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# CORPORATE AND SECURITIES LAW IMPACT ON SOCIAL RESPONSIBILITY AND CORPORATE PURPOSE

THOMAS LEE HAZEN

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# CORPORATE AND SECURITIES LAW IMPACT ON SOCIAL RESPONSIBILITY AND CORPORATE PURPOSE

THOMAS LEE HAZEN\*

**Abstract:** The role of social responsibility in corporate governance has been the subject of debate for nearly ninety years. That debate has been reframed over the decades. Several recent events have resulted in increased focus on corporate social responsibility, especially with respect to publicly held corporations. This Article explores the law's two different paths for impacting social responsibility. The current iteration of the corporate responsibility movement has implications for both state law chartering of corporations and federal securities regulation. This Article analyzes the ways in which stated purpose clauses in a corporation's articles of incorporation may be useful in addressing social responsibility and other corporate mission issues. This includes a brief discussion of benefit corporation statutes, followed by a discussion of how better use of stated purpose clauses may be a meaningful proxy for opting into benefit corporation statutes. This Article also traces developments in the securities laws' approach to corporate social responsibility, including recommending the adoption of a safe harbor rule to encourage corporations to make disclosures relating to social responsibility.

## INTRODUCTION

For nearly ninety years, scholars have debated whether the *sole* purpose of the business corporation is to maximize profits.<sup>1</sup> After fifty years of refram-

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<sup>1</sup> See, e.g., Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) [hereinafter Berle, *Corporate Powers*] (arguing that corporate managers should be required to take into account the interests of all shareholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (“[P]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function, that this view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future.”); see also Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365–67 (1932) [hereinafter Berle, *Corporate Managers*] (responding to Professor Dodd).

ing, this debate appears to have settled on a middle ground.<sup>2</sup> It now seems clear that social responsibility<sup>3</sup> has its place in setting corporate goals.<sup>4</sup> It has long been recognized that social responsibility and profitability can coexist as corporate goals.<sup>5</sup> The question has become: what is the appropriate balance between profitability and social responsibility? Some high-profile developments in 2019<sup>6</sup> have put corporate responsibility issues into an enhanced spotlight. This spotlight offers the opportunity to examine how the law has responded to date and also what to expect in the future. The corporate responsibility movement has evolved and grown over the years<sup>7</sup> and, as noted above, social responsibility has been a concern of scholars for nearly a century.

The corporate social responsibility (CSR) movement wants companies to consider the societal impact of their operations.<sup>8</sup> A recent outgrowth of CSR

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<sup>2</sup> See, e.g., C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78–82 (2002) (discussing the development of the current corporate social responsibility debate); see also, e.g., Thomas L. Hazen & Bren L. Buckley, *Models of Corporate Conduct: From the Government Dominated Corporation to the Corporate Dominated Government*, 58 NEB. L. REV. 100, 103–06 (1978) (same).

<sup>3</sup> It should go without saying that in many instances what constitutes socially responsible behavior can be highly subjective. Although there may be some common agreement that sustainability goals are a positive social good, there is not always such agreement as to what is socially responsible with respect to other issues. For example, in one highly publicized case, a company determined that it would be irresponsible to provide health insurance that included anti-abortion drugs. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701, 703, 711–12 (2014).

<sup>4</sup> See, e.g., Adi Libson, *Taking Shareholders' Social Preferences Seriously: Confronting a New Agency Problem*, 9 U.C. IRVINE L. REV. 699, 707 (2019) (discussing agency problems regarding managers and shareholders with respect to social preferences).

<sup>5</sup> See, e.g., David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. 209, 229 (1965) (“Whether induced by government legislation, government pressure, or merely by enlightened attitudes of the corporation regarding its long range potential as a unit in society, corporate activities carried on in satisfaction of public obligations can be consistent with profit maximization objectives. In contrast, justification of public obligations upon bold concepts of public need without corporate benefit will merely serve to reduce further the owner’s influence on his corporation and to create additional demands for public participation in corporate management.”); see also, e.g., Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 355–59 (2015) (encouraging legislatures and corporate boards to embrace corporate social responsibility as part of the corporate mission).

<sup>6</sup> See Bus. Roundtable, *Statement on the Purpose of a Corporation 1* (2019), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf> [<https://perma.cc/3JZX-AFW8>]; Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, <https://www.blackrock.com/us/individual/larry-fink-ceo-letter> [<https://perma.cc/67LC-2LFY>]; see also, e.g., David A. Katz & Laura McIntosh, *Sustainability in the Spotlight*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 27, 2020), <https://corp.gov.law.harvard.edu/2020/01/27/sustainability-in-the-spotlight/> [<https://perma.cc/J5JE-YS93>] (discussing the BlackRock letter to CEOs). For a discussion of these developments, see *infra* notes 30–55 and accompanying text.

<sup>7</sup> See *infra* notes 59–79 and accompanying text.

<sup>8</sup> See, e.g., Paul Monaghan, *Corporate Social Responsibility: How the Movement Has Evolved Since the 90s*, THE GUARDIAN (May 11, 2013), <https://www.theguardian.com/sustainable-business/csr-retrospective-how-movement-developed-90s> [<https://perma.cc/VBU5-JYWV>].

has been to speak in terms of environmental, social, and governance (ESG) impact of a company's operations.<sup>9</sup> The primary difference in the terminology is that CSR describes broadly a company's commitment to these goals. In contrast, ESG reflects a way to measure the societal impact by providing metrics. With its growing popularity,<sup>10</sup> ESG proponents are in the process of developing metrics that can provide a way of measuring CSR achievements.

There are ESG data providers that make ESG data and scores available to investors and investment analysts.<sup>11</sup> For example, as of 2016, more than one hundred organizations provided ESG data, but it is anticipated that the ESG data industry will consolidate.<sup>12</sup> The ESG data providers produce information for the growing number of investors considering CSR in making investment choices.<sup>13</sup> Corporate responsibility advocates hope and anticipate that as the data evolves, standardization will make it easier for investors to digest and evaluate the information.<sup>14</sup> The recent popularity of ESG metrics and disclosure likely will mushroom even more over the next decade.<sup>15</sup> This "new nor-

<sup>9</sup> See, e.g., George Strobel, *Making Sense of ESG: A Primer on Social Corporate Responsibility*, FORBES (Mar. 5, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/03/05/making-sense-of-esg-a-primer-on-social-corporate-responsibility/?sh=54d119fed471> [<https://perma.cc/AMW5-HTM9>].

<sup>10</sup> See, e.g., SHANE BLANTON & ANNA WEST, CALLAN INST., 2019 ESG SURVEY 2 (2019), <https://www.callan.com/wp-content/uploads/2019/09/2019-ESG-Survey.pdf> [<https://perma.cc/AHD8-AHAD>]; Billy Nauman, *ESG Money Market Funds Grow 15% in First Half of 2019*, FIN. TIMES (July 14, 2019), <https://www.ft.com/content/2c7b8438-a5a6-11e9-984c-fac8325aaa04> [<https://perma.cc/Q3F2-GUEQ>]; Abhishek Vishnoi, *Five Trends MSCI Sees in the Growth in Sustainable Investing*, BLOOMBERG GREEN (Jan. 15, 2020), <https://www.bloomberg.com/news/articles/2020-01-16/here-are-five-trends-msci-sees-leading-growth-in-esg-investing> [<https://perma.cc/TNJ5-6VVR>].

<sup>11</sup> See generally 8 J. ENV'T INVESTING, no. 1, 2017 (evaluating ESG data).

<sup>12</sup> SUSTAINABLE INSIGHT CAP. MGMT., SUSTAINABLE PERSPECTIVE FOR THE MAINSTREAM INVESTOR: WHO ARE THE ESG RATING AGENCIES? 2 (2016), <https://www.sicm.com/docs/who-rates.pdf> [<https://perma.cc/8RFA-TK7P>]. It was estimated that the six largest ESG data providers cover over two thousand companies. *Id.*

<sup>13</sup> See, e.g., *Environmental, Social, Governance (ESG)*, KPMG, <https://boardleadership.kpmg.us/esg.html> [<https://perma.cc/QQV2-SP4K>] (explaining ESG's relevance to investors); *ESG Data*, BLOOMBERG, <https://company.content.cirrus.bloomberg.com/impact/products/esg-data/> [<https://perma.cc/AA79-55FH>] (claiming eighteen thousand customers for Bloomberg's ESG data); Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#748ca06d1695> [<https://perma.cc/8T4V-LPB9>] (noting increasing use of ESG in corporate operations).

<sup>14</sup> See, e.g., RAKHI KUMAR & ALI WEINER, STATE ST. GLOB. ADVISORS, THE ESG DATA CHALLENGE 1, 4 (2019), <https://www.ssga.com/investment-topics/environmental-social-governance/2019/03/esg-data-challenge.pdf> [<https://perma.cc/49J9-FZUK>].

<sup>15</sup> See, e.g., Rodolfo Araujo & Kosmas Papadopoulos, *Top 10 ESG Trends for the New Decade*, JD SUPRA (Feb. 21, 2020), <https://www.jdsupra.com/legalnews/top-10-esg-trends-for-the-new-decade-26581/> [<https://perma.cc/9M5B-3X6C>] ("Our new decade is expected to see widespread adoption of ESG-related practices as the norm."). In a positive development, the Sustainability Accounting Standards Board and the Global Reporting Initiative announced a joint initiative to provide a greater degree of standardization in their ESG reporting methodologies. See Michael Cohn, *SASB Teams with GRI on Sustainability Reporting*, ACCT. TODAY (July 13, 2020), <https://www.accounting>

mal” will in turn lead to increased pressure on companies to make ESG disclosures<sup>16</sup> subject to scrutiny under the federal securities laws.

The continued growth of corporate responsibility advocates shows that this is far from a passing fancy. The growth of CSR and ESG has had an impact across the globe and the world’s financial markets.<sup>17</sup> Also, some countries mandate companies pay attention to social responsibility.<sup>18</sup> This Article focuses on CSR and ESG in the United States. Furthermore, it examines the current and future role of state and federal U.S. law with respect to CSR. Both state corporate law and federal securities law impact corporations and their conduct. This Article addresses the past and future of securities regulation<sup>19</sup> and corporate law<sup>20</sup> in adapting to the ever-increasing CSR movement.

Chartering of corporations by the states through the establishment of corporate enabling legislation provides the basis for corporate law in this country.<sup>21</sup> Although federal chartering has been suggested from time to time,<sup>22</sup> our

today.com/news/sasb-teams-with-gri-on-sustainability-reporting [https://perma.cc/5NLT-QV2L] (announcing the joint initiative).

<sup>16</sup> See Araujo & Papadopoulos, *supra* note 15 (describing ESG disclosures as “[t]he New Normal” and discussing the increased pressure to make ESG disclosures).

<sup>17</sup> See, e.g., John Kong Shan Ho, *Regulating Environmental, Social, and Governance Disclosure by Listed Companies: A Comparison of Major Financial Markets*, 15 J. COMPAR. L. 133, 138–52 (2020) (discussing the trend of regulators across the globe to increase ESG reporting); Gregory Jackson et al., *Mandatory Non-financial Disclosure and Its Influence on CSR: An International Comparison*, 162 J. BUS. ETHICS 323, 328–29 (2020) (discussing mandatory CSR disclosures in various countries); Francesco Guarascio, *EU Rules on Responsible Investments to Kick In from 2021: Document*, REUTERS (Nov. 4, 2019), <https://www.reuters.com/article/us-eu-regulations-sustainablefinance/eu-rules-on-responsible-investments-to-kick-in-from-2021-document-idUSKBN1XE1U3> [https://perma.cc/5B7E-GRVB] (discussing European Union’s finance leaders’ plan for responsible investing rules).

<sup>18</sup> See, e.g., Stephen Kim Park, *Social Responsibility Regulation and Its Challenges to Corporate Compliance*, 14 BROOK. J. CORP. FIN. & COM. L. 39, 43 (2019) (referencing CSR mandates in China and India); K.R. Pillai, *Corporate Social Responsibility in India: A Journey from Corporate Philanthropy to Government Mandate*, 10 INDIAN J. CORP. GOVERNANCE 176, 179–81 (2017) (discussing the evolution of CSR in India and its CSR mandate).

<sup>19</sup> See *infra* notes 106–151 and accompanying text.

<sup>20</sup> See *infra* notes 181–293 and accompanying text.

<sup>21</sup> See, e.g., Richard W. Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROBS. 193, 194–207 (1958) (surveying the roles of the states in corporate regulation); Elvin R. Latty, *Why Are Business Corporation Laws Largely “Enabling”?*, 50 CORNELL L.Q. 599, 601–02 (1965) (discussing the corporate law philosophy of allowing businesses to operate on a “free contract basis”); see also, e.g., Thomas L. Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 WIS. L. REV. 391, 392–96 (discussing the overlap of state corporate chartering and federal investor protection).

<sup>22</sup> See, e.g., Harris Berlack, *Federal Incorporation and Securities Regulation*, 49 HARV. L. REV. 396, 396 (1936); Donald E. Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125, 1125, 1128–30 (1976) (arguing in favor of federal chartering of corporations); Donald E. Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71, 71 (1972); Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89, 96 (1972) (same); see also, e.g.,

state law-based paradigm has not changed. Federal law has, however, had significant impact by virtue of the investor protection provisions found in federal securities laws.<sup>23</sup> The current iteration of the corporate responsibility movement has implications for both federal securities regulation and state law chartering of corporations. This Article analyzes those implications.

The recommendations herein do not include a mandate that corporations be socially responsible. Rather, the recommendations include the ways in which the law can better accommodate the increasing number of observers and investors who want to promote CSR. With respect to the securities laws, this means enhancing disclosures to enable investors who care about social responsibility to make more informed investment choices.<sup>24</sup> This Article also explores the ways in which corporate planners and their lawyers can invoke corporate law for corporations desiring to establish corporate responsibility as part of their mission.

This Article begins with an overview of the long-time debate over the role of social responsibility in setting corporate goals.<sup>25</sup> This Article then analyzes how both federal investor protection laws and state corporate chartering laws have adapted to increase focus on CSR. This begins with a discussion of state corporate law as it relates to corporate purpose.<sup>26</sup> This is followed by an explanation of the hybrid form of doing business known as the benefit corporation, with the Article questioning whether benefit corporation statutes provide the optimum solution for companies wanting a social responsibility agenda.<sup>27</sup> The Article then focuses on how the federal securities laws have responded to the CSR movement.<sup>28</sup>

## I. THE DEBATE: PROFITABILITY, SOCIAL RESPONSIBILITY, OR BOTH?

Over the past year, there has been a lot in the news regarding corporations shifting away from focusing solely on profitability and maximizing value.<sup>29</sup>

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William L. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101, 1114–16 (1974) (suggesting that federal law provide minimum corporate governance requirements for publicly held corporations); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 670–84 (1974) (discussing suggested failings in Delaware’s corporate law).

<sup>23</sup> See, e.g., Hazen, *supra* note 21, at 392–96 (discussing the intersection of state corporate law and federal securities laws); see also, e.g., Arthur Fleischer, Jr., “Federal Corporation Law”: *An Assessment*, 78 HARV. L. REV. 1146, 1179 (1965) (asserting that federal corporate law has existed since 1933 and that it has “grown wisely”).

<sup>24</sup> See *infra* notes 189–199, 246–264 and accompanying text.

<sup>25</sup> See *infra* notes 30–101 and accompanying text.

<sup>26</sup> See *infra* notes 106–151 and accompanying text.

<sup>27</sup> See *infra* notes 152–180 and accompanying text.

<sup>28</sup> See *infra* notes 181–293 and accompanying text.

<sup>29</sup> See *infra* notes 30, 36–37 and accompanying text.

Consider for example the Business Roundtable's statement redefining corporate purpose to include social responsibility.<sup>30</sup> The Business Roundtable is an interest group established to represent the interests of corporate America.<sup>31</sup> The Business Roundtable's redefinition of corporate purpose has not received universal praise,<sup>32</sup> but it certainly is a significant step in a growing movement toward increased corporate accountability for a company's social agenda. Other observers from the corporate community have recognized the role that ethical practices and sustainability play in defining a corporation's purpose.<sup>33</sup> Given the long history of the corporate responsibility movement and its growth, it is more likely that the Business Roundtable's emphasis on social responsibility is signaling a trend that is here to stay rather than a transitory one.<sup>34</sup> For example,

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<sup>30</sup> Bus. Roundtable, *supra* note 6, at 1.

<sup>31</sup> The Business Roundtable summarizes its purpose as follows:

Business leaders saw a need for an organization in which CEOs of leading enterprises could get together, study issues, try to develop a consensus, formulate positions and advocate those views. Business Roundtable was formed with two major goals: (1) to enable chief executives from different corporations to work together to analyze specific issues affecting the economy and business; and (2) to present government and the public with knowledgeable, timely information and with practical, positive proposals for action.

*History*, BUS. ROUNDTABLE (Jan. 17, 2011), [https://s3.amazonaws.com/brt.org/archive/legacy/uploads/studies-reports/downloads/BRT\\_History\\_1172011.pdf](https://s3.amazonaws.com/brt.org/archive/legacy/uploads/studies-reports/downloads/BRT_History_1172011.pdf) [<https://perma.cc/PFK9-KS8Z>].

<sup>32</sup> See, e.g., News Analysis: *Business Roundtable's "Statement on the Purpose of a Corporation" Raises Eyebrows & Ire*, WALL ST. LAW., Sept. 2019, at 9, 11–12 (discussing some of the negative reactions to the Business Roundtable's restatement of corporate purpose).

<sup>33</sup> See, e.g., Martin Lipton et al., *Wachtell Lipton on the Purpose of the Corporation*, CLS BLUE SKY BLOG (May 27, 2020), <https://clsbluesky.law.columbia.edu/2020/05/27/wachtell-lipton-on-the-purpose-of-the-corporation/> [<https://perma.cc/WT79-AKT2>] (“The purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to create value over the long-term, which requires consideration of the stakeholders that are critical to its success (shareholders, employees, customers, suppliers, creditors and communities), as determined by the corporation and the board of directors using its business judgment and with regular engagement with shareholders, who are essential partners in supporting the corporation’s pursuit of this mission. This conception of purpose is broad enough to apply to every business entity but at the same time supplies clear principles for action and engagement. The basic objective of sustainable profitability recognizes that the purpose of for-profit corporations is to create value for investors. The requirement of lawful and ethical conduct ensures minimum standards of corporate social compliance. Going further, the broader mandate to take into account corporate stakeholders—including communities, which is not limited to local communities, but comprises society and the economy at large—directs boards to exercise their business judgment within the scope of this broader responsibility. The requirement of regular shareholder engagement acknowledges accountability to investors, but also shared responsibility with shareholders for responsible long-term corporate stewardship.”)

