THE ENFORCEMENT VALUE OF DISCLOSURE

STEPHANIE BORNSTEIN†

ABSTRACT

Information disclosures often "nudge" consumers to make better choices—for example, when manufacturers include nutrition labels on food packaging or fuel economy standards on cars. Yet having to disclose can have a nudge effect on the disclosing entity, too—for example, by incentivizing a manufacturer to make healthier food or more fuel-efficient cars. Recently, regulators around the world have begun to use information disclosures to improve racial and gender equality—for example, by requiring certain businesses to disclose information on things like harassment complaints, board diversity, and employee pay. But are such disclosure efforts worth their costs? And what would indicate that policymakers should continue or expand similar measures?

This Article addresses how to evaluate what it refers to as "equality disclosures," highlighting the need to account for the often overlooked public enforcement value of the nudge on the disclosing entity. When measuring disclosure as a behaviorally informed intervention, we tend to focus on the welfare effects on the consumer *of the information—the now-informed person who chooses (or declines) to eat the food or purchase the car. But disclosure requirements also affect the behavior of the* producer *of the information, thus serving an important enforcement role in the administrative state. Any assessment of the value of equality disclosures must include the public benefit gained when the act of having to disclose nudges disclosing entities toward self-monitoring and legal compliance.*

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INTRODUCTION

Regulatory schemes requiring disclosure of information to the public are common—for example, auto manufacturers displaying miles per gallon on cars or food packaging labels displaying nutritional information on food.[1] These efforts have been described as "nudges"

1. *See, e.g.*, Memorandum from Cass R. Sunstein, Off. of Info. and Regul. Affs. Admin., for the Heads of Exec. Dep'ts & Agencies, Disclosure and Simplification as Regulatory Tools 3 (June 18, 2010), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf [https://perma.cc/J92X-G7L3] (explaining that, "[i]n many statutes, Congress requires or permits agencies to use disclosure as a regulatory tool," and establishing principles to guide disclosure requirements during the Obama administration). A large body of scholarship has addressed the role and effectiveness of information disclosures in law, a complete discussion of which is beyond the scope of this Article. *See generally, e.g.*, Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045 (2019); Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE L. REV. 599 (2013); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011); Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089 (2007); David Weil, Archon Fung, Mary Graham & Elena Fagotto, *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155 (2006); John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984); *see also infra* note 70.

that push consumers—those who receive the information—to make better choices.[2] Other measures compel more significant disclosures to administrative agencies directly—for example, publicly traded companies being required to produce to securities agencies all information that would be material to investors.[3] Although this information may nudge a consumer toward a better choice, it serves another role: as a secondary nudge on the entity required to disclose that may encourage the entity to modify its own behavior.[4]

Information disclosures are usually associated with product safety, health or financial risks, or sales transaction terms.[5] In recent years, however, regulators around the world have begun to use compelled disclosures to track and improve racial and gender equality—for example, by requiring companies to disclose corporate board diversity measures, incidents of sexual harassment, or employee pay by race and gender.[6] In particular, a long-standing global gender pay gap has inspired countries to experiment with a variety of regulations on pay, including information disclosure.[7] The concept has caught on more recently in the United States, where—despite efforts over six decades since federal law prohibited pay discrimination by sex and race[8]—the economy remains marked by steep and persistent gender and racial pay gaps.

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2. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 8 (2021).

3. *See Exchange Act Reporting and Registration*, SEC, https://www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting [https://perma.cc/8VCJ-6A7Y] (listing the reports public corporations must submit to the SEC).

4. *See* Sale, *supra* note 1, at 1046–47 (identifying what she terms the phenomenon of "information-forcing-substance"); George Loewenstein, Cass R. Sunstein & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECON. 391, 394, 403–04 (2014) (identifying what they term the "telltale heart effect"); *infra* Part I.B.

5. *See, e.g.*, Loewenstein et al., *supra* note 4, at 392–93 (describing common types of information disclosures).

6. *See infra* Parts I.C, II. *See generally* Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287 (2021) [hereinafter Bornstein, *Disclosing Discrimination*] (considering the use of compelled disclosure of employer information as a means of better enforcing antidiscrimination law based on lessons from information-forcing mechanisms in securities law and the power of public exposure).

7. *See, e.g.*, *EU Action for Equal Pay*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/eu-action-equal-pay_en [https://perma.cc/44PJ-MDS4].

8. *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 201); Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (codified at 42 U.S.C. § 2000e-2).

A full discussion of gender and racial pay gaps and their causes is beyond the scope of this Article,[9] but some basic information provides context for the rise of pay disclosures. Recent data shows that, when comparing average median wages of full-time, full-year workers, women earn only 82 cents on the dollar to men, reflecting an average pay gap of 18 percent.[10] Black and Latinx workers earn only 73.5 and 74.6 cents respectively on the dollar of white workers, reflecting a pay gap of 25.4 to 26.5 percent.[11] Black and Latina women, who bear the brunt of both gender and racial pay gaps, earn a mere 63 and 55 cents respectively on the dollar of white men.[12] Worse still, after narrowing between the 1960s and 2000, progress in closing the gender pay gap has been stalled for over two decades.[13] The racial pay gap is actually larger than it was forty years ago.[14]

Although median wage comparisons have been criticized for painting too broad a picture, even the most adjusted statistics that control for demographic differences in education, work experience, industry, occupation, geography, and race reveal a gender pay gap of 8.4 to 13.5 percent[15] and a racial pay gap of up to 14.9 percent.[16] Moreover, while adjusted pay comparisons are useful to infer possible

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9. In other work, I have written extensively on gender and racial pay gaps. *See generally* Stephanie Bornstein, *Confronting the Racial Pay Gap*, 75 VAND. L. REV. 1401 (2022) [hereinafter Bornstein, *Confronting the Racial Pay Gap*]; Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018) [hereinafter Bornstein, *Equal Work*].

10. AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 2 (2020) [hereinafter THE SIMPLE TRUTH], https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf [https://perma.cc/J7FC-CPMQ].

11. *See* Elise Gould, *Black-White Wage Gaps Are Worse Today Than in 2000*, ECON. POL'Y INST.: WORKING ECON. BLOG fig.A (Feb. 27, 2020, 5:34 PM) [hereinafter Gould, *Black-White Wage Gaps*], https://www.epi.org/blog/Black-white-wage-gaps-are-worse-today-than-in-2000 [https://perma.cc/Q957-ZQ6D] (showing a Black-white pay gap of 26.5 percent in 2019); ELISE GOULD, ECON. POL'Y INST., STATE OF WORKING AMERICA WAGES 2019: A STORY OF SLOW, UNEVEN, AND UNEQUAL WAGE GROWTH OVER THE LAST 40 YEARS 14 (2020), https://files.epi.org/pdf/183498.pdf [https://perma.cc/B2FL-7XHA] (showing that the gap between Latinx and white workers' wages was 25.4 percent in 2019).

12. *See* THE SIMPLE TRUTH, *supra* note 10, at 4.

13. Bornstein, *Confronting the Racial Pay Gap*, *supra* note 9, at 1409–10.

14. *See id.* at 1404.

15. ELISE GOULD, JESSICA SCHIEDER & KATHLEEN GEIER, ECON. POL'Y INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? 7 & nn.9–10 (2016), https://files.epi.org/pdf/112962.pdf [https://perma.cc/Z8CD-72FG] (documenting a 13.5 percent gender gap when industry, occupation, and work hours are controlled and an 8.4 percent gender gap when fully adjusted, so that education, industry, occupation, experience level, geography, race, ethnicity, and metropolitan region are controlled).

16. Gould, *Black-White Wage Gaps*, *supra* note 11.

discrimination, unadjusted median wage comparisons are useful to demonstrate inequality: women and racial minorities' systemic lack of access to equal opportunity to earn the same wages as white men.[17]

In response to these stubborn and persistent gaps, nearly half of U.S. states and the federal government have begun to experiment with a variety of regulatory interventions around pay disclosure, including rules around pay transparency and prior salary information, pay range posting requirements, and more extensive pay data reporting schemes.[18] But are such information disclosure efforts worth their costs? And what would indicate that policymakers should continue or expand similar disclosure requirements?

This Article analyzes how to evaluate such efforts, which it refers to as "equality disclosures,"[19] highlighting the need to account not only for the welfare benefits of the primary nudge on information recipients but also for the public enforcement value of the secondary "nudge" on regulated entities. When evaluating disclosure as a behaviorally informed intervention, we tend to focus on the *consumer* of the information—assessing the effectiveness of the nudges on the consumer who makes a decision after receiving a disclosure.[20] Yet disclosure schemes also have nudge effects on the *producer* of the information. The act of having to disclose affects the behavior of the entity providing the disclosure, often serving an essential enforcement role in the administrative state.[21] This is especially true when a regulatory scheme relies heavily on private enforcement through individual lawsuits, with limited public resources to ensure the law is followed, as in employment discrimination.[22] Assessing disclosure

17. Bornstein, *Confronting the Racial Pay Gap*, *supra* note 9, at 1413–14.

18. *See infra* Part II.

19. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 293 (coining the term "equality disclosures").

20. THALER & SUNSTEIN, *supra* note 2, at 137–44. Since its original publication in 2008, Thaler & Sunstein's book has been updated twice. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: REVISED & EXPANDED (2009); THALER & SUNSTEIN, *supra* note 2. Their work on nudges has launched a rich literature on "choice architecture"—how information shapes the decisions of those who receive it. *See generally, e.g.*, Stephanie Mertens, Mario Herberz, Ulf J.J. Hahnel & Tobias Brosch, *The Effectiveness of Nudging: A Meta-Analysis of Choice Architecture Interventions Across Behavioral Domains*, 119 PNAS 1 (2022) (describing several studies on choice architecture).

21. *See infra* Part I.B.

22. *See infra* Part I.C.

schemes and their social welfare, distributional effects, and costs and benefits,[23] then, requires equal or greater focus on the producer of the information and the benefits to the public when having to disclose nudges entities toward self-monitoring and legal compliance.

Part I situates the issue of information disclosure within the context of behaviorally informed administrative law interventions, explaining both primary (on consumers) and secondary (on producers) nudge effects. It identifies the main behavioral goals of such disclosure requirements: for consumers, to correct information asymmetry; for producers, to induce substantive change when forced to report and, where disclosures are made public, through pressure from information exposure.[24] It then explains that, as a bidirectional nudge, disclosure can serve a key enforcement role for laws that rely on private enforcement, such as antidiscrimination laws. Part II describes examples of the use of compelled disclosures to advance equality measures, including three recent approaches to disclosing information on pay in an effort to narrow gender and racial pay gaps. Part III reflects on how to assess the value of equality disclosures, considering existing data on costs and benefits. It concludes with a call to account for the enforcement value to the public gained when disclosure requirements nudge regulated entities toward greater gender and racial equality.

