The Case for the Inclusion of Employee Relations Matters in Mandatory Disclosure and Reporting Requirements for Public Corporations

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Public companies have no obligation to disclose and to report matters that pertain to equality in the workplace, the payment of wages and benefits, and health and safety issues—"employee relations matters"—under the current statutory and regulatory framework for the capital markets. The absence of this obligation significantly and glaringly handicaps shareholders and other market participants insofar as they are investing in public companies with a limited and distorted understanding of their operations that belies the historical and analytical justifications for mandatory disclosures and reporting. This Article posits that public corporations should publish information about employee relations matters because certain disclosure and reporting requirements already impliedly contemplate their publicization, it promotes the policy objectives that underlie these requirements, and it empowers shareholders and other market participants to make more fully informed decisions with respect to their investment activities.

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INTRODUCTION

One of the cornerstones upon which the capital markets rest is the requirement that public companies must disclose and must report certain information that pertains to their operations and the occurrence of various eventualities. The statutes, the regulations, and the rules currently require public companies to disclose and to report their structure, activities, and finances with a particular emphasis on the last element. The presentation of only this type of information, however, provides investors and other market participants with an incomplete and myopic picture of public companies insofar as it completely omits or cursorily and tangentially comments on the impact and the importance of corporate stakeholders and social issues, such as workplace equality, wage and hour matters, and health and safety issues ("employee relations matters"). The current focus, furthermore, fails to appreciate that providing information about employee relations matters is ostensibly an extension of existing disclosure and reporting requirements. It, moreover, glaringly ignores that this information squarely fits in the traditional paradigm of materiality because investors would view it as a vector that significantly alters the totality of available information and its absence from certain mandatory disclosures and reports would render them incomplete, inaccurate, or misleading. Even if this information were not already required or necessary to avoid making a partial, incorrect, or disingenuous statement, it, nonetheless, should be subject to mandatory disclosure and reporting requirements because of its intrinsic value and ability to advance the aims of this system.

The first part of this Article will provide a comprehensive review of the reasons and the justifications in support of mandatory disclosure and reporting requirements for public companies. The second part will identify the proper recipients of such information and will summarize the depth and the breadth of the information that public corporations must provide to market participants. The third part will delve into the role of materiality in identifying which information and records public corporations must share and will explore the nature and the contours of this concept. The fourth part will posit that public corporations should provide information about employee relations matters because certain disclosure and reporting requirements already impliedly contemplate their publicization. It, furthermore, will argue that this information is material, and withholding it can result in statements being incomplete, inaccurate, and misleading, which triggers the duty to share this information. This part will advance the argument that public corporations should publicize this information separate and apart from these reasons because it possesses value, it furthers the purposes of this system, and it is central for many inventors, particularly millennials. This section also will consider the primary counterargument to requiring the disclosure and the reporting of such information and will explain how the publicization of such information outweighs the transactional costs, the operational burdens, and the paternalism upon which the opposition relies.

PART I

To understand why public corporations should share information about employee relations matters, it is imperative to have a firm understanding of the reasons that underlie the current disclosure and reporting requirements. These obligations are a function of history, public policy, economic theory, and legal principles, which singularly, and more forcefully, collectively illustrate the need to furnish such information. In light of their role in shaping the disclosure and reporting requirements, this Article will expound upon these rationales in more depth below.

1. PROTECTING INVESTORS

The Great Depression caused the national unemployment rate to exceed 20 percent, the gross domestic product to plummet by 30 percent, the industrial production capacity to fall by 47 percent, and the whole price index to decrease by 33 percent.[1] In the disastrous aftermath of the Great Depression, there was a general consensus that "investors and the rest of society would benefit if publicly traded companies issued regular financial disclosures under the auspices of [the] government."[2] The sentiment was so strong that it served as the impetus for the passage of the Securities Act of 1933 ("Securities Act").[3] The purpose of this law was to protect investors and the public through the disclosure of information that was otherwise

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1. Richard H. Pells & Christina D. Romber, *Great Depression*, ENCYC. BRITANNICA (Sept. 9, 2018), https://www.britannica.com/event/Great-Depression [https://perma.cc/F3AM-VGUC].

2. Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting Is Practiced, Required, and More Would Be Better*, 10 U. ST. THOMAS L.J. 1060, 1062 (2013).

3. *Id.*

unavailable.[4] In fact, the congressional legislative reports for the Securities Act are telling as they unequivocally illustrate that the protection of investors was at the heart of this law. The House Report for the Securities Act stated, in pertinent part, "corporate issuers had failed to provide investors with information necessary to determine the worth of the securities they were offering (or more to the point, whether the security was worthless); and . . . [i]nvestors would have avoided worthless securities (estimated at $25 billion) if adequate information was provided."[5] The Senate Report for the Securities Act echoed its counterpart by emphasizing that disclosure was necessary "to prevent further exploitation of the public by sale of unsound, fraudulent, and worthless securities through misrepresentation[,] . . . to protect honest enterprise, seeking capital by honest presentation against the competition afforded by dishonest securities offered to the public through crooked promotion."[6] In light of these historical events and the legislative history of the Securities Act, it is evident that this law established disclosure requirements "to inform ordinary investors about the nature and value of [a] business, [to] warn them about the attendant risks of investment, and [to] protect them from frauds and scams."[7]

2. REDUCING FEAR AND RESTORING CONFIDENCE

On Black Thursday, "the stock market bubble burst," which consequently resulted in widespread "panic selling."[8] Once the stock market crashed, investors rightfully were afraid that it could collapse again and they would lose the value of their investments. To assuage their fears and to restore confidence in the capital markets, federal law required the disclosure and reporting of certain organizational and financial information and records so that "jittery investors" felt as though it was "safe to re-enter the stock market."[9] While many years have passed since Black Thursday, this justification, nonetheless, remains valid today given the decrease in market activity after the Great Recession and the need to promote confidence in it after the recent decline in investment activity.

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4. Ronnie Cohen, *Money Isn't Everything: Why Public Benefit Corporations Should Be Required to Disclose Non-Financial Information*, 42 DEL. J. CORP. L. 115, 127 (2017).

5. Brent J. Horton, *In Defense of a Federally Mandated Disclosure System: Observing Pre-Securities Act*, 54 AM. BUS. L.J. 743, 743-44 (2017).

6. Charles R. Korsmo, *The Audience for Corporate Disclosure*, 102 IOWA L. REV. 1581, 1594 (2016).

7. *Id.* at 1585; Joan MacLeod Heminway, *Personal Facts about Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 752 (2007).

8. Pells & Romber, *supra* note 1.

9. Korsmo, *supra* note 6, at 1594-95.

3. BALANCING INFORMATION ASYMMETRIES

One can justify these requirements on the basis that they combat the ills associated with the asymmetry of information between various participants in the capital markets.[10] This phenomenon typically occurs in three scenarios. First, the owners, the officers, the directors, and the employees of public corporations possess intimate and detailed knowledge of their companies' operations, finances, and other confidential and proprietary information that is not ordinarily available to outsiders by virtue of their position. The possession of this information simultaneously empowers such persons to calculate or to approximate the stock's value such that they can capitalize on it and disincentivizes them from sharing such information with outsiders lest they lose their strategic advantage.[11] Second, owners, officers, and directors are unwilling to share internal and proprietary information about their companies for fear that it will give other players in their industry a competitive advantage.[12] Third, large and sophisticated institutions and more experienced investment professionals may have access to certain information that grants them a distinct advantage over smaller or less experienced investors. The disclosure and reporting requirements strive to balance the scales between these market participants by giving them equal access to the same information.[13]

4. COMBATTING FRAUD

Mandatory disclosure and reporting are justifiable because they prevent or limit the commission of fraud. This theory posits that the required release of such information inhibits "low-quality firms from making misrepresentations that cause investors to mistakenly believe that they are high-quality firms."[14] This rationale also argues that mandatory disclosures inhibit or impair issuers' ability to exploit investors.