<sup>34</sup> See, e.g., Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV., May–June 2019, at 106 (noting a sea change in the investment community due to increasing investor interest in ESG issues); Adam Connaker & Saadia Madsbjerg, *The State of Socially Responsible Investing*, HARV. BUS. REV. (Jan. 17, 2019), <https://hbr.org/2019/01/the-state-of-socially-responsible-investing> [<https://perma.cc/88VJ-5ZK6>] (noting the rapid growth of socially responsible investing); Cydney Posner, *So Long to Shareholder Primacy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug.



as of 2018, ESG-driven investments accounted for more than \$30 trillion, and it is estimated that this could increase to \$50 trillion in twenty years.<sup>35</sup> There have been recent developments highlighting the focus on CSR.

For example, Chevron's shareholders voted in favor of a shareholder proposal asking management to report on its lobbying efforts regarding the Paris Agreement on climate change.<sup>36</sup> This followed on the heels of a letter from BlackRock, a major investment advisor, to corporate chief executive officers stressing the importance of sustainability and improved shareholder communication as a corporate goal.<sup>37</sup> BlackRock is among many managers, including pioneering public employee pension funds, such as CalPERS<sup>38</sup> and NYCERS,<sup>39</sup> which started many years ago to focus on companies' social values as part of the fund's investment strategy.<sup>40</sup> In addition to the many ESG-oriented pension plans, it is estimated that there are three hundred mutual funds and exchange traded funds that continue to attract increased investor interest.<sup>41</sup> In yet another significant development, Moody's Investor Service

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22, 2019), <https://corpgov.law.harvard.edu/2019/08/22/so-long-to-shareholder-primacy/> [<https://perma.cc/6F37-QT2W>] (referencing a March 2019 poll showing that "41% of Fortune 500 CEOs agreed that 'solving social problems should be "part of [their] core business strategy.'")").

<sup>35</sup> See Pippa Stevens, *Your Complete Guide to Investing with a Conscience, a \$30 Trillion Market Just Getting Started*, CNBC, <https://www.cnbc.com/2019/12/14/your-complete-guide-to-socially-responsible-investing.html> [<https://perma.cc/8B8L-3YBJ>] (Dec. 16, 2019).

<sup>36</sup> See David Wethe & Kevin Crowley, *Chevron's Investors Defy Board in Demanding Climate Disclosures*, BLOOMBERG GREEN (May 27, 2020), <https://www.bloomberg.com/news/articles/2020-05-27/chevron-investors-back-proposal-for-climate-lobbying-report> [<https://perma.cc/4PS9-GP4J>]. To read the Paris Agreement in its entirety, see Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1004, [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) [<https://perma.cc/UHS6-5PAY>].

<sup>37</sup> Fink, *supra* note 6; see, e.g., Katz & McIntosh, *supra* note 6.

<sup>38</sup> CalPERS is the acronym for the California Public Employees Retirement System. See CALPERS, [www.calpers.ca.gov](http://www.calpers.ca.gov) [<https://perma.cc/2XFK-L7PL>]; see also, e.g., Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 631, 641 (2001) (discussing CalPERS's pioneering role as an ethical investment fund).

<sup>39</sup> NYCERS is the acronym for the New York City Employees' Retirement System. See NYCERS, [www.nycers.org](http://www.nycers.org) [<https://perma.cc/49HU-LB6B>].

<sup>40</sup> See Branson, *supra* note 38, at 634 ("Inspired by CALPERS remarkable endeavors, other very active funds include the New York City Employees' Retirement System (NYCERS), the Wisconsin State Retirement System, the Amalgamated Clothing & Textile Workers (ACTW) pension scheme, and TIAA-CREF."); see also, e.g., David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 V.A. L. & BUS. REV. 221, 223–25 (2007) (discussing the importance of ESG with respect to public pension plans); cf. Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 399–425 (2020) (demonstrating that trustees of trusts and pension funds can make ESG investments consistent with their fiduciary duties).

<sup>41</sup> See Greg Iacurci, *Money Moving into Environmental Funds Shatters Previous Record*, CNBC (Jan. 14, 2020), <https://www.cnbc.com/2020/01/14/esg-funds-see-record-inflows-in-2019.html> [<https://perma.cc/7QP9-9HK2>] (noting that, in 2019, sustainable funds attracted \$20.6 billion in new invest-

expects that ESG will be of growing importance in evaluating a company's credit risks.<sup>42</sup> There are those who do not support focusing on ESG.<sup>43</sup> For example, the National Center for Public Policy Research, a conservative research and communications foundation, sent an open letter to BlackRock's CEO urging the need for economic recovery during the COVID-19 crisis as a reason for focusing on shareholder primacy and profitability rather than non-economic considerations.<sup>44</sup> It appears, however, that the better course for companies is to frame their COVID-19 responses in ways that are ESG compatible without altering their commitment to ESG.<sup>45</sup> A survey of corporate executives confirms the expectation that COVID-19 will have an impact on sustainability efforts, but not negate the need to continue to consider sustainability.<sup>46</sup>

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ments); *see also, e.g.*, Edouard Dubois & Ali Saribas, *Making Corporate Purpose Tangible—A Survey of Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 19, 2020), <https://corpgov.law.harvard.edu/2020/06/19/making-corporate-purpose-tangible-a-survey-of-investors/> [<https://perma.cc/N8T2-CW7H>] (discussing a survey showing investor interest in ESG and metrics).

<sup>42</sup> *See* David Caleb Mutua, *ESG Is Increasingly Important in Credit Ratings, Moody's Says*, BLOOMBERG GREEN (Apr. 14, 2020), <https://www.bloomberg.com/news/articles/2020-04-14/esg-is-increasingly-important-in-credit-ratings-moody-s-says> [<https://perma.cc/GAS2-FPTM>].

<sup>43</sup> *See, e.g.*, Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *Scarlet Letters: Remarks Before the American Enterprise Institute* (June 18, 2019), <https://www.sec.gov/news/speech/speech-peirce-061819> [<https://perma.cc/BL8W-6RXX>] (questioning the value of ESG).

<sup>44</sup> *Open Letter to BlackRock CEO Larry Fink*, NAT'L CTR. FOR PUB. POL'Y RSCH. (Apr. 15, 2020), <https://nationalcenter.org/ncppr/2020/04/15/open-letter-to-blackrock-ceo-larry-fink/> [<https://perma.cc/8DHJ-KAN9>] ("This economic crisis makes it more important than ever that companies like BlackRock focus on helping our nation's economy recover. BlackRock and others must not add additional hurdles to recovery by supporting unnecessary and harmful environmental, social, and governance (ESG) shareholder proposals.").

<sup>45</sup> For example, BlackRock responded that COVID-19 does not negate the desirability of sustainable investing. *See* PHILIPP HILDEBRAND ET AL., BLACKROCK, *SUSTAINABLE INVESTING: RESILIENCE AMID UNCERTAINTY 2-4* (2020), <https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf> [<https://perma.cc/JY2Y-3UKX>]; *see also, e.g.*, David A. Katz & Laura McIntosh, *Corporate Governance Update: EESG and the COVID-19 Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 31, 2020), <https://corpgov.law.harvard.edu/2020/05/31/corporate-governance-update-eesg-and-the-covid-19-crisis/> [<https://perma.cc/HYF9-Y3XA>] (noting that climate change issues remain important and that "[t]he COVID-19 crisis has accelerated the nascent shift toward stakeholder-oriented governance. It has heightened public expectations that companies will work toward meaningful engagement with employees, customers, investors, supply chain partners, and the broader community"); Klaus Schwab et al., *World Econ. F., Stakeholder Principles in the COVID Era 1* (2020), [http://www3.weforum.org/docs/WEF\\_Stakeholder\\_Principles\\_COVID\\_Era.pdf](http://www3.weforum.org/docs/WEF_Stakeholder_Principles_COVID_Era.pdf) [<https://perma.cc/5GDJ-D9PW>] (stressing the importance of commitment to sustainability while focusing on stakeholders' COVID-19 concerns).

<sup>46</sup> *See* Rusty O'Kelley et al., *Corporate Governance Challenges in the COVID-19 Crisis: Findings from a Survey of US Public Companies*, CONF. BD. (June 10, 2020), <https://conferenceboard.esgauge.org/covid-19/governance> [<https://perma.cc/JQ4L-QXR5>]. In particular, as summarized in one article, the findings of the survey state the following:

Survey Results

- 30% see the pandemic as having a negative impact on sustainability efforts.

The Department of Labor recently adopted<sup>47</sup> a rule limiting ESG considerations by employer-sponsored retirement plans subject to the Employment Retirement Income Security Act (ERISA)<sup>48</sup> that is disturbing. The new rule limits the use of ESG in plan managers' investment selections.<sup>49</sup> The fiduciaries acting as plan managers must "evaluate[] investments and investment courses of action based solely on pecuniary factors that have a material effect on the return and risk of an investment based on appropriate investment horizons and the plan's articulated funding and investment objectives."<sup>50</sup> This rep-

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- 12% think it will decrease the overall emphasis on sustainability; 10% think it will increase the overall emphasis.
  - 19% think it will put sustainability efforts on hold.
  - 38% expect a shift in the priorities of those programs.

#### Next Steps

- "To avoid a collision with institutional investors and other stakeholders, who are continuing to press forward on their ESG agenda, boards and senior management will want to carefully assess the impact of the pandemic on their sustainability initiatives, and promptly communicate any updates to their sustainability strategy to stakeholders," said Matteo Tonello, Managing Director of ESG Research at The Conference Board.

The Conference Board, *New Survey Finds Sharp Divide Over Pandemic's Impact on Corporate Sustainability*, CLS BLUE SKY BLOG (June 10, 2020), <https://clsbluesky.law.columbia.edu/2020/06/10/new-survey-finds-sharp-divide-over-pandemics-impact-on-corporate-sustainability/> [<https://perma.cc/2YLH-6J73>].

<sup>47</sup> Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Dep't of Labor Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550) (adopting release); Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39,113, 39,114–39,117 (proposed June 30, 2020) (to be codified at 29 C.F.R. pt. 2550) (proposing release).

<sup>48</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at scattered sections of 26 U.S.C. and 29 U.S.C. §§ 1001–1461). ERISA regulates many employer-sponsored retirement plans.

<sup>49</sup> Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,113, 39,117. The proposal includes any plan that uses "one or more environmental, social, and corporate governance-oriented assessments or judgments in their investment mandates . . . or that include these parameters in the fund name." *Id.* at 39,118.

<sup>50</sup> *Id.* at 39,127. The new rule goes significantly further than the "tie-breaker" standard that allows fund managers to select ESG investments. *See id.* at 39,114. Under the prior Department of Labor approach, fund managers could consider non-pecuniary factors only if the plan determines that two investment options effectively have the same economic risk and return profile. *See* Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 32,606 (June 23, 1994) (to be codified at 29 C.F.R. pt. 2509). Ironically, just two years before the Department of Labor's most recent proposal, the Government Accountability Office (GAO) issued a report calling on the Department of Labor to go in the other direction and ease barriers to pension plan ESG investing. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-398, RETIREMENT PLAN INVESTING: CLEARER INFORMATION ON CONSIDERATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS WOULD BE HELPFUL 1, 44 (2018), <https://www.gao.gov/assets/700/691930.pdf> [<https://perma.cc/5SKN-9BD9>]; Ted Knutson, *GAO Urges Removal of Roadblocks to ESG Investing in Retirement Plans*, FORBES (May 22, 2018), <https://www.forbes.com/sites/tedknutson/2018/05/22/esg-investing-roadblocks-by-retirement-plans-should-be-removed-urges-congressional-report/#4578f8ac517a> [<https://perma.cc/L3T2-J9SG>].

resents a victory for those who support the view that corporations should be concerned solely with profitability rather than also considering social responsibility.<sup>51</sup> The rule also prohibits ERISA retirement plans from listing ESG funds in their menu of funds unless selected *solely* on the basis of financial performance.<sup>52</sup> Even before the new rule, ERISA plans had been slow in offering ESG funds.<sup>53</sup> With fewer ERISA plans able to invest in ESG funds, those funds will have fewer potential investors.

One Securities and Exchange Commission (SEC) Commissioner suggests that there should be more disclosure by ESG funds explaining how ESG factors are evaluated and weighed in making investment decisions.<sup>54</sup> BlackRock recently explained that its focus on sustainability is based on maximizing companies' long-term financial performance.<sup>55</sup>

The discussion that follows briefly traces the development of CSR advocacy and the law's adaptation to CSR goals. In particular, this Article addresses the role of corporate purpose clauses, the *ultra vires* doctrine, the emergence of benefit corporations in many states, and federal securities law developments.

The debate over corporate purpose is not new.<sup>56</sup> Although the debate continues, it has been reframed over the course of the past ninety years.<sup>57</sup> It is too

<sup>51</sup> See *infra* notes 63, 70–71 and accompanying text.

<sup>52</sup> In addition, the new rule imposes increased record-keeping requirements, documenting the plan manager's reasoning. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,113, 39,120. The enhanced record-keeping requirement by itself may be another impediment to including an ESG fund in the retirement plan's menu.

<sup>53</sup> The Department of Labor's proposing release indicated that about 19% of ERISA governed plans offer ESG funds. *Id.* at 39,121. The new rule thus does not impact mutual funds and state retirement plans that are not regulated by ERISA. For more discussion on ERISA plans and ESG, see Schanzenbach & Sitkoff, *supra* note 40, at 403–13.

<sup>54</sup> See Elad L. Roisman, Comm'r, U.S. Sec. & Exch. Comm'n, Keynote Speech at the Society for Corporate Governance National Conference (July 7, 2020), <https://www.sec.gov/news/speech/roisman-keynote-society-corporate-governance-national-conference-2020> [<https://perma.cc/5BHQ-5NZU>] (suggesting that a principles-based materiality approach is preferable to mandating ESG disclosures).

<sup>55</sup> See Sandra Boss, *Our Approach to Sustainability*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2020), <https://corpgov.law.harvard.edu/2020/07/20/our-approach-to-sustainability/#more-131469> [<https://perma.cc/HW4G-M4RR>] (“This past January, BlackRock wrote to clients about how we are making sustainability central to the way we invest, manage risk, and execute our stewardship responsibilities. This commitment is based on our conviction that climate risk is investment risk and that sustainability-integrated portfolios, and climate-integrated portfolios in particular, can produce better long-term, risk-adjusted returns.”).

<sup>56</sup> See, e.g., Berle, *Corporate Powers*, *supra* note 1, at 1049; Dodd, *supra* note 1, at 1163 (“That lawyers have commonly assumed that the managers must conduct the institution with single-minded devotion to stockholder profit is true; but the assumption is based upon a particular view of the nature of the institution which we call a business corporation, which concept is in turn based upon a particular view of the nature of business as a purely private enterprise. If we recognize that the attitude of law and public opinion toward business is changing, we may then properly modify our ideas as to the nature of such a business institution as the corporation and hence as to the considerations which may

late to roll back the clock. The CSR movement has escalated over the years and cannot be denied as something that American corporations have to deal with.<sup>58</sup>

The corporate purpose debate had its genesis in the 1930s debate between Professors E. Merrick Dodd, Adolf Berle, and Gardner Means, regarding management control as compared to shareholder control of corporations and whether the law should go beyond shareholders in recognizing corporate stakeholders.<sup>59</sup> Professors Berle and Means thus began the debate concerning who are the appropriate corporate stakeholders. Over the years, the debate expanded to include the significance of corporate stakeholders other than the shareholders<sup>60</sup> and called for increased use of economics in analyzing the success of American corporations.

The literature of modern corporate criticism is severely lacking in one vital particular. It fails almost entirely to address itself to the central problem of any economic system—the production and allocation of scarce goods, services, and capital. The various schools have done one of two things: either they have viewed the corporation in a vacuum, concerning themselves mainly with internal relationships, or they have viewed the corporation solely as a social institution, ignoring the economic forces that have given the corporation its peculiarly institutional appearance.

It is really quite surprising that the economic factors affecting the modern corporation should have been so studiously ignored. The cor-

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properly influence the conduct of those who direct its activities.”); *see also, e.g.*, Berle, *Corporate Managers*, *supra* note 1, at 1365–67 (responding to Professor Dodd).

<sup>57</sup> *See, e.g.*, Libson, *supra* note 4, at 700–03.

<sup>58</sup> *See, e.g.*, Wan Saiful Wan-Jan, *Defining Corporate Social Responsibility*, 6 J. PUB. AFFS. 176, 181 (2006) (“The debate about CSR has shifted in the sense that it no longer focuses on whether or not to become socially responsible and what is CSR, but, as Smith explained, it now centres on *how* to be socially responsible.” (citation omitted) (citing N. Craig Smith, *Corporate Social Responsibility: Not Whether, but How?*, 45 CAL. MGMT. REV. 52, 55 (2003))); Peter A. Atkins et al., *Putting to Rest the Debate Between CSR and Current Corporate Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 7, 2019), <https://corpgov.law.harvard.edu/2019/09/07/putting-to-rest-the-debate-between-csr-and-current-corporate-law/> [<https://perma.cc/V3CQ-YM6H>] (noting that current law already embraces the ability of corporate actors to act in a socially responsible manner).

<sup>59</sup> *See supra* notes 1–2, 56 and accompanying text.

<sup>60</sup> *See, e.g.*, Henry G. Manne, *The “Higher Criticism” of the Modern Corporation*, 62 COLUM. L. REV. 399, 399 (1962) (“[T]he focus has been broadened to include a far larger group than the shareholders alone.”); *see also, e.g.*, Hazen & Buckley, *supra* note 2, at 111–15 (discussing the shift from the Berle-Dodd debate to a broader discussion of corporate responsibility); Bayless Manning, *Thinking Straight About Corporate Law Reform*, 41 LAW & CONTEMP. PROBS. 3, 9–29 (1977) (providing a taxonomy of approaches to corporate law reform); Cary Jones, Note, *The Modern Corporation Looks Homeward: The Berle and Means Revolution and the Corporate Paradigm*, 1975 UTAH L. REV. 471, 477–82 (tracing the expansion of the Berle and Means view over the years).

poration is, after all, the principal focus for the ebb and flow of capital within our still largely capitalist system, and it is the primary business form for competing firms within our still largely market-oriented economy. To a considerable extent, the modern corporation must be the result of the many pressures and interrelationships of the highly complex capital market, the somewhat obscure market for managerial talent, and finally the market for the corporation's production.<sup>61</sup>

There is much scholarly literature defining the debate between Professors Dodd, Berle, and Means questioning whether shareholder or managerial primacy is the better model for publicly held corporations.<sup>62</sup> Some modern commentators still insist on a shareholder primacy model and limiting the corporate purpose to wealth maximization.<sup>63</sup> This is in contrast to the more widely accepted view of the corporation recognizing the significance of all stakeholders.<sup>64</sup> There are skeptics regarding the significance of the sharehold-

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<sup>61</sup> See Manne, *supra* note 60, at 430.

<sup>62</sup> See, e.g., Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735–36 (2006) (asserting director primacy as the preferable model); Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45, 46 (2002) (arguing that director primacy best describes corporate governance in the United States); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951–56 (2018) (discussing shareholder primacy).

