NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 17 SPRING 2021 NUMBER 2

UNMASKING SEXUAL HARASSMENT: THE EMPIRICAL EVIDENCE FOR A NEW APPROACH

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If moral outrage were enough, 50 years of antidiscrimination law and two full years of #MeToo should have led to the rapid remediation and elimination of sexual harassment by corporate decisionmakers. However, moral condemnation apparently is not enough, so this Article urges a multifaceted approach that combines (to start) research, financial analysis, disclosure, preventative cultural change, and remediation (if still needed). Through disclosure, it suggests a tactic that combines the goals of social entrepreneurship and profit maximization. Estimates suggest that sexual harassment costs U.S. business millions, if not billions, annually. However, most stock exchange-listed companies avoid financial disclosure or other reporting of sexual harassment claims. The onus for the invocation of Title VII and other antidiscrimination protections falls upon the victims and targets of abuse. Our research and empirical evidence demonstrate that corporations need to make changes to improve the proverbial bottom line. The disclosures

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that companies do make lack useful information for users of financial reports. Further, a high number of perpetrators of corporate sexual harassment are those with power—key executives and Chief Executive Officers (CEOs). Further, a number of non-disclosures of sexual harassment indicate poor management and culture at companies. Our results are consistent with companies that use arbitration and non-disclosure agreements (NDAs) to conceal sexual harassment. Our research supports a new SEC reporting requirement for all publicly traded companies (and a best practices approach for all organizations). Arguably, corporations would save much more by getting ahead of sexual harassment cases, disclosing problems, and avoiding expensive Title VII and shareholder derivative lawsuits. The evidence and common sense call for additional prophylactic action.

Introduction

In July 1993, *The Wall Street Journal* published William Power's account of how a small California software company, The Santa Cruz Operation (SCO), failed to report several arguably important facts in its initial public offering (IPO) filings with the Securities & Exchange Commission (SEC). Two

facts were of note: (1) an ultimately fatal illness and (2) a sexual harassment lawsuit on behalf of four women against the former President and CEO, Larry Michels.[1] This sexual harassment case predated the #MeToo movement and Harvey Weinstein scandal of 2017 by almost 25 years,[2] meaning intense public scrutiny regarding the ubiquitous nature and huge financial costs of sexual harassment had not yet begun. The SCO case also predated a new wave of the social entrepreneurship movement.[3] That the SCO case caught the attention of the SEC and *The Wall Street Journal* foreshadowed scenes of later controversies and the need for innovation.

The SCO lawsuit settled out of court for a reported $1.25 million.[4] Shortly after the lawsuit's filing, Michels resigned. Power explained, "Mr. Michels was awarded a one-year, $200,000 consultant's job after the resignation, according to the prospectus. He also maintained an 11.4% stake in the company after the IPO."[5] Power also noted, "In the prospectus, the company refers to 'one lawsuit and several pending claims' re-

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1. *See* William Power, *In IPOs, Some Data Seem to Be Overlooked by Issuers as in Case of Santa Cruz Operation*, WALL ST. J., July 27, 1993, at C2.

2. *See, e.g.*, Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers For Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?action=click&contentCollection=media&module=relatedCoverage&region=EndOfChapter&pgtype=chapter.

3. Modern social enterprises develop, fund, and implement solutions to social and environmental problems. Social entrepreneurship gained formal traction as a movement when Bill Drayton founded Ashoka in 1980. Ashoka supports local social entrepreneurs. Sarah Shearman, *What's a Social Entrepreneur? And Other Frequently Asked Questions*, REUTERS (Oct. 22, 2019, 9:54 AM), https://www.reuters.com/article/us-entrepreneurs-poll-q-a/whats-a-social-entrepreneur-and-other-frequently-asked-questions-idUSKBN1X11MZ. Charles Leadbeater published *The Rise of the Social Entrepreneur* in 1997. CHARLES LEADBEATER, THE RISE OF THE SOCIAL ENTREPRENEUR (1997) reinvigorated the social entrepreneurship movement. *See, e.g.*, Jeff Church & Nika Water, *The Wave of Social Entrepreneurship*, ECORNER: ENTREPRENEURIAL THOUGHT LEADERS (Apr. 11, 2012), https://ecorner.stanford.edu/podcasts/the-wave-of-social-entrepreneurship/.

4. Paul Rogers, *Santa Cruz Firm Faces New Lawsuit: Drug Use, Harassment Alleged by Ex-Employees*, SAN JOSE MERCURY NEWS, May 22, 1993, at 1B.

5. Power, *supra* note 1.

lated to employee matters but says it doesn't expect a 'material' impact on operations."[6] Goldman Sachs, the IPO underwriter admitted that, despite normal stock price gains after an IPO, SCO's stock fell 134%.[7]

Twenty-five years after the SCO debacle, have things changed at all? Antidiscrimination law embodied in the Civil Rights Act of 1964[8] is more than 50 years old but sexual harassment scandals still make headline news. Social enterprises have existed for hundreds of years.[9] Myopic economic enterprises still value short-term profits, however, over long-term financial rewards and human dignity and well-being.[10] Dr. Jennifer Drobac reflects on the SCO case and concludes, based in part on the research of Dr. Mark Russell, that not much has changed.

Based on Dr. Russell's empirical research, this Article finds that most stock exchange-listed companies avoid explicit financial reports of sexual harassment claims, as did SCO in its IPO filings. The disclosures that companies do make, similar to those made by SCO, lack useful information for financial report users. Additionally, several perpetrators of corporate sexual harassment are CEOs or key executives, like Larry Michels, and the non-disclosure of sexual harassment further indicates poor management and culture.[11] Our research results are consistent with companies using arbitration and non-disclosure agreements (NDAs) to conceal instances of sexual harassment.

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6. *Id.*

7. *See id.* Power does not explain how this figure of more than 100% was calculated. Such a drop can occur, however, if one sets the new share price, for example, as the base amount of 100%. Then, if the stock price falls more than half of the old stock price, it has fallen more than 100% (e.g., the price fell from $2.34 to $1.00).

8. 42 U.S.C. § 2000d (2018).

9. *See, e.g.*, Matthew F. Doeringer, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT'L L. 291, 317 (2010).

10. *See infra* Section IV.A (especially discussion of the *Signet* and *Jock* litigation).

11. One might define poor management and culture in a number of different ways. We suggest that a failure to comply with basic civil rights law and corporate treatment of workers as a means to an end (in a Kantian perspective that denies them dignity) indicate a poor culture. Arguably, the failure to minimize unnecessary losses is a baseline indicator of poor management.

Rather than hide sex-based misconduct[12] and misappropriations that can seriously compromise a company or even precipitate bankruptcy filing,[13] companies should disclose harassment in a proactive way. By doing so, companies can remediate problems, reinforce their commitment to equality, and improve their financial productivity. Arguably, corporate executives and boards who shield information from shareholders, regulators, auditors, and others, are complicit in the misappropriation of corporate assets. Moreover, officers, directors, and trustees, who pay-off guilty perpetrators to leave, actively foster and contribute to misappropriation of corporate assets (both

12. Sex-based misconduct includes sexual harassment and other forms of non-sexual conduct such as sex-based animus and gender expression policing. *See generally* JENNIFER ANN DROBAC, CARRIE N. BAKER & RIGEL C. OLIVERI, SEXUAL HARASSMENT LAW: HISTORY, CASES, AND PRACTICE 4–6 (2d ed. 2020).

13. The Weinstein Company is one example of an enterprise driven to financial reorganization by the costs associated with pervasive and enduring sexual harassment by an owner/employee. *See Weinstein Company Files for Bankruptcy*, BBC NEWS (Mar. 19, 2018), https://www.bbc.co.uk/news/world-us-canada-43466469; Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html.

Bankruptcy filings are not uncommon in the wake of sexual harassment filings and awards. *See, e.g.*, *In re* Spagnola, 473 B.R. 518, 523 (Bankr. S.D.N.Y. 2012) ("This Court believes that exposure to unwelcome sexual conduct, like an advancing of one's prurient interests to the point of harassment, is the injury that a sexual harassment victim suffers and that a judgment finding an individual intentionally caused that injury is enough to meet the prong of willfulness under *§ 523(a)(6)*."); *In re* Carmona, Nos. 08-20783-dob, 08-2075-dob (Bankr. E.D. Mich. 2011) (finding sexual harassment debt/award not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(6)); Nicholas Gebelt, *Harvey Weinstein, et al., and Bankruptcy*, SOUTHERN CAL. BANKR. L. BLOG (Nov.13, 2017), https://www.southerncaliforniabankruptcy-lawblog.com/?s=sexual+harassment+bankruptcy; Law Offices of Dax J. Miller, *Hot Yoga Files Bankruptcy* (2017), https://daxjmiller.com/hot-yoga-files-bankruptcy/; Resnik Hayes Moradi, LLP, *Celebrity Chef* [Mike Isabella] *Files for Bankruptcy Following Sexual Harassment Allegations* (Sept. 10, 2018), https://www.rhmfirm.com/blog/2018/september/celebrity-chef-files-for-bankruptcy-following-se/; Cathy Ta & Alexander Brand, *Sexual Harassment Civil Judgments in Bankruptcy*, BBK L. (May 23, 2018), https://www.bbklaw.com/news-events/insights/2018/authored-articles/05/sexual-harassment-civil-judgments-in-bankruptcy.

human[14] and monetary).[15] In contrast, disclosing such malfeasance works in a company's best interest. Disclosure should be considered a "best practice." Under the right circumstances, disclosure could shield corporate officers from liability when they have made reasonable efforts to prevent and cure problems that arise.

Part I of this Article briefly reviews antidiscrimination law and the prevalence of sex-based harassment in employment.[16] It also considers the costs of sexual harassment to show that perceived corporate non-disclosure and secrecy about the problem frustrate efforts to fully understand its prevalence and financial impact. Part II introduces corporate governance, finance, and accounting theory to explore sex-based discrimination within corporations and by their executives. Part III empirically tests the preliminary conclusions with Dr. Russell's collected data, the first known systematized research into the financial reporting of company disclosures of sexual harassment. This research confirms that companies are not forthright in their disclosures regarding sex-based harassment. This

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14. We recognize that in accounting circles and in more technical parlance, people are not "assets." We considered replacing the word "assets" with "resources" but stay with the first term because it more literally conveys the commodified nature and financial value of the resources stolen or misappropriated through sexual harassment. This treatment of human beings as assets or capital is not a new conception. In 2001, Andrew Mayo suggested, "The concepts of 'human assets' and 'human capital' are complementary. It is the intrinsic worth of our people that comprise the human capital available to us, and at the same time that worth is a value-creating asset." ANDREW MAYO, THE HUMAN VALUE OF THE ENTERPRISE: VALUING PEOPLE AS ASSETS-MONITORING, MEASURING, MANAGING 19 (2001).

15. In a separate article, Jennifer Drobac explores the misappropriation of financial and human corporate assets by executives in the resolution or concealment of sexual harassment. Jennifer A. Drobac, The Misappropriation of Money and Human Corporate Assets: Sexual Harassment Reconceived (unpublished manuscript) (on file with authors). Such a review is beyond the scope of this paper.

16. *See supra* Introduction. As noted, this article discusses sex-based harassment, an umbrella term which may include behavior that has a sexualized aspect. Sex-based harassment also includes, however, behavior that is hostile or directed at only one sex or gender. This article analyzes cases that involve sexual harassment and gender- or sex-based disparate treatment. In sum, unequal opportunity can result from sexual behavior, hostile conduct, and disparate treatment. This article addresses all forms, as they result in violations of antidiscrimination law. Therefore, all would require disclosure under our analysis.

section also discusses why sexual harassment complaints might motivate companies to camouflage known or suspected problems.

In Part IV, Dr. Drobac leads the examination of the corporate financial disclosure laws that mandate, or at least encourage, responsible reports of corporate misconduct and misappropriations and their attendant costs. This section considers the significance of Dr. Russell's research and analyzes how corporate treatment of these cases of sexual harassment may violate SEC disclosure laws. Based on the synthesis of the empirical research and current legal realities, Part V proposes a bold new SEC disclosure requirement and provides detail on what should be disclosed to the SEC, shareholders, and others. The final section concludes this Article's findings and proposal.

In summary, this Article aspires to re-energize the conversation regarding the interplay of financial reporting, rigorous auditing, and the eradication of corporate sexual harassment. We hope that other experts in a variety of fields will see the utility of our interdisciplinary approach and will broaden the reach and depth of this discussion. While we start the conversation with research concerning publicly traded companies, we urge a similar approach for all corporate, business, and organizational forms. We acknowledge that the reporting of sexual harassment to the SEC (and others, including investors) alone is not a panacea for rampant sexual harassment. We view it, rather, as one arrow in the quiver that might strike a blow at the ubiquitous problem. Antidiscrimination law passed more than half a century ago has not eradicated it. With this Article, we suggest a new, ex ante approach to complement ex poste responses.

I.
Sexual Harassment Law and the Prevalence and Costs of Sexual Harassment

To understand how sexual harassment might be appropriately addressed, in part through securities regulation laws and public disclosure, one should understand a bit about the law and the prevalence, costs, and prohibitions against sexual harassment.

A. *Sexual Harassment Law*

No law specifically requires public disclosure of sexual harassment in the workplace. In fact, nothing in the U.S. Constitution or the U.S. Code specifically prohibits sexual harassment in non-military contexts.[17] Title VII of the Civil Right Act of 1964 (CRA) does not mention sexual harassment but prohibits discrimination in employment based on sex (and other specific classifications).[18] In its 1980 Guidelines, the Equal Employment Opportunity Commission (EEOC) explained that sexual harassment is a form of sex discrimination. The EEOC advised, "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."[19]

Twenty-two years after the passage of Title VII and six years after the EEOC's legal guidance, the U.S. Supreme Court confirmed the illegality of hostile work environment sexual harassment in *Meritor Savings Bank v. Vinson*.[20] This case also clarified that a friendly request for a date or a shared coffee break does not by itself constitute sexual harassment.[21] Under Title VII, the conduct must be either severe or pervasive to qualify as actionable sexual harassment for which the target could file a lawsuit.[22] Typically, a jury decides what con-

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17. *See* 10 U.S.C. § 1561(e) (2018) (defining prohibited sexual harassment in the military).

18. *See* 42 U.S.C. § 2000e-2(a)(1) (2018).

19. 29 C.F.R. § 1604.11(a) (2013). The full definition reads:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Id.

20. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

21. *See id.* at 67.

22. *See id.* Professor Catharine MacKinnon defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power de-

duct qualifies as severe or pervasive. Severity is inversely related to frequency, meaning one incident of rape constitutes actionable sexual harassment (as well as a serious crime). Additionally, a judge or jury must consider "all the circumstances" when evaluating abuse because "no single factor is required."[23] State fair employment practice statutes (FEPS) mirror the unwelcomeness requirement, but a number of these state laws have provisions that are more protective of harassed workers than U.S. federal law.[24]

For example, discriminatory damage caps within Title VII limit the amount that successful plaintiffs can recover for compensatory damages, based on the number of workers at a company. The maximum recoverable by a claimant in a company with more than 500 employees is $300,000.[25] Congress has not revised these limits since it allowed for compensatory damages (in addition to injunctive relief, declaratory relief, and front and back pay) in 1991.[26] Many states, including Indiana, still do not provide for compensatory damages in their state FEPS and require that employers agree in writing to be sued in state court.[27] Therefore, Indiana workers rarely use their FEPS. In contrast, California's FEPS has no damage caps, so when Dr. Drobac practiced there, she never used Title VII.

These Title VII caps are critically important because they impact the "materiality" of the liability that a company might face and what they must disclose as liabilities to shareholders under federal reporting laws. No other form of discrimination recovery is capped in this way. One might argue that limited damages mean that investors should not be concerned about

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rived from one social sphere to lever benefits or impose deprivations in another." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979).

23. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

24. *See, e.g.*, CAL. GOV'T CODE § 12940 (West 2019). California's Fair Employment and Housing Act contains no damage caps and applies to employers with only one employee. § 12940 (j)(4)(A). In contrast, Title VII retains its damage caps and applies only to employers with more than fourteen employees. 42 U.S.C. § 1981a(b)(3) (2018); 42 U.S.C. § 2000e(b) (2018).

25. 42 U.S.C. § 1981a(b)(3)(D).

26. 42 U.S.C. § 1981a.

27. *See* IND. CODE § 22-9-1-16 (1996). A complete dearth of Indiana sexual harassment case law suggests that most employers do not agree to be sued. Who would? Therefore, Indiana workers cannot proceed with civil claims under their FEPS and must rely on Title VII.

trivial financial problems, such as sex-based discrimination. While congressional damages caps keep the value of sex-based harassment claims low, they reinforce a valuation schedule that fails to account for the total and arguably significant costs of sexual harassment. Given the prevalence rates highlighted below, the indirect and hidden costs of sexual harassment are foreseeably quite high.

B. *The Prevalence and Some Costs of Sexual Harassment in the U.S. Workplace*

How common is sexual harassment? What are its associated costs? Different studies have widely divergent results, depending on how researchers selected respondents and what questions they asked.[28] We found an underlying dearth of information (including everything from prevalence and costs to causes and remedies) *from employers* concerning sexual harassment in the workforce. This lack of information, from the entities with the greatest amount of data, prompts our concern. Sections that follow examine this trend more closely and research the under-reporting of sexual harassment by companies. We hope to clarify the size of the problem, the costs, and the corporate liabilities.

