

January 18, 2022

Mr. Gary Gensler, Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: File 4-711 (Rulemaking Petition to Require Issuers to Disclose Information
About Their Human Capital Management Policies, Practices and Performance)

Dear Chair Gensler:

As the U.S. Securities and Exchange Commission considers updating its regulations for the disclosure of human capital, we urge the Commission to define the scope of that disclosure to include not simply the employees recognized by issuers but also the entire workforce that is material to investors (the “material workforce”). We note that existing workforce disclosure is inadequate, and we applaud the Commission’s intention to improve its disclosure rules. To that end, we support the recommendations for disclosure in the Human Capital Management Coalition’s Petition for Rulemaking, and we urge that the Commission draft its disclosure rules to cover the entire workforce that is material to investors.

The undersigned unions represent millions of people who work across the economy, in all 50 states, Canada, and Puerto Rico. Our members participate in pension plans with billions of dollars under management. To protect those retirement assets, we advocate for responsible investment along the value chain. For this reason, we urge the Commission to adopt a human capital disclosure rule that includes the entire workforce that is material for investor decision making. Attention to this aspect of human capital management is necessary to capture the recent proliferation of work models relying on workers who are not issuer-claimed employees. Workers employed through these models generate considerable value for an increasing number of issuers and are thus of great interest to investors.

The Material Workforce Is Larger Than Issuers’ Claimed Employees

In today’s economy, issuers use many arrangements to obtain the work they need to carry out their businesses. In an increasing number of cases, these arrangements involve the use of workers who are either not directly employed by the issuer or are not claimed by the issuer to be its employees. This workforce is often material to investors notwithstanding the fact that these workers may not be considered employees by the issuer under employment statutes or common law. They may be independent contractors or workers who have been misclassified as independent contractors. In other cases, they may be the employees of contractors or franchisees to the issuer.

For example, when Amazon.com, Inc. (“Amazon”) delivers a product to a customer’s home, the driver who brings the package typically is classified as employed by a contractor, not Amazon. Nevertheless, to ensure a quality on-time delivery, Amazon sets the driver’s route, the order of

delivery, and their pay, and monitors their speed, safety, and accuracy in real time. Despite this control and the importance of the drivers in producing value for Amazon, the company does not count them when disclosing the number of or other metrics about its employees. Press reports estimate that Amazon uses 150,000 drivers in this manner, meaning investors have no view into a significant portion of the company's workforce.¹

Similarly, McDonald's Corporation ("McDonald's") says little about the vast majority of workers who toil in McDonald's-branded restaurants, most of which are owned by franchisees. Yet these workers make valuable contributions to the company. As McDonald's states in its latest annual filing, "the over two million individuals who work in our independent Franchisee restaurants globally are critical to the Company's success, enabling us to drive long-term value creation and further our purpose and mission."² But McDonald's tells investors almost nothing more about these workers, even though, according to reports, the company sets and regularly inspects many of their working conditions, including uniforms, labor processes, training procedures, and performance expectations.³

A third example is Uber Technologies, Inc. ("Uber"), which provides ride-hailing and other transportation services via an online platform. Uber insists that its drivers are independent contractors, even though it controls virtually every aspect of their work, including the ride offers they receive, the routes they drive, and their pay.⁴ Many drivers dispute the independent contractor classification, believing they should receive the protections that come with direct employment.⁵ Despite not being treated as employees of Uber, hundreds of thousands of Uber drivers create value for the company. Yet, Uber discloses little about these drivers and what it does disclose is not directly comparable to disclosure from other issuers in the same or different

¹ Hayley Peterson, "'Amazon Has All the Power': How Amazon Controls Legions of Delivery Drivers Without Paying Their Wages and Benefits," *Business Insider*, October 4, 2018, <https://www.businessinsider.com/amazon-controls-delivery-drivers-without-paying-wages-2018-9>; Josh Eidelson and Matt Day, "Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers," *Bloomberg.Com*, May 5, 2021, <https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers>; Brian Straight, "2 Oregon Delivery Providers Drop Amazon; E-Tailer Says They Demanded \$36m," *Modern Shipper*, June 30, 2021, <https://www.freightwaves.com/news/2-oregon-delivery-providers-drop-amazon-e-tailer-says-they-demanded-36m>.