<sup>63</sup> See, e.g., STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 53 (2008) (“[T]he shareholder wealth maximization norm . . . indisputably is the law in the United States.”); Lucian A. Bebchuck & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2021) (claiming that stakeholderism adversely impacts shareholders, stakeholders, and society generally); Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 178, 180 (2008) (claiming that *Dodge v. Ford* stands for the proposition that shareholder primacy is the law); Roberta Romano, Comment, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2023 (1993) (“[I]t is the policy most consonant with the competitive and enabling approach of U.S. corporate law, which, by permitting experimentation and innovation in the choice of institutions, tends to maximize firm value.”); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 181 (2013) (“While I am a critic of the ‘shareholder primacy norm’ in corporate governance, I am nevertheless convinced that shareholder primacy is the law.”); see also, e.g., *Granada Invs., Inc. v. DWG Corp.*, 823 F. Supp. 448, 459 (N.D. Ohio 1993) (“As corporations developed and grew, a central principle of corporate law emerged: the sole duty of a corporation’s officers is to maximize shareholder wealth. As time passed, calls rose for corporations to be more socially responsible, nonetheless, the principle that a corporate officer’s overriding duty is to maximize shareholder wealth remains intact. Today, this appears to be the dominating goal of corporations in a free market society.” (citations omitted)).

<sup>64</sup> See, e.g., LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 25 (2012) (“The notion that corporate law requires directors . . . to maximize shareholder wealth simply isn’t true.”); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 764–65 (2005) (asserting that Delaware law rejects shareholder primacy as the sole governance norm); David J. Berger, *Reconsider-*

er/stakeholder debate. For example, one observer suggests that the scholarly debate is more rhetorical than accurately reflecting the real world.<sup>65</sup> Independent of any skepticism, it is clear that there is growing acceptance of the importance of corporate stakeholders.

Even the U.S. Supreme Court has recognized that shareholder primacy is not absolute, noting that “while it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”<sup>66</sup> One observer suggests that the Court’s observation should be viewed solely within the context of the religious freedom issue involved in the case.<sup>67</sup> Nonetheless, that is an unduly narrow view of the law’s rejection of an absolute shareholder primacy model.

The increasing focus on CSR has created a continued rift between shareholder primacy<sup>68</sup> and social responsibility.<sup>69</sup> The age-old and traditional share-

*ing Stockholder Primacy in an Era of Corporate Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2019), <https://corpgov.law.harvard.edu/2019/03/04/reconsidering-stockholder-primacy-in-an-era-of-corporate-purpose/> [<https://perma.cc/P33U-XEA4>] (“There is now a growing consensus that corporations must focus on corporate purposes beyond stockholder value.”); *see also, e.g.*, Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (Apr. 15, 2020), <https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/> [<https://perma.cc/CK72-N33L>] (suggesting that the growth of stakeholderism has been spurred by shareholders).

<sup>65</sup> Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345, 351 (2021) (“I still find myself more amused than educated by the debates between the ideologues on real world subjects that I know, as a practical matter, rarely present themselves in such a binary fashion when those in the corporate management trenches address them. Academics (especially tenured), politicians (especially those tending to the extremes of the liberal-conservative continuum), and pundits have the luxury of professing ideologically pure positions. But they are false dichotomies. Corporate executives and their lawyers know that leading and managing organizations—i.e. execution rather than mere rhetoric—is a lifelong process of coming to terms with the tension between principles, on one hand, and pragmatism, on the other. The shareholder absolutists and the stakeholder or social responsibility purists are engaging in a rhetorical battle largely removed from the reality that shareholder success is and always has been inseparable from corporate commitment to some or all of those constituencies.”). Lipshaw also suggests that the business judgment rule validates directors’ focus on various constituencies. *Id.*

<sup>66</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711–12 (2014).

<sup>67</sup> Rhee, *supra* note 62, at 2015 (“[I]t is not too cynical to believe that this liberal-sounding statement from a conservative majority was a convenient and instrumental rationale, unique to the case and the issue of corporate religious liberty at hand.”).

<sup>68</sup> *See, e.g.*, Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 638 (2006) (asserting that maximizing shareholder value is not the only issue in assessing shareholder primacy); Peter Atkins et al., *Social Responsibility and Enlightened Shareholder Primacy: Views from the Courtroom and Boardroom*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 21, 2019), <https://corpgov.law.harvard.edu/2019/02/21/social-responsibility-and-enlightened-shareholder-primacy-views-from-the-courtroom-and-boardroom/> [<https://perma.cc/FMA4-KDL7>] (discussing the relationship between ESG and shareholder primacy).

holder primacy view of corporate purpose is captured by economist Milton Friedman's view that a corporation has one social responsibility—to maximize wealth for its shareholders.<sup>70</sup> Friedman did not dismiss the importance of caring about social issues as a positive value. Rather, the rationale behind Friedman's view is that a corporation is inanimate. As an inanimate entity, a corporation has no conscience and hence, according to Friedman, has no social responsibility other than its profit-making mission. Although once popular, Friedman's views are now out of sync with today's corporate community, which has since embraced social responsibility as part of a corporation's mission.<sup>71</sup>

Longtime consumer advocate Ralph Nader is often referenced as one of the first modern-day proponents of socially responsible corporations. In 1970, Nader helped launch Campaign GM, a proxy battle urging General Motors management to include seatbelts in its vehicles as a safety matter.<sup>72</sup> General Motors management successfully opposed Nader's proposal, but as we now know, management may have initially won the seatbelt battle but eventually lost the war.<sup>73</sup>

Beyond Campaign GM, Nader and others called for the adoption of laws requiring corporations to be socially responsible citizens by focusing on more responsible corporate governance.<sup>74</sup> Social responsibility was promoted as necessary for corporations to recognize all of their stakeholders and constituencies rather than concentrating solely on profitability and wealth maximization. Not surprisingly, this initiative was opposed by the corporate community. In a sense of irony, however, in the midst of the 1980s takeover mania, companies convinced several state legislatures to adopt constituency statutes that permit corporate boards to consider the interests of constituencies other than shareholders in making decisions.<sup>75</sup> These early constituency statutes original-

<sup>69</sup> See, e.g., Virginia Harper Ho, *Why the U.S. Is Lagging on ESG Disclosure Reform*, CLS BLUE SKY BLOG (June 2, 2020), <https://clsbluesky.law.columbia.edu/2020/06/02/why-the-u-s-is-lagging-on-esg-disclosure-reform/> [<https://perma.cc/6QM9-SX3L>] (lamenting the fact that the United States lags behind other countries in ESG disclosure, and attributing “deep roots of shareholder primacy in U.S. business practice and a greater skepticism toward regulation in some quarters of the U.S. public”).

<sup>70</sup> See, e.g., Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

<sup>71</sup> As noted above, the most recent evidence of this is the Business Roundtable's redefinition of corporate purpose. See *supra* notes 30–34 and accompanying text. *But cf.* Marianne M. Jennings, *The Social Responsibility of Business Is Not Social Responsibility: Assume That There Are No Angels and Allow the Free Market's Touch of Heaven*, 16 BERKELEY BUS. L.J. 325, 416, 461 (2019) (suggesting that companies focusing on CSR are doing so for their self-interest).

<sup>72</sup> See, e.g., Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 425 (1971).

<sup>73</sup> See *id.* at 430.

<sup>74</sup> See, e.g., RALPH NADER, MARK J. GREEN & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* 118–31 (1976).

<sup>75</sup> See, e.g., Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 23–24 (1992). These statutes were in large part a response to the decision in



ly were enacted in large part to enable companies in those states to more effectively oppose unwanted takeover attempts.<sup>76</sup> Today, most states have some form of constituency statutes.<sup>77</sup> These constituency statutes clearly enable boards to make decisions that may sacrifice profitability for what they view as socially responsible decisions. It is worth noting that Delaware is one of only nine states without a constituency statute.<sup>78</sup> At the other extreme, Connecticut in its constituency statute requires directors of publicly held companies incorporated in Connecticut to consider “community and societal considerations” as part of their decision-making process.<sup>79</sup>

The absence of such a constituency statute in a particular state is not significant in being able to establish that corporations may engage in socially responsible conduct even at the expense of maximizing profits and shareholder wealth.<sup>80</sup> Additionally, as discussed below,<sup>81</sup> a well-drafted corporate purpose

*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, which held that under certain circumstances, management is unable to do anything to impede maximization of shareholder value. 506 A.2d 173, 176 (Del. 1986). Like most states, Delaware does not have a constituency statute.

<sup>76</sup> See Joseph R. Shealy, Comment, *The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*, 94 N.C.L. REV. 686, 688–92 (2016) (tracing the history of constituency statutes); see also, e.g., Thomas Lee Hazen, *State Anti-takeover Legislation: The Second and Third Generations*, 23 WAKE FOREST L. REV. 77, 78–81 (1988) (discussing the impact of state tender offer legislation).

<sup>77</sup> See Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 833 (2003) (stating that forty-one states have some form of a constituency statute); Shealy, *supra* note 76, at 691 (same); Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 212 (2012) (same).

<sup>78</sup> North Carolina is also one of nine states that have not enacted a constituency statute. See Shealy, *supra* note 76, at 696.

<sup>79</sup> CONN. GEN. STAT. § 33-756(g) (2020) (“[A] director of a corporation that has a class of voting stock registered pursuant to Section 12 of the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time, in addition to complying with the provisions of subsections (a) to (c), inclusive, of this section, may consider, in determining what the director reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation’s employees, customers, creditors and suppliers, and (4) community and societal considerations, including those of any community in which any office or other facility of the corporation is located. A director may also consider, in the discretion of such director, any other factors the director reasonably considers appropriate in determining what the director reasonably believes to be in the best interests of the corporation.” (footnote omitted)); cf. Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1086 (2000) (recommending that states adopt a default rule empowering corporations to consider other constituencies in setting corporate policy and in taking corporate action).

<sup>80</sup> See, e.g., David B. Guenther, *The Strange Case of the Missing Doctrine and the “Odd Exercise” of eBay: Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. & BUS. REV. 427, 486 (2018) (criticizing *eBay Domestic Holdings, Inc. v. Newmark* as a dangerous return to *Dodge v. Ford Motors*: “[w]here *Dodge v. Ford* emerged from the corporate charter, 90 years later, *eBay* retreats back into it . . . revers[ing] the logic of *Dodge v. Ford* and regress[ing] from the reasonable shareholder expectations of the modern firm to the publicly ordered corporation of the 19th

clause can accomplish the same things as a constituency statute, permitting corporate boards to consider the interests of constituencies other than shareholders. In fact, use of the purpose clause may be preferable, and therefore a good idea even in those states that have a constituency statute.

The American Law Institute's Principles of Corporate Governance recognizes that corporations may sacrifice wealth maximization for the public good.<sup>82</sup> Thus, the courts have been extremely deferential to the board of directors' determination regarding the appropriate balance between wealth maximization and the public good.<sup>83</sup> There is one relatively recent Delaware case that indicates that there are some limits to sacrificing wealth maximization in pursuit of social responsibility. In *eBay Domestic Holdings, Inc. v. Newmark*,<sup>84</sup> the Delaware Chancery Court rejected reliance on social responsibility to support the directors' actions. The directors of craigslist created a poison pill<sup>85</sup> to thwart a proposed takeover by eBay that would have increased craigslist's profitability but, according to the craigslist's management, also would have sacrificed the company's commitment to communitarianism and social values.<sup>86</sup> The court indicated that it was not proper for the craigslist directors to view the corporation as a "vehicle for purely philanthropic ends," stating:

The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of

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century"); Dalia T. Mitchell, *From Dodge to eBay: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 155–56 (2019) (analyzing caselaw and concluding that courts never really adhered to profit maximization as the sole corporate purpose, but rather courts, utilizing the business judgment rule, deferred to directors' discretion as to the proper balance between wealth maximization and other corporate goals).

<sup>81</sup> See *infra* notes 108–119 and accompanying text.

<sup>82</sup> AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2)–(3) (1994) (noting that, even at the expense of maximizing profits, corporate managers "[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business" and "[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes").

<sup>83</sup> See Mitchell, *supra* note 80, at 155–56.

<sup>84</sup> 16 A.3d 1, 34 (Del. Ch. 2010).

<sup>85</sup> A poison pill is a shareholder rights plan that is used to preclude a corporate takeover by making the takeover less desirable or prohibitively more expensive. *Poison Pill*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/poison%20pill> [<https://perma.cc/966P-L9AB>].

<sup>86</sup> *eBay*, 16 A.3d at 33–35 (invalidating craigslist's board of directors' poison pill to fend off eBay's takeover attempt after craigslist had argued that the poison pill was necessary to maintain the company's communitarian approach to operations). Although the court invalidated the poison pill, it did allow craigslist to stagger its board elections, which effectively eliminated eBay's ability to secure a seat on craigslist's board of directors. *Id.* at 41.

dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce. If Jim and Craig were the only stockholders affected by their decisions, then there would be no one to object. eBay, however, holds a significant stake in craigslist, and Jim and Craig’s actions affect others besides themselves.<sup>87</sup>

It has been suggested that the *eBay* decision is an outlier<sup>88</sup> rather than a significant statement on corporate purpose. It is a mistake to consider *eBay* without paying heed to its factual milieu. The *eBay* case arose out of claims of alleged improper action by controlling shareholders to the detriment of the minority in the context of thwarting a takeover attempt.<sup>89</sup> Others have viewed *eBay* as a

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<sup>87</sup> *Id.* at 34 (emphasis added) (footnote omitted).

<sup>88</sup> See, e.g., Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 774 (2015) (indicating that *eBay* “is an odd case”); see also, e.g., Mitchell, *supra* note 80, at 210–11 (observing that the “very few exceptions” to deference to directors’ business judgment, including *eBay*, are “interesting cases,” but “they cannot, alter the rule, that is, the business judgment rule,” which in Delaware dictations that “decisions about a corporation’s purpose, like any other business matter, are in the discretion of corporate directors and executives . . . [who] have defined and will continue to define the role and purpose of corporations in our society”). But see, e.g., William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 828 (2012) (“Like *Dodge v. Ford*, the *eBay* court provides a clear statement on the requirements with respect to shareholder wealth maximization . . .”). The dispute in *eBay* arose out of the context of fending off an unwanted takeover attempt and thus implicates a line of Delaware caselaw addressing that particular takeover context. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (stating that once a corporation is “for sale,” the directors’ only duty is not to interfere with maximization of shareholder value); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (holding that directors may respond to an unwanted takeover attempt only if the action taken is in response to a reasonably perceived threat to corporate policy and the response taken is proportional to the threat).

<sup>89</sup> See *Swortwood v. Tenedora de Empresas, S.A. de C.V.*, No. 13CV00362, 2014 WL 12026068, at \*6 (S.D. Cal. Sept. 9, 2014) (characterizing *eBay* as a duty of loyalty issue); *In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 776 (Bankr. W.D. La. 2013) (referencing *eBay* as a case involving the fiduciary duties of controlling shareholders); *Silverberg v. Padda*, C.A. No. 2017-0250, 2019 WL 5295141, at \*3 (Del. Ch. Oct. 18, 2019) (citing *eBay* as involving the duties of controlling shareholders); *CertiSign Holding, Inc. v. Kulikovsky*, C.A. No. 12055, 2018 WL 2938311, at \*15 n.184 (Del. Ch. June 7,

more potent example of Delaware's reaffirmation of the shareholder primacy model that places limits on a corporate purpose clause's ability to enable ESG decisions.<sup>90</sup> As discussed in the following sections of this Article, a well-drafted corporate purpose clause can play a significant role in enabling ESG decisions that might otherwise be challenged as inconsistent with wealth maximization.<sup>91</sup> It has been suggested, for example, that "[t]he question, therefore, is not whether there is a sensible way to make purpose meaningful, it is whether the powerful players that dominate American corporate governance will come together to make it happen."<sup>92</sup>

The *eBay* decision is far from a total rejection of social responsibility as a factor in corporate decision-making. The *eBay* court itself reaffirmed the importance of the business judgment rule in deferring to the directors' decisions regarding social responsibility even at the expense of wealth maximization,

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2018) (citing *eBay* in connection with the controlling shareholders' self-interested transaction); *RCS Creditor Tr. v. Schorsch*, C.A. No. 2017-0178, 2018 WL 1640169, at \*3 (Del. Ch. Apr. 5, 2018) (citing *eBay* with respect to self-dealing); *In re Metrologic Instruments, Inc. S'holders Litig.*, C.A. No. A-2472-13T1, 2017 WL 541104, at \*11 (Del. Ch. Feb. 10, 2017) (characterizing *eBay* as standing for the proposition that when shareholders band together to exert control, they will be viewed as having controlling shareholder duties); *In re Books-A-Million, Inc. S'holders Litig.*, C.A. No. 11343, 2016 WL 5874974, at \*11 n.5 (Del. Ch. Oct. 10, 2016) (citing *eBay* for the proposition that bad faith rebuts the presumption of the business judgment rule), *aff'd*, 164 A.3d 56 (Del. 2017); *Quadrant Structured Prods. Co. v. Vertin*, 115 A.3d 535, 549 n.22 (Del. Ch. 2015) (same); *In re Orchard Enters., Inc.*, 88 A.3d 1, 33 n.16 (Del. Ch. 2014) (same); *Blaustein v. Lord Baltimore Cap. Corp.*, C.A. No. 6685, 2013 WL 1810956, at \*18 (Del. Ch. Apr. 30, 2013) (characterizing *eBay* as a controlling shareholders' duty of loyalty case), *aff'd*, 84 A.3d 954 (Del. 2014).

<sup>90</sup> See, e.g., *Atkins et al.*, *supra* note 68 ("The obvious but, nonetheless, key takeaway is that in the board's decision-making relating to consideration of ESG matters, directors of Delaware for-profit companies need to be focused on the shareholder primacy path and be thoughtful, careful and well-advised, just as they are required to be with all of their business decisions. While there are many other substantive and procedural rules and arrangements—including provisions of the Delaware General Corporation Law, the company's certificate of incorporation and its bylaws—that may affect the outcome of a litigation challenge to a board's ESG-related decision, they do not change that conclusion." (footnote omitted).

<sup>91</sup> See *infra* notes 108–119 and accompanying text; see also, e.g., Francis J. Aquilla, *Considering the Corporate Purpose*, PRAC. LAW—THE JOURNAL: TRANSACTIONS & BUS., Feb.–Mar. 2020, at 24, [https://www.sullcrom.com/files/upload/PLJ\\_FebMar20\\_InTheBoardroom.pdf](https://www.sullcrom.com/files/upload/PLJ_FebMar20_InTheBoardroom.pdf) [<https://perma.cc/7F5V-EA4L>] ("[S]hareholder primacy does not prohibit directors from considering the interests of constituencies other than shareholders, but those '[o]ther constituencies may be considered only instrumentally to advance [shareholders' best interests].'" (quoting *In re Tradco, Inc. S'holder Litig.*, 73 A.3d 17, 37 (2013))).