1. *Prevalence*[29]

In 2016, the EEOC conducted a comprehensive review of sexual harassment, including its prevalence.[30] It examined its own EEOC complaints (charges) and concluded generally, be-

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28. *See generally* J.M.F., *What is sexual harassment and how prevalent is it?*, THE ECONOMIST, https://www.economist.com/the-economist-explains/2017/11/24/what-is-sexual-harassment-and-how-prevalent-is-it (last visited Nov. 24, 2017).

29. For a discussion of prevalence see generally DROBAC, BAKER & OLIVERI, *supra* note 12. Additionally, this discussion focuses on sexual harassment directed at women because most targets are female. It does not specifically cover harassment directed at men or non-binary persons. The authors recognize, of course, that sexual harassment can affect anyone. We discuss the most likely targets, women, and the research on that group. We expect that readers will understand that non-female targets also experience similar negative employment, emotional, physical, and financial consequences.

30. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (June 2016).

cause of the continuing number of harassment-based charges over time that the EEOC receives, that harassment is a persistent problem.[31] "Based on testimony to the Select Task Force and various academic articles," the EEOC found that "anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace."[32] It explained that when researchers used a randomly representative sample ("probability sample") and asked employees if they have experienced "sexual harassment," which they did not define, approximately 25% of women reported experiencing "sexual harassment."[33] When researchers asked employees the same question in surveys using convenience samples (not randomly representative, e.g., respondents from one organization), and sexual harassment was similarly not defined, 50% of women reported they had been sexually harassed.[34] When researchers asked employees selected from probability samples whether they had experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion, 60% of women responded affirmatively.[35] When researchers

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31. *See id.* at 7 (citing U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT & LITIGATION STATISTICS, ALL CHARGES ALLEGING HARASSMENT (FY 2010–FY 2015)), https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ANNUAL REPORTS ON THE FEDERAL WORK FORCE (PART I), EEO COMPLAINT PROCESSING, FISCAL YEARS 2010–2015, https://www.eeoc.gov/federal-sector/reports/.)

32. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 30, at 7.

33. *Id.* at 8.

34. *Id.* (citing Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607 (2003)).

35. *Id.* at 8–9. The EEOC noted that Ilies and his colleagues included three probability surveys conducted by the Merit Systems Protection Board (MSPB) of federal employees in 1980, 1987 and 1994. U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1994) http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948; U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT UPDATE (1988), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=252435&version=252720&application=ACROBAT; U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=240744&version=241014&application=ACROBAT. The EEOC advised, "While the MSPB studies were conducted nearly 20 years ago, they remain the only set of surveys using probability samples taken over a period of 14 years of largely the same type of workforce." *Id.* at 41 n.16.

asked these questions using convenience samples, 75% of respondents reported that they had.[36] Researchers thus concluded that many individuals do not label certain forms of unwelcome, sex-based behaviors as sexual harassment, even if they find these behaviors offensive.[37]

Researchers have also studied sexist or crude behavior—sometimes called "gender harassment"—directed at women in the workplace. These behaviors may include "sexually crude terminology or displays (for example, calling a female colleague a derogatory sexual word or posting pornography) and sexist comments (such as telling anti-female jokes or making comments that women do not belong in management)."[38] Almost 60% of women reported having experienced gender harassment in surveys using probability samples.[39]

Most research on sexual harassment focuses only on women, but the federal government's Merit Systems Protection Board surveyed all federal employees in 1980, 1987, and 1994. It asked whether respondents had experienced unwanted sexual attention or sexual coercion. Forty-two percent of women and 15% of men responded in the affirmative in 1981, as did 42% of women and 14% of men in 1988, and 44% of women and 19% of men in 1994.[40] Surveys of LGBT workers also show high rates of sexual harassment. Using probability samples, researchers found that 35% of openly LGBT workers reported harassment in one study.[41] In another study in 2009, 58% of openly LGBT individuals reported that they heard derogatory comments about their sexual orientation and gender identity in their workplace. Research on transgender individuals also reveals particularly high rates of harassment.[42]

When one considers that sexual harassment occurs everywhere, one understands that the behavior at the workplace is just one symptom of a larger systemic problem, a social dis-

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36. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 30, at 8.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* The report also discussed current research on harassment based on race, ethnicity, disability, age, and religion, as well as "intersectional harassment," meaning harassment based on two or more protected characteristics. *Id.* at 11–14.

ease. A recent study by the National Opinion Research Center (NORC) at the University of Chicago found that most female respondents have experienced sexual harassment in a public place. Often the misconduct occurs in "a street, store or restaurant . . . (68% of women and 23% of men)." When researchers "include mass transit and nightlife venues, that statistic for sexual harassment in all public spaces (or, street harassment) rises to 71% women and 28% men."[43] The study also notes that "81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime."[44]

Researchers also asked about reporting and accusations finding that, first, very few people confront their harassers or otherwise report the behavior.[45] This suggests that what we are seeing reported at the workplace is only a small fraction of a much greater problem. Second, the evidence suggests that very few people falsely report sexual harassment: "Only 1% of those who self-reported that they have never committed sexual harassment or assault said they were told by an individual that they had done so."[46] In other studies, researchers found that false reports of sexual assault accounted for only 2–8% of all reports.[47] In other words, 92–98% of reports are verified or

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43. NATIONAL OPINION RESEARCH CENTER, MEASURING #METOO: STREET HARASSMENT FACT SHEET - 2019 1 (2019), http://www.stopstreetharassment.org/wp-content/uploads/2012/08/Street-Harassment-Factsheet-2019-Study.pdf.

44. NATIONAL OPINION RESEARCH CENTER, MEASURING #METOO: EXECUTIVE SUMMARY 1 (2019), http://www.stopstreetharassment.org/wp-content/uploads/2012/08/Executive-Summary-2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf.

45. *See* UC SAN DIEGO CENTER ON GENDER EQUITY & HEALTH & STOP STREET HARASSMENT, MEASURING #METOO: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 12 (2019) http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf (reporting that even though 81% of women and 43% of men said they had experienced "sexual harassment, only 2% of men and 1% of women said they had been told that they sexually harassed or assaulted someone").

46. *Id.*

47. Kimberly A. Lonsway, Joanne Archambault & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault,* THE NAT'L CTR. FOR THE PROSECUTION OF VIOLENCE AGAINST WOMEN (2009), https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf.

substantiated. Until companies start tracking and verifying complaints, we cannot know what the false report rates are in workplace settings. If they are anything like the rates for sexual assault, they are incredibly low.

2. *Costs and Effects*

Research has shown that sex-based harassment has significant negative psychological, physical, and financial effects. Workplace sexual harassment undermines an individual's workplace authority, reduces targets to sexual objects, and reinforces sexist stereotypes about appropriate gender behavior.[48] Sexual harassment can result in anger, harm to self-esteem and self-worth, reduced job satisfaction, increased absenteeism and work withdrawal, and a deterioration of co-worker relationships.[49]

Psychological effects of sexual harassment can include depression, anxiety, stress, and even Post Traumatic Stress Disorder (PTSD), which may include flashbacks and panic attacks. These symptoms can lead to substance abuse problems and attempted suicide.[50] Physical effects include high blood pressure, stomach problems, headaches, and other stress-related ailments.[51] The stress can impact cardiovascular function, autoimmune diseases, and metabolic function and may lead to hair loss, hives, loss of appetite, weight gain or loss, nausea, sleeplessness, lethargy, inability to concentrate, neck pain, and muscle aches.[52]

Many women who experience sexual harassment in their twenties and early thirties suffer financially during this formative career stage. Lost promotions, abandoned jobs, and other consequences can depress lifelong earnings. Moreover, sexual

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48. Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333, 333 (2017).

49. *Id.* at 335.

50. Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 89 (2011); Margaret S. Stockdale, T.K. Logan & Rebecca Weston, *Sexual Harassment and Posttraumatic Stress Disorder: Damages Beyond Prior Abuse*, 33 L. & HUM. BEHAV. 405 (2009).

51. *See, e.g.*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 30, at 20–21 nn.84–85.

52. *See, e.g.*, *id.* Dr. Drobac also recalls seeing these physical and psychological symptoms in her own clients during her years of law practice.

harassment affects not only directly targeted women, but also other workers in the hostile environment.[53]

Arguably, corporations suffer on a macro-scale some of what targeted employees experience on a micro-level. To date, robust and specific data concerning the actual financial impact of sexual harassment has been difficult to find. A 2005 estimate of the costs of sexual harassment caused by absenteeism, lost productivity, and employee turnover exceeded $6 million per Fortune 500 company.[54] Additional costs can include increased insurance costs, litigation expenses, and employee recruitment cost increases because of terminations and the difficulty in attracting talented workers to a hostile environment.[55] For example, in the first quarter of 2017, Twenty-First Century Fox paid $45 million "to settle allegations of sexual harassment."[56] In the same year, it received a $90 million insurance payment for investor claims arising from the sexual harassment scandal at Fox News."[57] A published 2016–17 time-

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53. McLaughlin, Uggen & Blackstone, *supra* note 48, at 352.

54. Christine M. Pearson & Christine L. Porath, *On the Nature, Consequences and Remedies of Workplace Incivility: No time for "nice"? Think again*, 19 ACA. MGT. EXEC. 7–18 (2005), http://www.ulib.iupui.edu/cgi-bin/proxy.pl?url=https://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=15841946&site=eds-live; A. THEODORE RIZZO ET AL., INT'L. CTR. FOR RESEARCH ON WOMEN, THE COSTS OF SEX-BASED HARASSMENT TO BUSINESSES: AN IN-DEPTH LOOK AT THE WORKPLACE 1 (2018), https://www.icrw.org/wp-content/uploads/2018/08/ICRW_SBHDonorBrief_v4_WebReady.pdf.

55. RIZZO ET AL., *supra* note 54, at 7.

56. Twenty-First Century Fox, Quarterly Report (Form 10-Q) n.11 (May 10, 2017). The note reads:

> Other [costs] for the three and nine months ended March 31, 2017 included approximately $10 million and $45 million, respectively, of costs related to settlements of pending and potential litigations following the July 2016 resignation of the Chairman and CEO of Fox News Channel after a public complaint was filed containing allegations of sexual harassment.

Id.; see also Eliza Anyangwe, *Sexual Harassment: The Hidden Costs for Employers*, FIN. TIMES (Mar. 14, 2018), https://www.ft.com/content/af64eea0-207f-11e8-8d6c-a1920d9e946f; *see generally* RIZZO ET AL., *supra* note 54.

57. Twenty-First Century Fox, Quarterly Report (Form 10-Q) n.9 (Feb. 7, 2018). This section of the Report states:

> On November 20, 2017, a stockholder of the Company filed a derivative action . . . captioned *City of Monroe Employees' Retirement System* v. *Rupert Murdoch, et al.*, C.A. No. 2017-0833-AGB. The lawsuit named as defendants all directors of the Company and the Estate of Roger Ailes (the "Ailes Estate"), and named the Company as a

line of sexual harassment allegations, suits, and departures at Fox News—including the resignations of Roger Ailes and Bill O'Reilly—highlights the damage caused.[58]

Of course, brand and reputational costs depend upon the industry but might include the withdrawal of advertising dollars, protests, boycotts, loss of investment capital (including human capital), and loss of other lucrative business relationships.[59] For example, a growing number of companies have faced boycotts and social media campaigns designed to challenge sexist corporate policies and practices.[60] Senator Eliza-

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> nominal defendant. The plaintiff alleged that the directors of the Company and Rupert Murdoch as a purported controlling stockholder breached their fiduciary duties by, among other things, failing to properly oversee the work environment at Fox News. The plaintiff also brought claims of breach of fiduciary duty and unjust enrichment against the Ailes Estate.
>
> On November 20, 2017, the parties reached an agreement to settle the lawsuit and filed a Stipulation and Agreement of Settlement, Compromise, and Release with the Court (the "Settlement Agreement"). Pursuant to the terms of the Settlement Agreement, the parties agreed that the director defendants and the Ailes Estate would cause their insurers to make a payment in the amount of $90 million to the Company, less any attorneys' fees and expenses awarded by the Court to the plaintiff's counsel. In addition to the payment to the Company, the Settlement Agreement provides that the Company shall put in place governance and compliance enhancements, including the creation of the Fox News Workplace Professionalism and Inclusion Council, as set forth in the Non-Monetary Relief agreement agreed to by the parties. These governance and compliance enhancements shall remain in effect for five years. On November 28, 2017, the Court issued a Scheduling Order which, among other things, set the settlement hearing for February 9, 2018, and approved the forms of the notices to stockholders, which were disseminated in accordance with the Scheduling Order.

Id. This section makes clear that the governance and compliance enhancements remain in effect for only five years. *See also* Anyangwe, *supra* note 56.

58. Samantha Cooney, *A Timeline of Sexual Harassment Allegations at Fox News*, TIME (May 2, 2017), https://time.com/4757734/timeline-sexual-harassment-allegations-fox-news/.

59. RIZZO ET AL., *supra* note 54, at 8.

60. *See, e.g.*, Sam Levin, *Uber's Sexual Harassment Case Shines Light on a Startup's Culture of Defiance*, THE GUARDIAN (Feb. 21, 2017), https://www.theguardian.com/technology/2017/feb/21/uber-sexual-harassment-discrimination-scandal (explaining that Uber "is facing a widespread backlash [including a boycott] after a former engineer went public with her story

beth Warren announced in July 2019 that she would join the #CancelTerranea boycott. Terranea is one of California's largest hospitality employers that "has attracted negative press for its handling of claims of sexual harassment."[61] Analysts rarely quantify these losses of capital and relationships, however, and reported numbers for such relationship costs do not appear to exist across time for specific industries or for the U.S. economy as a whole.

A new study by Shiu-Yik Au, Ming Dong, and Andréanne Tremblay analyzed more than 1.65 million job reviews from Glassdoor and Indeed concerning reported instances of sexual harassment at more than 1,100 firms.[62] Professor Au and his team matched an annualized sexual harassment incidence rate to corporate profitability and stock market performance. Companies with the worst sexual harassment issues underperformed the stock market by an average of 19.9% per year, represent[ing] an average loss in market capitalization of US$2.1 billion per firm."[63] Their research spans from 2011 to

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of sexual harassment and discrimination by management and repeated rebuffs from the HR department, adding fuel to the #DeleteUber campaign that went viral last month").

61. Roxy Szal, *Elizabeth Warren Joins Growing #MeToo Boycott of Terranea Resort*, Ms. (July 25, 2019), https://msmagazine.com/2019/07/25/elizabeth-warren-joins-growing-metoo-boycott-of-terranea-resort/.

62. On its website, Glassdoor explains, "Glassdoor is one of the world's largest job and recruiting sites. Built on the foundation of increasing workplace transparency, Glassdoor offers millions of the latest job listings, combined with a growing database of company reviews, CEO approval ratings, salary reports, interview reviews and questions, benefits reviews, office photos and more." *About Us: Our Mission*, GLASSDOOR, https://www.glassdoor.com/about-us/ (last visited Nov. 29, 2019). In 2018, Indeed's parent company Recruit Holdings Co., Ltd. acquired Glassdoor. *See* Press Release, Glassdoor, Glassdoor To Be Acquired By Recruit Holdings For $1.2 Billion (May 8, 2018), https://www.prnewswire.com/news-releases/glassdoor-to-be-acquired-by-recruit-holdings-for-1-2-billion-300645079.html.

63. Shiu-Yik Au, *The Real Cost of Workplace Sexual Harassment to Businesses*, CONVERSATION (Sept. 2, 2019, 12:37 PM) (citing Shiu-Yik Au et al., *How Much Does Workplace Sexual Harassment Hurt Firm Value?* 19 (Aug. 19, 2020), https://ssrn.com/abstract=3437444.), https://theconversation.com/the-real-cost-of-workplace-sexual-harassment-to-businesses-122107 ("The market capitalization of the 101 firms we identified as the worst sexual harassers had a combined market capitalization of approximately US$1.1 trillion in 2017 dollars) [sic]. This translates to a total loss of US$212.2 billion per year (US$1.1 trillion multiplied by 19.9 per cent), or an average annual dollar loss of US$2.1 billion per firm.").

2017, thus predating the #MeToo movement, and demonstrates that sexual harassment has been a severe cost to companies since long before the movement.[64]

Seeking such cost data in January 2018, Democratic senators, led by Senator Kirsten Gillibrand, asked the Labor Department about the economic impact of sexual harassment.[65] Still headed by Alex Acosta (who resigned in July 2019 after news of his 2008 secret plea deal with accused child sex-trafficker Jeffery Epstein),[66] the Labor Department had no ready statistics. In April 2018, the Labor Department's Bureau of Labor Statistics (BLS) declined to do an investigation:

> The [Labor] Department takes workplace sexual harassment very seriously. . . . However, collecting this information would be complex and costly. . . .
>
> Questions about workplace harassment are very sensitive in nature. Employers may have difficulty providing the data you are requesting, as such information may not always be reported by victims and the release of such information may be subject to privacy or other restrictions.[67]

Apparently, an investigation into the financial impact of sex-based misconduct was too difficult for the Labor Department because of *the lack of reporting*.

In their reply to the Labor Department and the BLS, the senators stated, "[w]hile your letter indicated the Department takes workplace sexual harassment 'very seriously,' your lack of commitment to collect this data undermines your assur-

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64. *Id.*

65. Joe Davidson, *#MeToo, #NoMore, Now #HowMuch? What is the Cost of Sexual Harassment?*, WASH. POST (June 8, 2018, 7:00 AM), https://www.washingtonpost.com/news/powerpost/wp/2018/06/08/senators-continue-search-for-sexual-harassment-economic-data-after-labor-dept-refuses-to-help/?utm_term=.b5e7a8501d5e.

