HUMAN CAPITAL DISCLOSURE & CORPORATE GOVERNANCE: THE NEW EVIDENCE

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This Article explores the evolution of human capital disclosure—firm-supplied information about various workforce-related matters—as a factor in contemporary corporate governance. Regulatory and nonregulatory developments from recent years have upended longstanding practices and generated extensive new evidence. Most notably, the Securities and Exchange Commission (SEC) adopted a human capital management ("HCM") disclosure mandate in 2020, which, though long overdue, was criticized from the outset for its modest scope and lax design. In the meantime, courts have taken a renewed interest in board of directors' oversight responsibilities in a number of areas, including HCM, while labor's power has unexpectedly increased in some areas and decreased in others. HCM-focused shareholder proposals have proliferated and now cover a range of heretofore unexplored topics. This dynamic new landscape raises important analytical and normative questions: Has the SEC's disclosure intervention from 2020 been effective and, if not, what should a revised HCM disclosure framework look like? More broadly, does the increased visibility of labor in corporate filings indicate that its role and status within corporate governance, which had been static for decades, have now changed?

To answer these questions, the Article examines six complementary types of evidence selected through an original "mixed methods" research design—a methodological approach popular in the social and behavioral sciences but

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underutilized in corporate law. The new evidence includes: (1) a meta-analysis of large-scale quantitative studies examining the incidence and characteristics of HCM disclosure; (2) hand-collected data from the SEC review process for initial public offering ("IPO") filings; (3) an original case study showing the existence of material disclosure gaps in regulatory filings; (4) evidence from HCM-related shareholder proposals; (5) evidence from recent labor market developments; and (6) a new line of Delaware fiduciary duty cases focused on board oversight of "mission-critical" matters. While these six lines of inquiry in isolation offer only fragmented depictions, combining them through the mixed methods approach generates a more nuanced and comprehensive picture that can inform both policy and academic discourse.

The principal implications are twofold. With respect to securities law, the analysis highlights the need for a revised HCM disclosure framework that: (1) elicits more detailed, standardized, and, where appropriate, quantitative information; (2) covers both traditional employees and the so-called shadow workforce comprised of contingent workers; and (3) pays much-needed attention to the complementarities and substitutability between human capital and AI-enabled technology. With respect to corporate governance writ large, the analysis underscores the enduring precarity of labor's status within the firm, which will likely be deepened by the AI revolution.

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INTRODUCTION

Workforce-related matters appear to represent a major concern for today's investors and corporate boards: from skill shortages and growing labor costs; to workplace health, safety, and culture; to the integration of artificial intelligence ("AI") in the workplace and the potential replacement of knowledge workers with AI-enabled technologies. Rather remarkably, this sustained focus on the workforce dates back only to the mid- to late-2010s, and, for decades prior, workers clearly stood at the periphery of corporate governance.[1] Oversight of workforce-related matters did of course take place, but it was a task assigned primarily to corporate management and not to the locus of firm governance, the corporate board. The workforce was also largely invisible in corporate disclosure reports and annual shareholder meetings. For instance, the Securities and Exchange Commission (SEC) did not require public companies to disclose any specific information about their workforce save for a single number, the total employee headcount,[2] despite mandating extensive disclosures on a wide array of other topics. Along similar lines, shareholder proposals on workforce-related matters faced indifference from most investors and even occasional hostility from the SEC.[3]

By the late 2010s, the term "human capital"—workers' skills, knowledge, training, and overall productive capacity—had become the dominant way to refer to the workforce in mainstream corporate

1 *See infra* Section I.B.

2 *See* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 650 (2021) [hereinafter Georgiev, *Human Capital Management*].

3 *See id.* at 648–56 (2021) (discussing the historical role of workers in U.S. corporate governance). Between 1992 and 1998, the SEC interpreted the ordinary business exclusion in Rule 14a-8 to cover any proposal addressing employment-related matters, including in the infamous Cracker Barrel case. *Id.*

governance discussions.[4] In turn, human capital's ascendant visibility in board deliberations, shareholder proposals, and disclosure documents reflected a sea change in attitudes and approaches and represented a novel corporate governance phenomenon, which I identified in earlier work as a *human capital management ("HCM") movement*.[5] Several years on, the HCM movement is an established—though still relatively novel—phenomenon, and, given its prominence and potential for expansion, the evidence it has generated thus far requires careful study and analysis. This is the goal of this Article.

Much of the new evidence relates to the new SEC disclosure rule adopted in 2020 (the "HCM disclosure rule") requiring any public company to provide a description of its "human capital resources, including any human capital measures or objectives that [it] focuses on in managing the business."[6] The rule was a formal acknowledgement of the strong investor demand for HCM disclosure and generated much new information about firms' HCM practices. From the outset, however, the rule was also criticized for its limited scope and excessive flexibility due to its open-ended design.[7] Accordingly, investors, commentators, and legislators urged the SEC

4 Labor economist and Nobel laureate Claudia Goldin defines "human capital" as "the stock of skills that the labor force possesses," and notes that the concept "encompasses the notion that there are investments in people (e.g., education, training, health) and that these investments increase an individual's productivity." *See* Claudia Goldin, *Human Capital*, *in* HANDBOOK OF CLIOMETRICS (Claude Diebolt & Michael Haupert eds., 2016). Usage of the term in corporate governance discourse is somewhat looser, as demonstrated by the examples included in this Article.

5 *See* Georgiev, *Human Capital Management*, *supra* note 2, at 648–56; *infra* Section I.B. In this context, HCM, a business concept adopted by corporate governance practitioners, means the effective management of the firm's human resources (i.e., workforce) for the purpose of improving firm productivity. HCM can expand to accommodate virtually all matters related to workers, including training, compensation, turnover and retention, health and safety, pay equity, diversity, and corporate culture, among others. *See infra* Section I.A.

6 Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Release No. 33-10825, Exchange Act Release No. 34-89670, 85 Fed. Reg. 63726, 63739 (Oct. 8, 2020) (to be codified at 17 C.F.R. pts. 229, 239–40) [hereinafter Reg. S-K 2020 Modernization Release].

7 *See, e.g.*, Caroline Crenshaw, Comm'r, U.S. Sec. & Exch. Comm'n, Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105 (Aug. 26, 2020), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-modernization-regulation-s-k [https://perma.cc/TTA2-6YYH] (criticizing the new rule as "generic and vague" and noting that it fails to provide investors with "critical and useful information about key corporate metrics").

to expand the rule,[8] and the SEC expressed openness to the idea (though it did not act).[9]

These regulatory developments in the area of mandatory disclosure have intersected with nonregulatory ones: In the realm of investor-driven private ordering, shareholder proposals filed during the four proxy seasons since the rule's adoption have highlighted the importance of various workforce-related matters for investors.[10] At the same time, decisions by the leading business law court in the United States, the Delaware Court of Chancery, have put a spotlight on certain new "mission-critical" issues—a nebulous term which, this Article argues, should be understood to encompass certain matters pertaining to the workforce.[11] Developments in these two ancillary areas, shareholder proposals and Delaware corporate law doctrine, provide both context and additional evidence for developments pertaining to human capital disclosure.

The Article addresses two principal questions: Has the SEC's disclosure intervention from 2020 been effective and, if not, what should a revised HCM disclosure framework look like? More broadly, does the increased visibility of labor in corporate filings indicate that its role and status within corporate governance, which had been static for decades, have now changed?

These questions are highly consequential. Firms and their advisers, as well as policymakers, regulators, and independent standard-setters are actively focused on human capital disclosure and the potential need to refine the 2020 HCM disclosure rule.[12] In the academic fields of corporate law, accounting, and finance, SEC disclosure policy—especially on more novel topics such as HCM—is the subject of lively debate,[13] which became particularly pitched

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8 *See, e.g.*, Press Release, Office of Sen. Mark R. Warner, Warner, Brown Urge SEC To Implement Improvements to Their Human Capital Disclosure Rules (June 16, 2022), https://www.warner.senate.gov/public/index.cfm/2022/6/warner-brown-urge-sec-to-implement-improvements-to-their-human-capital-disclosure-rules [https://perma.cc/Q638-JSQK] (supporting further rulemaking on HCM topics).

9 *See* Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, Prepared Remarks at London City Week (June 23, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-speech-london-city-week-062321 [https://perma.cc/85VX-8PSQ] (noting that he had "asked staff to propose recommendations for the Commission's consideration on human capital disclosure," which "builds on past agency work and could include a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety").

10 *See infra* Section III.D.

11 *See infra* Section III.F.

12 *See* Georgiev, *Human Capital Management*, *supra* note 2, at 666–91.

13 *See, e.g.*, Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923 (2019) (advocating for sustainability disclosure and discussing potential approaches);

after the SEC's 2022 proposal on climate-related financial disclosure.[14] More broadly, the role of workers in corporate governance—a longstanding scholarly question—is attracting renewed attention due to troubling economic trends,[15] a resurgent labor movement,[16] the disruptions caused by AI technologies,[17] and corporate law's renewed interest in stakeholderist approaches.[18] This Article is relevant to each of these active academic conversations.

It is worth noting that there are parallel conversations about workforce-related matters in various other areas of the law, including labor, employment, and competition law. This Article intentionally approaches the issues from the vantage point of corporate and securities law and, in particular, disclosure regulation. Disclosure requirements will never move the needle as much as, say, labor or employment law interventions, or even specific corporate

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Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453 (2021) (making the case for SEC rulemaking on climate-related financial disclosure); Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277 (2022) (arguing in favor of SEC disclosure reform to cover ESG matters); Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023) (advocating disclosure on diversity matters); Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821 (2021) (arguing against the expansion of the disclosure regime to cover ESG topics).

14 *See, e.g.*, George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101 (2022) [hereinafter Georgiev, *The SEC's Climate Disclosure Rule*] (refuting arguments against the SEC's climate-related disclosure rule through an analysis of the underlying statutory framework, judicial pronouncements, and the SEC's historic rulemaking practice); George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 U.C. DAVIS L. REV. 2105 (2023) (advancing a "market efficiency" justification for mandatory climate disclosure over the contested "investor demand" justification).

15 *See, e.g.*, Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1326–32 (2022) (discussing the decline of labor in modern corporations).

16 *See, e.g.*, Annie Nova, *UAW Strikes Could Make 2023 the Biggest Year for Labor Activity in Nearly Four Decades*, CNBC (Sept. 22, 2023, 3:02 PM), https://www.cnbc.com/2023/09/22/uaw-strikes-could-make-2023-biggest-year-for-labor-activity-in-decades.html [https://perma.cc/8VJV-9QES].

17 *See, e.g.*, Rebecca Stropoli, *A.I. Is Going to Disrupt the Labor Market. It Doesn't Have to Destroy It.*, CHI. BOOTH REV. (Nov. 14, 2023), https://www.chicagobooth.edu/review/ai-is-going-disrupt-labor-market-it-doesnt-have-destroy-it [https://perma.cc/9NA5-EYAD] (summarizing data on the economic impact of AI).

18 *See, e.g.*, Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217 (2022); Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 U.C. DAVIS L. REV. 1445 (2022).

governance mandates.[19] This is a feature of disclosure regulation, not a bug, and disclosure requirements on HCM have to be assessed with reference to what they are meant to do—inform investors and facilitate investor decision-making—even when the underlying workforce-related issues run deep and demand multi-pronged regulatory solutions. Put simply, the focus here is on what disclosure regulation is doing, and not on what other areas of law should be doing. Evidence of the former, of course, can also be relevant to the latter.

The selection of evidence presented in the Article is guided by an original "mixed methods" research design, a methodological approach growing in popularity in the social and behavioral sciences but underutilized in corporate law, which entails the deliberate triangulation of data derived using single-method studies for the purpose of filling some of the epistemic gaps that inevitably inhere in any study of a complex socio-legal phenomenon.[20] Given its many manifestations, loosely coordinated nature, and the number of actors involved, the HCM movement is an ideal candidate for using mixed methods. While the six types of evidence in isolation offer only fragmented depictions, combining them through the mixed methods approach generates a more detailed and nuanced picture that can inform both policy and academic discourse.

What are those six types of evidence and what do they tell us?

(1) A meta-analysis of large-scale quantitative studies examining the incidence of HCM disclosure, its format, quality, and utility, and the particular topics it covers. This analysis identifies various pitfalls in the technical design of the 2020 HCM disclosure rule.[21]

(2) Hand-collected evidence drawn from the SEC review process for initial public offering ("IPO") filings, which illuminates the wide range of disclosures that firms and their advisers deem compliant with the SEC's open-ended rule.[22]

(3) An original case study comparing regulatory filings against information already in the public domain, which shows that,

19 *See* George S. Georgiev, *Disclosure as a Corporate Governance Tool: Channels and Challenges*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., forthcoming 2025).

20 *See infra* Part II.

21 *See infra* Section III.A.

22 *See infra* Section III.B.

the new SEC rule notwithstanding, material HCM information still remains outside investors' reach.[23]

(4) Evidence about the levels of shareholder support for HCM-related proposals, with attention to the types of inferences that can (and cannot) be drawn from the available data.[24]

(5) Evidence from recent labor market developments highlights the significant reliance on contingent workers, which usually are not covered by existing disclosures, as well as the need to consider the disruptions caused by AI technologies.[25]

(6) A line of new Delaware fiduciary duty cases, which suggest that the "human" element has emerged as a key differentiator on the question of board oversight liability.[26]

With respect to securities law, the analysis of the performance of the original HCM rule highlights the need for a revised and expanded HCM disclosure framework capable of eliciting information that is more detailed, more standardized, and, in many cases, more quantitative. Importantly, the new disclosure rule should cover both employees and so-called contingent workers because many firms are reliant on the latter for their operations.[27] With respect to corporate governance more broadly, the evidence suggests that human capital is mission critical, both as an asset and as risk, which creates a strong presumption that board-level monitoring of HCM matters is required under the *Caremark* doctrine. An analysis of recent Delaware cases suggests that the "human" element—comprising health, safety, and culture, among others—is emerging as a key differentiator on the question of legal liability for oversight failures.[28] The rise of HCM in corporate governance underscores the importance of new types of corporate disclosure and oversight—whether labeled "ESG" or otherwise—that transcend outdated twentieth-century thinking about business strategy and

23 *See infra* Section III.C.

24 *See infra* Section III.D.

25 *See infra* Section III.E.

26 *See infra* Section III.F.

27 For example, Alphabet/Google employs roughly the same number of contractors as direct hires—a fact that was never disclosed in the firm's SEC reports despite investor interest. *See* Mark Bergen & Josh Eidelson, *Inside Google's Shadow Workforce*, BLOOMBERG (July 25, 2018, 12:09 PM), https://www.bloomberg.com/news/articles/2018-07-25/inside-google-s-shadow-workforce [https://perma.cc/NK7Z-TUC2].

28 *See infra* Sections III.B, IV.B.

investing and that account for the ever-evolving challenges and opportunities faced by firms.[29]

A brief note on terminology and normative orientation may be useful. This Article favors the term "workforce" due to its generality and uses it where possible; sometimes, "workforce" and the generic "workers" are used interchangeably. Unless required by context, I avoid the term "employee" because of its distinct legal significance, particularly in labor and employment law, and, hence, its under-inclusivity. In the aggregate, the workforce is comprised of workers, but only some of them qualify as "employees," whereas others are independent contractors who do not benefit from various labor law protections.[30] While "employee" may connote, in purely linguistic terms, a higher dignitary status than "worker," nothing negative is meant here by the use of "worker" over "employee," which is done solely for the sake of accuracy. Similarly, the use of "human capital" to refer to the skills, knowledge, training, and productive capacity of the workforce reflects no value judgments and merely follows common practice in the corporate governance literature.[31]

The Article proceeds as follows. Part I sets the scene by defining key terms, discussing the historical and theoretical nexus between human capital and corporate governance, and outlining the rise of the HCM movement, including the process that led to the adoption of the SEC's 2020 HCM disclosure rule. Part II focuses on methodology and describes the attributes and advantages of the mixed methods research design. Part III presents the six sources of new evidence. Part IV discusses the resulting legal implications for federal securities law and for the corporate governance system overall.

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29 *See, e.g.*, Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 256, 261 (2022) ("Few concepts have come to dominate an academic discipline as quickly as the concept of Environmental, Social, and Governance (ESG) has come to dominate the field of corporate law."); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. (forthcoming 2024) (manuscript at 1), https://papers.ssrn.com/abstract=4219857 [https://perma.cc/D6HN-T8BS] ("ESG is one of the most notable trends in corporate governance, management, and investment of the past two decades. It is at the center of the largest and most contentious debates in contemporary corporate and securities law.").

30 *See generally* Richard R. Carlson, *Employment by Design: Employees, Independent Contractors and the Theory of the Firm*, 71 ARK. L. REV. 127 (2018).