² McDonalds Corporation, SEC Form 10-K for the fiscal year ended December 31, 2020, p. 6, <https://www.sec.gov/ix?doc=/Archives/edgar/data/63908/000006390821000013/mcd-20201231.htm>.

³ Daniel Kruger, "You Want Data With That?," *Forbes* 173, no. 6 (March 29, 2004): 58–60, <https://www.forbes.com/forbes/2004/0329/058.html?sh=7009be7a1d54>.

⁴ Tyler Sonnemaker, "Uber Gave Drivers More Control to Prove They're Independent. Now the Company Is Taking Back Control Because Drivers Actually Used It.," *Business Insider*, April 5, 2021, <https://www.businessinsider.com/uber-california-driver-independent-contractors-pricing-destinations-prop-22-passage-2021-4>; Rachel Sandler, "Uber Won't Let California Drivers Set Their Own Prices Anymore After Rider Cancellations Increased 117%," *Forbes*, April 9, 2021, <https://www.forbes.com/sites/rachelsandler/2021/04/08/uber-wont-let-california-drivers-set-their-own-prices-after-rider-cancellations-increased-117/>; Lawrence Mishel and Celine McNicholas, "Uber Drivers Are Not Entrepreneurs: NLRB General Counsel Ignores the Realities of Driving for Uber" (Washington, D.C.: Economic Policy Institute, September 20, 2019), <https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlr-general-counsel-ignores-the-realities-of-driving-for-uber/>; Errol Schweizer, "Why Do Gig Workers Want You To Delete Instacart?," *Forbes*, October 21, 2021, <https://www.forbes.com/sites/errolschweizer/2021/10/21/why-do-gig-workers-want-you-to-delete-instacart/>.

⁵ <https://www.classlawgroup.com/gig-economy/>.

industries. The same is true for other gig economy companies, such as DoorDash, Inc. and Lyft, Inc. (“Lyft”).

Hotel real estate investment trusts (“REITs”) are another example of issuers that rely on subcontracted workforces to create value for investors. Hotel REITs operate hotels through their own subsidiaries unlike most other REITs that enter into true leases with third-party tenants who pay fixed rent and are responsible for operating expenses. In the hotel industry, the largest operating cost is labor, yet hotel real estate investment trusts, such as Park Hotels & Resorts, Inc. (“Park”), employ their hospitality workforces through third-party hotel operating companies. Park acknowledges the materiality of such employment relationships in the Risk Factors section of its annual (Form 10-K) report, which discloses that “We are subject to risks associated with the employment of hotel personnel, particularly with hotels that employ unionized labor, which could increase our operating costs, reduce the flexibility of our hotel managers to adjust the size of the workforce at our hotels and could materially and adversely affect our revenues and profitability.”⁶ Yet, Park discloses little more about these workers.

Investor Interest in Material Workforce Data

Investors demonstrate their interest in issuers’ broader workforces in multiple ways. Most tellingly, stock prices react to developments that could allow or force change in hiring and compensation practices for such workers. For example, shares of Uber and Lyft went up 12 percent and 10 percent, respectively, the day after the passage in California of Proposition 22, which helped the companies “preserve their business models as tech platforms rather than taxi or logistics companies, a classification upon which their own stratospheric valuations so deeply depend.”⁷ If the legal classification of these companies’ workers as independent contractors can move markets, they are material to investors.

Additionally, several investor-sponsored initiatives and standard-setting organizations urge issuers to disclose information on their material workforces. According to the Financial Reporting Council, the UK Corporate Governance Code uses the term “workforce” to encourage “companies to consider how their actions impact on all, not only those with formal contracts of employment.”⁸ The Sustainable Accounting Standards Board has identified the alternative workforce (including contingent and contract labor) as a core theme for its Human Capital

⁶ Park Hotels & Resorts, Inc., SEC Form 10-K for the year ending December 31, 2020, p. 20, https://www.sec.gov/ix?doc=/Archives/edgar/data/1617406/000156459021009414/pk-10k_20201231.htm#ITEM_1A_RISK_FACTORS.