<sup>92</sup> Robert G. Eccles, Leo E. Strine & Timothy Youmans, *Purpose with Meaning: A Practical Way Forward*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 16, 2020), <https://corpgov.law.harvard.edu/2020/05/16/purpose-with-meaning-a-practical-way-forward/> [<https://perma.cc/HQM9-MLKA>]; see Leo E. Strine, Jr. et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and ESG Strategy 2–3* (Harv. L. Sch., Discussion Paper No. 1037, 2020), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Strine\\_1037.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Strine_1037.pdf) [<https://perma.cc/W97Q-2RKJ>] (explaining that corporate managers can further ESG goals consistent with traditional corporate law norms).

stating that “[w]hen director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value.”<sup>93</sup> Furthermore, it has long been recognized that promoting socially responsible conduct may negatively impact profits in the short term but can have the long-term impact of increasing profitability.<sup>94</sup>

Common terminology for the social responsibility movement has developed over the years. For many years, advocates pursued CSR as part of what came to be known as the CSR movement.<sup>95</sup> As noted earlier, there has been a shift toward ESG-driven metrics as the benchmark of the CSR movement.<sup>96</sup> The primary aspect of ESG is that it establishes metrics by which advocates can evaluate a company’s success in achieving ESG goals.<sup>97</sup>

Other commentators have explored the challenges for corporate lawyers and their clients in adapting to the increasing emphasis on CSR and ESG.<sup>98</sup> The following discussion first explores the important role of corporate purpose claus-

<sup>93</sup> 16 A.3d 1, 33 (Del. Ch. 2010); *see also, e.g.*, Lipshaw, *supra* note 65, at 6, 26 (discussing the role of the business judgment rule in deferring to directors’ decisions regarding various constituencies).

<sup>94</sup> *See, e.g.*, Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012) (“It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term.”); *The Rise of Responsible Investment*, KPMG, <https://home.kpmg/xx/en/home/insights/2019/03/the-rise-of-responsible-investment-fs.html> [<https://perma.cc/WRU4-XXM9>] (“Studies confirm that having appropriate ESG policies in place is not just about doing the right thing and being compliant with laws and regulations, it’s financially beneficial. Companies with sustainable practices outperform companies that have not integrated ESG considerations into operations.”).

<sup>95</sup> *See, e.g.*, John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 5–11 (2005) (conducting an anthropological study of how corporations and activists perceive the CSR movement); Wells, *supra* note 2, at 130; Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 CORNELL L. REV. 1282 (1999) (collection of articles discussing CSR).

<sup>96</sup> *See supra* notes 5–10 and accompanying text.

<sup>97</sup> *See supra* notes 11–13 and accompanying text; *see also, e.g.*, *Why ESG Is Replacing CSR—and What This Means to Your Business*, NPOWER BUS. SOLS. (Apr. 26, 2019), <https://www.energy-hq.co.uk/information-and-resources/editorials/why-esg-is-replacing-csr-and-what-this-means-to-your-business/> [<https://perma.cc/BZ5E-VPUF>] (“In particular, ESG looks at how businesses: [r]espond to climate change[,] [t]reat their workers[,] [b]uild trust and foster innovation[,] [and] [m]anage their supply chains[.]”).

<sup>98</sup> *See, e.g.*, Martin Lipton & William Savitt, *Stakeholder Governance—Issues and Answers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 25, 2019), <https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/> [<https://perma.cc/7ZZH-5JV9>]; John Wilcox & Morrow Sodali, *A Common-Sense Approach to Corporate Purpose, ESG & Sustainability*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 26, 2019), <https://corpgov.law.harvard.edu/2019/10/26/a-common-sense-approach-to-corporate-purpose-esg-and-sustainability/> [<https://perma.cc/2FQK-P23N>].

es in the articles or certificate of incorporation in framing the corporate mission.<sup>99</sup> This is followed by a discussion of the emergence of benefit corporations and their value to CSR and ESG initiatives.<sup>100</sup> The Article then discusses the extent to which federal securities laws do and should address CSR issues.<sup>101</sup>

## II. CORPORATE CHARTERS AND THE PURPOSE CLAUSE

The discussion below provides an overview of the historic development and evolution of corporate charters,<sup>102</sup> their purpose clauses,<sup>103</sup> and the *ultra vires* doctrine.<sup>104</sup> The discussion then focuses on how corporate purpose clauses and the *ultra vires* doctrine can motivate and reward a corporation's socially responsible actions, even when they appear to go against the corporate profit motive.<sup>105</sup>

### A. Corporate Charters

Corporate law developed in England in the sixteenth and seventeenth centuries in a system wherein individual corporate charters were granted by the Crown.<sup>106</sup> Conceptually this is significant because it shows that corporations developed as a charter or contract between the Crown and the corporate entity. Eventually, Parliament took over the function of chartering corporations by acts of Parliament. The United States imported this pattern whereby a special act of a state legislature granted each corporation an individual charter.<sup>107</sup> Following the example set by the English practice, each charter specified the specific purposes for which the corporation was formed. Corporate acts beyond the stated purpose were *ultra vires* and thus invalid. This remains the case even with the shift from individually chartered corporations to the general corporation acts that are now in place.

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<sup>99</sup> See *infra* notes 108–119, 141–151 and accompanying text.

<sup>100</sup> See *infra* notes 152–180 and accompanying text.

<sup>101</sup> See *infra* notes 181–293 and accompanying text.

<sup>102</sup> See *infra* notes 106–107 and accompanying text.

<sup>103</sup> See *infra* notes 108–119 and accompanying text.

<sup>104</sup> See *infra* notes 120–139 and accompanying text.

<sup>105</sup> See *infra* notes 141–151 and accompanying text.

<sup>106</sup> See 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 2:2 (3d ed. 2011) (discussing the development of corporate law in England). For additional details on the history of corporate law in England, see 3 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 469–75 (5th ed. 1942); 11 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 45 (5th ed. 1942); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 486–512 (2d ed. 1898).

<sup>107</sup> See 1 COX & HAZEN, *supra* note 106, § 2:3 (discussing the evolution of corporate law in the United States).

### B. The Corporate Purpose Clause

As the American frontier expanded, the inefficiency of charters via special acts of the legislature gave way to today's paradigm—general corporation statutes enabling of entities that comply with the act's required formalities.<sup>108</sup> These statutes required specifically enumerated purpose clauses, which meant that companies seeking an expansive grant of authority would have purpose clauses spanning many pages.<sup>109</sup> Eventually, these statutes gave way to corporate statutes permitting a so-called "all purpose" clause.<sup>110</sup> The Model Business Corporation Act that most states have adopted—not including all-important Delaware—no longer requires a purpose clause. Instead of requiring a statement of purpose in the articles of incorporation, the Model Act sets forth the equivalent of an all-purpose clause as the default provision, but allows compa-

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<sup>108</sup> See generally *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–67 (1933) (Brandeis, J., dissenting in part) (tracing the development of American corporate law); JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (1965) (same); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105 (1888) (same). The first such statute appears to have been adopted in New York, in 1811, permitting incorporation for twenty years. An Act Relative to Incorporations for Manufacturing Purposes, ch. 67, 1811 N.Y. Laws 111; see 1 COX & HAZEN, *supra* note 106, § 2:3 (discussing the early history of corporate law in the United States).

<sup>109</sup> Consider, for example, the following excerpt from Uniroyal Corporation's several page purpose clause:

The objects for which said company is formed are:

1. To manufacture, formulate, construct, grow, raise, produce, mine, develop, purchase, lease, buy or acquire in any other manner, import, export, convert, combine, compound, spin, twist, knit, weave, dye, grind, mix, process, introduce, improve, exploit, repair, design, treat or use in any other manner, to lease, sell, assign, exchange, transfer or dispose of in any other manner, and generally to deal and trade in and with any or all of the following:

(a) rubber, balata, gutta percha, all other related or unrelated natural gums, artificially prepared rubber, reclaims of such rubbers and other gums; raw or processed natural latex, artificially prepared aqueous dispersions of crude or reclaimed rubber, aqueous dispersions of synthetic rubber or of rubber-like or other materials, and equivalents, derivatives and substitutes of any of the foregoing, whether now or hereafter known or used in industry, and all other commodities and materials competent to be put to any use similar to any of the uses of any of them, and articles, goods or commodities produced in whole or in part from any thereof or from the use of any thereof. . . .

THOMAS LEE HAZEN, JERRY W. MARKHAM & JOHN F. COYLE, *CORPORATIONS AND OTHER BUSINESS ENTERPRISES CASES AND MATERIALS* 192–93 (4th ed. 2016) (quoting Uniroyal, Inc., Amended Certificate of Organization (as amended Apr. 18, 1969)). The purpose clause in the Uniroyal charter actually continues for twenty additional, similar paragraphs and subparagraphs.

<sup>110</sup> See, e.g., DEL. CODE ANN. tit. 8, § 101(b) (2020) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.").

nies to set forth a narrower purpose.<sup>111</sup> It is this author's view that under such a statute it is still a good idea to have a purpose clause in the articles of incorporation even if it is a redundant statement of the default all-purpose clause.<sup>112</sup>

Notwithstanding the permissive nature of all-purpose clauses in corporate charters, there may be good reasons to have a more limited corporate purpose.<sup>113</sup> Consider, for example, a family corporation wherein the founders want to limit future generations' ability to change the focus of the family business. Although the impact of a limited purpose clause could be eliminated by amending the articles of incorporation, it still would stand as a barrier to expanding the scope of the business at least until the barrier is lifted by an amendment to the articles of incorporation's purpose clause. Also, limited purpose clauses are common in not-for-profit corporations that are established for a particular mission. Specifically drafted corporate purpose clauses can be particularly useful to corporations wanting to include social goals as part of their corporate mission thus validating management decisions that might be at odds with profit maximization. Many years ago, proponents argued that purpose clauses include a mandate to act in a socially responsible manner;<sup>114</sup> however, this suggestion did not appear to get much traction. Today's social responsibility climate presents a new opportunity for focusing on how corporate purpose clauses can enhance a corporation's social responsibility.

In its notable *Burwell v. Hobby Lobby Stores, Inc.* decision,<sup>115</sup> the U.S. Supreme Court recognized how a corporation's purpose can define the scope of permissible corporate activity:

For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-

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<sup>111</sup> MODEL BUS. CORP. ACT § 3.01(a) (AM. BAR ASS'N 2016) ("Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.").

<sup>112</sup> See Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. (forthcoming 2021) (manuscript at 105–08) (urging for the use of purpose clauses).

<sup>113</sup> For example, the Model Act's Official Comments to § 3.01 explain: "Many corporations may also find it desirable to supplement a general purpose clause with an additional statement of business purposes. This may be necessary for licensing or for qualification or registration purposes in some states." MODEL BUS. CORP. ACT § 3.01(a) cmt.

<sup>114</sup> See Daniel J. Morrissey, *Toward a New/Old Theory of Corporate Social Responsibility*, 40 SYRACUSE L. REV. 1005, 1032–38 (1989) (suggesting that the corporate purpose be framed in terms of "ethical and beneficent corporate conduct" in addition to the profit motive).

<sup>115</sup> 573 U.S. 682, 711–12 (2014).



profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.<sup>116</sup>

This reflects traditional corporate law doctrine, notwithstanding its controversial application to the statute<sup>117</sup> involved in that case.<sup>118</sup>

The significance of a well-drawn purpose clause in a corporation's articles of incorporation should not get lost despite the treatment of all-purpose clauses as the default and the norm. With the growing significance of the CSR and ESG movements, the issue is not whether to respond, but rather how to balance the profit and social responsibility agendas. Corporations may want to consider whether a well-drawn purpose clause could help set the parameters of this balance. Also, for corporations desiring to single out particular ESG goals as their focus, a well-drawn purpose clause could serve that function. Corporations can, of course, establish CSR and ESG priorities through resolutions and policy-setting decisions. The stated purpose clause presents the opportunity for corporations to set these goals in a less transitory fashion because it takes shareholder approval to amend the articles of incorporation.<sup>119</sup>

A stated corporate purpose thus provides the parameters for corporate conduct. The *ultra vires* doctrine, discussed directly below, is the enforcement mechanism with respect to the stated corporate purpose.

### C. The Ultra Vires Doctrine

*Ultra vires* is a Latin phrase that literally means beyond the powers.<sup>120</sup> As a legal doctrine, *ultra vires* refers to acts that are beyond a person or entity's legal authority. Corporate conduct that goes beyond the corporation's stated purpose or implied powers is *ultra vires* and formerly was deemed void in all

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<sup>116</sup> *Id.* at 712.

<sup>117</sup> The Court was interpreting the Religious Freedom Restoration Act of 1993, § 3(a)–(b), 42 U.S.C. § 2000bb-1(a)–(b).

<sup>118</sup> The Court in *Hobby Lobby* held that a corporation could invoke religious freedom to opt out of mandatory health insurance for abortion-inducing drugs. 573 U.S. at 685.

<sup>119</sup> *E.g.*, MODEL BUS. CORP. ACT §§ 2.02(b)(2)(i), 10.03 (AM. BAR ASS'N 2016).

<sup>120</sup> *See, e.g.*, John E. Kennedy, Note, *Corporations: Powers—Ultra Vires—Problems Remaining After Legislative and Judicial Modification of the Doctrine*, 34 NOTRE DAME LAW. 99, 99 (1958) (“A literal translation of ‘ultra vires’ is ‘beyond the powers.’ As a legal concept, it has application mainly to corporations in testing whether corporate acts are within (intra) or without (ultra) the limited powers granted to the corporation as an artificial creature of the law.”).

respects.<sup>121</sup> Modern corporate statutes changed this rule and now permit *ultra vires* claims in only three contexts:

(1) in a proceeding by a shareholder against the corporation to enjoin the [*ultra vires*] act; (2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or (3) in a proceeding by the attorney general.<sup>122</sup>

This means that although the corporation may no longer invoke the doctrine to excuse itself from an *ultra vires* contract with a third party,<sup>123</sup> there are potentially severe consequences as a result of *ultra vires* acts. Although a state attorney general's action to dissolve a business corporation is extremely unlikely, such a remedy is far from unheard of in the context of nonprofit corporations.<sup>124</sup>

In addition to its use in nonprofit corporations, *ultra vires* has played a role in prohibiting municipal corporation conduct that exceeds the municipal charter.<sup>125</sup> The *ultra vires* doctrine is equally available to enforce a for-profit corporation's purpose clause.

At one time, courts took a very strict view in interpreting corporate purpose clauses.<sup>126</sup> For example, in an early case, the court refused to allow a company, which had been chartered to build and maintain a road, to expand its

<sup>121</sup> See, e.g., *Ashbury Ry. Carriage & Iron Co. v. Riche* (1875) 7 HL 653 at 653 (Eng.) (ruling that the contract in question was outside the corporation's stated purpose and therefore void).

<sup>122</sup> MODEL BUS. CORP. ACT § 3.04; see also DEL. CODE ANN. tit. 8, § 124 (2020).

<sup>123</sup> It should be remembered that even with the elimination of the use of *ultra vires* by and against third parties, an agent who acts beyond his or her authority cannot bind the corporation. Also, a contract to perform an illegal act will not be enforced. See, e.g., Kent Greenfield, *Ultra Vires Lives!: A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302–13 (2001) (discussing the ways in which the doctrine of illegality survives the restriction of the *ultra vires* doctrine).

<sup>124</sup> See, e.g., *Shorter Coll. v. Baptist Convention*, 614 S.E.2d 37, 41 (Ga. 2005) (holding that the dissolution of a nonprofit corporation was *ultra vires*); Thomas Lee Hazen & Lisa Love Hazen, *Punctilious and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 388–89 (2012) (discussing *ultra vires* and its correlative duty of obedience).

<sup>125</sup> See, e.g., *CSX Transp., Inc. v. City of Garden City*, 418 F. Supp. 2d 1366, 1370 (S.D. Ga. 2006) (holding that a municipality's entering into an indemnity contract was void as *ultra vires*), *aff'd*, 258 F. App'x 287 (11th Cir. 2007); *Buckhorn Ventures, LLC v. Forsyth Cnty.*, 585 S.E.2d 229, 232–33 (Ga. Ct. App. 2003) (determining that a settlement contract entered into by the county was *ultra vires* and therefore void); *Mitchell's Bar & Rest., Inc. v. Allegheny Cnty.*, 924 A.2d 730, 738–39 (Pa. Commw. Ct. 2007) (finding that a municipal ordinance prohibiting smoking in public places was void as *ultra vires*).

<sup>126</sup> See, e.g., Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 58–61 (1923) (discussing the harshness of the *ultra vires* doctrine).

operations to include operating a mail carrier along the road.<sup>127</sup> In another early decision, the U.S. Supreme Court invalidated a railroad's attempt to lease its operations to another entity, determining that this was not within the scope of the corporate charter.<sup>128</sup> In a more recent example, the Supreme Court of Alabama struck down voluntary payments to widows of corporate executives.<sup>129</sup> Over the years, courts became increasingly inclined to permit corporate action by finding that the corporation has the implied power to engage in the challenged conduct. For example, in an early case, it was held that a lumber company had the implied power to build a community and its infrastructure to support the company's operations.<sup>130</sup> Courts continued to rely on implied powers to engage in conduct not expressly set forth in the corporation's stated purpose, including for example, the power to make charitable donations.<sup>131</sup> This resulted in limited efficacy of the stated purpose clause in challenging corporate actions. Nevertheless, *ultra vires* has been used creatively by some courts in prohibiting certain corporate conduct.<sup>132</sup> Further, a specific purpose clause can be drafted to limit or preclude expansive use of the implied powers approach.

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<sup>127</sup> See *Wiswall v. Greenville & Raleigh Plank Rd. Co.*, 56 N.C. 183, 183 (1857) (holding that it was *ultra vires* for a plank road company to operate mail coaches); see also, e.g., *Ashbury Railway Carriage & Iron Co. v. Riche* (1875) 7 HL 653 at 653 (Eng.) (finding that the corporate purpose in question was to make, sell, and hire railway carriages, and holding that a contract to build a railway was void as *ultra vires* even though it had been approved by the shareholders).

<sup>128</sup> *Thomas v. R.R. Co.*, 101 U.S. 71, 82–83 (1879) (stating that “the powers of corporations organized under legislative statutes are such and such only as those statutes confer,” and also noting that the corporate franchise as granted by the state is “intended in large measure to be exercised for the public good”).

<sup>129</sup> *Adams v. Smith*, 153 So. 2d 221, 222, 224 (Ala. 1963) (characterizing payments to corporate executives' widows as waste and thereby invalidating the payments).

<sup>130</sup> *State ex rel. Gentry v. Long-Bell Lumber Co.*, 12 S.W.2d 64, 83–85 (Mo. 1928) (en banc).