I. DISCLOSURE OF EQUALITY MEASURES AS A BEHAVIORALLY INFORMED INTERVENTION

Disclosure requirements provide information that may nudge a consumer to make a better choice with more complete information.[25] That the consumer may, or may not, make use of the information provided discounts the value gained relative to the costs the provider undertook to produce the disclosure. Yet a disclosure requirement may

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23. Professor Sunstein proposes five questions to measure regulatory interventions meant to affect behavior:

> (1) What are the aggregate effects on social welfare? . . . . (2) What are the effects of the intervention on people's emotional states? . . . (3) Who is likely to be helped and who is likely to be hurt? . . . . (4) What are the expected effects on the least well-off? . . . . (5) Do the benefits to those who are helped exceed the costs to those who are hurt?

Cass R. Sunstein, *Welfare Now*, 72 DUKE L.J. 1643, 1652–53 (2023) (italics removed) [hereinafter Sunstein, *Welfare Now*].

24. *See infra* Part I.C; *see also* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 303–08 (describing the benefits of affirmative disclosure of compliance with antidiscrimination laws).

25. *See* THALER & SUNSTEIN, *supra* note 2, at 6.

also nudge the producer of the information: regardless of whether the consumer uses the information, the act of having to disclose affects the behavior of the discloser, making disclosure itself a tool for enforcing related regulation. In regulated areas in which the primary means of enforcement is left to private actors—for example, in antidiscrimination law—the tool of information disclosure and its behavior-forcing effects becomes more valuable, providing an important benefit to the public, too.

A. Disclosure as a Primary Nudge: Information Recipient Behavior

Many behaviorally informed interventions by the regulatory state serve as nudges, defined by Professors Cass Sunstein and Richard Thaler in their foundational work as "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives."[26] By "choice architecture," the authors mean how we "organiz[e] the context in which people make decisions."[27] The regulatory tool of information disclosure often functions as such a nudge. Where laws or regulations encourage or require regulated entities to provide certain information to the public, the goal is to help the recipient of that information make informed, and better, choices.[28]

Two examples demonstrate this concept. A 1990 law required food manufacturers to provide a standard nutrition facts label on packaged food, enforced by the Food and Drug Administration ("FDA").[29] Without barring any food items from being produced or sold, nutrition labels now provide food purchasers with information that may nudge them toward making healthier eating choices, in turn reducing obesity and other public health concerns.[30] Likewise, a 1975

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26. *Id.*

27. *Id.* at 3.

28. *Id.*

29. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343).

30. *See generally, e.g.*, Catherine E. Cioffi, David A. Levitsky, Carly R. Pacanowski & Fredrik Bertz, *A Nudge in a Healthy Direction. The Effect of Nutrition Labels on Food Purchasing Behaviors in University Dining Facilities*, 92 APPETITE 7 (2015) (finding that use of nutrition labels in a university dining hall reduced the number of unhealthy foods purchased by a small but significant amount); Gyorgy Scrinis & Christine Parker, *Front-of-Pack Food Labeling and the Politics of Nutritional Nudges*, 38 LAW & POL'Y 234 (2016) (describing the benefits and impact of using front-of-pack nutrition labels as a nudge in the context of obesity and diet-based disease); H. Ensaff, *A Nudge in the Right Direction: The Role of Food Choice Architecture in Changing*

law required auto manufacturers to post consistent fuel economy labels stating average car mileage, enforced by the Environmental Protection Agency ("EPA").[31] Without changing the cost of any given car or prohibiting its sale, today fuel economy labels provide car buyers with information that may nudge them toward buying a more fuel-efficient car, in turn reducing carbon emissions.[32] Examining these examples, numerous studies have documented how small nudges can make significant impacts.[33]

As scholars have identified, disclosure requirements help correct "information asymmetry" between the parties to a transaction, in which only one side has information material to the decision.[34] Without nutrition labels, the consumer deciding what food to eat lacks knowledge of its calorie and fat content, which the food producer knows. Without fuel economy labels, the consumer deciding which car to buy lacks knowledge of how many miles to the gallon each car may get, which the auto manufacturer knows. This makes for an uneven playing field for the consumer's choice. Correcting the balance of information can benefit the consumer, who—with more complete information—can make a better eating or purchasing choice.

Yet merely providing information also leaves the ability to make a choice intact; nudges by definition "preserve freedom of choice and thus allow people to go their own way."[35] This matters when trying to evaluate the effectiveness of any information disclosure regime. If consumers who receive the information choose to ignore it, the benefits gained by the costs to produce and disclose the information may be undermined.[36] And even nudges may not be costless on consumers—for example, if the cost of imposing disclosure requirement gets passed

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Populations' Diets, 80 PROCS. NUTRITION SOC'Y 195 (2021) (analyzing current labeling policies and suggesting policy guidance to change unhealthy diets).

31. Energy Policy and Conservation Act, Pub. L. No. 94-163, § 506, 89 Stat. 871, 910 (1975) (codified as amended at 49 U.S.C. § 32908).

32. *See, e.g.*, Cristiano Codagnone, Giuseppe Alessandro Veltri, Francesco Bogliacino, Francisco Lupiáñez-Villanueva, George Gaskell, Andriy Ivchenko, Pietro Ortoleva & Francesco Mureddu, *Labels as Nudges? An Experimental Study of Car Eco-Labels*, 33 ECONOMIA POLITICA 403, 405, 407–08 (2016) (collecting studies on "eco labels for cars" and presenting own findings that "large and expensive cars tend to be given less value when fuel economy is made salient").

33. *See, e.g.*, *supra* notes 30, 32.

34. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 303–05 (discussing scholarship on information asymmetry); Loewenstein et al., *supra* note 4, at 396–97.

35. Cass R. Sunstein, *Nudges vs. Shoves*, 127 HARV. L. REV. F. 210, 210 (2014).

36. THALER & SUNSTEIN, *supra* note 2, at 320–23.

on to consumers when manufacturers charge higher prices for healthier food or more efficient cars to absorb the cost of producing the disclosure.[37] Consumers may also lose limited time they have to pay attention to information[38] or experience negative emotions affecting their welfare when they receive information that diminishes their enjoyment of their favorite (unhealthy) foods or (gas guzzling) cars.[39]

Focusing on the costs, benefits, and effectiveness of information disclosure as solely a nudge on consumers, however, ignores the other party to any disclosure transaction. It fails to account for the behavioral effects that the act of disclosing has on the regulated entities producing the information.

B. Disclosure as a Secondary Nudge: Information Provider Behavior

While information disclosure serves primarily as a nudge on a consumer, it may also have a nudge effect on a producer. Disclosures not only correct information asymmetry, but induce what Professor Hillary Sale calls the "information-forcing-substance" theory, whereby a disclosing entity, once faced with the information it must disclose, changes its behavior.[40] Should the disclosure be made to the public, rather than only internally or to a regulatory agency confidentially, the phenomenon of "publicness" may compound such effects due to peer and social pressure after exposure.[41]

To return to the examples provided in the prior Section, a food manufacturer required by the FDA to create a nutrition facts label may be motivated to make their food items healthier or to create new, healthy items.[42] And that the public can see and share how caloric or

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37. *See id.*

38. Loewenstein et al., *supra* note 4, at 398–99.

39. *See* Sunstein, *Welfare Now*, *supra* note 23, at 1646 (describing the "emotional tax" of interventions); Cass R. Sunstein, *Ruining Popcorn? The Welfare Effects of Information*, 58 J. RISK & UNCERTAINTY 121, 123 (2019) (explaining that more information may diminish consumers enjoyment of certain products).

40. *See* Sale, *supra* note 1, at 1046–47.

41. *Id.* at 1065 ("Publicness is a concept that encompasses the interplay between the inside players in the corporation (directors and officers) and outsiders—like media and analysts—who cover the company. Outsiders reframe and recapitulate information about the issuer and play an important role in the public perception of the company."); *see also* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 306–08 (discussing scholarship on publicness).

42. *See, e.g.*, *McDonald's Phasing Out Supersize Fries, Drinks*, NBC NEWS (Mar. 3, 2004, 4:29 AM), https://www.nbcnews.com/id/wbna4433307 [https://perma.cc/4KJW-MUNA].

fattening an item is may further this effect.[43] Likewise, an auto manufacturer required by the EPA to calculate and display fuel economy averages may be inspired to make its cars more fuel efficient or to manufacture new, greener models—either because, once made aware, it is concerned about emissions or because the public nature of the disclosure affects marketing.[44] Professors Sunstein, George Loewenstein, and Russell Golman refer to this as the "telltale heart effect" (named after the Edgar Allan Poe short story about a guilty conscience) due to findings that disclosing entities make changes even when their disclosures had little or no effect on consumer behavior.[45] This, the authors surmise, is because the disclosers "either have an exaggerated expectation of the likely consumer response or feel guilty about the information disclosed."[46]

The disclosure regime in securities law provides another example of rules originally enacted to correct information asymmetry but which developed over time to be primarily behavior forcing. In response to the Great Depression, securities laws enacted in the 1930s placed mandatory disclosure requirements on companies to serve the "national public interest" of restoring investor faith in the stock market to grow the economy.[47] Congress also created the Securities and Exchange Commission ("SEC") as the responsible regulatory agency, to whom companies issuing public securities (stocks and bonds) were required to provide periodic disclosures.[48] Current law requires

43. *See, e.g.*, *id.* (describing McDonald's menu changes due to "intense pressure to cater to Americans' growing preference for healthier food options"); Eunju Lie, *Health Group Bashes High-Calorie Restaurant Food*, REUTERS (July 19, 2011, 9:48 PM), https://www.reuters.com/article/restaurants-health-idCNN1E76H09920110719 [https://perma.cc/X9B5-EFJG] (describing a health group's criticism of several restaurants exceeding daily calorie intake limits).

44. *See* Benjamin Preston, *New Ways Carmakers Are Getting You More MPG*, CONSUMER REPORTS (Apr. 26, 2022), https://www.consumerreports.org/fuel-economy-efficiency/new-ways-carmakers-are-getting-you-more-mpg-a1199412618 [https://perma.cc/EU9J-JECK] ("For a variety of reasons, including consumer demand and government fuel and emissions standards, automakers have been forced to invent gas-saving innovations as they try to squeeze out incremental improvements to fuel economy.").

45. Loewenstein et al., *supra* note 4, at 403–04.

46. *Id.* at 404.