5. PROMOTING BETTER BEHAVIOR

Securities laws impose these requirements on public corporations because they have the potential to shape and to improve their behavior. If public companies must disclose and must report certain information, officers and directors will be more mindful of how their behavior will reflect on

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10. Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L.J. 183, 187 (2016).
11. *Id.*
12. Donald C. Langevoort & Robert B. Thompson, "*Publicness" in Contemporary Securities Regulation after the JOBS Act*, 101 GEO. L.J. 337, 375-76 (2013).
13. Choudhury, *supra* note 10, at 187.
14. Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 411 (2004).

them and will impact their positions, how investors and the public will perceive their actions, and how market participants will act in response thereto. This mindfulness concomitantly precludes or chills unlawful or otherwise inappropriate conduct and promotes more prudent and responsible behavior, such as taking efforts to eliminate or to limit conflicts of interest, corporate waste, and reckless or risky transactions. [15] Indeed, Louis Loss evocatively summarized how these requirements affect corporate behavior when he exclaimed: "[p]eople who are forced to undress in public will presumably pay some attention to their figures."[16]

6. IMPROVING CORPORATE SUFFRAGE

The impetus for disclosure and reporting requirements also stems from the desire to enlighten and to empower shareholders. When they are aware of public corporations' management practices, operations, and finances, they are more inclined to attend and to participate in shareholder meetings and they can vote in a more meaningful and deliberate manner.[17] The byproduct of increased shareholder engagement and suffrage enhances their role with respect to corporate governance and ostensibly improves corporate behavior.[18]

7. CALIBRATING MARKET EFFICIENCY

One of the most critical questions with which market participants must wrestle at the time of an initial public offering ("IPO") is the valuation of the stock. Its price, to a certain extent, is a reflection of the information about the company that is available to the public. Where more information is available by virtue of mandatory disclosure requirements, the price of the stock more accurately reflects its actual value, which hedges against overinflating or undervaluing its stock and facilitates its initial purchase and subsequent trading.

An increase in market efficiency is also a function of reducing the costs and the risks that more experienced investors and traders may encounter.[19] If these parties can obtain information about public corporations' structure, management, activities, and financial health with greater ease, they can reduce the costs and the risks associated with investing.[20] Manda-

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15. *See generally* Choudhury, *supra* note 10, at 188; Heminway, *supra* note 7, at 752; Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1222 (1999).

16. *See* Choudhury, *supra* note 10, at 188.

17. Williams, *supra* note 15, at 1220-21.

18. *Id.*

19. Korsmo, *supra* note 6, at 1614.

20. *Id.*

tory disclosures and reports facilitate investors' and traders' acquisition of such information by reducing the costs of collecting relevant data[21] and diminishing the risks born of conducting their own research, which, incidentally, may be inaccurate or incomplete. The mandatory requirements provide market participants with information that they, to a certain extent, potentially could obtain from other sources by themselves, but would result in them losing time, money, and other resources, which could be allocated to more fruitful endeavors.[22] The compulsory release of this information also relieves investors and traders from the costs that arise in connection with the verification of data the corporations previously have shared or relevant information that shareholders think corporations have yet to share.[23]

8. JUSTIFYING MANDATORY DISCLOSURE ON OTHER GROUNDS

In his work, John Coffee has articulated four reasons for which mandatory disclosure and reporting requirements exist. First, public corporations' internal and proprietary information is a public good. [24] This argument asserts that "securities research tends to be underprovided" because it "has many characteristics of a public good."[25] The "underprovision" of information will result in the less than optimal verification of information that corporate issuers provide and insufficient efforts to locate and to obtain material information from sources other than the issuer.[26] According to Coffee, "[a] mandatory disclosure system can thus be seen as a desirable cost reduction strategy through which society, in effect, subsidizes search costs to secure both a greater quantity of information and a better testing of its accuracy."[27] Second, the absence of a mandatory disclosure and reporting system would result in greater market inefficiency because investors would incur excess social costs to obtain trading gains.[28] Third, the idea of voluntary disclosures has limited validity because it fails to appreciate the disparity in market participants' position and assumes that the alignment of shareholders and managers' interests is simple and possible despite their

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21. *Id.*
22. *Id.*
23. *Id.* at 1614-15.
24. John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722, 725 (1984) (noting that "[t]he key characteristic of a public good is the non-excludability of users who have not paid for it; people benefit whether or not they contribute to the costs of acquiring the good, in part because consumption of the good by one user does not diminish its availability to others.").
25. *Id.* at 722.
26. *Id.*
27. *Id.*
28. *Id.*

apparent differences.[29] Fourth, rational investors need certain information to maximize their securities profile even if the market functions efficiently. [30] In Coffee's view, the mandatory disclosure and reporting system represents the best vehicle to furnish such information. [31]

PART II

To appreciate the argument in support of requiring the disclosure and the reporting of employee relations matters, it is essential first to understand to whom public corporations must furnish information and which information they must give those persons.

1. WHO ARE THE PROPER RECIPIENTS OF DISCLOSURES?

The legislative history of the Securities Act and the primary purposes for which Congress enacted it—protection of investors, deterrence of dubious and risky business practices, restoring confidence in the market, and empowering investors to make informed decisions—demonstrate that issuers should direct their disclosures to average investors.[32] After the passage of the Securities Act, the Securities and Exchange Commission ("SEC") and the courts repeatedly have recognized that issuers may tailor their disclosures and reports to more sophisticated and experienced parties, but they, nonetheless, must temper the way in which they transmit the information so that they strike a balance between the needs of professionals and laypeople.[33] This view, however, came under attack because the average investor purportedly cannot sift through the voluminous amount of complex information and records associated with publicly traded stock, such as profit and loss statements and balance sheets, let alone appreciate their real significance. The rigorous debate in the field ultimately prompted the SEC to appoint a committee and to charge it with answering the following question:

> At what audience should disclosure be aimed? Is [disclosure] . . . intended primarily to aid the unsophisticated? Is it, on the contrary, designed to assist

29. Coffee, *supra* note 24, at 722.
30. *Id.*
31. *Id.*
32. Kenneth B. Firtel, *Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933*, 72 S. CAL. L. REV. 851, 858 (1999); Korsmo, *supra* note 6, at 1583-84.
33. Korsmo, *supra* note 6, at 1584.

> the assiduous student of finance who searches for every clue to the intrinsic value of securities?[34]

This committee issued the Wheat Report, which echoed prior jurisprudence and agency policy by declaring: "a pragmatic balance must be struck between the needs of the unsophisticated investor and those of the knowledgeable student of finance."[35]

2. WHAT ARE THE MANDATORY DISCLOSURE AND REPORTING REQUIREMENTS?

The disclosure and reporting requirements with which public corporations must comply are an expression of multiple statutes and regulations. In light of the fact that the applicability and the scope of these laws greatly vary, this Article will explore each of them individually.

a. The Securities Act

The Securities Act imposes the obligation to disclose certain administrative, organizational, and financial information and records about public corporations. Pursuant to this law, an issuer that is not exempt from its requirements must file a comprehensive registration statement with the SEC and must distribute a prospectus to the public if it wishes to offer securities to the public.[36] The registration statement must contain all information and documents in Schedule A.[37] This schedule contemplates that issuers will provide detailed information that relates to thirty-two different domains, which, *inter alia*, consist of the following topics: [38]

1. The issuer's name, place of incorporation, principal place of business, and agent; [39]
2. The company's officers, directors, and underwriters;[40]
3. The general character of the business that the issuer transacts or will transact;[41]

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34. *Id.* at 1597 (quoting SEC. & EXCH. COMM'N, DISCLOSURE TO INVESTORS: A REAPPRAISAL OF FEDERAL ADMINISTRATIVE POLICIES UNDER THE '33 AND THE '34 ACTS, (1969) 51).
35. *Id.* (quoting SEC. & EXCH. COMM'N, DISCLOSURE TO INVESTORS: A REAPPRAISAL OF FEDERAL ADMINISTRATIVE POLICIES UNDER THE '33 AND THE '34 ACTS, (1969) 10).
36. 15 U.S.C.A. § 77e (West 2012).
37. *Id.* § 77g.
38. *Id.* § 77aa.
39. *Id.* § 77aa(1)-(3).
40. *Id.* § 77aa(4)-(5).
41. 15 U.S.C.A. § 77e (West 2012).

