma.cc/8J4Q-EY2P] (arguing that the new principles-based SEC rule on human capital disclosures does not do enough to provide investors material information).

107. *See id.* (explaining how investors care about workforce diversity and climate risk, yet the promulgated principles-based rule does not prescribe specific categories that would produce material information about workforce diversity and climate risk).

108. *See* Caroline Crenshaw, *Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105*, U.S. SEC. & EXCH. COMM'N (Aug. 26, 2020), https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k [https://perma.cc/R8ZS-SACX] (criticizing principles-based approach to disclosure requirements of human capital for Regulation S-K; explaining how human capital is a valuable asset and information about human capital can show investors how a company is faring).

109. *See id.* (arguing that investors should be informed about how climate change is impacting companies, how companies invest in their workforce, and companies' diversity efforts).

110. *See id.* (arguing that specific human capital metrics would have allowed investors to understand how companies would fare during the COVID-19 crisis).

111. Lee, *supra* note 106 (describing the public comments received about the updated SEC rule and how the principles-based approach falls short of providing investors the information they need to make decisions).

112. *See* Comment Letter from Brandon J. Rees, Deputy Dir., Am. Fed'n of Lab. & Cong. of Indus. Orgs., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324055-194715.pdf [https://perma.cc/X8NV-NCPX] (explaining how a prescriptive-based disclosure

discretion might enable companies to only disclose the information about human capital resources that depicts their company in the most favorable manner.[113]

Many comments suggested the SEC include prescriptive requirements in combination with a principles-based approach to human capital resources disclosures in Item 101 of Regulation S-K.[114] The Los Angeles County Employees' Retirement Association ("LACERA") urged the SEC to adopt rules-based disclosure requirements for specified human capital metrics in addition to a principles-based approach to disclosures.[115] In advocating for the inclusion of rules-based disclosure requirements, LACERA cited concerns the CFA Institute[116] had previously expressed to the SEC in 2016 about updating Regulation S-K disclosure requirements.[117] The flaw of purely

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requirement for Regulation S-K Item 101(c) in addition to principles-based disclosure requirements would ensure investors have "uniform and consistent" information about a company's human capital resources).

113. *See* BATISH ET AL., *supra* note 80, at 4 ("Our analysis shows that companies tend to cherry pick the categories of [human capital management] that they disclose, and disclosure is rarely detailed and quantitative.").

114. *See, e.g.*, Comment Letter from Martin Whittaker, Chief Exec. Officer, JUST Capital, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Dec. 12, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6533942-200448.pdf [https://perma.cc/2CPX-Q67E] (explaining why the SEC should adopt both a principles-based approach and prescriptive requirements for its human capital disclosure requirements in Item 101 of Regulation S-K); Comment Letter from Martin Buttle, Head of Good Work, ShareAction, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Dec. 21, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6577976-201111.pdf [https://perma.cc/AH6U-PQ24] (articulating that a principles-based and prescriptive-based approach to human capital disclosure requirements would allow investors to have a fuller understanding of a company's human capital resources).

115. *See* Comment Letter from Jonathan Grabel to Vanessa Countryman, *supra* note 68, at 2 ("Principles-based disclosures alone, however, have inherent weaknesses and may impede effective comparability, thereby limiting the Commission in its aim to promote efficient capital markets and facilitate capital formation.").

116. The CFA Institute is an organization of investment professionals which provides the Chartered Financial Analyst designation for investors. *Mission & Vision*, CFA INST., https://www.cfainstitute.org/en/about/vision [https://perma.cc/AX8K-8NNG] (last visited Jan. 3, 2023); *CFA Institute Programs*, CFA INST., https://www.cfainstitute.org/en/programs [https://perma.cc/WE3R-ULG2] (last visited Jan. 15, 2023).

117. Comment Letter from Jonathan Grabel to Vanessa Countryman, *supra* note 68, at 2 (("First, issuers will withhold disclosure based on an internal determination that the information is immaterial. Second, issuers will group information in a manner that obfuscates negative performance or conditions. And third, different issuers will apply the 'principles' differently, thus making the information incomparable across different issuers.") (quoting Comment Letter from Kurt N. Schacht & James C. Allen, CFA Institute, to Brent J. Fields, Sec'y, U.S. Sec. & Exch. Comm'n 4 (Oct. 6, 2016), https://www.cfainstitute.org/-

principles-based disclosure requirements, the CFA Institute noted, is that issuers will likely prioritize their needs in disclosures over what would be informative to investors.[118] A principles-based approach to disclosure would enable issuers to determine what information is immaterial and to disclose information in a way that conceals the truth about a company's conditions.[119]

Another concern about the principles-based approach to the updated disclosure requirements in Item 101(c) is the lack of uniformity, which will not allow for comparable data across companies in similar industries.[120] The omission of prescriptive rules for the disclosure requirements runs counter to the principle of disclosing material information to investors.[121] Without standardization in human capital disclosures, investors are likely to only receive "boilerplate language" about companies' human capital resources.[122] Comparable

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/media/documents/comment-letter/2015-2019/20161006.pdf [https://perma.cc/KZJ8-MM7F])).

118. *See* Comment Letter from Kurt N. Schacht & James C. Allen to Brent J. Fields, *supra* note 117, at 4 (explaining why the CFA Institute is a "strong proponent" of rules-based disclosure requirements in financial reporting).

119. *See id.* (describing the consequences of principles-based disclosure requirements); Comment Letter from Fiona Reynolds, Chief Exec. Officer, Principles for Responsible Inv., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Oct. 30, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6368809-196430.pdf [https://perma.cc/K2XB-QH6C] (expressing concern that a principles-based approach will encourage companies to only disclose information that looks favorable).

120. *See* Comment Letter from Martin Buttle to Vanessa Countryman, *supra* note 114 (emphasizing that a prescriptive approach to human capital disclosure requirements can create "comparable and consistent data"); Comment Letter from Paul Rissman, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 20, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6317166-193710.pdf [https://perma.cc/F9PH-L4LH] (expressing concern that a purely principles-based approach to SEC disclosure requirements in Regulation S-K will not promote comparability among companies).