47. Securities Exchange Act of 1934, ch. 404, § 2, 48 Stat. 881, 881 (codified as amended at 15 U.S.C. § 78b); Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa).

48. Securities Exchange Act of 1934, ch. 404, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78(d)); *see also What We Do*, SEC, https://www.sec.gov/Article/whatwedo.html [https://perma.cc/A4G9-A7JX] (describing the SEC's work).

covered businesses to disclose key information on investment risks when it issues securities and to provide periodic updates.[49] Some disclosures are available for the public to access through the SEC's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") online database; other, more detailed information is provided only to the SEC to use for enforcement actions or in aggregated form in public reports.[50]

The goal of the SEC disclosure regime is to correct information asymmetry—to provide accurate information from which investors and the "information traders" that serve them can make investment choices.[51] The SEC itself neither assesses the merits of a security, nor operates directly to regulate corporate behavior. As such, the disclosure requirement was intended as a nudge on consumers to feel confident investing and make sound investment choices when doing so.[52]

Yet while this may be its primary goal, the securities disclosure regime has also led to additional behavioral effects on covered entities.[53] As Professor Sale notes, having to collect and produce

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49. *See* 15 U.S.C. §§ 78*l*, 78m, 78o(d) (requiring disclosures, periodical reports, and supplementary information); EVA SU, CONG. RSCH. SERV., IF11256, SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 1–2 (2019). Required disclosures include anything material to the value of the stock, such as "financial statements, business risks and prospects, a description of the stock to be offered for sale, and the management team and their compensation." *Id.* at 1. Such disclosures are coupled with an anti-fraud rule to ensure that the information disclosed is accurate and free of material omissions. *See* 17 C.F.R. § 240.10b-5 (2022) (making it unlawful "[t]o employ any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security"); Sale, *supra* note 1, at 1048 ("This disclosure regimen is paired with an antifraud rule, the enforcement of which plays a key backend investor-protection role.").

50. *See About EDGAR*, SEC (Oct. 6, 2022), https://www.sec.gov/edgar/about [https://perma.cc/3WLS-HHYE]; SU, *supra* note 49, at 1–2 (describing nonpublic disclosures). A company's failure to comply honestly can result in civil or criminal liability enforced by the SEC through litigation. *See* 15 U.S.C. §§ 77t(b), (d)(1); *What We Do*, *supra* note 48 (noting that the SEC "vigorously enforc[es] the federal securities laws to hold wrongdoers accountable and deter future misconduct").

51. *See* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 713–14 (2006); Sale, *supra* note 1, at 1048–49 ("Indeed, the regulatory choice was to provide investors with accurate information, not to develop a regime where regulators determined the merits of the securities or entity.").

52. *See* Sale, *supra* note 1, at 1047–48.

53. The nudge effect on disclosing entities may become even more pronounced with the recent move, spurred by public pressure, to include what are known as ESG (Environmental, Social, Governance) disclosures in the securities regime. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (proposing "to require

accurate information about the operations of the company for which the company and its leadership can be held accountable "create[s] incentives for directors to engage in a dialogue with management about the basis for any disclosures" that, in turn, may affect their "substantive behavior," including management actions to better serve and reflect the company's goals.[54]

Moreover, the "publicness" of some disclosures further impacts covered entities' behavior when media or activists pick up and expose any concerns they perceive within the disclosures.[55] For example, when news of a state investigation into systemic sex discrimination and harassment at video game company Activision Blizzard became public, investors sued for securities fraud, "accus[ing] the company of stuffing its securities filings with vague disclosures about 'routine' legal claims to deflect attention" from the major threat to its operations.[56]

Information disclosure as a regulatory tool, then, informs not just consumer behavior in making choices, but also the behavior of the entity producing the information. In evaluating the costs and benefits of information disclosures, behavioral effects on regulated entities must also be considered.

C. *Equality Disclosures as a Bidirectional Nudge*

In the context of equality disclosures, the behaviorally informed intervention of information disclosure is a bidirectional nudge, operating on both disclosing entities and information recipients. By

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disclosures about climate-related risks and metrics reflecting those risks"); Press Release, SEC Proposes To Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Practices (May 25, 2022), https://www.sec.gov/news/press-release/2022-92 [https://perma.cc/D3F7-S2XN]. For more on the topic of ESG disclosures, which is well beyond the scope of this Article, see generally, for example, David N. Katz & Laura A. McIntosh, *ESG in 2023: Politics and Polemics*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2023), https://corpgov.law.harvard.edu/2023/02/06/esg-in-2023-politics-and-polemics [https://perma.cc/22G9-AKRE]; Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277; Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273 (2022).

54. *See* Sale, *supra* note 1, at 1047.

55. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 306–08.

56. Mike Leonard, *Activision Blizzard Hid Harassment Probe, Investor Suit Says*, BLOOMBERG L. (Aug. 3, 2021, 2:06 PM), https://news.bloomberglaw.com/class-action/activision-blizzard-hid-harassment-probe-from-investors-suit-says [https://perma.cc/GVH4-ATZS]; *see* Kia Kokalitcheva, *Companies Under Pressure To Disclose More Information to Investors*, AXIOS (Oct. 11, 2021), https://www.axios.com/2021/10/11/facebook-money-information-disclosure-investors [https://perma.cc/DFT4-VL8L].

"equality disclosures," this Article refers to a variety of information disclosures on a regulated entity's measures of gender and racial equality.[57] Examples include: federal securities regulations that require public corporations to disclose how they "consider[] diversity in identifying nominees for director"[58]; state laws that require entities to report confidential settlements of sexual harassment[59] or all discrimination[60] claims; and a variety of approaches to gather and report information on employee pay, including by race and gender.[61]

Equality disclosures serve first to correct information asymmetry between employers and current or prospective employees. For employees or applicants, it is very difficult to obtain information about prior employee discrimination complaints or other employees' pay.[62] If employers disclose this information, it may nudge current employees to seek more equitable pay, or prospective employees to seek out more equitable employers. The power imbalance between information consumer (here, employee or applicant) and information producer (here, employer) greatly heightens the value of disclosure to correct the information asymmetry. Yet even if an employee receives complete and accurate information, they may not be able to act on it: except for

57. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 293–94.

58. Proxy Disclosure Enhancements, Securities Act Release No. 9089, Exchange Act Release No. 61,175, Investment Company Act Release No. 29,092, 74 Fed. Reg. 68334, 68343 (Dec. 23, 2009). The SEC has interpreted this to include a description of "the self-identified diversity characteristics . . . (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background)" it considered and how it did so in appointing board members. *Regulation S-K: Questions and Answers of General Applicability*, SEC, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm [https://perma.cc/SZ3L-Q9QK], (last updated Sept. 21, 2020). In addition, scholars have proposed adding sexual harassment reporting to required SEC disclosures. *See, e.g.*, Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1650–51 (2018).

59. *See, e.g.*, H.B. 1596, 2018 Gen. Assemb., Reg. Sess. (Md. 2018); S.B. 1010, Gen. Assemb., Reg. Sess. (Md. 2018). Maryland law requires employers of at least 50 employees to submit information to the Maryland Commission on Civil Rights on the number of sexual harassment settlements it received and whether they involved repeat offenders or included a confidentiality provision. MD. CODE ANN., LAB. & EMP. § 3-715 (West 2018). The agency can publish anonymized aggregated reports on their website and allow public inspection upon request. *Id.*

60. *See, e.g.*, 775 ILL. COMP. STAT. 5/2-108 (2020). Illinois law require all employers to report to the Illinois Department of Human Rights any judgments or rulings of unlawful discrimination, including total number, equitable relief ordered, and whether the claims involve sexual harassment. *Id.* at 5/2-108(B). The agency can publish an annual anonymized and aggregated report, though individual filings remain confidential and excluded from FOIA. *Id.* at 5/2-108(E)(c).

61. *See infra* Part II.

62. *See infra* Part III.C.

highly skilled professionals, most employees lack the bargaining power to demand higher pay and cannot simply move to another employer.[63] This makes the nudge of equality disclosures on disclosers (employers) even more valuable than the nudge on consumers (employees or applicants) of the information.

Moreover, in areas of legal regulation that rely heavily on private enforcement, like antidiscrimination law, disclosure is an essential regulatory tool. Many areas of public law—including consumer, securities, antitrust, environmental, and work law—were enacted with limited public resources, instead relying on private actors to complain and sue when the law is violated.[64] As discussed further in Part III, under federal law, if an employee experiences race, gender, or other protected class discrimination, their primary form of enforcement is through a private lawsuit that an attorney brings on their behalf.[65] Employees must also be willing to file a complaint despite fear of retaliation at work.[66] The behavior-forcing effects of equality disclosures and the public pressure deriving from any negative publicity of the information disclosed stand to do a significant amount of enforcement work, shifting the burden for legal compliance more equally on employers. Employers who are required to collect, track, and report complaints or data to government agencies are more likely to reflect upon the inequality within their own institutions and take voluntary measures to comply with antidiscrimination law.[67]

For effective evaluation of equality disclosures, understanding the full range of benefits gained from the behavioral effects such disclosures have on employers—benefits to both individual employees

63. *See* Teresa Ghilarducci, *Worker Power Is Weakening, Indicators Show*, FORBES (Sept. 14, 2022, 9:00 AM), https://www.forbes.com/sites/teresaghilarducci/2022/09/14/worker-power-is-weakening-indicators-show [https://perma.cc/H83C-PZC4].

64. *See generally, e.g.*, Steven B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION & PRIVATE LAWSUITS IN THE U.S. (2010); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005).

65. *See infra* Part III.C. For scholarship on private enforcement of employment discrimination law, see generally, for example, Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811 (2019); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998).

66. *See infra* note 176 and accompanying text.

67. *See infra* notes 161–166 and accompanying text.

and to the public interest—is essential. Applying this insight requires understanding the specifics of equality disclosure regimes, to which the next Part turns.

II. REGULATIONS COMPELLING EQUALITY DISCLOSURES: EXAMPLES ON PAY

A longstanding global gender pay gap has inspired regulators around the globe to adopt a variety of information disclosures on employee pay.[68] The concept has caught on more recently in the United States, where deep gender and racial pay gaps have persisted for decades.[69] In an effort to jumpstart stalled progress toward closing pay gaps, nearly half of U.S. states and the federal government have begun to experiment with regulating information exchange and disclosures on pay.[70] As discussed in this Part, the interventions come in three main forms, ranging from least to most burdensome on information producers: (1) rules limiting information exchange about pay, (2) posting requirements for job pay ranges, and (3) disclosure schemes on employee pay data.