4. The issuer's capitalization, the number and the classes of shares, and the shareholders' rights with respect to the various classes of shares; [42]
5. The issuer's outstanding debt and the debt that will arise as a result of offering the security as well as the material terms that pertain to the debt, such as the date of obligation, the date of maturity, and the rate of interest;[43] and
6. The price of the stock, the method for determining its value, and the way in which the issuer will use the capital that it generates through the sale of the stock.[44]

Schedule A also requires issuers to produce documents that are material to their organization, operations, and financial health, such as detailed balance sheets and a profit and loss statement, which respectively must list their assets and liabilities and must identify their earnings, income, expenses, and fixed charges.[45] It is also necessary for issuers to distribute a prospectus that contains the same information and documents that the registration statement requires, with the exception of underwriting agreements, legal opinion letters, material contracts, the articles of incorporation and bylaws, and any contracts that affect the stock, bonds, or debentures offered or to be offered.[46]

b. The Exchange Act

Once public corporations issue stock to the public, the Securities and Exchange Act of 1934 ("Exchange Act") imposes additional obligations on them to report and to disclose certain information to the SEC and the public on an ongoing basis.[47] This Act, in pertinent part, states that issuers of registered securities must file current, quarterly, and annual reports with the SEC and must furnish any other information or documents that the agency deems necessary to keep the information and the documents, which the issuers originally filed with the registration statement, current.[48] In accordance with the Exchange Act and enabling regulations, such as Regulation S-K, which is discussed *infra*, issuers must file current (Form 8-K), quarterly (Form 10-Q), and annual (Form 10-K) reports that predominantly focus on

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42. *Id.* § 77aa(9).
43. *Id.* § 77aa(12).
44. *Id.* § 77aa(13), (16).
45. *Id.* § 77aa(25)-(26).
46. 15 U.S.C.A. § 77j (West 2021).
47. Cohen & Lingenfelter, *supra* note 4, at 127-28.
48. 15 U.S.C.A. § 78m (West 2021).

operational and financial data.[49] In 1964, Congress enacted Section 12(g) of the Exchange Act, which broadened the category of companies that must share information with the public.[50] The enactment of Section 12(g) required issuers to register their securities if five hundred or more persons held the shares of record and their assets exceeded $1 million.[51] Before the passage of Section 12(g), only listed companies were subject to the mandatory reporting requirements.[52]

c. *Regulation S-K*

The SEC promulgated Regulation S-K to promote the uniformity and the integration of registration statements under the Securities Act and mandatory reports under the Exchange Act.[53] It effectively established five primary categories in which public corporations must share organizational, operational, financial, and narrative information about their businesses.[54] Under Regulation S-K, issuers must furnish information that pertains to their business; the securities that they already have issued and will use; their finances; their managers, the compensation that they receive, and the stock that they hold; and the particulars regarding the issuance of stock.[55] Each of these categories consists of a high degree of specificity about the information that issuers must supply,[56] demanding both "qualitative descriptions" and "quantitative financial metrics."[57] For instance, Item 201, which is one of twelve separate items, contemplates that issuers will describe the market price of the issuers' common equity stock, the dividends thereon, and related stockholder matters.[58] In doing so, issuers must address five different domains that have various subparts: market information; the holders of securities; dividends; securities authorized for issuance under equity compensation plans; and performance metrics.[59] This section alone illustrates the thorough and probative nature of Regulation S-K. Even though its disclosure and reporting requirements are extensive and exacting, issuers,

49. Carlos Berdejó, *Going Public After the JOBS Act*, 76 OHIO ST. L.J. 1, 14 (2015); 17 C.F.R. § 249.308a (2021); 17 C.F.R. § 249.310 (2021).
50. Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916 (proposed Apr. 22, 2016).
51. *Id.*
52. *Id.*
53. *Id.*
54. Williams, *supra* note 15, at 1208.
55. *Id.*
56. *Id.*
57. Korsmo, *supra* note 6, at 1591.
58. 17 C.F.R. § 229.201 (2021).
59. *Id.*

nonetheless, must temper their disclosure with materiality,[60] which will be discussed in more depth *infra*.

In the aggregate, the categories in Regulation S-K predominately concentrate on the financial condition of public corporations.[61] This notwithstanding, Regulation S-K touches on three areas that do not solely pertain to financial matters: Item 101—Description of the Company's Business; Item 103—Disclosure of Legal Proceedings; and Item 303—Management's Discussion and Analysis of Financial Conditions and Results ("MDA").[62] Item 101 contemplates that larger issuers will describe the nature of their business, which requires a discussion of six areas: the general development of business; the financial information for the segments of their business; a narrative of the nature of their business; the financial information about the geographic areas in which they operate; their reports to security holders; and the information that they make available to the public. Pursuant to Item 103, issuers must detail any material and pending legal proceedings that are outside of ordinary and incidental litigation in which they or their subsidiaries are parties or their property is at issue. Item 303 obligates issuers to prepare a description of their "liquidity, capital resources, results of operations, and any other information . . . necessary to understand its financial condition and results."[63] This description necessitates introspection on the part of public corporations concerning their operations, successes, failures, and uncertainties, and it "encourages them to disclose additional forward-looking information voluntarily."[64] Even though issuers must furnish a significant amount of information and records in accordance with specifically listed statutory and regulatory line items, their disclosure and reporting obligations go past these bullet points and encompass publicization of material matters in particular circumstances.

d. Materiality, Misrepresentations, and Omissions

Pursuant to the Exchange Act, it is unlawful for public corporations, *inter alia*, "[t]o use or [to] employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the

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60. Williams, *supra* note 15, at 1208.

61. Cohen & Lingenfelter, *supra* note 4, at 128.

62. 17 C.F.R. § 229.101 (2021); 17 C.F.R. § 229.103 (2021); 17 C.F.R. § 229.303 (2021). *See* Cohen & Lingenfelter, *supra* note 4, at 128.

63. Korsmo, *supra* note 6, at 1591 (quoting Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U.L.Q. 417, 425 (2003)).

64. *Id.*

protection of investors."[65] To promote the spirit of the Exchange Act, the SEC has promulgated three separate rules that require public corporations affirmatively and proactively to disclose and to report material information and records in specific circumstances. In light of the fact that the purview of these rules differs, this Article will explore each of them in more depth *in seriatim* below.

i. Rule 10b-5

The SEC promulgated Rule 10b-5 in an effort to eradicate fraudulent, manipulative, or deceptive practices with respect to the sale of securities. Under this rule, it is unlawful for any person:

> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business[,] which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[66]

Rule 10b-5 essentially prohibits "misrepresentations, half-truths, omissions, and concealments of after-acquired information," which manifest in words and/or actions or the absence of the same.[67] The intent of this rule is to protect investors from fraudulent omissions and misstatements.[68] To achieve this objective, the purview of Rule 10b-5 is not limited to specifically mandated disclosures and reporting, but also encompasses information that public corporations voluntarily publicize.[69] While the reach of this rule seems to be rather wide, it, nonetheless, imposes obligations on issuers only insofar as the omissions and misrepresentations are material.[70]

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65. 15 U.S.C.A. § 78j (West 2021).
66. 17 C.F.R. § 240.10b-5 (2021).
67. Arnold S. Jacobs, *What Is a Misleading Statement of Omission Under Rule 10b-5?*, 42 FORDHAM L. REV. 243, 244 (1973).
68. Sulkowski & Waddock, *supra* note 2, at 1071.
69. *Id.*
70. Chloe Ghoogassian, *Evading the Transparency Tragedy: The Legal Enforcement of Corporate Sustainability Reporting*, 11 HASTINGS BUS. L.J. 361, 373 (2015).

ii. Rule 14a-9

To empower shareholders and to foster a greater degree of corporate governance, the SEC implemented Rule 14a-9.[71] This regulation essentially prohibits public companies from making material misrepresentations or omissions in connection with proxy statements and other related documents. It, in pertinent part, states:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.[72]

This rule effectively insulates the integrity of proxy statements and promotes proper corporate suffrage by barring public corporations from withholding vital information and making misrepresentations with impunity.[73]

iii. Rule 13e-3

Congress passed the William Act of 1968 to "protect investors from potential manipulation of tender offers and corporate repurchases of stock."[74] After its enactment, the SEC passed Rule 13e-3, which prohibits public companies from engaging in fraudulent conduct whenever they "go private" by requiring the disclosure of certain material information that pertains to such transactions. It, in pertinent part, states:

71. Mark V. Wilson, Comment, *Reliance and Causation Under the Federal Securities Laws when Minority Shareholders Are Forced Out*, 26 WAKE FOREST L. REV. 403, 408 (1991).

72. 17 C.F.R. § 240.14a-9 (2021).

73. Wilson, *supra* note 71, at 408-09.

74. *Id.* at 410 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988)).

> It shall be unlawful for an issuer…to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the [SEC], in the public interest or for the protection of investors, may adopt (A) to define acts and practices[,] which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities… with such information [that relates to the contemplated transaction], as the [SEC] deems necessary or appropriate in the public interest or for the protection of investors, or which [it] deems to be material to a determination whether such security should be sold.[75]

Each of these rules illustrates that the central inquiry for the publicization of information and records that are not specifically listed in the statutes and the regulations focuses on materiality, but how do we define this concept in this context?