31 There are, to be sure, important normative objections that can be raised in this respect. *See, e.g.*, John Leary, *The Problem with 'Human Capital,'* OPENDEMOCRACY (Apr. 1, 2019, 10:00 PM), https://www.opendemocracy.net/en/oureconomy/the-problem-with-human-capital [https://perma.cc/XXF3-EH4Z] ("Another advantage to employers of treating education or health care as human capital development is that risk in labor markets can be outsourced to employees. . . . The ideology of human capital asks one to think of nearly every form of social existence in terms of an actuarial calculation.").

I. HUMAN CAPITAL AND CORPORATE GOVERNANCE

This Part discusses the nexus between human capital and corporate governance. It begins by considering definitional and theoretical matters, and then describes the rise of HCM since the mid-2010s, with a particular focus on the process that led to the adoption of the SEC's 2020 HCM disclosure rule.

A. *Definitions, Means, and Ends*

At its core, HCM focuses on a range of workforce matters—employee training, compensation, turnover and retention, health and safety, pay equity, diversity and inclusion, and corporate culture, among others—as determinants of firm performance. The HCM concept is expansive and can accommodate virtually any workforce issue so long as it relates in some way to firm performance. While this makes HCM a useful shorthand for the multitude of workforce-related matters, both narrow and broad, that arise within modern firms, it can also render the concept unwieldy and difficult to define. Partly for this reason, the SEC declined to include a definition of HCM in the 2020 HCM disclosure rule.[32]

According to one commonly accepted definition, HCM "addresses the management of a company's human resources (employees and individual contractors) as key assets to delivering long-term value . . . [and] includes issues that affect the productivity of employees . . . [,] management of labor relations . . . [,] and management of the health and safety of employees and the ability to create a safety culture."[33] The Conference Board offers a different articulation that covers similar ground: "HCM is how the organization attracts, hires, develops, retains, enables, and engages the entire workforce, including full-time and part-time employees, contractors, freelancers, and crowdsourced workers. It is how human capital is managed in concert with other resources to execute the organization's business model."[34]

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32 *See* Reg. S-K 2020 Modernization Release, *supra* note 6, at 63739.

33 SUSTAINABILITY ACCT. STANDARDS BD., SASB CONCEPTUAL FRAMEWORK 3 (Feb. 2017), https://sasb.ifrs.org/wp-content/uploads/2019/05/SASB-Conceptual-Framework.pdf [https://perma.cc/BYR9-CPWZ].

34 PAUL WASHINGTON, REBECCA RAY, SOLANGE CHARAS & AMY LUI ABEL, CONF. BD., BRAVE NEW WORLD: CREATING LONG-TERM VALUE THROUGH HUMAN CAPITAL MANAGEMENT AND DISCLOSURE 5 (2021), https://www.conference-board.org/publications/brave-new-world-creating-value-through-HCM [https://perma.cc/Z5TY-AG76]; *see also id.* at 3 ("[HCM] is not a passing fad:

Importantly, these definitions suggest that the introduction of HCM into corporate governance is driven by an interest in improving *the firm's economic performance* through greater transparency of workforce practices and the appropriate valuation and management of human capital as a strategic resource. As such, HCM fits within the traditional shareholder primacy approach to corporate governance. While it does focus on a key nonshareholder constituency (i.e., workers), HCM is about the *optimal management* of that constituency for the purpose of improving firms' financial performance for the benefit of shareholders. In other words, workers are, at best, only secondary beneficiaries of firms' HCM initiatives. Moreover, HCM does not give workers a role in corporate governance through board representation or through information or litigation rights akin to those currently enjoyed by shareholders (and shareholders alone).[35] Consequently, the HCM movement differs markedly from past labor-focused reform agendas, some of which advocated for giving workers active governance rights, and all of which viewed workers as the primary beneficiaries of the proposed reforms.[36] Put differently, even though HCM is about the consideration of workforce-related matters in corporate governance, it does not amount to workforce participation in corporate governance.

It bears noting that HCM's shareholder-focused approach is neither a theoretical inevitability nor a practical one. Human capital theory offers alternative ways to view workers' role in the firm, while

Boards and management should devote sustained time and attention to evaluating their firm's human capital capabilities, needs, and performance, including developing a human capital strategy that supports the company's broader business strategy.").

35 *See* Georgiev, *Human Capital Management*, *supra* note 2, at 648–52 (contrasting the traditional roles and status of shareholders with those of workers in U.S. corporate governance).

36 The HCM movement stands in contrast to a variety of prior labor-focused reform proposals. I have previously conceptualized these as spanning three distinct "reform agendas," and it is worth mentioning these here because the historical comparisons highlight HCM's relative modesty and, in turn, explain its success. First, the *worker empowerment agenda* encompasses proposals to give employees various governance rights akin to rights presently enjoyed by shareholders alone (e.g., the ability to elect directors), with the expectation that this would, in turn, rebalance the allocation of the firm's surplus between shareholders and employees. Second, the *worker shareholder agenda* has sought to encourage workers to make more active use of the financial capital they hold through their savings (and the governance rights embedded in that capital) in order to advocate for labor-friendly reforms through the traditional tools of corporate governance, again leading to a greater share of the firm's surplus being allocated to workers. Finally, the *stakeholder primacy agenda* urges a redefinition of corporate purpose to encompass stakeholder (including worker) interests, while holding the means of corporate governance relatively intact. Most of these proposals have been in existence for decades, yet none have been adopted. *See id.* at 652–56 (describing historical labor-focused reform initiatives).

the experience of other advanced market economies highlights the feasibility of different institutional arrangements. Regarding theory, HCM initiatives reflect a *workers as assets* model; they start by identifying workers (or workers' human capital) as an "asset" that is key to firm success and then focus on strategies for the optimal management of this asset in the interest of shareholders.[37] An alternative theoretical approach would be to view *workers as investors of human capital*, not dissimilar from shareholders who invest financial capital in the firm; this framing would make workers residual claimants, akin to shareholders, and would imply that workers should receive at least some of the same corporate law protections.[38] The extensive international experience with worker governance rights (such as, for example, worker participation on corporate boards) showcases what such an approach might look like in practice.[39]

B. *The Rise of the HCM Movement*

The introduction of HCM into U.S. corporate law dates back to the mid-2010s and comprises three elements: (1) the incorporation of HCM into board and board-committee deliberations; (2) shareholder proposals and shareholder engagement focused on HCM; and (3) HCM disclosure, first on a voluntary basis and, since 2020, pursuant to an SEC disclosure mandate. The loosely coordinated nature of the underlying initiatives and their

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37 *Id.* at 660–63 (contrasting the "workers as assets" and "workers as human capital investors" models).

38 Just as shareholders make a firm-specific investment when they purchase stock, so, too, do workers make a firm-specific investment when they enter into an employment relationship. In the case of shareholders, the firm-specific investment is induced and protected through the variety of property and control rights embedded in corporate law, and, the argument goes, some of the same rights should be extended to workers in order to induce and protect their firm-specific investment. *Id.* at 662–63.

39 About half of the member states of the European Union have laws requiring worker representation on boards of directors. The provisions differ substantially across jurisdictions, but in most cases, worker representatives comprise one-third of the board, and those "employee directors" have the same powers to participate in decision-making as shareholder-elected directors. *See* ALINE CONCHON, EUR. TRADE UNION INST., WORKERS' VOICE IN CORPORATE GOVERNANCE: A EUROPEAN PERSPECTIVE 6 (2015); *see also* Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 880 (2021) (providing a survey of board-level codetermination and board structures in selected European countries).

simultaneity suggest that the HCM phenomenon can be described as a movement within corporate governance.[40]

How did the HCM movement arise? The first visible signs came from institutional investors calling for greater attention to workforce-related matters in their engagement with public companies in 2017.[41] The same year, a group of public pension funds introduced a petition for rulemaking on HCM disclosure, which spurred the SEC's work in this area.[42] The world's largest asset manager, BlackRock, advocated for both HCM and climate-related initiatives with equal zeal for years, and in 2022, identified HCM as the most urgent priority for corporate CEOs.[43] Largely in response, boards increasingly started to view HCM as a core area of oversight and have been changing their practices. For example, board compensation committees have been expanding their remit beyond executive compensation to consider rank-and-file employee compensation and other HCM matters; the same board committees have also started to incorporate HCM metrics (alongside other ESG metrics) in executive compensation plans, which traditionally link

40 I use the term "movement" in its common meaning and do not claim that the HCM movement is a *social* movement. For an elaboration, see Georgiev, *Human Capital Management*, *supra* note 2, at 665–66.

41 *See* Larry Fink, *Larry Fink's 2017 Letter to CEOs*, BLACKROCK (2017), https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter [https://perma.cc/GF7R-BV27] (arguing that firms must "fulfill their responsibilities to their employees" by improving "internal training and education" so that employees can leap over the "skills gap" and increase their earnings potential, thereby "helping the employee who once operated a machine learn to program it"); *see also* Abe Friedman & Robert McCormick, *BlackRock's 2017–2018 Engagement Priorities*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 17, 2017), https://corpgov.law.harvard.edu/2017/03/17/blackrocks-2017-2018-engagement-priorities [https://perma.cc/3J29-LDG4] (noting that BlackRock has added "developing areas like climate risk and human capital management" to the "traditional areas of investor engagement such as governance, strategy and compensation").

42 The Human Capital Management Coalition (HCMC), a group of public pension funds with $2.8 trillion in assets under management, submitted a rulemaking petition to the SEC asking it to consider adopting disclosure rules related to the knowledge, skills, and engagement of the workforce in 2017. The HCMC noted a "broad consensus that human capital management is important to the bottom line" and pointed to "a large body of empirical work [showing] that skillful management of human capital is associated with better corporate performance, including better risk mitigation." *See* Letter from Meredith Miller, Hum. Cap. Mgmt. Coal., to William Hinman, U.S. Sec. & Exch. Comm'n (July 6, 2017), https://www.sec.gov/files/rules/petitions/2017/petn4-711.pdf [https://perma.cc/Q4HM-R6Y6] [hereinafter HCMC Petition for SEC Rulemaking].

43 *See* Alex Gallimore & Delphine Robert, *6 Points We Took Away from Larry Fink's 2022 Letter*, RIVERON (Jan. 20, 2023), https://riveron.com/posts/6-points-we-took-away-from-larry-finks-2022-letter [https://perma.cc/5R8C-FXTW].

incentive-based compensation solely to financial metrics.[44] Finally, and as discussed further below, the SEC adopted a new rule requiring HCM disclosure in 2020 after overwhelming support from mainstream shareholder constituencies and the SEC's Investor Advisory Committee (IAC).[45] Figure 1 summarizes some of the highlights from the rapid progression of the HCM movement.

Figure 1: Selected Milestones in the Development of the HCM Movement[46]

2013–2016:

- Human Capital Management Coalition (HCMC), founded in 2013, carries out low-visibility engagement on HCM matters

2017:

- HCMC files petition with the SEC requesting an HCM disclosure rule
- HCM begins to emerge as a key topic in BlackRock's engagement with boards and management

2018:

- SEC's Investor Advisory Committee begins considering the need for an HCM disclosure rule
- Firms increasingly provide HCM disclosure, on a voluntary basis, in their sustainability reports

2019:

- SEC's Investor Advisory Committee recommends HCM disclosure rulemaking (Mar. 2019)
- SEC formally proposes a principles-based HCM disclosure rule (Aug. 2019)
- U.S. Congress: First of several bills on HCM disclosure proposed in the House.
- Sustainability Accounting Standards Board (SASB) launches a project on HCM reporting
- The influential Council of Institutional Investors endorses HCM disclosure

2020:

- Increased focus on HCM oversight within boards and board committees

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44 *See* Georgiev, *Human Capital Management*, *supra* note 2, at 667–83, 690–91 (discussing changes in board-level governance and related aspects).

45 *See infra* Section I.C.

46 Figure 1 is based on the author's analysis of HCM developments during the relevant period.

- HCM & ESG metrics become commonplace in incentive-based executive compensation plans
- World Economic Forum's "stakeholder capitalism" agenda incorporates HCM alongside climate
- COVID-19 pandemic and racial justice protests heighten relevance of HCM oversight
- SEC adopts a principles-based HCM disclosure rule in August 2020

2021:

- Public companies begin complying with the SEC's 2020 HCM disclosure rule
- BlackRock and other asset managers continue to emphasize HCM on par with climate change
- Mainstream investor groups demand better HCM disclosure, including through comment letters submitted to the SEC
- Incoming SEC Chair indicates that the agency intends to revise the 2020 HCM disclosure rule

2022:

- BlackRock describes HCM as the most urgent priority for CEOs
- Additional evidence of the shortcomings of the 2020 HCM disclosure rule emerges
- Group of academics files a rulemaking petition seeking enhanced HCM disclosure with a focus on workforce expense accounting

2023:

- FASB proposes changes to accounting rules to require disaggregation of expenses in the income statement, including expenses related to employee compensation
- The International Sustainability Standards Board (ISSB) identifies human capital reporting as a potential priority and seeks stakeholder input
- SEC Investor Advisory Committee issues new recommendation in support of HCM disclosure (Sept. 2023)

2024:

- Calls for revised HCM disclosure continue from investors and policymakers
- The SEC's Spring 2024 regulatory agenda suggested that the SEC was still considering proposing an expanded HCM disclosure rule
- The outcome of the November 2024 U.S. Presidential Election made it unlikely that the SEC would update or expand the 2020 HCM disclosure rule in the near term.

C. *The SEC's 2020 HCM Disclosure Rule*

The SEC's 2020 HCM disclosure rule is contained in Item 101(c)(2)(ii) of Regulation S-K, and requires each public company to provide "a description of . . . [its] human capital resources, including any human capital measures or objectives that . . . [it] focuses on in managing the business" and "to the extent such disclosure is material to an understanding of the [company's] business taken as a whole."[47] Before analyzing the evidence from the rule's operation, it is worth focusing on its path to adoption, which foreshadowed some of the questions this Article seeks to answer.

The 2020 HCM disclosure rule was the culmination of a multi-stage process, which started with occasional investor demands for HCM disclosure during the 2010s, gained momentum after the SEC's Investor Advisory Committee issued recommendations in favor of HCM disclosure in 2019, and was bolstered further by strong support for HCM disclosure in comment letters on the SEC's rule proposal in 2019 and 2020.[48] Despite general agreement that some form of HCM disclosure is warranted, the various participants in this process expressed different views on the purpose, scope, and format of the new disclosure requirement. Many of these questions remain contested today.

The SEC rulemaking process began with the petition for rulemaking submitted by the Human Capital Management Coalition (HCMC) in July 2017.[49] Less than a year later, SEC Chairman Jay Clayton noted in testimony to the House Appropriations Subcommittee on Financial Services and General Government that he "would like to see more disclosure from public companies on how they think about human capital."[50] The same year, the SEC Investor Advisory Committee, an independent body attached to the agency, launched a study of the idea of HCM disclosure.[51] The process moved

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47 Reg. S-K 2020 Modernization Release, *supra* note 6, at 63739.

48 *See Comments on Proposed Rule: Modernization of Regulation S-K Items 101, 103, and 105*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/comments/s7-11-19/s71119.htm [https://perma.cc/QR2R-7Q4R] [hereinafter *Comments on Proposed Rule*].

49 *See* HCMC Petition for SEC Rulemaking, *supra* note 42.

50 *Financial Services and General Government Appropriations for 2019: Hearings Before a Subcomm. of the Comm. on Appropriations, Subcomm. on Fin. Servs. & Gen. Gov't*, 115th Cong. 222 (2018) (statement of Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n).

51 The IAC was established by the Dodd-Frank Act of 2010 and has been operational since 2012. It is tasked with representing the interests of investors in various matters before the Commission. The IAC has emerged as an effective voice in debates about the regulation of the securities markets. *See Investor Advisory Committee*, U.S. SEC. & EXCH. COMM'N,

swiftly, and in March 2019, the IAC produced and formally adopted a detailed recommendation in support of HCM disclosure.[52] The IAC recommendation noted estimates that the implied intangible asset value of the S&P 500 had grown from an average of 17% in the 1970s to an average of 87% by 2015—evidence that the economy is transitioning from one "based almost entirely on industrial production to one that is becoming increasingly based on technology and services."[53] As a result, the IAC suggested that the disclosure system should also evolve to include information about intangible assets, such as intellectual property and human capital. The IAC noted that whereas human capital is increasingly conceptualized as an investable *asset*, the SEC's traditional disclosure approach had been to treat human capital as a *cost*, and cited this as evidence that the SEC's disclosure framework, in both its qualitative and quantitative aspects, has not kept pace with the shift toward viewing HCM as a primary source of value.[54] The IAC suggested an extensive, multi-party consultative process to decide on any new disclosure requirements.[55] SEC Chairman Jay Clayton supported the IAC's HCM

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https://www.sec.gov/about/advisory-committees/investor-advisory-committee [https://perma.cc/S2LD-LWRL].