⁷ Laura Forman, “Uber and Lyft’s Victory Lap May Be Fleeting,” *Wall Street Journal*, November 4, 2020, sec. Markets, <https://www.wsj.com/articles/uber-and-lyfts-victory-lap-may-be-fleeting-11604514612>; Laura Forman, “The Gig Is Up for Uber in the U.K.,” *Wall Street Journal*, March 17, 2021, sec. Markets, <https://www.wsj.com/articles/the-gig-is-up-for-uber-in-the-u-k-11616008663>. Laura Forman, “An Uncomfortable Proposition for Gig Economy Investors,” *Wall Street Journal*, August 23, 2021, sec. Markets, <https://www.wsj.com/articles/an-uncomfortable-proposition-for-gig-economy-investors-11629754144>.

⁸ Financial Reporting Council, Proposed Revisions to the UK Corporate Governance Code, December 2017, p. 8, <https://www.frc.org.uk/getattachment/31897789-cef6-48bb-aea9-f46b8cf80d02/ProposedRevisions-to-the-UK-Corporate-Governance-Code-Dec-2017-1.pdf>.

Management Research Project.⁹ The Global Reporting Initiative requires disclosure of information on other workers performing work for the organization beyond direct employees.¹⁰ And the Workforce Disclosure Initiative’s reporting framework requires disclosure on employees, contractors and non-employee direct operations workers.¹¹

Another indicator of investor interest in enhanced disclosure regarding the material workforce is the Human Capital Management Coalition’s rulemaking petition to the Commission to require issuers to disclose information about their human capital management policies, practices, and performance. The petition cites numerous examples of investor interest in human capital management metrics and examples of how investors use such data. It also specifically lists the disclosure of the “number of contingent workers, policies on and use of subcontracting and outsourcing,” to capture work done outside of direct employment relationships.¹²

Identifying the Material Workforce for Disclosure

To ensure that investors receive adequate disclosure on material workforces, the Commission must guide issuers as to how they should determine which workers to include. Issuers are already required to identify and disclose their global employee headcount in their annual reports.¹³ Below, we suggest three methods for identifying the material workforce beyond the workers directly claimed as employees by issuers. These methods should be considered in combination in order to comprehensively capture issuers’ material workforce.

In the first method, the Commission would require issuers to include in their workforce disclosure all natural persons to whom they make or to whom they facilitate payments. Issuers should have no difficulty in tracking the natural persons to whom they make or facilitate payments. Payment tracking is a requirement for accurate financial accounting and reporting under GAAP. Additionally, in many cases in the United States, issuers must deliver to these workers and the Internal Revenue Service one of several types of IRS Form 1099, which reports a worker’s compensation. This means that the cost to issuers of compliance with this form of data collection and disclosure would be negligible.

A second suggestion for capturing issuers’ misclassified workers is the state law ABC test for independent contractors, which defines the conditions that must be met for a worker to be classified as an independent contractor. This test has been employed by numerous states for determining eligibility for workers’ compensation and unemployment insurance.¹⁴ For example,

⁹ “SASB Human Capital Bulletin,” Sustainable Accounting Standards Board, November 2020, p. 10, <https://www.sasb.org/wp-content/uploads/2020/12/HumanCapitalBulletin-112320.pdf>.

¹⁰ “GRI 401: Employment 2016,” Global Reporting Initiative, July 1, 2018, available at <https://www.globalreporting.org/how-to-use-the-gri-standards/resource-center/>.

¹¹ “2021 Survey Guidance Document,” ShareAction Workforce Disclosure Initiative, June 6, 2021, <https://api.shareaction.org/resources/reports/WDI-2021-survey-guidance.pdf>.

¹² Petition for Rulemaking, Human Capital Management Coalition, SEC File 4-711, July 6, 2017, p. 26, <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf>.

¹³ For example, Item 101 of Regulation S-K has long required disclosure of the issuer’s global employee headcount.