66. *See* Annie Karni et al., *Acosta to Resign as Labor Secretary Over Jeffrey Epstein Plea Deal*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html.

67. Letter from William J. Wiatrowski, Acting Comm'r, Bureau of Lab. Stats., to Hon. Kirsten Gillibrand, U.S. Senate (Apr. 11, 2018), https://www.documentcloud.org/documents/4498008-Sexhar041118-DOL-Response.html.

ances."[68] They also referred the Labor Department to a U.S. Merit Systems Protection Board (MSPB) 1994 estimate stating "that over the course of two years, sexual harassment in the federal workforce cost the government a total of $327.1 million as a result of job turnover, sick leave, and decreased productivity. . . . Surely the government's capacity to collect data has only become more sophisticated" since 1994.[69] In its 2018 coverage of this exchange, *The Washington Post* noted, "[t]hat $327.1 million would be worth $556 million today, according to a BLS inflation calculator."[70]

Senator Gillibrand and her team next asked the General Accounting Office (GAO), a nonpartisan agency that works for Congress, to investigate the question.[71] Dr. Drobac contacted Senator Gillibrand's office and received the following response: "Thanks for reaching out. We are working with GAO on a report, but we can't discus [sic] more at the moment."[72] While we eagerly anticipate more from Senator Gillibrand and the GAO, we rely on confirmation from researchers such as Professor Au and his team that sexual harassment costs U.S. businesses and government employers *billions* of dollars and much more over time. Whatever the actual sum, we suspect that this figure is significant—a "material" cost to companies.

Dr. Drobac hypothesized that one possible explanation for the dearth of information regarding the costs of sexual harassment, noted by the Labor Department, rests with inadequate corporate disclosures. To test this hypothesis, she recruited Dr. Russell to investigate whether, for a specific period, companies disclose sexual harassment in their financial reports.

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68. Letter from Hon. Kirsten Gillibrand et al., U.S. Senate, to Hon. R. Alexander Acosta, Sec'y of Lab., Dep't of Lab., and William J. Wiatrowski, Acting Comm'r, Bureau of Lab. Stats. (Apr. 30, 2018), https://www.help.senate.gov/imo/media/doc/Gillibrand%20Murray%20Letter%20BLS%20043018.pdf.

69. *Id.* (citing U.S. MERIT SYS. PROT. BD., *supra* note 35, at 26).

70. Davidson, *supra* note 65.

71. *Id.*

72. E-mail from Jasmin Palomares, Legis. Aide for Sen. Kirsten Gillibrand, to author (July 19, 2019) (on file with authors).

II.
Corporate Reporting of Sexual Harassment and its Study

Corporate disclosure of sexual harassment makes sense, for reasons beyond cost and prevalence data collection. Such disclosure serves investors, customers, analysts, and other users of financial reports. A recent rise in shareholder derivative suits regarding the failure to disclose such materially adverse financial details highlights the need for such information in required SEC reports (discussed in Part V below). For example, the disclosure of sexual harassment can reveal negative managerial qualities such as low integrity, selfishness, and abuse of power. Such negative managerial qualities may correlate with other problems in management performance and firm value.[73]

The relationship between corporate disclosure and the remediation of poor management and corporate culture has long been recognized. Almost forty years ago, Professor Marc Steinberg suggested that "there is little question that disclosure has a substantial impact on the normative conduct of corporations."[74] More recently, DLA Piper issued a cybersecurity law alert and recommended the disclosure of all material facts regarding a cybersecurity incident. Partner Jim Halpert explained, "In the event of a cybersecurity incident, the SEC will view favorably a law-abiding business environment. Establishing proper documentation, controls and training are first steps in establishing a compliant corporate culture."[75] The disclosure of sexual harassment might similarly shift corporate culture and lower the tolerance for sexual harassment.

Additionally, corporate disclosure and early remediation of sexual harassment charges could help to reduce litigation and some of its associated costs. Concern that sexual harass-

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73. Brandon N. Cline, Ralph A. Walking & Adam S. Yore, *The Consequences of Managerial Indiscretions: Sex, Lies, and Firm Value*, 127 J. Fin. Econ. 389, 391–92 (2018).

74. Marc I. Steinberg, Corporate Internal Affairs: A Corporate and Securities Law Perspective 29 (1983).

75. Jim Halpert, *SEC Advises Companies to Publicly Disclose Cybersecurity Risks and Prohibit Insider Trading Around Cybersecurity Incidents: Action Steps for Public Companies*, DLA Piper (Feb. 26, 2018), https://www.dlapiper.com/en/us/insights/publications/2018/02/sec-advises-companies-to-publicly-disclose-cybersecurity-risks/.

ment complaints will result in litigation leads to expensive attempts to avoid litigation. More specifically, due to the potential for expensive litigation and resulting negative publicity, some companies pay large compensation settlements to the victims of sexual harassment in the workplace to keep them quiet. They may also offer expensive "golden handshakes" to alleged harassers to rid the organization of these offending executives and employees.[76] "FOX News Chairman Roger Ailes was reported to have received an exit package worth $40 million after being ousted from his job amid sexual harassment claims."[77] Many of these payments—to complainants and the accused perpetrators—are hidden by NDAs. If more corporations disclosed sexual harassment, they might not only lessen financial exposure, but might also deter future cases and the stigma of remediation after a complaint against a rogue employee.

The relationship between disclosure and the reduction of costs associated with sexual harassment begs the question of whether corporations are already making such disclosures. A quick review reveals that no one has rigorously studied SEC disclosures regarding sexual harassment and its costs. Therefore, we undertook such an analysis and present Dr. Russell's data in Part IV below.

A. *Literature Review*

Our research regarding corporate disclosures furthers several well-established streams of literature. First, we examine sexual harassment and its voluntary disclosure by companies. Second, we explore mandatory company disclosure of material information and contingent liabilities. Third, our research further relates to the importance of reputation and trust in economic exchanges.[78]

Companies volunteer a large volume of information. The economic benefits of voluntary disclosure include lower information asymmetry, lower price volatility, and the convergence

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76. *See, e.g.*, James Farrell, *Google Fired 48 People Over Sexual Harassment, Some Allegedly With Golden Handshakes*, SILICON ANGLE (Oct. 25, 2018), https://siliconangle.com/2018/10/25/google-let-48-people-go-sexual-harassment-allegedly-handsome-golden-handshake/.

77. Peer Fiss, *A Short History of Golden Parachutes*, HARV. BUS. REV. (Oct. 3, 2016), https://hbr.org/2016/10/a-short-history-of-golden-parachutes.

78. Cline, Walking & Yore, *supra* note 73, at 392.

of investor beliefs.[79] Professors Goshen and Parchomovsky explain:

> Mandatory disclosure duties reduce the cost of searching for information. Absent mandatory disclosure duties, information traders would engage in duplicative efforts to uncover nonpublic information. The cost of these efforts would be extremely high because information traders, as outsiders, lack access to the management of the firm. Disclosure duties pass these costs to the individual firm. For the firm, the cost of obtaining firm-specific information is rather minimal; indeed, it is a mere by-product of managing the firm. Moreover, securities regulation mandates a specific format for disclosure, which further reduces the costs of analyzing information and comparing it to data provided by other firms.[80]

This passage also supports the Labor Department's contention to Senator Gillibrand and her colleagues that it would be difficult and expensive to report on the economic impact of sexual harassment because of the dearth of corporate disclosures. While mandatory reporting would reduce these costs, one could argue that the Labor Department should still provide such statistics as part of its obvious role in the oversight of the American workplace.

Companies also have incentives to disclose bad news. The proactive revelation of bad earnings news can reduce the litigation risk from shareholder suits.[81] In crisis communication, corporate disclosure of negative events before third party disclosure is known as stealing thunder.[82] However, most studies

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79. Baruch Lev, *Toward a Theory of Equitable and Efficient Accounting Policy*, 63 ACCT. REV. 1, 1–19 (1988); Woon-Oh Jung & Young K. Kwon, *Disclosure When the Market Is Unsure of Information Endowment by Managers*, 26 J. ACCT. RES. 146, 146–47 (1988); Paul M. Healy, Amy P. Hutton & Krishna G. Palepu, *Stock Performance and Intermediation Changes Surrounding Sustained Increases in Disclosure*, 16 CONTEMP. ACCT. RES. 485, 511 (1999).

80. Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 738 (2006) (citation omitted).

81. Douglas J. Skinner, *Why Firms Voluntarily Disclose Bad News*, 32 J. ACCT. RES. 38, 39 (1994).

82. An-Sofie Claeys, Verolien Cauberghe & Mario Pandelaere, *Is Old News No News? The Impact of Self-Disclosure by Organizations in Crisis*, 69 J. BUS. RES., 3963, 3964 (2016).

indicate that organizations hesitate to reveal negative events out of fear of drawing unnecessary attention to the crisis, and potential legal liability.[83] Professor Cristi Gleason and Professor Lillian Mills find that only 27% of companies undergoing an Internal Revenue Service tax audit make any disclosure of a contingent tax liability.[84] Associate Professor Jason Schloetzer et al. find that, among 239 material negative economic events including catastrophes and accidents, only 40% of firms issue disclosures. Further, these firms are four times less likely to disclose negative economic events if they believe they might be considered responsible for the event.[85]

Schloetzer et al. highlight that litigation risks exist with respect to the negative economic event itself and to its disclosure. In particular, the company disclosure of bad news may assist plaintiffs, including investors, to plead a claim or submit evidence against the company.[86] The company disclosure of a contingent litigation liability could be worse as the liability may represent the company's estimate of potential damages multiplied by the likelihood that the litigation will succeed.[87] Such information could be very useful to plaintiffs. In addition to litigation risks, the disclosure of negative news has reputational risks to a wider range of company stakeholders such as employees and customers.

At the individual level, managers have incentives to withhold bad news to avoid career problems. Career problems include lower management compensation, termination of employment, and reduced future employment opportunities.[88] In particular, bad news of personal managerial indiscretions has labor market consequences and affects management trust and reputation.[89] In addition, the companies of executives accused of indiscretions experience significant wealth deterioration

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83. *Id.*

84. Cristi A. Gleason & Lillian F. Mills, *Materiality and Contingent Tax Liability Reporting*, 77 ACCT. REV. 317, 318–19 (2002).

85. Jason D. Schloetzer et al., *Blame Attribution and Disclosure Propensity*, ACCT. REV. (unpublished manuscript at 3) (on file with authors).

86. *Id.* at 7–9.

87. Linda Allen, *Accounting for Contingent Litigation Liabilities: What You Disclose Can Be Used Against You*, 12 VA. L. & BUS. REV. 321, 325 (2018).

88. S.P. Kothari, Susan Shu & Peter D. Wysocki, *Do Managers Withhold Bad News?*, 47 J. ACCT. RSCH. 241, 242 (2009).

89. Cline, Walking & Yore, *supra* note 73, at 392.

and loss of business partners.[90] Indiscretions are also associated with an increased probability of unrelated shareholder-initiated lawsuits, and SEC investigations.[91]

Accordingly, managers have strong incentives to withhold sexual harassment claims and hope subsequent events favor them before any third-party disclosure of the negative news. In addition, managers have opportunities to hide sexual harassment claims by enforcing arbitration or settling claims with NDAs. However, once a plaintiff initiates litigation, companies increase disclosure. Typically, increased media coverage and reputational concerns trigger the increased disclosure.[92]

B. *Materiality*

Management incentives to withhold bad news contrast with conservative accounting recognition rules and company reporting obligations.[93] Generally accepted accounting principles (GAAP) and SEC rules mandate that companies disclose material events. Nevertheless, which events are material and require disclosure depend on the definition of materiality. The Financial Accounting Standards Board (FASB) Concepts Statement 8 states that the omission or misstatement of an item in a financial report is material if, in light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.[94] The SEC in defining materiality refers to case law, GAAP, and FASB Concept State-

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90. *Id.* at 389.

91. *Id.*

92. Mary Brooke Billings, Matthew C. Cedergren & Svenja Dube, Does Litigation Change Managers' Beliefs about the Value of Voluntarily Disclosing Bad News? 5 (May 17, 2019) (unpublished manuscript) (on file with authors).

93. Kothari, Shu & Wysocki, *supra* note 88, at 243.

94. *Concepts Statements*, FIN. ACCT. STANDARDS BD., https://www.fasb.org/jsp/FASB/Page/PreCodSectionPage&cid=1176156317989 (last visited Oct. 19, 2020); *Concepts Statement No. 8*, FIN. ACCT. STANDARDS BD. (Aug. 2018), https://www.fasb.org/cs/ContentServer?c=document_C&cid=1176171111398&d=&pagename=FASB%2FDocument_C%2FDocumentPage; the exact language reads:

> The omission or misstatement of an item in a financial report is material if, in light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasona-

ments.[95] The FASB has long emphasized that materiality cannot be reduced to a numerical formula—materiality judgments require interaction of quantitative and qualitative considerations. Hence, companies report material events with some discretion.

Despite the obligation to disclose material events, we still expected companies to withhold sexual harassment claims to protect reputations and avoid litigation. Sexual harassment is often seen as the responsibility of an employer, making a company even less likely to disclose a claim.[96]

C. *Contingent Liabilities*

Sexual harassment claims can be disclosed and studied as contingent liabilities. Under FASB Accounting Standards Codification *(ASC) 450-20 Contingencies*, a company accrues and recognizes a probable loss if it is probable that a liability has been incurred, and the amount of loss can be reasonably estimated.[97] When estimating the amount of the loss, corporate personnel need not necessarily identify a single amount—a range of amounts is sufficient to disclose a contingent loss. When a loss from a contingency is probable or reasonably possible and no estimate is possible, then reporting personnel also disclose the facts and circumstances of the possible loss.[98] However, if the loss is remote, then regulations excuse accrual or disclosure of the risk of loss.[99]

Corporate personnel must use their judgment to classify the likelihood of future events as probable, reasonably possible, or remote. To complicate the assessment of likelihood, researchers find management inconsistencies in the interpretation of the terms probable, reasonably possible, remote, and

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ble person relying upon the report would have been changed or influenced by the inclusion or correction of the item.

Id. ¶ QC11.

95. SEC Staff Accounting Bulletin No. 99, 17 CFR 211 (Aug. 12, 1999).

96. Schloetzer et al., *supra* note 85, at 3.

97. FASB Accounting Standards Codification, FIN. ACCT. STANDARDS BD., at ¶ 450-20-25-2, https://asc.fasb.org/section&trid=2127173.

98. *Id.* ¶ 450-20-50-3, 450-20-50-4.

99. *Id.* ¶ 450-20-50-3.

also likely and unlikely.[100] Nevertheless, in company litigation, unless the company attorney indicates that the risk of loss is remote or slight, or the loss would be immaterial to the company, legal regulations mandate disclosure in the financial statements. If a figure is unknown or unknowable, then personnel report the contingency in the footnotes of the financial statements.[101]

Early research on Statements of Financial Accounting Standards (SFAS) 5: Accounting for Contingencies confirms that companies limit litigation disclosures.[102] Little et al. identified 103 hazardous waste lawsuits, but only 53 were disclosed in financial reports.[103] Further, for disclosing companies, limited information exists on the estimated loss amount.[104] In practice, financial report disclosure is so limited that financial report users have difficulty drawing valid conclusions about possible losses.[105] Despite the obligation to report contingent losses, we expected companies to disclose limited information on sexual harassment litigation and any contingent losses.

D. *Hypotheses*

The foregoing discussion, combined with the information concerning the prevalence and costs of sexual harassment, lead to the predicted outcomes of our study. First, most companies do not disclose sexual harassment claims. Second, the companies which disclose sexual harassment claims do not disclose the resolution of the claims.

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100. Gary M. Entwistle et al., *The Incomplete Disclosure of Litigation-Type Contingencies: Contemporary Canadian Evidence*, 3 J. Int'l Acct., Auditing & Tax'n 169, 171 (1994).

101. *See generally* Joanne M. Flood, Wiley GAAP 2017: Interpretation and Application of Generally Accepted Accounting Principles 478 (2017).

102. Robert D. Fesler & J. Larry Hagler, *Litigation Disclosures under SFAS No. 5: A Study of Actual Cases*, Acct. Horizons, Mar. 1989, at 10, 19; Edward B. Deakin, *Accounting for Contingencies: The Pennzoil-Texaco Case*, Acct. Horizons, Mar. 1989, at 21.

103. Philip Little et al., *Hazardous Waste Lawsuits, Financial Disclosure, and Investors' Interests*, 10 J. Acct., Auditing & Fin. 383, 388 (1995).

104. Karen M. Hennes, *Disclosure of Contingent Legal Liabilities*, 33 J. Acct. & Pub. Pol'y 32, 47 (2014).

105. *Id.* at 33.

III.
Empirical Evidence Regarding Corporate Reporting of Sexual Harassment and its Associated Financial Costs

Dr. Russell's investigation examines company disclosure of sexual harassment and claim resolution. Further, it notes companies that do not report sexual harassment in the face of litigation and media reports of harassment. The next sections present Dr. Russell's research and its contextual interpretation by Dr. Drobac.

This Article contributes to the literature concerning the disclosure and costs of sexual harassment in several ways. As noted, Dr. Russell's data comprise the first known research into corporate disclosure of sexual harassment despite the existence of sexual harassment in the workplace for centuries.[106] This study is also the first research into the financial reporting of sexual harassment. Many other studies have reviewed EEOC complaint and court litigation statistics and spotlight how much sexual harassment cases eventually cost companies at resolution.[107] While those reviews focus on the ex post consequences of sexual harassment cases, this research and our analysis focus on how companies approach potential problems.

