Human Capital Disclosure Report: With Vague SEC Guidance Comes General Disclosures

Seyfarth Shaw LLP

Last fall, we reported[1] that the Securities and Exchange Commission (SEC) was deliberately vague in its new requirement that publicly listed companies subject to the SEC's reporting requirements disclose their "human capital resources." For this first proxy season of disclosure, the SEC opted for a principles-based approach, choosing to rely on registrants to make their own judgment on which elements of their human capital management (HCM) are material to investors.

The SEC's HCM rule specifically requires:

> (ii) A description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel). [2]

While the human capital disclosure requirements have been in the works for years, they came into effect in the midst of a global health pandemic that wreaked havoc on workforces across the value chain, and on the heels of a tumultuous year that required communities and businesses to directly address unhealed wounds revealed by the 2020 social justice movements. These global overlays only fueled the calls for businesses—private and public—to address and disclose their environmental, social and governance (ESG) matters at all levels of the business.

A significant ESG matter that has captured the attention of all parties shaping the ESG dialogue is an organization's approach to and management of its human capital, or simply, its people. An organization's asset value is primarily derived from intangible assets. These assets include, among other things, goodwill, brand value, reputation, and—of course—people. An organization's talent is one of its greatest assets nowadays.

As a result, an organization's approach and management of its talent—typically the purview of human resources—has shifted to be a prominent topic for boards of directors. For the SEC, this has become a topic that warrants disclosures so that investors are informed of material issues related to their investments.

First Season Human Capital Disclosures: Seyfarth Insights

Against this backdrop and vague SEC requirements, registrants had wide discretion to shape their first human capital management disclosure. As Seyfarth guided clients on their first disclosures, anecdotally we noticed that many disclosures focused on the protection of the workforce amidst the 2020 events. To gain further perspective, Seyfarth analyzed the HCM disclosures across industries.

Using Lexis® Securities Mosaic® industry categories, we reviewed companies in the following industries:

- Agriculture & Livestock
- Construction & Real Estate
- Energy & Natural Resources (including Utilities)
- Financial & Insurance
- Healthcare & Pharmaceuticals
- Industrial & Manufacturing
- Services
- Technology & Telecommunications
- Transportation
- Retail

This analysis covers 10 S&P 500 and/or Fortune 500 companies in each industry with revenue between $311 M-$386 B.[3] We reviewed the Human Capital Management sections of the companies' most recent 10-Ks, filed between November 2020–April 2021.

Findings on Impact of HCM Requirements

Because the new HCM requirements are so broad, we saw great variation in the HCM disclosures reviewed. What a company chooses to include in their HCM disclosures may provide insights into their culture and values. Some of these disclosures were focused on employees, and some were more focused on the impact of human capital to the business's bottom line. Intentional or not, by leaving the requirements broad, the SEC has provided companies with an opportunity to provide insight into what matters most to them by what they choose to include in these HCM disclosures.

While most of the HCM disclosures Seyfarth reviewed included similar subheadings related to diversity, training, benefits, and safety (particularly around COVID-19), these disclosures varied based on the particular company and industry group. For example, companies with an international workforce tended to include references to the number of employees in those offices and the differences in policies across countries. The topics covered also tended to vary based on industry type. For example, employers with a large entry-level workforce tended to focus on minimum wages and benefits for recruiting and retention, while companies with more highly paid workforces tended to focus on more tailored benefit programs and philanthropic efforts for social good, such as offering employees opportunities for public service, both domestically and abroad.

General Trends in HCM Disclosures

As we reviewed these HCM disclosures, some common threads appeared across all industry groups:

- Most of the HCM disclosures included information about the number of employees and whether they were represented by unions.
- Most of the disclosures also included references to a commitment to diversity. We saw an array of metrics included—race (sometimes including many racial categories and sometimes including all people of color in a single category), gender, and age (often by referencing generational groups). We also saw breakdowns within the general employee population compared to breakdowns within the executive team and promotion metrics.
- When specific diversity metrics were included, they usually presented the company in a positive light, even if it meant combining groups (such as women and people of color) and categories (such as new hires and promotions). Some companies attributed the lack of specific metrics or data to the fact that the laws of other countries in which their employees reside restricted the collection of certain personal information.
- On balance, however, we saw little discussion of some of the other key topics in the HCM space, such as discussion regarding LGBTQ issues, prevention of harassment, hourly wages, or labor conditions in the supply chain. When we saw references to supply chain measures, they tended to be in industries with manufacturing operations overseas.
- Many of the HCM disclosures we reviewed included discussion of company culture, specific initiatives and activities, and recruiting and retention efforts. A number of companies referenced utilizing employee engagement surveys. Some disclosures called out that the company had been engaging in a number of the listed initiatives for years, but we saw reference to many new initiatives as well.
- Many companies referenced some type of centralized committee or council tasked with overseeing and assessing workplace diversity issues, and some referenced new leadership roles being created to oversee these efforts.
- While some of these roles were reporting to the board, we did not see much discussion in the HCM disclosures about the board's role in oversight of overall strategy for these HCM issues. As the ESG space continues to mature, we expect the board will continue to increase oversight of these issues.
- A number of HCM disclosures we reviewed included a discussion of broader social justice efforts such as charitable giving and volunteer projects sponsored by the company.
- Many of the companies included cross-references to external resources and disclosures such as the company's website or a specific ESG report.