121. *See* Frey, *supra* note 10, at 1031–32 ("Merely including an unorganized mess of human capital disclosure within Item 101(c) will not allow for coherent disclosure given the amount and complexity of human capital disclosure that investors are seeking."); TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("The general standard of materiality . . . is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . What the standard does contemplate is a showing of a substantial likelihood that, under all circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.").

122. *See* Comment Letter from Peter Coffin, President, Breckinridge Cap. Advisors, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 31, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6434378-198587.pdf [https://perma.cc/XBG3-6ETF] (explaining concerns about the principles-based approach to

data about companies' human capital allow investors to assess companies' long-term sustainability.[123]

Some comments suggested categories that should be added to Regulation S-K Item 101(c) with regard to human capital disclosures.[124] These comments suggested that Item 101(c) should include standardized metrics about the number of full-time and part-time employees, retention rate, cost of the workforce, diversity within the workforce, and employee engagement and wellbeing.[125] These standardized categories

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Regulation S-K and how it will not provide investors with the information they need to assess companies).

123. *See* Letter from Mark R. Warner, Sen., U.S. Senate, & Cynthia Axne, Rep., U.S. House of Reps., to Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n (May 19, 2020), https://www.sec.gov/comments/s7-11-19/s71119-7489137-221745.pdf [https://perma.cc/T4RN-8D74] (arguing that standardized metrics in human capital disclosures allow for comparability, which allows investors to assess current and future performance); Comment Letter from Jonathan Grabel to Vanessa Countryman, *supra* note 68, at 2 (expressing concern that a principles-based approach to human capital disclosures will likely prevent comparability of human capital resources among different companies).

124. *See, e.g.*, Comment Letter from Martin Whittaker to Vanessa Countryman, *supra* note 114 (describing "potentially universal" human capital metrics for companies, including "1) Size and composition (full-time, part-time, non-employee) of the workforce; 2) Total cost of workforce and pay equity analyses; 3) Turnover; and 4) Demographics of workforce (gender, race/ethnicity)"); Comment Letter from Anne Sheehan, Dir. Corp. Governance, Cal. State Tchrs.' Ret. Sys., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Oct. 26, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6353231-195593.pdf [https://perma.cc/5Q7B-HUAG] (proposing specific line-item disclosures about human capital, including for example the "number of full-time, part-time, and contingent workers," metrics on workplace diversity, and retention rate of workers); Comment Letter from Tim Goodman, Dir., Hermes Equity Ownership Servs. Ltd., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6339499-195289.pdf [https://perma.cc/AQ54-V3FW] (suggesting standardized categories for human capital disclosures regardless of industry, including "the number of full-time, part-time and contingent workers; workforce costs; employees paid the national minimum legal wage in each country of operation; workforce diversity (by seniority, gender and ethnicity); employee turnover; the gender pay gap as defined by the UK legislation"); Comment Letter from Renaye Manley, Dir. of Cap. Stewardship, Serv. Emps. Int'l Union, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 2–3 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324053-194702.pdf [https://perma.cc/G8G5-CCRY] (explaining baseline prescriptive requirements that should be included in human capital disclosures to facilitate material information for investors across industries, including certain metrics, as well as "a list of potentially material factors such as worker recruitment, employment practices and hiring practices, employee benefits and grievance mechanisms, investment in employee training, workplace health and safety, strategies and goals related to human capital management, legal or regulatory proceedings related to employee management, and coverage by collective bargaining agreements").

125. *See, e.g.*, Comment Letter from Martin Whittaker to Vanessa Countryman, *supra* note 114 (listing examples of metrics that provide useful information to investors); Comment Letter from Anne Sheehan to Vanessa Countryman, *supra* note 124 (specifying metrics that should be included in human capital disclosures); Comment Letter from Tim

for human capital disclosures could be applicable across various industries.[126]

While some comments urged the SEC to prescribe standardized requirements for human capital disclosures regardless of industry, other comments expressed the need for disclosure requirements that account for industry differences.[127] Disclosure requirements that account for industry differences provide investors with material information to compare metrics across companies.[128]

Other comments urged the SEC to define human capital in Regulation S-K.[129] One international investor with over $1.4 trillion in assets argued that the SEC should use the Human Capital Management Coalition's definition of human capital and that ultimately disclosures about human capital should illustrate companies' workforce strategy to investors.[130] The Human Capital Management Coalition defined human

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Goodman to Vanessa Countryman, *supra* note 124 (providing examples of metrics that would be relevant across industries).

126. *See* Comment Letter from Renaye Manley to Vanessa Countryman, *supra* note 124, at 2 ("Given the importance of human capital management to business performance, a 'hybrid' approach would be more appropriate, where the SEC establishes a limited set of well-defined, baseline disclosure standards for information that is of particular interest to investors and universally-applicable across issuers, regardless of industry or business strategy.").

127. *See* Comment Letter from Peter Coffin to Vanessa Countryman, *supra* note 122 (suggesting that the SEC use Sustainability Accounting Standards Board standards that are tailored to specific industries for human capital disclosure requirements); Comment Letter from Sandra J. Peters, Senior Head, Glob. Fin. Reporting Pol'y, CFA Inst., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 9 (Nov. 27, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6490515-199568.pdf [https://perma.cc/ATT9-7ZZU] (expressing support for use of SASB standards in Item 101(c) disclosures on human capital).

128. *See* Comment Letter from Thomas L. Riesenberg, Dir. of L. & Regul. Pol'y, Sustainability Acct. Standards Bd., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 11–12 (Oct. 17, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6313644-193668.pdf [https://perma.cc/TNQ2-LYZC] (explaining how under the SASB framework, companies would have to disclose information for all prescribed standards in their specific industry, which would provide comparable data for investors).