We examine the gap between the existence and the reporting of sexual harassment by complainants and employers. Until recently, the number of company disclosures of sexual harassment has been small and further restricted by NDAs between companies and complainants. A recent study concerning the prevalence of mandatory arbitration, which is usually confidential, found that "[m]ore than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures."[108] Because of the increasing number of cases companies force into confidential mandatory arbitration, researchers

106. Although the term "sexual harassment" was coined in the late 1970's, the behaviors that constitute sexual harassment have existed for centuries.

107. *See, e.g.*, U.S. Equal Emp't Opportunity Comm'n, *supra* note 30, at 18–20.

108. Alexander J.S. Colvin, Econ. Pol'y Inst., The Growing Use of Mandatory Arbitration 2 (2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

and organizations such as the Labor Department and the GAO arguably have even greater difficulty in collecting information regarding the costs of corporate sexual misconduct. Mandatory or robust voluntary reporting could change the trend and provide improved transparency and understanding of this problem.

The evidence reveals, not surprisingly, that most companies avoid the discussion of problems and costs associated with sexual harassment. The disclosures that do occur tend to lack quantitative or qualitative detail. Further, a number of reported perpetrators of corporate sexual harassment are CEOs.[109] This detail suggests a culture of unethical and unlawful behavior at the top, which likely infects the rest of the corporation. Hence, the results are consistent with a tendency of companies to conceal sexual harassment claims. Even with some company disclosures, the evidence exposes a lack of transparency in reporting sexual harassment and in its resolution.

A. *Research Data Sample*

We study companies listed on a United States stock exchange that filed financial reports with the SEC's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR). Hence, we exclude private companies and other entities with no financial reporting obligations.[110] The sample period of sexual harassment disclosures covers a five-year period from January 2014 to December 2018.

We collect a sample of companies based on several criteria. First, we identify companies that disclose sexual harassment in their financial reports filed with EDGAR. Second, we

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109. *In re* Signet Jewelers Ltd. Sec. Litig., No. 16 Civ. 6728, 2018 WL 6167889, at *5 (S.D.N.Y. Nov. 26, 2018); Twenty-First Century Fox, Inc., Quarterly Report (Form 10-Q) 19 (May 10, 2017); Wynn Resorts, Ltd., Annual Report (Form 10-K) 3 (Feb. 28, 2018); Jeffrey A. Trachtenberg, *Barnes & Noble Details Why Former CEO Demos Parneros Was Fired*, WALL ST. J. (Oct. 30, 2018), https://www.wsj.com/articles/barnes-noble-details-why-former-ceo-demos-parneros-was-fired-1540935642; Steven Zeitchik, *CBS Board to Investigate Chief Executive Leslie Moonves over Sexual Misconduct Allegations*, WASH. POST (July 27, 2018), https://www.washingtonpost.com/business/2018/07/27/cbs-board-investigate-chief-executive-leslie-moonves-over-forthcoming-sexual-misconduct-allegations/.

110. As noted, we think future studies and calls for disclosure should include other organizational forms.

identify companies from media reports of corporate sexual harassment. Third, we identify companies defending sexual harassment lawsuits in the U.S. We source the lawsuits from the Bloomberg BNA company, law reports, and media reports.

To identify companies disclosing sexual harassment, we use an EDGAR full text search for sexual harassment in filed financial reports. To identify companies not disclosing sexual harassment claims, we rely first on media and law reports of sexual harassment claims. Then, we test for company non-disclosure by examining company financial reports issued 365 days around an external sexual harassment disclosure. The 365-day window contains the issue of at least one financial report, either an annual 10-K[111] or quarterly 10-Q report.[112] In general, the financial reporting period examined is concurrent with sexual harassment litigation or the settlement of a sexual harassment case. In particular, we search financial reports for disclosures of sexual harassment in contingent liabilities and litigation disclosures.

Generally, our sample of non-disclosing companies includes companies defending sexual harassment cases that have not ended in summary dismissal of the claim by a court in favor of the company. Hence, these sexual harassment claims are more likely to result in an award of damages and high legal fees. Additionally, they are more likely to influence users of financial reports. Non-disclosing companies include parent companies that fail to disclose sexual harassment claims in subsidiary companies. Finally, ours is a preliminary and small study that begins what we imagine will be a much more extensive academic inquiry.

B. *Research Design*

The initial purpose of this research is to identify whether companies financially report and disclose sexual harassment. If they do, we also discover whether companies quantify a lia-

111. The SEC requires that every publicly traded company file a Form 10-K report about its financial health and performance. 15 U.S.C. §§ 78m, 78o(d) (2018). Usually, this report looks different from the more graphically attractive annual report that a company sends to shareholders before an annual meeting. *See* Will Kenton, *10-K*, INVESTOPEDIA (Mar. 16, 2020), https://www.investopedia.com/terms/1/10-k.asp.

112. U.S. Sec. & Exch. Comm'n, *Fast Answers: Form 10-Q* (Sept. 2, 2011), https://www.sec.gov/fast-answers/answersform10qhtm.html.

bility, contingent liability, or compensation payment. Further, we examine if any disclosures are revised in later annual reports, and whether the resolution of the claim is disclosed.

The event date of sexual harassment for our search of financial reports is the first date that a third party or the company reports the event. We classify several properties of the disclosure with the following variables:

- *Estimates* is the amount or company estimate of the liability or compensation payment;
- *Inestimable* is if the disclosure is of a loss that the company cannot estimate;
- *Defense* is if the company states it has a defense to the claim;
- *Settlement* is if the company states the claim has been settled;
- *Material* is if the company indicates that the claim could be material;
- *Remote* is if the company views the claim as a remote possibility of loss;
- *Litigation details* indicates if the company disclosed details of the claim such as jurisdiction, plaintiff, or court;
- *Revised disclosure* indicates if the company revised the disclosure of sexual harassment; and
- *Resolution details* indicates if the company disclosed any details of the claims' resolution.

C. *Results*

For the period 2014–2018, Dr. Russell found 119 company disclosures in SEC filings of sexual harassment claims by 23 publicly listed companies. Forty-five percent of the discovered sexual harassment cases were not reported, or 98 company non-disclosures by 73 companies. Companies disclosing sexual harassment claims sometimes reported different sexual harassment claims by targets or claims by multiple targets. More often, companies disclosed sexual harassment claims over a period of time in multiple financial reports. In contrast, non-disclosures are an omission and can only be counted once. Hypothetically, if these sexual harassment claims had been disclosed by the company then the claims would likely have been disclosed multiple times. From Table 1, the median

number of company disclosures is four. Hence, the number of non-disclosures is likely to be closer to 392 than 98. This estimated increase in non-disclosures is consistent with the relative numbers of disclosing and non-disclosing companies. Focusing on the companies, we find three times more companies do not disclose sexual harassment claims than do disclose. Hence, companies withhold disclosure of sexual harassment claims in the same way as they hide negative events.[113]

Table 1 details that companies disclosed sexual harassment in multiple financial reports. Disclosure often occurred over a number of financial periods and years, in part because litigation is a time-consuming, lengthy process. The range of sexual harassment disclosures is from 1 to 13 with an average of 5.4 disclosures. The higher frequency disclosures are associated with multiple claims against the company. The 13 Twenty-First Century Fox, Inc. harassment disclosures are significantly related to the ex-CEO of Fox News, Roger Ailes. The 11 Scores Holding Co. Inc. harassment disclosures relate to long-running claims by a cocktail waitress and a receptionist that were vigorously defended by the company. The numerous disclosures of Allergan plc (13), ABM Industries Inc. (10), and Bloomin' Brands, Inc. (10) were generally uninformative for investors despite their longevity. Part IV below details the eight Signet Jewellers Ltd. harassment disclosures.

113. Schloetzer et al., *supra* note 85, at 3.

TABLE 1: COMPANY DISCLOSURE FREQUENCY 2014–2018

Company	**Disclosure frequency**
Allergan plc	13
Twenty-First Century Fox, Inc.	13
Scores Holding Company, Inc.	11
ABM Industries Inc.	10
Bloomin' Brands, Inc.	10
Signet Jewelers Ltd.	8
American Apparel Inc.	7
Warner Chilcott Limited	7
Actavis plc [now Allergan above]	6
Professional Diversity Network, Inc.	6
Frisch's Restaurants, Inc.	5
lululemon athletica	4
SigmaTron International, Inc.	4
Guess? Inc.	3
Wynn Resorts, Ltd.	3
Actavis Funding SCS	2
Healthsouth Corp. [now Encompass Health Corporation]	2
Encompass Health Corp. [see above]	1
Forest Laboratories [now Allergan]	1
ProLung, Inc.	1
Unilever NV	1
Unilever plc	1

1. *Quantitative Information*

Table 2 reports the contingent liability amounts and estimates of damages from the sexual harassment claims. First, only five of 23 companies disclosed 13 estimates of damages out of 119 sexual harassment disclosures. This is a low disclosure rate over our five-year sample. The wide range of estimates reflects the different sizes of the companies and the

gravity of the claims. For example, Twenty-First Century Fox, Inc. disclosed four estimates from $35 million to $55 million. The six estimates of $800,000 by ABM Industries, Inc. indicate a jury award to the plaintiff, which the company had appealed to a higher court, rather than revisions to the estimated value of the case.

The low rate of quantitative estimates is consistent with earlier research and user complaints of limited contingent liability disclosure.[114] For companies, an estimation of the result of litigation proves difficult because of the idiosyncratic nature of litigation. Case facts, state laws, and the peculiar characteristics of the plaintiff and company influence each case.

TABLE 2: CONTINGENT AMOUNT DISCLOSURE

Contingent Amounts and Estimates	**Frequency**
$90,000	1
$500,000	1
$800,000	6
$7,000,000	1
$35,000,000	2
$50,000,000	1
$55,000,000	1

More generally, estimates of contingent liabilities can be extremely uncertain. Accordingly, companies disclose a variety of minimum estimates, maximum estimates, a range, or best estimates.[115] Past studies have found companies disclosing environmental liabilities between $30,000 and $226 million,[116] and tax liabilities with an average of $302 million up to a maximum exceeding $1 billion.[117] Hence, sexual harassment contingent liabilities are similar in amount to environmental liabilities disclosed 20 years ago. Note again, however, that these estimates are typically based on damages caps that have not

114. Hennes, *supra* note 104, at 32–33; Allen, *supra* note 87, at 323–24.

115. Jane Kennedy, Terence Mitchell & Stephan E. Sefcik, *Disclosure of Contingent Environmental Liabilities: Some Unintended Consequences?*, 36 J. ACCT. RES. 257, 261 (1998).

116. *Id.* at 266.

117. Gleason & Mills, *supra* note 84, at 326.

been revised since 1991. Thus, while the estimates may be realistic for legal reporting purposes, they may grossly underestimate the actual value of the cases and the damage done.

2. *Content Analysis*

Table 3 details qualitative information disclosed by a company about the sexual harassment claim in its financial reports. Eighty-two times a company stated it was defending the claim, while 38 times a company had indicated a settlement or part-settlement of multiple claims. Thirty-three times a company could not estimate the liability of the claim. As for whether the claim was material, only three times did a company state the liability was material while companies stated the liability was not material 53 times. Only 12 times did a company disclose an NDA, though the actual number of NDAs is probably much higher.

No company stated that the likelihood of a liability was remote. Hence, companies typically left financial report users to assess whether the contingent liabilities were probable, reasonably possible, or remote. The very limited information disclosed by the companies created a very difficult assessment for readers of financial reports.[118]

TABLE 3: QUALITATIVE INFORMATION DISCLOSURE

Classification	**Yes**	**No**	**No Disclosure**
Inestimable liability	33		86
Defense	82		37
Settlement	38		81
Material	3	53	63
NDA	12		107
Remote			119

3. *Claim Revisions and Resolution*

Table 4 reports litigation details and claim resolutions reported by companies. Executives disclosed litigation and claim details, such as the court jurisdiction and plaintiff's names, in the majority of cases—82 out of 117 disclosures. As companies

118. Hennes, *supra* note 104, at 32–33.

reissued sexual harassment disclosures in multiple financial reports, the disclosed information became more detailed. Some companies disclosed no litigation details in the initial sexual harassment disclosures and later provided more information in their financial reports.

Only 26 disclosures provided any details of the claim's resolution. This result is consistent with company fear of reputational damage and litigation.[119] Further, the withholding of claim resolution details is consistent with the widespread use of NDAs.

The Encompass Health Corp. report serves as an extreme example of a minimalist disclosure of sexual harassment. The company stated *other operating expenses* during 2015 included the settlement of a sexual harassment matter not covered by insurance. The delayed disclosure on February 28, 2018 provides little use to investors in 2018.

Bloomin' Brands, Inc. is noteworthy for having ten sexual harassment disclosures and no substantial revisions or a resolution disclosure. The company declared that it was subject to legal proceedings, including claims for harassment.[120] This statement presented the only information available to financial report users.

TABLE 4: LITIGATION DETAILS AND RESOLUTION

Content	**Yes**	**No**
Litigation details	82	35
Revised disclosure	91	25
Resolution details	26	79

119. Schloetzer et al., *supra* note 85, at 4.

120. The full quote reads:

> We are subjected to lawsuits, administrative proceedings and claims that arise in the regular course of business. These matters typically involve claims by consumers, employees and others regarding issues such as food borne illness, food safety, premises liability, "dram shop" statute liability, compliance with wage and hour requirements, work-related injuries, promotional advertising, discrimination, harassment, disability and other operational issues common to the foodservice industry, as well as contract disputes and intellectual property infringement matters.

Bloomin' Brands, Annual Report (Form 10-K) 23 (Feb. 28, 2018).

4. *Chief Executive Officer*

Our sample reveals 24 sexual harassment disclosures and claims against CEOs from a total of 217 observations. A number of disclosures fail to identify the perpetrator. Further, the use of NDAs limits the amount of information available for analysis.

Nevertheless, the number of CEO perpetrators is high. In our sample of companies, the consequences of CEO sexual harassment often led to the CEO's resignation or retirement. It also correlated with costly payments to targets. Sexual harassment claims against CEOs and changes to a company's CEO are important facts for investors to know because of the importance of top management[121] and the importance of reputation and trust in economic exchanges.[122] These results are also consistent with the association between sexual harassment perpetrators and their respective positions of power.

5. *Non-Disclosing Companies*

Table 5 below lists the companies that did not financially report a sexual harassment claim following litigation or media reports of sexual harassment, and the number of non-disclosed claims. The table captures media reports in the early days of the #MeToo movement. At that time, prominent media and entertainment companies such as Comcast Corp., CBS Corp., The Walt Disney Company, and Time Warner, Inc. received multiple sexual harassment claims. Nevertheless, the table reveals a diverse range of companies and industries that reflect the pervasiveness of sexual harassment. In addition, the table features a number of large U.S. companies, such as Amazon, Bank of America, Walmart, and Microsoft, which have substantial resources to address sexual harassment.

121. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301, 314 (1983).

122. Cline, Walking & Yore, *supra* note 73, at 392.

TABLE 5: NON-DISCLOSING COMPANIES

Company	**Frequency**	**Company**	**Frequency**
Comcast Corp.	5	The Home Depot, Inc.	1
CBS Corp.	4	Ingersoll-Rand plc	1
The GEO Group, Inc.	4	JPMorgan Chase & Co.	1
AutoZone, Inc.	3	JetBlue Airways Corp.	1
The Kroger Co.	3	Knight-Swift Transportation Holdings Inc.	1
Amazon.com, Inc.	2	Lions Gate Entertainment Corp.	1
Bank of America Corp.	2	MGM Resorts International Inc.	1
Dollar General Corp.	2	Marriott International, Inc.	1
Microsoft Corp.	2	McDonalds Corp.	1
National Beverage Corp.	2	Medtronic plc	1
Restaurant Brands International Inc.	2	Monster Beverage Corp.	1
SunTrust Banks, Inc.	2	Morgan Stanley	1
The Walt Disney Company	2	Nabors Industries Ltd.	1
Time Warner Inc.	2	Newell Brands Inc.	1
United Continental Holdings Inc.	2	PNC Financial Services Group, Inc.	1
United Parcel Service, Inc.	2	Papa John's International, Inc.	1
U.S. Steel Corp	2	Pfizer Inc.	1
Walmart Inc.	2	Red Rock Resorts, Inc.	1
Wells Fargo & Company	2	SkyWest, Inc.	1

Company	Frequency	Company	Frequency
AECOM Inc.	1	Starbucks Corp.	1
Alphabet Inc.	1	Stericycle Inc.	1
BWX Technologies, Inc.	1	StoneMor Partners L.P.	1
Barnes & Noble, Inc.	1	Stryker Corp.	1
Brinkler International, Inc.	1	TD Ameritrade Holding Corp.	1
CVS Health Corp.	1	Target Corp.	1
Cedar Realty Trust, Inc.	1	Tofutti Brands, Inc.	1
Centene Corp.	1	Twenty-First Century Fox, Inc.	1
Citizens Financial Group, Inc.	1	Tyson Foods, Inc.	1
Consolidated Edison, Inc.	1		
CoreCivic Inc.	1		
Costco Wholesale Corp.	1	Urban One, Inc.	1
Darden Restaurants, Inc.	1	Urban Outfitters, Inc.	1
Dollar Tree, Inc.	1	Verizon Communications Inc.	1
Envision Healthcare Corp.	1	Viacom Inc.	1
FedEx Corp.	1	Walgreens Boots Alliance, Inc.	1
Ford Motor Co.	1	WestRock Co.	1

Amongst these non-disclosures, several sexual harassment claims created a potential contingent liability, or reflected poorly on the company culture or management. Whether or not these sexual harassment claims would have registered as financially "material," they all should have interested investors and employees. They also demonstrate corporate hostility to compliance with and enforcement of antidiscrimination law.

a. The GEO Group, Inc.

