

United States Senate
WASHINGTON, DC 20510

February 28, 2022

The Honorable Gary Gensler
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Mr. Gensler,

We write to urge you to respect the jurisdictional boundaries of the Securities and Exchange Commission (SEC) as established by Congress during upcoming rulemakings on human capital. Recent calls for the SEC to use its limited authority over the investment space in order to forcibly reclassify workers who have intentionally chosen to be independent and subcontracted workers is entirely unrelated to the mission of the SEC.¹

The SEC has a mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.² While the SEC is integral to enforcing the nation's securities law, it has no authority to use securities disclosure indirectly to set policy regarding federal employment law. In fact, it has no jurisdiction of any kind over federal labor law. It is therefore surprising that as part of the Unified Regulatory Agenda, the SEC announced that it is considering recommending a proposed rule to "enhance" registrant disclosures regarding human capital management.³

While the public does not yet know what the SEC may be considering in this rulemaking, two U.S. Senators recently called upon the SEC to require companies to report how many workers they employ who are not classified as full-time employees, including independent and subcontracted workers.⁴ This letter follows a similar letter sent by six labor unions asking the

¹ Press Release, U.S. Senate Banking Committee, Majority, "Warner, Brown Call on SEC to Update Human Capital Disclosures So That Companies Report the Number of Employees Who Are Not Full-time Workers," (Feb. 4, 2022), <https://www.banking.senate.gov/newsroom/majority/warner-brown-call-on-sec-to-update-human-capital-disclosures-so-that-companies-report-the-number-of-employees-who-are-not-full-time-workers>.

² U.S. Securities and Exchange Commission, "What We Do" webpage, <https://www.sec.gov/about/what-we-do#:~:text=For%20more%20than%2085%20years,markets%2C%20and%20facilitating%20capital%20formation>, accessed February 18, 2022.

³ U.S. Securities and Exchange Commission press release (2021-99), "SEC Announces Annual Regulatory Agenda," (June 11, 2021), <https://www.sec.gov/news/press-release/2021-99>. See also, Regs.Gov, SEC Fall 2021, RIN: 3235-AM88, Human Capital Management Disclosure, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM88>.

⁴ Press Release, U.S. Senate Banking Committee, Majority, "Warner, Brown Call on SEC to Update Human Capital Disclosures So That Companies Report the Number of Employees Who Are Not Full-time Workers," (Feb. 4, 2022), <https://www.banking.senate.gov/newsroom/majority/warner-brown-call-on-sec-to-update-human-capital-disclosures-so-that-companies-report-the-number-of-employees-who-are-not-full-time-workers>.

SEC to ensure that companies disclose more information about their workforce numbers.⁵ It also follows then-SEC Chair Allison Herren Lee’s statement that the SEC should require metrics on workforce diversity, part time vs. full time workers, workforce expenses, and turnover.⁶ In a telling comment, one such senator’s spokesperson commented in media that her boss wrote to the SEC to ask for its intervention into labor matters because he was “generally concerned about companies’ increased use of subcontracted and contingent workers for work that used to be performed by direct employees.”⁷ While it may be appropriate for members of Congress to examine the implications of our evolving economy, it is another matter entirely to urge the SEC to force the disclosure of this information—with no apparent nexus to the financial materiality of a business.

To be clear, the SEC does not have jurisdiction over independent contractor status. Title 29 of U.S. Code, which is the jurisdiction of the Department of Labor (DOL), defines key terms such as “employers,” “employees,” and addresses “independent contractors” as a means of enforcing federal wage and hour laws. The National Labor Relations Act, enforced by the National Labor Relations Board (NLRB), also under Title 29 of the U.S. Code, enforces the rights and protections afforded to employees for the purposes of most federal labor and employment laws. The Internal Revenue Service (IRS), for the purposes of carrying out federal tax law in accordance with Title 26 of the U.S. Code, also utilizes a framework to ascertain who is an employee versus an independent contractor.

Situated under Title 15 of the U.S. Code, the SEC’s primary mission is not to be a steward over labor law or its enforcement, nor is the SEC’s primary mission to enforce the federal tax framework that coincides with such labor designations. In fact, the SEC, in 2017 interpretive guidance, intentionally deferred to appropriate authorities in such spaces, providing that a public company can determine whether a worker is an “employee” for purposes of the pay ratio rule by applying a widely recognized test used under another of area of law, such as tax law or employment law. In other words, the SEC refrained from mission creep and deferred to the appropriate bodies for defining employment status.⁸

What is driving requests for the SEC to engage in destructive mission creep can be attributed to comparable legislative efforts stalling in Congress in the face of bipartisan opposition. The PRO Act, for example, seeks to institute a three-part, so-called “ABC test” to determine when individuals should be classified as independent contractors. The PRO Act seeks to classify more workers as direct employees, thereby making them easier to unionize. However, the failings of the PRO Act have resulted in a lack of sufficient support in Congress, and the

⁵ Levi Sumagaysay, “Senators ask SEC to require disclosure of gig workers and other contractors,” MarketWatch (Feb. 10, 2022), <https://www.marketwatch.com/story/senators-ask-sec-to-require-disclosure-of-gig-workers-and-other-contractors-11644435739>.

⁶ Acting Chair Allison Herren Lee, “A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC,” Mar. 15, 2021, <https://www.sec.gov/news/speech/lee-climate-change>.

⁷ Levi Sumagaysay, “Senators ask SEC to require disclosure of gig workers and other contractors,” MarketWatch (Feb. 10, 2022), <https://www.marketwatch.com/story/senators-ask-sec-to-require-disclosure-of-gig-workers-and-other-contractors-11644435739>.

⁸ Kelsey A. O’Gorman, Benjamin F. Ridders, Koh Tanimoto, “The SEC weighs in on the independent contractor vs. employee debate,” Benefit News, (Sept. 28, 2017), <https://www.benefitnews.com/advisers/opinion/the-sec-weighs-in-on-the-independent-contractor-vs-employee-debate>.

The Honorable Gary Gensler

February 28, 2022

Page 3

legislation is stalled. Facing this reality, some labor unions are urging the SEC to help realize their vision of a fully unionized workforce through regulatory fiat. However, the SEC's jurisdiction is not to micromanage the American workforce, nor to overstep into the domain of DOL, the NLRB, or the IRS.

We are also concerned that opponents of the independent contractor model (including organized labor unions) would use the information disclosed on human capital disclosures to pressure and potentially intimidate companies that do not subscribe to their worldview of how the modern workforce should be structured.

In closing, we would urge the SEC to reject calls to inject social engineering of the nation's workforce, requests that also distract the SEC from its core mission—especially at a time when employers are struggling to find workers. It is critical for our federal policy framework to support a variety of choices for individuals when it comes to employment. Whether individuals choose to be independent contractors, direct employees, or subcontractors, preserving their freedom to choose is pro-worker and enables individuals to choose the path that best fits them and their families.

Sincerely,



Pat Toomey
Ranking Member
Committee on Banking, Housing and
Urban Affairs



Richard Burr
Ranking Member
Committee on Health, Education, Labor and
Pensions



Mike Crapo
Ranking Member
Committee on Finance



Mike Braun
Ranking Member
HELP Subcommittee on Employment and
Workplace Safety