129. *See* Comment Letter from John Bremen et al., Willis Towers Watson, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 3 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324049-194704.pdf [https://perma.cc/4DDP-KKBP] ("We propose defining human capital as '[t]he knowledge, skills, competencies, and other attributes in individuals or groups of individuals acquired during their life and used to produce goods, services, or ideas.'").

130. *See* Comment Letter from Clare Payn & John Hoeppner, Legal & Gen. Inv. Mgmt. Ltd., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 4–5 (Oct. 21, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6319110-194060.pdf [https://perma.cc/6RLN-LQ9U] (explaining why the SEC should define human capital and how "mandatory reporting metrics should be enhanced" to help inform investors).

capital as "encompass[ing] the knowledge, motivation, skills and experience of company's workforce, as well as its alignment with the company's mission and values."[131] A financial consulting firm urged the SEC to define human capital in a way that focuses on companies' workforce "as individuals and as a group."[132]

The common thread among these comments to the SEC is that the current rule does not provide investors with material information about a company's human capital resources. Many comments to the SEC included recommendations for specific categories within human capital that companies should disclose. The SEC can address these concerns and protect investors by defining human capital to include the workforce throughout a company's supply chain.

IV. MANDATED DISCLOSURE ABOUT HUMAN CAPITAL IN SUPPLY CHAINS WOULD PROTECT INVESTORS

A company's human capital encompasses the risks that impact workers through all levels[133] of the supply chain.[134] A company's supply chain includes the following entities: the company itself, the company's direct suppliers, and the suppliers to the direct suppliers.[135] Human capital resources in all tiers of a company's supply chain—direct suppliers, suppliers to direct suppliers, and sub-contractors—should be monitored and disclosed because human capital risks are common in lower tiers even if these occurrences seem further removed from the company itself.[136]

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131. Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 2.

132. Comment Letter from John Bremen et al. to Vanessa Countryman, *supra* note 129.

133. *See* CRAIG MOSS & JANE HWANG, MEASURE & IMPROVE YOUR LABOR STANDARDS PERFORMANCE 71 (2010) (defining "Tier 1" as direct suppliers, "Tier 2" as sub-suppliers who supply to direct suppliers, and "Tier 3" as entities that supply to sub-suppliers).

134. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 9 (explaining how companies' supply chains have increased risks regarding human capital).

135. *See* MOSS & HWANG, *supra* note 133, at 70 (explaining how companies should think about the entire supply chain, which includes the company, direct suppliers to the company, and suppliers to direct suppliers).

136. *See id.* at 69 (explaining how lower tiers in the supply chain are ripe for human capital risks because of pressures to meet rapid consumer demand and maintain lower prices); THE ECONOMIST INTELLIGENCE UNIT, NO MORE EXCUSES: RESPONSIBLE SUPPLY CHAINS IN A GLOBALISED WORLD 58 (2017) ("Rapid globalisation over the past few decades has generated extremely long and dispersed supply chains, and risks have proliferated hand-in-hand with their complexity."); Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 9

Disclosures about human capital within companies' supply chains are material because social media and technology make supply chain risks more visible to the general public.[137] Supply chain transparency is critical to mitigate the effects of risky events, such as reports of child labor, unpaid wages, and workplace hazards within operations of the supply chain.[138] Two areas also indicate that human capital within the supply chain is material information: legislation targeting human rights and labor violations in the supply chain and the fallout after reports of labor and human rights violations in the supply chain.[139]

A. *Legislative Efforts to Address Workers' Rights Violations Throughout the Supply Chain*

There are efforts underway to end human rights violations in the workforce throughout the supply chain at the international, federal, and state levels.[140] In 2021, President Biden signed into law bipartisan legislation that prohibits goods produced by forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China from

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("Generally, the further down the chain one goes, the greater the incentives are to cut corners through nonpayment of owed wages, safety shortcuts and other violations.").

137. *See* DAVID LINICH, THE PATH TO SUPPLY CHAIN TRANSPARENCY 3 (Deloitte University Press, 2014) (explaining the necessity for transparency about companies' supply chains as it relates to the materiality of risk); *see e.g.*, Clean Clothes (@cleanclothes), TWITTER (Oct. 26, 2022, 3:59 AM), https://twitter.com/cleanclothes/status/1585179204022321152 [https://perma.cc/79JD-9SKR] (documenting garment workers in Myanmar protesting for higher wages and protection of worker rights).

138. *See* LINICH, *supra* note 137, at 3 (arguing that transparency about supply chains can help companies reduce the effects of risk events that occur within the supply chain); SUSTAINABILITY ACCT. STANDARDS BD., PRELIMINARY FRAMEWORK ON HUMAN CAPITAL AND THE SASB STANDARDS 106 (2020) (unpublished draft), https://www.sasb.org/wp-content/uploads/2020/12/Human-Capital_Preliminary-Framework_2020-December_FINAL.pdf [https://perma.cc/8XMQ-5CHN] ("From the investor perspective, respect for human rights is strongly associated with value chain resilience and a stable business operating environment.").

139. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 10 (noting that the U.K.'s Modern Slavery Act of 2015 and California's Transparency in Supply Chains Act are examples of regulatory efforts to mitigate human rights violations in the supply chains of companies and referencing that poor oversight of supply chain risks can have "serious consequences").

140. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021); *see also* CAL. CIV. CODE § 1714.43 (West 2012); Modern Slavery Act, 2015, c. 30, § 54(1)–(2) (Eng.).

entering the U.S. market.[141] The Uyghurs Forced Labor Prevention Act creates a rebuttable presumption that the importation of any goods produced or manufactured in the Xinjiang region is banned pursuant to the Tariff Act of 1930.[142] This presumption may be rebutted if the Customs and Border Protection Commissioner finds that the importer provided evidence that no goods were produced by forced labor in the Xinjiang region.[143] An importer who requests an exception to the presumption must conduct due diligence to show compliance with requirements of the Act.[144]

Recognizing that due diligence efforts may differ across industries, the Department of Homeland Security suggested several factors that importers can use in conducting due diligence.[145] These factors included involving stakeholders, analyzing risks in the supply chain, communicating across the supply chain, assessing compliance, and rectifying violations.[146] Even though this law does not require companies to disclose information to the SEC about their supply chain as it relates to labor conditions in Xinjiang, investors may call for more ethical decisions to be made in the supply chain.[147]

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141. *See* Uyghur Forced Labor Prevention Act § 1(1) ("It is the policy of the United States to strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930 (19 U.S.C. 1307), which prohibits the importation of all 'goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by forced labor.'").

142. *See id.* § 3(a) ("The Commissioner of U.S. Customs and Border Protection shall . . . apply a presumption that, with respect to any goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China . . . the importation of such goods . . . is prohibited under section 307 of the Tariff Act of 1930.").

143. *Id.* § 3(b).

144. *See* U.S. DEP'T OF HOMELAND SEC., STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE'S REPUBLIC OF CHINA 41 (June 17, 2022) ("To overcome the rebuttable presumption, importers must conduct due diligence to ensure they do not import any goods mined, produced, or manufactured wholly or in part with forced labor. For the purposes of this guidance, due diligence includes assessing, preventing, and mitigating forced labor risk in the production of goods imported into the United States.").

145. *See id.* at 41–42 (providing a non-exhaustive list of measures a company may implement to conduct due diligence in assessing its supply chain for forced labor risks).

146. *Id.*

147. *See* Lydia Beyoud, *U.S. Crackdown on Forced China Labor Risks Supply Chains Snarls*, BLOOMBERG L. (Jan. 27, 2022, 6:00 AM), https://news.bloomberglaw.com/esg/china-forced-labor-law-risks-snarling-supply-chains-esg-goals [https://perma.cc/FRU2-CHA5] (citing an expert who stated that the law will

The State of California also recognized the need for disclosure about supply chains and the sourcing of companies' products.[148] The California Transparency in Supply Chain Act is focused on providing consumers with information about supply chain sourcing so that consumers can make informed decisions about where to direct their purchases.[149] Pursuant to the Act, companies conducting business in the state of California, whose gross receipts exceed $100 million, must disclose "their efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale."[150] The disclosures under this Act must include information about how companies assess their supply chains for risks of human trafficking.[151] This includes information pertaining to companies' inspection of suppliers to ensure suppliers follow company standards within the supply chain, as well as "internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking."[152] Similar to the consumers in California who benefit from transparency about supply chain sourcing,[153] investors would benefit from disclosures about human capital in the supply chain.

The UK Modern Slavery Act mandates businesses of certain sizes to issue a statement describing efforts "to ensure that slavery and human trafficking is not taking place in any of its supply chains."[154] Similar to the SEC disclosure requirements under Regulation S-K, the Modern Slavery Act does not encompass a prescriptive-based approach

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impact companies with regard to investors who may push for companies to make ethical choices in their supply chain and disclose more information about supply chain sourcing).

148. *See* CAL. CIV. CODE § 1714.43 (West 2012) (requiring certain companies to disclose information about the steps companies have taken to inspect their supply chains for modern slavery and human trafficking); CAL. DEP'T OF JUST., THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 1 (2015) (explaining what companies need to do to ensure compliance with the California statute).

149. *See* CAL. DEP'T OF JUST., *supra* note 148, at 3 (explaining the purpose behind the California Transparency in Supply Chains Act).

150. CAL. CIV. CODE § 1714.43(a)(1) (West 2012).

151. § 1714.43(c)(1).

152. § 1714.43(c)(2)–(4).

153. *See* CAL. DEP'T OF JUST., *supra* note 148, at i (explaining how the California Transparency in Supply Chains Act makes information available to consumers about company efforts eradicate slavery within their product supply chains).

154. Modern Slavery Act, 2015, c. 30, § 54(4)(a)–(a)(i) (Eng.).

to disclosure.[155] In fact, under the Modern Slavery Act, a company may even disclose that they have not taken any measures to ensure slavery is not taking place in its supply chains.[156]

While the purpose behind the UK Modern Slavery Act differs from the purpose behind the 2020 amendments to Regulation S-K,[157] reported modern slavery statements from companies show a similar result to S-K filings about human capital resources: general statements without much information.[158] A report analyzed over 16,000 modern slavery statements from companies since the MSA went into effect and only about three out of five companies published information about modern slavery.[159] Similar to early Regulation S-K disclosures about human capital, most of the statements companies disclosed pursuant to the MSA were vague and did not accomplish the result intended.[160]

155. *Compare* Annie Kelly, *The UK's New Slavery Laws Explained: What Do They Mean for Business?*, THE GUARDIAN (Dec. 14, 2015, 8:18 AM), https://www.theguardian.com/sustainable-business/2015/dec/14/modern-slavery-act-explained-business-responsibility-supply-chain [https://perma.cc/WM87-ZZA7] (explaining how the Modern Slavery Act does not set forth specific requirements of what to include in statements and instead companies have a great deal of discretion in choosing how much information to disclose), *with supra* Part III.C (discussing the negative impacts of the SEC's prescriptive-based rules).

156. Modern Slavery Act, 2015, c. 30, § 54(4)(b) (Eng.).

157. *See* Molly Millar, *Five Years On, Is the UK's Landmark Anti-Slavery Law Fit for Purpose?*, REUTERS (Oct. 17, 2019), https://www.reuters.com/article/us-britain-slavery-expertviews-trfn/five-years-on-is-the-uks-landmark-anti-slavery-law-fit-for-purpose-idUSKBN1WX02J [https://perma.cc/CQ4Y-SCGV] (describing that the purpose behind the UK Modern Slavery Act was to mandate that large businesses disclose their efforts to address modern slavery risks in their supply chains).