The GEO Group, Inc. owns, leases, and operates a broad range of correctional and detention facilities. In its 2016, 2017, and 2018 annual financial reports, the company stated, "The nature of the Company's business exposes it to various types of third-party legal claims, including but not limited to . . . sexual misconduct claims brought by prisoners or detainees . . . [and] employment discrimination claims."[123] However, the company did not report sexual harassment of female employees, including up to 20 claims.[124] This selective reporting raises the question whether the company calculated that the sexual harassment claims of prisoners and detainees would trigger less investor interest and sympathy than would the sexual harassment of female employees.

In September 2010, the EEOC and the State of Arizona sued The GEO Group, Inc. alleging sexual harassment.[125] A successful 2016 appeal on procedure allowed the EEOC to proceed with its claims that 20 female corrections officers experienced sexual harassment and retaliation while they worked at two prisons operated by The GEO Group.[126] The GEO Group petitioned the Supreme Court, arguing that the EEOC should have, and failed to, investigate each individual claim against The GEO Group in the conciliation process.[127] In January 2017, the Supreme Court denied the petition for certiorari, causing the Ninth Circuit's summary dismissal to stand.[128] Had the Supreme Court required the EEOC to identify and investigate every claim, the administrative burden would have effectively overwhelmed the agency. This effort by The GEO Group exemplifies corporate hostility to EEOC en-

123. The GEO Group, Inc., Annual Report (Form 10-K) (Feb. 27, 2017).

124. Tricia Gorman, *EEOC Urges Supreme Court Not to Expand Pre-Suit Conciliation Process*, 31 WESTLAW J. EMP. 34, 35 (2017), http://www.wfbm.com/wp-content/uploads/2017/01/Westlaw-Employment-Journal.pdf.

125. Press Release, U.S. Equal Opportunity Comm'n, Ninth Circuit Reinstates EEOC Case Against The GEO Group for Sexual Harassment, Retaliation in Arizona Prisons (Mar. 15, 2016), https://www.eeoc.gov/newsroom/ninth-circuit-reinstates-eeoc-case-against-geo-group-sexual-harassment-retaliation-arizona.

126. Arizona v. Geo Grp., Inc., 816 F.3d 1189 (9th Cir. 2016).

127. Gorman, *supra* note 124, at 35.

128. Geo Grp., Inc. v. EEOC, 137 S. Ct. 623 (2017).

forcement of Title VII. On January 5, 2018, The GEO Group agreed to pay $550,000 to 16 plaintiffs.[129]

b. Google

In October 2018, a Google staff memo stated that, in the past two years, 48 people had been terminated for sexual harassment, including 13 who were senior managers and higher ranking.[130] *The New York Times* also reported other instances when Google had protected executives who had been accused of sexual misconduct or had ousted alleged offenders but softened the blow by paying them millions of dollars as they departed.[131] In particular, Google's parent company, Alphabet Inc., paid a former top Google executive as much as $45 million when he resigned from the company in 2016 after allegedly groping a subordinate.[132] The previously undisclosed sum was in the separation agreement for Amit Singhal, a senior vice president who ran Google's search operations until February 2016. A shareholder lawsuit revealed the amount and accused the Alphabet board directors of shirking their responsibilities by agreeing to pay executives accused of misconduct, instead of firing them for cause.

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129. Press Release, U.S. Equal Opportunity Comm'n, GEO Group to Pay $550,000 to Settle EEOC Sexual Harassment and Retaliation Lawsuit (Jan. 8, 2018), https://www.eeoc.gov/newsroom/geo-group-pay-550000-settle-eeoc-sexual-harassment-and-retaliation-lawsuit.

130. Jillian D'Onfro & Steve Kovach, *Google CEO Admits Company Had a Sexual Harassment Problem—Says it Has Fired 48 Employees for Sexual Misconduct*, CNBC (Oct. 25, 2018), https://www.cnbc.com/2018/10/25/google-ceo-memo-says-48-fired-for-sexual-misconduct.html.

131. Katie Benner & Daisuke Wakabayashi, *How Google Protected Andy Rubin, the 'Father of Android'*, N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html; Alistair Barr, *Google CEO Tries to Calm Staff After Report on Misconduct*, BLOOMBERG (Oct. 26, 2018), https://www.bloomberg.com/news/articles/2018-10-25/google-ceo-tries-to-calm-staff-after-executive-misconduct-report.

132. Daisuke Wakabayashi, *Google Approved $45 Million Exit Package for Executive Accused of Misconduct*, N.Y. TIMES (Mar. 11, 2019), https://www.nytimes.com/2019/03/11/technology/google-misconduct-exit-package.html.

c. Papa John's International, Inc.

In August 2018, an investor lawsuit against Papa John's International, Inc. claimed a pattern of sexual harassment by executives.[133] A month earlier, *Forbes* had cited 37 current and former Papa John's employees, reporting that founder John Schnatter had spied on workers and engaged in sexually inappropriate conduct.[134] This sexual misconduct had resulted in at least two confidential settlements.[135]

The long history of problems involving founder John Schnatter and Schnatter's executive allies, documented by *Forbes*, affected corporate profitability. A November 2018 CNBC article notes, "The company excluded $24.8 million in special charges from its adjusted earnings that included $3.6 million in costs to remove Schnatter's image from its marketing materials and $9.9 million in financial assistance to its franchise owners."[136]

d. United Airlines, Inc.

United Airlines, Inc. might still maintain that it did nothing wrong in failing to disclose a matter that it claimed was not a corporate issue. However, in August 2018, the EEOC initiated a lawsuit against the airline.[137] According to the EEOC, the FBI arrested the alleged perpetrator, a United Airlines pilot, in May 2015. He later pleaded guilty to stalking and was sentenced to 41 months in prison.[138]

The Washington Post article provides more details on the matter and explains that the pilot had been posting revenge

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133. Complaint, Danker v. Papa John's Int'l Inc., No. 1:18-cv-07927 (S.D.N.Y. Aug. 30, 2018).

134. Noah Kirsch, *The Inside Story of Papa John's Toxic Culture*, FORBES (July 19, 2018), https://www.forbes.com/sites/forbesdigitalcovers/2018/07/19/the-inside-story-of-papa-johns-toxic-culture/#a9e93493019f.

135. *Id.*

136. Sarah Whitten, *Papa John's Swings to a Loss as Embattled Pizza Chain Spends Millions to Repair Tarnished Image*, CNBC (last updated Nov. 6, 2018, 6:27 PM), https://www.cnbc.com/2018/11/06/papa-johns-2018-q3-earnings.html.

137. Lori Aratani, *Lawsuit: A United Airlines Pilot Repeatedly Posted Sexually Explicit Images of a United Flight Attendant on Various Websites*, WASH. POST (Aug. 10, 2018, 2:14 PM), https://www.washingtonpost.com/news/dr-gridlock/wp/2018/08/10/eeoc-lawsuit-claims-united-airlines-did-not-intervene-in-pilots-sexual-harassment-of-flight-attendant/.

138. *Id.*

porn, comprised of pictures and video recordings obtained during a consensual relationship with a flight attendant, for almost a decade.[139] The flight attendant had filed multiple complaints with United and in court, obtaining money judgments and an injunction against the pilot.[140] However, since 2011, United has declined to take further action.[141] Shortly after the pilot's arrest by the FBI, "United granted him long-term disability. He continued to be paid by the airline and received benefits. In July 2016, one month after he pleaded guilty to federal stalking charges, the company allowed him to retire with full benefits, according to court documents."[142]

e. Barnes & Noble, Inc.

In July 2018, the board of directors fired the CEO of Barnes & Noble, Inc., Demos Parneros, for violating company policies.[143] Later news revealed that Barnes & Noble terminated him, in part due to allegations of sexual harassment.[144] These claims of sexual harassment were not disclosed in the 10-K annual report issued 11 days before his dismissal.[145] A defamation and breach of contract claim filed a month later, and Barnes & Noble's response, provided the additional details.[146] Parneros alleged that Barnes & Noble owed him more than $4 million in severance pay, equity, and damages. Noting that Barnes & Noble's stock has fallen 60% in the last three years, *The New York Times* suggested, "The allegations lobbed in the suit are likely to make it even more difficult for Barnes & Noble to recruit its next chief executive, at a moment when the company desperately needs stable leadership."[147]

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Trachtenberg, *supra* note 109.
144. *Id.*
145. Barnes & Noble Inc., Annual Report (Form 10-K) (June 21, 2018).
146. Tiffany Hsu & Alexandra Alter, *Barnes & Noble Says Former C.E.O. Demos Parneros Was Fired for Sexual Harassment*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/business/barnes-noble-ceo-sexual-harassment-lawsuit.html.
147. *Id.*

f. Other Cases Involving Sexual Misconduct: Microsoft Corp., FedEx Corp., The Home Depot, Inc., McDonald's Corp., United Parcel Service, Inc. (UPS)

Research from media reports indicated that other corporations dealt with sexual harassment in recent years but did not disclose the problem in SEC filings. For example, in March 2018, Microsoft stated in a staff email that it received 83 sexual harassment complaints in 2017 and fired approximately 20 staff over sexual harassment.[148] What Microsoft does not reveal is how much, if anything, it paid to investigate and settle claims. Additionally, we found no discussion of whether terminated employees received an exit or severance package.

An October 2017 appeal demonstrates that FedEx Corp failed to disclose a 2010 gender discrimination, hostile work environment, and retaliation case in its 2017 10-K annual report and December 2017 10-Q quarterly report.[149] Alvin Beal, a FedEx supervisor, allegedly ordered Lisa Kennedy, an operations manager, to come into the office on a Sunday and allegedly raped her when they were alone.[150] According to the appellate decision, he had already allegedly raped her the previous month under similar circumstances.[151] Whether or not FedEx knew about the first alleged assault by Beal, this case causes concern for several reasons. First, in 2004, a jury awarded $3.4 million (including $2.5 million in punitive damages) to a female FedEx driver in a case filed by the EEOC.[152]

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148. Dan Levine & Salvador Rodriguez, *Microsoft Hits Back at Claims it Ignored Sexual Harassment*, BNN BLOOMBERG (Mar. 16, 2018), https://www.bnnbloomberg.ca/microsoft-hits-back-at-claims-it-ignored-sexual-harassment-1.1029557.

149. Kennedy. Fed. Express Corp., No. 16-3634-cv, 2017 BL 357302 (2d. Cir. Oct. 5, 2017).

150. *Id.*

151. *Id.*

152. *Federal Express to Pay over $3.2 Million to Female Truck Driver for Sex Discrimination, Retaliation*, U.S. EQUAL EMP'T OPPORTUNITY COMMISSION (Feb. 25, 2004), https://www.eeoc.gov/eeoc/newsroom/release/2-25-04.cfm. One court's ruling does not mean that a subsequent harassment case will yield the same outcome. The *Kennedy* district court found that plaintiff's delay in reporting meant that she did not take advantage of FedEx's remedial opportunities. And, the 2004 case involved numerous timely complaints. The point of this discussion, however, is not the outcome of the second case. The point is that a company with a documented history of alleged "rape" did

FedEx was on notice that the EEOC takes action when a company fails to properly investigate and remediate sexual harassment. Second, FedEx then fought Kennedy's harassment claims. While the *Kennedy* district court granted a motion for summary judgment in 2016 against Kennedy, which had ended the case, she successfully appealed.[153]

Some looking at this 2009 FedEx case might argue that FedEx was justified in not reporting the costs of this case and the potential for additional material costs. Even taken in combination with the prior 2004 sex discrimination case, the FedEx matters might not reach a level of "materiality." For example, the actual 2004 damages were $0.9 million (i.e., $3.4 million minus $2.5 million). A fifteen-year low market capitalization of FedEx was approximately $11 billion in 2009.[154] If one compares those two numbers, the damages were a matter of eight hundred-thousandths of the company's value, 0.00008%. If we were to require corporations to disclose such matters based on limited value calculations, investors would be inundated with piecemeal facts and information.

The case highlights the problem of reporting based solely on limited damage valuations. After the first case involving an allegation of rape, FedEx should have been on notice and reporting such grossly abusive, predatory, and illegal behavior. It also showcases the drawbacks of adversarial litigation and the poor management of resources. The company spent seven years contesting the alleged 2009 rape and sexual harassment.[155] Arguably, FedEx's prior history and the successful appeal suggest that FedEx should have disclosed this case and the potential for liability. Materiality involves more than raw numbers and market capitalization.

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not report another claim. Reporting requires the revelation of threats and potentials for liability, not just guaranteed liability for violent sexual assault.

153. Kennedy v. Fed. Express Corp., No. 5:13-CV-1540 (MAD/ATB), 2016 WL 5415774 (N.D.N.Y. Sept. 28, 2016); *see Kennedy*, 2017 BL 357302.

154. *FedEx Market Cap 2006-2019*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/FDX/fedex/market-cap (this market capitalization chart reflected the data closest in time to 2004 that we could find.).

155. According to the district court, the plaintiff told FedEx about the behavior in February 2010 and filed suit in 2013. Kennedy v. Fed. Express Corp., 2016 WL 5415774 at *5, *1. Thus, at least seven years passed just through the first appeal and remand dated October 5, 2017. *Kennedy*, 2017 BL 357302.

In March 2017, The Home Depot, Inc. failed to disclose a case involving allegations of sexual harassment, rape, and murder in its May 2017 10-Q quarterly report and March 2018 10-K annual report.[156] Brian Cooper, a supervisor with a known history of allegations of sexual harassment against female subordinates, allegedly required Alisha Bromfield, an employee, to accompany him on business trips and a personal trip—to an out-of-state family wedding.[157] He allegedly manipulated Bromfield by threatening to fire her or cut her hours if she refused. She went. After the wedding, Cooper allegedly killed and then raped Bromfield.[158] This case followed a 2004 $5.5 million potential resolution of a Colorado class action lawsuit against Home Depot for discrimination, harassment, and retaliation.[159] Again, the question arises whether Home Depot's track record changes if it disclosed the lawsuit filed by Bromfield's estate.

Another company with a long history of sexual harassment complaints is McDonald's. In September 2016, 15 McDonald's employees from stores across the U.S. filed complaints with the EEOC. They alleged that they had been victims of harassment, including unwanted sexual comments and touching.[160] Another 25 filed against McDonald's in May 2019, bringing the three-year total to more than 50 lawsuits.[161] In September 2018, McDonald's workers in Chicago organized a one-day march and strike to protest sexual harassment at McDonald's restaurants across the nation.[162] Certainly, a single

156. Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643, 646 (7th Cir. 2017).

157. *Id.*

158. *Id.*

159. Press Release, EEOC, Home Depot To Pay $5.5 Million To Resolve Class Discrimination Lawsuit in Colorado (Aug. 25, 2004), https://www.eeoc.gov/eeoc/newsroom/release/8-25-04.cfm.

160. Leslie Patton, *McDonald's Workers File EEOC Sexual Harassment Complaints*, BLOOMBERG (Oct. 5, 2016, 12:48 PM), https://www.bloomberg.com/news/articles/2016-10-05/mcdonald-s-workers-file-eeoc-complaints-over-sexual-harassment.

161. Brock Colyar, *The Sexual Harassment Strikes Against McDonald's Were Only the Beginning*, Ms. (July 15, 2019), https://msmagazine.com/2019/07/15/the-sexual-harassment-strikes-against-mcdonalds-were-only-the-beginning/.

162. Brock Colyar, *#MeTooMcDonalds: Fast-Food Workers Just Made History with a Nationwide Strike Against Sexual Harassment*, Ms. (Sept. 21, 2018),

case might not rise to the level of a material event. However, as these cases begin to add up and arise over a lengthening period of time, they evidence a toxic corporate culture and mounting financial losses.

Even one case can prove significant to investors, however. On January 12, 2016, a court awarded Denise Rivera, a former manager in New York City, $1.55 million against United Parcel Service, Inc. for sexual harassment and retaliation that she suffered in 2006–07.[163] Rivera had detailed her direct supervisor's drunken advances and retaliation, including her termination. A New York appellate court upheld the judgment on March 29, 2017, ten years after her termination.[164] Cases such as Rivera's raise questions of how many other cases exist and how much such cases are costing U.S. companies at the expense of their shareholders and employees.

These cases of non-disclosure are consistent with a widespread corporate refusal to reveal negative events.[165] One might legitimately conclude that the companies fail to disclose expensive sexual harassment problems to protect their reputation and perceived trustworthiness.[166] Arguably, the cases reinforce the view that a voluntary disclosure regime of corporate reporting, such as in environmental reporting, is inadequate.[167]

IV.
Securities Regulations and Disclosure Requirements

Despite a new consciousness prompted by the #MeToo movement, Dr. Russell's research from the recent five years past makes it clear that companies are three times more likely to avoid negative publicity than disclose sexual harassment. They treat litigation associated with sexual harassment as an adversarial contest that requires the defeat or destruction of

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https://msmagazine.com/2018/09/21/metoomcdonalds-fast-food-workers-just-made-history-nationwide-strike-sexual-harassment/.