PART III

1. HOW DO WE DEFINE MATERIALITY?

Pursuant to the operative statutes, regulations, and rules, materiality functions as the touchstone for the amount, the depth, and the breadth of information and records that public corporations must disclose and must report.[76] If these items are not material, public corporations need not share them with market participants. Public corporations, however, need not publicize all information and records simply because they are material, such as market expansion strategies or plans for future products. On the contrary, the courts consistently have ruled that there is no general duty to disclose and to report all material information; rather, they must share such information and records only where a statute or a regulation prescribes them or where a corporate statement would be inaccurate, incomplete, or misleading

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75. 15 U.S.C.A. § 78m (West 2015).

76. Kurt S. Schulzke & Gerlinde Berger-Walliser, *Toward a Unified Theory of Materiality*, 56 COLUM. J. TRANSNAT'L L. 6, 12 (2017); Alison B. Miller, Comment, *Navigating the Disclosure Dilemma: Corporate Illegality and the Federal Securities Law*s, 102 GEO. L.J. 1647, 1654 (2014).

without them.[77] In spite of the fact that materiality plays a central role under this framework, there is no statutory litmus test to determine which information and records are material. In the absence of such a benchmark, the courts have needed to craft an operational definition for this concept, which has focused on the financial importance or impact of the information in question.[78]

a. Judicial construction of materiality

In *TSC Industries, Inc. v. Northway, Inc.*, the Supreme Court of the United States of America ("Supreme Court") set the parameters for the definition of materiality for the first time in the context of proxy statements.[79] There, National Industries, Inc. ("National") expressed an interest in acquiring TSC Industries, Inc. ("TSC").[80] This potential transaction required the approval of TSC's Board of Directors ("Board") and shareholders.[81] Before the Board voted on the matter, five nominees with ties to National joined TSC's Board, National's president and chief executive officer became the chairman of TSC's Board, and National's executive vice president became the chairman of TSC's executive committee.[82] At the time of the vote, National's nominees abstained from the vote, but the Board nonetheless approved the transition to liquidate and to sell all of its assets to National.[83] TSC's Board thereafter sent a proxy statement to its shareholders in which it recommended that they approve the proposed transaction, which they did.[84] The proxy statement, however, was silent with respect to the fact that National's president and chief executive officer was the chairman of TSC's Board, National's executive vice president was the chairman of TSC's executive committee, and National could be deemed the parent of TSC.[85] This document also failed to mention that an investment banking firm found the transaction to be unfavorable in certain respects and that recent purchases of National's common stock were suggestive of manipulation by National and a mutual fund.[86] Once the shareholders ratified the transaction, Northway, Inc. ("Northway"), one of TSC's shareholders, initiated an action

77. David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENV'T. L.J. 137, 141-42 (2007).
78. Cohen, *supra* note 4, at 129.
79. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 440 (1976).
80. *Id.*
81. *Id.*
82. *Id.* at 438.
83. *Id.* at 441.
84. *TSC Indus., Inc.*, 426 U.S. at 441.
85. *Id.* at 451.
86. *Id.* at 444.

against it on that basis that the proxy statement violated the Exchange Act, Rule 14a-3, and Rule 14a-9 because it was incomplete and materially misleading.[87]

On appeal, the Supreme Court ruled that withheld information is material where there is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[88] The Justices thereafter further clarified this standard by tying materiality to a "substantial likelihood that the disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered the 'total mix' of information" available about the security in question.[89] The Supreme Court set these particular parameters for materiality based on the "prophylactic purpose" of Rule 14.[90] In forging this definition, the Justices underscored the difference between the quality and the quantity of information that public corporations must disclose, preferring the publicization of more meaningful data instead of subjecting shareholders to an "avalanche of trivial information."[91] The Supreme Court further recognized that inquiries into materiality are mixed questions of law and fact, which "require[] delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him."[92]

Against this background, the Supreme Court first weighed whether the omissions that pertained to National's control over TSC at the time of the proxy solicitation were material. The Justices concluded that the omissions were not material given that the proxy statement contained other information that "clearly revealed the nature of National's relationship with TSC and alerted the reasonable shareholder to the fact that National exercised a degree of influence over TSC."[93] Indeed, the proxy statement conspicuously stated the identities of National's president, vice president, and director and indicated that National held 34 percent of TSC's shares; no other person or entity held more than 10 percent of TSC's shares; and five out of the ten directors on TSC's Board were National's nominees.[94] On the basis of these disclosures, the Supreme Court concluded that the additional, undisclosed

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87. *Id.* at 441.
88. *Id.* at 449.
89. *TSC Indus., Inc.*, 426 U.S. at 449.
90. Martin Goodlett, *Subjective Materiality and the Over-the-Counter Derivatives Markets*, 61 DEPAUL L. REV. 165, 178 (2011).
91. *TSC Indus., Inc.*, 426 U.S. at 448.
92. *Id.* at 450.
93. *Id.* at 452.
94. *Id.*

information, as a matter of law,[95] was not "so obviously important that reasonable minds could not differ on their materiality," which precluded summary judgment. [96] It is important to emphasize that the Justices did not conclude that this information was immaterial; rather, the trier of fact needed to resolve the issue of materiality at a fact-finding hearing.[97]

With respect to the second set of omissions, the Supreme Court first ruled that TSC did not withhold material information as a matter of law because other disclosed information sufficiently apprised a reasonable shareholder of the favorability of the transaction. [98] Northway challenged the propriety of the proxy statement because TSC incorporated the investment firm's first favorable assessment of the transaction therein, but it neglected to disclose the investment firm's second less-than-favorable one.[99] In the first letter, the investment bank stated that National's warrants would be $5.23; however, in the second letter, it indicated that the warrants would not be their current market price, but would be approximately $3.50.[100] While this disparity was superficially disconcerting, it, nonetheless, was unavailing in that the investment firm explicitly noted that the premiums were but one of the factors upon which it based its opinion. A director of TSC, who was also a partner in the investment firm, explained that there was a likelihood that National's warrants would decline, but the transaction was still favorable.[101] With regard to the allegation that TSC withheld material information about market manipulation, the Supreme Court underscored that the company only needed to disclose material information, not information that related to a possible collusion, which the evidence of record failed to establish.[102] While the Justices declined to deal with whether suppositional information could be material in the case, they ultimately would revisit this issue and, in doing so, would refine the test for materiality even further.

b. *Reaffirmation and Expansion of the Definition for Materiality*

In *Basic Inc. v. Levinson*, the Supreme Court reaffirmed the test for materiality, adopted it for the purposes of Rule 10b-5, and articulated a new

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95. *Id.* at 450. (holding summary judgment as a matter of law is only permissible where the omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality.").
96. *TSC Indus., Inc.*, 426 U.S. at 452-53.
97. Schulzke & Berger-Walliser, *supra* note 76, at 17.
98. *TSC Indus., Inc.*, 426 U.S. at 456-57.
99. *Id.* at 444-45.
100. *Id.*
101. *Id.* at 456-57.
102. *Id.* at 460-64.

standard to weigh materiality in the context of contingent or speculative information. In that matter, Combustion Engineering, Inc. ("Combustion") expressed an interest in merging with Basic, Inc. ("Basic").[103] The companies thereafter commenced discussions concerning the possible merger, but Basic publicly denied the negotiations three times.[104] Basic ultimately acknowledged that these companies were contemplating a merger and that they agreed to consummate one.[105] This acknowledgment prompted shareholders, who sold their stock between Basic's first public denial of the merger and the suspension of its stock's trading prior to the merger announcement, to initiate an action against Basic and its directors on the basis that they violated Rule 10b-5 by deceiving them.[106]

In adjudicating this matter, the Supreme Court first declared that the "total mix" test, which it articulated in *TSC*, not a bright-line test, was the appropriate standard to use in the context of putative violations of Rule 10b-5. [107] Rejecting any abrogation of this test, the Justices recognized that "[t]he role of the materiality requirement is not to 'attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of negotiations,' . . . but to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his investment decision."[108] The Supreme Court, thereafter, elaborated on the matrix of materiality through its recognition that no single factor is dispositive insofar as consideration of only one factor or occurrence results in overinclusivity or underinclusivity.[109] It, moreover, emphasized that inquiries into the materiality of information are "fact-specific" and necessitate consideration of all the circumstances.[110] In its opinion, the Supreme Court also stressed that courts should use a framework that strikes a balance between the likelihood of the potential event and its anticipated magnitude when wrestling with the materiality of prospective or contingent information.[111] Ultimately, the Justices remanded the case to the trial court for further adjudication in accordance with its exposition and refinement of the concept of materiality.