¹⁴ Lynn Rhinehart et al., “Misclassification, the ABC Test, and Employee Status: The California Experience and Its Relevance to Current Policy Debates” (Washington, D.C.: Economic Policy Institute, June 16, 2021),

in California it is used more broadly to determine worker eligibility for the protections provided by wage and hour, workplace safety, and retaliation laws.¹⁵ Under California Assembly Bill 5's ABC test, an employer must meet three objective criteria to qualify anyone it engages to work as an independent contractor:

- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (B) The person performs work that is outside the usual course of the hiring entity's business.
- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.¹⁶

The ABC test has variations from state to state, but it is a widely recognized way to determine who is an employee and who is an independent contractor. Since issuers are already familiar with the ABC test, the cost of compliance with a new ABC test workforce disclosure rule should be low. We recommend that the Commission adopt the California definition of the ABC test for simplicity given that California is the largest state in the U.S. as measured by its civilian workforce. California's version of the ABC test has also been proposed for inclusion in the National Labor Relations Act by the Protecting the Right to Organize Act.

A third suggestion for defining the scope of the material workforce is the Fair Labor Standards Act ("FLSA") joint employer standard. Joint employment relationships can arise under section 3(g) of the FLSA which defines the term "employ" to include "to suffer or permit to work." Courts have traditionally applied an economic realities test to determine joint employer relationships under the FLSA.¹⁷ California has also established joint liability for subcontracted workers.¹⁸ Joint employment can occur in contracting, subcontracting, and franchising situations. Delivery drivers for Amazon, restaurant workers at McDonald's franchisees, and room cleaners at Park-owned hotels are examples of where the joint employer rule captures the scope of the material workforce. The Commission could describe joint employment situations where issuers must disclose additional information regarding their material workforces. In addition, the Commission may wish to consider adopting industry specific bright-line regulations to capture the widespread use of joint employer relationships in certain industries.¹⁹

<https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/>.

¹⁵ State of California, Labor and Workforce Development Agency, "Workers," Worker Resources, accessed December 10, 2021, <https://www.labor.ca.gov/employmentstatus/workers/>.

¹⁶ Cal. Lab. Code Sec. 2775.

¹⁷ See U.S. Department of Labor, Wage and Hour Division, "Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule," 86 FR 40939, July 30, 2021, <https://www.federalregister.gov/documents/2021/07/30/2021-15316/rescission-of-joint-employer-status-under-the-fair-labor-standards-act-rule>.

¹⁸ California Labor Code § 2810.3.

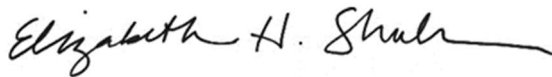
¹⁹ For example, the Commission could require that hotel REITs disclose information about the employees of any "eligible independent contractor" within the meaning of 26 U.S.C. Sec. 856(d)(9)(A) that has entered into an agreement with the issuer or its subsidiary to operate a "qualified lodging facility" within the meaning of 26 U.S.C. Sec. 856(d)(8)(D).

Conclusion

Issuer disclosure regarding workers who are not employees claimed by the issuer will, by necessity, differ from that of the issuer's claimed employees. Nevertheless, the Commission should, wherever possible, require that issuers disclose the same metrics for all categories of workers who are material to investors. For example, if the Commission requires disclosure of turnover rates or diversity metrics, it should require issuers to report these for both the issuer's claimed employees and other workers who are critical to the issuer's operations.

Given the importance of human capital in the creation of value, and given the rapid proliferation of alternative work arrangements, it is imperative that the Commission's human capital management disclosure regulations cover the entire workforce that is material to investors and not be limited to those employees that issuers are willing to claim. Such an expanded disclosure rule will provide investors with essential information that will help them make better investment decisions and thereby facilitate the allocation of capital to companies that are sustainably managing their material workforces for long-term economic growth.

Sincerely,



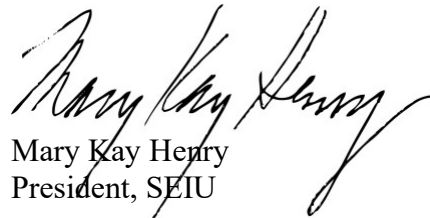
Elizabeth H. Shuler
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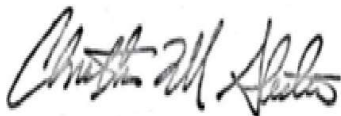
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