163. Rivera v. United Parcel Serv., No. 3483, 2017 BL 91704 (N.Y. App. Div. Mar. 23, 2017).

164. *Id.*

165. *See* Claeys et al., *supra* note 82, at 3964; Schloetzer et al., *supra* note 85, at 3.

166. *See* Cline et al., *supra* note 73, at 392.

167. *See* Martin Freedman & Dennis M. Patten, *Evidence on the Pernicious Effect of Financial Report Environmental Disclosure*, 28 Accт. F. 27, 27 (2004).

the "other" side. While companies, and the current Labor Department, are quick to point condemningly at silent targets (of sex-based discrimination and harassment), these same companies enforce confidential arbitration provisions, require confidentiality clauses (gag orders), and provide only cryptic revelations in corporate reports. Many companies employ secrecy, shun independent review, or refuse to disclose reports, prompting responses like the one by the Labor Department to Senator Gillibrand.[168]

From Tables 2 and 3, Dr. Russell's research confirms that corporate disclosure of sexual harassment and associated legal liabilities in SEC required filings is uniformly limited and often inadequate. Regulators have criticized formulaic company disclosure of legal liabilities with no useful information.[169] A limited review of several securities regulation laws provides the basis for a more tailored inquiry into whether such laws might serve in the prevention and remediation of sexual harassment.

Some critics might argue that the EEOC might be a better venue for reports since it is charged with the administration of Title VII. Three reasons undermine the strength of that assertion. First, the EEOC does not currently receive corporate reports. It is already overburdened (and under-financed) with education, enforcement, and other administration tasks that follow a target's charge. In contrast, federal law already requires companies to report significant events to the SEC, making it a logical repository for such information. Second, a report to the EEOC would emphasize the civil rights violation and minimize the socioeconomic nature of the problematic events. We stress through SEC disclosure requirements and the list of companies in Table 1 that sexual harassment is a socioeconomic harm. Corporations should report it to inves-

168. *See, e.g.*, Michael M. Grynbaum & John Koblin, *NBC Investigation Finds No Wrongdoing in Handling of Matt Lauer Case*, N.Y TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/business/media/matt-lauer-nbc-investigation.html (describing how NBC investigated itself, relying on an internal investigation of whether NBC management knew about Matt Lauer's behavior); AP, *Tom Brokaw 'Hurt and Unmoored' by Sex Harassment Allegations*, CBC (Apr. 27, 2018, 10:08 AM), https://www.cbc.ca/news/entertainment/brokaw-sexual-misconduct-1.4638131. See *supra* Table 5 for further examples of companies failing to disclose reports of sexual harassment.

169. *See, e.g.*, Hennes, *supra* note 104, at 33.

tors and the agency that monitors capital investments. Third, we suspect that compared to the EEOC, the SEC carries more clout.[170] Money and investors talk, in part through the SEC, and executives listen. The EEOC does not reach the same ears of influence. Therefore, the SEC is the better agency to receive this type of information that would then be available to the Labor Department and the EEOC.

A. *The Securities & Exchange Act of 1934*

Perhaps the most well-known disclosure requirement of the Securities & Exchange Act of 1934 (the Exchange Act), is Section 10b-5. Rule 10b-5 prohibits "any untrue statement of a material fact or [failure] 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."[171] Rule 10b-5 also proscribes "engage[ment] 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."[172] To recover from a violation of Section 10(b) and Rule 10b-5, a private securities plaintiff must prove six elements (the *Halliburton* elements): "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[173]

While these elements seem to impose a high bar, one can imagine a sexual harassment case that meets the requirements. For example, a publicly traded company might protect a Harvey Weinstein-like employee, because he creates so much revenue for the business. This company might minimize or simply omit from Rule 10-K disclosures the costs associated with the Weinstein-like conduct. One can similarly imagine a high-level executive who might deliberately lie to cover-up his or her crimes or misconduct. If investors can show that they

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170. *See generally* SEC, *What We Do* (June 10, 2013), https://www.sec.gov/Article/whatwedo.html (providing a discussion of the mission and control authority of the SEC).

171. 17 C.F.R. § 240.10b-5 (2020).

172. *Id.*

173. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014).

relied on misstatements by officers, directors, or key employees in SEC or other filing and suffered losses, as might have happened in the SCO IPO discussed at the beginning of this Article, those investors might prosecute a viable Rule 10b-5 claim.

In their 2018 article, however, Daniel Hemel and Dorothy S. Lund doubt "that publicly traded companies have an affirmative duty to disclose sexual harassment claims in most cases."[174] Table 5's list of non-disclosing companies demonstrates that corporate executives may share this perspective. Nevertheless, Hemel and Lund explore "the circumstances under which companies might be held liable under federal securities statutes for misleading statements regarding workplace sexual misconduct."[175] Hemel and Lund discuss eight class action and derivative shareholder lawsuits arising from sex-based harassment and discrimination claims against publicly traded companies.[176] They explain that neither Title VII nor state FEPS offer a remedy because these shareholder plaintiffs are not typically company employees.[177] Their "derivative" injury is why shareholders rely on the Exchange Act and the Securities Act of 1933 (the Securities Act) when management fails to act in perceived investor best interests.

Therefore, Hemel and Lund analyze these other avenues for relief through their selected cases. They ask, in particular, whether "federal securities laws require publicly traded companies to disclose the fact that top executives have been accused of sexual misconduct or that corporate funds have been used to settle harassment claims."[178] One case that they profile involves Signet Jewelers Limited, the world's largest retailer of diamond jewelry.[179] At the time that Hemel and Lund published their informative article, the *Signet* case was set for a de-

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174. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1591 (2018).

175. *Id.*

176. *Id.* at 1587, 1613–26.

177. *See id.* at 1612, 1671–72.

178. *Id.* at 1589.

179. *In re* Signet Jewelers Ltd. Sec. Litig., No. 16 CIV.6728 (CM), 2018 WL 6167889 (S.D.N.Y. Nov. 26, 2018). Signet appears in Table 1 above, sixth company from the top, with eight sexual harassment disclosures from March 1, 2017 (after *The Washington Post* article discussed in 2.b. below) to December 7, 2018. *See supra* Table 1.

cision on a Rule of Civil Procedure 12(b)-6 motion to dismiss for failure to state a claim upon which relief might be granted.[180] That decision came down the month after their article.

1. In re Signet Jewelers Ltd. Sec. Litig.

In November 2018, Chief Judge Colleen McMahon denied the defendants' motion to dismiss in *In re Signet Jewelers Ltd. Sec. Litig.* (and, thereby, permitted the shareholder plaintiffs to proceed with their securities fraud action).[181] Relying on the plaintiffs' complaint and disclosures in Signet's SEC filings, the court analyzed malfeasance and alleged misstatements regarding Signet's credit portfolio.[182] More pertinent to this Article, the court reviewed alleged filing misstatements regarding sworn instances of widespread sexual harassment throughout the corporation.[183] Those sexual harassment claims had surfaced as part of a separate lawsuit for gender discrimination, *Jock et al. v. Sterling Jewelers, Inc.*,[184] which became relevant to Signet shareholders.

a. The Relevance of the *Jock* Lawsuit

Plaintiffs had sued Sterling Jewelers, wholly owned by Signet, for improper promotion and compensation practices in violation of Title VII and the Equal Pay Act.[185] The district court had referred this case to confidential binding arbitration pursuant to Sterling's employment contract mandatory arbitration provision.[186] Sterling's insistence on confidential arbitration concerning any employment dispute arguably supports the notion that the company prefers to limit notoriety and public awareness of its employment practices and disputes.

Signet properly disclosed the *Jock* litigation in a March 20, 2008 Form 6-K filing.[187] This filing is similar to the Rule 10b-5

180. Hemel & Lund, *supra* note 174, at 1587.
181. *In re Signet*, 2018 WL 6167889, at *1.
182. *Id.* at *8.
183. *Id.* at *5–6, *9–10.
184. Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d. Cir. 2011).
185. *Id.*
186. Jock v. Sterling Jewelers Inc., 677 F. Supp. 2d 661 (S.D.N.Y. 2009) (confirming order to class action arbitration).
187. *In re* Signet Jewelers Ltd. Sec. Litig., 389 F. Supp. 3d 221, 224 (S.D.N.Y. 2019). The SEC Form 6-K is a cover statement on a foreign filing

filing but for companies, such as Signet, incorporated outside of the U.S. Signet's Form 6-K, however, gave few details and denied the *Jock* allegations. It explained, "The lawsuit is based on the allegations of 15 former and current employees working in a few stores . . . . When these allegations first surfaced, they were investigated. That investigation failed to substantiate the allegations."[188] A year later, Signet filed another Form 6-K and revealed that the EEOC had recently sued Sterling, as well. The 2009 Form 6-K stated:

> The Group is not party to any legal proceedings considered to be material to the financial statements. Furthermore, no director, officer or affiliate of the Group or any associate of any such director has been a party adverse to the Group or any of its subsidiaries or has a material interest adverse to the Group or any of its subsidiaries.
>
> A class lawsuit for an unspecified amount has been filed against Sterling Jewelers Inc., a subsidiary of Signet Jewelers Limited, in the New York federal court by private plaintiffs. The US Equal Opportunities Commission has filed a separate lawsuit alleging that US store-level employment practices are discriminatory as to compensation and promotional activities. The Group denies these allegations and intends to defend them vigorously.[189]

In this disclosure, Signet followed up its general denial of material contingencies with the notation that the allegations involved only "US store-level employment practices."[190]

Two years later, the SEC requested further information regarding the suits.[191] Signet disclosed "the private arbitration

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that goes to the SEC and allows for a foreign corporation to lessen the burden of dual reporting. Foreign corporations may file these forms on an annual, semi-annual, or quarterly financial report done for regulators in their country of incorporation.

188. Signet Jewelers Ltd., Special Report of Foreign Issuer (Form 6-K) (Mar. 20, 2008).

189. Signet Jewelers Ltd., Special Report of Foreign Issuer (Form 6-K) (Mar. 25, 2009).

190. *Id.*

191. *In re* Signet Jewelers Ltd. Sec. Litig., No. 16 Civ. 6728 (CM), 2018 WL 6167889, at *5 (S.D.N.Y. Nov. 26, 2018).

and "class-wide basis" of the proceedings.[192] It also reiterated that the matters involved store-level practices and the "pay and promotions of female retail store employees . . . ."[193] The *Signet* district court noted, "This characterization of the *Jock* Litigation appears in Signet's SEC filings up to the end of the Class Period."[194]

b. Publicity Regarding the Confidential *Jock* Arbitration

Not until 2017 did more details of the basis for the original 2008 case come to light. As part of the briefing for certification as a class in the mandated confidential arbitration, claimants had offered 250 declarations from almost 200 employees that described their experiences while at Sterling.[195] Those declarations became public with some Signet-approved redactions only on February 26, 2017. The next day *The Washington Post* published some of the unredacted information:[196]

> Many of the most striking allegations stem from the company's annual managers meetings, which former employees described as a boozy, no-spouses-allowed "sex-fest" where attendance was mandatory and women were aggressively pursued, grabbed and harassed.
>
> Multiple witnesses told attorneys that they saw [Mark] Light [Signet's then-CEO] "being entertained" as he watched and joined nude and partially undressed female employees in a swimming pool, according to the 2013 memorandum.
>
> . . . .
>
> In a 2015 decision to grant class-action status to the women, [Kathleen A.] Roberts [arbitrator and retired federal magistrate judge] wrote that the testimony includes references to "soliciting sexual relations with women (sometimes as a quid pro quo for employment benefits), and creating an environment at often-mandatory Company events in which women

192. Signet Jewelers Ltd., Annual Report Form 10-K, 119 (Mar. 30, 2011).
193. *Id.* at 117.
194. *In re Signet*, 2018 WL 6167889, at *5 (citing Signet Jewelers Ltd., Annual Report (Form 10-K) (Mar. 16, 2017), at 122).
195. *In re Signet,* 2018 WL 6167889, at *5.
196. *Id.* at *5.

> are expected to undress publicly, accede to sexual overtures and refrain from complaining about the treatment to which they have been subjected."
> "For the most part Sterling has not sought to refute this evidence," Roberts wrote. Instead, she wrote, "Sterling argues that it is inadmissible, irrelevant and insufficient to establish a corporate culture that demeans women."
> The case could deeply tarnish a business that sells billions of dollars worth of jewelry a year through romance-centered marketing campaigns such as "Every Kiss Begins with Kay." Signet told shareholders in an annual report last year that it would have to "pay substantial damages" if it lost the case.[197]

In addition to the rampant, multi-management-level sexual harassment, the article described retaliation against those who complained and unfair treatment of women in every aspect of their employment. This news article made clear that Signet had either grossly misunderstood the circumstances that led to the *Jock* lawsuit or had deliberately covered-up the problem and misrepresented it to the SEC and shareholders.[198]

The day after *The Washington Post* article, Signet's stock price dropped 8.3% by midday.[199] Signet halted trading until it could issue a press release. Its statement referred to "distorted and inaccurate media reports" and explained, "None of the 69,000 class members have brought legal claims in this arbitration for sexual harassment or sexual impropriety. . . . . These allegations publicized by claimants' counsel and reported in the media create a distorted, negative image of the company."[200]

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197. Drew Harwell, *Hundreds Allege Sexual Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01d47f8cf9b643_story.html?utm_term=.e17e37e424de.

198. *Id.*

199. Danielle Wiener-Bronner, *Signet Shares Plummet After Discrimination Claims Surface*, CNN BUS. (Feb. 28, 2017), https://money.cnn.com/2017/02/28/investing/signet-shares-plummet/index.html.

200. *Sterling Jewelers Statement on Ongoing Arbitration*, SIGNET JEWELERS LTD., (Feb. 28, 2017), https://www.signetjewelers.com/investors/news-releases/

Even this brief excerpt from the 2017 press statement raises several concerns. First, note that during almost ten years of presumably expensive legal battles, the class had grown from 15 women to 69,000. Second, Signet focused on the claimants' failure to sue for sexual harassment. However, one need not be a legal genius to understand that the alleged "sexcapades," if true, could support the alleged pay and promotion inequities, retaliation, and the claims of disparate treatment of women. Third, the company also neglected to mention that claimants brought the confidential arbitration case only because Signet had forced employees to waive their civil right to sue in federal court as the price of employment. Fourth, it also failed to acknowledge that it had approved the release of the still-*redacted* declarations. According to *The Washington Post*, "More than 1,300 pages of sworn statements . . . feature company-approved redactions that obscure the names of managers and executives accused of harassment or abuse."[201] Only a memorandum from the motion for class certification, "filed in 2013, revealed that top executives including Mark Light, [then] chief executive of Sterling's parent company, Signet Jewelers, were among those accused of having sex with female employees and promoting women based upon how they responded to sexual demands."[202]

By the close of trading on February 28, 2017 the stock price had fallen 13%.[203] Less than six months later, Signet announced that CEO Mark Light (approximately 54 years old) was "retiring" for "health reasons."[204] The news of Signet's troubles triggered the actualization of huge corporate losses. Had an independent Signet board of directors acted early and transparently, it might have avoided corporate losses. It could have alerted the press to the problem and highlighted its quick internal remediation. The news headlines might have been very different, with positive results. Imagine the public

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news-release-details/2017/Sterling-Jewelers-Statement-on-Ongoing-Arbitration/default.aspx.

201. Harwell, *supra* note 197.

202. *Id.*

203. Wiener-Bronner, *supra* note 199.

204. Press Release, Signet Jewelers Ltd., Signet Jewelers Appoints Virginia "Gina" C. Drosos as CEO (July 17, 2017), https://www.signetjewelers.com/investors/news-releases/news-release-details/2017/Signet-Jewelers-Appoints-Virginia-Gina-C-Drosos-as-CEO/default.aspx.

response to "Signet Takes Swift Action to End Harassment: Ousts Mark Light and Demonstrates Commitment to Women."

c. *Wal-Mart Stores v. Dukes*[205] and the *Jock* Arbitration

Before moving to a broader discussion of the *Signet* evaluation of the *Jock* case, one must address the intervening Supreme Court precedent that makes it much more difficult for Title VII plaintiffs to proceed. Specifically, the Supreme Court's 2011 decision in *Wal-Mart Stores v. Dukes* undermines the legal relevance of the *Jock* decision as it relates to the certification of a class. In *Dukes*, the Court invalidated the certification of approximately 1.5 million female Wal-Mart employees who sued for sex discrimination related to pay and promotions.[206] *Dukes*'s reasoning is not particularly important to this Article's discussion except to the extent that *Dukes* makes class certification in Title VII sex discrimination cases much more difficult (and, perhaps practically speaking, impossible).

Because of this limitation related to class actions, *Dukes* creates additional consequences. First, if plaintiffs must proceed individually rather than as a class, their potential damages claims will be exponentially lower, more unlikely to reach a threshold level of "material." Second, individual claims may protect a company from the very large damage awards that juries sometimes assign to successful class claims. Third, disperse individual claims, which are more expensive to bring, could shield an organization such as Signet from suit (and the associated costs) through less affluent plaintiffs. Fourth, disperse and "unrelated" claims will not create a focal point for media and public attention. Fifth, without media attention or mandated disclosures, corporations may camouflage rampant sexual harassment and discrimination that might affect thousands of their workers.

The *Jock* class case and *Dukes* highlight the attacks on the enforcement of Title VII, the prosecution of discrimination claims, and the need for remedial innovations. Without a chance at class certification, the information contained in the *Jock* briefing in the mandated confidential arbitration might not have been picked up by *The Washington Post*. That *Post* story alerted everyone, including investors, to the sexual harassment

205. 564 U.S. 338 (2011).
206. *Id.*

and other pervasive problems at Signet. That alert led to the shareholder derivative suit, prompted by Signet's failure to disclose and remedy alleged rampant sexual harassment.