<sup>131</sup> See, e.g., *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953) (invoking the implied powers doctrine and holding that because private universities were consistent with our capitalist system and because the company could benefit from better educated graduates in the workforce, the donation was a legitimate exercise in furtherance of the corporation's profit-making purpose); see also, e.g., *Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1991) (approving a class action settlement in a lawsuit challenging charitable donations to maintain an art collection, and noting the court's agreement with “the Court of Chancery[’s] conclu[sion] that the test to be applied in examining the merits of a claim alleging corporate waste “is that of reasonableness, a test in which the provisions of the Internal Revenue Code pertaining to charitable gifts by corporations furnish a helpful guide” (quoting *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969)); *Kelly v. Bell*, 266 A.2d 878 (Del. 1970) (reaffirming the corporation's social responsibility, as the court upheld the corporation's voluntary payments to the county following the repeal of county taxation); *Union Pac. R.R. v. Trs., Inc.*, 329 P.2d 398, 402 (Utah 1958) (upholding a five-thousand-dollar contribution to the Union Pacific Railroad Foundation). Today, corporate statutes authorize charitable contributions unless that power is limited in the articles of incorporation. DEL. CODE ANN. tit. 8, §§ 122(9), 124 (2020); MODEL BUS. CORP. ACT § 3.02(m) (AM. BAR ASS'N 2016).

<sup>132</sup> See *Cross v. Midtown Club, Inc.*, 365 A.2d 1227, 1231 (Conn. Super. Ct. 1976) (“[A]ctions and policies of the [club] in excluding women as members and guests solely on the basis of sex is *ultra vires* and beyond the power of the corporation . . . .”); see also *Sterner v. Saugatuck Harbor*

As noted above, invoking *ultra vires* has not succeeded with respect to acts related to CSR.<sup>133</sup> There are, however, a few examples where courts have rejected social responsibility as a basis for disregarding shareholder wealth. For example, more than one hundred years ago, in *Dodge v. Ford Motor Co.*, the Michigan Supreme Court held that Ford Motor's failure to pay dividends was *ultra vires* in light of the huge amount of unproductive cash the corporation had on hand.<sup>134</sup> The court rejected Henry Ford's contention that he had caused the company to retain the profits and therefore could use the cash to further socially responsible causes. Ford's decision not to declare dividends relied upon Henry Ford's claim that:

My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.<sup>135</sup>

The court, however, did not accept this justification and mandated a dividend declaration.<sup>136</sup> Scholars have questioned the case as a significant limit on using social responsibility as a basis for sacrificing shareholder wealth.<sup>137</sup> *Dodge* remains one of the few cases taking this view,<sup>138</sup> which arguably epitomizes the apex of shareholder primacy.<sup>139</sup>

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Yacht Club, Inc., 450 A.2d 369, 535 (Conn. 1982) (citing *Cross v. Midtown Club, Inc.* favorably); cf. *DeBernardo v. Pinewood Lake Ass'n, Inc.*, No. CV980149841S, 2000 WL 274071, at \*10 (Conn. Super. Ct. Mar. 6, 2000) (holding that a bylaw permitting ouster of member was *ultra vires*).

<sup>133</sup> See authorities cited *supra* note 131.

<sup>134</sup> 170 N.W. 668, 685 (Mich. 1919).

<sup>135</sup> *Id.* at 671.

<sup>136</sup> *Id.* at 685.

<sup>137</sup> See, e.g., Mitchell, *supra* note 80, at 210–11 (discussing the *Dodge* decision and its legacy as it relates to social responsibility); Morrissey, *supra* note 5, at 355–59 (same). Compare, e.g., Macey, *supra* note 63, at 190 (“In my view, the holding in *Dodge v. Ford* is attributable to the fact that the rule of wealth maximization for shareholders is virtually impossible to enforce as a practical matter. The rule is aspirational, except in odd cases. As long as corporate directors and CEOs *claim* to be maximizing profits for shareholders, they will be taken at their word, because it is impossible to refute these corporate officials’ self-serving assertions about their motives. Nonetheless, fully understanding the futility of the holding in *Dodge v. Ford* can provide an interesting and important lesson about the ability of corporate law to provide much of value to investors.”), with, e.g., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166 (2008) (arguing that law professors and lawyers should not point to *Dodge* as supporting wealth maximization as the corporation’s sole purpose).

<sup>138</sup> Another outlier is *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). See *supra* notes 84–90 and accompanying text.

<sup>139</sup> See, e.g., D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278–79 (1998) (discussing *Dodge* as an example of shareholder primacy).

The discussion below explores how a well-drafted purpose clause in the corporate charter can go a long way in validating socially responsible motivated actions that might seem contrary to the profit motive.

#### *D. Using Corporate Purpose and Ultra Vires to Promote Corporate Social Responsibility*

The foregoing discussion explains the roles of corporate purpose and the *ultra vires* doctrine, both of which can play an important role for corporations wishing to establish social responsibility as part of their mission.<sup>140</sup> A well-drawn purpose clause can set out the contours of the role of social responsibility in corporate affairs. If so desired, it also can define which social responsibility goals constitute the corporate focus. The purpose clause also can suggest the appropriate balance between social responsibility and profitability. Once given this grant of authority, the business judgment rule<sup>141</sup> enables management to pursue these goals. As discussed above, the *ultra vires* doctrine can play a meaningful role in assuring that corporate managers do not veer from the corporate mission. The heyday of the *ultra vires* doctrine occurred when specifically drafted purpose clauses were required.<sup>142</sup>

The advent of all-purpose clauses has, to a large extent, rendered the doctrine in disrepair,<sup>143</sup> at least in the case of for-profit corporations. Enhanced focus on social responsibility using a specifically drafted purpose clause can generate new life for the *ultra vires* doctrine. Professor Berle, perhaps the initial champion of shareholder supremacy, observed that “you can not [sic] abandon emphasis on ‘the view that business corporations exist for the sole purpose of making profits for their stockholders’ until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”<sup>144</sup> Lawyers’ use of a specifically drafted corporate purpose clause focusing on socially responsible goals allows for the revitalization of the *ultra vires* doctrine as a powerful tool to help enforce a corporation’s CSR mission. It has been recognized elsewhere that the burden falls on the company

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<sup>140</sup> See *supra* notes 108–139 and accompanying text.

<sup>141</sup> The well-recognized business judgment rule precludes courts from second-guessing informed judgments by corporate managers. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (discussing but not applying the business judgment rule because the directors were not adequately informed); *Shlensky v. Wrigley*, 237 N.E.2d 776, 777, 781 (Ill. App. Ct. 1968) (holding that the business judgment rule protected the board’s decision not to install lights in Wrigley Field, even though all other major league baseball clubs reaped significant profits from night baseball).

<sup>142</sup> See *supra* notes 126–129 and accompanying text.

<sup>143</sup> See, e.g., *Fisch & Solomon*, *supra* note 143, at 111 (“Today, the *ultra vires* doctrine has fallen into disrepair.”).

<sup>144</sup> Berle, *Corporate Managers*, *supra* note 1, at 1367.

to make its commitment to CSR enforceable.<sup>145</sup> The specifically drafted purpose clause can be an effective way of making the company's commitment to CSR and ESG enforceable.

For example, a corporate code of ethics could inform the drafting of the purpose clause. Most large corporations have adopted a code of ethics<sup>146</sup> and they also can be useful for privately held and smaller companies. Codes of ethics typically focus on corporate conduct and corporate culture. Rather than a company simply having a code of ethics, it would be even more empowering to incorporate the company's ideals expressly in a corporate purpose clause. Thus, sustainability, social commitment, and governance standards could be spelled out in the purpose clause. Doing so could then make corporate managers accountable for deviations from the ethical and governance standards by invoking the *ultra vires* doctrine as an enforcement mechanism. Thus, for example, enabling a corporate culture that contravenes the standards set forth in the purpose clause could be challenged in court as *ultra vires* which, in turn, could lead to injunctive relief. In an appropriate case, the officers and directors responsible for enabling violations of the company's standards as expressed in the purpose clause could be held liable for damages resulting from the *ultra vires* acts. As discussed in a later section of this Article, under the securities laws, corporate codes of ethics often are viewed as aspirational rather than factual representations about the company.<sup>147</sup> Including ethical and conduct standards as part of the stated corporate purpose could help establish that the code of ethics is not simply aspirational and possibly provide a basis for challenging contrary corporate conduct.

Incorporating a code of ethics and conduct into the purpose clause would lead to longer purpose clauses as once was the norm before all-purpose clauses were permitted.<sup>148</sup> The fact that a specifically drafted purpose clause would be wordy should not by itself be a reason for corporations wanting to strengthen their social responsibility not to consider this option.

Even without a specifically drafted purpose clause, a toxic corporate culture and widespread sexual harassment could rise to the level of state-law fiduciary duty claims. For example, a shareholder of Victoria's Secret parent com-

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<sup>145</sup> See Eccles et al., *supra* note 92 (“[E]ven with the widespread adoption of statements of purpose and the increased use of integrated reporting frameworks to communicate companies’ progress toward enacting business purpose, a crucial, final step remains: making a company’s commitment to its purpose enforceable.”).

<sup>146</sup> See *infra* note 267 and accompanying text.

<sup>147</sup> As discussed *infra* notes 275–276 and accompanying text, in securities fraud suits, many courts have dismissed a corporation’s code of ethics as aspirational rather than factual representations concerning a company’s practices in carrying out its operations.

<sup>148</sup> For an example of a wordy purpose clause, see *supra* note 109 and accompanying text.

pany has sought books and records relating to the alleged rampant sexual harassment taking place within the company.<sup>149</sup>

Over the past few decades, most states have adopted benefit corporation statutes that are designed to provide a basis for corporations seeking to focus on socially desirable goals as part of their mission.<sup>150</sup> As discussed in the next section, although these statutes may provide a useful branding function, they do not provide a strong basis for legally enforcing the social responsibility goals.<sup>151</sup> Thus, even in the case of corporations incorporated under benefit corporation statutes, corporate planners and their lawyers would be well advised to include well-drafted purpose clauses in the articles of incorporation.

### III. BENEFIT CORPORATIONS AND BRANDING

A majority of states<sup>152</sup> have enacted a new category of benefit corporation statutes to enable a for-profit corporation incorporated under such a statute to focus on sustainability and other socially responsible goals even if sacrificing profits to do so.<sup>153</sup> Benefit corporation statutes define benefit corporations in somewhat different terms. For example, the Delaware Act states that “[a] ‘public benefit corporation’ is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”<sup>154</sup> There is suggested Model Benefit Corporation Legislation that would define

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<sup>149</sup> See Jeff Montgomery, *Investor Sues Victoria’s Secret Parent Over ‘Toxic Culture,’* LAW360 (June 4, 2020), <https://www.law360.com/articles/1280141> [<https://perma.cc/XQ5W-BZLP>] (seeking corporate records relating to “alleged ‘toxic culture’ of sexual harassment and intimidation”). The complaint alleges breaches of fiduciary duty by the company’s directors and a lack of director independence from the company founder, chairman, and CEO. See, e.g., Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 383–90 (2020) (discussing corporate purpose, executive misconduct, and fiduciary obligations).

<sup>150</sup> See *infra* notes 152–153 and accompanying text.

<sup>151</sup> See *infra* notes 152–180 and accompanying text.

<sup>152</sup> See Ronald J. Colombo, *Taking Stock of the Benefit Corporation*, 7 TEX. A&ML. REV. 73, 75 (2019) (“[T]hirty-six states have adopted some form of benefit corporation legislation, and another five are in the process of doing so.” (footnote omitted)); *Why Pass Benefit Corporation Legislation*, BENEFIT CORP., <https://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation> [<https://perma.cc/2YQ6-BRAF>] (“[Thirty-eight] states including the District of Columbia have passed benefit corporation legislation.”).

<sup>153</sup> E.g., DEL. CODE ANN. tit. 8, §§ 361–368 (2020); see 1 COX & HAZEN, *supra* note 106, § 2:14 (discussing benefit corporations); Steven Munch, Note, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL’Y 170, 173–74, 183–88 (2012) (discussing benefit corporations and traditional corporate governance mechanisms). In addition, some states recognize a limited liability company (LLC) as equivalent to the benefit corporation—the low-profit limited liability company (L3C)—that offers a similar structure for those individuals who would prefer to organize as LLCs. See Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 689–92 (2013).

<sup>154</sup> DEL. CODE ANN. tit. 8, § 362.

“general public benefit” as “[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard.”<sup>155</sup>

In addition to the majority of states jumping on the benefit corporation bandwagon,<sup>156</sup> in 2020, the Model Business Corporation Act adopted benefit corporation provisions.<sup>157</sup> The Model Act defines “public benefit” as “a positive effect, or reduction of negative effects, on one or more communities or categories of persons (other than shareholders solely in their capacity as shareholders) or on the environment, including effects of an artistic, charitable, economic, educational, cultural, literary, medical, religious, social, ecological, or scientific nature.”<sup>158</sup>

Notwithstanding the popularity of benefit corporation statutes,<sup>159</sup> they are not necessary for a number of reasons.<sup>160</sup> In the first instance, courts’ deference to directors’ business judgment means that judicial interference on socially responsible decisions is unlikely.<sup>161</sup> Furthermore, in light of the ability to craft an appropriate purpose clause to achieve the same goal,<sup>162</sup> what exactly is the advantage of opting into a benefit corporation statute? In addition to not being

<sup>155</sup> MODEL BENEFIT CORP. LEGIS. § 102(A) (B LAB 2017), [https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf) [<https://perma.cc/PPJ9-F8ZX>]; see, e.g., CAL. CORP. CODE § 14601(c) (West 2020); HAW. REV. STAT. § 420D-2 (2020); MD. CODE ANN., CORPS. & ASS’NS § 5-6C-01(c) (LexisNexis 2020); N.J. STAT. ANN. § 14A:18-1 (West 2020); N.Y. BUS. CORP. LAW § 1702(b) (McKinney 2020); VT. STAT. ANN. tit. 11A, § 21.03(a)(4) (2020); VA. CODE ANN. § 13.1-782 (2020).

<sup>156</sup> As of 2012, only nine states were identified as having benefit corporation statutes. See Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 291 (2013). Less than a decade later, the majority of states have benefit corporation statutes. See authorities cited *supra* note 152.

<sup>157</sup> MODEL BUS. CORP. ACT §§ 17.01–.06 (AM. BAR ASS’N 2016); see Frederick H. Alexander, *Putting Benefit Corporation Statutes into Context by Putting Context into the Statutes*, 76 BUS. LAW. 109, 113–18 (2020) (discussing the Model Act’s benefit corporation provisions).

<sup>158</sup> MODEL BUS. CORP. ACT § 17-01(b).

<sup>159</sup> See, e.g., Clark & Babson, *supra* note 88, at 845 (discussing how benefit corporations can implement CSR); Kayleen Asmus, Note, *Finding the Benefit in a New Administration: A Uniform B Corporation Legislation*, 43 J. CORP. L. 375, 390–93 (2018) (discussing uniform benefit corporation legislation).

<sup>160</sup> See, e.g., Peter Molk, *Do We Need Specialized Business Forms for Social Enterprise?*, in CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 241, 241 (Benjamin Means & Joseph W. Yockey eds., 2019) (suggesting that traditional forms of doing business sufficiently enable social enterprise and that more specialized social enterprise forms of doing business do not add significant value).

<sup>161</sup> See, e.g., Eric M. Jamison, Note, *The Juxtaposition of Corporate Social Responsibility Initiatives and the Pursuit of Corporate Wealth Maximization*, 57 WAYNE L. REV. 1457, 1467–72 (2011) (discussing the business judgment rule in the context of CSR).

<sup>162</sup> Cf. Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 646–69 (2019) (arguing against the creation of benefit LLC statutes).



necessary for corporations desiring to have a social responsibility focus, benefit corporation statutes are likely not sufficient to assure that end. Commentators have suggested that benefit corporation statutes do not go far enough because they fail to “clearly and powerfully [enforce the] dual mission” of profitability and social responsibility.<sup>163</sup> For example, benefit corporation statutes arguably have not had a significant impact on changing corporate governance norms for corporations opting into those statutes.<sup>164</sup> A well-drawn corporate purpose clause would seem the better solution, rather than reliance solely on a benefit corporation statute.

A potential drawback to benefit corporation statutes is the absence of judicial precedent in applying the statute. For example, how are courts to determine whether management is striking the proper balance between social responsibility and profitability in order to satisfy the benefit corporation standard?<sup>165</sup> As discussed above, courts dealing with for-profit corporations would likely apply the business judgment rule absent a conflict of interest thus deferring to the board.<sup>166</sup> If the benefit corporation status means anything, however, then there must be some yardstick to enable courts to determine compliance with the statute. This necessarily injects a bit of uncertainty that corporate planners loathe embracing. One way to protect against court intervention could be with a well-drawn purpose clause; however, that is equally the case with use of the clause without benefit corporation status. As such, what does benefit corporation status add to a well-drawn purpose clause that highlights social goals?

Benefit corporation status can create uncertainty and confusion given the lack of judicial precedent. Thus, states that do not have benefit corporation statutes should not feel pressured to join the bandwagon.<sup>167</sup> For similar rea-

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<sup>163</sup> Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 624–25 (2011); see, e.g., Tiffany M. Burba, Note, *To “B” or Not to “B”: Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 VAND. L. REV. EN BANC 329, 346 (2017), <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2017/04/16073959/To-B-or-not-to-B-Duties-of-Directors-and-Rights-of-Stakeholders-in-Benefit-Corporations.pdf> [<https://perma.cc/RTH5-7BED>] (pointing to the lack of enforcement mechanisms in benefit corporation statutes); Munch, *supra* note 153, at 190 (same).

<sup>164</sup> See Colombo, *supra* note 152, at 73 (“[C]ontrary to the predictions . . . the benefit corporation has not, apparently, resulted in much change at all.”).

<sup>165</sup> See, e.g., Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, 2017 COLUM. BUS. L. REV. 92, 98–100 (discussing the difficulties in assessing the extent of hybrid organizations’ commitment to social enterprise as compared to profitability).

<sup>166</sup> See Jamison, *supra* note 161, at 1467–68.

<sup>167</sup> Even in states without such a statute, benefit corporation statutes have been introduced though not yet enacted. For example, in 2015, a bill was introduced to adopt a benefit corporation statute in North Carolina. H.B. 534, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015). The proposed legislation was not enacted. See *House Bill 534*, N.C. GEN. ASSEMB., <https://www.ncleg.gov/BillLookup/2015/H534> [<https://perma.cc/Q4XR-YPDE>]. A similar bill was introduced in 2017, but failed on the second read-

sons, attorneys in states with benefit corporation statutes should be hesitant to opt in, rather than simply rely on a well-drafted purpose clause in the articles of incorporation. Delaware's benefit corporation statute is more powerful than the law in many other states.<sup>168</sup> This is because Delaware's public benefit statute specifically authorizes a derivative suit to enforce the public benefit aspects of the corporation.<sup>169</sup> After making the choice to become a benefit corporation, a well-drafted purpose clause remains imperative. The Model Business Corporation Act's new benefit corporation provisions contain a similar right of action.<sup>170</sup> In many states, and even in Delaware, the *ultra vires* doctrine remains a potential enforcement mechanism.<sup>171</sup>

One of the major advantages of a benefit corporation designation is an improved brand. Effective branding of the benefit corporation status may enhance the image and reputation of certified companies by creating "a coherent and marketable image of what it means to be a social enterprise organization."<sup>172</sup> An effective brand also may help benefit corporations attract capital by distinguishing them from other companies holding themselves out as being dedicated to social responsibility.<sup>173</sup> Opting into a benefit corporation statute, however, is not the only way to create branding for a corporation committed to being socially responsible.<sup>174</sup>

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ing. See *HB 616: North Carolina Public Benefit Corporation Act.*, OPEN STATES, <https://openstates.org/nc/bills/2017/HB616/> [<https://perma.cc/J42Q-HMEG>].