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103. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 232.
108. *Levinson*, 485 U.S. at 235 (quoting *Flamm v. Eberstadt*, 814 F.2d 1169, 1175 (7th Cir. 1987) and *TSC Indus., Inc.*, 426 U.S. at 448-49, respectively).
109. *Id.* at 236.
110. *Id.* at 236, 240.
111. *Id.* at 239.

c. *Further Refinement of the Definition of Materiality*

In *Matrixx Initiatives, Inc. v. Siracusano*, the Supreme Court further clarified the contours of the concept of materiality by rejecting the use of bright-line measurements and emphasizing that a determination of materiality necessitates inquiry into the source, the content, and the context of the information.

By way of background, shareholders filed a class action against Matrixx Initiatives, Inc. ("Matrixx") and three of its executives in which the shareholders claimed that the executives violated the Exchange Act and Rule 10b-5 by failing to disclose a potential causal link between one of its products, Zicam Cold Remedy ("Zicam"), and anosmia—a loss of the sense of smell—notwithstanding their knowledge of the same.[112] The sale of Zicam was crucial for Matrixx's business insofar as it accounted for 70 percent of its sales.[113] In 1999, a neurologist contacted Matrixx's customer service line because he detected a possible link between the use of Zicam and the occurrence of anosmia in a cluster of his patients.[114] In 2002, Matrixx's vice president for research and development contacted a professor after one of the professor's patients complained that she lost her sense of smell after using Zicam.[115] During their conversation, the vice president admitted that Matrixx received similar complaints from other customers.[116] At that time, the professor cited studies that connected anosmia with zinc sulfate.[117] In 2003, a colleague of this professor discovered the incidence of anosmia after ten patients used Zicam, which prompted him to prepare a presentation on this topic.[118] After Matrixx learned about the presentation, it forbade the doctor from referring to its product in his presentation.[119] One month after the presentation, two plaintiffs initiated product liability cases against Matrixx.[120] Two months thereafter, Matrixx filed a Form 10-Q with the SEC in which it advised shareholders of the material adverse effects from the product liability claims, but was silent with respect to the pending lawsuits.[121] At the beginning of 2004, Matrixx issued a press release in which it asserted that it manufactured and marketed Zicam in accordance with regulatory guidelines and the lawsuits were without merit, citing an

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112. Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 30 (2011).
113. *Id.* at 31.
114. *Id.* at 32.
115. *Id.*
116. *Id.*
117. *Matrixx Initiatives, Inc.*, 563 U.S. at 32.
118. *Id.*
119. *Id.*
120. *Id.* at 33.
121. *Id.*

absence of empirical evidence and identifying other potential causes for anosmia.[122] Shortly thereafter, a national television show reported the aforesaid doctor's findings.[123] In response to the coverage, Matrixx filed a Form 8-K in which it announced that it convened a panel of doctors and researchers who concluded that there was insufficient evidence of a causal link.[124] This notwithstanding, Matrixx subsequently declared that it intended to conduct additional human and animal studies with respect to the putative causal link.[125]

Once the shareholders commenced this action, Matrixx moved to dismiss it on the basis that there was not a "statistically significant correlation" between the use of its product and this condition to warrant disclosure.[126] On appeal, the Supreme Court flatly rejected this contention because it would constrain the focus of inquiry too much and it artificially would exclude information that a reasonable investor otherwise would consider to be significant.[127] The Justices, furthermore, rejected the notion that information must be statistically significant for it to be material given that actors do not rest their decisions on math alone.[128] While statistical significance may have an impact on materiality, it is not determinative.[129] The Supreme Court was careful to stress that assessments of materiality are fact-specific inquiries, which require consideration of the source, the content, and the context of the information.[130] Against this background, the Justices concluded that there was a sufficient basis to support a finding of materiality and declined to dismiss the case.

Armed with an understanding of what the courts consider to be material, it is now possible to appreciate how employee relations matters fit into that paradigm and why they should be subject to mandatory disclosures and reporting.

PART IV

1. WHAT ARE EMPLOYEE RELATIONS MATTERS?

As a preliminary matter, it is important to assign an operational definition to the term employee relations matters. For the purposes of this Article, this concept refers to the prohibition against discriminatory practices and

122. *Matrixx Initiatives, Inc.*, 563 U.S. at 34-35.
123. *Id.*
124. *Id.* at 35.
125. *Id.* at 36.
126. *Id.*
127. *Matrixx Initiatives, Inc.*, 563 U.S. at 36.
128. *Id.* at 40-43.
129. *Id.* at 43.
130. *Id.*

the establishment of workplace equality, the payment of wages and the tracking of compensable time, and the provision of a safe and sanitary workplace in accordance with a constellation of federal statutes. What, however, do these federal statutes require public corporations to do?

a. *Workplace Equality*

Pursuant to federal law, it is illegal to discriminate,[131] to harass,[132] and to retaliate[133] against employees on the basis of their membership in a protected class; e.g., race;[134] color;[135] sex;[136] pregnancy status;[137] national origin;[138] religion;[139] disability;[140] age;[141] genetic information;[142] past, pre-

131. Discrimination refers to a wide range of prohibited conduct that employers commit based on candidates' and employees' protected status, such as declining to hire them, demoting them, failing to promote them, disciplining them, terminating them, or otherwise altering the terms and conditions of their employment. *See* 42. U.S.C. § 2000e-2(b).

132. Harassment happens in a variety of contexts based upon the protected class at issue. With respect to sexual harassment, it occurs where employers tie the terms and the conditions of employees' employment to the receipt of sexual favors. It also happens where employees face unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when the submission to it is made either explicitly or implicitly a term or a condition of an individual's employment; it becomes the basis for employment decisions; or unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. In the other contexts, employers engage in harassment where they take actions or make statements that denigrate or demonstrate hostility or aversion towards employees on the basis of their protected status with purpose or effect of creating an intimidating, hostile, or offensive work environment, interfering with their work performance, or adversely affecting their employment opportunities. *See* 29 C.F.R. § 1604.11; Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); *Policy Guidance on Current Issues of Sexual Harassment*, EEOC (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [https://perma.cc/3GLB-7XVR]; *CM-615 Harassment*, EEOC (May 1, 1987), https://www.eeoc.gov/laws/guidance/cm-615-harassment [https://perma.cc/U4YC-TYK5].

133. Retaliation refers to instances where employers take adverse employment action against employees because they engaged in protected conduct, such as reporting instances of discrimination. *See Policy Guidance on Current Issues of Sexual Harassment*, EEOC (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues [https://perma.cc/9YKP-JCJD]; *Enforcement Guidance on Retaliation and Related Issues*, EEOC (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [https://perma.cc/JC36-NPRR].

134. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

135. *Id.*

136. *Id.*

137. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

138. 42 U.S.C. §2000e-2.

139. *Id.*

140. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12113; 105 Stat. 1071; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

141. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634.

sent, or prospective military service;[143] and citizenship, national origin, or work authorization documentation.[144] In light of the prohibition against such conduct, public corporations also must take affirmative steps to eradicate and to respond to reports of unlawful, discriminatory conduct.

b. Wage and Hour

Under federal law, all covered employers, *inter alia*, must calculate nonexempt employees' compensable time,[145] must pay them a minimum wage and overtime in certain instances,[146] must pay certain exempt employees certain amounts to avoid application of the minimum wage and overtime requirements,[147] and, absent certain circumstances, must refrain from using sex-based wage differentials where employees, regardless of their status as exempt or nonexempt workers, perform work under similar working conditions that requires the same skill, effort, and responsibility.[148]

c. Workplace Safety

Pursuant to the federal workplace safety law, employers, *inter alia*, must provide their employees with "a place of employment [that is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees."[149] They also have an obligation to comply with all occupational safety and health standards that the Occupational Safety and Health Administration ("OSHA") promulgates.[150]

2. THE IMPLICIT DUTY TO DISCLOSE AND TO REPORT

On the surface, it appears as though the current disclosure and reporting system entirely disregards employee relations matters or largely rele-

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142. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-1.
143. Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311.
144. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.
145. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219; 29 C.F.R. §§ 785.18, 785.19 (2021) (meal and rest breaks); 29 C.F.R. §§ 785.14-785.16 (2021) (waiting time); 29 C.F.R. § 785.17 (2021) (on-call time); 29 C.F.R. §§ 785.20-785.23 (2021) (sleeping time); 29 C.F.R. §§ 785.27-785.32 (2021) (meetings, lectures, and training); Portal-to-Portal Act of 1947, 29 U.S.C. § 254; 29 C.F.R. §§ 785.33-785.41 (2021) (traveling); 29 C.F.R. §§ 785.24(c), 785.25, 785.26 (2021) (donning and doffing).
146. 29 U.S.C. §§ 206(a), 207(a).
147. 29 C.F.R. §§ 541.600(a), 541.602(a) (2021).
148. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).
149. Occupational Safety and Health Act of 1970, 29 U.S.C. § 654.
150. *Id.*

gates them to a peripheral role. The text of Regulation S-K, however, demonstrates that there is arguably an implicit duty to disclose and to report these matters, which, given the historical and public policy reasons in support of the same, seems only more plausible. This regulation contains three sections that posit employee relations matters fall, or should fall, within the purview of the mandatory disclosure and reporting framework, which this Article will explore in more depth below.