2. *Federal Court Review of the Signet Disclosures re* Jock

The *Signet* district court reviewed the *Jock* history discussed in Section 1 above as part of the Signet shareholder § 10b-5 claim and the associated § 20(a) claim under the Exchange Act against the executive defendants for control person liability.[207] It then analyzed the allegations against several of the relevant elements of the *Halliburton* proof structure to determine whether plaintiffs had demonstrated a viable prima facie case.[208]

a. A Material Misrepresentation or Omission by the Defendant

The Fifth Amended Complaint (FAC) alleged that Signet had made material misrepresentations or omissions associated with the *Jock* Litigation.[209] The defense moved for dismissal of the action for failure to state a viable claim.[210] Defendants argued that they complied with their litigation disclosure obligations and had no duty to disclose contested allegations.[211]

The court denied the motion to dismiss under Rule 12b-6 for two reasons. First, the court agreed that while "Defendants were not obligated to disclose 'salacious' allegations, they were required to provide a brief but accurate 'description of the factual basis alleged to underlie' the claims in *Jock*.[212] For resolu-

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207. Section 20(a) specifies:

> Joint and Several Liability; Good Faith Defense. Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

208. *In re* Signet Jewelers Ltd. Sec. Litig., No. 16 Civ. 6728 (CM), 2018 WL 6167889, at *11–18 (S.D.N.Y. Nov. 26, 2018).

209. *Id.* at *1, *5–10 (discussing "disclosures regarding jock litigation").

210. *Id.* at *1.

211. *Id.* at *17.

212. *Id.* (citing 17 C.F.R. § 229.103: public issuer's disclosure obligations relating to legal proceedings).

tion of the motion, the court accepted as true "that the allegations in *Jock* were about pervasive sexual harassment that reached the highest offices in the company.[213] It also accepted "that Defendants had an opportunity to refute declarants' allegations but chose not to do so."[214] The court determined that these allegations were sufficient to support claims that Signet made false or misleading statements.[215]

Second, the court focused on how the claimants' allegations stood in stark contrast to "Signet's Code of Conduct and Code of Ethics concerning their policy and procedures against sexual harassment."[216] The Code touted that Signet made employment decisions based on an employee's merit, maintained confidential methods for reporting problems, and disciplined anyone who violated the Code standards. The court found that the accepted allegations detailed how "the company conditioned employment decisions on whether female employees acceded to sexual demands and retaliated against women who attempted to anonymously report sexual harassment."[217] If ultimately proven, the alleged facts demonstrated that Signet's Code of Conduct was, at best, a rude joke to all hardworking and decent employees, and shareholders.

b. Scienter

In evaluating scienter, the court accepted the claimants' contention that the Signet Board of Directors had been updated on the *Jock* litigation since the very beginning.[218] Furthermore, the court accepted the claim that high-ranking executives knew about and had been involved in the sexual mis-

213. *Id.* (citing FAC ¶¶ 203–68).
214. *Id.* (citing FAC ¶ 205).
215. *Id.* at *18.
216. *Id.* at *17.

Note that Item 406 of Regulation S-K of the Securities Act and Exchange Act requires:

> [A disclosure of] whether the registrant has adopted a code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the registrant has not adopted such a code of ethics, [the company must] explain why it has not done so.

17 C.F.R. § 229.406 (2020).

217. *In re Signet,* 2018 WL 6167889 at *17 (citations omitted).
218. *Id.* at *18.

conduct.[219] It concluded, "Plaintiff has adequately pleaded that Defendants either had present knowledge or were reckless as to the misleading nature of their disclosures regarding *Jock* and their corporate policy against sexual harassment."[220]

c. Loss Causation

After the court credited the claims that Signet had made materially misleading statements relating to the nature of the *Jock* allegations, it needed to find a connection with a purported loss. The court found that "the precipitous decline of Signet's securities on February 28, 2017, following the fraud's revelation to the market" constituted the required loss.[221]

d. The Section 20(a) Claim

The court found that all of the executive defendants qualified as control persons under Section 20(a).[222] It emphasized that "all are alleged to have made or signed the alleged false statements. . . . Plaintiff's control person claim cannot be dismissed, since it has adequately pleaded a primary violation of Section 10(b)."[223] With this final evaluation, the court denied the motion to dismiss and allowed the case to progress. The *Signet* case, an expensive endeavour involving multiple lawyers and huge potential liability, could continue to drain corporate financial resources for years to come.

B. *Other Relevant Securities Regulation Laws and a New Approach*

The *Signet* decision supports Hemel and Lund's ultimate conclusion "that corporate law can play a productive role in reducing the incidence of sexual harassment and sexual assault at and beyond publicly traded companies."[224] As noted, Hemel and Lund focus primarily on shareholder and pension fund derivative litigation to analyze the remedial potential for disclosures. They discuss a variety of laws and legal doctrines including fiduciary duties under Delaware corporate law (in-

219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at *18–19.
223. *Id.*
224. Hemel & Lund, *supra* note 174, at 1592.

cluding the duties of care and loyalty),[225] state "blue sky" laws that govern securities sold within each state,[226] and disclosure duties under the Exchange Act.

If American society stays focused primarily on the civil rights and fiduciary duty violations caused by sexual harassment, then litigation remains an obvious remedial response. While litigation can serve as a useful tool, such an ex post solution to sexual harassment creates adversarial camps and potentially inefficient processes, as are evident in the *Signet* and *Jock* litigations and the resulting disastrous media reports.

1. *A Perspective Shift*

We join Professor Au who concludes, "[N]ot only is it [sexual harassment] morally reprehensible, it's also extremely damaging to the value of any company—so damaging, in fact, that CEOs must stand up and take notice."[227] Arguably, harassment prevention starts with the board of directors, which appoints the CEOs. Writing about risk and tax strategy, Professor Linda H. Chen notes, "[F]irms with gender-diverse boards are more cautious about potential reputation risks."[228] Future research should explore whether gender-diverse boards are more risk averse about sexual harassment. We hypothesize that they might be. In any case, once CEOs and corporate executives and boards adopt this change in perspective, they will respond with alternative remedies and approaches to reduce business losses.

For example, when CEOs discover production cost overruns or suspect losses in a particular corporate segment, they do not sue that division or deny the losses. They first investigate and discover the source of the problem. They share this information with others to build a plan of corrective action. They may ultimately close the division, but a team makes that decision based on sound financial and market information. The same should occur for a suspected case of sexual harassment or a hostile work environment created by a group of perpetrators.

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225. *Id.* at 1628–35.

226. *Id.* at 1635 n.366.

227. Au, *supra* note 63.

228. Linda H. Chen et. al., *The Effects of Board Gender Diversity on a Firm's Risk Strategies*, 59 ACCT. FIN. 991, 991 (2019).

If society treated sexual harassment as a disease *and* a corporate loss, more executives might be motivated to remediate. Cover-up would be exposed for what it is, illogical and uneconomical. For example, if sexual harassment were polio or a virus, most people would support eradication through vaccination. One sick person in a pool of unvaccinated workers threatens an epidemic and severely disabled employees. Similarly, anyone who suspects that they have a cancerous tumor should not hide it from professionals or pretend that it will cure itself. Such a tumor needs to be reported, biopsied, and excised.

Sexual harassment is a socioeconomic disease that can spread and cripple, not only its targets, but also their affiliated companies. As noted above, it affects thousands of people and costs corporations billions of dollars. While we may never completely eradicate this disease, we can reduce its prevalence and costs. Corporate lawyers should not regard sexual harassment as an adversarial contest. They need to insist that executives cooperate with subordinates to minimize the impact and spread of this disease. Corporate concealment of sexual harassment only leads to more expensive damage and the spread of this socioeconomic cancer.

Just as government agencies must take targeted action to deal with threatening health crises, so must business organizations deal with the debilitating effects of toxic sexual harassment. According to one research source, "Organizational climate is the single most important factor in determining whether sexual harassment is likely to occur in a work setting. . . . The degree to which a particular organization's climate is seen by those in the organization as permissive of sexual harassment has the strongest relationship with how much sexual harassment occurs in the organization."[229] This research confirms that prevention and remediation of the diseased socioeconomic culture should be a top priority for executives, managers, and other leaders.

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229. NAT'L ACADS. OF SCIS., ENG'G, & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, & MEDICINE 121 (Paula A. Johnson et al. eds., 2016) (citing Chelsea Willness et.al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 Pers. Psych. 127, 134 (2007), https://doi?.org/10.1111/j?.17446570.2007.00067.x.), https://www.ncbi.nlm.nih.gov/books/NBK519454/#sec_000065.

Instead of focusing on litigation, we propose transparency and communication. This Article recommends enhancement of reporting requirements to the SEC, shareholders, employees, and the media. To put it metaphorically, a corporation that acknowledges it may have a cancer has a much better chance of remission and recovery. Acknowledgment and notice permit it to seek aggressive, proven treatment. Many SEC rules and regulations, in addition to Rule 10(b)-5, mandate reporting.

2. *Additional Disclosure Laws in Securities Regulation*

Section 13(a) of the Exchange Act requires publicly traded corporations to file annual reports with the SEC.[230] Corporations can use those reports not only to educate investors, but also to change corporate culture.[231] Roberta Karmel explains, "In the past, advancing societal good was an infrequent use of SEC disclosure policy. One example is corporate disclosure about environmental infractions. Today, however, some political players are attempting to use the federal securities laws to implement social policies to compel large multinationals to behave as 'good' corporate citizens."[232] Such change might include an emphasis on equitable treatment of all workers and the eradication of a socioeconomic disease such as sexual harassment.

Corporations should sound a remediation "alarm" regarding suspected misconduct for all affiliates. They should publish the results of investigations for the building of institutional history and feedback, and detail corrective measures taken for the benefit of individual targets, associated teams, and the corporation as a whole. Karmel describes how "the Sustainability Accounting Standards Board ("SASB") was organized as a private sector nonprofit to formulate standards for substantive disclosure in SEC filings on sustainability issues regarding environmental, social, and human capital; innovation; and govern-

230. 15 U.S.C. § 78m (2018).

231. MR: Corporations do use financial reports for multiple purposes including to inform users of financial reports, for investor relations and marketing.

232. Roberta S. Karmel, *Disclosure Reform—The SEC Is Riding Off in Two Directions at Once*, 71 BUS. LAW. 781, 782 (2015).

ance."[233] We maintain that the eradication of sexual harassment is a sustainability issue.

In addition to Rule 10b-5, discussed above in the context of the *Signet* litigation, numerous other provisions of the Securities Act and the Exchange Act mandate disclosure and regular reporting of material information or changes. For example, most publicly traded companies must make disclosures in their proxy solicitations in advance of their annual meetings.[234] Also, Regulation S-K specifies the requirements concerning nonfinancial issues that are part of SEC-filed documents. Most relevant to our discussion, Regulation S-K covers legal proceedings, financial information, and management and major securityholders.[235] Specifically, Item 103 of Regulation S-K requires disclosure of "any material pending legal proceedings" and "any such proceedings known to be contemplated by governmental authorities."[236]

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233. *Id.* at 786 (citing SUSTAINABILITY ACCOUNTING STANDARDS BD., CONCEPTUAL FRAMEWORK 7–8 (Oct. 2013)).

234. *See, e.g.*, 17 C.F.R. § 240.14a-101 (2015).

235. 17 C.F.R. § 229.103 (2019) (Item 103, Legal Proceedings); § 229.300 (2019) (Financial Information); § 229.400 (2019) (Management and Certain Security Holders).

236. 17 C.F.R. § 229.103 (2019); Hemel & Lund, *supra* note 174, at 1636–37. Accounting rules also require the declaration of any "loss contingency," further defined as "an existing condition, situation, or set of circumstances involving uncertainty as to possible gain (gain contingency) or loss (loss contingency) to an entity that will ultimately be resolved when one or more future events occur or fail to occur." *See* Fin. Acct. Standards Bd., *Contingencies (Topic 450): Disclosure of Certain Loss Contingencies* 52 (2010), https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176157116458&acceptedDisclaimer=true. A corporation must, therefore, reveal pending or possible litigation if it might result in a "material loss." *Id.* at 50–54. Several courts have opined that Item 103 does not command a report of federal or state investigations of a company. *See* City of Westland Police & Fire Ret. Sys. v. MetLife, Inc., 928 F. Supp. 2d 705, 718 (S.D.N.Y. 2013) (holding that an insurance company had no obligation to disclose its own investigation by authorities in more than half the states); Richman v. Goldman Sachs Grp., 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012) (determining that a company had no obligation to disclose an SEC "Wells Notice," which could result in a civil action); *see also* David M. Stuart & David A. Wilson, *Disclosure Obligations Under the Federal Securities Laws in Government Investigations*, 64 BUS. LAW. 973, 982 (2009) ("An investigation on its own is not a 'pending legal proceeding' until it reaches a stage when the agency or prosecutorial authority makes known that it is contemplating filing suit or bringing charges."). However, a corporation risks violation of Rule 10b-5 if it makes false or misleading statements regarding such an investigation. *See*

This regulation will not require disclosure of most individual sexual harassment claims because most will not meet the financial threshold. In particular, Item 103 specifies that "[n]o information need be given with respect to any proceeding [or an aggregate of similar matters] that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10[%] of the current assets" of the company and its subsidiaries.[237] However, we suggest that the law should require corporations to report sexual harassment (internal and EEOC) complaint statistics, investigation results, confirmed perpetrator names, and all costs (including those associated with estimated lost productivity, absenteeism, recruitment costs). Even those costs that do not reach the 10% figure merit disclosure, for corporations to promote the socioeconomic health of their organization. Additionally, ethical and fiduciary duties to shareholders, employees, and society as a whole support disclosure.

Two other provisions also cover corporate revelation of less expensive risks. First, Item 303 of Regulation S-K requires the revelation of "any known trends or uncertainties that have had or that the [company] reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[238] Hemel and Lund review the circuit debate over whether a violation of Item 303 is actionable under Rule 10b-5 and conclude that "uncertainty regarding the consequences of Item 303 noncompliance lingers."[239] We suggest that if the SEC wants to protect investors and promote the front-end use of Item 303, then a violation of Item 303 should be actionable under Rule 10b-5.

The SEC's intentions may no longer be clear, however. In August 2019, the SEC announced "propose[d] rule amendments to modernize the description of business, legal proceedings, and risk factor disclosures that registrants are required to make pursuant to Regulation S-K."[240] Chairman Jay Clayton explained that the world economy and markets have changed

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Menaldi v. Och-Ziff Cap. Mgmt. Grp., 164 F. Supp. 3d 568, 584 (S.D.N.Y. 2016).

237. 17 C.F.R. § 229.103 (2019).

238. 17 C.F.R. § 229.303 (2019).

239. Hemel & Lund, *supra* note 174, at 1638.

240. Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Reg-

in the 30 years since the SEC promulgated some of its business disclosure rules. He anticipated additional changes in the future and stated, "I applaud the staff for their efforts to modernize and improve our disclosure framework, including recognizing that intangible assets, and in particular human capital, often are a significantly more important driver of value in today's global economy."[241]

The *Financial Times* offers a very different perspective on these changes, though.[242] It refers to "a loosening of corporate disclosure requirements . . . to reduce compliance costs for publicly traded companies."[243] The proposed changes "include eliminating a requirement that executives disclose the 'most significant' risk factors affecting their company. Instead, they would be required to disclose 'material' risks, a move the SEC said was intended to reduce the amount of unnecessary disclosure."[244] The SEC also apparently wants "to give executives more freedom to decide what to disclose to investors when describing their business."[245] For example, concerning human capital, the SEC stated its "view that prescribing fixed, specific line item disclosures . . . would not result in the most meaningful disclosure."[246] Rather disclosure would shift to a principle-based approach using materiality.[247] This shift "to see through the eyes of management how this resource is managed" would arguably preserve the status-quo for sexual harassment disclosure.[248]

Second to the issue of reporting comparatively lower costs of sexual harassment, Item 402 instructs public companies to disclose information concerning CEO and other executive

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ulation S-K (Aug. 8, 2019), https://www.sec.gov/news/press-release/2019-148.

241. *Id.* at 1.

242. Kadhim Shubber, *SEC Proposes Revamp of Corporate Disclosures*, FINANCIAL TIMES (Aug. 9, 2019), https://www.ft.com/content/df5a9ac2-ba2c-11e9-96bd-8e884d3ea203.

243. *Id.*

244. U.S. SEC. & EXCH. COMM'N, MODERNIZATION OF REGULATION S-K ITEMS 101, 103, 105 1, 49 (Aug. 8, 2019), https://www.sec.gov/rules/proposed/2019/33-10668.pdf

245. Shubber, *supra* note 242.

246. U.S. SEC. & EXCH. COMM'N, *supra* note 244.

247. *Id.*

248. *Id.*

compensation.[249] The SEC defines compensation to include "perquisites."[250] Historically, the SEC has investigated and charged companies that have neglected, deliberately or not, to report perquisites and benefits for key executives. Recently, for example, SEC personnel discovered that companies were disbursing executive incentive pay based on adjusted earnings "that were, on average, 23% higher than GAAP earnings. . . . . The SEC requires earnings releases to reconcile adjusted measures with GAAP figures. Unfortunately, those requirements do not apply to the reports that compensation committees of corporate boards disclose to investors each year."[251] Commissioner Robert J. Jackson, Jr. explained, "The SEC's disclosure rules have not kept pace with changes in compensation . . . . It's time for the SEC to help investors understand exactly what performance they're paying for."[252]

Imagine that instead of incentive pay, auditors or the SEC were considering settlement monies paid to sexual harassment targets. Should those monies qualify as an executive job perquisite, since the executive himself is not having to make the payment (for the privilege of harassing a subordinate or client) but instead the corporation is paying that amount for him? If accountants were to estimate the cost to a company of an executive's sexual harassment, shouldn't that cost be disclosed because the executive benefited at the corporation's (and target's or targets') expense?