<sup>168</sup> See Munch, *supra* note 153, at 170 (pointing to the lack of enforcement mechanisms in benefit corporation statutes); Eccles et al., *supra* note 92 (discussing the Delaware statute).

<sup>169</sup> DEL. CODE ANN. tit. 8, § 367 (2020); see, e.g., Eccles et al., *supra* note 92 ("[I]t does not give other stakeholders enforcement rights but depends on the existence of stockholders who give real weight to social responsibility and respect for other stakeholders.").

<sup>170</sup> MODEL BUS. CORP. ACT § 17.06 (AM. BAR ASS'N 2016).

<sup>171</sup> See, e.g., Eccles et al., *supra* note 92 (suggesting that corporations adopt a detailed, stakeholder-inclusive Statement of Purpose and metrics to report on their progress toward that purpose).

<sup>172</sup> Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 361 (2009) (quoting THOMAS J. BILLITTERI, ASPEN INST., MIXING MISSION AND BUSINESS: DOES SOCIAL ENTERPRISE NEED A NEW LEGAL APPROACH? 9 (2007)).

<sup>173</sup> WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 4 (2013), [https://benefitcorp.net/sites/default/files/Benefit\\_Corporation\\_White\\_Paper.pdf](https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf) [<https://perma.cc/W24E-BX57>].

<sup>174</sup> See, e.g., Robert S. Rachofsky et al., *Lemonade, Inc.: Harbinger of Future Public Benefit Corporation IPOs?*, CLS BLUE SKY BLOG (Aug. 14, 2020), <https://clsbluesky.law.columbia.edu/2020/08/14/lemonade-inc-harbinger-of-future-public-benefit-corporation-ipo/> [<https://perma.cc/3HSC-9UF3>] ("A related question is whether PBC [Public Benefit Corporation] status is even necessary to achieve recognition on ESG issues from the public or investors. A company can be a 'responsible and sustainable' corporate citizen and support important ESG-related causes, thereby appealing to the same demographic as PBCs, without formally organizing as a public benefit corporation or even being certified as a B-Corp. Indeed, for-profit corporations of all kinds are increasingly devoting substantial attention and resources to ESG-related causes, whether for purely self-interested marketing and long-term value purposes, because their employees and shareholders are pushing them to do so, or

B Lab has established itself as a reliable certification system for “B corporations.” Thus, certification as a B corporation by B Lab<sup>175</sup> enables a firm to be identified and thus branded as a benefit corporation regardless of whether it is incorporated under a benefit corporation statute. Similarly, there are organizations that provide ESG ratings<sup>176</sup> that can be effective in branding companies as socially responsible.

B Corporation, CSR, and ESG branding’s significance goes beyond the social responsibility implications. Socially responsible branding can have a positive economic impact on corporate performance. For example, the branding may attract money managers and social responsibility-focused mutual funds and pension plans which, in turn, will have a positive impact on the company’s stock price. Also, consumers may have a positive reaction to branding or a negative response<sup>177</sup> to the lack of a corporation’s socially responsible agenda. Consumer response can, of course, have a significant impact on a company’s profitability from operations. Thus, consumer and investor input can play a powerful role in influencing corporate conduct.

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in fact as part of a broader reimagining of the corporation’s purpose in society. Recent specific examples include Bank of America pledging \$1 billion to address racial and economic inequality and Blackrock’s chairman and CEO recently stating that every company and shareholder must confront climate change. In addition, smaller companies like Etsy and Warby Parker continue to generate goodwill and popularity among consumers on ESG issues, despite not being PBCs or B-Corps. It is true that a company formally organized as a PBC is *legally required* to act for some broader societal interest, and thus may pack more punch on ESG issues and be more accountable in the long term. Nevertheless, the traditional corporate form may already be evolving naturally towards a similar model, which could limit PBCs largely to smaller companies and start-ups.” (footnotes omitted)).

<sup>175</sup> See, e.g., B CORP., <https://bcorporation.net/> [<https://perma.cc/CW8G-PNPJ>]. For example, North Carolina’s government website encourages the recognition of certified B Corporations. See Powerpoint, *B the Change: Benefit Corporations as a Force for Good in the World 3*, 9, 46, <https://files.nc.gov/ncdeq/ESI/7%20B%20Corporations%20-%20Thomas%20Tracy%20%26%20Machles.pdf> [<https://perma.cc/F83F-CBVK>].

<sup>176</sup> For example, the Sustainability Accounting Standards Board (SASB) establishes standards for assessing a company’s sustainability progress. See SUSTAINABILITY ACCT. STANDARDS BD., <https://www.sasb.org/> [<https://perma.cc/8LQN-4CPE>]. There are other ESG rating services. See, e.g., Gregor Dorfleitner et al., *Measuring the Level and Risk of Corporate Responsibility—An Empirical Comparison of Different ESG Rating Approaches*, 16 J. ASSET MGMT. 450, 465 (2015) (comparing various ESG rating methods); Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 645 (2019) (promoting the SASB’s approach to sustainability as compared to the SEC’s “hands-off” approach); Betty Moy Huber & Michael Comstock, *ESG Reports and Ratings: What They Are, Why They Matter*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 27, 2017), <https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/> [<https://perma.cc/N5W9-4DAF>] (discussing various ESG rating organizations and their respective methodologies); cf. Ronnie Cohen & Gabriele Lingenfelter, *Money Isn’t Everything: Why Public Benefit Corporations Should Be Required to Disclose Non-financial Information*, 42 DEL. J. CORP. L. 115, 121 (2017) (encouraging mandatory SASB disclosures by benefit corporations).

<sup>177</sup> There are organizations that target companies for what they perceive as socially irresponsible conduct. See, e.g., *Boycotts List*, ETHICAL CONSUMER, <https://www.ethicalconsumer.org/ethical-campaigns/boycotts> [<https://perma.cc/J7SE-9PA3>].

The foregoing discussion traced the shift of the American corporate paradigm to increasing focus on social responsibility. As noted earlier, American corporate law in this country is based on state law chartering of corporations through enabling legislation.<sup>178</sup> Although federal incorporation statutes have been previously suggested,<sup>179</sup> the state-law-based paradigm for corporate law has not changed. The investor protection provisions in federal securities laws, however, have had a significant impact.<sup>180</sup>

#### IV. THE SECURITIES LAWS AND CORPORATE SOCIAL RESPONSIBILITY

The federal securities laws focus on disclosure rather than focusing on corporate conduct as state law does. As Louis Brandeis declared, sunlight is the best disinfectant.<sup>181</sup> The idea behind Brandeis's famous analogy is that disclosure can shame people and corporations into engaging in more responsible conduct than they might otherwise.

ESG-focused investors play a significant role in pushing corporations to act in a socially responsible manner. In recent years, the SEC and courts have given greater weight to investors' interest in social responsibility. The discussion below provides an overview of the securities laws' approach to CSR, beginning with a discussion of social responsibility-related corporate disclosures<sup>182</sup> and the materiality standard.<sup>183</sup> The discussion then explores the ability of shareholder-sponsored proposals in management proxy statements to serve as tools for advancing ESG goals.<sup>184</sup> Next, the discussion examines the SEC's approach toward disclosure in relation to a variety of socially relevant

<sup>178</sup> See, e.g., Jennings, *supra* note 21, at 194–207; Latty, *supra* note 21, at 601–02.

<sup>179</sup> See *supra* note 22 and accompanying text.

<sup>180</sup> See *supra* note 23 and accompanying text.

<sup>181</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”). Professor Alasdair Roberts traces this sentiment to an earlier analysis in *The American Commonwealth*. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 1012 (Liberty Fund 1995) (1888) (“Public opinion is a sort of atmosphere, fresh, keen, and full of sunlight, like that of the American cities, and this sunlight kills many of those noxious germs which are hatched where politicians congregate. That which, varying a once famous phrase, we may call the genius of universal publicity, has some disagreeable results, but the wholesome ones are greater and more numerous. Selfishness, injustice, cruelty, tricks, and jobs of all sorts shun the light; to expose them is to defeat them. No serious evils, no rankling sore in the body politic, can remain long concealed, and when disclosed, it is half destroyed.”); Alasdair S. Roberts, *Where Brandeis Got “Sunlight Is the Best Disinfectant.”* ALASDAIR S. ROBERTS (Mar. 1, 2015), <https://aroberts.us/2015/03/01/where-brandeis-got-sunlight-is-the-best-disinfectant/> [<https://perma.cc/UVB3-62PM>].

<sup>182</sup> See *infra* notes 189–199 and accompanying text.

<sup>183</sup> See *infra* notes 200–223 and accompanying text.

<sup>184</sup> See *infra* notes 224–243 and accompanying text.

issues including companies' environmental and employment practices,<sup>185</sup> conflict minerals and resource extractions,<sup>186</sup> and corporate codes of conduct.<sup>187</sup> Finally, the Article proposes recommendations for increasing the role of securities law disclosures in advancing CSR.<sup>188</sup>

### A. Social Responsibility Disclosures Generally

Over the years, an increasing number of institutional investors have become "ethical investors"<sup>189</sup> that monitor the social balance sheet of companies they invest in. The recommendation that companies make social responsibility-related disclosures in addition to financial disclosures is not new.<sup>190</sup> The suggestion behind the recommended increased social responsibility-related disclosure is that widespread transparency regarding the societal impact of corporate policies would be a positive step in promoting CSR.<sup>191</sup> These social responsibility-related disclosures could include corporate legal compliance, labor practices,

<sup>185</sup> See *infra* notes 246–255 and accompanying text.

<sup>186</sup> See *infra* notes 256–264 and accompanying text.

<sup>187</sup> See *infra* notes 265–276 and accompanying text.

<sup>188</sup> See *infra* notes 277–293 and accompanying text.

<sup>189</sup> See, e.g., Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 466–70 (1997) (discussing ethical investors and the environmental movement); Maria O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 AM. U. L. REV. 1, 2–6 (1992) (discussing ethical investors and socially responsible investing); Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 374 (2018) (suggesting that investors really do care about CSR and ESG). Ethical investors are not new. See Danny Hakim, *On Wall St., More Investors Push Social Goals*, N.Y. TIMES (Feb. 11, 2001), <https://www.nytimes.com/2001/02/11/business/on-wall-st-more-investors-push-social-goals.html> [<https://perma.cc/LQG6-93BV>] (noting the existence of investment funds that avoid investing in companies that are involved with abortions, alcohol, gambling, pornography, the meat business, hunting equipment, and testing of products using animals). The SEC strives to assure that ESG funds identify their specific ESG goals and, in turn, that the fund's investment strategy is in fact carried out by investing in companies whose operations are consistent with the stated ESG goals. See, e.g., Juliet Chung & Dave Michaels, *ESG Funds Draw SEC Scrutiny*, WALL ST. J. (Dec. 16, 2019), <https://www.wsj.com/articles/esg-funds-draw-sec-scrutiny-11576492201> [<https://perma.cc/6V8B-VH8E>] (discussing SEC letters to some investment funds regarding the criteria used for investing).

<sup>190</sup> See, e.g., Douglas M. Branson, *Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility*, 29 VAND. L. REV. 539, 543–44 (1976) (suggesting that corporations conduct social audits to investigate the extent of their social responsibility efforts); see also, e.g., A.A. Sommer, Jr. et al., *Corporate Social Responsibility Panel: The Role of the SEC*, 28 BUS. LAW. 215, 226–39 (1973) (discussing securities laws and social responsibility); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1199, 1293–96 (1999) (suggesting that SEC disclosure could increase corporate social transparency and have a positive effect on CSR).

<sup>191</sup> Branson, *supra* note 190, at 543–44; Williams, *supra* note 190, at 1199, 1293–96.

supplier/vendor standards, environmental impact, charitable and political contributions, and the impact of the company's products on health and safety.<sup>192</sup>

From the 1970s to the beginning of this century, CSR advocates began to view ways in which CSR and corporate goals converge.<sup>193</sup> It is the traditional view that disclosures relating to social responsibility could not be “justified as necessary for the protection of investors.”<sup>194</sup> The use of the SEC's disclosure provisions in order to further the public interest has been considered a possibility for quite some time, but the SEC has been only minimally receptive.<sup>195</sup> In this century, the SEC has been a bit more receptive than in the past regarding investors' interest in a company's contributions to socially relevant issues.<sup>196</sup> The law has not reached the point of mandating widespread social responsibility disclosures,<sup>197</sup> but more progress on this front will improve CSR considera-

<sup>192</sup> Williams, *supra* note 190, at 1201–03.

<sup>193</sup> See Douglas M. Branson, Essay, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1225 (2002) (“[T]he new corporate social responsibility movement is converging with, rather than diverging from, broader trends in corporate governance.”); Russell B. Stevenson, Jr., *The SEC and the New Disclosure*, 62 CORNELL L. REV. 50, 60 (1976) (analyzing the impact of increased disclosure regarding social responsibility); Elliott J. Weiss, *Disclosure and Corporate Accountability*, 34 BUS. LAW. 575, 596–603 (1979) (discussing the impact of disclosure on corporate social accountability).

<sup>194</sup> Robert L. Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 647–48 (1964); see, e.g., Stevenson, *supra* note 193, at 91 (“What is to be remarked about the Commission's actions is that they appear to be motivated in both instances by a clear intention to use the disclosure process to influence primary corporate conduct whose principal impact is on areas of the public interest only tangentially associated with the protection of investors.”). Focus on social issues, in addition to investors, has support in other countries. For example, the decision to gear disclosure as “society-oriented” rather than “investor-oriented” has long been a part of German law. See Thomas J. Schoenbaum, *The Relationship Between Corporate Disclosure and Corporate Responsibility*, 40 FORDHAM L. REV. 565, 579–87 (1972).

<sup>195</sup> See Stevenson, *supra* note 193, at 51 (“It is somewhat ironic . . . that the Commission's response to pressures to wield its disclosure implement more imaginatively—in particular to scribe its mark on the institutional machinery that shapes the social behavior of large corporations—has been traditionally one of extreme reluctance, and that in those areas in which it has moved, the Commission has backed into action after the manner of a reluctant Don Quixote.”).

<sup>196</sup> See, e.g., Fidelity Aberdeen St. Tr., SEC No-Action Letter, 2008 WL 223122 (Jan. 22, 2008) (stating that management could rely on neither Rule 14a-8(i)(3) nor Rule 14a-8(i)(7) to exclude the following proposal from management's proxy statement: “In order to ensure that Fidelity is an ethically managed company that respects the spirit of international law and is a responsible member of society, shareholders request that the Fund's Board institute oversight procedures to screen out investments in companies that, in the judgment of the Board, substantially contribute to genocide, patterns of extraordinary and egregious violations of human rights, or crimes against humanity.”).

<sup>197</sup> See, e.g., Tom Quaadman & Erik Rust, *ESG Reporting Best Practices*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 2, 2019), <https://corpgov.law.harvard.edu/2019/12/02/esg-reporting-best-practices/> [<https://perma.cc/TTP9-A9SC>] (suggesting best practices for SEC reporting); David R. Woodcock et al., *Managing Legal Risks from ESG Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 12, 2019), <https://corpgov.law.harvard.edu/2019/08/12/managing-legal-risks-from-esg-disclosures/> [<https://perma.cc/525T-S354>] (noting the voluntariness of the SEC's ESG disclosures).

bly.<sup>198</sup> Even in the absence of regulatory mandates, pressure from institutional, social responsibility-focused investors is likely to have a positive impact on increasing socially responsible disclosures.<sup>199</sup>

### B. Materiality and Social Responsibility

The concept of materiality is the lynchpin of the securities laws' disclosure requirements. For example, the securities laws' antifraud provisions<sup>200</sup> address misstatements and omissions<sup>201</sup> of material facts.<sup>202</sup> A fact is material if a rea-

<sup>198</sup> See, e.g., Williams, *supra* note 190, at 1199, 1293–96.

<sup>199</sup> See, e.g., Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 650–54 (2016) (discussing the potential positive impact of institutional investors monitoring companies' ESG metrics). There appears to be some evidence that companies with positive ESG ratings experience a positive impact on firm value, and that those with poor ESG ratings experience negative impact on the value of their shares. See Carmine de Franco, *ESG Controversies and Their Impact on Performance*, 29 J. INVESTING, no. 2, 2020, at 33, 33 (“[T]he study shows that in Europe and the US, stocks that undergo severe controversies significantly underperform both their benchmarks and other portfolios consisting of stocks with low controversy or no controversy at all.”); Robert G. Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2835 (2014) (stating that positive ESG scores correlate with performance); Yiwei Li et al., *The Impact of Environmental, Social, and Governance Disclosure on Firm Value: The Role of CEO Power*, 50 BRIT. ACCT. REV. 60, 60 (2018) (finding a correlation between ESG ratings and firm value). *But see* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39,113, 39,118 n.24 (proposed June 30, 2020) (to be codified at 29 C.F.R. pt. 2550) (“[F]iduciaries should . . . be skeptical of ‘ESG rating systems’ . . . .”); Amal Aouadi & Sylvain Marsat, *Do ESG Controversies Matter for Firm Value? Evidence from International Data*, 151 J. BUS. ETHICS 1027, 1027 (2018) (failing to find a strong correlation between ESG scores and stock value); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 789–94 (2019) (arguing that the prudent investor standard requires investment managers, as fiduciaries, to incorporate ESG into their investment decisions).

<sup>200</sup> The Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act) have various antifraud provisions. *E.g.*, 1933 Act § 11, 15 U.S.C. § 77k (imposing civil liability for material misstatements and omissions in 1933 Act registration statements); 1933 Act § 12(a)(2), 15 U.S.C. § 77l(a)(2) (imposing civil liability for material misstatements and omissions in connection with the offer or sale of a security); 1933 Act § 17(a), 15 U.S.C. § 77q(a) (general antifraud prohibition); 1934 Act § 10(b), 15 U.S.C. § 78j(b) (general antifraud provision); 1934 Act § 14(a), 15 U.S.C. § 78n(a) (fraud in connection with proxy solicitations); 1934 Act § 18(a), 15 U.S.C. § 78r(a) (imposing civil liability for material misstatements and omissions in SEC filings); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2020) (corresponding regulation for the 1934 Act's general antifraud provision); SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 (corresponding regulation for the 1934 Act's fraud in connection with proxy statements provision).

<sup>201</sup> Omissions of material fact are not actionable unless the omission would have been necessary to prevent statements from being materially misleading. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (“Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”). An omission of material fact is actionable, however, when there is a specific line-item requirement in an SEC-required filing.