a. Item 101

Item 101 mandates that public corporations must furnish information about the general development of their businesses and must provide a narrative description of their operations.[151] As a threshold matter, public corporations cannot conduct their operations without employees, which inextricably links them to those entities and their operations. In light of employees' integral role, it is not possible for public corporations to expound upon their development activities or to describe their businesses in a thoughtful and meaningful manner without a review of their employment practices and how they relate to their employees. This discussion, at a bare minimum, necessarily implicates whether public corporations take measures to ensure their compliance with relevant employment laws. In elaborating on their compliance activities, public corporations would need to state whether they have policies, procedures, and practices in place to combat discriminatory practices, to pay employees the proper amount, and to provide them with a safe workplace; if they revisit and revaluate these matters based on new developments or legislative changes; and whether they provide adequate and ongoing training. They, furthermore, would need to indicate if, and to what extent, they have reporting, auditing, and monitoring systems in effect; whether they conduct investigations; and if there is corrective action for violations, such as coaching, counseling, reeducation, and discipline. Any exposition of a business also requires commenting on its culture and climate, such as promoting equal employment opportunities ("EEO"), fostering a safe workplace, and encouraging the reporting of discriminatory practices, payment issues, or workplace hazards. Without this information, shareholders are effectively left with a diluted, partial, and artificial image of how public corporations carry on their operations.

b. Item 103

According to Item 103, public corporations must furnish information about any material legal process that is currently pending and is outside of

151. 17 C.F.R. § 229.101 (2021).

ordinary litigation.[152] Administrative charges, regulatory complaints, and lawsuits that relate to employee relations matters arguably satisfy these requirements such that public corporations should disclose and should report their incidence. As a preliminary matter, litigation in these areas is material given that it can significantly affect the financial condition of public corporations. The following table shows the relief that employees can receive under various employment laws and the risks that public companies face.

Statute	Protection	Relief
Title VII	Race; color; national origin; religion; sex (gender and pregnancy status)	Back pay; front pay; compensatory damages; punitive damages; attorneys' fees and costs; and injunctive relief[153]
ADA	Disability and failure to accommodate	Back pay; front pay; compensatory damages; punitive damages; attorneys' fees and costs; and injunctive relief[154]
ADEA	Age	Back pay; front pay; liquidated damages; attorneys' fees and costs; and injunctive relief[155]
FLSA	Payment of minimum wage and overtime	Civil penalties; criminal penalties; back pay; front pay; liquidated damages; attorneys' fees and costs; and injunctive relief[156]
OSH Act	Prohibition against hazardous conditions	Civil penalties[157]

Based on the foregoing, there is a panoply of economic relief that employees can receive. The significant financial impact of employee relations

152. 17 C.F.R. § 229.103 (2021).
153. 42 U.S.C. § 1981a.
154. 42 U.S.C. §§ 1981a(a)(2)-(3); 42 U.S.C. § 12117.
155. 29 U.S.C. § 626(b).
156. 29 U.S.C. §§ 216(b), 260.
157. 29 U.S.C. § 666.

litigation is even more palpable upon consideration of recent jury awards, settlements, and regulatory action, which the following chart illustrates.[158]

Case	Statute	Outcome
EEOC v. Consolidated Edison Co. of N.Y., Inc.	ADA; GINA	Compensatory damages: $144,000 Back pay: $656,000
Bingman v. Baltimore County	ADA	Compensatory damages: $298,000 Back pay: $218,000
Ortega v. Chicago Board of Education	ADA	Compensatory damages: $285,000 Back pay with interest: $430,697 Front pay: $83,512 Lost pension benefits: $216,716
EEOC v. Whirlpool Corp.	Title VII	Back pay and front pay: $773,261 Compensatory damages: $300,000 Counsel fees: $210,039 Costs: $4,976.30
In re Andre Chreky, Inc.	Title VII	Compensatory damages - Party 1: $300,000 Punitive - Party 1: $2,000,000. Compensatory damages, counsel fees, and costs - Party 2: $7,000,000
Beckford v. Department of Corrections, State of Florida	Title VII	Compensatory damages: $630,000 Counsel fees: $372,812.50 Costs: $29,859.89
Davis v. J.P. Morgan Chase & Co.	FLSA	Amount: $28,000,000 Counsel fees: $14,000,000
Craig v. Rite Aid Corp.	FLSA	Amount: $13,900,000 Counsel fees: $7,000,000
In re: Sunfield, Inc.	OSH Act	Fines: $3,400,000[159]

158. PRAC. L. LAB. & EMP., INDIVIDUAL ADA JURY AWARDS AND SETTLEMENTS CHART: OVERVIEW (2019), Westlaw, https://us.practicallaw.thomsonreuters.com/w-015-3293 [https://perma.cc/MM26-BBER] (internal citations omitted); PRAC. L. LAB. & EMP., INDIVIDUAL SEXUAL HARASSMENT JURY AWARDS AND SETTLEMENTS CHART: OVERVIEW (2019), Westlaw, https://us.practicallaw.thomsonreuters.com/3-589-7845 [https://perma.cc/66XA-8F6C] (internal citations omitted).

159. Bebe Ruape, *OSHA Slaps Ohio Auto Parts Plant with $3.4M Penalty*, BLOOMBERG L. (June 30, 2016, 11:00 PM), https://www.bna.com/osha-slaps-ohio-n57982076363 [https://perma.cc/7J23-CXZD].

Taking into account the amount of these verdicts, settlements, and fines, it is apparent that litigation in these areas significantly can affect public corporations' financial health such that it satisfies the first element of Item 104—materiality.

For legal action to be reportable, it must be outside the scope of ordinary, routine litigation that is incidental to public corporations' business. While it is true that employee relations matters generally are common for businesses, there may be exceptions, which would place such cases squarely in the scope of Item 104. For instance, class actions for the nonpayment of wages or systemic or disparate impact discrimination claims exemplify one of the exceptions insofar as they are more complex, nuanced, procedurally complex, and fact-intensive. Likewise, litigation may touch upon areas where the law is unsettled and questions of liability are unclear. For example, there is a lack of consensus among federal courts as to whether sexual orientation and gender identity are subject to Title VII's protections. Furthermore, the inherent ambiguity or the possibility for differing opinions can transform a situation into a reportable matter. For instance, an employer may need to train its staff on how to respond to violence in the workplace under the OSH Act.[160] This obligation arises if the violence is not "recognized" as characteristic of employment and does not represent random antisocial acts, which may occur anywhere.[161] While the OSHA stresses that the most salient factors are "[t]he recognizability and foreseeability of the hazard . . . and the feasibility of the means of abatement," there is little guidance on how to measure these factors.[162] When, however, would the employer's failure to conduct such training be a violation, and if it is, would the violation be an ordinary one or a serious one with much more significant penalties? The foregoing patently demonstrates how litigation can become more complex and atypical such that it meets the second element under Item 103, thereby necessitating the disclosure and the reporting of litigation as it relates to employee relations matters.

c. *Item 303*

Item 303 impliedly calls for the publicization of employee relations matters even though it explicitly does not contain any disclosure and report-

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160. OSHA, *Standard Interpretations: OSHA Policy Regarding Violent Employee Behavior*, U.S. DEP'T LAB. (Sept. 9, 2018), https://www.osha.gov/laws-regs/standardinterpretations/1992-12-10 [https://perma.cc/3D7Y-FLVX].

