

ESG: Insight into SEC Human Capital Disclosures

By Susan M. Corcoran &

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Meet the Authors



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Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work, focused solely on workplace issues. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

Corporate governance reporting is a framework that gives stakeholders insight into a company's ESG practices, allowing them to better understand the demographic makeup of its corporate board and overall workforce. On this episode of We Get Work, we discuss how organizations are responding to the SEC's Human Capital Management Disclosure Rules and the push for greater workforce and board diversity.

Our hosts today are Susan Corcoran, a principal in Jackson Lewis's White Plains office, and Jillian Mueller, an associate in the St. Louis office, and both members of the firm's ESG group. Susan is an experienced employment counselor and litigator, a corporate governance and internal investigations group member and co-editor of its blog. Susan provides legal advice to organizations and boards relating to risk

and strategy. Jillian is a former assistant attorney general for the state of Missouri, employment counselor, litigator and member of the Corporate Governance and Internal Investigations Group. She leverages her past experience to assist clients with thorny and sensitive workplace issues while minimizing business disruption and avoiding negative public attention.

Susan and Jillian, the question on everyone's mind today is how can public companies prepare for the SEC's proposed disclosure rules and how does this impact my organization?

Susan Corcoran:

Thank you. Julian, I'm very excited to discuss with you today these disclosure rules, and specifically we're talking about human capital management and what exactly that means for organizations. And as we both know and have lived through, the SEC issued a rule in 2020 requiring public companies to disclose human capital management measures. And very broadly, and I know you're going to talk about it a little bit further, but very broadly, they've pronounced our rule and companies now, both public and private, are doing a lot more disclosures in the area of human capital.

And when I think about these disclosures, I first scratch my head and think about, well, what is human capital? And I have to admit that I love dictionaries. So I pulled out the dictionary and pulled out the definition of human capital. And human capital means skills, knowledge, and qualifications of a person, group, or workforce considered as economic assets. And I know that doesn't really help, but I know we're going to give a little bit of a roadmap today as to what these disclosure rules are all about. So Jillian, could you give us some more information?

Jillian Mueller:

Absolutely, Susan. And yes, I mean, I don't know that the dictionary definition gives us the full spectrum of what organizations are looking at, but it does provide a useful starting place to think about what the SEC might be wanting to know. And as you said, in 2020, organizations started providing these kind of disclosures as part of their Form 10Ks. But there's been no guidance yet about specifically what needs to be included. So companies have had sort of free reign to include or not include whatever information they wanted. There's been some interesting research into what companies have chosen to include. A lot of companies have included things like quantitative statistics about diversity and inclusion. Workplace safety is another big area that we're seeing people do these disclosures on a voluntary basis. Pay equity is another trending topic in these human capital disclosures, and the SEC has advised us that they're going to be issuing more specific rulemaking sometime this summer.

So we'll definitely be staying tuned for that. I do think that we can look to some of the other ESG data gathering that the SEC has been doing in terms of what kinds of rulemaking we can expect. So for example, if you look at the required disclosures pertaining to climate, the SEC seems really interested in having companies factor in the risk of climate change into their 10Ks so that theoretically their shareholders

can predict, Hey, what's climate change going to do to the value of this company? I think that we can expect something similar. So the SEC may be looking for some kind of risk assessment pertaining to any one of these metrics, so not just, Hey, what are your DEI numbers, but maybe predicting some areas of potential risk for companies. So that might be something that people want to start thinking about as they're looking towards the rulemaking coming out this summer.

Susan Corcoran:

And we've been doing a lot of talking about how do employers prepare for the rulemaking that's going to come out this summer and eventual clarity on these disclosure requirements. And a lot of this relates to data and the data that companies have been collecting and are going to continue to collect and making sure that now really is the time to take a step back and ensure that the right processes are in place to review what types of information may have to be collected, reviewed, analyzed, and so forth to ensure the accuracy of the disclosure. Because I'm sure you've seen Jillian, and certainly I have, these disclosures that companies are providing come in all shapes and sizes because different employers are in different industries and are focusing on different things. And along with that comes different types of messages that companies are trying to do to attract, retain the best they can to particular companies. And one of the things that we've seen, particularly in the climate area already, is heightened awareness by the SEC on ensuring the accuracy of the information that goes into these disclosures.

Jillian Mueller:

Absolutely, absolutely. There's been a lot of focus on that.

Susan Corcoran:

And as we review whether it's ESG policies or disclosures, separate disclosures that companies are making, we want to make sure that employers, companies, organizations are not trying to overpromise in what they're trying to deliver or are not trying to embellish, but have that appropriate balance to ensure that the information that they're disclosing with respect to their human capital is as accurate as can be.

Jillian Mueller:

Absolutely. I mean, this is something because there's been so little guidance, and frankly because a lot of the private metrics for ESG vary so widely, companies have understandably wanted to promote their efforts in these areas, and sometimes the statements can be a little bit aspirational rather than reflecting the data as it exists now. And that's something that companies are really going to want to watch out for because this can essentially translate into a problem with the SEC if your human capital disclosures are a little bit more about how you'd like to be versus how you actually are.

Susan Corcoran:

Over the past year or so, we've added another word to our vocabulary. Greenwashing. And rather than go back to the dictionary and look up that word,

Jillian, can you explain that word to us?