158. *See* PATRICIA CARRIER, BUS. & HUM. RTS. RES. CTR., MODERN SLAVERY ACT: FIVE YEARS OF REPORTING 3 (2021) (explaining that because the UK Modern Slavery Act does not impose prescriptive reporting requirements on large businesses, there is an information void in companies' general statements).

159. *See id.* at 23 (discussing the Centre's efforts to analyze modern slavery and attributing the lack of informative disclosure statements to the principles-based approach of the Modern Slavery Act in which the Act does not prescribe specific criteria for companies' disclosure statements).

160. *Compare* Part III.A (describing the inadequacy of early Regulation S-K disclosures), *with* CARRIER, *supra* note 158, at 11 ("The weak reporting requirements result in poor disclosure and the lack of enforcement fails to ensure companies report at all, signaling it is simply not a priority for government.").

B. *How Workers' Rights Violations Within Supply Chains Have Hurt Investors*

When stories of poor work conditions in companies' supply chains make the headlines, shareholders and investors are harmed by the reputational damage that results.[161] The Hershey Company faced public scrutiny when details emerged about the workplace conditions of foreign students who had been hired to work at a packing facility for a contractor of Hershey Company.[162] These students were lied to about a cultural exchange program and instead were forced to work at a Hershey's packing facility, which underpaid the students' labor.[163] Hershey had contracted with the packing facility for day-to-day operations, and in turn, this packing facility had contracted with another contractor to provide workers.[164] Hershey was also in the spotlight in 2012 when Louisiana Municipal Police Employees' Retirement System—one of Hershey's shareholders—filed a lawsuit against Hershey to obtain documents to determine whether the company knew about and permitted child labor in its supply chain.[165] In its complaint, the Louisiana Municipal Police Employees' Retirement System expressed concern that Hershey permitting child labor in its supply chain risked the company's "reputation."[166] When labor rights

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161. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 8–9 (explaining how supply chain failures can generate corporate reputational harm which hurts investors); MOSS & HWANG, *supra* note 133, at 8 ("Reputational risk is broadly defined as events that undermine public trust in your company, project or product/service.").

162. *See* Jorge Rivas, *Foreign Students on U.S. Summer Visas Tricked to Work at Hershey's Factory*, COLORLINES (Aug. 19, 2011, 12:16 PM), https://www.colorlines.com/articles/foreign-students-us-summer-visas-tricked-work-hersheys-factory [https://perma.cc/57PD-HB96] (reporting on a walkout that occurred at a Hershey's packing facility in response to poor working conditions and unpaid labor).

163. *Id.*

164. Julia Preston, *Companies Point Fingers as Students Protest Conditions at Chocolate Plant*, N.Y. TIMES (Aug. 18, 2011), https://www.nytimes.com/2011/08/19/us/19students.html [https://perma.cc/Y6UF-WPMT].

165. Tom Hals, *Hershey Sued for Information on Use of Child Labor in Cocoa Supplies*, REUTERS (Nov. 1, 2012), https://www.reuters.com/article/cbusiness-us-hershey-childlabor-idCABRE8A01OD20121101 [https://perma.cc/D24K-K9N5]; Kathryn Manza, Note, *Making Chocolate Sweeter: How to Encourage Hershey Company to Clean Up Its Supply Chain and Eliminate Child Labor*, 37 B.C. INT'L & COMPAR. L. REV. 389, 390 (2014).

166. *See* Manza, *supra* note 165, at 390 ("The shareholders argued that the Board's actions could damage Hershey's brand and reputation . . . .").

violations publicly emerge in companies' supply chains, investors may bear the brunt of the resulting damage.[167]

The Deepwater Horizon explosion and oil spill in 2010 provides another example of the need for disclosures to investors about companies' supply chains.[168] BP and its contracted drilling rig operator neglected to consider safety within the process of drilling oil.[169] BP understated the severity of the oil spill,[170] which was caused by inadequate hazard assessment protocol and BP's failure to ensure the work conditions in its oil drilling operations were safe.[171] Ultimately, this failure in oversight of the drilling rig operations cost shareholders because once the reality of the situation was revealed, shares drastically dropped.[172] Ongoing disclosure and transparency in BP's drilling rig operations may have provided investors with the information they needed to understand BP's risk exposure, which ultimately could have influenced BP to adopt safer standards for its oil drilling operations.[173]

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167. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 8–9 (explaining how risks pertaining to human capital in companies' supply chains can cause problems when there is not proper oversight of workers within the supply chain).

168. *See id.* (explaining how the Deepwater Horizon explosion and subsequent oil spill was costly to shareholders).

169. Press Release, U.S. Chem. Safety Bd., CSB Investigation: At the Time of 2010 Gulf Blowout, Transocean, BP, Industry Associations, and Government Offshore Regulators had not Effectively Learned Critical Lessons from 2005 BP Refinery Explosion in Implementing Safety Performance Indicators (July 24, 2012), https://www.csb.gov/csb-investigation-at-the-time-of-2010-gulf-blowout-transocean-bp-industry-associations-and-government-offshore-regulators-had-not-effectively-learned-critical-lessons-from-2005-bp-refinery-explosion-in-implementing-safety-performance-indicators/ [https://perma.cc/5L68-DRPK] (assessing the Deepwater Horizon explosion and reporting that BP and its contractor did not manage risk for process safety issues of the oil rig).

170. *See* Jonathan Stempel, *BP Oil Spill Lawsuit in U.S. Wins Class-Action Status*, REUTERS (May 21, 2014, 8:47 AM), https://www.reuters.com/article/us-bp-lawsuit/bp-oil-spill-lawsuit-in-u-s-wins-class-action-status-idUSBREA4K0GY20140521 [https://perma.cc/Q2G9-MNMW] (reporting that shareholders could pursue a class action because BP "lowballed" the severity of the oil spill).

171. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 9 (explaining how companies are incentivized to not have the proper oversight of work conditions further down the supply chain and this oversight can be costly to investors).