161. *Id.*

162. *Id.*

ing requirements that relate to stakeholders and social issues.[163] Pursuant to this provision, managers are under an obligation to prepare a description of any other information "necessary to understand [a company's] . . . financial condition or results."[164] As part of their analysis and discussion, managers must describe "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[165] In doing so, they should focus on any known, material events and uncertainties that could "cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."[166] Employee relations matters materially can impact public companies' sales, revenues, and income in several ways. First, as discussed *supra*, the failure to comply with applicable federal law can result in contentious and protracted litigation and regulatory action, which causes public corporations to expend significant resources to defend against the legal action, to divert personnel from other endeavors, and, at times, to face hefty verdicts, settlements, and fines, which, in their own right and in the aggregate, profoundly affect their finances. Second, public corporations may not be able to recruit and to retain the talent that they need to carry out their operations unless they pay their employees properly and provide them with a safe and sanitary workplace that is free from discrimination. Third, the culture, the climate, and the philosophy of public corporations with respect to employee relations matters have a correlative link to innovation, dedication, loyalty, efficiency, and productivity, which affect entities' finances. Fourth, public perception and reputation greatly affect corporate sales, revenues, and income. Allegations that a company only hired young, attractive, Caucasian females, it shorted thousands of minimum wage workers who live paycheck to paycheck, or it neglected to replace a faulty fire alarm, which could have saved the lives of employees, undoubtedly would shape public opinion and would affect profits. Without a reflective and comprehensive discussion of anti-discrimination policies and procedures, payroll practices, safety initiatives, and attendant compliance efforts, shareholders simply lack the information that they need to understand public corporations' financial condition and results.

While the foregoing shows that there is arguably an implicit duty to disclose and to report employee relations matters under these sections in

163. Ghoogassian, *supra* note 70, at 380; Monsma & Olson, *supra* note 77, at 150-51.

164. 17 C.F.R. § 229.303(b)(3) (2021).

165. 17 C.F.R. § 229.303(b)(1)(ii)(B) (2021).

166. 17 C.F.R. § 229.303(a) (2021).

Regulation S-K, there is another statutory and regulatory basis to argue for its inclusion in the mandatory disclosure and reporting system.

3. DISCLOSURE IS NECESSARY TO PREVENT INCOMPLETE, INACCURATE, OR MISLEADING STATEMENTS

Pursuant to Section 10b of the Exchange Act and Rule 10b-5, public corporations are under a duty to disclose material information to correct or to update inaccurate, incomplete, or misleading statements. Public corporations conceivably can violate these laws when they issue statements about their operations and finances and make assessments about their present and future activities, successes, failures, and uncertainties without any discussion of employee relations matters.

For the purposes of these laws, such information is material because there is a substantial likelihood that it would be significant for shareholders while they deliberate on whether to purchase or to sell securities for several reasons. First, the failure to prohibit discriminatory practices, to pay employees their wages, and to provide them with a workplace free from hazards raises serious concerns about the soundness of investing in a company. Second, the absence of appropriate EEO, payroll, and safety practices calls management's ability to direct the affairs of a business into question. For instance, if a company acquires manufacturing facilities to expand its operations and thereafter fails to conduct adequate testing for ventilation, chemical exposure, or air containments,[167] shareholders undoubtedly would question its business acumen. Third, shareholders would want to know if there are appropriate compliance measures in place because inaction or improper responsive action, as discussed *supra*, can result in expensive and distracting litigation and costly judgments or settlements. For example, let us assume that a company announces that it is experiencing rapid expansion and needs to hire a significant number of new employees. In this instance, shareholders unquestionably would like to know whether the company, on a macro level, has an appropriate EEO hiring policy and procedure and if it is recruiting employees in accordance with the same such that they need not fear the negative repercussions of litigation, which could impact the business's finances. Fourth, a company's compliance with employment laws or lack thereof affects organizational reputation and employees' productivity, efficiency, and longevity, which are factors that weigh heavily on a stock's value. Based on the foregoing, information about employee relations matters significantly can alter the "total mix" of information available such that it would be material. Even so, why, however, would we require public cor-

167. 29 C.F.R. § 1910.94 (2021); *Id.* § 1000.

porations to disclose this material information when they make statements and assessments?

The operations and the financial condition of public corporations are a function and a reflection of their employees, the environment in which they work, and the way that management treats them with respect to employee relations matters. If public corporations make statements or assessments about their operations, finances, successes, failures, and uncertainties divorced from the interplay with and the impact of employee relations matters, particularly compliance with relevant employment laws, they are providing shareholders with a partial and highly selective set of information that disregards the foundation upon which it rests. In such instances, shareholders effectively cannot comprehend and cannot scrutinize the conclusory declarations, figures, and other quantifiable metrics that public corporations include in mandatory filings. For example, investors oftentimes will read generic and global statements to the effect that a public company is expanding and is diversifying its workforce, it is compensating its employees in line with market parameters, and it is acquiring new facilities in different geographic markets to increase its footprint. What, if anything, is the import of those statements without more context, particularly with regard to employee relations matters and compliance with applicable employment laws? Essentially, the absence of such information ostensibly renders them incomplete, inaccurate, or misleading.

Where, however, public corporations publicize information about employee relations matters in connection with statements about their activities, finances, etc., shareholders possess a more comprehensive and more correct understanding of what the companies actually are reporting. For instance, suppose that a company reports:

> Our company is committed to fair and equitable compensation practices. Our Board's Human Resources Committee oversees our compensation strategy and we regularly review our compensation programs and practices. We conduct an annual pay equity analysis through a third-party consultant that is designed to ensure that we apply our pay practices consistently regardless of gender, race, or ethnicity. As needed, we take appropriate actions to ensure that our compensation is fair and equitable. The results of our most recent study . . . showed that (i) team members who are women based in the U.S. earn more than 99 cents for every dollar earned by their male peers, and (ii) team members who are people of color based in the U.S.

> earn more than 99 cents for every dollar earned by their white peers.[168]

In this instance, the public company elaborated on its conclusory statement regarding its commitment to payroll practices by providing shareholders with additional details about employee relations matters, such as complying with Title VII and conducting audits, so that its initial assertion was not ambiguous, disingenuous, or incomplete. Without the publication of the additional information that relates to employee relations matters, the initial statement—"our company is committed to fair and equitable compensation"—is open to multiple interpretations, conveys nothing of meaning, and could lead shareholders into a false sense of security. The same could be true for numbers on a balance sheet; i.e., if public companies report that they earn X, but do not explain how employee relations matters or compliance efforts factor into that number, how accurate and trustworthy is that figure? As there is an interconnectedness between employee relations matters and public corporations' operations, finances, successes, etc. in light of the fact that the latter cannot happen without employees in the workplace, the absence of any such information would render any statements that relate to those topics incomplete, inaccurate, or misleading such that the Exchange Act and Rule 10b-5 then would require disclosure of such information to cure any deficiencies with those statements.

While the foregoing gives us other legitimate grounds upon which to require the disclosure and the reporting of employee relations matters, other justifications for this proposition, which are rooted in public policy and empirical evidence, also exist.

4. OTHER REASONS TO JUSTIFY MANDATORY DISCLOSURE AND REPORTING OF EMPLOYEE RELATIONS MATTERS

a. Protection of investors

One of the primary reasons for which mandatory disclosure and reporting requirements exist is to protect investors and shareholders. These actors base their decisions on the accuracy and the completeness of the information that public corporations share.[169] If these entities do not provide details about employee relations matters, investors and shareholders will not have enough information about their operations and financial condition to make an informed decision and they effectively will be operating in a

168. WELLS FARGO & CO., *Proxy Statement: 2018 Annual Meeting of Shareholders* (Sept. 8, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2018-proxy-statement.pdf [https://perma.cc/8KNF-4V7D].

169. Monsma & Olson, *supra* note 77, at 184; Choudhury, *supra* note 10, at 195.

caveat emptor system, which is historical antithesis to the current system. Indeed, shareholders may hesitate to purchase an issuer's shares if they knew it had no EEO compliance system, it never inspected its machinery at certain facilities to ensure that it was safe for its workers, etc. The publicization of this information, furthermore, empowers shareholders to price shares with more accuracy in consideration of the fact that they would have more information about potential liabilities or problems with leadership.[170] Indeed, asking shareholders to purchase stock without this information is much like asking them to buy a house without letting them tour all its rooms, which is antithetical to the protectionist purpose that underlies this system.

b. Shareholder engagement and corporate accountability

One can justify mandatory disclosure and reporting for employee relations matters on the basis that it promotes greater shareholder engagement and corporate accountability.[171] If shareholders are aware of any potential risks, failures of management, or opportunities for improvement, they can intervene by voicing their concerns, making recommendations at meetings, and voting. For instance, if shareholders become aware that the OSHA has cited multiple manufacturing facilities for safety violations and management has yet to inspect all equipment and to replace faulty units, they likely will mobilize and will intercede by pulling on the purse strings with respect to executive compensation or calling for a changing of the guard. The power to nominate, to elect, and to remove managers is both a sword and a shield, but without information about employee relations matters, they hardly will know how to wield them.