Item 401(f) of Regulation S-K requires more specific disclosures regarding executives by companies. In particular, Item 401(f) requires the company to describe specific events from the past ten years, including whether a director or executive officer "was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)."[253] However, this requirement applies only to events "that are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the

249. 17 C.F.R. § 229.402 (2019).

250. *Id.*

251. Robert J. Jackson Jr. & Robert C. Pozen, *Executive Pay Needs a Transparent Scorecard*, WALL ST. J. (Apr. 10, 2019, 6:49 PM), https://www.wsj.com/articles/executive-pay-needs-a-transparent-scorecard-11554936540.

252. *Id.*

253. 17 C.F.R. § 229.401 (2019).

registrant."[254] Moreover, the long list of specific events enumerated in 401(f) does not include a mandate to disclose civil proceedings related to discrimination or sexual harassment. This omission, the widespread failure to prosecute CEOs for sexual harassment, and prevalent attitudes concerning its irrelevance to effective governing arguably protect CEOs and key executives from company disclosure to investors under this Item.

SEC Rule 405 further narrows what corporations must disclose by defining what constitutes material information. It provides, "The term material when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered."[255]

Would investors want to know about 69,000 plaintiffs, an EEOC suit, "sexcapades," and executive behavior similar to that involving Mark Light or Harvey Weinstein? Should multiple sexual harassment allegations against someone in a position of influence or authority, such as Bill O'Reilly,[256] Dr. Larry Nassar,[257] Steve Wynn, or Les Moonves also qualify for disclosure?[258] Securities Act Rule 408 and Exchange Act Rule 12b-20 require that, in addition to specifically compelled information, qualifying corporations must provide material information "as may be necessary to make the required statements,

254. *Id.*

255. 17 C.F.R. § 230.405 (2019).

256. Paul Farhi, *Bill O'Reilly's gone—with $25 million in severance. Now the hard work really starts for Fox News.*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/lifestyle/style/bill-oreillys-gone-now-the-hard-work-really-starts-for-fox-news/2017/04/20/3ddc8f1c-25d6-11e7-b503-9d616bd5a305_story.html; Stephen Battaglio, *Bill O'Reilly Reportedly Paid $32-Million Harassment Settlement Before Signing New Fox News Contract*, L.A. TIMES (Oct. 21, 2017, 4:50 PM), https://www.latimes.com/business/hollywood/la-fi-ct-oreilly-settlement-20171021-story.html.

257. Dwight Adams, *Victims Share What Larry Nassar Did to Them Under the Guise of Medical Treatment*, INDYSTAR (May 24, 2018, 1:12 PM), https://eu.indystar.com/story/news/2018/01/25/heres-what-larry-nassar-actually-did-his-patients/1065165001/.

258. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (May 18, 2019), https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations.

in light of the circumstances . . . not misleading.[259] Do these regulations mandate the disclosure of problems, material or not in the traditional sense, which could include severe or pervasive sexual harassment?

V.
A New Approach and Anticipated Objections

Civil rights should not be contingent upon materiality. Neither a seat on the bus nor one at the business conference table should depend on the perceived monetary value of that seat. As long as people continue to think of sexual harassment as "just" a feminist or civil rights issue that has minimal financial relevance, the problem will continue relatively unabated. Au et al. refute the minimal relevance in certain instances, but many more corporations will continue to deal with cases that do not garner current SEC scrutiny.

Executives and auditors could employ numerous other reporting requirements in addition to the ones mentioned above to create additional transparency. Karmel notes, "Regulations S-K and S-X primarily embody the SEC's disclosure regime, but disclosure policies are also scattered throughout SEC forms, interpretative releases, no-action letters, and comment letters on SEC filings; and the courts have articulated them in a variety of securities cases."[260] Even with all of these policies and regulations, however, companies are still not disclosing the costs and prevalence of sexual harassment.

Therefore, we suggest a new SEC regulation that explicitly mandates such sexual harassment reporting. To that end, we urge scholars, who have an expertise with SEC reporting language, to draft a mandate that would include a number of reporting points.

A. *Mandatory Reporting Points—Costs*

First, companies should report their direct costs as a minimum standard. Direct costs must include monetary judgments, settlement amounts, unanticipated severance pay, associated lawyers and auditors' fees, other litigation costs, training ex-

259. 17 C.F.R. §§ 230.408, 240.12b-20.
260. Karmel, *supra* note 232, at 787.

penses, and recruiting costs (to replace employees lost because of sexual harassment).

Second, indirect costs should include valuations for lost productivity, associated lost market share or profitability, absenteeism, and losses due to employee turnover. Furthermore, actuaries and auditors should quantify the sum of these indirect costs, by some measure as the costs of the unlawful abuse of human capital by corporate managers. The designation of the costs in this way will allow investors to see sexual harassment as an abuse of corporate assets akin to the misappropriation of corporate funds or the theft of other corporate assets.[261]

Two possible measures for valuing an abuse of human capital could prove useful. An accountant might aggregate a worker's salary and other remuneration, plus training and education costs, and prior work experience. One might imagine other relevant enhancements, depending on the person and the job. The accountant would determine the average number of years that such an employee might have continued to provide value to the company and use that number as a multiplier to arrive at a total figure. This method might serve if the targeted employee quit because of unbearable harassment or if the harasser terminated the target in a retaliatory move.

A second method might entail a valuation of the target's outputs or production and assess how the harassment interrupted or lowered that productivity. For a harassed lawyer at a firm, that calculation might focus on the lawyer's annual lodestar, the average number of billable hours that the target works, multiplied by her billed hourly rate. Non-billable work such as firm committee service or pro bono work that enhances the firm's reputation and community good will might also figure into the calculation. Then accountants might compare how that worker's productivity has suffered since the onset of the harassment. They can then compare the cost of prevention and remediation with the costs of litigation, bad press and lost business, etc.

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261. One might argue that workplace injuries not caused by sexual harassment might similarly warrant quantification and report communication. We agree. We focus on sexual harassment because the EEOC found it so prevalent across sectors in the U.S. workplace. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 30, at 7.

B. *Mandatory Reporting Points—Prevalence, Perpetrators, Severity, and Claims*

Second, reports should include information related to claims and charges. We understand that some complainants and whistleblowers may wish to and should remain anonymous. However, unless state law requires confidentiality or specifically prohibits disclosure, we would mandate the reporting of at least: the number of corporate complainants and complaints, the names of senior executives (from enumerated credible or substantiated claims), any class actions, EEOC and state FEPS charges, arbitrations, and ombudsperson calls. Consultation with the Department of Labor and EEOC could provide additional detail regarding what might be useful information for employees, investors, governmental agencies, etc. that employers should report.

We see sexual harassment as an important financial reporting matter and critical to the overall health and stability of a corporation. Nevertheless, we acknowledge corporate and regulator opposition to demands that companies disclose additional information.

C. *Objections to Sexual Harassment Disclosure*

Disclosure critics rely on numerous objections to mandatory reporting. One key complaint centers on the notion that some current reporting does not serve the primary goal of informing potential investors and shareholders.

1. *Disclosures Meant to Inform Investors*

Specific debates focus on environmental, social, and governance (ESG) issues and corporate social responsibility (CSR) matters. We agree with Professor Celia Taylor that many company ESG and CSR disclosures have little to do with the protection of investor interests.[262] For example, sections 1502 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) require company ESG disclosure of various mineral matters and payments to foreign governments.[263] Additionally, the Iran Threat Reduction and

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262. Celia R. Taylor, *Drowning in Disclosure: The Overburdening of the Securities & Exchange Commission*, 8 VA. L. & BUS. REV. 85, 88 (2014).

263. 15 U.S.C. §§ 78m(p)–(q) (2018).

Syria Human Rights Act (ITRA) of 2012 requires company disclosure of Iran-related activities.[264] These ESG provisions apply to a limited number of companies with connections to particular overseas geographical areas. The relevance for most corporate investors is not immediately clear.

Disclosure critics might view sexual harassment as a similar ESG issue or CSR matter. They might further argue that mandatory reporting will not make a difference to investors. Unlike the examples provided above, however, sexual harassment has no such limiting foreign policy dimensions. Sexual harassment exists in all industries and investors have borne the costs of harassment in U.S. companies for decades. Table 2 illustrates these costs. Sexual harassment imposes a number of economic consequences that include direct costs to the company and contingent liabilities. Hence, one can distinguish sexual harassment from many other ESG and CSR issues on economic grounds.

Another important difference between certain ESG issues and sexual harassment is the prevalence of voluntary reporting. Over 85% of companies in the S&P 500 produce voluntary sustainability reports.[265] Therefore, some form of ESG information is available to investors.[266] In contrast, we found no company that voluntarily issues sexual harassment reports. Companies go to extraordinary lengths to conceal sexual harassment information from investors, using arbitration and NDAs. Furthermore, Tables 2 through 4 provide evidence that even when sexual harassment disclosures are material and regulated, companies provide minimal information—not particularly useful to investors.

Voluntary ESG reporting also lacks the reliability and comparability that investment analysis requires.[267] Hence, informally provided ESG information is less useful to investors than specific information prescribed by regulation. In fact, 96% of investors asserted that voluntarily reported ESG infor-

264. 15 U.S.C. § 78m(r) (2018).

265. Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 81 (2020).

266. *Id.*

267. Virginia Harper Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1240 (2019).

mation was inadequate for investment purposes and costly to analyze.[268]

Moreover, investors want more information, rather than less information. Associate Professor Ann Lipton notes that the increase in company disclosure is contemporaneous with the increased demand for information from investors, particularly institutional investors.[269] More recently, Professor Virginia Harper Ho analyzed public comments to a SEC Concept Release that was part of a comprehensive review of the federal disclosure regime.[270] Professor Harper Ho found that most investors were not overloaded with information from company disclosures. Most investors asserted that companies underreport rather than overload investors.[271] Investors were also more supportive of prescriptive or line-item disclosures than companies were.[272] Not surprisingly, investors strongly favored ESG disclosure while public company representatives strongly opposed mandatory disclosures.[273]

2. *Disclosure Burdens on Involved Entities*

The second major argument against mandatory ESG reporting is the burden mandatory reporting imposes on various parties. For all parties, advances in technology assist with financial reporting. For investors, technology permits machine reading and automated analytics. Those tools enable efficient analysis of extensive disclosures, provided the information is presented in a comparable format.[274]

For most companies, the volume of sexual harassment information is likely to be manageable, not voluminous. Even if sexual harassment disclosures are voluminous, that volume will not thwart a large proportion of investors, which are institutions.[275] Institutions generally function as sophisticated investors by employing financial analysts. Additionally, the costs of disclosure are likely low. Companies routinely collect informa-

268. Harper Ho, *supra* note 265, at 120.
269. Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 105–06 (2017).
270. Harper Ho, *supra* note 265, at 67.
271. *Id.* at 70.
272. *Id.* at 85.
273. *Id.*
274. *Id.* at 119.
275. Lipton, *supra* note 269, at 93.

tion on the incidence and the costs of sexual harassment, if only to prove remediation under Title VII in the event of a lawsuit. Auditors and lawyers might verify and collate this information. Sexual harassment costs are generally simple to present and require no specialized knowledge or expertise to interpret.

An increase in corporate sexual harassment reporting will not pose added burdens for the SEC. Companies transmit disclosures electronically through EDGAR, the Electronic Data Gathering, Analysis, and Retrieval system, already used by the SEC. The SEC need not respond to sexual harassment or enforce sexual harassment laws. The SEC has admitted that it does not have the resources to police the entire securities industry.[276] Congress and the SEC have stated that they rely on both public and private enforcement, including by aggrieved private plaintiffs.[277] If the SEC mandated disclosure of sexual harassment and its costs, however, a corporation's failure to report would create a glaring hole. Sexual harassment targets, the EEOC, non-profit organizations such as Time's Up,[278] and state regulators, in addition to corporate shareholders might point to such a hole and the failure as proof of poor corporate culture, laxity, and unlawful conduct.

As an alternative to new disclosure rules, Professor Celia Taylor and Professor Galit Sarfaty propose a more conservative approach. They recommend that the SEC issue interpretative guidance.[279] In addition, Professor Taylor offers the alternative solution simply to decrease the amount of disclosure required in the first instance.[280] However, the empirical evidence in this study and past studies dictate against additional corporate discretion regarding sexual harassment claims disclosures. This discretion and lack of transparency only exacerbate the underlying discrimination issues.

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276. *Id.* at 99.

277. *Id.*

278. The Time's Up Legal Defense Fund is supported by the Time's Up Foundation. The National Women's Law Center Fund, LLC, houses and administers the Time's Up Legal Defense Fund. *Our Story*, TIME'S UP (Oct. 25, 2020), https://timesupnow.org/about/our-story/.

279. Taylor, *supra* note 262, at 119; Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 123 (2013).

280. Taylor, *supra* note 262, at 114.

If the SEC does not require disclosure, shareholders could demand reporting at an annual meeting. However, Professor Harper Ho argues that shareholder activism is an inefficient substitute for non-financial disclosure reform under federal securities laws.[281] Shareholder proposals are by law advisory, and the board is free to disregard even a majority vote.[282] The use of federal proxy rules for shareholder proposals operates as a barrier to effective disclosure reforms.[283]

Given our research and its empirical findings, we are convinced that unless compelled to do so, many corporate executives will not accurately investigate, analyze, and report the costs of sexual harassment. In light of #MeToo and 50 years of antidiscrimination law application, corporations should finally deal with discrimination and harassment in a transparent manner.

Conclusion

This Article suggests that companies could minimize the impact of litigation with early disclosures. It also explains how companies (whether publicly traded or not) might otherwise improve their profitability by making those early disclosures and protecting their human capital and capital investments. The empirical research and our discussion support several specific conclusions regarding our analysis.

First, we find that companies are three times more likely to withhold sexual harassment claims from their financial reports than disclose the claims. Once disclosed, the sexual harassment claims are disclosed multiple times in financial reports for an average period of over one year. Despite multiple disclosure, companies are very reluctant to provide estimates of the damages and quantify contingent liabilities. Hence, 25 years after the SCO debacle things have changed little, even after the #MeToo movement.

Second, companies tend to provide details of the lawsuits such as jurisdiction and the plaintiff, and further state they are defending the sexual harassment claim. A review of five years of sexual harassment court cases finds that many companies still adopt an adversarial response to sexual harassment claims.

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281. Harper Ho, *supra* note 267, at 1235.
282. *Id.* at 1242–43.
283. *Id.* at 1235.

However, companies disclose little information about the probability of loss. The size of the loss is generally described as inestimable. Overall, the sexual harassment disclosures provide little useful information to investors and other users of financial reports.

Third, once the limited information on lawsuits is disclosed, companies generally revise progress of the lawsuits in later financial reports. In contrast, since the disclosure of contingent liabilities is infrequent, the revision of contingent liabilities is rare. Further, companies are not likely to reveal that the claim is settled or provide details of the claim's resolution. Companies are also reluctant to reveal a non-disclosure agreement was used in settlement. This is consistent with a fear of litigation and adverse publicity. Companies not only withhold harassment information but also pay off perpetrators. Essentially companies are placing the interests of harassers above those of investors and other employees. These corporate responses to sexual harassment further obscure the costs of sexual harassment to targets, investors, and the community. Most companies are a long way from best practice disclosure of sexual harassment.

Fourth, CEOs are frequently identified as perpetrators of sexual harassment.[284] Often sexual harassment claims against CEOs are not disclosed in financial reports. In many cases, the CEOs resigned, retired, or were removed by the board of directors.[285] These consequences of CEO sexual harassment suggest that disclosure of the sexual harassment claim would have been important to investors. The CEO turnover and sexual harassment costs of companies, such as Twenty-First Century Fox,[286] Inc., suggest that harassers should not be insulated from individual liability and companies should not hide the damage to stockholders.

A number of non-disclosing companies are among the largest in the United States and face multiple sexual harassment claims.[287] These companies have the resources to help prevent sexual harassment. However, the non-disclosure of sexual harassment is consistent with an overriding fear of bad

284. *See supra* Section III.C.4.
285. *Id.*
286. *See supra* Table 2; *see also* Section III.C.1.
287. *See supra* Table 5.

publicity and litigation. At times, the non-disclosure indicates poor management and culture. As noted, a toxic culture "is the single most important factor in determining whether sexual harassment is likely to occur in a work setting."[288] A socioeconomic disease such as sexual harassment should be identified, investigated, disclosed, and cured.

Fifth, an SEC mandatory reporting requirement regarding the prevalence and costs of sexual harassment would provide valuable information to shareholders, employees, government regulators, and others. It would also provide evaluation assessment information to ascertain whether the reporting requirement itself was successful.

Future research avenues include formulation of specific disclosure regulation and further analysis of investor lawsuits against companies and auditors as methods to increase disclosure of sexual harassment claims. Since many claims involve CEOs, researchers should also examine the employment prospects of CEOs after sexual harassment, and the labor market discipline of CEOs and other key executives. This Article merely launches the invitation for future comment and reporting.

288. *See* NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 229, at 121 and accompanying text.