52 INV. ADVISORY COMM., U.S. SEC. & EXCH. COMM'N, RECOMMENDATION OF INVESTOR ADVISORY COMMITTEE: HUMAN CAPITAL MANAGEMENT DISCLOSURE 3–5 (2019), https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf [https://perma.cc/Q7QR-V578].

53 *Id.* at 1.

54 *Id.* at 1–2. The IAC discussed two different approaches to remedying these deficiencies in the disclosure regime. First, the IAC suggested that a principles-based disclosure requirement could ask firms to describe their HCM policies and strategies for competitive advantage and comment on their progress in meeting their corporate objectives. *Id.* at 3. The IAC also discussed a second possibility—mandating disclosure of specific HCM metrics, since many such metrics are a routine part of financial due diligence, including basic valuation models in M&A transactions. *Id.* According to the IAC, these metrics could include standardized human capital-related key performance indicators (KPIs), such as:

> [T]he stability of the workforce, including voluntary and involuntary turnover and internal hire and promotion rates; the safety of the workforce, including frequency, severity and lost-time due to injuries, illnesses and fatalities, and percent of first-tier suppliers that were audited for safety and health compliance; average hours of training per employee per year; race/ethnicity and gender diversity data; and standardized survey measures of employee satisfaction.

Id. at 4 (emphasis omitted) (footnotes omitted).

55 *Id.* at 3 ("We encourage the Commission to learn more from investors, issuers and the academic community through its customary processes, such as roundtables, concept releases, and proposed rules for public comment, including information about what kinds of HCM disclosures are already required under other regulatory regimes . . . .").

disclosure initiative by noting that human capital is the source of economic strength and, for some firms, "a mission-critical asset."[56]

The SEC took up HCM disclosure in August 2019, only a few months after the IAC recommendation.[57] Whereas the IAC had suggested that the rulemaking process should start with concept releases and broad-based roundtables that include investors, firms, and the academic community,[58] the SEC skipped those steps and included HCM disclosure as part of a lengthy Proposing Release covering changes to a number of disclosure items that had been under consideration for most of the 2010s.[59] The formulation of the HCM disclosure proposal was open-ended and "principles-based," placing heavy reliance on the complex and contested concept of materiality.

The Proposing Release generated an extensive comment file, which reflected a broad acknowledgment of the importance of human capital, and near-universal support for some form of HCM disclosure.[60] The comment letters contained disagreement on the format of HCM disclosure, with a number of commenters arguing in favor of a "hybrid" or "dual" approach combining principles-based and prescriptive (or "rules-based") requirements.[61] The prescriptive

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56 Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at Meeting of the Investor Advisory Committee (Mar. 28, 2019), https://www.sec.gov/newsroom/speeches-statements/clayton-remarks-investor-advisory-committee-032819 [https://perma.cc/L4GG-NHYG].

57 Reg. S-K 2020 Modernization Release, *supra* note 6, at 63728 (discussing amendments to Regulation S-K to modernize the description of disclosure requirements for businesses, legal proceedings, and risk factors).

58 INV. ADVISORY COMM., *supra* note 52, at 3.

59 Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Testimony on "Examining the SEC's Agenda, Operations, and FY 2018 Budget Request" (Nov. 15, 2016), https://www.sec.gov/newsroom/speeches-statements/white-testimony-sec-agenda-fy2018-budget-request [https://perma.cc/4BGM-QX8V] (summarizing SEC actions as part of the Disclosure Effectiveness initiative); Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020), https://www.sec.gov/newsroom/press-releases/2020-220 [https://perma.cc/PSD7-JS9B]; U.S. SEC. & EXCH. COMM'N, PROXY VOTING ADVICE, https://www.sec.gov/files/34-95266-fact-sheet.pdf [https://perma.cc/PBH6-SAWQ].

60 *See Comments on Proposed Rule*, *supra* note 48. For an analysis, see Georgiev, *Human Capital Management*, *supra* note 2, at 681–82. Even the U.S. Chamber of Commerce's Center for Capital Market Competitiveness, a reliable opponent of any proposal to expand the SEC disclosure regime, indicated that it was "cautiously supportive." *Id.* at 681.

61 *See, e.g.*, Letter from Cambria Allen-Ratzlaff, Chair, Hum. Cap. Mgmt. Coal., to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6322887-194462.pdf [https://perma.cc/8XD2-B6BT] [hereinafter HCMC Letter]; Letter from Marcie Frost, CEO, Cal. Pub. Emps.' Ret. Sys., to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324067-194727.pdf

requirements would call for the disclosure of specific metrics or categories of information in order to make firm-specific information more useful and promote some degree of comparability across firms.

The SEC opted for the principles-based approach outlined in the Proposing Release. The final rule contained language noting that "depending on the nature of the registrant's business and workforce," relevant HCM information potentially subject to disclosure may include "measures or objectives that address the development, attraction and retention of personnel."[62] The Final Rule Release emphasized that these are not disclosure mandates, but rather represent "non-exclusive examples of subjects that may be material."[63] The Final Rule Release also refused to adopt a definition of the term "human capital," reasoning that its meaning "may evolve over time and may be defined by different companies in ways that are industry specific."[64] The two Democratic SEC commissioners criticized the SEC's approach and voted against the Regulation S-K amendments containing the rule, despite agreeing in principle that HCM disclosure is needed.[65]

Notably, in his statement upon the rule's adoption, SEC Chairman Clayton stated: "[U]nder the principles-based approach, I do expect to see meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs."[66] Though little noticed at the time, this statement can and should be viewed as the benchmark for assessing the performance of the HCM disclosure rule.

[https://perma.cc/4R2H-Q5E2]; Letter from Brandon J. Rees, Deputy Dir. of Corps. & Cap. Mkts., Amer. Fed'n of Lab. & Cong. of Indus. Orgs., to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 22, 2019), https://www.sec.gov/comments/s7-11-19/s71119-6324055-194715.pdf [https://perma.cc/VL3X-YL6U].

62 Reg. S-K 2020 Modernization Release, *supra* note 6, at 63760.

63 *Id.* at 63739.

64 *Id.*

65 *See* 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/newsroom/speeches-statements/lee-regulation-s-k-2020-08-26 [https://perma.cc/TAV6-Z7Z6] (noting that she "would have supported [the] final rule if it had included even minimal expansion on the topic of human capital to include simple, commonly kept metrics such as part time vs. full time workers, workforce expenses, turnover, and diversity"); Crenshaw, *supra* note 7 (criticizing the rule as "generic and vague").

66 Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Modernizing the Framework for Business, Legal Proceedings and Risk Factor Disclosures (Aug. 26, 2020), https://www.sec.gov/newsroom/speeches-statements/clayton-regulation-s-k-2020-08-26 [https://perma.cc/G8XW-UESK].

D. *Open Questions*

After four years of mandated HCM disclosure, there are many open questions about the design and utility of the 2020 HCM disclosure rule: Is the rule eliciting new information (i.e., information that is different from the disclosure some firms provided voluntarily before the rule went into effect)? Is this information meaningful (or, alternatively, is it boilerplate)? Are firms providing adequate quantitative information in line with former SEC Chairman Clayton's stated expectations? Are those disclosures meeting investors' informational needs? Is the principles-based approach to disclosure working as expected? Is there a need for additional HCM rulemaking, and what form should any new disclosure requirements take? What particular topics should an expanded HCM disclosure rule cover? And, finally, does the HCM disclosure process have broader implications for the role and status of employees in the corporate enterprise?

It is important to seek answers to these questions as part of the ongoing assessment of regulatory rules, which is a hallmark of good administrative governance. In the current instance, the answers to these questions are even more important given the pressure investors and stakeholders have put on the SEC to pursue enhanced rulemaking on HCM. Identifying the right questions to ask is only the first step in the analysis; it is also necessary to think carefully about evidence selection and interpretation and to weigh different studies appropriately based on the quality of the underlying evidence. This is the goal of the next Part.

II. THE MIXED METHODS RESEARCH DESIGN

The new evidence presented in this Article is selected through a mixed methods research design. The key feature of this approach is the deliberate triangulation of data derived using single-method studies for the purpose of filling some of the epistemic gaps that inevitably inhere in any study of a complex socio-legal phenomenon, including the contemporary HCM movement.[67] This Part describes the mixed methods approach, its advantages compared to the dominant single-method approaches, and its utility in illuminating the research questions identified in Section I.D.

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67 *See infra* notes 67–72 and accompanying text.

The choice of research methodology matters a great deal because it can influence both the substantive findings of a particular study and the level of certainty underpinning those findings. Studies of corporate compliance (including corporate reporting) in law and finance generally deploy either a qualitative methodology or a quantitative methodology, with the latter often perceived, rightly or wrongly, to be more rigorous and generalizable. This self-enforced separation between quantitative and qualitative methods, however, is somewhat out of step with recent trends in the social and behavioral sciences, where there has been a movement in favor of research designs that deliberately adopt so-called "mixed methods" approaches.[68]

One leading theorist explains that "[m]ixed methods research is a research design (or methodology) in which the researcher collects, analyzes, and mixes (integrates or connects) both quantitative and qualitative data in a single study or a multiphase program of inquiry."[69] This research strategy recognizes that "all methods have inherent biases and weaknesses [and] that using a mixed method approach increases the likelihood that the sum of the data collected will be richer, more meaningful, and ultimately more useful in answering the research questions."[70] As for the purpose of mixing quantitative and qualitative approaches, another scholar explains that "it can help to discover and to handle threats for validity arising from the use of [a single method] by applying methods from the alternative methodological tradition and can thus ensure good scientific practice" and, moreover, that "it can be used to gain a fuller picture and deeper understanding of the investigated phenomenon by relating complementary findings to each other which result from the use of methods from the different methodological traditions of qualitative and quantitative research."[71]

What the literature on research methodology makes clear is that the mixed methods approach entails more than the mere mixing of

68 *See generally* JENNIFER C. GREENE, MIXED METHODS IN SOCIAL INQUIRY (2007); JOHN W. CRESWELL & VICKI L. PLANO CLARK, DESIGNING AND CONDUCTING MIXED METHODS RESEARCH (3d ed. 2018); *see also* Charles Teddlie & Abbas Tashakkori, *Major Issues and Controversies in the Use of Mixed Methods in the Social and Behavioral Sciences*, *in* HANDBOOK OF MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH, at 4–8 (Abbas Tashakkori & Charles Teddlie eds., 2003) (discussing debates between quantitatively- and qualitatively-oriented social science research methodologies in historical perspective).

69 R. Burke Johnson, Anthony J. Onwuegbuzie & Lisa A. Turner, *Toward a Definition of Mixed Methods Research*, 1 J. MIXED METHODS RSCH., Apr. 2007, at 112, 119 (quoting John Creswell).

70 *Id.* at 121 (quoting Hallie Preskill).

71 *Id.* at 120 (quoting Udo Kelle).

different research methods. Rather, and when done right, it involves a process of careful deliberation at the outset of a particular study and the intentional triangulation of different types of evidence in an effort to obtain as full a picture as possible of the phenomenon or question under investigation.

Corporate law as a field has long had a tradition of single-method research, be it quantitative, theoretical, or doctrinal, along with an occasional preference for narrower empirical work that seeks to emulate fields like economics and finance. Accordingly, mixed methods approaches have been underutilized in corporate law research, and even when studies have mixed different methodologies, they have not called this approach "mixed methods."[72] Nevertheless, mixed methods approaches have been identified and advocated in the accounting literature—a relevant data point because the fields of accounting and corporate law often study similar questions and phenomena. For example, accounting researchers have observed that "the divides between quantitative versus qualitative methods and economic versus other behavioral theories are not constructive toward understanding accounting phenomena" and have argued that "in many studies, using a mixed method approach provides the best opportunity for addressing research questions."[73] This statement likely applies with equal force to a host of complex corporate law questions.

What would a mixed methods study of HCM disclosure entail, and what are the advantages and limitations of each of the study's constitutive parts? Quantitative empirical studies would appear to be a natural starting point, since they have been viewed traditionally as the evidentiary gold standard in the context of rulemaking, including

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72 Prior corporate law studies combining quantitative and qualitative methods in an effort to understand a phenomenon from multiple angles could be described as "mixed-methods" studies. For one such example, see George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602 (2017) [hereinafter Georgiev, *Too Big to Disclose*] (combining case studies of disclosure practices with a quantitative survey comprised of hand-collected disclosure data).

73 Mary A. Malina, Hanne S.O. Nørreklit & Frank H. Selto, *Lessons Learned: Advantages and Disadvantages of Mixed Method Research*, 8 QUALITATIVE RSCH. ACCT. & MGMT., Apr. 2011, at 59, 60 (2011). The authors further note that "accounting researchers have separated into methodological camps that do not communicate well to refine or modify our incomplete theories and knowledge of practice," and that "the methodological camps are divided on the nature of the data which are worthy of rigorous examination." *Id.* The authors urge awareness of "the fact that both numbers and words convey meaning and both are needed if we are to understand the world," and suggest that "the issue is one of knowing when it is useful to count and when it is difficult or inappropriate to count at all, when data are non-standardized and we have no clear rules for saying what is variation and what is error." *Id.* (cleaned up).

SEC rulemaking.[74] A number of quantitative studies focusing on early compliance with the HCM disclosure rule have emerged since 2020. These are large-scale studies conducted by accounting and finance researchers, which generally seek to cover all publicly traded companies, and they often ask questions that are narrower in scope but can be answered with a high degree of confidence. Section III.A provides a meta-analysis of several such large-scale quantitative studies examining the incidence and characteristics of HCM disclosure. Section III.A also includes the results of a smaller-scale study that tracks changes in the disclosure practices of the 100 largest firms in the S&P 500 index over time.

It is worth considering why this evidence is not sufficient and why other types of evidence are potentially useful. While the large-scale quantitative studies have the advantage of covering the entire existing disclosure landscape, and the smaller-scale study covers the largest firms, those studies do suffer from certain classification and generalization challenges. For example, what should count as "quantitative" (or numerical) HCM disclosure, and how should we account for the fact that the different types of quantitative metrics that are disclosed may have very different levels of usefulness to investors?[75]

Moreover, quantitative empirical studies cannot directly answer an important question: what is the reason for the non-disclosure of ostensibly pertinent information? Is it that the firm has considered its disclosure obligations and decided not to disclose (due to lack of materiality), or is it because the firm has decided to withhold the information because of the perceived low risk of detection or enforcement, or, finally, is it due to some other reason (for example, lack of regulatory guidance on working with the new disclosure rule, legal counsel's lack of understanding of the rule, or faulty internal controls and disclosure systems)? We cannot formulate effective policy without answering these questions, which in turn requires us to enter the more nuanced domain of small-scale event studies and case studies.

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74 This statement should be qualified by the fact that the sources of both the dependent and independent variables in empirical corporate governance research have been subjected to trenchant—and troubling—critiques in recent years. *See generally* Robert Bartlett & Frank Partnoy, *The Misuse of Tobin's* q, 73 VAND. L. REV. 353 (2020) (calling attention to problems with Tobin's *q* as a measure of firm value, which is the most common dependent variable); Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric L. Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1 (2021) (discussing problems with the independent variables in corporate governance studies).

75 See the discussion on treating as equally important metrics on staff volunteer rates and workforce turnover rates in the context of the Bourveau et al. study. *See infra* note 86.

Along these lines, Section III.B presents my original case study of IPO filings during the 12-month period following the adoption of the 2020 HCM disclosure rule, which specifically examines the question of whether the rule provided sufficient disclosure guidance. On the question of materiality and non-materiality, Section III.C presents an original case study showing the existence of material disclosure gaps in the regulatory filings of one large firm with many salient characteristics (Amazon). To be sure, when used in isolation, such studies also have shortcomings because the evidence they provide is often more suggestive than conclusive. These shortcomings are mitigated by a central feature of the mixed methods approach: it provides for the blending of multiple sources of evidence in order to obtain a more fulsome understanding of the complex socio-legal landscape.

Avoiding the misinterpretation of seemingly compelling evidence is just as important as identifying and interpreting new evidence. Section III.D focuses on evidence from shareholder proposals on HCM topics and highlights the limited relevance of the fact that shareholder proposals on HCM have attracted fluctuating and even declining levels of shareholder support. In this case, the most obvious interpretation is in fact erroneous (or, at best, incomplete). As shown below, an understanding of the idiosyncratic characteristics of the shareholder proposal process suggests that year-on-year comparisons of support rates, as well as aggregate data on support rates for different proposals at different firms, are of very limited value.[76] Such an understanding is particularly necessary because in other disclosure areas, such as climate, certain commentators and lobbyists have relied precisely on this kind of evidence to oppose new SEC disclosure regulation. Evidence from the shareholder proposal process is most helpful and most informative when viewed in more nuanced and qualitative ways, focusing on questions such as: what are the topics of interest to investors, how do these topics evolve over time, and how do firms engage with shareholders.