172. Rob Davies, *BP to Pay $175m to Investors over Deepwater Horizon Spill*, THE GUARDIAN (June 3, 2016, 6:14 AM), https://www.theguardian.com/business/2016/jun/03/bp-compensate-investors-deepwater-horizon-oil-spill [https://perma.cc/UHH2-AH2B].

173. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 9 ("For example, investigators have concluded that BP's 2010 Deepwater Horizon explosion and oil spill . . . resulted from, among other things, the lack of hazard assessment coordination between BP and the contractor actually operating the drilling rig.").

A boycott against Wal-Mart, in response to reports of serious labor rights violations in the retailer's operations and supply chains, subsequently impacted Wal-Mart shareholders.[174] The ethical council of a Norwegian government pension fund—the entity that boycotted Wal-Mart—had found that Wal-Mart violated labor rights by employing minors and permitting dangerous workplace conditions in its supply chain.[175]

Legislative efforts addressing labor violations in the supply chain and news stories about labor rights in the supply chain indicate that human capital in the supply chain is material information to investors.[176] Investors face financial harm if they invest in companies not doing their due diligence in investigating human rights violations in their supply chain.[177] Labor conditions in the supply chain is material to investors because investors are already using ESG factors in their decision-making,[178] and some investors have even called on the SEC to adopt established sustainability standards for disclosure requirements in Regulation 10-K.[179]

V. PRACTICAL CONSIDERATIONS AND CHALLENGES WITH DISCLOSING INFORMATION ABOUT HUMAN CAPITAL IN THE SUPPLY CHAIN

One practical challenge with mandated human capital disclosures in the supply chain is the cost of compliance, which several SEC public comments cited as a reason for supporting a principles-based approach.[180] The American Securities Association commended

174. Terry Macalister, *Biggest Pension Fund Boycotts Wal-Mart*, THE GUARDIAN (June 6, 2006, 7:03 AM), https://www.theguardian.com/business/2006/jun/07/supermarkets.asda [https://perma.cc/RDU6-3VL5] (noting the company's shares fell in response).

175. *Id.*

176. *See* Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 9–11 (linking regulatory action to workforce risks in the supply chain by discussing news stories about supply chain risks).

177. *See id.* at 9 (explaining how human capital risks in the supply chain can be costly to companies and investors).

178. *Supra* Part III.A.

179. *Supra* Part III.C.

180. *See, e.g.,* Comment Letter from Christopher A. Iacovella, Chief Exec. Officer, Am. Secs. Ass'n, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 25, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6332002-194901.pdf [https://perma.cc/WX8X-BC8E] (stating that the average compliance costs for companies to complete an initial public offering is $2.5 million); Comment Letter from Nancy B. Hammer, Vice President, Regul. & Jud. Engagement, Soc'y for Hum. Res. Mgmt., to

the SEC for its principles-based disclosure requirements in Regulation S-K.[181] In support of the principles-based approach, the American Securities Association cited a report that found it costs issuers on average $2.5 million in compliance costs for an initial public offering.[182] Companies may view additional disclosure requirements as burdensome especially considering that the length of the average 10-K has increased in the last 23 years.[183] Disclosure requirements about human capital in the supply chain may also place greater burdens on smaller registrants in comparison to larger registrants because larger firms have more resources to conduct due diligence about human capital within the company workforce.[184]

Disclosing information about labor conditions in the supply chain may pose the question of the scope of the supply chain do issuers go with disclosure. Tracing labor conditions throughout different levels of the supply chain for disclosure purposes may simply not be feasible for companies[185] because supply chains are often "multi-tiered and fluid."[186] It may be difficult for companies to investigate workforce

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Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 1–2 (Oct. 28, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6375873-197302.pdf [https://perma.cc/6A3N-8G5E] (explaining support for the principles-based approach to disclosure requirements and describing the impracticalities with the SEC mandating prescriptive-based disclosure requirements).

181. *See* Comment Letter from Christopher A. Iacovella to Vanessa Countryman, *supra* note 180 ("The ASA supports several key components of the [p]roposal, including the adoption of a more principles-based approach to certain disclosure requirements . . . . The Commission must continue to reject these attempts to politicize disclosure and maintain the longstanding materiality standard.").

182. *See id.* (citing Vipal Monga & Emily Chasan, *The 109,894-Word Annual Report*, WALL ST. J. (June 2, 2015, 4:30 AM), https://www.wsj.com/articles/BL-CFOB-8071 [https://perma.cc/7TDT-FXB2]).

183. *See* Monga & Chasan, *supra* note 182 (reporting that the average length of a 10-K in 2013 was 42,000 words compared to an average length of 30,000 words in 2000).

184. *See* Comment Letter from John A. Zecca, Exec. Vice President, Chief Legal Officer, Chief Regul. Officer, Nasdaq Inc., to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 4 (Oct. 29, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6363798-196412.pdf [https://perma.cc/SBL5-NX9L] (stating that human resources departments in larger firms are more equipped to handle regulatory demands of human capital disclosures in contrast to smaller firms whose human resources departments do not have access to many resources).

185. *See* Comment Letter from Nancy B. Hammer to Vanessa Countryman, *supra* note 180, at 2 (stating that there are practical challenges when requiring companies to disclose information about their supply chains).

186. Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 424 (2015) (describing the difficulty with enforcing supply chain regulation with regard to human rights risks).

conditions within the sub-contractors or suppliers of the company's direct suppliers.[187] In fact, the most cited challenge to companies conducting due diligence is "supply chain complexity."[188]

In a climate change and ESG survey in which over 430 companies participated, 84% of the companies favored a principles-based approach to SEC disclosure requirements.[189] These same companies also argued that disclosure requirements should account for industry differences.[190] One concern expressed in a SEC public comment about Regulation S-K Item 101(c) was that comparability of human capital disclosure statements might significantly differ across companies and confuse investors.[191] However, some frameworks already have standards to address human capital in supply chains that are tailored to specific industries and would allow for comparability.[192]

Companies may also be reluctant to disclose information about human capital in supply chains because of concerns about the confidentiality of corporate information.[193] Some companies have been

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187. *See* MOSS & HWANG, *supra* note 133, at 71 (explaining that direct suppliers may not want to reveal their sub-contractors because the company may try to work directly with the sub-contractors instead of the direct supplier).