Jillian Mueller:

Absolutely. So greenwashing is a really useful term to describe what I was just referring to, which is companies seeking to embellish or sort of paint over, thus greenwashing, some uglier realities. Right? And so what these disclosures are going to require of companies is an accurate relaying of data. So you don't want to be in a situation where you are accused by the SEC of embellishing, for example, one statistic that people think is likely to be included is gender pay equity. You don't want to be in a situation where either due to inaccurate data or incomplete data or frankly just bad numbers, putting something in your disclosure that looks more positive than it is. So again, this is just a great time as we await that rule making to maybe take a deep dive into those numbers and find out what they actually reflect before they're required to be put in any kind of filing.

Susan Corcoran:

In thinking about, further clarification of the rule, one of the things that I think about as a key takeaway here is think about those types of areas that may create enhanced risk to your organization. And Jillian just talked about the pay equity audit and something like a pay equity audit can be done under the rubric of the attorney-client privilege. So this way the information can be protected under legal privilege as well as is considered to be confidential, and there may be other areas of risk as well. And then certainly there may be some other things that an organization may want to do now, as we talked about before, to get ready for this rule.

For example, education. There's so many facets to human capital. Some of the things that I think about is not only data, but just understanding the full breadth of what goes into the different aspects of this human capital rule. Jillian talked again about equity, that you have so many other aspects of perhaps talent management or perhaps other things within the organization that the board or the C-suite may not necessarily be familiar with, which now is really the time to make sure that an organization is fully familiar with as opposed to closer to the time when we're going to have to make an ultimate disclosure.

Can you think of anything else, Julian, that an organization should think about now as opposed to when the rule might come out?

Jillian Mueller:

Absolutely. Well, I think one of the things that really needs to be assessed is not just what the numbers are going to say, but also what the company has already said about the numbers. Because one of the big concerns for employers is that this is going to create an entire new class of whistleblower claims. And while everybody works to make sure that these numbers reflect the diverse, safe, vibrant workforce that every company wants to have, again, it's just important to keep in mind that the 10K disclosure in any other filing with the SEC has to reflect that utmost accuracy. And there is concern that because companies have used some of these metrics or some of these initiatives to greenwash or as a brand differentiator or a

marketing tool, the fact that they're now going to have the force of the SEC behind them creates an entirely new area of risk.

So if you are an employer and you're looking towards not just how to make these disclosures and what numbers you need to have at hand, you also do need to be evaluating, Hey, have we maybe said something that's not reflected in our numbers? Have we maybe overextended in terms of what we've promised that we're going to be able to deliver and how can we correct that before we have to disclose it to the SEC rather than suddenly giving this whistleblower dimension to potentially inaccurate numbers? So this is really the time while we have a few months to dig in on assessing your numbers, assessing your areas of risk, and we certainly will be watching for those rules and ready to assist in achieving and maintaining compliance.

Susan Corcoran:

And certainly one of the things that I've been thinking about, I know you have too, Julian, is how is this going to change the landscape in terms of expectations? And I think one of the things that we have seen over the years is by the disclosure of the makeup of the board, I've taken a look at some statistics and there has been an increase in diversity with respect to board members. Over the past couple of years, there's certainly been an increase in the number of females on the boards. There's certainly been an increase in the number of certain minority groups on boards. And certainly there's been an increase in certain underrepresented groups on the boards as well. Do you have any thoughts on how this might change the landscape?

Jillian Mueller:

Well, I think what we can really expect is that there is going to be the kind of emphasis on data collection, data monitoring and data reporting for human capital that we've already seen with climate information and greenhouse gas emissions. I mean, I think that we can expect that companies on an ongoing basis, really public or private, are going to be expected to gather this data and have this information at their fingertips on it, at minimum the annualized basis required by the 10K. And so if your organization is set up for this, you will have smooth sailing going in to your disclosures whenever this rulemaking comes out. But if there are numbers that you don't have at your fingertips, or frankly numbers that you think could be better, that by the time you report them you want to see the numbers improve, this is really the opportunity because I think on an ongoing basis, the landscape is going to reflect a requirement that these numbers be kept and collected in again, the same manner that we expect of the climate disclosures.

Susan Corcoran:

Jillian, I know you and I are going to be closely taking a look at the timing and of when the SEC is going to be potentially issuing further clarification. Do you have any idea when they might do so?

Jillian Mueller:

All we've been told Susan is this summer, which I guess is we're getting pretty close to what we can consider the beginning of that period. And we will just be looking

out now. There was a public comment period and a lot of organizations weighed in about what they thought would be reasonable in terms of inclusion in this disclosure rule. So we'll definitely expect something in the coming months providing a little bit more clarity.

Susan Corcoran:

Well, I guess Jillian, you and I will be spending summer vacation together. We'll be waiting and seeing what happens, and then we'll be-

Jillian Mueller:

I cannot think of anything more exciting than sitting by the pool waiting to review SEC human capital disclosure requirements, and I'm sure that you feel the same way. But for any organization that maybe is not as excited as we are, that is definitely something that we are happy to assist with.

Susan Corcoran:

And I know we're preparing now to make sure that we have the right resources in place to be able to help organizations deal with any challenges that lie ahead. So, Jillian, this was a terrific conversation and I look forward to spending the summer with you and in helping employers deal with this challenge.

Jillian Mueller:

Absolutely, Susan, thank you.

Alitia Faccone:

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