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76 Such an understanding is particularly necessary because in other disclosure areas, such as climate, certain commentators and lobbyists have relied precisely on this kind of evidence to oppose new SEC disclosure regulation. *See, e.g.*, Letter from Lawrence Cunningham et al., Professor, George Washington Univ., to U.S. Sec. & Exch. Comm'n 7 (Apr. 25, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf [https://perma.cc/YUD5-N6XE] (motivating opposition to the SEC proposal by suggesting that climate-related disclosure shareholder resolutions do not always enjoy majority support); Letter from James A. Overdahl, U.S. Chamber of Com., to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 8 (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf [https://perma.cc/VK4G-6AG3] (same).

As the foregoing discussion demonstrates, designing a mixed methods study entails a series of informed judgments, some of which are admittedly subjective. It is logical to expect that these judgments will be open to challenge. The same is true, of course, of any single-method study. The point of the mixed methods approach is not to come up with unassailable analytical and normative conclusions but, rather, to widen the aperture and identify implications with a broader scope.

III. THE NEW EVIDENCE: SOURCES AND FINDINGS

This Part summarizes findings from each of the six sources of evidence identified already. For ease of reference, these include: (1) a meta-analysis of large-scale quantitative studies; (2) hand-collected data drawn from the SEC review process for IPO filings; (3) an original case study comparing regulatory filings with information in the public domain for a firm with a large and varied employee base (Amazon); (4) evidence from the shareholder proposal process; (5) evidence from recent labor market developments; and (6) recent developments in Delaware jurisprudence. This evidence forms the basis for the Article's normative analysis and policy recommendations, which are presented in Part IV.

A. *Aggregate Evidence of Firms' Disclosure Practices*

Firms' disclosure practices with respect to HCM matters have been the subject of large-scale empirical studies from finance and accounting scholars, as well as various studies focusing on smaller subsets of firms. Many of the large-scale studies treat the 2020 HCM disclosure rule as an external policy shock creating the optimal conditions for a natural experiment because it is possible to compare firms' disclosures on HCM matters, if any, before the rule went into effect on November 9, 2020, with the same firms' disclosures after the rule's effective date and then to carry out year-on-year comparisons. This Section describes the headline findings from these studies and interprets their implications for policy.

A study by Demers et al. (2024) provides relevant evidence about the SEC's HCM disclosure rule and deserves careful review by policymakers and stakeholders. Using a comprehensive sample of over 3,600 firms, the study confirms that "[human capital] disclosure[] characteristics vary considerably across firms in terms of their length in words, topics covered, specificity, numerical

intensity, and readability" and that "[e]ven within the same industry, objectively quantified linguistic measures of similarity indicate that [human capital] disclosures are quite dissimilar."[77] The authors also find that disclosures tend to be very positively toned and inherit many of the properties of the rest of the firm's disclosures.[78] Consistent with investor complaints, the disclosures are generally not numerically intensive.[79] A nontrivial number of issuers provide disclosures comprising fewer than 100 words.[80]

Interestingly, the authors find that, "rather than the disclosures improving on average over time, there is significant evidence of *regression towards the mean* on each qualitative dimension of disclosure."[81] Those qualitative dimensions include length, number of topics disclosed, specificity, numerosity, readability, and similarity across firms.[82] The authors conclude that "although firms with relatively poor-quality disclosures improve over time, [the] evidence suggests that those with better-quality disclosures learn that they have overshot the lower-than-expected standard, and thus they subsequently diminish the quality of their disclosures on the second filing, on average."[83]

As a policy matter, then, a key question is whether the mean level of disclosure is the optimal one. The authors frame this as follows: "unless the SEC . . . [is] content with an average level of disclosure that is below that which better-disclosing firms were clearly able and willing to provide [initially], a more specific disclosure standard/regulation should be developed."[84] The Demers et al. study is very helpful in identifying one of the questions that is relevant to an assessment of the 2020 HCM disclosure rule and any future policymaking in this area. Nevertheless, the study does not attempt to answer this question—i.e., determine whether the mean level of disclosure observed is optimal—which again highlights the

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77 Elizabeth Demers, Victor Xiaoqi Wang & Kean Wu, Corporate Human Capital Disclosures: Evidence from the First Two Years of the SEC's Disclosure Mandate 11–12 (May 15, 2024) (unpublished manuscript) (emphasis omitted), https://papers.ssrn.com/abstract=4153845 [https://perma.cc/QX7S-CNPF].

78 *Id.* at 13–14, For example, if the company has higher specificity/numerical intensity in other Item 1 disclosures, HCM disclosures tend to follow suit. *Id.* at 13.

79 *Id.*

80 *Id.*

81 *Id.* (emphasis added).

82 *Id.*

83 *Id.*

84 *Id.*

need to look to other sources of evidence, including qualitative evidence of the kind presented in Section III.C.[85]

Another large-scale study, by Bourveau et al. (2023), analyzes the disclosures of over 2,393 firms between 2018 and 2023, a period that covers reporting both before and after the SEC's HCM disclosure rule went into effect.[86] The authors find that the rule increased quantitative disclosures in 10-K filings, with the percentage of 10-Ks with quantitative metrics increasing from 40% to 72%.[87] Most of this increase was caused by added disclosure of metrics on employee turnover and diversity, equity, and inclusion.[88] It bears noting that 28% of firms still do not disclose *any* human capital metrics.

The authors also report that the average number of metrics per 10-K increased from one pre-regulation to 2.5 by 2023 (the third reporting season after the rule's adoption). Notably, the average number of *financially material* metrics (as identified by SASB) increased from approximately one pre-regulation to only 1.4 by 2023.[89] This implies that firms are under-disclosing relevant information, since SASB has recommended approximately four human capital metrics for disclosure, with the number of recommended metrics and metrics themselves varying by industry.[90] The authors also find that the disclosures of firms within the 11 industry groups identified by SASB have not coalesced around a common set of metrics—there is heterogeneity not just across the

85 A case study can provide an indicative answer to the question at hand, but it cannot provide a precise answer. The firm examined in Section III.C (Amazon) is, almost certainly, not the *median firm* in terms of disclosure quality or a firm whose disclosure quality scores are closest to the *mean levels* for all disclosing firms. We can stipulate with a very high degree of confidence that no such firm exists. There are, instead, different firms that fall in the middle (whether defined as mean or median) on each of the different qualitative rubrics discussed in the Demers et al. study. Even if those firms were to be identified, however, analyzing their disclosures still would not move the needle by much; the best research design would be to look at the median firm or the firm with disclosure scores closest to the mean within each of the eleven industry sectors as defined by the Global Industry Classification Standard (GICS).

86 *See* Thomas Bourveau, Maliha Chowdhury, Anthony Le & Ethan Rouen, Human Capital Disclosures 3 (Nov. 23, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=4138543 [https://perma.cc/V4QQ-WM3Z].

87 *Id.* The authors of the study report that they did not count metrics on employee unionization and employee breakdowns by geography because those were disclosed voluntarily by a subset of firms before the rule's effectiveness and because that rate of disclosure did not increase meaningfully after the rule's effectiveness. The total employee count was not counted as well because this metric was covered by a pre-2020 disclosure obligation. *Id.* at 13–14.

88 *Id.* at 3.

89 *Id.*

90 *Id.*

entire sample but also within each specific industry group.[91] This, in turn, implies that investors' ability to compare firms on the basis of firm-disclosed human capital metrics is limited.

In a different study, Mayew and Zhang (2022) focus on whether corporate HCM responses to the COVID-19 pandemic ("COVIDHCM") have value implications.[92] They find that COVIDHCM disclosure is positively associated with how favorably employees view the firm's pandemic response, but that the effects of COVIDHCM on firm value are insignificant on average.[93] While this finding may appear to undermine the effectiveness of the SEC's disclosure rule (or HCM disclosure more generally), it is important to recall that the goal of the rule is not to increase firm value. Rather, the goal of the rule is to provide investors with material information with respect to buy/sell decisions and voting decisions. Moreover, the authors use measures of firm value, such as Tobin's *q*, that have been criticized in the literature.[94]

Another study by Haslag et al. (2022) compares HCM disclosures against employee flows, using a proprietary dataset of 45 million individual career histories. The authors find that HCM "disclosures respond to changes in the underlying stock and flow of employees," and conclude that the changes in disclosure are informative.[95] The authors also find that the SEC's 2020 HCM disclosure rule has "elicit[ed] greater disclosures, especially from firms that previously under-disclosed workforce information."[96] These results can be boiled down to the following: firm's disclosures do reflect underlying changes at the firm-level (as one would expect), and the introduction of a mandatory disclosure rule leads to firms disclosing more information (as one would expect). Unfortunately, the results do not tell us whether the SEC rule is eliciting the necessary level of disclosure, and they also do not tell us anything

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91 *Id.*

92 William J. Mayew & Yuan Zhang, COVID-19 Human Capital Management Response and Firm Value (Feb. 29, 2024) (unpublished manuscript), https://papers.ssrn.com/abstract=4010151 [https://perma.cc/GH3C-JSP4].

93 *Id.* (manuscript at 24–25).

94 *See, e.g.*, Bartlett & Partnoy, *supra* note 74, at 354 ("Our message for corporate law scholars is straightforward: view with suspicion the large body of empirical law and finance scholarship that misuses Tobin's *q*.").

95 Peter Haslag, Berk A. Sensoy & Joshua T. White, Human Capital Disclosure and Workforce Turnover (Sept. 19, 2022) (unpublished manuscript) (manuscript at i), https://papers.ssrn.com/abstract=3991257 [https://perma.cc/G34A-7R9D].

96 *Id.*

about the quality and informational integrity of the disclosure produced by the new rule.[97]

Finally, a smaller-scale study focused on the 100 largest public companies offers more granular detail on the kinds of information disclosed by those companies.[98] This study, conducted by the law firm Gibson Dunn (the "Gibson Dunn study"), is useful in at least two ways. First, it unpacks the term "human capital resources" contained in the open-ended 2020 HCM disclosure rule by identifying the specific topics discussed by the largest public companies. Second, it indicates the extent to which those firms disclose quantitative information about particular topics. While the study has an obvious limitation—it covers only the 100 largest public companies—this limitation is mitigated by the fact that smaller firms usually copy the disclosures of larger firms,[99] as well as the fact that, by virtue of their size, the firms covered by the study represent a substantial share of the total capitalization of the equity market.[100]

The Gibson Dunn study reported that in 2023 the 100 largest public companies provided disclosure (qualitative unless indicated otherwise) about the following topics, with the percentage of companies providing disclosure listed in parentheses: talent development (96%); diversity/inclusion (96%); talent attraction and retention (94%); employee compensation and benefits (88%); quantitative diversity statistics (gender) (65%); monitoring culture (64%); workplace health and safety (61%); quantitative diversity statistics (race or ethnicity) (60%); governance and organizational practices (51%); employee mental health (50%); diversity in retention or development (45%); diversity in hiring (42%); pay equity (42%); unionized employee relations (37%); COVID-19 (34%); culture and engagement initiatives (26%); diversity in promotion practices (24%); succession planning (21%); quantitative workforce turnover rates (20%); diversity goals or targets (19%); quantitative employee compensation (17%); quantitative pay gap (17%); quantitative full-time/part-time employee split (16%); quantitative talent development (14%); supplier diversity (11%);

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97 *See* Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1180–89 (2019) (setting out the notion of informational integrity—the "accuracy, comprehensibility, and completeness" of information subject to mandatory disclosure).

98 *See* Elizabeth Ising et al., *Form 10-K Human Capital Disclosures Continue to Evolve*, GIBSON DUNN (Nov. 21, 2023), https://www.gibsondunn.com/form-10-k-human-capital-disclosures-continue-to-evolve [https://perma.cc/ZN9S-XDB6].

99 *See infra* note 107.

100 In practice, this means that those firms also represent a substantial share of the capitalization-weighted equity market portfolios held by broadly diversified investors.

community investment (10%); and quantitative new hire diversity (2%).[101]

The year-on-year comparisons contained in the Gibson Dunn Study generally show steady but small increases in the number of firms disclosing information about particular topics (with the exception of the number of firms disclosing information about COVID-19, which has been decreasing).[102] Notably, there were only ten topics that were covered by a majority of the firms in the sample, and only three topics that were covered by more than two-thirds of the firms in the sample.[103] This confirms the concerns about inconsistency and heterogeneity identified by the large-scale studies. Finally, there were only eight topics containing quantitative disclosures, and, for all but one of them, those quantitative disclosures were supplied by fewer than one-third of the firms in the sample. This, too, confirms concerns identified by the large-scale studies.

B. *SEC Review Process for IPO Filings*

The SEC review process for firms' preliminary registration statements—and the SEC's comments on those filings as part of the routine IPO process—offer a different perspective on the 2020 HCM disclosure rule. As part of its review process, the SEC sends written comments, which the issuer, in close consultation with legal counsel, works to address. The comments usually lead to revisions to the registration statement.[104] The SEC's comments and firms' responses are released in the EDGAR database upon the completion of the registration process.[105] Examining this paper trail allows for an analysis of firms' initial compliance with the HCM disclosure rule, the SEC's assessment of this compliance, and firms' subsequent remedial efforts, if any. This paper trail is particularly illuminating in the case of an open-ended rule, such as the HCM disclosure rule where the SEC placed the onus on firms to determine what, if any, HCM information they ought to disclose.

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101 Ising et al., *supra* note 98.

102 *Id.*

103 *Id.*

104 *See* Bank & Georgiev, *supra* note 97, at 1139–48.

105 *See Filing Review Process*, U.S. SEC. & EXCH. COMM'N (last modified Sept. 27, 2019), https://www.sec.gov/about/divisions-offices/division-corporation-finance/filing-review-process-corp-fin [https://perma.cc/ZL49-QTVK].

Conducting an original study, I analyzed all comment letters pertaining to registration statements by domestic issuers made in the 12-month period after the HCM rule's entry into force (November 9, 2020, to November 8, 2021). I found SEC comment letters addressing the HCM rule in the case of 15 issuers.[106] In these instances, I analyzed the issuers' responses to the comments, as well as the original and revised disclosures. I limited my study to 12 months on the theory that firms are more likely to start copying other firms' HCM disclosure after that period.[107] The subsequent disclosures, then, are more likely to reflect established "market practice," whereas the early disclosures are more likely to reflect a good-faith effort to carry out a materiality assessment in respect of HCM practices in order to determine what information should be disclosed pursuant to the SEC's open-ended rule.

My analysis reveals surprisingly similar dynamics in each of the 15 cases, which allows for some inferences about the design of the 2020 HCM disclosure rule. In each case, the firm's initial filing featured very limited HCM disclosure, which was followed by an SEC comment to expand disclosure in line with Item 101(c)(2)(ii) of Regulation S-K (i.e., the new rule).[108] In each case, the issuer did not contest the SEC's recommendations, as sometimes happens, and, instead, agreed to submit revised disclosure. The revised disclosure was much more extensive, but generally contained "soft" information that can still be described as boilerplate.

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106 The following list sets out the names of the 15 firms in the sample and the date of their initial SEC filing: Smart for Life, Inc., Aug. 2021; Hyperfine, Inc., July 2021; Yubo International Biotech Ltd., June 2021; LegalZoom.com, Inc., Apr. 2021; iAnthus Capital Holdings, Inc., Feb. 2021; Alight, Inc., Feb. 2021; Surge Holdings, Inc., Feb. 2021; ThredUp Inc., Jan. 2021; Vaccitech, Inc., Dec. 2021; TransCode Therapeutics, Inc., Dec. 2021; Seneca Biopharma, Inc., Dec. 2021; Sensei Biotherapeutics, Inc., Nov. 2020; Nuvation Bio, Inc., Nov. 2020; Lucira Health, Inc., Nov. 2020; Diversey Holdings, Ltd., Nov. 2020.

107 According to neo-institutional theories of organizational behavior, organizations tend to copy from one another, which leads to convergence in practices. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV., Apr. 1983, at 147, 151. ("When organizational technologies are poorly understood, when goals are ambiguous, or when the environment creates symbolic uncertainty, organizations may model themselves on other organizations." (citation omitted)).

108 The following is representative of the formulations used by the SEC in its comments: "Please expand your disclosure to include a description of your human capital resources, including any human capital measures or objectives that you focus on in managing your business. Refer to Regulation S-K Item 101(c)(2)(ii)." *See* Letter from Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, to Oleg Nodelman, CEO & Chairman, Panacea Acquisition Corp., at 3 (Dec. 9, 2020), https://www.sec.gov/Archives/edgar/data/1811063/000000000020011833/filename1.pdf [https://perma.cc/4P56-MF7N].