A. Rules on Information Exchange About Pay

Among U.S. regulatory approaches to redress pay inequality, laws that require pay transparency and prior salary information bans are the least burdensome on employers. While both function as interventions that modify behavior, neither are disclosure requirements; rather, they are rules about information exchange on the issue of pay. Pay

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68. *See supra* notes 6–7 and accompanying text.

69. *See supra* notes 6–7 and accompanying text; Bornstein, *Confronting the Racial Pay Gap*, *supra* note 9, at 1403–06, 1443–50.

70. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 313–48. For scholarship on the value of disclosures in employment law, see generally Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781 (2014); Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177 (2015); ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007). For scholarship on the value of pay transparency to improve negotiation in private law, see generally, Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951 (2011); Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020); Gowri Ramachandran, *Pay Transparency*, 116 PA. ST. L. REV. 1043 (2012). For scholarship exploring whether to add equality measures to existing securities law disclosures, see generally, for example, Hemel & Lund, *supra* note 58.

transparency laws, enacted in nearly twenty states to date, explicitly protect employees' rights to discuss pay with each other and prohibit employers from penalizing employees for having such discussions.[71] The laws appear as simple mandates, often incorporated into the state's existing equal pay statutes and relying on similar enforcement and remedies.[72] For example, Louisiana's statute, similar to many others, makes it "unlawful for any employer to . . . take any adverse employment action . . . against any employee for inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of any other employee."[73]

State prohibitions on pay secrecy overlap with federal law under the National Labor Relations Act ("NLRA"), which guarantees covered workers the right to "engage in concerted activities, for the purpose of . . . mutual aid or protection," including discussions about pay.[74] Yet because the NLRA covers only a subset of workers,[75] and because enforcement of any NLRA violation requires an employee to complain despite fear of retaliation,[76] employers often still deter or prohibit workers from speaking to each other about pay.[77] A more

71. *See Equal Pay and Pay Transparency Protections*, U.S. DEP'T OF LAB., WOMEN'S BUREAU, https://www.dol.gov/agencies/wb/equal-pay-protections [https://perma.cc/K6HD-YKLN] (scroll to map and hover cursor over any state to see that specific state's laws); NAT'L WOMEN'S L. CTR., PROGRESS IN THE STATES FOR EQUAL PAY 4 (2020) [hereinafter NAT'L WOMEN'S L. CTR., PROGRESS IN THE STATES], https://nwlc.org/wp-content/uploads/2019/12/State-Equal-Pay-Laws-2020-11.13.pdf [https://perma.cc/89VP-HFFE].

72. *See* NAT'L WOMEN'S L. CTR., PROGRESS IN THE STATES, *supra* note 71, at 4–5; *see, e.g.*, LA. REV. STAT. ANN. § 23:664(D) (2022) (adding protections within the Louisiana Equal Pay for Women Act); ME. STAT. tit. 26, § 628 (2022) (barring prohibitions on employee discussion of wages "if the purpose of the disclosure or inquiry is to enforce the rights granted by this section," referring to the Maine Equal Pay Law).

73. *See* LA. REV. STAT. ANN. § 23:664(D) (2022); *see, e.g.*, NEV. REV. STAT. § 613.330(1)(c) (2022); OR. REV. STAT. § 659A.355(1)(a) (2021); 820 ILL. COMP. STAT. 112/10(b) (2022); *see also Equal Pay and Pay Transparency Protections*, *supra* note 71 (compiling states' pay transparency laws).

74. *See* National Labor Relations Act, Pub. L. No. 74-198, §§ 7–8, 49 Stat. 449, 452–53 (1935) (codified as amended at 29 U.S.C. §§ 157–158(a)).

75. The NLRA covers many private sector employees but excludes government workers and "supervisors" as defined. National Labor Relations Act § 2, 29 U.S.C. § 152(2)–(3). For this reason, state level protections for employees to discuss pay go beyond existing federal protections.

76. *See* LYNN RHINEHART & CELINE MCNICHOLAS, ECON. POL'Y INST., SHORTCHANGED—WEAK ANTI-RETALIATION PROVISIONS IN THE NATIONAL LABOR RELATIONS ACT COST WORKERS BILLIONS (2021), https://files.epi.org/uploads/225230.pdf [https://perma.cc/Z2TR-4PC8].

77. *See* INST. FOR WOMEN'S POL'Y RSCH., QUICK FIGURES: PAY SECRECY AND WAGE DISCRIMINATION 1 (2014), https://iwpr.org/wp-content/uploads/2020/09/Q016.pdf [https://per

explicit pay transparency protection has been introduced in legislative proposals to expand the federal Equal Pay Act but has yet to be successful.[78]

The separate but related approach of prior salary information bans, enacted in over twenty states to date, prohibit an employer from asking a job applicant about their salary at their last job, or delay such conversations until later in the hiring process.[79] As with pay transparency laws, prior salary information bans require little on the part of employers except refraining from asking about certain things. For example, Connecticut's statute, typical of many others, prohibits an employer from "inquir[ing] about a prospective employee's wage and salary history unless a prospective employee has voluntarily disclosed such information."[80] Legislators have also attempted, unsuccessfully, to enact a federal ban on prior salary information.[81]

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ma.cc/Q4LV-693Z] ("About half of all workers . . . report that the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment.").

78. *See* Paycheck Fairness Act, H.R. 7, 117th Cong. (2021); Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889, 908 (2016).

79. *See Salary History Bans*, HR DRIVE (Feb. 3, 2022), https://www.hrdive.com/news/salary-history-ban-states-list/516662 [https://perma.cc/EXT5-V6UC] (listing twenty-one states as of Feb. 3, 2022); ROBIN BLEIWEIS, CTR. FOR AM. PROGRESS, WHY SALARY HISTORY BANS MATTER TO SECURING EQUAL PAY 3 (2021), https://www.americanprogress.org/issues/women/reports/2021/03/24/497475/salary-history-bans-matter-securing-equal-pay [https://perma.cc/DYZ2-JB4P] (listing nineteen states as of 2021). Such laws may be adopted as part of the state's equal pay act or as a standalone statute with a private right to sue for similar damages. *See, e.g.*, CONN. GEN. STAT. § 31-40z(d) ("An action to redress a violation . . . may be maintained in any court of competent jurisdiction by any one or more employees [with possible remedies of] compensatory damages, attorney's fees and costs, punitive damages and such legal and equitable relief as the court deems just and proper.").

80. CONN. GEN. STAT. § 31-40z(b)(5). For other examples, see CAL. LAB. CODE § 432.3 (West 2020); N.Y. LAB. LAW § 194-a (McKinney 2020); *Salary History Bans*, *supra* note 79.

81. *See* Paycheck Fairness Act, H.R. 7, § 9, 117th Cong. (2021). Both federal and state prior salary information ban proposals are, in part, a response to mixed caselaw on a related issue under the federal Equal Pay Act. The act allows an employer to defend a pay disparity based on "any . . . factor other than sex." *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1). A female employee's prior salary may have been affected by sex bias, so relying on it to set current pay may perpetuate past discrimination. For this reason, most courts of appeal refuse to consider prior salary *alone* to constitute a "factor other than sex." *See* Bornstein, *Confronting the Racial Pay Gap*, *supra* note 9, at 1445 (identifying that the Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits follow this approach, while the Seventh Circuit does not); Daniela Porat, *Equal Pay Act's 'Other than Sex' Defense Meaning Still Murky*, LAW360 (July 27, 2021, 7:52 PM), https://www.law360.com/employment-authority/articles/1407167/equal-pay-act-s-other-than-sex-defense-meaning-still-murky [https://perma.cc/8ZMV-DKLB].

Both pay transparency protections and prior salary prohibitions focus on correcting information asymmetry to help employees better negotiate and advocate for fair pay themselves.[82] Unless employees can talk to each other freely about pay, they may never discover that they have experienced sex- or race-based pay discrimination. This knowledge is essential to enforce antidiscrimination law, for which enforcement relies primarily on employee complaints.[83]

Moreover, social science studies have long demonstrated that when pay is subject to negotiation, women and racial minorities are disadvantaged by gender and racial stereotypes about how they should behave, and are penalized more than male or white employees if they advocate strongly for themselves.[84] Economic data also shows that setting pay for a new position based on prior pay at one's last job depresses the wages of women and racial minorities, perpetuating past discrimination into the future.[85] Thus, rules on information exchange can serve as useful interventions to modify the behavior of employees and employers in pay negotiations.

B. Job Pay Range Posting Requirements

Somewhat more burdensome on employers than rules that govern what may be discussed in pay negotiations, a handful of states and localities have begun to enact information disclosure requirements around pay ranges for advertised jobs. To date, salary range posting

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82. *See* Lobel, *supra* note 70, at 549; Bornstein, *Equal Work*, *supra* note 9, at 602–03.

83. *See infra* Part III.C.

84. *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003) (documenting how and why women are penalized in negotiations around pay and promotion); *see* Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. RELS. 635, 653 (2003); Morela Hernandez & Derek R. Avery, *Getting the Short End of the Stick: Racial Bias in Salary Negotiations*, MIT SLOAN MGMT. REV. (June 15, 2016), https://sloanreview.mit.edu/article/getting-the-short-end-of-the-stick-racial-bias-in-salary-negotiations [https://perma.cc/3UGM-K2PE].

85. *See, e.g.*, Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence from a Field Experiment* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26627, 2020), https://www.nber.org/papers/w26627 [https://perma.cc/HL2F-MUFQ]; *see also* Claire Cain Miller, *How a Common Interview Question Hurts Women*, N.Y. TIMES (May 1, 2018), https://www.nytimes.com/2018/05/01/upshot/how-a-common-interview-question-fuels-the-gender-pay-gap-and-how-to-stop-it.html [https://perma.cc/9CB9-LFC3].

requirements[86] have been enacted in four states—California,[87] Colorado,[88] Washington,[89] and New York[90]—as well as a number of localities, including New York City.[91] These laws require covered entities to provide information on the available salary range for any job for which they are hiring in any advertisement or job posting.[92] For example, in Colorado, the law requires entities to "disclose in each posting for each job opening . . . a range of the hourly or salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant."[93]

As a behavioral intervention, like rules on pay information exchange, pay range disclosures function primarily to correct information asymmetry: they give applicants access to key information that only the employer may know. This information is essential to help job candidates, particularly female and racial minority candidates, to achieve equal pay when faced with negotiating a starting salary.[94] Pay range disclosures also stand to help current employees discover if they are being underpaid, either to ask for more or equitable compensation or, if the employee suspects discrimination, to initiate an enforcement action.[95]

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86. Confusingly, the term pay transparency has been used to refer to the whole area of equality measures on pay. Here, I use the term "pay transparency" to refer only to the free information exchange rule discussed at Part II.A, and separate out "job salary range posting," which is an affirmative requirement on entities to produce information.