<sup>202</sup> See generally 3–4 THOMAS LEE HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* ch. 12 (7th ed. 2016) (discussing the 1934 Act, its provisions, and private remedies in response to fraud and manipulation).

sonable investor would consider it significant in making an investment decision.<sup>203</sup> Determining whether something is material defies a bright-line test<sup>204</sup> and thus requires a nuanced analysis based on the context of the statements in question.

Omission or misstatement of social responsibility issues relating to corporate behavior can be material. There is considerable support elsewhere for characterizing ESG-related disclosures as material<sup>205</sup> and thus these should be required in SEC filings.<sup>206</sup> To date, however, the call for mandatory ESG disclosures has not gained significant traction with the SEC.

Given the reasonable investor test of materiality, sufficient investor interest in distinct CSR issues should impact materiality determinations.<sup>207</sup> Some suggest that the voluntary disclosure regime is not sufficient and that the SEC should implement meaningful mandatory ESG and other corporate social responsibility-related disclosure requirements.<sup>208</sup> To date, the SEC has not been responsive to requests for such a mandate.<sup>209</sup> One SEC Commissioner suggests

<sup>203</sup> See *Levinson*, 485 U.S. at 231–32 (“[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))); *TSC Indus.*, 426 U.S. at 449 (holding that a fact is material if there is “a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote”).

<sup>204</sup> E.g., *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 30–31 (2011) (holding that the lack of a study’s statistical significance did not prevent it from being material); *Levinson*, 485 U.S. at 236 (rejecting a price and structure threshold for determining the materiality of preliminary merger negotiations).

<sup>205</sup> See, e.g., Jebe, *supra* note 176, at 645 (criticizing the SEC’s failure to act on sustainability, and arguing in favor of SASB standards as a basis for determining the materiality of ESG issues); Hana V. Vizcarra, Comment, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, 50 ENV’T L. REP. 10,106, 10,113–14 (2020) (supporting the materiality of climate change disclosures); Cynthia A. Williams & Jill E. Fisch, Request for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure 6–9 (Oct. 1, 2018), <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf> [<https://perma.cc/8K74-6FSS>] (suggesting that ESG disclosures are material).

<sup>206</sup> See Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 929 (2019) (proposing that the SEC adopt principles-based sustainability disclosures in the form of requiring Sustainability Discussion and Analysis (SD&A) that would parallel the current Management Discussion and Analysis and Compensation Discussion and Analysis requirements); see also, e.g., Amanda Iacone, *Warren Urges SEC to Require Climate Change Disclosures*, BLOOMBERG TAX (Apr. 30, 2020), <https://news.bloombergtax.com/financial-accounting/warren-urges-sec-to-require-climate-change-disclosures> [<https://perma.cc/GGE5-AUUK>] (reporting on Senator Elizabeth Warren asking the SEC to require climate change disclosures).

<sup>207</sup> See Williams & Fisch, *supra* note 205, at 1 (suggesting, among other recommendations, “the clear materiality” of ESG issues).

<sup>208</sup> See *id.*

<sup>209</sup> In addition to the rulemaking petition referenced *supra* note 205, other initiatives have gone unanswered. See, e.g., Anne Stausboll et al., Comment Letter on Roundtable on Modernizing the SEC’s Disclosure System (Oct. 22, 2008), <https://www.sec.gov/comments/4-567/4567-20.pdf> [<https://perma.cc/E3YN-VDV9>]. The most positive response to date has been the SEC Chair’s request for



that ESG scoring is nothing more than shaming corporate conduct that is opposed by environmental interest groups who are not investors.<sup>210</sup> This criticism ignores the growing number of investors expressing an interest in CSR and ESG disclosures.<sup>211</sup> Also, a number of corporate interest groups have resisted any movement towards mandated ESG disclosures.<sup>212</sup>

With our voluntary disclosure system, the choice is between no disclosure and full disclosure. Absent an SEC mandate, there is no duty to make a statement even with respect to material facts.<sup>213</sup> Affirmative disclosure duties are limited to the line-item disclosures found in SEC forms. Once a company decides to speak and make a statement, it has a duty to do so honestly and with full disclosure.<sup>214</sup> Thus, for example, once a company decides to make ESG disclosures, it cannot focus only on positive ESG impact and ignore material, negative activities that would lead an investor to a more accurate evaluation of the company's commitment to ESG values.

Many have called for mandatory CSR and ESG disclosures.<sup>215</sup> The SEC should be more encouraging of voluntary corporate responsibility and ESG disclosures, such as through a safe harbor rule to encourage ESG disclosures.

guidance from the SEC's Investor Advisory Committee as to what investors would like to see in terms of ESG disclosures. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at Meeting of the Investor Advisory Committee (Nov. 7, 2019), <https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-110719> [<https://perma.cc/GTQ8-YHNX>].

<sup>210</sup> See, e.g., Peirce, *supra* note 43 (questioning the value of ESG); Roisman, *supra* note 54 (suggesting that a principles-based materiality approach is preferable to mandating ESG disclosures).

<sup>211</sup> See, e.g., NUVEEN, 2020 PROXY SEASON PREVIEW: ENVIRONMENTAL AND SOCIAL PRACTICES REACH A TIPPING POINT 1–3 (2020), <https://documents.nuveen.com/documents/nuveen/default.aspx?uniqueid=cb6df5e9-6268-4389-8317-e2b1c569398e> [<https://perma.cc/2UA4-TX73>] (showing the increasing concern among investors with respect to social and environmental issues); see also, e.g., *supra* notes 170–172 and accompanying text.

<sup>212</sup> See, e.g., CTR. FOR CAP. MKTS. COMPETITIVENESS, U.S. CHAMBER OF COM., ESSENTIAL INFORMATION: MODERNIZING OUR CORPORATE DISCLOSURE SYSTEM 3–5 (2017), [https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information\\_Materiality-Report-W\\_FINAL-1.pdf](https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL-1.pdf) [<https://perma.cc/Z6WJ-SJCU>].

<sup>213</sup> See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988).

<sup>214</sup> See, e.g., *Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014) (“Even when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth.”); *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2d Cir. 2002) (“[T]he lack of an independent duty is not . . . a defense to . . . liability because upon choosing to speak, one must speak truthfully about material issues. Once Citibank chose to discuss its hedging strategy, it had a duty to be both accurate and complete.” (citations omitted)).

<sup>215</sup> See, e.g., Daniel C. Etsy & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. ON REG. 625, 662–90 (2019) (arguing in favor of mandatory ESG disclosures). In addition, there is scholarly support for rulemaking petitions that suggest that the SEC cease its resistance to mandating more meaningful ESG and CSR disclosures. See Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 93–126 (2020) (discussing public comment responses to the SEC's Concept Release on modernizing disclosure requirements); *supra* note 205 and accompanying text.

Even without a safe harbor, to the extent that ESG disclosures are aspirations, corporate statements regarding ethical goals and activities may be viewed as aspirational and thus not as readily susceptible to material misstatements.<sup>216</sup>

There is SEC precedent for requiring disclosures relating to items of interest to investors even if not directly tied to a company's financial performance. Qualitative information can be material even if there is no direct correlation to the quantitative impact on a company's financial condition. For example, failure to disclose commercial bribery could be material even though it had less than a 0.3% impact on operations because it was relevant to assessing the integrity of the company's management.<sup>217</sup> The SEC considers management integrity to be material in other contexts.<sup>218</sup> Immoral conduct by itself, however, is not material.<sup>219</sup>

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<sup>216</sup> See, e.g., *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1278 (9th Cir. 2017) (holding that the alleged sexual misconduct of an officer and alleged violation of ethics code were not material because the code of ethics was "transparently aspirational" and "did not reasonably suggest that there would be no violations of the [code] by the CEO or anyone else").

<sup>217</sup> *SEC v. Joseph Schlitz Brewing Co.*, 452 F. Supp. 824, 830 (E.D. Wis. 1978) (determining that the nondisclosure of a kickback scheme was material because, *inter alia*, it reflected on the lack of management integrity).

<sup>218</sup> *In re Franchard Corp.*, Securities Act Release No. 4710, 42 SEC Docket 163 (July 31, 1964) (finding that the company failed to make sufficient disclosures concerning the CEO's misuse of corporate funds); see, e.g., Lin, *supra* note 149, at 361–70 (lamenting the gaps in disclosure requirements regarding executive misconduct).

<sup>219</sup> E.g., *Gaines v. Haughton*, 645 F.2d 761, 778–79 (9th Cir. 1981) ("Many corporate actions taken by directors in the interest of the corporation might offend and engender controversy among some stockholders. Investors share the same diversity of social and political views that characterizes the polity as a whole. The tenor of a company's labor relations policies, economic decisions to relocate or close established industrial plants, commercial dealings with foreign countries which are disdained in certain circles, decisions to develop (or not to develop) particular natural resources or forms of energy technology, and the promulgation of corporate personnel policies that reject (or embrace) the principle of affirmative action, are just a few examples of business judgments, soundly entrusted to the broad discretion of the directors, which may nonetheless cause shareholder dissent and provoke claims of 'wasteful,' 'unethical,' or even 'immoral' business dealings. Should corporate directors have a duty under § 14(a) to disclose all such corporate decisions in proxy solicitations for their re-election? We decline to extend the duty of disclosure under § 14(a) to these situations. While we neither condone nor condemn these and similar types of corporate conduct (including the now-illegal practice of questionable foreign payments), we believe that aggrieved shareholders have sufficient recourse to state law claims against the responsible directors and, if all else fails, can sell or trade their stock in the offending corporation in favor of an enterprise more compatible with their own personal goals and values." (footnotes omitted), *overruled on other grounds by In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc)); see also, e.g., *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 328, 330 (S.D.N.Y. 1979) (holding that the required disclosure of alleged corporate policy was not necessary to "thwart," "resist," and "abuse" federal labor laws, if there had been disclosure of labor litigation and specific findings of labor law violations), *vacated as moot per curiam*, 638 F.2d 7 (2d Cir. 1980).

If companies go beyond qualitative disclosure in response to the investment community's desire for ESG metrics, then additional disclosure issues arise. The SEC recently issued guidance for companies using metrics, whether financial or nonfinancial, in their disclosures. The SEC cautions against using both financial and nonfinancial metrics without including disclosures "as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading."<sup>220</sup>

Sufficient ethical investor interest is a good starting point for establishing the materiality of social responsibility issues. As the following discussion reveals, the SEC and the courts have not been particularly receptive to social responsibility issues except in a few isolated situations.<sup>221</sup> Even if investor interest in social responsibility does not push the materiality needle for the SEC and the courts, investor pressure may push companies to increase social responsibility disclosures in their SEC filings.<sup>222</sup> Mandatory ESG disclosure would bring U.S. securities regulation more in line with other countries.<sup>223</sup>

### C. The Shareholder Proposal Rule

Shareholder meetings and voting in public companies generally take place through proxy solicitation because most shares are not represented in-person at shareholder meetings.<sup>224</sup> When management solicits proxies from the shareholders, the SEC rules require a detailed proxy statement containing

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<sup>220</sup> Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, 85 Fed. Reg. 10,568, 10,569 (Feb. 25, 2020) (to be codified at 17 C.F.R. pts. 211, 231, 241); see, e.g., Lee Barnum et al., *Will the New SEC Guidance on Performance Metrics Impact Disclosure of ESG Metrics?*, WALL ST. LAW., Mar. 2020, at 9, 10.

<sup>221</sup> See Hazen, *supra* note 21, at 409–12 (discussing disclosure of social issues in the 1970s).

<sup>222</sup> See Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV'T L. REP. 10,155, 10,156 (2019) (suggesting that investors may pressure companies into making more social responsibility disclosures).

<sup>223</sup> See, e.g., John Plender, *Norway and Japan Show the Conflicting Approaches to ESG Investment*, FIN. TIMES (June 24, 2019), <https://www.ft.com/content/d059656a-934b-11e9-b7ea-60e35ef678d2> [<https://perma.cc/V9Y3-UJB7>]; Jacqueline Poh & Mariko Ishikawa, *China Set to Lead ESG Disclosure to Lure Foreign Investments*, BLOOMBERG L., <https://www.bloomberg.com/news/articles/2019-06-20/china-set-to-lead-esg-disclosures-to-lure-foreign-investments> [<https://perma.cc/3XB6-C4FR>] (June 20, 2019) (discussing China's ESG initiatives); Ali Zaidi, *Insight: Pending Federal ESG Legislation Could Yield Significant and Step-Wise Change*, BLOOMBERG L. (Oct. 11, 2019), <https://news.bloomberglaw.com/banking-law/insight-pending-federal-esg-legislation-could-yield-significant-and-step-wise-change> [<https://perma.cc/TQ74-YDTP>] (noting ESG disclosure progress in other countries).

<sup>224</sup> See generally 2–3 HAZEN, *supra* note 202, ch. 10 (discussing the nuances of proxy solicitation and the federal regulation of proxies).

mandated disclosures.<sup>225</sup> Corporate shareholders often present shareholder proposals for consideration at the shareholder meeting.<sup>226</sup> Activist shareholders have relied heavily on shareholder proposals to bring focus to social issues, CSR, and corporate governance.<sup>227</sup>

SEC Rule 14a-8 sets forth the circumstances under which shareholders of publicly held companies can require management to include shareholder-sponsored proposals in management's proxy statement.<sup>228</sup> The rule contains a list of grounds upon which management may refuse to include a timely-submitted shareholder proposal in management's proxy statement.<sup>229</sup> One such ground is that the proposal relates to the company's ordinary business.<sup>230</sup> This is the basis often relied on by management to exclude a shareholder proposal from the proxy statement.<sup>231</sup> The SEC's initial responses to social issues in shareholder proposals were not favorable.<sup>232</sup> For example, in a 1951 decision, a district court relied on the ordinary business basis when upholding exclusion of a shareholder proposal requesting racial integration on the company's buses.<sup>233</sup> In today's climate, it can hardly be doubted that the SEC and the courts

<sup>225</sup> See Schedule 14A, 17 C.F.R. § 240.14a-101 (2020) (providing the information required in proxy statements).

<sup>226</sup> See 2 COX & HAZEN, *supra* note 106, § 13:28 (discussing proxy voting generally).

<sup>227</sup> 1 COX & HAZEN, *supra* note 106, § 2:2; cf. Brett McDonnell et al., *Green Boardrooms?*, 53 CONN. L. REV. (forthcoming 2021) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3569303](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569303) [<https://perma.cc/BT4V-JJAA>] (suggesting that shareholder activism has not been very successful in changing corporate conduct).

<sup>228</sup> 17 C.F.R. § 240.14a-8.

<sup>229</sup> *Id.* § 240.14a-8(i)(1)–(13).

<sup>230</sup> *Id.* § 240.14a-8(i)(7). The rationale for this exclusion is that even if there is a proper matter for shareholder proposals under the applicable state law, these proposals constitute micromanagement and thus do not warrant space in the management's proxy statement. See 3 HAZEN, *supra* note 202, §§ 10:41–:56 (analyzing the SEC's interpretations of Rule 14a-8(i)(7)'s ordinary business basis for excluding shareholder proposals).

<sup>231</sup> On occasion, management has tried to rely on Rule 14a-8(i) to exclude proposals that are not significantly related to the company's business. See 17 C.F.R. § 240.14a-8(i)(5). It is clear, however, that shareholder proposals relating to those operations that account for a relatively small part of the company's business may still have to be included when they raise matters of social responsibility. See, e.g., *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 561 (D.D.C. 1985) (holding that a shareholder proposal relating to foie gras production using the gavage method was significant, even though it related to a small portion of the company's business).

<sup>232</sup> For a fuller discussion of the shareholder proposal rule and social responsibility issues, see Hazen, *supra* note 21, at 402–09.

<sup>233</sup> *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 680–81 (S.D.N.Y. 1951) (holding that a shareholder proposal asking a major bus company's management to cease segregated seating in the South was properly excludible). The decision was predicated on a former version of the Rule that would no longer be applicable today. Although it would arguably still be excludible as relating to the issuer's ordinary business, it would probably have to be included under current law. See 17 C.F.R. § 240.14a-8(c)(7).

would recognize the interest of shareholders desiring to voice their views on their company's approach to this type of civil rights issue.

The SEC has demonstrated resistance to some other social issues. For example, as recently as 1992, the SEC staff opined in a no-action letter that management could rely on the ordinary business basis for excluding a shareholder proposal asking management not to engage in discriminatory hiring practices.<sup>234</sup> The rationale for exclusion was that hiring practices relate to the company's ordinary business.<sup>235</sup> Five years later, the SEC retreated from this controversial position in stating that, going forward, proposals focusing primarily on social issues could no longer be excluded as relating to the ordinary business of hiring and employment matters.<sup>236</sup> Where the proposal relates primarily to employee hiring and promotion processes, however, the proposal may be excluded.<sup>237</sup> In more recent years, shareholders have enjoyed considerable success under the shareholder proposal rule in requiring management to include shareholder proposals relating to social issues.<sup>238</sup> For example, the SEC staff

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<sup>234</sup> Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1992 WL 289095 (Oct. 13, 1992).

<sup>235</sup> *Id.*

<sup>236</sup> Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240); see, e.g., Shireen B. Rahnama, *The SEC's Reversal of Cracker Barrel: A Return to Uncertainty*, 7 U. MIA. BUS. L. REV. 273, 275–76 (1999) (bemoaning the uncertainty of case-by-case analysis and recommending a presumption in favor of shareholder proposals addressing employment discrimination); Neel Rane, Comment, *Twenty Years of Shareholder Proposals After Cracker Barrel: An Effective Tool for Implementing LGBT Employment Protections*, 162 U. PA. L. REV. 929, 943–47 (2014) (discussing no-action letter developments after *Cracker Barrel*); Reilly S. Steel, Note, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1547–51 (2016) (analyzing recent no-action letter responses).

<sup>237</sup> See, e.g., Wal-Mart Stores, Inc., SEC No-Action Letter, 2006 WL 695801 (Mar. 16, 2006) (stating that management could rely on Rule 14a-8(i)(7) to exclude a proposal requesting that the board amend the company's Equality of Opportunity policy barring intimidation of company employees exercising their right to freedom of association, develop systems to prevent future violations of federal labor law, and publish periodic reports to shareholders on its progress); United Parcel Servs., Inc., SEC No-Action Letter, 2004 WL 351777 (Feb. 23, 2004) (stating that management could exclude a proposal urging the board of directors to prepare a report to shareowners on the company's relationship with the International Brotherhood of Teamsters). In the case of *United Parcel Services, Inc.*, the SEC staff's response noted: "There appears to be some basis for your view that UPS may exclude the proposal under rule 14a-8(i)(7), as relating to UPS' ordinary business operations (i.e., relations between the company and its employee representatives)." SEC No-Action Letter, 2004 WL 351777, at \*1.