One representative example of revised disclosure, for instance, notes the issuer's recognition that "attracting, motivating and retaining talent at all levels is vital to [its] continued success," that its "employees are a significant asset," and states a goal of "creat[ing] an environment that is equitable, inclusive and representative in which [its] employees can grow and advance their careers, with the overall goal of developing, expanding and retaining [the] workforce."[109] The issuer also states that it "value[s] agility, passion and teamwork, and [is] building a diverse environment where [its] employees can thrive and one that inspires exceptional contributions and professional and personal development in order to achieve [the firm's] mission."[110] Without more, these generic statements can describe almost any firm's governance philosophy.

The evidence derived from the review of SEC comments and the original and revised disclosures offers a novel and more granular perspective, which complements the findings of the large-scale empirical studies discussed above. While the weight of this evidence should not be overstated, it is suggestive of deficiencies in the design of the original rule, which ought to be remedied as discussed in Part IV.

C. *Firm-Level Evidence: Amazon Case Study*

To supplement the evidence supplied by the quantitative studies discussed above, I carried out a case study examining firm-level evidence of disclosure practices. I chose Amazon because it is one of the world's largest employers and its business depends heavily on both low-wage earners (e.g., warehouse employees), as well as high-wage earners.[111] Amazon is also unique among tech firms in that its workforce is geographically dispersed and contains a mix of employee types in terms of skill due to the nature of its business.[112] An analysis of pre-2020 annual reports and other disclosure statements revealed that Amazon also had a very low rate of *voluntary* disclosure of workforce information prior to the adoption of the SEC's disclosure rule. Any disclosure post-2020, therefore, can be attributed largely to the 2020 HCM disclosure rule.

109 Panacea Acquisition Corp., Proxy Statement/Prospectus (Form 424B3) 197 (Dec. 18, 2020), https://www.sec.gov/Archives/edgar/data/1811063/000119312521012539/d13601d424b3.htm [https://perma.cc/E5RT-DFGW].

110 *Id.*

111 *See generally* Amazon.com, Inc., Annual Report (Form 10-K) (Feb. 2, 2024).

112 *See id.*

As a result, Amazon's post-2020 filings provide a test case for whether the new rule has had the effect of eliciting new and meaningful disclosure.

There is another, even more compelling reason for selecting Amazon. By virtue of Amazon's size, geographic footprint, consumer-facing nature, and overall prominence, significant new information about Amazon is often revealed by media organizations and other third-party sources. If this information appears material but had not been disclosed in Amazon's regulatory filings, this suggests a failure to comply with the 2020 HCM disclosure rule, which imposed a new duty to disclose material HCM information. As described in more detail below, Amazon has indeed failed to disclose information about various material HCM matters.

This case study focuses on two broad categories of information: (1) workforce stability, and (2) workforce health and safety. To lend structure to the discussion, I proceed as follows: First, I set out the types of relevant information we might expect to see disclosed by drawing on HCM disclosure frameworks developed by SASB, the HCMC, and the International Organization for Standardization (ISO). Next, I examine Amazon's annual reports on Form 10-K for 2021 and 2022 to determine whether Amazon disclosed any of this information. Finally, I search media reports for non-disclosed but publicly available information in these areas that appears material.

This process yields analytical insights due to the nature of Amazon's disclosure obligations. Under the current rule, a disclosure duty attaches only once a firm has determined, following an open-ended materiality analysis, that a particular piece of information is material. If a firm decides that it does not have to disclose particular information, the information remains hidden, and the firm's analysis cannot be double-checked, *unless* the information becomes available from a media report or another third-party source. Under this framework, nondisclosure can be explained either by a lack of materiality (Scenario A), or by failure to comply with the open-ended disclosure rule (Scenario B). However, if we identify publicly available information and determine that this information is material, we can rule out Scenario A and conclude that nondisclosure was due to Scenario B—a failure to comply with the disclosure rule.

A material disclosure failure is always problematic and ought to be remedied, either through enforcement or improved rule design, or both. Notably, however, a disclosure failure could occur for several different reasons and only some of those imply intentionality on behalf of the disclosing entity. A disclosure failure can certainly—and problematically—occur because the entity intended to hide the

information and defraud investors. A disclosure failure can also occur because the entity did not have adequate systems, controls, and procedures for collecting and assessing HCM information—a distinct possibility in the case of Amazon, particularly given the size of its workforce (1.52 million employees in 2024 and a large-yet-unspecified number of contingent workers and independent contractors). Finally, a disclosure failure can be attributed to poor rule design. It is difficult to comply with a rule that is open-ended, does not provide relevant guidance, and requires complex and resource-intensive materiality assessments.

1. Workforce Stability Disclosure

Disclosure Frameworks: The topic of workforce stability is covered prominently by each of the existing HCM disclosure frameworks. For example, it is one of the HCMC's nine HCM disclosure categories and entails information about voluntary and involuntary turnover, as well as internal hiring rates.[113] The SASB human capital standards for the E-Commerce and Multiline Specialty Retailer industries (which would capture Amazon) likewise suggest specific disclosures relating to voluntary and involuntary turnover for all employees.[114] The ISO standards suggest disclosures in the areas of Recruitment, Mobility, and Turnover, and, in addition to voluntary and involuntary turnover, the ISO suggests providing more information on the quality of new hires, the percentage of vacant positions filled internally, the internal mobility rate, and investments made into training employees.[115]

Analysis of Amazon's (Non)Disclosure: Amazon disclosed very little about its workforce stability during the relevant period after the enactment of the SEC's 2020 HCM disclosure rule. The only mention the company made regarding the availability of workers was in the risk factors section of its 2021 Form 10-K.[116] Under the "Variability in Our Retail Business Places Increased Strain on Our Operations" section, it stated that it may be unable to adequately staff its fulfillment networks during peak periods to meet the seasonal

113 HCMC Letter, *supra* note 61, at 26.

114 *See* SUSTAINABLE ACCT. STANDARDS BD., E-COMMERCE SUSTAINABILITY ACCOUNTING STANDARD 23 (2015) [hereinafter SASB E-COMMERCE STANDARD]; SUSTAINABLE ACCT. STANDARDS BD., MULTILINE AND SPECIALTY RETAILERS & DISTRIBUTORS SUSTAINABILITY ACCOUNTING STANDARD 20 (2015).

115 INT'L ORG. FOR STANDARDIZATION, HUMAN RESOURCE MANAGEMENT—GUIDELINES FOR INTERNAL AND EXTERNAL HUMAN CAPITAL REPORTING 22–25 (2018).

116 Amazon.com, Inc., Annual Report (Form 10-K) 6–8 (Feb. 3, 2021).

demand.[117] This disclosure is framed as addressing seasonal shortages alone. Amazon's 2022 Form 10-K added additional risk factor language that included "constrained labor markets," "labor or trade disputes," and "labor union efforts" as adversely affecting operations without reference to seasonality.[118] In 2021, Amazon released a sustainability report for 2020 that purported to provide disclosures in compliance with the recommended SASB framework.[119] Nevertheless, even though the SASB HCM framework for E-Commerce industries includes disclosure of both voluntary and involuntary turnover rate, Amazon very clearly omitted this information from its report.[120] Amazon provided some level of disclosure for the metrics found immediately above and below the turnover metric on SASB's checklist, but it simply skipped the turnover metric.[121]

Analysis of Publicly Available Information: A large-scale *New York Times* investigation revealed several notable facts about Amazon's turnover and promotion rates that the company had failed to provide on its own accord.[122] Amazon's annual workforce turnover rate was 150%, a number *more than double* the annual turnover rate of other companies in the industry.[123] This rate, both on its own terms and in comparison with industry peers, very likely constituted material information that would have been relevant to investors and that should have been disclosed. As discussed above, however, Amazon failed to do so.[124] This omission made the risk factors regarding labor constraints insufficient to fully inform investors of the true risk that turnover presents to the company. What is more, this risk was clearly known to the company. The *New York Times* reported that Amazon's own executives feared that, if the

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117 *Id.* at 8.

118 Amazon.com, Inc., Annual Report (Form 10-K) 9–10 (Feb. 4, 2022).

119 AMAZON.COM, INC., AMAZON SUSTAINABILITY 2020 REPORT: FURTHER AND FASTER, TOGETHER 115–17 (2021), https://sustainability.aboutamazon.com/amazon-sustainability-2020-report.pdf [https://perma.cc/Q4YF-GJBU].

120 SASB E-COMMERCE STANDARD, *supra* note 114, at 23.

121 AMAZON.COM, INC., *supra* note 119, at 115–17.

122 *See* Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon that Customers Don't See*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html [https://perma.cc/H2E3-VZEC].

123 *Id.*

124 Though highly unlikely, it is possible that Amazon itself was unaware that its turnover data was material because other companies were also not openly disclosing their turnover information. If that were the case, this would bolster further the need for a prescriptive rule requiring turnover information, so that firms can conduct accurate materiality assessments.

turnover rate persisted, the firm would simply run out of workers to hire in some important U.S. markets.[125]

This information is clearly material not just in comparative but also in absolute terms: with a turnover rate of 150%, simple arithmetic suggests that Amazon must hire approximately new 525,000 workers annually; using industry estimates, the cost of each of these hires will be in the range of $2,500 to $6,000.[126] This translates to an annual cost due to turnover of $1 to 3 billion—a staggering amount when compared against Amazon's annual revenue for 2021 "of approximately $4.5 billion."[127] This significant cost is not reported as a standalone item in Amazon's financial statements and it is unclear whether it is even captured fully as part of other line items under existing accounting rules.

2. Workforce Health & Safety Disclosure

Disclosure Frameworks: The HCMC framework includes workplace health and safety among its nine categories for HCM disclosure and recommends disclosure of "work-related injuries and fatalities" and the "lost day rate" for injured employees.[128] The SASB recommendations on health and safety include the disclosure of the Total Recordable Incident Rate ("TRIR"), as well as the fatality rate for direct employees and contract employees.[129] A TRIR is defined as an injury or illness that "results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness" or is "a significant injury or illness

125 *See* Kantor et al., *supra* note 122. The company's own practices and ideology, not disclosed in its filings but available elsewhere, contribute to the high turnover and low promotion rates. *Id.* The company stops guaranteed wage increases for warehouse employees after three years of work. *Id.* Until recently, Amazon had a formal "Pay to Quit" program that paid workers up to $5,000 to resign only if they agreed to never work at Amazon again. *See* Michael Tedder, *Amazon Won't Pay (Most) Workers to Quit Anymore*, THESTREET (Jan. 26, 2022, 4:55 PM), https://www.thestreet.com/investing/amazon-makes-changes-to-pay-to-quit-program-wont-cover-most-workers [https://perma.cc/DE8L-BMEQ].

126 *See* Ulrich Atz & Tensie Whelan, Hidden Figures: The State of Human Capital Disclosures for Sustainable Jobs 10 (Dec. 22, 2023) (unpublished manuscript), https://ssrn.com/abstract=4573340 [https://perma.cc/9BYD-BBEX].

127 *Id.*

128 HCMC Letter, *supra* note 61, at 26.

129 SUSTAINABILITY ACCT. STANDARDS BD., HUMAN CAPITAL BULLETIN 3, 7 (2020), https://sasb.ifrs.org/wp-content/uploads/2020/12/HumanCapitalBulletin-112320.pdf [https://perma.cc/X7MB-R3XF].

diagnosed by a physician or other licensed health care professional" even if it does not lead to such dire consequences.[130]

The ISO framework recommends disclosure of the following metrics in its "[o]rganizational health, safety, and well-being" section: (1) "[l]ost time for work-related injuries, accidents and disease"; (2) the "[n]umber of occupational accidents"; (3) the number of fatalities that occurred during work accidents; and (4) the "[p]ercentage of employees who have participated in training on health and safety at work."[131]

Analysis of Amazon's (Non)Disclosure: Amazon acknowledged the importance of the health and safety of its employees in the 2020 letter to shareholders and on its sustainability website.[132] In the letter to shareholders, founder and then-CEO Jeff Bezos discussed his goal to make the company "Earth's Safest Place to Work," along with initiatives to achieve this goal.[133] The letter disclosed that 40% of workplace injuries at the company were related to musculoskeletal disorders ("MSDs"), which are often caused by repetitive movements.[134] The company addressed this issue with a program called "WorkingWell," which educates employees about "body mechanics" and "proactive wellness" and seeks to ameliorate repetitive muscle movements through job rotations.[135] Amazon reported that these initiatives decreased overall MSDs by 32% from 2019 to 2020, reducing the "time away from work."[136]

Amazon's sustainability website during the relevant period highlighted what appeared to be significant investments in safety: more than 6,000 safety professionals, $11.5 billion spent on COVID-19 safety measures, $125 million spent on safety capital projects in 2020, and $300 million invested into new and continuing safety projects in 2021.[137] Both Amazon's 2021 Form 10-K and its 2021

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130 SUSTAINABILITY ACCT. STANDARDS BD., ELECTRONIC MANUFACTURING SERVICES & ORIGINAL DESIGN SUSTAINABILITY ACCOUNTING STANDARD 13 (2018). SASB also recommends disclosure of near miss frequency rates ("NMFRs") for both direct employees and contract employees. An NMFR is defined as "an unplanned incident in which no property or environmental damage or personal injury occurred, but where damage or personal injury easily could have occurred but for a slight circumstantial shift." *Id.* at 16.

131 INT'L ORG. FOR STANDARDIZATION, *supra* note 115, at 17–20.

132 Letter from Jeffrey P. Bezos, Founder & CEO, Amazon.com, Inc., to Shareowners 4 (2021), https://s2.q4cdn.com/299287126/files/doc_financials/2021/ar/Amazon-2020-Shareholder-Letter-and-1997-Shareholder-Letter.pdf [https://perma.cc/5NRW-MV5Q].

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Safety, Health, and Wellbeing*, AMAZON, https://sustainability.aboutamazon.com/employees#on-the-road [https://perma.cc/Y9WE-UL6F].

Proxy Statement frequently reiterated the $11.5 billion invested in COVID-19 safety measures.[138]

Despite these seemingly impressive figures, in the absence of context it is impossible to determine whether the measures described by Amazon amounted to meaningful investments or to a form of safety-themed "greenwashing" seeking to placate (and, effectively, mislead) investors.[139] Some probative evidence does, however, exist and it points to the second hypothesis. In early 2021, Amazon's shareholders called out the company for undermining its publicly stated positions on health and safety with its active lobbying activities.[140] In a shareholder proposal requesting additional disclosures on lobbying, shareholders raised concerns over the reputational risks arising from Amazon publicly supporting COVID-19 safety measures, while also openly lobbying for programs seeking to undermine those safety measures.[141] At a minimum, this proposal suggested that investors were concerned about the mismatch between the company's disclosures and the actual state of affairs.

Analysis of Publicly Available Information: Quite apart from its SEC disclosure obligations, Amazon is required to submit workplace injury reports to the Occupational Safety and Health Administration (OSHA).[142] Several media outlets have used this data to compare

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138 Amazon.com, Inc., Annual Report (Form 10-K) 20 (Feb. 3, 2021); Amazon.com, Inc., Proxy Statement (Form DEF 14A) 13 (Apr. 15, 2021).

139 *See generally* Caroline M. Bradley, It's Not Easy Being Anti-Greenwashing (Mar. 2024) (Legal Studies Research Paper, University of Miami) https://papers.ssrn.com/id=4784535 [https://perma.cc/N8SA-KAAX] (providing an analysis of the greenwashing phenomenon and comparing regulatory approaches in the United States and the European Union).

140 Amazon.com, Inc., Proxy Statement (Form DEF 14A) 56 (Apr. 15, 2021).

141 *Id.* The proposal states that:

> (A) CEO Jeff Bezos signed the [Business Roundtable]'s *Statement on the Purpose of a Corporation*—committing to invest in employees—yet Amazon hired lobbyists on COVID-19 issues to counter workers who protested lack of protections; (B) Amazon publicly supported COVID-19 efforts, but its [Chamber of Commerce] dues went to directly lobby against use of the *Defense Production Act* for production of personal protective equipment for workers.

Id. (footnote omitted) (first citing Brian Schwartz, *Big Tech Spends over $20 Million on Lobbying in First Half of 2020, Including on Coronavirus Legislation*, CNBC (Aug. 3, 2020, 5:13 PM), https://www.cnbc.com/2020/07/31/big-tech-spends-20-million-on-lobbying-including-on-coronavirus-bills.html [https://perma.cc/LQ9H-ZN46]; then citing Gin Armstrong, *Unmasked: The Corporations Backing a Lobbying Campaign Against the Use of the Defense Production Act*, LITTLESIS (Apr. 16, 2020), https://littlesis.org/reports/unmasked-the-corporations-backing-a-lobbying-campaign-against-the-use-of-the-defense-production-act [https://perma.cc/7U4F-TYUF]).