87. CAL. LAB. CODE § 432.3(c) (2022).

88. COLO. REV. STAT. § 8-5-201(2) (2022).

89. WASH. REV. CODE ANN. § 49.58.110 (West 2022).

90. N.Y. LAB. LAW § 194-B (McKinney 2022).

91. New York, N.Y., Local Law No. 59, § 1 (2022).

92. *See supra* notes 87–91; Jennifer Liu, *Here Are All the New Salary Transparency Laws Going into Effect in 2023*, CNBC (Dec. 29, 2022, 9:45 AM), https://www.cnbc.com/2022/12/29/new-salary-transparency-laws-going-into-effect-in-2023.html [https://perma.cc/J6ZY-7D5K]. In addition, state laws in Connecticut, Maryland, Nevada, and Rhode Island require employers to provide the pay range for a job upon request by a job applicant or candidate. *See, e.g.*, CONN. GEN. STAT. § 31-40z (b)(8); MD. CODE, LAB. & EMPL. § 3-304.2; NV REV. STAT. § 613.133 (2022); R.I. GEN. LAWS § 28-6-22(c) (2022).

93. COLO. REV. STAT. § 8-5-201(2) (2022).

94. *See supra* notes 79–81 and accompanying text (discussing gender and race negotiation penalties).

95. *See* NAT'L WOMEN'S L. CTR., SALARY RANGE TRANSPARENCY REDUCES THE WAGE GAP 1–2 (2020) [hereinafter NAT'L WOMEN'S L. CTR., SALARY RANGE TRANSPARENCY], https://nwlc.org/wp-content/uploads/2018/06/Salary-Range-and-Transparency-FS-2020-1.17.2020-v2.pdf [https://perma.cc/6GDV-VD4M].

But the duty to disclose a pay range and to do so publicly goes further, serving other important purposes of a disclosure scheme. It may induce behavior-forcing effects[96] by requiring an employer to identify the pay received by other employees currently in the position and set new employee pay comparably. The goal is that the employer will create pay uniformity based on the position itself rather than the person holding the position. That pay range postings are public creates additional pressure on employers[97] to provide accurate and fair salary ranges that will attract the best job applicants. And setting pay in a range to which an employer has publicly pre-committed may likely limit the role that even unconscious gender and racial biases play in pay setting.[98]

C. *Employee Pay Data Disclosures*

The third form of disclosure requirement around pay poses the greatest burden on employers: mandating that entities collect, and provide to administrative enforcement agencies, pay data on current employees by gender and race. The federal government during the Obama administration, through the regulatory arm of the U.S. Equal Employment Opportunity Commission ("EEOC"), enacted such a measure covering the years 2017 and 2018, which expired after a political battle.[99] A future presidential administration could reintroduce this or a similar rule.[100] In the wake of the short-lived federal requirement, two states, California and Illinois, adopted their own compelled pay data disclosure schemes.[101] Each of these requirements directs disclosures to government enforcement agencies, making them the strongest of the nudges around pay: the goal is

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96. *See supra* notes 40, 54 and accompanying text (discussing behavior-forcing effects).

97. *See supra* notes 41, 55 and accompanying text (discussing publicness).

98. *See* NAT'L WOMEN'S L. CTR., SALARY RANGE TRANSPARENCY, *supra* note 95, at 1. This could also be considered a type of commitment strategy, albeit externally rather than internally imposed. *See* THALER & SUNSTEIN, *supra* note 2, at 52 (describing how a pre-commitment can serve as a nudge toward desired behavior).

99. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 323–27.

100. *See* Mike LaSusa, *Feds May Restart Collecting Pay Equity Data as States Step In*, LAW360 (Apr. 1, 2021, 7:17 PM), https://www.law360.com/employment-authority/articles/1371100/feds-may-restart-collecting-pay-equity-data-as-states-step-in [https://perma.cc/HH6G-CBXE] (noting that the Biden administration "is widely expected to move to reinstate the so-called Component 2 data collection").

101. *See* S.B. 973 § 2, 2019–2020 Leg., Reg. Sess. (Cal. 2020); S.B. 1480 § 10-10, 101st Gen. Assemb. (Ill. 2021); LaSusa, *supra* note 100.

primarily to induce accountability by covered entities.[102] For this reason, pay data disclosures offer significant promise to induce employer behavior to track and correct pay disparities by gender and race among their own workforces.[103]

At the federal level, the new pay data disclosures enacted for 2017 and 2018 built upon limited data already being collected by the EEOC.[104] Included as part of the enforcement mechanism for Title VII since 1966, federal law requires private employers of 100 or more to file an annual Employer Information Report EEO-1 ("EEO-1") with the EEOC.[105] The form asks for a snapshot of the gender and race of employees in ten job categories, ranging from Laborers to Senior-Level Executives.[106] The EEOC uses EEO-1 information to track compliance with antidiscrimination law and inform their enforcement priorities.[107] Aside from occasional aggregated reports on workforce trends, however, EEO-1 information is kept confidential (though discoverable by parties to litigation).[108]

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102. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 321–22.

103. *See supra* notes 40, 54 and accompanying text (discussing behavior-forcing effects).

104. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 323–25.

105. *See* 42 U.S.C. § 2000e-8(c) (establishing this requirement); 29 C.F.R. § 1602.7 (2020) (showing specific regulation); *EEO-1 Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/eeo-1-data-collection [https://perma.cc/5J5E-CG7K] (summarizing EEO-1 requirements). Federal contractors with at least 50 employees and contracts over $50,000 are also covered by Executive Order, enforced by the EEOC and the Office of Federal Contract Compliance Programs. Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965) (establishing reporting requirements for government contractors).

106. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EQUAL EMPLOYMENT OPPORTUNITY: EMPLOYER INFORMATION REPORT EEO—1, at 2 (2006), https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeo1survey/eeo1-2-2.pdf [https://perma.cc/9HPM-J6QC]. Ethnicity options include Hispanic or Latino, and race options include White, Black or African American, Asian, Native Hawaiian or Other Pacific Islander, American Indian or Alaskan Native, or two or more races; occupational categories include executive/senior level officials and managers, first/mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers. *Id.*; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, 2021 EEO-1 COMPONENT 1 DATA COLLECTION INSTRUCTION BOOKLET app.D–E (2021) (defining these categories).

107. Robert W. Sikkel, *What EEO-1 Reports Really Tell Us*, PRAC. LITIGATOR, Sept. 2004, at 17; *see* U.S. EQUAL EMP. OPPORTUNITY COMM'N, CHARACTERISTICS OF PRIVATE SECTOR EMPLOYMENT (2003), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/statistics/reports/ceosummit/characteristics.pdf [https://perma.cc/25JE-BVN6].

108. *See* 42 U.S.C. § 2000e-8(e) (prohibiting the EEOC from "mak[ing] public in any manner . . . any information obtained by the Commission pursuant to its authority . . . prior to the institution of any proceeding . . . involving such information"); Sikkel, *supra* note 107, at 23 (noting the discoverability of EEO-1 forms).

In 2016, the EEOC undertook the regulatory process to revise the EEO-1 form to require disclosure of more granular pay data from covered entities.[109] The revision (referred to as "Component 2" data) added twelve pay bands (from "$19,239 and under" to "$208,000 and over") and work hours to already required data collected by sex, race, ethnicity, and occupational category (referred to as "Component 1" data).[110] This more inclusive disclosure scheme allowed employers—and the EEOC—to track where female workers and workers of color were underrepresented in higher-paying jobs and overrepresented in lower-paying jobs. After a change in presidential administration and a lawsuit to force the data collection, the enhanced data was collected for fiscal years 2017 and 2018 only, when the measure was set to expire.[111] The EEOC under the Trump administration refused to seek renewal[112]; the collected data is currently being analyzed by a third party, while the Biden administration considers revisiting the issue.[113]

With federal efforts at a standstill, two states—California and Illinois—passed their own state laws requiring detailed pay data disclosures, based on the same model of expanding existing data collection. Both state laws apply to entities already required to provide EEO-1 data under federal law, limiting any additional state disclosure burden to entities already engaged in such efforts.[114] Enacted in 2020 and effective March 31, 2021, California's law requires covered entities

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109. *See* Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45479, 45483–91 (July 14, 2016) (proposing this change); *see also* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 323–28 (summarizing the history of the proposed change).

110. *See* Foley & Lardner LLP, Component 2 EEO-1 Online Filing System Sample Form 1, https://www.foley.com/-/media/files/firm/comp2eeo1onlinefilingsampleform.pdf [https://perma.cc/NA7B-S46T] (showing the added pay bands and work hours); *see also* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 324–25 (describing the newly collected data as "Component-2" information).

111. *See infra* Part III.A; Joint Status Report at 1, Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, No. 17-cv-2458 (D.D.C. Aug. 26, 2020) (outlining the current status of the case).

112. *See* Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48138, 48141 (Sept. 12, 2019) (announcing the Trump EEOC's decision to not seek renewal).

113. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection (July 16, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection [https://perma.cc/E6AM-NKMZ]; LaSusa, *supra* note 100.

114. *See* S.B. 973 § 2, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (limiting application to any private employer of 100 or more "who is required to file an annual Employer Information Report (EEO-1) pursuant to federal law"); S.B. 1480 § 10-10, 101st Gen. Assemb. (Ill. 2021) (similarly limiting application).

to disclose pay data by sex, race, and ethnicity in ten job categories in annual reports to the state Department of Fair Employment and Housing (the state equivalent of the EEOC).[115] As with the federal regulation, the data may not be made public except in aggregated, anonymized reports.[116]

Illinois' law goes significantly further. Enacted in 2021 and effective January 1, 2023, covered entities must not only disclose pay data but must also obtain an "equal pay registration certificate" from the state's Department of Labor certifying that "the average compensation for its female and minority employees is not consistently below the average compensation . . . for its male and non-minority employees within each of the major job categories" reported.[117] The law also allows the Illinois secretary of state to make such data public on its website.[118] As such, it goes the furthest to meet all three goals of an information disclosure regime: it fosters both behavior-forcing[119] and publicness effects,[120] and—to the extent employees review the public data—it corrects information asymmetry between employees and employers on the issue of pay.[121]

While compelled disclosure of pay data is the heaviest touch, and rarest, of the regulatory interventions around equal pay, it will likely be revisited at the federal level.[122] In the meantime, additional state legislatures are considering the other two approaches—rules on pay information exchange and pay range posting requirements—and both may be reintroduced federally.[123] It is useful, then, to consider how to evaluate equality disclosures on pay as a behaviorally informed intervention, which the next Part considers.