The **chart on page six** reflects the number of HCM disclosures by certain categories mentioned in company HCM disclosures.

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Specific Industry Group Insights

Our review also illustrated trends in the HCM disclosures within particular industry groups.

- **Agriculture & Livestock.** The HCM disclosures we reviewed in this industry went to great lengths to tout items such as compensation/benefits, health/wellness, and other metrics showing the companies to be good places to work. We suspect those disclosures were driven by difficulty attracting workers.
- **Construction & Real Estate.** Many of the HCM disclosures we reviewed from companies in this category were fairly brief and did not provide much detail. For those in the construction industry, not surprisingly, we saw a focus on safety and compensation tied to performance on safety metrics. For those companies in the real estate investment and management field, we saw a much greater emphasis on diversity and inclusion initiatives and statistics.
- **Energy & Natural Resources (including Utilities).** Perhaps not surprisingly, the HCM disclosures we reviewed in this category put safety front-and-center in their disclosures and many included detailed statistics on workplace injuries and fatalities. We also saw a strong emphasis on safety training and procedures, and safety ratings based on independent industry and regulatory standards. Most of the companies we reviewed in this category specifically referenced OSHA standards and pointed to a specific part of their organization's dedication to safety. Companies in this category also tended to include information on professional development focusing on vocational training, internal technical training, and independent learning.
- **Financial & Insurance.** Diversity and inclusion (D&I) played a central role in many of the disclosures we reviewed for companies in this industry. A majority of the companies provided metrics regarding the diversity of its workforce and identified specific ways in which they were furthering diversity and inclusion. Notably, much of the diversity and inclusion efforts in this industry focused on customers, policyholders and shareholders.
- **Healthcare & Pharmaceuticals.** Most of the discussion around health and safety for this group focused on COVID-19. We did not see much discussion of health and wellness benefits in this group, which is interesting given that these companies are in the health space. We did, however, see a great deal of emphasis and detail regarding training and talent development in this group. Companies in this industry tended to specifically reference caring for patients and ethical standards in the discussion of diversity and inclusion.
- **Industrial & Manufacturing.** Many of the HCM disclosures we reviewed in this industry provided very general numbers of employees. Some included statistics related to the number of women employees, but few referenced statistics related to employees from underrepresented groups. Some companies in this category did reference, however, numbers of employees working in international locations and opportunities related to working abroad.
- **Retail.** The HCM disclosures we reviewed in this category focused on culture, recruitment and retention, and talent development programs. Many of the companies in this category included some type of numbers on employee diversity and inclusion. Notably, with this group, we found that D&I initiatives were frequently linked to business performance by fostering a welcoming environment for customers. Employee participation in such efforts often was measured in performance evaluations. The majority of the health and safety discussion in this group focused on the companies' responses to COVID-19. We also saw references to training and development activities which included apprenticeship-style training and coaching, training programs for managers on discreet topics, and executive leadership programs.
- **Services.** The HCM disclosures we reviewed in this category tended to focus on activities that were part of a broader campaign to increase job satisfaction and employee retention. Many companies justified their HCM activities as the natural manifestation of their core values or guiding principles. In the case of the companies in the entertainment sector, this justification read as an element of their branding strategies, as opposed to the companies in the waste disposal sector, which appeared to take a more utilitarian approach. Many of the companies in this group articulated a measurable goal for certain HCM activities and a method to monitor progress, such as employee surveys related to satisfaction

and intention to stay.

- **Technology & Telecommunications.** We saw a focus on the importance of attracting and retaining diverse candidates in this group. Due to the nature of this industry, many of the disclosures emphasized the company's flexible work schedule, allowing most, if not all, employees to work remotely, and enhanced safety protocols for those employees who could not work remotely.
- **Transportation.** The disclosures in this category ranged widely based on their operations. Those in the airline industry tended to include detailed discussions on diversity initiatives (specifically highlighting training and retaining more female and diverse candidates for leadership positions) references to employees represented by unions and COVID-19 safety measures. Due to the unique impact COVID-19 had on the transportation industry—perhaps because most employees in these industries are unable to work remotely—these disclosures tended to focus on specific safety-response committees, increased wellness benefits, sanitizing and contact tracing, and other enhanced measures.