142 STRATEGIC ORG. CTR., PRIMED FOR PAIN: AMAZON'S EPIDEMIC OF WORKPLACE INJURIES 3 (2021), https://thesoc.org/wp-content/uploads/2021/02/PrimedForPain.pdf [https://perma.cc/PNL9-D3UY].

Amazon to industry peers and analyze the company's injury rate.[143] The *Washington Post* found that "[s]ince 2017, Amazon reported a higher rate of serious injury incidents that caused employees to miss work or be shifted to light-duty tasks than at other warehouse operators in retail."[144] The *Washington Post* also found that "[i]n 2020, for every 200,000 hours worked at an Amazon warehouse in the United States—the equivalent of 100 employees working full time for a year—there were 5.9 serious incidents, according to the OSHA data," and, notably, that this represented "nearly double" the rate of non-Amazon warehouses."[145] Even though such comparisons strongly suggest that Amazon's injury data would have been material to investors, the data reported to OSHA was not included in Amazon's investor-facing materials in 2021.

The following year, and perhaps spurred by shareholder demands, Amazon did disclose its 2019 and 2020 injury rates in its "Delivered with Care" safety report and in the 2022 Proxy Statement.[146] It is likely that these disclosures also amounted to a form of greenwashing. According to a third-party source, Amazon's injury rates were still very high and an outlier in the industry.[147] The same source alleged that Amazon's safety report was misleading because it only addressed 2019 and 2020 data and focused on the decrease in the overall injury rate between the two years.[148] Amazon failed to mention that the "overall injury rate had actually *increased*"

143 *Id.* at 3–4; Jonathan Shieber, *Serious Injuries at Amazon Fulfillment Centers Topped 14,000 Despite the Company's Safety Claims*, TECHCRUNCH (Sept. 29, 2020, 12:48 PM), https://techcrunch.com/2020/09/29/serious-injuries-at-amazon-fulfillment-centers-topped-14000-despite-the-companys-safety-claims [https://perma.cc/5YNS-YCZZ]; Will Evans, *Leaked Documents Show How Amazon Misled the Public About Warehouse Safety Issues*, PBS: NEWS HOUR (Oct. 13, 2020, 6:30 PM), https://www.pbs.org/newshour/show/leaked-documents-show-how-amazon-misled-the-public-about-warehouse-safety-issues [https://perma.cc/7383-62W3]; Jay Greene & Chris Alcantara, *Amazon Warehouse Workers Suffer Serious Injuries at Higher Rates Than Other Firms*, WASH. POST (June 1, 2021, 8:00 AM), https://www.washingtonpost.com/technology/2021/06/01/amazon-osha-injury-rate [https://perma.cc/8GAL-9SMS].

144 Greene & Alcantara, *supra* note 143.

145 *Id.*

146 DELIVERED WITH CARE: AMAZON'S 2022 SAFETY, HEALTH, AND WELL-BEING REPORT 7–8 (Jan. 24, 2022), https://cdn-safety.aboutamazon.com/ea/c3/d72d03394d0db22e336048031ec8/amazon-safety-report-2022-v41.pdf [https://perma.cc/EV75-2C7U].

147 STRATEGIC ORG. CTR., THE INJURY MACHINE: HOW AMAZON'S PRODUCTION SYSTEM HURTS WORKERS 1 (2022), https://thesoc.org/wp-content/uploads/2022/04/The-Injury-Machine_How-Amazons-Production-System-Hurts-Workers.pdf [https://perma.cc/PME5-6U6B].

148 *Id.* at 12.

between 2020 and 2021.[149] Since Amazon's report was released in 2022 and mentioned other related 2021 data, it appears that the company had the most recent injury rate information, saw the increase, and chose not to disclose it.[150] Thus, by presenting only the 2019 and 2020 data, Amazon was able to paint an overly positive—and misleading—picture of its progress on safety.[151]

Without belaboring the health-and-safety point, it is worth noting that Amazon has a history of *purposely* misleading the public about safety issues at its warehouses.[152] Amazon has claimed that warehouses with robots and new technology make employees safer, but investigations have revealed that injury rates were in fact higher at warehouses with such technology.[153] Amazon also claimed that injury rates did not go up during its busiest periods: Prime Day and the holidays.[154] The investigations revealed that Amazon's own records showed that injuries spiked during the weeks of Cyber Monday and Prime Day.[155] Worse yet, Amazon has attempted to artificially deflate "injury rates by controlling the medical care [available to] injured workers."[156] If a particular clinic was recording too many incidents that would be reportable to OSHA, then the company would switch medical providers to lower its injury rates; it also pressured medical providers to find injuries "nonrecordable."[157] According to the *Financial Times*, in 2022, Amazon even planned to expand a program that channels injured warehouse workers to nonprofit groups without the same level of data collection, in an effort to artificially lower the company's injury rates.[158]

Zooming out from this granular evidence, several more general observations are in order. First, third-party data cannot paint a complete picture of any company's workforce stability or its workforce health and safety practices; even when pertinent third-party data is available to investors, it does not have the same level of accuracy as firm-supplied securities disclosure and cannot replace it.

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149 *Id.*

150 *Id.*

151 Amazon.com, Inc., Proxy Statement (Form DEF 14A) 46–47 (Apr. 14, 2022).

152 Evans, *supra* note 143.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* In other cases, the company was found discouraging the use of external medical providers and "was using its in-house EMTs to [provide] . . . improper medical care." *Id.*

158 Dave Lee, *Amazon Criticised Over Charity Work Scheme for Injured Warehouse Staff*, FIN. TIMES (Apr. 21, 2022), https://www.ft.com/content/a77a1adf-723c-48d4-99ae-6df9855e1bdc [https://perma.cc/42PY-88ZC].

This is one of the primary justifications for the existence of a regime of mandatory securities disclosure.[159] Second, the specific evidence discussed in this Section does not establish conclusively that Amazon's disclosures were deficient; the evidence remains merely suggestive until a materiality assessment shows that the undisclosed information would have been material to investors. This task, in turn, is complicated by the difficulties in operationalizing materiality, including in the HCM context, which I have discussed in prior work.[160] At the rulemaking stage, however, the SEC need not establish the materiality of each *specific* datapoint it may wish to include in the disclosure regime. In other contexts, the SEC has developed information-generating frameworks about *general* subject matters that are material to investors, including executive compensation, related-party transactions, asset-backed securities, and so on.[161] Finally, evidence of the type of information that remains undisclosed, even without establishing the materiality of each piece of information, does point to a general conclusion that Amazon's HCM disclosures under the existing rule are deficient.

D. *Evidence from Shareholder Proposals*

As noted in Part I, shareholder proposals on workforce-related matters have also been an important part of the HCM movement. The substance of these proposals has varied over time, but in recent years they have included topics such as policies against sexual harassment,[162] employee health and safety,[163] reproductive rights,[164]

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159 *See, e.g.*, Georgiev, *Too Big to Disclose*, *supra* note 72, at 673*;* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 288–309 (2022).

160 *See* Georgiev, *Human Capital Management, supra* note 2, at 714–23.

161 *See id.*

162 Of particular focus here has been the use of concealment clauses, including nondisclosure or non-disparagement agreements with employees, with shareholder proposals seeking to end those practices. This type of proposal received an average support of 48% and passed at SunRun (98%), Twitter (69%), and IBM (65%). It received 50% of the votes cast at Apple. SULLIVAN & CROMWELL LLP, 2022 PROXY SEASON REVIEW: PART 1 RULE 14A-8 SHAREHOLDER PROPOSALS 15 (2022), https://www.sullcrom.com/insights/memo/2022/August/2022-Proxy-Season-Review-Part-1-Rule-14a8-Shareholder-Proposals [https://perma.cc/YG3E-HEWL].

163 There were 11 proposals regarding employee health and safety in 2022. *Id.* at 15 ("Six of these proposals demanded the adoption of a paid sick leave policy for employees, four of which were with withdrawn following settlement, and two of which went to a vote [where they failed to gain majority support].").

164 Such proposals ask firms "to report on the employment-related risks and costs associated with state-level restrictions on access to reproductive healthcare." *Id.* at 16.

workforce diversity reporting, wage gap reporting, and EEO-1 reporting.[165] Figure 2 presents data of the incidence of HCM-related shareholder proposals between 2018 and 2022. Data from 2023 and 2024, which is not presented in the table because of concerns over the stability of the classification "HCM proposal" from year to year, generally shows decreases in the number of HCM proposals receiving majority support and the average support received by HCM proposals.[166] Taken as a whole, the data shows that the volume of filed proposals, voted proposals, and passed proposals has fluctuated over time, as has the average support rate for proposals.

Figure 2: Shareholder Proposals on HCM—Volume, Pass Rate, Average Support Rate (2018–2022)[167]

	2018	2019	2020	2021	2022
Filed Proposals (#)	62	85	83	119	99
Voted Proposals (#)	19	47	32	32	38
Majority Support (#)	0	3	5	10	6
Average Support (%)	22%	21%	23%	39%	33%

Besides highlighting the basic fact that shareholder proposals on HCM continue to be filed, year-on-year data can be more misleading than illuminating. The misinterpretation of shareholder proposal data, in turn, can lead to erroneous conclusions about

165 *Id.* at 8.

166 For example, the Conference Board reported that the number of proposals receiving majority support declined from 14 in 2022 to five in 2023 to zero in 2024, and the average support for HCM proposals declined from 28% in 2022 to between 20–22% in 2023 to 17% in 2024. *See* MEREL SPIERINGS, CONF. BD., 2024 PROXY SEASON REVIEW: CORPORATE RESILIENCE IN A POLARIZED LANDSCAPE 13 (2024), https://www.conference-board.org/publications/2024-proxy-season-review-corporate-resilience-in-a-polarized-landscape [https://perma.cc/B7X2-4QXW] (comparing 2023 and 2024 data); MEREL SPIERINGS, CONF. BD., 2023 PROXY SEASON REVIEW: NAVIGATING ESG BACKLASH & SHAREHOLDER PROPOSAL FATIGUE 12 (2023), https://www.conference-board.org/publications/2023-proxy-season-review-navigating-ESG-backlash-and-shareholder-proposal-fatigue [https://perma.cc/V7UL-6Q2J] (comparing 2022 and 2023 data).

167 Shareholder proposals compiled by the author, based on data from reports published by the Conference Board and by Sullivan & Cromwell LLP. *See* CONF. BD., HUMAN CAPITAL MANAGEMENT PROPOSALS 2 (2022), https://www.conference-board.org/publications/pdf/index.cfm?brandingURL=human-capital-management-proposals-brief-2 [https://perma.cc/Z2SA-5EM7]; SULLIVAN & CROMWELL LLP, *supra* note 162, at 2.

HCM's importance. For example, one might conclude that shareholders' enthusiasm for HCM proposals is waning due to declines in both the number of shareholder proposals that were filed and the number of shareholder proposals that received majority support between 2021 and 2022, as well as the decline in the average support rate for HCM proposals.[168] A careful look at the complex and, at times, counterintuitive SEC shareholder proposal process, however, reveals that such inferences would not be accurate.

The reasons for exercising extreme caution in the interpretation of shareholder proposal data are fourfold. First, the rules underlying the SEC's shareholder proposal process have been in a state of flux; eligibility criteria, the availability of no-action relief, and even the permitted grounds for exclusion have changed more than once over the past decade. During the tenure of Chairman Clayton, the SEC undertook several initiatives to slow down the shareholder proposal process, and those initiatives, as well as more longstanding guidance, were reversed during the Biden administration.[169] Second, a number of the most viable shareholder proposals either get settled (and are never voted on), or receive management support and morph into management proposals.[170] The sample of proposals on which shareholders express a view, therefore, is skewed in favor of the less viable shareholder proposals. It would be unremarkable, and indeed desirable, for the less viable proposals to receive lower levels of support. A related distorting factor includes firms taking steps to address some, but not all, of the demands in a shareholder proposal,

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168 This is evidenced on a more granular level as well. Some of the biggest changes from 2021 to 2022 were the "decline[s] in support for workforce diversity proposals (from 45% to 22%) and EEO-1 reporting (from 70% to 46%)." *See* SULLIVAN & CROMWELL LLP, *supra* note 162, at 8. The informational value of this data, however, is limited for the reasons set out below.

169 *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020), https://www.sec.gov/newsroom/press-releases/2020-220 [https://perma.cc/PSD7-JS9B]; U.S. SEC. & EXCH. COMM'N, PROXY VOTING ADVICE, https://www.sec.gov/files/34-95266-fact-sheet.pdf [https://perma.cc/PBH6-SAWQ].

170 *See, e.g.*, Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 297 (2016) (noting that "[t]he Rule 14a-8 regime itself . . . may actually channel social and environmental activism toward settlement"). Expert analysis has found that the number of proposals withdrawn due to settlement is increasing. *See, e.g.*, Marc Treviño, June M. Hu & Joshua L. Levin, *2021 Proxy Season Review: Shareholder Proposals on Environmental Matters*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 11, 2021), https://corpgov.law.harvard.edu/2021/08/11/2021-proxy-season-review-shareholder-proposals-on-environmental-matters [https://perma.cc/LNG6-V2NP] (observing that 70 of out 115 environmental proposals were withdrawn in 2021 in large part due to settlements that met shareholders' demands).

which then undermines support for the proposal even if it is not formally withheld.

The remaining reasons for the need to exercise extreme caution in interpreting quantitative data on shareholder proposals relate to the heterogeneity of firms and of the proposals themselves. Because the business models and workforce management practices of public companies differ from one another in a variety of ways, the subset of companies in which a particular HCM issue would be salient depends on the issue and the company. This calculus may also vary from year to year, which renders aggregate data and longitudinal comparisons suspect. Firms' shareholder bases also differ. At some founder-controlled firms, even resolutions that enjoy widespread *independent shareholder* support receive low levels of *overall* support, and that is the only number that is reported and included in aggregate statistics.[171] Finally, shareholder proposals, even proposals that are on the same topic, can differ in their reach, intrusiveness, and costliness.[172]

The shareholder proposals filed in connection with Amazon's 2022 Annual Meeting provide useful illustrations of both the mechanics of the process and the need for careful interpretation. On the surface, the outcome of Amazon's Annual Meeting was a repudiation of critics of the company's HCM practices; none of the seven shareholder proposals on workforce-related matters received

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171 Tech companies, which have grown in size and now dominate surveys that focus on the largest market-capitalization companies, are a case in point. At Meta, Inc., Mark Zuckerberg controls the majority of the voting shares and can determine the outcome of any vote. Even though 68% of Meta's outside shareholders in 2019 supported a proposal to split the roles of CEO and Board Chair, and 83% voted to replace the firm's dual-class structure with a "'one share, one vote' system," both proposals failed. *See, e.g.*, Betsy Atkins, *Facebook Strong Arms Investors Who Want Zuckerberg Out*, FORBES (Jan. 8, 2021, 4:15 PM), https://www.forbes.com/sites/betsyatkins/2019/06/07/facebook-strong-arms-investors-who-want-zuckerberg-out [https://perma.cc/VX4G-4WMX]; *see also* Emily Stewart, *Facebook Will Never Strip Away Mark Zuckerberg's Power*, VOX (May 30, 2019, 2:38 PM), https://www.vox.com/recode/2019/5/30/18644755/facebook-stock-shareholder-meeting-mark-zuckerberg-vote [https://perma.cc/H2D9-F5JS].

172 This point applies to shareholder proposals across the board and is best illustrated by a type of shareholder proposal that is unrelated to HCM—proxy access. There have been a variety of different proxy access resolutions with widely different thresholds; some have enjoyed high levels of support, whereas others have not. Aggregating these under the single rubric of "proxy access shareholder proposals" would be misleading. *See, e.g.*, Avrohom J. Kess, *Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 10, 2015), https://corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals [https://perma.cc/BH9K-M4SF].

majority support.[173] The reality, however, was much more complicated and highlighted shareholders' widespread concern with HCM matters as well as Amazon's active efforts to avoid releasing information on HCM matters, including by taking advantage of ambiguities in the existing reporting framework.

As suggested above, the fact that there were seven workforce-related proposals on the proxy statement is, in part, a function of regulatory changes making it easier to file such proposals. For example, Amazon attempted to exclude a proposal demanding a report on warehouse working conditions (the "working conditions proposal") by arguing that it falls under the so-called "ordinary business exception."[174] The SEC, however, disagreed in light of the changes to its shareholder proposal guidance from November 2021, stating that shareholder proposals related to "significant social policy issues" can no longer be excluded under the "ordinary business exception."[175]

Furthermore, the fact that none of the proposals received majority support among *all* shareholders needs to be interpreted in light of the substantial voting stakes held by founder and former CEO Jeff Bezos (16.3%) and other insiders.[176] The working conditions proposal, for example, received 44% *overall* support, which translates into majority support from *independent shareholders*.[177]

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173 *See Shareholder Proposals Appearing on the 2022 Amazon Proxy Ballot*, INTERFAITH CTR. ON CORP. RESP. (Dec. 14, 2021), https://www.iccr.org/shareholder-proposals-appearing-on-the-2022-amazon-proxy-ballot [https://perma.cc/8BDD-7FBX].