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115. S.B. 973 § 2, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

116. *See id.*; 42 U.S.C. § 2000e-8(e).

117. Pub. Act 101–0656, § 11(c), 2020–2021 Ill. Laws 3102, 3115–16 (amending 820 ILL. COMP. STAT. 112/11); *see* Meg Karnig, Paul Newendyke & Barry Hartstein, *Illinois Will Require EEO-1 Transparency and Equal Pay Data*, LITTLER: NEWS & ANALYSIS (Mar. 29, 2021), https://www.littler.com/publication-press/publication/illinois-will-require-eeo-1-transparency-and-equal-pay-data [https://perma.cc/T7KM-75R3] ("[P]ay data reporting begins January 1, 2023 and employers must obtain an equal pay registration certificate by March 24, 2024.").

118. Pub. Act 101–0656, § 5-5, 2020–2021 Ill. Laws 3102, 3109 (amending 805 ILL. COMP. STAT. 5/14.05).

119. *See supra* notes 40, 54 and accompanying text (discussing behavior-forcing effects).

120. *See supra* notes 41, 55 and accompanying text (discussing publicness).

121. *See supra* note 34 and accompanying text (discussing information asymmetry).

122. *See* LaSusa, *supra* note 100.

123. *See* Liu, *supra* note 92.

III. ASSESSING THE VALUE OF EQUALITY DISCLOSURES

Any assessment of the value of a regulatory intervention starts with a cost/benefit analysis but does not end there. Economists have begun to study the impacts of equality disclosure laws on pay, attempting to calculate their effects on narrowing gender and racial pay gaps. These requirements, at least in the United States, are relatively new, making it hard to draw reliable conclusions from such data.[124] Where economists have attempted to do so, early indications show that pay is increasing and pay gaps are narrowing for both women and racial minorities.[125] Yet statistical increases in wages are merely one factor to be assessed; costs, to both employers and to applicants and employees, must also be considered. And improvement in wages is merely one benefit to be gained from behavioral interventions that increase equality measures. Benefits flow to enforcement agencies and the public, too, by increasing employer compliance with antidiscrimination law.

A. Costs

For equality disclosures, the direct costs to the regulated entity are the expenses, usually in labor hours, to produce the required information.[126] These costs will depend on the extent of the information produced, as demonstrated by the three examples of pay information disclosure discussed in Part II. Pay transparency laws and prior salary information bans require no affirmative effort on the part of the

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124. Moreover, as Professor Sunstein identified in 2010 while serving as Administrator of the Office of Information and Regulatory Affairs (OIRA):

> [I]n some contexts, the costs and benefits of disclosure may be difficult or even impossible to specify, and a formal analysis may not be feasible or appropriate. Quantitative assessment of benefits may involve a high degree of speculation, and a qualitative discussion, based on available evidence, may be all that is feasible. In assessing benefits, agencies should consider the fact that improvements in welfare are a central goal of disclosure requirements, but should also note that informed choice is a value in itself (even if it is difficult to quantify that value).

Memorandum from Cass R. Sunstein, *supra* note 1, at 6.

125. *See infra* Part III.C.

126. *See, e.g.*, *infra* notes 137–139 and accompanying text. For a broader discussion of how nudges create private costs to third parties like regulated entities, see generally Avishalom Tor, *The Private Costs of Behavioral Interventions*, 72 DUKE L.J. 1673 (2023). This Article responds, in part and in the context of equality disclosures, by highlighting the public benefit that counterbalances such private costs: the enforcement value of increased legal compliance with antidiscrimination law; *see also* Loewenstein et al., *supra* note 4, at 392 ("Mandatory disclosure can be justified by an efficiency argument when the societal gains from information provision outweigh the societal costs." (citing Coffee, *supra* note 1)).

regulated entity.[127] Other than incidental costs to add training and information on these rules as part of any existing management or supervisorial training, the direct costs are nonexistent.

Job pay range posting requirements may be relatively more costly, but again, direct costs remain minimal. Regulated entities must make the effort to calculate a good faith pay range for an existing job and then include this information in any job posting or advertisement.[128] An employer must add this information to its postings, but the employer would likely already expend similar effort simply to figure out what pay it planned to offer any job candidate. And these laws demand no additional advertisement or posting; they merely require that the voluntary advertisements or postings that the employer is already making include pay range information.[129]

The third approach, pay data collection, entails significantly more costs; yet, to date, enacted laws add complexity to existing disclosures rather than creating new disclosure requirements out of whole cloth. Both California and Illinois laws compelling pay data disclosure by race, gender, and occupation apply only to entities already required to comply with EEO-1 reporting to the EEOC—an obligation in federal law since 1966.[130] The short-lived federal regulation applied similarly.[131] Given that covered entities are already tracking Component-1 data, the effort needed to track and report Component-2 data would be an incremental increase.[132]

Yet to the regulated entity, this cost may still be significant. Indeed, the legal dispute over the 2016 federal rule adding Component 2 data to the EEO-1 form centered largely on a disagreement about costs. After the EEOC under the Obama administration received permission from the Office of Management and Budget to add Component 2 data to the EEO-1 form and the new form was set to be adopted for 2017 and 2018, the presidential administration changed.[133]

127. *See supra* Part II.A.

128. *See supra* Part II.B.

129. *See supra* Part II.B.

130. *See supra* Part II.C.

131. *See supra* Part II.C.

132. *See supra* Part II.C.

133. *See* Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48138, 48139 (Sept. 12, 2019) (noting that "OMB approved the proposed collection of Component 2 data for calendar years 2017 and 2018 under OMB control number 3046–0007 on September 29, 2016").

The EEOC under the Trump administration refused to require the additional disclosures, prompting the National Women's Law Center ("NWLC") to sue to force compliance, as the regulation had been validly enacted.[134] The NWLC prevailed, and the U.S. District Court for the District of Columbia ordered the data to be collected.[135]

A mere seven months later, however, having shown compliance with the court's order for 2017 and 2018, the EEOC under the Trump administration ended the expanded data collection and announced that it would not seek renewal of the Component-2 addition to the original EEO-1 form.[136] Its reason: costs. The EEOC under the Obama administration estimated that it would cost all covered entities approximately $53.5 million total for 2017 and 2018 combined to collect and produce the additional Component-2 data.[137] Based on an estimated 60,886 total entities covered, this amounted to $440 per firm per year.[138] To justify its failure to renew, the EEOC under the Trump administration recalculated the two-year cost at nearly $1.24 billion—twenty-three times the original—and, based on its estimate of ninety thousand covered entities, $6,869 per firm per year.[139] (Notably, even using this estimate, $6,869 is likely of little consequence to most businesses with 100 or more employees.)

Beyond direct monetary costs to employers to comply with transparency, posting, or disclosure requirements on pay are the potential indirect costs on applicants or employees that could flow

134. *See* Memorandum from Neomi Rao, Adm'r, Off. of Info. & Regul. Affs., to Victoria Lipnic, Acting Chair, Equal Emp. Opportunity Comm'n (Aug. 29, 2017); Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, 358 F. Supp. 3d 66, 74–75 (D.D.C. 2019).

135. Memorandum Opinion at 1, Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, No. 17-cv-2458 (D.D.C. Feb. 22, 2022) (denying Defendant's Motion for Relief from Judgment).

136. Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48138, 48141 (Sept. 12, 2019).

137. *Id.* at 48140 ("Applying this 2016 methodology, the EEOC concluded that 'the total estimated *annual* burden hour costs for employers and contractors that will complete both Components 1 and 2 in 2017 and 2018 will be $53,546,359.08.'").

138. *See* Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45479, 45494 (July 14, 2016) (estimating that "the number of annual respondents that would submit both Components 1 and 2 starting with the 2017 reporting cycle [is] 60,886 private industry and contractor filers"). The $53.5 million figure for the two years, divided by two to arrive at a yearly figure, and then divided by the number of filers expected per year (60,886) is roughly $440 per firm, per year.

139. Agency Information Collection Activities, 81 Fed. Reg. at 45493; Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48138, 48140–41 (Sept. 12, 2019) (estimating costs of $614,391,388 in 2017 and $622,015,798 in 2018 to 90,000 filers).

from employers having to comply. Any new regulation on employers comes with the perennial criticism that it will be a "job killer," resulting in fewer jobs and more unemployment.[140] While this argument should not be ignored, pay transparency or disclosure rules are far less costly or onerous than other laws for which the same criticisms have largely failed to materialize.[141] A more relevant concern would be that employers may adapt to concerns about unequal pay by freezing wages for the highest paid employees, which could lead to so-called wage "compression."[142] This is certainly a possibility, but market forces may limit any extreme effects, as employers will lose out on the best employees if they limit top wages too much.[143] Moreover, decreasing the distance between bottom and top wages may be a good, not bad, development—a market correction that indicates a decline in income inequality.

Other indirect costs include attention-related and emotional burdens on employees or applicants who receive disclosed information. Humans have limited time, meaning that focus on disclosed information may come at the cost of attention to other matters.[144] Scholars also note the concern of "disclosure overload," in which information consumers are overwhelmed by so much information such that they tune it out.[145] Certainly, employees may

140. *See generally, e.g.*, PETER DREIER & CHRISTOPHER R. MARTIN, "JOB KILLERS" IN THE NEWS: ALLEGATIONS WITHOUT VERIFICATION (2012), https://sites.uni.edu/martinc/JobKillerStudy_June2012.pdf [https://perma.cc/3YHY-9T2M] (analyzing the frequency and use of the term "job killer" in news stories describing new regulations on employers).

141. *See, e.g.*, Kate Bahn & Will McGrew, *Minimum Wage Increases Are Good for U.S. Workers and the U.S. Economy*, WASH. CTR. FOR EQUITABLE GROWTH (June 2019), https://equitablegrowth.org/wp-content/uploads/2019/07/070819-CBO-minwage.pdf [https://perma.cc/4KYS-AAQV] (discussing studies showing that minimum wage increases have little effect on job losses); Michael Hiltzik, *'Job-Killing' Obamacare Actually Created 240,000 Well-Paying Healthcare Jobs*, L.A. TIMES (Apr. 7, 2017, 10:00 PM), https://www.latimes.com/business/hiltzik/ la-fi-hiltzik-obamacare-jobs-20170407-story.html [https://perma.cc/S359-D3QL] (discussing how the Affordable Care Act created jobs).