188. *See* THE ECONOMIST INTELLIGENCE UNIT, *supra* note 136, at 13 (reporting on survey of 800 executives in which 49% of executives stated that supply chain complexity was the biggest barrier to monitoring human capital risks in the supply chain).

189. U.S. CHAMBER OF COM. CTR. FOR CAP. MKTS. COMPETITIVENESS, CLIMATE CHANGE & ESG REPORTING FROM THE PUBLIC COMPANY PERSPECTIVE 12 (2021) https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/08/CCMC_ESG_Report_v4.pdf [https://perma.cc/VP6T-VTK8].

190. *See id.* (stating that 84% of surveyed companies expressed support specifically for climate risk disclosure requirements that factor in industry differences).

191. *See* Comment Letter from Prat Bhatt, Chairman, Comm. on Corp. Reporting, to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 4 (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6323221-194578.pdf [https://perma.cc/ZCC3-BPCV] ("The relationship between human capital information and financial performance is indirect, and many companies are still developing their understanding of this relationship and how it might be used for decision making . . . . [E]very company is unique and collects, uses, and evaluates human capital information differently . . . . Even within voluntary disclosures, there is a wide range of the type of information that companies are disclosing . . . . We believe the comparability of human capital disclosures across companies and even within industries may vary widely and could lead to confusion among users.").

192. *See supra* notes 68–71 and accompanying text (discussing the SASB standards for human capital disclosure requirements).

193. *See* AARON BERNSTEIN & LARRY BEEFERMAN, LAB. & WORKLIFE PROGRAM AT HARV. L. SCH., THE MATERIALITY OF HUMAN CAPITAL TO CORPORATE FINANCIAL PERFORMANCE 39 (2015) (describing a 2003 task force report which found that companies in the UK only disclosed limited information about human capital because of confidentiality concerns); Comment Letter from Prat Bhatt to Vanessa Countryman, *supra* note 191, at 4–5

reluctant to disclose information about their suppliers due to "competition for supplier capacity."[194] This concern has even prevented companies from collaborating with non-competitors to improve supplier standards.[195] Specifically, companies are hesitant to disclose information about suppliers that might compromise their "competitive advantage."[196]

The SEC may also face criticism that the agency is acting beyond its regulatory power and instead focusing too much on regulating social issues if it were to require companies to disclose information about human capital in its supply chains. In response to the agency's regulatory agenda, Commissioner Hester M. Peirce compared the proposed rules on the regulatory agenda to a "rip current" by accelerating the pace of activist rulemaking, which would "make for dangerous conditions in our capital markets." [197] Commissioner Peirce described the proposed rules on the regulatory agenda as a "rush of radical rulemakings" that consider "far-reaching changes to our regulatory regime."[198]

Along similar lines, the Supreme Court's decision in West Virginia v. EPA in summer 2022 embraced the major questions doctrine[199]—a doctrine which could prevent the SEC from adopting a rule that includes the supply chain in its human capital definition. In *West Virginia*, the Court held that the EPA did not have congressional authorization to implement a generation-shifting rule to reduce carbon emissions from coal-fired power plants.[200] The majority in *West Virginia* concluded that under the major questions doctrine, a federal

(explaining concerns that human capital disclosure requirements might cause companies to reveal sensitive information).

194. *See* Basak Kalkanci & Erica L. Plambeck, *Reveal the Supplier List? A Trade-off in Capacity vs. Responsibility,* 22 MFG. & SERV. OPERATIONS MGMT. 1251, 1252 (2020) (explaining how supplier information is proprietary to companies).

195. *See* THE ECONOMIST INTELLIGENCE UNIT, *supra* note 136, at 55 (reporting that only 27% of companies that participated in the survey were willing to work with non-competitors out of concern that disclosing supplier information may reveal company secrets).

196. *Id.*

197. Public Statement, Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, Rip Current Rulemakings: Statement on the Regulatory Flexibility Agenda (June 22, 2022), https://www.sec.gov/news/statement/peirce-statement-regulatory-flexibility-agenda-062222 [https://perma.cc/53BT-W8F9].

198. *Id.*

199. West Virginia v. EPA, No. 20–1530, slip op. at 20 (U.S. June 30, 2022).

200. *Id.* at 31.

agency must have "clear congressional authorization" for rules that implicate "vast economic and political significance."[201]

Under the major questions doctrine that was laid out in *West Virginia*, an amended rule that requires registrants to disclose human capital resources in the supply chain could be challenged on the grounds that such a rule is regulating social issues instead of regulating securities.[202] A crucial question would be whether the inclusion of human capital in companies external to the reporting company in the supply chain is a major question that cannot be decided by the SEC via Regulation S-K without specific direction from Congress.

Anti-ESG pushback against large investment firms may also serve as a cautionary signal to the SEC to tread carefully before amending human capital disclosure requirements under regulation S-K.[203] In December 2022, Florida divested $2 billion in assets that BlackRock had managed in opposition of the firm's ESG investing.[204] If officials are targeting investment firms for ESG initiatives, then mandating disclosure of labor conditions in companies' supply chains and exposing companies to divestment could be seen as contrary to the SEC's mission of protecting investors.

The SASB framework, however, shows that these practical challenges to human capital disclosures in the supply chain may not be too cumbersome. For example, in the apparel industry, SASB has created three standards for company disclosures about labor conditions in the supply chain, which could help provide investors with uniform information about human capital risks.[205] The first standard measures

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201. *Id.* at 17, 19.

202. *See* Peirce, *supra* note 197 ("[The SEC] used to focus on companies' disclosure of economically material information; we now focus on disclosure of hot-button matters outside our remit.").

