NYU STERN

Center for Business and Human Rights

ROBERT F. KENNEDY HUMAN RIGHTS

Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549

November 1, 2021

Dear Mr. Gensler:

We write to commend your ongoing efforts to expand mandatory reporting requirements for information related to public companies' environmental, social, and governance (ESG) risks. We welcome, in particular, your plan to revisit the mandatory human capital disclosure requirements that the Commission advanced last year. We encourage the SEC to use this opportunity to adopt a standards-based approach to disclosure and to broaden its focus on human capital to include outsourced labor, similar to the way the Commission has approached the issue of direct and indirect emissions in its climate risk disclosure requirements.

Through the RFK Compass Investors program, a network of institutional investors, fund managers and investment consultants who collectively control close to $7 trillion of assets under management, New York University Stern Center for Business and Human Rights and Robert F. Kennedy Human Rights have been partners for over ten years working with the investment sector to strengthen the "S" in ESG.

We applaud your leadership in working to improve the amount and quality of information available to investors on corporate labor practices. We share Commissioner Lee's concern that the current human capital management rule is too open-ended to meet investors' needs and hope that the Commission will move toward a standards-based disclosure requirement. The metrics proposed by the Human Capital Management Coalition provide a good starting point, as they incorporate common sense measures that apply across industries, such as work force size and contract type, total wage bill, and turnover rate. But these measures are too limited in that they only apply to a company's direct employees. While this is consistent with historic approaches to human capital, it fails to reflect the degree to which outsourcing—both within the United States and to other countries—has transformed workforces in recent decades.

Since the late 1980s, the outsourcing of labor to lower-wage workers, both in the U.S. and globally, has become a core component of many corporate business models. These workforces are increasingly fragmented and opaque to corporate managers and investors, which results in new operational and financial risks for investors, suppliers, and workers. This development was on display during the early months of the Covid-19 pandemic. Many companies were faced with uncertain sales and invoked *force majeure* clauses to avoid paying suppliers for orders resulting in financial losses that led to millions of workers being terminated. In some industries, these financial shocks to the production pipeline and the loss of trust between buyers and suppliers have resulted in ongoing production delays and higher prices for customers. In the U.S., a growing number of low-wage workers who are employed as independent contractors worked with neither adequate safety protections nor paid sick days. Low-wage workers of all types are now pushing back in large numbers, either by formally striking or walking off the job permanently.

Current corporate reporting standards and ESG assessments typically fail to take these widespread risks into consideration. The Sustainability Accounting Standards Board, for instance, restricts its "Human Capital" category to information about a company's direct employees. The treatment of outsourced workers is considered in a separate category called "Business Model and Innovation," which only assesses management practices such as the volume of social audits a company conducts but not outcomes such as wage levels or contract types. The JUST Capital ranking similarly restricts its "Workers" category to direct employees. Outsourced workers are again put in a separate category called "Communities" and are assessed based on company policies and audit practices, as opposed to measures of what policies and audits actually achieve, if anything.

A growing number of jurisdictions in the U.S. and Europe are extending corporate disclosure requirements, and, in some cases, liability, to incorporate supply chains and contract workers. The United Kingdom, Australia and the State of California all have enacted regulations focused on addressing the issue of "modern slavery" by asking companies to disclose more information about their supply chains. Similarly, the European Union is moving toward enactment of regulations that will increase the due diligence companies must conduct into their potential human rights effects, including those related to supply chain working conditions and contractors. California recently implemented a new law, which holds companies liable if they fail to ensure that all people working on behalf of the company in the State of California, including outsourced workers, earn the minimum wage. New York City recently passed bills that increase protections for food delivery workers who are typically independent contractors, restricting the fees and terms that companies like Grubhub and DoorDash may require of workers.

Private sector ratings agencies, investors and companies also are beginning to expand their assessments of outsourced workers. MSCI now lists supply chain labor standards as a component of human capital in its methodology. Europe's largest asset manager, Amundi, also is encouraging companies to promote better pay and working conditions for both their direct and supply chain workers. And Norges Bank Investment Management (NBIM) lists working conditions in the global supply chains as one of its top priorities. NBIM has stressed, in particular, the need to gather more reliable data on these conditions. Finally, some companies are proactively taking greater responsibility for outsourced workers. In the U.S., Bank of America recently mandated that all of its U.S. vendors pay their employees at or above $15 per hour.

Given these developments, providing investors with the information they need to assess a company's approach to human capital management requires expanding the scope of disclosures beyond the narrow focus on direct employees. While the recommended disclosures for direct employees and outsourced workers are likely to differ, more standardized and rigorous disclosures are needed for both groups.

As the SEC examines human capital, we would welcome the opportunity to connect with staff members working on the issue in hopes of helping support the agency's work. We look forward to hearing from you on how we can contribute to this important process.

Sincerely,

Michael Posner	Kerry Kennedy
Director	President
NYU Stern Center for Business and Human Rights	Robert F. Kennedy Human Rights