174 The proposal's proponent, Tulipshare, noted that "Amazon's human capital management strategy implements constant surveillance, demanding quotas which contribute to high injury and turnover rates, and a punitive 'time-off-task' tracking system." *Id.*

175 Sebastian Klovig Skelton, *Amazon Shareholders to Vote on Audit of Working Conditions*, COMPUTERWEEKLY.COM (May 13, 2022, 11:30 AM), https://www.computerweekly.com/news/252518134/Amazon-shareholders-to-vote-on-audit-of-working-conditions [https://perma.cc/N34A-2CVE] (citing *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14l-cf [https://perma.cc/ZYN6-AUCF]). Of the nine workforce-related shareholder proposals filed in 2022, the SEC allowed for the exclusion of only two. *See 2021-2022 No-Action Responses Issued Under Exchange Act Rule 14a-8*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action [https://perma.cc/3LAV-53A6].

176 Jeffrey Dastin & Arjun Panchadar, *Jeff Bezos Keeps Amazon Voting Power in Divorce Settlement*, REUTERS (Apr. 4, 2019, 9:49 PM), https://www.reuters.com/article/us-people-bezos/jeff-bezos-keeps-amazon-voting-power-in-divorce-settlement-idUSKCN1RG2CI [https://perma.cc/Z8ZQ-EKBL].

177 Press Release, Interfaith Ctr. on Corp. Resp., Shareholder Proposals Calling Out Environmental and Social Risks Receive Near Majority Support at Amazon Annual Meeting (June 1, 2022), https://www.iccr.org/shareholder-proposals-calling-out-environmental-

Arguably, support for the working conditions proposal would have been higher if shareholders had been aware of the true level of injury rates among workers, which goes back to the lack of disclosure discussed in Section III.C. As noted above, labor advocates had criticized the fact that Amazon chose to emphasize outdated 2020 data showing that its injuries per 100 workers fell about 40% in 2020, whereas an analysis of data Amazon submitted to OSHA found that the injury rate actually increased 20% in 2021.[178]

Finally, proactive steps taken by Amazon also worked to skew the level of support for workforce-related proposals. Shortly after unsuccessfully trying to block two related shareholder proposals demanding racial and gender equity audits of Amazon's human resources policies,[179] Amazon announced that it had commissioned a similar audit.[180] Importantly, however, whereas the shareholder proposals sought a top-down racial and gender equity audit, Amazon's audit covered only racial equity, only for Amazon's hourly employees, and excluded employees at a number of Amazon subsidiaries (e.g., Whole Foods).[181] Nevertheless, this preemptive move on Amazon's part was sufficient to lead to the withdrawal of one of the proposals,[182] and to the other proposal receiving only 13.2% support.[183]

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and-social-risks-receive-near-majority-support-0 [https://perma.cc/H98A-T8VK]. Two non-HCM proposals that did not gather majority support from all shareholders similarly had majority support from outside shareholders. *Id.*

178 Lauren Rosenblatt, *Activists Say Amazon Misled Shareholders About Warehouse Working Conditions*, SEATTLE TIMES (July 7, 2022, 12:07 PM), https://www.seattletimes.com/business/activists-say-amazon-misled-shareholders-about-warehouse-working-conditions [https://perma.cc/24KC-N3GS].

179 *See* Gibson, Dunn & Crutcher LLP, SEC Staff No-Action Letters, WSB File No. 0418202215 (Apr. 7, 2022), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/newyorkamazon040722-14a8.pdf [https://perma.cc/7GQV-6WHA].

180 *See* Lauren Rosenblatt, *Amazon Taps Former Attorney General Loretta Lynch to Run Racial Equity Audit*, SEATTLE TIMES (Apr. 19, 2022, 4:27 PM), https://www.seattletimes.com/business/amazon-taps-former-attorney-general-loretta-lynch-to-run-racial-equity-audit [https://perma.cc/L6FH-EKXU].

181 *See* Amrita Khalid, *Amazon Will Perform a Racial Equality Audit of Its Hourly Workers*, ENGADGET (Apr. 19, 2022), https://www.engadget.com/amazon-will-comply-with-doj-led-racial-audit-202537322.html [https://perma.cc/6MRF-EQMP].

182 *See* Amazon.com, Inc., Amendment to Schedule 14A, Notice of Withdrawal.

183 INTERFAITH CTR. CORP. RESP., *supra* note 173 (reporting result for Proposal #9: Report on Worker Health And Safety Differences).

E. *Lessons from Recent Labor Market Developments*

Firms' employment practices and, more generally, labor markets evolve over time and respond to changes in the broader economy. By virtue of its open-ended design, the 2020 HCM disclosure rule should, at least in theory, be capable of eliciting disclosures that accommodate those ongoing changes, because the rule created an obligation to report on material workforce-related developments.

There are, however, at least two recent shifts in labor markets that are structural in nature and that the 2020 HCM disclosure rule is ill-equipped to cover: (1) the increased reliance on contingent workers, who do not qualify as employees but, instead, comprise a sizeable "shadow workforce," and (2) the ever-growing use of AI-enabled technologies, which learn from and, in effect, appropriate workers' human capital and have the capacity to serve as complements and, problematically, substitutes for human workers.

The tech industry relies extensively on temporary, vendor, and contract workers ("TVCs"), who in many instances outnumber a firm's full-time employees.[184] This employment model raises significant legal issues, including concerns about labor rights, wage equity, and compliance with labor laws, as many TVCs do not receive the same benefits or protections as regular employees. It also highlights challenges around workplace equity, as TVCs often perform similar tasks as full-time employees but are excluded from critical organizational opportunities, such as career development and participation in the company culture. From a human capital perspective, this practice raises concerns about workforce morale, retention, and the long-term sustainability of such employment structures. The disparity between full-time employees and TVCs may create divisions within the workforce, undermining collaboration and employee satisfaction.[185]

If the issues related to TVCs are problematic from the point of view of worker morale and performance, then they are also likely to be material for investors. In addition, there is a basic investor

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[184] *See, e.g.*, Nick Bastone, *Google Barred Contractors from Communicating with Full-Time Googlers on Some Internal Groups Forums, and Makes Temps Wear Red Badges That Add to a 'Sense of Shame'*, BUS. INSIDER (May 28, 2019, 8:18 PM), https://www.businessinsider.com/google-contractor-temp-workers-roadblocks-2019-5 [https://perma.cc/V485-LV37].

[185] *See* Bergen & Eidelson, *supra* note 27; *see also* Daisuke Wakabayashi, *Google's Shadow Work Force: Temps Who Outnumber Full-Time Employees*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/technology/google-temp-workers.html [https://perma.cc/QU8Q-BRCK].

transparency point and public pension funds and their affiliates have highlighted the need for more comprehensive human capital disclosure by public companies that cover not just workers classified as employees, but the "material workforce."[186] The argument is that current disclosures often exclude significant segments of the workforce, such as independent contractors, franchisee employees, and subcontracted workers, who are integral to a company's operations.[187] It is important to note that part of the reason for the information gaps relates to the growth of private markets.[188] If one company's shadow workforce were employed by other companies within the public company disclosure universe, then those other companies would arguably fill the information gaps about the workers in question through their own public disclosures; unfortunately, the proliferation of private capital and large private firms means that this is not the case.

The proliferation of AI-enabled technologies that learn from and, in effect, appropriate workers' human capital poses significant challenges from a corporate and securities law perspective. These issues can be analyzed through the lenses of corporate governance, disclosure obligations, fiduciary duties, and workforce-related externalities. As an initial matter, AI systems often rely on data inputs generated by human workers, including skills, expertise, and decision-making patterns. When this data is used to train AI,[189] workers' intellectual contributions are appropriated without explicit consent, adequate compensation, or acknowledgment. Since institutional investors are increasingly prioritizing HCM as a material factor for long-term value creation, overreliance on AI as a substitute for human labor without equitable consideration for displaced workers may lead to reputational risks and diminish a firm's ability to attract and retain talent.

There are also implications for securities markets. Overestimation of AI's capabilities and underestimation of human input would distort the valuation of firms heavily reliant on these

186 *See, e.g.*, Letter from Elizabeth H. Shuler, President, AFL-CIO, et al., to Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n (Jan. 18, 2022), https://www.sec.gov/comments/4-711/4711-20112177-265269.pdf [https://perma.cc/9F8S-DJUC].

187 *Id.*

188 *See* George S. Georgiev, *Is "Public Company" Still a Viable Regulatory Category?*, 13 HARV. BUS. L. REV. 1 (2023) (discussing the regulatory wedges between public and private companies); *see also* George S. Georgiev, *The Breakdown of the Public–Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & BUS. 221, 284–86 (2021).

189 *See, e.g.*, WENYAN FEI & ROB GARLICK, CITI, AI MEETS HUMAN CAPITAL (MANAGEMENT) — PART 1: TALENT INTELLIGENCE PLATFORMS (TIPS) FOR SKILL MIGRATION (2023), https://www.citivelocity.com/t/r/eppublic/2qelE [https://perma.cc/BQN6-8W5X].

technologies. Investors may overvalue firms claiming to replace human labor with AI, leading to potential mispricing and market volatility if these promises fail to materialize. An economy increasingly dependent on AI could create systemic vulnerabilities, and firms with excessive reliance on AI technologies may face operational risks if AI systems fail.[190]

Just like developments related to temporary and contingent workers, the AI-related developments signal structural shifts in the labor market. The fact that the 2020 HCM disclosure rule, as currently drafted, fails to account for these shifts is an important data point in the overall assessment of the rule.

F. *The Resurgence of Caremark Duties in Delaware Corporate Law*

Delaware corporate law serves as a barometer for what is permissible and what is required of corporate directors and officers because many legal and business scenarios end up being tested through fiduciary duty litigation in Delaware court.[191] The commentaries and interpretations of Delaware court decisions, in turn, offer guidance on what is desirable and what is merely acceptable in terms of director and officer conduct.[192] Since 2019, there have been modest yet highly relevant shifts in the jurisprudence and best practices regarding the oversight duties of directors and officers. As we will see, the presence of catastrophic impacts on "human" constituencies—employees as well as customers—has emerged as a key differentiating factor in duty-of-oversight cases. Boards and officers, therefore, should be expected to pay heightened attention to how corporate decisions impact these human constituencies, which represents another indicator of the place of human capital in corporate governance.

As an initial matter, it is worth noting that fiduciary duties related to oversight are invariably nuanced and contextual. Moreover, the threshold for imposing director and officer liability

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190 *See, e.g.*, NICOLAS DE BELLEFONDS ET AL., WHERE'S THE VALUE IN AI?, BOS. CONSULTING GRP. 15 (Oct. 24, 2024), https://web-assets.bcg.com/75/ab/7ec60ba84385ad89321f8739ecaf/bcg-wheres-the-value-in-ai.pdf [https://perma.cc/KKL4-BFRJ] (providing that "[t]o get an AI [t]ransformation [r]ight, 70% of the [f]ocus should be on [p]eople and [p]rocesses").

191 *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015–19 (1997).

192 *See* Claire A. Hill, Caremark *as Soft Law*, 90 TEMPLE L. REV. 681, 681 (2018) (arguing that "*Caremark* can be both influential and legally toothless" and that "[a]s soft law, *Caremark* can have a considerable penumbra beyond what law requires, encompassing other aspects of corporate good citizenship").

under the classic *Caremark* case is very high: liability for oversight failures arises when "(a) the directors [and officers] *utterly failed* to implement *any* reporting or information system or controls; *or* (b) having implemented such a system or controls, *consciously failed* to monitor or oversee its operations thus *disabling themselves from being informed* of risks or problems requiring their attention."[193] This high threshold for imposing liability translates into a low standard for director and officer conduct. Recent commentary has suggested that a successful oversight claim requires "egregious facts following an extreme corporate trauma,"[194] with anything less than that falling outside the bounds of *Caremark* liability.

Fiduciary duty litigation based on alleged oversight failures experienced a resurgence in 2019 with two watershed Delaware cases.[195] First, in *Marchand v. Barnhill*, the Delaware Supreme Court allowed a *Caremark* complaint to proceed because, inter alia, an ice-cream-making company whose products had caused a listeria outbreak and multiple deaths had "no system of board-level compliance monitoring and reporting" in respect of food safety,[196] which, crucially, was "essential and *mission critical*" for the company.[197] Later the same year, in *In re Clovis Oncology, Inc. Derivative Litigation*, the Court of Chancery allowed a *Caremark* complaint to proceed because the board "consciously ignored red flags that revealed a *mission critical* failure to comply with . . . FDA

193 Stone ex rel. AmSouth Bancorp. v. Ritter, 911 A.2d 362, 370 (Del. 2006) (emphasis added) (restating and applying the *Caremark* standard). In 2023, the Court of Chancery confirmed that *Caremark* applies to officers as well as directors. *See* In re McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 350 (Del. Ch. 2023). Notably, *Caremark* duties fall under the duty of loyalty and not under the duty of care, which means that the now-widespread charter exculpation provisions, which are limited to duty of care claims for monetary damages, cannot exculpate directors and officers from liability for oversight failures. DEL. CODE ANN. tit. 8, § 102(b)(7) (2022). A showing of bad faith is a requirement for oversight liability, and the existence of bad faith automatically makes both indemnification and business judgment rule protections unavailable.

194 *See* Gail Weinstein, Philip Richter & Steven Epstein, *2024 Caremark Developments: Has the Court's Approach Shifted?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 20, 2024), https://corpgov.law.harvard.edu/2024/05/20/2024-caremark-developments-has-the-courts-approach-shifted [https://perma.cc/G5NR-98CC].

195 *See* Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1866 (2021) (identifying "a systematic change in failure-of-oversight litigation").

196 Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019) (emphasis added).

197 *Id.* at 824 (emphasis added). The court pointed out that there was "no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments." *Id.* at 809.

regulations" regarding the veracity of clinical trial data.[198] Because both cases made liberal use of the modifier "mission critical,"[199] which had not been used in Delaware law before and is not a known term of art,[200] much of the focus rightly fell on trying to interpret this term.[201] It does appear that "mission critical" sits on a continuum somewhere between "business essential" and "survival critical."[202] For our purposes, this means that a factor (a risk, product, or failure) can be deemed "mission critical"—with all the attendant doctrinal consequences—even if the factor in question does not endanger the very survival of the business.

Five years on, the newly refurbished *Caremark* standard has been applied to a wide variety of corporate crises with mixed success. Cases where plaintiffs have been unable to sustain an oversight failure claim at the motion-to-dismiss stage still vastly outnumber cases where plaintiffs have been successful. Commentators have suggested that "when a *Caremark* claim is premised on a 'mission-critical' *regulatory risk*, it is easier to infer the element of bad faith as a practical matter," and that, by contrast, claims premised on failure to oversee a *business risk* are much less likely to succeed.[203] In other words, when directors and officers fail

198 *In re* Clovis Oncology Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *1, *15 (Del. Ch. Oct. 1, 2019) (emphasis added).

199 The mission-critical modifier was attached to "failure to comply," "regulatory compliance risk," "operations," "regulatory issues," and "product." *See Clovis*, 2019 WL 4850188, at *12–15. Because these are not the same thing, it is unclear whether the key to oversight liability is the mission-critical nature of the company's compliance failure, its regulatory compliance risk, its operations, its regulatory issues, its product, or some combination thereof.

200 The term "mission-critical" appears to originate from critical systems theory and the study of change management, though it is not a defined term even in those areas. There is considerable heterogeneity among definitions available online, but they usually focus on the fact that the "failure or malfunction" of a system or a component of a system "would result in significant disruptions, adverse consequences, or catastrophe within an organization or process," and that "[such] systems are crucial to the core functioning and success of an organization." *Mission Critical System*, DEVX (Jan. 16, 2024), https://www.devx.com/terms/mission-critical-system [https://perma.cc/372W-QLHV].

201 *See, e.g.*, Adam B. Badawi & Frank Partnoy, *Social Good and Litigation Risk*, 12 HARV. BUS. L. REV. 315, 360 (2022). After a detailed analysis of the *Marchand* and *In re Clovis* cases and the various interpretations proffered by law firms, the authors note that "the 'mission critical' standard could support a conclusion that oversight standards are related to ESG and sustainability." *Id.* at 367.

202 *See generally* MISSION-CRITICAL AND SAFETY-CRITICAL SYSTEMS HANDBOOK: DESIGN AND DEVELOPMENT FOR EMBEDDED APPLICATIONS (Kim Fowler, ed., 2010).