203. *See, e.g.*, Rebecca Leber, *The Weird Republican Turn Against Corporate Social Responsibility*, VOX (Dec. 10, 2022, 7:00 AM), https://www.vox.com/energy-and-environment/2022/12/10/23496712/esg-gop-climate-corporate-responsibility [https://perma.cc/77FA-MA9W] (describing how Republican officials are targeting BlackRock and other large investment firms because of those firms' ESG investments).

204. Ross Kerber, *Florida Pulls $2 Bln from BlackRock in Largest Anti-ESG Divestment*, REUTERS (Dec. 1, 2022, 4:39 PM), https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01/ [https://perma.cc/X8P7-P3VL].

205. *See* SASB STANDARDS BD., APPAREL, ACCESSORIES & FOOTWEAR: SUSTAINABILITY ACCOUNTING STANDARD 4 (2022), https://www.sasb.org/wp-content/uploads/2018/11/Apparel_Accessories_Footwear_Standard_2022.pdf [https://perma.cc/6D7F-42R5] ("SASB standards are designed to identify a minimum set of

the percentage of direct suppliers and sub-suppliers "that have been audited to a labor code of conduct."[206] The second standard builds on the first standard by focusing on the rates of non-compliance with the labor code of conduct and "associated corrective action rate" for direct suppliers and sub-suppliers after being audited.[207] Under the third standard, apparel companies must describe the "greatest labor and environmental, health, and safety risks in the supply chain."[208] These three standards for the apparel industry serve as guidelines for monitoring human capital risks in the supply chain[209]—something the SEC could consider implementing.

With prescriptive standards, as demonstrated by the SASB framework, companies can report consistent and material information that allow investors to truly understand companies' supply chain risks.[210] In its 2021 10-K disclosure, Allbirds, an apparel company, used the SASB standards to disclose information about labor conditions in its supply chain.[211] Allbirds detailed its auditing measures in the supply chain and how the company assesses factories' compliance with Allbirds' Supplier Code of Conduct.[212] Gap Inc., another apparel company, implemented the SASB standards to complete its 2021 ESG Report.[213] Using an SASB accounting metric for labor conditions in the supply chain, Gap reported that 83% of its Tier 1[214] suppliers were

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sustainability issues most likely to impact the operating performance or financial condition of the typical company in an industry . . . . SASB standards can help investors by encouraging reporting that is comparable, consistent, and financially material, thereby enabling investors to make better investment and voting decisions.").

206. *Id.* at 18.

207. *Id.* at 20.

208. *Id.* at 21.

209. *See id.* at 18 (explaining how enhanced oversight of direct suppliers and suppliers of direct suppliers can protect investors).

210. *See* Comment Letter from Thomas L. Riesenberg to Vanessa Countryman, *supra* note 128, at 11 (explaining how SASB standards require companies to use all of the metrics listed for their industry and to include an explanation for excluding any metrics).

211. *See* Allbirds, Inc., Annual Report (Form 10-K) 21–34 (Mar. 16, 2022), https://ir.allbirds.com/static-files/66199551-bb59-4070-9d19-9cdca77dfe4d (explaining in detail how the company audits its suppliers).

212. *See id.* at 26–27 (describing how the company uses third-party auditors to assess labor conditions in factories).

213. GAP INC., 2021 ESG REPORT 64–71 (2021), https://gapinc-prod.azureedge.net/gapmedia/gapcorporatesite/media/images/values/sustainability/documents/2021/gap-inc-2021-esg-report.pdf [https://perma.cc/7N27-HW4C].

214. *See* SASB STANDARDS BD., *supra* note 205, at 18 (defining "Tier 1" suppliers as the direct supplier of a company).

audited for compliance with the company's Code of Vendor Conduct.[215] These two apparel companies' reports provide comparable data for investors by using the SASB framework, which has baseline metrics for labor conditions in the supply chain.[216] The fact that companies across industries are already incorporating the SASB standards into annual reports suggests that prescriptive-based disclosure requirements can adequately account for industry differences and provide consistent and comparable metrics about human capital across industries.[217]

VI. CONCLUSION

With proposed rules to amend human capital disclosure requirements on its regulatory docket,[218] it is important that the SEC consider amending its human capital disclosure requirements in a way that provides investors with material information about a company's human capital.[219] The SEC can carry out its mission of protecting investors by defining human capital to include the workforce throughout a company's supply chains.[220] Perhaps the SEC would be venturing into social issues if it adopted such a proposal. However, if investors are already considering ESG issues in their decision-making—which necessarily implicates the materiality of social issues, then this just might be an area that falls within the SEC's regulatory power.

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215. GAP INC., *supra* note 213, at 66.

216. *Compare id.* (disclosing in accordance with the SASB accounting metric for labor conditions in the supply chain that 83% of Tier 1 suppliers were audited for compliance with the Code of Vendor Conduct), *with* Allbirds, Inc., *supra* note 211, at 26 (disclosing in accordance with the SASB accounting metric for labor conditions in the supply chain that 100% of the company's Tier 1 suppliers were audited for compliance with the labor code).

217. *Companies Reporting with SASB Standards*, SASB STANDARDS, https://www.sasb.org/company-use/sasb-reporters/ [https://perma.cc/Z34H-XHUW] (last visited Oct. 27, 2022) (indexing the hundreds of companies who implement SASB standards into their reporting mechanisms to investors).

218. U.S. Gen. Servs. Admin., *supra* note 13 ("The Division is considering recommending that the Commission propose rule amendments to enhance registrant disclosures regarding human capital management.").

219. *See e.g.*, Hum. Cap. Mgmt. Coal. letter, *supra* note 15, at 11 (emphasizing the value of "human capital management to company performance").

220. *See id.* at 9 ("Human capital-related risks are not limited to a company's direct employees . . . . [T]he rise of outsourcing, subcontracting, franchising and complex global supply chains, have multiplied those risks.").

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