142. *See* Allen Smith, *NYC Pay Transparency Law May Result in Pay Compression*, SHRM (Aug. 1, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/nyc-pay-transparency-pay-compression.aspx [https://perma.cc/6AZQ-3LLV]; Zoe B. Cullen & Bobak Pakzad-Hurson, *Equilibrium Effects of Pay Transparency* 4–5, 13, 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28903, 2021), https://www.nber.org/papers/w28903 [https://perma.cc/MC8D-RLLV].

143. *See Smith*, *supra* note 142.

144. *See* Loewenstein et al., *supra* note 4, at 398–99.

145. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 349 (discussing "disclosure overload" and citing scholarship); *see also* Troy A. Paredes, *Blinded by the Light: Information*

experience welfare costs, too, if they discover that they are being paid less than their similarly situated coworkers.[146] Still, employees are unlikely to be overwhelmed by being able to discuss pay or receive information on pay salary ranges, as this information is both limited in amount and of very high interest to them as consumers. And while discovering that you are underpaid may make you unhappy, using that information to increase your pay will have a net gain on your emotional and financial welfare. Lastly, for more detailed pay data disclosures, a related concern is that the information provided could be misinterpreted by unsophisticated consumers.[147] This is something to keep in mind as the Illinois law goes into effect and should federal law adopt greater *public* pay data disclosures, as some other countries have done.[148] At least currently, however, U.S. schemes primarily provide data to the very enforcement agencies that set the form of the data collected.[149]

B. Benefits

Whatever the costs of imposing equality disclosures on employers and to employees, they must be considered in light of the interventions' benefits. The important possible benefits of equality disclosures—including the potential to increase the wages of women and racial minorities, narrow gender and racial pay gaps, decrease income inequality, and improve compliance with antidiscrimination law—counterbalance their costs.

Although state laws regulating information exchange on pay are relatively new, early economic data shows that they have had some success in increasing the wages of female and racial minority

Overload and Its Consequences for Securities Regulation, 81 WASH. U. L.Q. 417, 446 (2003) ("Because of information overload, in some cases, more disclosure can mean less effective disclosure.").

146. *See* Sunstein, *Welfare Now*, *supra* note 23, at 1652 (calling for consideration of "the effects of the [behavioral] intervention on people's emotional states" (italics removed)); Loewenstein et al., *supra* note 4, at 392 (identifying that a "comprehensive accounting" of disclosure's costs should include "the emotional costs of dealing with the information").

147. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 330; *see also* Loewenstein et al., *supra* note 4, at 400–01 (discussing other issues with attention of disclosure recipients, including "inattention to missing information" and "motivated attention").

148. *See infra* notes 162–166 and accompanying text.

149. *See supra* Part II.C.

workers.[150] Studies on prior salary information bans show particular promise.[151] One analysis found that, when California's ban took effect in 2018, it cut the gender pay gap by up to 20 percent for women who changed jobs and increased women's wages by 2.3 percent for women over thirty-five and 4.7 percent for women with children.[152] Another study showed that pay increased by an additional 3.9 percent for those changing jobs in states with prior salary history bans—increasing by 6.4 percent for female workers and 7.7 percent for workers of color.[153]

Likewise, because state and local pay range posting laws have just been enacted, little economic data yet exists on their specific effects. One early study of the Colorado pay range posting law showed that, among firms that complied, posted job salaries increased by 3.6 percent.[154] Similar posting requirements in other contexts may also offer useful data. Two sectors of the U.S. economy that regularly require pay range disclosures—unions and the federal government—provide examples. In both sectors, gender and racial pay gaps are significantly smaller than those experienced in the economy as a whole,[155] which is dominated by private sector employers with no

150. *See* BLEIWEIS, *supra* note 79 (discussing studies). *See generally* Zoë Cullen, *Is Pay Transparency Good?* (Harv. Bus. Sch., Working Paper No. 23-039, 2023), https://www.hbs.edu/ris/Publication%20Files/JEP%20Is%20Pay%20Transparency%20Good_bba6b458-37a6-41d4-9e25-91a2906da5f1.pdf [https://perma.cc/UL4T-47XP] (discussing both positive and negative labor market effects caused by pay transparency measures).

151. *See* BLEIWEIS, *supra* note 79 (noting several such studies, including one that found that "following the implementation of salary history bans, workers who changed jobs saw their pay increase by 5 percent more than comparable workers who changed jobs in the absence of a ban, with even larger benefits for women and African Americans").

152. Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* 4–5, 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27054, 2020), https://www.nber.org/papers/w27054 [https://perma.cc/XX8D-FFNM]. The researchers also found "early evidence" that, overall, "female earnings have increased relative to male earnings" in states that had passed salary history bans, yet acknowledged that "[t]he estimated effects on the overall population are small and we fail to reject that the impact is zero." *Id.* at 4.

153. James Bessen, Chen Meng & Erich Denk, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* 29 (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Paper No. 20-19, 2021), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2137&context=faculty_scholarship [https://perma.cc/7EHC-AP2L].

154. David Arnold, Simon Quach & Bledi Taska, The Impact of Pay Transparency in Job Postings on the Labor Market 2 (Aug. 17, 2022) (unpublished manuscript), https://ssrn.abstract_id=4186234 [https://perma.cc/KBQ5-L9U2].

155. *See* Bornstein, *Equal Work*, *supra* note 9, at 635–36, 638.

similar pay posting obligations.[156] One study showed that women in unionized jobs experienced a gender pay gap of only 6 percent as compared to 22 percent in the private sector.[157] Another showed that the gender pay gap among federal government workers was half the size of that among the private sector workforce.[158] Of course, pay range disclosure is not the sole cause of these narrower gaps, given other differences between public and private and unionized and nonunionized workplaces.[159] Yet anchoring pay to a publicly available pay range certainly contributes to more uniform pay among workers doing the same job—and to more attention to relative pay differences between different jobs.[160]

The few U.S. pay data disclosure laws are also too new to yet measure, but comparative models provide some guidance.[161] To help

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156. *See Spotlight on Statistics*, BUREAU OF LAB. STAT. (Dec. 2021), https://www.bls.gov/spotlight/2021/occupational-employment-and-wages-in-state-and-local-government/home.htm [https://perma.cc/M9S9-SMUB] ("[P]rivate sector jobs in May 2020[] represent[ed] 85 percent of U.S. employment."); *Union Members – 2022*, BUREAU OF LAB. STAT. (Jan. 19, 2023, 10:00 AM), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/9NRT-E9UV] (citing unionization rate of 10.1 percent of overall U.S. workforce in 2022).

157. Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST.:WORKING ECON. BLOG fig.A (Apr. 3, 2017, 8:00 AM), https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap [https://perma.cc/TER2-U73Y] (documenting that, in 2016, unionized women averaged 94 percent of unionized men's pay as compared to only 78 percent in non-unionized sectors).

158. THE SIMPLE TRUTH, *supra* note 10, at 3 (documenting that "federal government workers experience a 13% pay gap between men and women; in the private, for-profit sector, that number jumps to 29%").

159. *See, e.g.*, *The Union Advantage*, U.S. DEP'T OF LAB., https://www.dol.gov/general/workcenter/union-advantage [https://perma.cc/3N3X-SF2N] (providing data about how unions improve wages and working conditions for both members and non-members); Dimple Sunayna Johnson, *Public Versus Private Employees: A Perspective on the Characteristics and Implications*, 9 FIIB BUS. REV. 9, 9 (2020) (highlighting key characteristics about employees in the public and private sectors).

160. *See* Bornstein, *Equal Work*, *supra* note 9, at 635–40.

161. In addition, some studies have shown the utility of existing EEO-1 data collection on integrating workplaces by sex and race. *See, e.g.*, JOCELYN FRYE, CTR. FOR AM. PROGRESS, WHY PAY DATA MATTER IN THE FIGHT FOR EQUAL PAY 4 (2020), https://www.americanprogress.org/wp-content/uploads/sites/2/2020/02/030220Frye_WhyPayDataMatter_BRIEF.pdf [https://perma.cc/CX9C-JKYN] (explaining that the EEO-1 form has long been used as a tool "in helping to identify disparities" across industry hiring practices); *see also* VALERIE WILSON & WILLIAM M. RODGERS III, ECON. POL'Y INST., BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY 53 (2016), http://epi.org/101972 [https://perma.cc/J3DS-B2NW] (noting that during the 1990s, the EEOC's data collection efforts "reveal[ed] evidence of racial and gender pay inequities among workers in the same occupations and with the same work experience at the same firms").

close their own gender pay gaps, more than a dozen high-income countries around the world have enacted some form of pay data collection law, many of which have been in place for several years or more.[162] While the data is not yet conclusive, several studies and anecdotal evidence show progress toward improving women's pay.[163] For example, in the United Kingdom, a 2016 law requires employers of 250 or more to calculate and report to the U.K. Equality and Human Rights Commission their own gender pay gap according to guidelines established by the agency.[164] The data is then posted publicly on the Commission's website.[165] Since the law was enacted, the data to date shows uneven results overall, but some significant efforts by companies to redress their own pay gaps that the law forced them to face.[166]

Of course, the benefits of equality disclosures may also be tempered by criticisms and even legal challenges. While economic data suggests that prior salary information bans have helped equalize wages,[167] some economists caution that limiting information exchange may not be as effective where employees provide such information voluntarily or employers make assumptions in the absence of information.[168] In the context of securities disclosures, scholars have

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162. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 315–20 (discussing examples of pay data collection laws and their positive effects).

163. *See id.*

164. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, art. 2 (U.K.); *Guidance: Gender Pay Gap Reporting: Make Your Calculations*, GOV.UK, https://www.gov.uk/guidance/gender-pay-gap-reporting-make-your-calculations [https://perma.cc/N3SY-HT3D].

165. *See Gender Pay Gap Service: Search and Compare Gender Pay Gap Data*, GOV.UK, https://gender-pay-gap.service.gov.uk [https://perma.cc/6KYF-DFWT] (providing a means for the public to search equal pay data).

166. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 318–20 (summarizing data and discussing efforts by Condé Nast, Easy Jet, and Guardian Group and Media). *Compare* Jack Blundell, *Wage Responses to Gender Pay Gap Reporting Requirements* 3 (Ctr. for Econ. Performance, Discussion Paper No. 1750, 2021), https://cep.lse.ac.uk/pubs/download/dp1750.pdf [https://perma.cc/MU95-CF6D] (finding "that the introduction of the policy led to a 1.6 percentage point increase in women's hourly wages relative to those of men"), *with* Neil Callanan & Lucy Meakin, *Five Years of Disclosure Have Barely Changed U.K. Gender Pay Gap*, BLOOMBERG (Aug. 18, 2022), https://www.bloomberg.com/graphics/2022-uk-gender-pay-gap/?leadSource=uverify%20wall [https://perma.cc/4FVS-YGTC] (noting that "U.K. companies are struggling to shrink the gender pay gap, with the differential barely changed in the five years [since] firms [were] forced to disclose the data").