Publicization of this information also permits shareholders to evaluate whether they want to retain their shares or to sell them. Employee relations matters and their potential for significant verdicts, settlements, and defense costs can factor into shareholders' decisional calculus. In the absence of this information, shareholders cannot protect themselves by knowing if, and when, they should sell their stock.

c. Elimination or limitation of litigation

Mandatory disclosure and reporting of employee relations matters have the potential to eliminate or to limit litigation. When management goes through the introspective and evaluative exercise of collecting and analyzing information about employee relations matters and preparing the

170. Choudhury, *supra* note 10, at 196.
171. *Id.* at 189; Ghoogassian, *supra* note 70, at 364-65.

MDA under Item 303, they can become cognizant of potential liabilities and obstacles and can act to minimize or to overcome them, such as instituting mandatory training of equal employment opportunity topics or performing periodic inspections of previously unchecked equipment.[172] In fact, one study has shown that corporate disclosure and reporting on non-financial issues—environmental performance—plays a role in managing the risk of bankruptcy.[173] The results of this study, albeit in a topically different context, are promising insofar as they suggest that mandatory disclosure and reporting of employee relations matters could produce beneficial effects.

One of the most common allegations that shareholders lodge against public corporations is that management committed fraud on the market by issuing incomplete or misleading statements. If public corporations publicize information about employee relations matters, they effectively can undercut the number, the frequency, and the viability of such litigation because shareholders will have a greater quantity of more comprehensive and more relevant information.

d. Benefiting from a positive public image

Businesses can benefit from a positive public image if they responsibly and proactively manage employee relations matters and share such information with the market. For instance, if a public corporation initiates an affirmative action plan—it recruits minorities and invest in them through training and subsequent leadership opportunities—and it subsequently shares this information with the public, the optics of doing the "right thing" can pay dividends.[174] This is so because socially conscientious shareholders and customers develop an affinity for the business, shareholders are more inclined to make additional investments, and customers become more loyal to the brand, all of which translates into additional equity or profit for the company.[175]

e. Empirical data supports this position

Legislators and regulators should consider requiring the disclosure and the reporting on employee relations matters because empirical evidence shows that investors and market participants want this information. For instance, the Investor Responsibility Research Center Institute conducted a study at the end of 2013 in which it solicited information from 133 publicly

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172. *See* Choudhury, *supra* note 10, at 196.
173. *Id.*
174. Ghoogassian, *supra* note 70, at 362-63.
175. *Id.* at 363.

traded American corporations, which had an aggregate market capitalization of over $2.3 trillion, and 82 institutional investors that held shares in American companies, which totaled more than $17 trillion of owned or managed assets.[176] The study found that investors were more likely to engage with public corporations with respect to non-financial social issues, such as employee relations matters, than on financial results or transactions and corporate strategy.[177] It also discovered that "[n]early twice as many investors reported that they sought to engage on environmental and social/non-financial issues."[178] Likewise, a study by the Morgan Stanley Institute for Sustainable Investing illustrates that investors, particularly millennials, want data about sustainable investing—investment based on environmental, social, and governance factors, which include employee relations matters, and their impact.[179] The results of the study were telling in three respects. First, it found that 75 percent of investors and 86 percent of millennials are interested in sustainable investing.[180] Second, it discovered that 80 percent of investors are likely to do sustainable investment if they can tailor their decisions to areas of interest in which they can have an impact.[181] Third, it noted that investors who are millennials are nearly twice as likely as other investors to purchase stock "because of a brand's environmental or social impact."[182] While there is strong support for the expansion of these requirements, it is not without its critics.

f. The opposition to the inclusion of employee relations matters

Opponents challenge the inclusion of employee relations matters in the mandatory disclosure and reporting system on the basis that it would be burdensome and cost prohibitive and it would overload shareholders with too much information. This section will examine each of those claims and will respond to them *in seriatim* below.

176. Marc Goldstein, *Defining Engagement: An Update on the Evolving Relationship Between Shareholders*, DIRS. & EXECS. 7 (Sept. 9, 2018), http://www.shareholderforum.com/access/Library/20140410_ISS-IRRC.pdf [https://perma.cc/FGK7-8K25].

177. *Id.* at 31.

178. *Id.*

179. Morgan Stanley Institute for Sustainable Investing, *Sustainable Signals: New Data from the Individual Investor* (Sept. 8, 2018), https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-signals/pdf/Sustainable_Signals_Whitepaper.pdf [https://perma.cc/8L65-KJX4].

180. *Id.*

181. *Id.*

182. *Id.*

i. Expansion would be burdensome and cost prohibitive

The primary argument against expansion of these requirements posits that the current system is already too onerous, time-consuming, and expansive and any additional requirements only would compound these problems. Indeed, the process of going public can take up to twenty-seven months (pre-kickoff, preparation, and execution) and can cost between $7.3 million and $70.3 million in accounting, legal, underwriting, and other fees.[183] Once companies are public, a significant majority expects to spend more than $1 million each year in legal, accounting, and other professional fees to satisfy all statutory and regulatory requirements.[184] Businesses oftentimes also need to hire and/or to train additional personnel to ensure that they can comply with their obligations, which causes them to incur even more expense.[185] If public corporations need to collect, to analyze, and to publish more information, they would need to spend even more time and money on this activity, which, in turn, they could not allocate to other activities or could not disperse to shareholders as dividends.

While this argument may appear persuasive, it likely cannot carry the day for several reasons. First, if companies want to go public and to receive the attendant benefits, they must be willing to pay the "cost of admission," which includes expenses associated with disclosing and reporting information. Second, if we were to make ease, cost, and time the litmus test for disclosure and reporting requirements, countless other pieces of information, which are material and necessary for investors to make informed decisions, could be excluded, which would undermine the very purpose for this system. Third, if public corporations already are gathering a significant amount of data and are analyzing it, the addition of another data subset—employee relations matters—ostensibly would not have an appreciable effect on cost, time, or resource allocation. Fourth, the expenditure of time, money, and resources to report on these matters likely would result in a net saving to public corporations insofar as they, as result of conducting an introspective audit of their affairs for the release of this information, can reduce the risk of litigation, can implement better business practices, and can be more appealing to socially conscientious investors and customers.

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183. Price Waterhouse Cooper, *Considering an IPO to Fuel Your Company's Future?: Insight into the Costs of Going Public and Being Public* (Nov. 2017), https://financetreasury.com.au/wp-content/uploads/2019/02/PWC_cost-of-an-ipo.pdf.
184. *Id.*
185. *Id.*

ii. Overloading shareholders with too much information

Critics also challenge further expansion of disclosure and reporting requirements by arguing that it would overload shareholders, particularly unsophisticated ones, with too much information and would impair their ability to make sound decisions. While this argument is appealing, it is inconsistent with the core tenets that underlie our system; e.g., empowering and protecting investors through knowledge, combatting information asymmetries, and encouraging greater corporation suffrage through awareness. If we were to accept this premise, we also would start to walk on a slippery slope regarding dispensing with other disclosure and reporting requirements that exist for the protection of shareholders, such as certified financial statements, on the basis that such information is purportedly too difficult for them to grasp. This argument, furthermore, takes a far too paternalistic and pessimistic view of investors in that it presumes that they, on their own or in consultation with accountants, attorneys, and other investment advisors, cannot distill the significance of the furnished information and cannot act accordingly. Indeed, the Supreme Court admonished us not to attribute a "child-like simplicity" to investors and to assume that they cannot "grasp the probabilistic significance" of events.[186]

CONCLUSION

Information that relates to employee relations matters is extremely pertinent because it is inextricably tied to public corporations' operations, financial condition, and success. While the conventional view holds that these matters fall outside the scope of mandatory disclosure and reporting requirements, there, nonetheless, is a legitimate basis to claim that public corporations must publicize this information because it is subsumed by existing requirements or is necessary to prevent certain required statements from being incomplete, inaccurate, or misleading. In view of the intrinsic value of this information, its ability to advance the aims of the disclosure and reporting system, and its importance to investors as demonstrated by empirical evidence, legislators and regulators should modify the current framework to include it if there is no implied duty under the current regime.

186. *Basic Inc.*, 485 U.S. at 234.

TABLE OF ACRONYMS AND INITIALISMS

ADA – Americans with Disabilities Act
ADEA – Age Discrimination in Employment Act
EEO – equal employment opportunities
EEOC – Equal Employment Opportunity Commission
FLSA – Fair Labor Standards Act
GINA – Genetic Information Nondiscrimination Act
IPO – initial public offering
OSH Act – Occupational Safety and Health Act
OSHA – Occupational Safety and Health Administration
SEC – Securities and Exchange Commission