203 Nathaniel J. Stuhlmiller & Brian T.M. Mammarella, *Three Lessons from Three Years of Post-'Marchand' Caselaw*, DEL. BUS. CT. INSIDER (Nov. 16, 2022), https://www.rlf.com/wp-content/uploads/2022/11/Three-Lessons-From-Three-Years.pdf [https://perma.cc/PCJ3-4LRS].

to monitor regulatory risks that obviously pose an existential threat to the enterprise, it is more likely that a court will deem such failures to involve bad faith.[204]

A close analysis of the caselaw suggests that the presence of catastrophic *human* impacts is a key differentiator between cases that are dismissed outright and cases that are successful in surviving the motion-to-dismiss stage (at which point, as a matter of practice, they settle). One commentator has noted that Delaware courts have "considered employment-related issues (such as sexual harassment and, more generally, employees' safety and welfare) to be 'mission-critical risks' to which *Caremark* duties apply (*McDonald's*)."[205] By contrast, cases where board decisions allegedly caused harm through "excessive compensation to the executives and loss of tax benefits by the company," or where directors allegedly "[took] on increased risk without creating sufficient loss reserves," or where there was allegedly inadequate "oversight with respect to financial accounts after discrepancies were discovered," all failed.[206]

Duty of oversight cases are sufficiently idiosyncratic and rare that we cannot draw a straight line between Delaware court decisions and specific changes in corporate behavior. Those cases, however, do matter in the larger echo chamber of corporate governance. By spotlighting *potential* liability due to failure to monitor employee- and human-related compliance risks, these cases invariably generate commentary from law firms, other corporate advisers, and academics that urges corporate boards to pay more serious attention to such matters. Indeed, most legal analyses of new *Caremark* cases contain specific advice for corporate boards, which most often takes the form of softer and more aspirational best practices, rather than legal requirements.[207]

IV. LEGAL IMPLICATIONS

This Part draws normative and analytical conclusions based on the evidence presented in the Article viewed through the prism of established regulatory goals and strategies under federal securities law. It focuses first on the performance and potential redesign of the 2020 HCM disclosure rule. It then examines the broader question—whether labor's increased visibility in corporate filings has changed

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204 *Id.*

205 Weinstein et al., *supra* note 194.

206 *See id.*

207 *See id.*

its role in U.S. corporate governance—and considers the implications.

A. *Federal Securities Law*

The evidence discussed in Part III suggests that current HCM disclosures are suboptimal and that there is a need for a new disclosure rule that addresses the information gaps that have become apparent over the past four years. This Section, considers, in turn, the use of materiality, the need for standardization and comparability (including through quantitative disclosures), and the need to consider new disclosure rubrics based on the recent labor market developments discussed in Section III.E. Finally, this Section examines and ultimately endorses the SEC Investor Advisory Committee's recommendations regarding expanded HCM disclosure from September 2023.

1. Materiality

The issue of materiality in the context of SEC rulemaking is complex and contested; it is also highly relevant for any future rulemaking on HCM. Recall that the SEC's 2020 HCM disclosure rule did not list specific disclosure items, but instead required HCM disclosure "to the extent such disclosure [is] material to an understanding of the [company's] business taken as a whole."[208] The SEC characterized this as a "principles-based" approach to disclosure based on a traditional understanding of materiality.[209]

Based on a detailed analysis of the relevant caselaw and historical regulatory practices, I have argued in prior work that the SEC's traditional materiality-based approach to disclosure does not preclude the agency from requiring firms to provide qualitative and quantitative information on specific HCM topics (sometimes referred to as "line-item disclosures"). To the contrary, a proper understanding of materiality suggests that, once the SEC has identified a general subject area that is material to investors, the SEC has a responsibility to come up with detailed guidance or an information-generating framework that ensures the informational integrity of public companies' disclosures in this area. Importantly, not every single piece of information required to be disclosed

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208 Reg. S-K 2020 Modernization Release, *supra* note 6, at 63739.

209 *See id. passim*.

pursuant to such a framework needs to be material for each individual disclosing firm at each point of disclosure.[210] There are several precedents for such detailed information-generating frameworks developed by the SEC, including on topics such as executive compensation, asset-backed securities, oil and gas assets, and, most recently, climate-related disclosure.[211]

The same approach is needed for HCM information. This conclusion is supported by the new evidence showing that the principles-based HCM disclosure rule has failed to meet the SEC's original expectations, which were stated upon the rule's adoption (i.e., to generate "meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs").[212] Recall from Section III.A, for example, that the average number of quantitative metrics that firms disclosed in the third year since the rule became effective remains low—merely 2.5 metrics, of which only 1.4 are metrics that are generally viewed as material.[213] It is highly implausible that any modern firm could manage its business with such a low number of workforce-related metrics. And, as we saw in Section III.C.1, Amazon failed to disclose an abnormally high turnover rate (150% in 2021), a metric that appears material both in its own right and within the context of the broader industry.[214] Moreover, the non-disclosure occurred even though turnover was a matter of serious internal concern and even though the financial implications of having to replace such a substantial share of the workforce each year has been estimated at $1–3 billion (against annual revenue for 2021 of approximately $4.5 billion).[215]

2. Standardization, Comparability, and Quantitative Metrics

Any new rulemaking on HCM should therefore focus on standardization and comparability, drawing on work done by investor groups, such as the HCMC, and various standard setters, including SASB (now part of ISSB). An important difficulty to

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210 *See* Georgiev, *The SEC's Climate Disclosure Rule*, *supra* note 14, at 125–27 (critiquing the notion of "universal materiality").

211 *See* Georgiev, *Human Capital Management*, *supra* note 2, at 714–18.

212 Clayton, *supra* note 66.

213 *See supra* notes 89–91 and accompanying text (reporting results from the Bourveau et al. study).

214 *See supra* notes 126–27 and accompanying text (discussing leaked Amazon data on annual turnover and reporting estimates of the associated costs).

215 *Id.*

formulating specific disclosure rules stems from the broad nature of the underlying subject matter. Investors and corporate governance practitioners who have been active in this space have included a wide variety of general categories under the catch-all umbrella of HCM, and there is no complete overlap among these different conceptions of HCM. To this end, future SEC rulemaking should seek to disambiguate HCM and promote a focused discussion of individual categories, such as training and development, workforce compensation, diversity and inclusion, and more. It would be much easier to argue that a metric within a particular category, such as the rate of voluntary and involuntary workforce turnover or total compensation expense, is material and should be disclosed, than to make the same argument for one of the highly detailed HCM disclosure frameworks.

Relatedly, the SEC ought to emphasize the utility of standardization and comparability. The materiality of a particular piece of firm-specific information often depends at least in part on information provided by other firms. For an investor, the rate of voluntary turnover at a given firm is likely to mean little on its own—to interpret the information, the investor would need to know both the historical trends at the particular firm and, importantly, how the firm compares to its peers. In order for investors to make such inter-firm comparisons for purposes of investment or voting decisions, firms should disclose the same types of information, and this disclosure needs to have informational integrity.[216]

Standardization and comparability are often achieved through financial accounting standards. Until 2021 and 2022, financial accounting had received little attention from participants in the HCM movement.[217] One explanation for this is the inability of generally accepted accounting principles ("GAAP") to account for any type of intangible asset (and not just human capital), a decades-long problem that remains largely unresolved despite its growing urgency.[218]

216 *See* Georgiev, *Human Capital Management*, *supra note* 2, at 723–27.

217 *See id.* at 727–33 (highlighting relevant accounting considerations); *see also* Colleen Honigsberg & Shivaram Rajgopal, *Disclosure of the Extent to Which Firms Invest in Their Workforce*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 29, 2022), https://corpgov.law.harvard.edu/2022/06/29/disclosure-of-the-extent-to-which-firms-invest-in-their-workforce [https://perma.cc/7KRB-2C8V].

218 *See, e.g.*, WAYNE S. UPTON, JR., FIN. ACCT. STANDARDS BD., SPECIAL REPORT: BUSINESS AND FINANCIAL REPORTING, CHALLENGES FROM THE NEW ECONOMY (2001), https://www.cs.trinity.edu/~rjensen/Calgary/CD/fasb/uptonApril01.pdf [https://perma.cc/N58S-B6M7] (summarizing challenges with the accounting treatment of intangibles from FASB's perspective).

The many technical and policy judgments that have to be made when formulating human capital disclosure requirements should not detract from the bigger picture and the need for better disclosures. The development of human capital reporting discussed in this Article underscores the importance of new types of information that focus on the ever-evolving challenges and opportunities faced by firms and that transcend outdated twentieth-century thinking about business strategy and investing. Economic value today is generated by knowledge, not by "property, plant, and equipment," but it is only the latter that appears as a line item in financial statements. The share of intangibles as a source of value was estimated at 90% in 2020, up from 17% in 1975.[219] The importance of human capital disclosure in this intangibles universe is twofold. Human capital is an intangible asset in its own right, and, separately, human capital is essential to the monetization of other intangible assets, such as intellectual property and data.

3. New Disclosure Topics

As discussed in Section III.E, recent changes in labor markets suggest that, as a structural matter, the 2020 HCM disclosure rule may omit at least two important categories of information: information about the shadow workforce (including temporary workers, vendors, and contingent workers), and information about the interplay between human capital and AI-enabled technologies, which are capable of appropriating workers' human capital and substituting it with the expectation of cost savings. In each case, expanding the coverage of the 2020 HCM disclosure rule will help fill important information gaps.

4. The 2023 Investor Advisory Committee Recommendations

In September 2023, the SEC's Investor Advisory Committee adopted a set of recommendations that address some of the matters covered in this Article with the goal of enhancing the quality of HCM disclosures and providing investors with more comprehensive and

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219 *Intangible Asset Market Value Study*, OCEAN TOMO, https://oceantomo.com/intangible-asset-market-value-study [https://perma.cc/ES2L-UWZ9].

comparable HCM information.[220] The recommendations covered four principal areas: (1) workforce composition: firms should disclose the total number of employees, categorized by full-time, part-time, and contingent workers; (2) turnover metrics: firms should disclose workforce turnover rates or similar stability metrics in order to reflect employee retention and organizational stability; (3) compensation details: firms should report the total cost of the workforce, breaking down major compensation components to provide insight into financial commitments toward human capital; and (4) demographic information: firms should share workforce demographic data to help investors evaluate diversity and inclusion efforts and access to talent.[221] The detailed analysis presented in this Article supports each of these recommendations. Of course, as with any policy proposal, the IAC recommendations would need to be tested and sharpened through the SEC's standard notice-and-comment rulemaking process.

The IAC's recommendations faced criticism from SEC Commissioner Hester Peirce, and it is worth examining the relevant arguments because they are sure to be repeated in connection with any future initiative to revise the 2020 HCM disclosure rule.

Commissioner Peirce criticized the expansion of human capital management disclosures, emphasizing concerns about consistency, regulatory burden, and potential deviation from investor-focused priorities. These points, however, do not acknowledge the increasing relevance of human capital information to investors. As discussed in this Article, workforce practices, including diversity, turnover rates, and employee engagement, have become critical to evaluating long-term value, risk management, and operational resilience.

On the issue of consistency, Commissioner Peirce's argument that uniform standards across diverse industries may be difficult to implement overlooks the possibility that well-designed principles-based guidance could balance flexibility with consistency. Rather than imposing rigid metrics, such an approach could allow companies to tailor disclosures to their specific contexts while still providing investors with the comparability they need. Commissioner Peirce's second concern, about regulatory burdens, including on smaller companies, is plausible, but likely overstated. Many companies already disclose information about human capital management. A standardized framework would streamline these

220 INV. ADVISORY COMM., U.S. SEC. & EXCH. COMM'N. RECOMMENDATION REGARDING HUMAN CAPITAL MANAGEMENT DISCLOSURE (Sept. 21, 2023), https://www.sec.gov/files/spotlight/iac/20230921-recommendation-regarding-hcm.pdf [https://perma.cc/9PMK-WSRY].

221 *See id.*

efforts, reducing ambiguity and providing a clearer understanding of what is expected in terms of disclosure. Such clarity could ultimately mitigate the potential legal uncertainties identified by Commissioner Peirce. Finally, the skepticism about whether expanded disclosures serve investors ignores evidence of the evolving nature of investor interests. The growing focus on sustainability-related factors, including human capital, suggests that investors see these as material to understanding a firm's strategic direction and risks. More generally, each of these general objections can be addressed through careful and thoughtful rule design.

B. *Human Capital and Modern Corporate Governance*

It is useful to zoom out and consider workforce disclosure within the broader corporate governance landscape. In particular, has labor's increased visibility in corporate filings, as a result of the SEC's 2020 HCM disclosure rule, led to changes in its role in corporate governance? And is there evidence of worker empowerment or a shift away from treating workers as "assets" and toward treating them as "investors" of the human capital they own? Based on the evidence presented in this Article, it appears that the answer to both questions is no. There is no systematic evidence that labor's power has changed for the better as a result of the increased focus on HCM disclosure and oversight. While this outcome may well appear disappointing, it is useful to recall that the goal of the SEC's 2020 HCM disclosure rule was investor information, not worker empowerment.

Looking ahead, labor is facing an unprecedented threat—the rapid rise of AI. This raises at least two difficult questions. First, can and will human capital remain mission critical in an AI-driven economy? As we have seen, the workforce is an essential source of value, but there is no denying that it is also a significant cost. Consequently, having AI perform tasks previously assigned to workers makes it possible to reduce labor costs, while improving productivity and efficiency. In the absence of bold policy interventions, AI technologies are likely to diminish human capital's "mission critical" status because AI is a direct—and much cheaper—substitute for human capital. AI-driven productivity improvements would clearly benefit shareholders in the form of higher returns on capital and would be difficult to resist. AI, thus, gives a powerful structural advantage to capital over labor. This is something that corporate law, and economic policy more generally, should

recognize, and it is also something that corporate law, as it now stands, is ill-equipped to address.

Second, the proliferation of standardized workforce data stemming from the development of an HCM reporting framework, along with the analytic advances made possible by AI, will make workforce management, as well as workforce micro-management, easier, more subtle, more precise, and more profitable. Workers are already quantified through various means of workforce surveillance and measurement, and the external reporting of HCM data will enable shareholders, investment analysts, and others in the larger shareholder-advising ecosystem to compare firms and, likely, argue for efficiency improvements that will go directly against the interests of the workforce. Are these developments inevitable and what would be their consequences? The AI challenge represents the next big frontier in thinking about human capital, human capital management, and labor's role in corporate governance, and it is a topic worthy of its own full-length treatment.

CONCLUSION

The incorporation of HCM reporting into the SEC disclosure regime since 2020 has generated a rich dataset, as well as opportunities for analysis and contemplation. This Article seeks to draw relevant lessons from this and related developments by combining six complementary types of evidence through an original mixed methods research design, ultimately concluding that human capital reporting needs to be strengthened. More specifically, this Article highlights the need for a revised HCM disclosure framework that: (1) elicits more detailed, standardized, and, where appropriate, quantitative information; (2) covers both traditional employees and the so-called shadow workforce, comprised of contingent workers; and (3) pays much-needed attention to the complementarities and substitutability between human capital and AI-enabled technology.

Given the expected regulatory retrenchment following the outcome of the November 2024 presidential election, it is highly unlikely that the SEC will take any action in this area. It is worth remembering, however, that the SEC is not the only actor with the capacity to improve capital market transparency for the benefit of investors. Investors themselves can advocate for enhanced disclosures in line with the general recommendations presented in this Article. And, as with the case of climate-related disclosure, regulators and standard-setters operating beyond the U.S. federal level can do much to fill the regulatory gaps in U.S. markets.

International standard-setters, such as the ISSB, can contribute by developing universal standards that U.S. companies may adopt, either voluntarily or as a result of investor-driven pressure. Non-U.S. regulators, such as the EU, can also impose disclosure requirements that apply on an extraterritorial basis, as exemplified by the EU's Corporate Sustainability Reporting Directive. Finally, and if California's initiative on climate-related disclosure is any guide, it is not inconceivable that state-level regulators may take an interest in improving public company disclosures on human capital, particularly if there is a readily-available disclosure framework.

The fact that investors' interests may be protected even without renewed action from the SEC should not obscure the reality that attention to labor does not automatically protect labor's interests. Disclosure alone cannot lead to tangible improvements in working conditions, workforce training, compensation, organizational culture, and other desirable changes that redound to the benefit of workers. Disclosure—particularly the investor-focused disclosure at issue here—merely allows investors to observe the direction of change and contributes to the much-needed refocusing of the corporate information environment toward the factors that deliver value. Problematically, it appears that the collateral effects of enhanced disclosure may include enhanced worker surveillance and, in turn, the use of the obtained information to extract more from workers or, ultimately, replace many of them. As stated at the outset, these much larger problems lie outside the scope of the Article; but, the evidence presented in this Article suggests that analyzing and addressing those problems should be high on policymakers' and legislators' agendas.