167. *See supra* notes 150–153 and accompanying text.

168. *See* Joni Hersch & Jennifer Bennett Shinall, *Something To Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 49, 66–70 (2016) (documenting employers' "ambiguity aversion" in the context of familial status information and raising similar

also cautioned that data may be manipulated when providing disclosures, making compliance with disclosure requirements more symbolic than transformative.[169] While a valid concern, this goes to the reach of equality disclosures rather than to undermining their benefits overall.[170]

In addition, advocates for businesses have brought legal challenges to prior salary information bans and other kinds of disclosure requirements, arguing that such laws violate the First Amendment by either prohibiting (in the case of prior salary bans) or compelling (in the case of mandatory disclosures) speech.[171] To date, no legal challenge has been successful in the context of equality disclosures,[172] and such information may likely be found unprotected as commercial speech or, alternatively, to survive strict scrutiny.[173] Regardless, more requirements have the potential to spark additional litigation.

C. The Enforcement Value of Nudging the Nudgers

In the context of equality disclosures, focusing on direct costs and benefits to individuals or on individual welfare is underinclusive. Behaviorally informed interventions in areas of law that rely heavily on private enforcement, like antidiscrimination law, improve important legal compliance, which benefits the public as a whole and

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concerns in the context of criminal records information); Amanda Agan, Bo Cowgill & Laura Katherine Gee, *Do Workers Comply with Salary History Bans? A Survey on Voluntary Disclosure, Adverse Selection, and Unraveling*, 110 AM. ECON. ASS'N PAPERS & PROC. 215, 219 (2020) (noting that people with "unattractive salaries" are less likely to disclose).

169. *See, e.g.*, Sale, *supra* note 1, at 1052.

170. *See* Bornstein, *Disclosing Discrimination*, *supra* note 6, at 351–52 (discussing symbolic compliance in the context of equality disclosures).

171. *See id.* at 355–57.

172. *See* Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116, 157 (2002) (vacating injunction and holding that Philadelphia ordinance instituting prior salary ban did not violate the First Amendment).

173. *See* Tyler M. Wood, Comment, *Never Ask a Woman Her Wage: The Constitutionality of Salary-History Bans*, 88 U. CHI. L. REV. 1247, 1265–82 (2021); Helen Norton, *Discrimination, the Speech that Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 234–38, 245–46, 248–51; Elizabeth A. Aronson, Note, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93 N.Y.U. L. REV. 1201, 1232–33 (2018); *see also* Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 671–76 (1993) (arguing that disclosing more information promotes the pluralistic goals of the First Amendment).

increases aggregate welfare.[174] Because equality disclosures operate as a bidirectional nudge, the public as a whole reaps the benefit of nudging the regulated entity that is, itself, nudging the consumer of its information. Requiring pay data disclosures, for example, encourages disclosing entities to improve their own behavior—here, employers to set pay more equitably—while also prompting disclosure recipients to act on the information—here, employees to seek more equitable pay or redress suspected discrimination. This in turn helps achieve the societal goals of antidiscrimination law.

When Congress passed Title VII of the Civil Rights Act of 1964 and created the EEOC to enforce it, it also created a private right of action in the statute, with the expectation that most enforcement would be by private employee lawsuits.[175] For complaints alleging pay discrimination, virtually any enforcement requires an employee knowing and being willing to take legal action against their employer. An employee must file a complaint with the federal EEOC and then, almost always, find a private attorney to represent them, despite the potential that they may experience retaliation at work for complaining.[176] The EEOC litigates cases on behalf of employees and has an extremely important systemic enforcement unit, but its resources pale in comparison to the enforcement need.[177] Its own data shows that the EEOC represents workers in fewer than 0.5 percent of all charges it receives: it litigated between 114 and 465 cases out of the seventy-five thousand to one hundred thousand charges of discrimination it received in each of the past twenty years.[178]

174. As Professor Sunstein argues, "to evaluate behaviorally informed interventions, it is essential to consider both their welfare effects and their effects on distributive justice"—considering "aggregate effects on social welfare" and "whether the relevant interventions help or hurt those who have the least, defined in terms of welfare." Sunstein, *Welfare Now*, *supra* note 23, at 1643, 1651.

175. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 705–706, 78 Stat. 241, 258–62 (codified at 42 U.S.C. § 2000e-4 to -5).

176. *See generally* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (cataloguing reasons that the extant private Title VII litigation regime fails employees who face workplace discrimination); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (critiquing EEOC's current function as gatekeeper and proposing how it can reform this function to improve the Title VII litigation regime).

177. See Bornstein, *Disclosing Discrimination*, *supra* note 6, at 291.

178. *Compare Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2019*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/EB7E-KSFZ] (showing tens of thousands of charges), *with EEOC Litigation Statistics, FY 1997 Through*

What is worse, due to the rise of pre-dispute arbitration agreements in employment and nondisclosure or confidential settlement agreements preventing publicity, finding out that an employer has a history of discrimination is very difficult.[179] Likewise, getting information on what others are paid is particularly challenging for applicants and employees, who may be unaware that they are being paid less than a similarly qualified coworker of a different race or gender.[180]

For these reasons, equality disclosures serve a vital enforcement role that may otherwise never be fulfilled. For example, pay transparency and pay range posting requirements provide employees with information necessary to discover and pursue violations of antidiscrimination law.[181] And pay data disclosure requirements provide needed information to responsible state or federal antidiscrimination enforcement agencies.[182] In fact, this was the reason cited by the EEOC under the Obama administration for expanding EEO-1 pay disclosure requirements in 2016. As the agency explained:

> [P]ay discrimination persists as a serious problem that EEOC and OFCCP are statutorily required to address. . . . [The agencies] now lack the employer- and establishment-specific pay data that, prior to issuing a detailed request for information or a subpoena, would be extremely useful in helping enforcement staff to investigate potential pay discrimination. Balancing utility and burden, the EEOC has concluded that the proposed EEO–1 pay data collection would be an effective and appropriate tool for this purpose . . . .[183]

An essential benefit to be included in any evaluation of such measures is the value of improved enforcement of antidiscrimination law and the legal compliance it encourages, given that responsible federal agencies have limited resources.

Relatedly, to account for the enforcement value of behavioral interventions like equality disclosures, effective evaluation requires a

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FY 2019, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm [https://perma.cc/46ZZ-NXVD] (noting a few hundred cases per year).

179. Bornstein, *Disclosing Discrimination*, *supra* note 6, at 299–300.

180. *Id.* at 296, 311–12.

181. *Id.* at 311–12.

182. *Id.* at 312.

183. *See* Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45479, 45483 (July 14, 2016).

longer timeline. On the benefits side, disclosing information about pay or pay disparities is just the first step in what will likely be a slow progression toward correcting unequal pay. Unless an employer is willing or able to immediately raise all employees' pay,[184] the solution will require not only incremental pay corrections but a focus on promoting female workers and workers of color into higher-paid, higher-ranked positions.[185] And while the benefits of such efforts may reveal themselves over time, the costs of producing the disclosures will likely decrease over time. Once any initial system for collecting necessary data or making required disclosures is established, an entity will only have marginal costs of reproducing information in future years. For any given disclosure requirement, then, the start-up costs to comply should be amortized over the life of the requirement.

It goes without saying that gender and racial pay inequality are complex, systemic problems that have been long entrenched.[186] While equality disclosures may take time to show their impact, they present a promising piece of the puzzle, nudging employers and employees alike to act on their own, without additional government mandates, to achieve greater gender and racial equality.

CONCLUSION

Behavioral interventions have become a popular regulatory tool because they encourage desired outcomes at a low cost while preserving freedom of choice.[187] They are not, however, costless. As a result, scholars have begun to weigh in on how to evaluate the effectiveness and utility of such "nudges."[188]

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184. This may sound fantastical, but one employer, Salesforce, has worked to do so based on its stated commitment to close its own gender pay gap. *See* Kristen Bellstrom, *Salesforce Spent $3 Million To Close the Gender Pay Gap. Here's Why That's a Big Deal*, FORTUNE (Nov. 7, 2015, 10:30 AM), https://fortune.com/2015/11/07/salesforce-3-million-close-pay-gap [https://perma.cc/PW38-XCSA]; Brent Hyder, *2022 Equal Pay Update: The Salesforce Approach to Pay Fairness*, SALESFORCE, INC. (Mar. 30, 2022), https://www.salesforce.com/news/stories/2022-equal-pay-update-the-salesforce-approach-to-pay-fairness [https://perma.cc/GT5B-JCGU] (stating its investment of $22 million since 2015 to establish and maintain pay equity).

185. *See generally, e.g.*, GOOGLE, GOOGLE UK: 2020/21 BINARY GENDER PAY GAP REPORT, https://static.googleusercontent.com/media/diversity.google/en//static/pdf/Google_UK_2020_21_Binary_Gender_Pay_Gap_Report.pdf [https://perma.cc/8U9B-C4VC] (documenting no horizontal pay gap, but a significant vertical pay gap).

186. See *supra* notes 9–17 and accompanying text.

187. THALER & SUNSTEIN, *supra* note 2, at 3, 6.

188. *See, e.g.*, Sunstein, *Welfare Now*, *supra* note 23, at 1644–45; Tor, *supra* note 126.

When considering the behavioral intervention of information disclosure, most assessment has focused on disclosure consumers—the recipients who may be nudged toward a desired end once provided with the disclosed information.[189] Yet the act of having to disclose, particularly where the information provided may be undesirable, operates as an important nudge on disclosure producers, too—the regulated entities who may improve their own behavior once faced with the consequences of their disclosures.[190] This nudge on the disclosers is particularly valuable in areas of public law that rely on private enforcement, like antidiscrimination law. Because public resources to enforce the law are limited, and private actors face significant obstacles to litigating enforcement actions, any regulatory tool that encourage entities toward self-monitoring and legal compliance provides an important public value.[191]

As regulators both in the United States and abroad act to adopt equality disclosures, including disclosure rules around pay,[192] any concerns about producer costs must be weighed against not only consumer benefits but the societal benefits of enhanced enforcement of public law.[193] It is essential to consider the aggregate welfare benefits we all receive when entities are nudged toward greater fairness and nondiscrimination.

189. *See supra* Part I.A.
190. *See supra* Part I.B.
191. *See supra* Part I.C.
192. *See supra* Part II.
193. *See supra* Part III.C.