The Employers' Perspective

What employers chose to include—and, perhaps more tellingly, not include—in their disclosures as summarized above is indicative of trends in how companies are focusing on HCM internally, through diversity, equity, and inclusion (DEI); human resources; employment law; and other initiatives. For example, these trends illustrate:

- **Business Case for DEI and ESG.** Long before ESG became a recognized acronym, supporters of DEI were striving to make the business case for its importance. Now that companies are making direct connections in their disclosures between DEI and investor relations, revenue sources (e.g., customers), branding strategies, and policyholders, the business case is even stronger.
- **Evaluation on Measurable Goals.** If an aspect of HCM is not measured, it is less likely to be viewed as important and is harder to improve. Nothing promotes improvement more than being evaluated on measurable improvement in relation to defined goals, particularly if compensation can be impacted by this evaluation.
- **Increasing Leadership Diversity.** The disclosures that address metrics on diversity in leadership and/or initiatives to improve diverse representation in leadership reflect both the external and internal pressures on companies to make demonstrable and meaningful progress in this area. Corporate culture often thrives or flounders depending on the degree to which it is embodied by leadership.
- **Centralized DEI Committees or Councils.** While earlier forms of diversity initiatives were often run through departments such as human resources with many reporting steps separating these initiatives from C-Suites and boards, these initiatives and their leaders are increasingly reporting directly to the highest-level executives and to boards. This shift recognizes that without broad and visible top-level support, including through allocating monetary and other resources, cultural change and buy-in throughout the rest of the organization is far less likely.
- **Health and Safety.** The COVID-19 pandemic has caused many companies to pay additional attention to the health and safety of their employees, with increased attention on mental-health support evident across a broad array of industries.
- **Social Justice Efforts.** In response to targeted social movements such as the renewed focus on the experiences of Black Americans following George Floyd's murder, companies have re-evaluated their social justice efforts such as employee-supported volunteer projects. In addition to simply increasing resources devoted to these efforts, companies have increasingly paid closer attention to breadth and depth in these efforts, with some companies making larger and longer-term commitments to a narrower range of efforts such as those focused on improving cross-racial equities.

Conversely, the trends illustrated through omissions in the disclosures include:

- **Reluctance to Voluntarily Make Less Flattering Disclosures.** So long as companies have leeway to decide to omit or limit discussion of certain topics, it is not surprising that many will opt to exercise this leeway with respect to less flattering metrics. We expect to see more companies begin to change this approach. There is an emerging understanding that transparency and revealing the distance left to travel may be expected by investors and consumers, and may soon be required by regulatory agencies. Among other things, ESG is about continuous improvement and not a static point in time. Revealing areas of improvement and executing on them is being recognized as a way to develop trust with stakeholders.
- **Pay Equity.** Virtually all of the disclosures steer far from addressing differences in pay by protected characteristics; making apples-to-apples comparisons in relation to legitimate business considerations is difficult, and the metrics from such imperfect comparisons continue to look unfavorable.
- **Non-Evident Diversity.** Identifying individuals with non-evident diversity—such as those who are LGBTQ+,

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veterans, or who have experienced disabilities—is an important challenge. First, companies need to seek this self-identification. While companies are beginning to take this step, doing so will continue to result in marked undercounting unless companies also ensure they have created an environment where individuals feel comfortable to self-identify. Efforts to foster this comfort is a more nascent trend.

- **Intersectionality.** Many of the disclosures do not attempt to reflect the degree to which employees possess multiple protected characteristics (such as women of color) despite abundant evidence that individuals with intersection of characteristics often experience more challenges and underrepresentation in the workplace. Metrics on intersectionality may be omitted because they do not look good on their own, or because they reveal the degree to which other metrics involve double counting or other arguable obfuscations of the data (e.g., aggregating all people of color in a single category despite strong evidence that different racial groups often experience different employment challenges).
- **Allyship.** Leaders and others with privilege are often less diverse, yet essential to setting the tone and ensuring the success of DEI, ESG, and other HCM initiatives. Encouraging their constructive engagement in promoting the advancement and well-being of their more diverse and less represented colleagues can yield significant business dividends.

While most of the above examples of employment practices relate to the social aspect of ESG, some also relate to governance such as through increased reporting transparency and involvement of boards and C-Suite executives. Another trend highlighted in some disclosures—more remote work and less business travel (including for commuting and far-off meetings)—relates to the workplace environment.

For companies looking to strengthen the ESG impact of their HCM-related disclosures in the future, following the lead of other companies in the areas highlighted as noteworthy is a good place to start. To the extent that value-added ESG differentiation is a goal, companies should also consider reporting in the areas where this year's disclosures reflect telling omissions. Because employment counsel is typically closest to these HCM and related DEI areas, enlisting experienced employment counsel to work with your securities counsel on such disclosures is certainly a best practice.

What's Next?

Looking ahead, it's important to note that the new leaders at the SEC dissented to the vague, materiality-based approach promulgated last year. Indeed, the new leaders have foreshadowed that while the SEC evaluates its disclosure approach to ESG broadly, it will likely look to more specific human capital guidance in the near future.[4]

The SEC's rulemaking process will take years to play out. In the meantime, the risk calculation equation for organizations has shifted. The view is that an organization's assessment of their ESG systemic risks have a significant impact on sustainability and long term shareholder value. Disclosure of more quantitative and qualitative information on what has been historically seen as the softer side of a business is front and center. How an organization delivers value and develops trust with its stakeholders hinges, in part, on authentic action and how it reshapes the conversation with their stakeholders, which is accomplished through a variety of disclosures and reports it makes publicly available.

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[1] https://www.seyfarth.com/news-insights/sec-to-require-human-capital-disclosureis-fuzzy-on-the-details.html

[2] SEC, *Final Rule: Modernization of Regulation S-K Items* 101, 103 and 105 (August 26, 2020) at 125, available here: https://www.sec.gov/rules/final/2020/33-10825.pdf.

[3] In order to reach a comparable sample size of 10 per industry, we added one company with similar revenue that was outside of the S&P 500 / Fortune 500 to the Agriculture & Livestock (A&L) group.

[4] https://www.seyfarth.com/news-insights/the-sec-paves-a-path-to-formally-address-esg-from-all-sides.html

Human Capital Management Report Mentions

	Agriculture & Livestock	Construction & Real Estate	Energy & Natural Resources (incl Utilities)	Financial & Insurance	Healthcare & Pharm	Industrial & Manufacturing	Retail	Services	Technology & Telecom	Transportation
COVID	80%	80%	70%	80%	90%	80%	70%	80%	60%	70%
Culture	90%	100%	90%	90%	90%	60%	80%	80%	80%	70%
Demographics	50%	60%	50%	70%	50%	30%	40%	10%	30%	50%
Diversity and Inclusion	100%	90%	90%	100%	90%	100%	80%	80%	90%	90%
Employee Health and Safety	90%	90%	100%	90%	90%	100%	80%	80%	80%	80%
Initiatives	90%	90%	100%	90%	90%	90%	90%	90%	100%	90%
Pay Equity	20%	20%	0%	50%	50%	30%	40%	20%	30%	20%
Recruiting and Retention	50%	80%	90%	80%	100%	70%	90%	90%	100%	80%
Talent Development and Management	70%	100%	90%	90%	90%	80%	90%	90%	100%	80%
Did it mention the Board or a Board committee as having oversight of human capital?	30%	30%	70%	30%	0%	40%	40%	60%	10%	40%

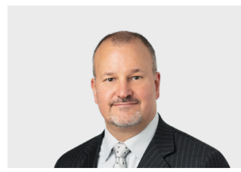
Meet the Authors

Ameena Majid
Partner, Employee Benefits
Chicago
amajid@seyfarth.com

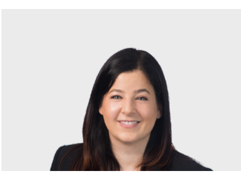
Jennifer Kraft
Partner, Employee Benefits
Chicago
jkraft@seyfarth.com

Candace Quinn
Senior Counsel, Employee Benefits
New York
clquinn@seyfarth.com

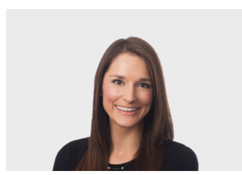
Gina Ferrari
Partner, Securities & Financial Litigation
San Francisco
gferrari@seyfarth.com



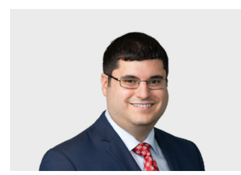
Loren Gesinsky
Partner, Labor & Employment
New York
lgesinsky@seyfarth.com



Sara Rogers
Associate, Commercial Litigation
San Francisco
sarogers@seyfarth.com



Ali Drury
Associate, Commercial Litigation
San Francisco
adrury@seyfarth.com



Matthew Catalano
Associate, Commercial Litigation
New York
mcatalano@seyfarth.com

Katrina Bennett
Associate, Corporate
Houston
kbennett@seyfarth.com

James Dorough-Lewis
Associate, Corporate
Houston
jdoroughlewis@seyfarth.com

Seyfarth

www.seyfarth.com