<sup>238</sup> See 3 HAZEN, *supra* note 202, § 10:55 (discussing the application of the shareholder proposal rule to social issues); see also, e.g., Virginia Harper Ho, *From Public Policy to Materiality: Non-financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1236–41 (2019) (arguing that the SEC should expand its approach to non-financial significance of social issues).

has been more receptive to shareholder proposals relating to sustainability,<sup>239</sup> climate change,<sup>240</sup> and ESG.<sup>241</sup>

The SEC recently adopted amendments limiting shareholder access to management's proxy statement under the shareholder proposal rule by raising shareholder eligibility thresholds.<sup>242</sup> It will be a shame if, as should be expected, the new thresholds lead to a reduction of shareholder proposals raising significant social issues.<sup>243</sup> On a more positive note, the SEC staff continue to require inclusion of appropriate ESG-related shareholder proposals.<sup>244</sup> The SEC also recently announced increased scrutiny of ESG disclosures generally.<sup>245</sup>

<sup>239</sup> See, e.g., Host Hotels & Resorts, Inc., SEC No-Action Letter, 2018 WL 487395 (Feb. 28, 2018) (stating that management could not rely on Rules 14a-8(i)(3) or 14a-8(i)(6) to exclude a proposal requesting that the company issue an annual sustainability report with due diligence about operations at the company's properties, including the impact on investors from the hotel operators' environmental, human rights, and labor practices).

<sup>240</sup> See, e.g., Amazon.com, Inc., SEC No-Action Letter, 2019 WL 1641356 (Apr. 3, 2019) (stating that management could not rely on Rules 14a-8(i)(5) or 14a-8(i)(7) to exclude a proposal requesting that the company issue an annual report on the environmental and social impacts of food waste generated from the company's operations, given the significant impact that food waste has on societal risk from climate change and hunger); Ross Stores, Inc., SEC No-Action Letter, 2019 WL 993566 (Mar. 29, 2019) (stating that management could not rely on Rule 14a-8(i)(7) to exclude a proposal requesting that the board prepare a climate change report for the shareholders).

<sup>241</sup> See, e.g., Rite Aid Corp., SEC No-Action Letter, 2018 WL 818011 (Apr. 23, 2018) (stating that management could not rely on Rules 14a-8(i)(7) or 14a-8(i)(10) to exclude a proposal requesting that the company prepare a sustainability report describing the company's ESG risks and opportunities, including customer and worker safety, privacy and security, and environmental management).

<sup>242</sup> Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 89964, 2020 WL 5763382 (Sept. 23, 2020); Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 84 Fed. Reg. 66,458, 66,458 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240).

<sup>243</sup> Benjamin Bain, *Carl Icahn Blasts SEC Proxy Overhaul as a 'Big Step Backward,'* BLOOMBERG (Feb. 10, 2020), <https://www.bloomberg.com/news/articles/2020-02-10/carl-icahn-blasts-sec-proxy-overhaul-as-a-big-step-backward> [<https://perma.cc/HEJ6-VKFD>]; Comment Letter on Proposed Rule: Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (Feb. 2, 2020), <https://www.sec.gov/comments/s7-23-19/s72319-6733997-207590.pdf> [<https://perma.cc/4YTX-A2N2>].

<sup>244</sup> See Saijel Kishan, *Citigroup and Exxon Must Let Investors Vote on ESG Issues*, BLOOMBERG L. (Mar. 1, 2021), <https://www.bloomberglaw.com/bloomberglawnews/> ("ensure Bloomberg Law News is selected below search bar; then search "Citigroup and Exxon"; then sort results by date; then scroll down to results from Mar. 1, 2021 and select source) (discussing SEC no-action responses requiring inclusion of ESG-related proposals; one relating to undertaking a racial justice audit and the other relating to the company's climate change efforts).

<sup>245</sup> See, e.g., Public Statement, Allison Herren Lee, Acting Chair, U.S. Sec. & Exch. Comm'n, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure> [<https://perma.cc/F8AW-U3U8>]; Hester M. Peirce & Elad L. Roisman, *Commissioners Discuss SEC's Enhanced Climate-Change Efforts*, CLS BLUE SKY BLOG (Mar. 5, 2021), <https://clsbluesky.law.columbia.edu/2021/03/05/commissioners-discuss-secs-enhanced-climate-change-efforts/>.

The SEC's approach to shareholder proposals and ESG has evolved over time. The discussion below provides additional examples of the SEC's checkered history with disclosure of socially relevant issues.

#### *D. Environmental and Employment Disclosures*

In 1974, a federal court ordered the SEC to determine whether reporting companies should be required to disclose: "(1) the effect of [their] corporate activities on the environment, and (2) statistics about [their] equal employment practices."<sup>246</sup> The court relied on the National Environmental Policy Act (NEPA), which requires every federal agency "to the fullest extent possible" to interpret and administer federal laws "in accordance with the policies set forth" in NEPA.<sup>247</sup>

In February 1975, the SEC followed the court order by soliciting the public's views concerning:

(1) the advisability of its requiring disclosure of socially-significant matters, (2) whether and on what basis these disclosures might be viewed as being material, particularly where these matters may not be considered material in an economic sense, (3) the basis and extent, if any, of the Commission's authority to require disclosure of matters primarily of social concern but of doubtful economic significance, and (4) the probable impact, if any, of such disclosure on corporate behavior.<sup>248</sup>

On the basis of the comments received in response to this request, among other things, the SEC in October 1975 acknowledged that "economic matters were the primary concern of the Congress in prescribing the Commission's disclosure authority" and decided not to require disclosures relating to the extent of noncompliance with federal environmental laws.<sup>249</sup> With respect to disclosure of equal employment practices, the SEC concluded that "there is no distinguishing feature which would justify the singling out of equal employment from among the myriad of other social matters in which investors may be interested," and that "[d]isclosure of comparable non-material information regarding each of these would in the aggregate make disclosure documents wholly unmanageable."<sup>250</sup> The D.C. Circuit eventually held that the SEC's re-

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<sup>246</sup> Nat. Res. Def. Council, Inc. v. SEC, 389 F. Supp. 689, 692-93 (D.D.C. 1974).

<sup>247</sup> Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (1969) (codified at 42 U.S.C. §§ 4321-4347).

<sup>248</sup> Disclosure of Env't & Other Socially Significant Matters, 40 Fed. Reg. 7013, 7014 (SEC Feb. 18, 1975).

<sup>249</sup> Notice of Commission Conclusions and Rulemaking Proposals, Securities Act Release No. 5627, 8 SEC Docket 73, 1975 WL 160503, at \*5 (Oct. 14, 1975).

<sup>250</sup> *Id.* at \*20.

sponse to the public interest group's proposals was fully adequate to satisfy the requirements of NEPA and other applicable laws.<sup>251</sup>

Over the years, the SEC's increased focus on disclosure of risk factors<sup>252</sup> has resulted in increasing pressure on companies to make disclosures regarding the environmental impact of the company's operations.<sup>253</sup> Most recently, the SEC proposed expanding existing disclosure requirements regarding environmental impact issues.<sup>254</sup> These proposals should warrant serious consideration in light of increasing investor interest in corporations' social responsibility agenda. The trend toward recognizing materiality of environmental disclosures is likely to continue.<sup>255</sup>

### *E. Conflict Minerals and Resource Extraction Disclosures*

The Dodd-Frank Act directed the SEC to adopt rules requiring disclosures relating to a publicly held company's involvement with conflict minerals.<sup>256</sup> The Dodd-Frank Act also directed the SEC to adopt rules requiring disclosures concerning oil, gas, mining, and related companies' businesses involving resource extraction.<sup>257</sup> Following this statutory mandate, the SEC adopted rules requiring disclosures relating to conflict minerals and to resource extraction.<sup>258</sup> A district court invalidated the resource extraction disclosure rule as too broad.<sup>259</sup> The D.C. Circuit affirmed the lower court's ruling that the SEC had acted reasonably in adopting its conflict mineral disclosure rule.<sup>260</sup> The court

<sup>251</sup> Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1036, 1062 (D.C. Cir. 1979).

<sup>252</sup> See, e.g., Item 101(c) of Regulation S-K, 17 C.F.R. § 229.101(c)(1)(xii) (2019) (requiring disclosure of environmental matters affecting a company's business). Specifically, this Item requires disclosure of "the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position." *Id.* (amended in 2020, under 17 C.F.R. § 229.101(c)(2)(i), to require the disclosure of "[t]he material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries").

<sup>253</sup> This is relevant to the "E" in ESG.

<sup>254</sup> Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,726–63,727 (Oct. 8, 2020) (to be codified at 17 C.F.R. p. 229, 239, 240).

<sup>255</sup> See Vizcarra, *supra* note 205, at 10,113–14 (concluding that recent trends indicate that climate information is likely to be considered material by reasonable investors and that courts are likely to accept climate change disclosures as material).

<sup>256</sup> Conflict minerals are defined to include those minerals from the Democratic Republic of the Congo or an adjoining country. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p). The concern over conflict minerals is one example of the "S" in ESG.

<sup>257</sup> *Id.* § 1504, 15 U.S.C. § 78m.

<sup>258</sup> 17 C.F.R. §§ 240.13p-1, 240.13q-1.

<sup>259</sup> Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 23 (D.D.C. 2013).

<sup>260</sup> Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 368 (D.C. Cir. 2014), *aff'd on reh'g*, 800 F.3d 518 (D.C. Cir. 2015).



of appeals, however, struck down the requirement that companies dealing with conflict minerals state on their websites that their products were not “DRC [Democratic Republic of the Congo] conflict free”<sup>261</sup> as a violation of the First Amendment.

The resource extraction disclosure saga did not end there. In 2016, the SEC issued a revised resource extraction disclosure requirement. The revised rules would have required that publicly held companies engaging in resource extraction to disclose payments that were made to further the commercial development of oil, natural gas, or minerals and that were “not de minimis.”<sup>262</sup> These disclosures were to become effective in 2018, but in early 2017, Congress enacted legislation that effectively revoked these enhanced disclosures regarding oil and gas operations.<sup>263</sup> In December 2020, the SEC adopted a new set of rules regarding resource extraction disclosures.<sup>264</sup> The rules as adopted are less rigorous than the first set of rules that was struck down.

The foregoing are just some examples of the SEC’s foray into socially relevant disclosures. Another issue related to socially responsible corporate conduct involves corporate codes of ethics that are discussed directly below.

#### *F. Corporate Codes of Ethics*

One of the key aspects of ESG metrics is corporate governance. Ethical conduct in carrying out a company’s operations is a key component of any evaluation of a company’s commitment to ESG.<sup>265</sup> In turn, codes of ethics are a significant factor in evaluating a company’s governance and governance structure.<sup>266</sup>

<sup>261</sup> *Id.* at 373.

<sup>262</sup> See Press Release, U.S. Sec. & Exch. Comm’n, SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016), <https://www.sec.gov/news/pressrelease/2016-132.html> [<https://perma.cc/QYU5-KYMK>].

<sup>263</sup> Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10 (2017); see Nicholas Grabar & Sandra L. Flow, *Congress Rolls Back SEC Resource Extraction Payments Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 16, 2017), <https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/> [<https://perma.cc/V4K5-S6J2>]; *US Senate Kills SEC ‘Resource Extraction’ Rule*, CNBC, <https://www.cnbc.com/2017/02/03/us-senate-kills-sec-resource-extraction-rule.html> [<https://perma.cc/XB33-XDUL>] (Feb. 3, 2017); see also, e.g., Karen E. Woody, *Can Bad Law Do Good? A Retrospective on Conflict Minerals Regulation*, 78 MD. L. REV. 291, 300–01 (2019).

<sup>264</sup> 17 C.F.R. § 240.13q-1 (2020); see Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2522, 2527–2528 (proposed Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240, 249b).

<sup>265</sup> This, of course, is the “G” in ESG.

<sup>266</sup> See, e.g., Simon Webley & Andrea Werner, *Corporate Codes of Ethics: Necessary but Not Sufficient*, 17 BUS. ETHICS: A EUR. REV. 405, 405 (2008) (“[H]aving such a code is generally regarded as the principal tool of a corporate ethics policy.”); see also, e.g., Krista Bondy et al., *The Adoption of Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study*, 109 BUS. & SOC’Y REV. 449, 449 (2004) (noting that companies use “corporate social responsibility (CSR) codes of

Codes of ethics have been around for decades<sup>267</sup> and were given increased importance in 2002 when § 406 of the Sarbanes-Oxley Act<sup>268</sup> directed the SEC to develop rules requiring disclosures relating to public companies' codes of ethics.<sup>269</sup> There is no SEC mandate that a publicly held company have a code of ethics,<sup>270</sup> but the disclosure requirements clearly provide a strong incentive for companies without a code of ethics to adopt one.<sup>271</sup> Companies without a code of ethics must disclose the absence of a code of ethics and explain the reasons for not having one.<sup>272</sup> Also, companies that do not have a code of ethics will appear out of line with the many companies that have adopted one.<sup>273</sup>

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conduct"); Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535, 535 (2011) ("Corporate codes of conduct are a practical corporate social responsibility (CSR) instrument commonly used to govern employee behavior and establish a socially responsible organizational culture.").

<sup>267</sup> See, e.g., Gary R. Weaver, *Corporate Codes of Ethics: Purpose, Process and Content Issues*, 32 BUS. & SOC'Y 44 (1993) (analyzing corporate codes of ethics); *A (Brief) History of Codes of Ethics*, ARTHUR W. PAGE CTR., <https://pagecentertraining.psu.edu/public-relations-ethics/professional-codes-of-ethics/lesson-1-some-title-goes-here/a-brief-history-of-codes-of-ethics/> [https://perma.cc/CAC4-HJTR] (referencing a 1989 study of 150 corporate codes of ethics). As of 1998, 90% percent of Fortune 500 companies had a code of ethics. See Myrna Wulfson, *Rules of the Game: Do Corporate Codes of Ethics Work?*, 20 REV. BUS., Fall 1998, at 12, 13.

<sup>268</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.). By 2013, 95% percent of Fortune 100 companies had a code of ethics. See Ahmad Sharbatoghlie et al., *Exploring Trends in the Codes of Ethics of the Fortune 100 and Global 100 Corporations*, 32 J. MGMT. DEV. 675, 675 (2013). Independent of the Sarbanes-Oxley requirements, the SEC is not always receptive to this investor concern because it is said to relate to the company's ordinary business. See, e.g., Verizon Commc'ns, Inc., SEC No-Action Letter, 2010 WL 5169382, at \*1 (Jan. 10, 2011) ("Proposals that concern general adherence to ethical business practices are generally excludable under rule 14a-8(i)(7)."); Monsanto Co., SEC No-Action Letter, 2005 WL 6065453, at \*8 (Nov. 3, 2005) (stating that management could rely on Rule 14a-8(i)(7) to exclude a proposal requesting that the board establish an ethics oversight committee to "insure compliance with the Monsanto Code of Conduct, the Monsanto Pledge, and applicable laws, rules and regulations of federal, state, provincial and local governments, including the Foreign Corrupt Practices Act"); Emerson Elec. Co., SEC No-Action Letter, 2000 WL 1469731, at \*1 (Oct. 3, 2000) (stating that management could not exclude from its proxy statement a shareholder proposal that management review and consider amending the company's code of business ethics and conduct). For a discussion of Rule 14a-8, see *supra* notes 228–231 and accompanying text.

<sup>269</sup> Sarbanes-Oxley Act of 2002 § 406, 116 Stat. at 789–90 (codified at 15 U.S.C. § 7264).

<sup>270</sup> In contrast to publicly held companies generally, an investment adviser who is registered with the SEC under the Investment Adviser Act of 1940 is required to have a code of ethics. Investment Adviser Codes of Ethics, 17 C.F.R. § 275.204A-1 (2020); see Investment Adviser Code of Ethics, 69 Fed. Reg. 41,696, 41,696 (July 9, 2004) (to be codified at 17 C.F.R. pts. 270, 275, 279).

<sup>271</sup> A code of ethics should be designed to promote compliance with laws, rules, and regulations applicable to the company's business. The code of ethics must identify appropriate reporting procedures within the organization with respect to code violations.

<sup>272</sup> See Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 5110, 5110 (Jan. 31, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 249). See generally 3 HAZEN, *supra* note 202, § 9:97 (discussing the code of ethics disclosure requirement).

<sup>273</sup> See Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2125 (2003).

Companies that have a code of ethics must disclose it. They also need to address compliance with the code of ethics and applicable methods of assuring compliance with the code.<sup>274</sup>

Investors generally have not been successful in stating fraud claims based on code of ethics disclosures.<sup>275</sup> The difficulty in challenging codes of ethics disclosures as materially misleading is in large part because a company's code of ethics is viewed as aspirational rather than a statement as to the actual conduct of the company and its employees.<sup>276</sup>

### *G. Recommendations for the Securities Laws and Social Responsibility*

The foregoing discussion reveals that the securities laws to date have not been terribly receptive to CSR disclosures. The current regime consists of voluntary ESG disclosures, with some SEC guidance to help companies frame the disclosures they decide to make.<sup>277</sup> It is the position of this Article that the SEC should seriously consider requests for mandatory CSR and ESG disclosures.<sup>278</sup>

<sup>274</sup> See Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. at 5117–5119.

<sup>275</sup> See, e.g., *Singh v. Cigna Corp.*, 918 F.3d 57, 63–64 (2d Cir. 2019) (holding that statements in the corporation's code of ethics, expressing its commitment to regulatory compliance, were “puffery” and could not support securities fraud claims); *In re Sinclair Broad. Grp., Inc. Sec. Litig.*, No. 18-2445, 2020 WL 571724, at \*19 (D. Md. Feb. 4, 2020) (“Statements in corporate codes of conduct can be characterized as inactionable ‘puffery’: statements of a company’s ideals rather than representations of past or present fact.”); *Barilli v. Sky Solar Holdings, Ltd.*, 389 F. Supp. 3d 232, 253 (S.D.N.Y. 2019) (holding that statements in prospectus, regarding the company’s code of ethics, were mere puffery and thus not actionable); *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, 964 F. Supp. 2d 1128, 1140 (N.D. Cal. 2013) (holding that the CEO’s misconduct and firing did not render the company’s code of ethics, which he had violated, materially misleading); see also, e.g., *Gaines v. Haughton*, 645 F.2d 761, 778 (9th Cir. 1981), *overruled on other grounds by In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc).

<sup>276</sup> See, e.g., *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1278 (9th Cir. 2017) (holding that the alleged sexual misconduct of the officer and his alleged violation of the ethics code were not material, and noting that the company’s statements promoting the company’s code of ethics “were transparently aspirational” and “did not reasonably suggest that there would be no violations of the [code] by the CEO or anyone else”); *In re TransDigm Grp., Inc. Sec. Litig.*, 440 F. Supp. 3d 740, 766 (N.D. Ohio 2020) (“[A] code of conduct is not a guarantee that a corporation will adhere to everything set forth in its code of conduct’ and, instead, is simply a ‘declaration of corporate aspirations.’” (quoting *Bondali v. Yum! Brands, Inc.*, 620 F. App’x 483, 490 (6th Cir. 2015))).

<sup>277</sup> See, e.g., Commission Guidance on Management’s Discussion and Analysis of Financial Condition and Results of Operations, 85 Fed. Reg. 10,568, 10,569 (Feb. 25, 2020) (to be codified at 17 C.F.R. pts. 211, 231, 241) (including guidance for discussing sustainability and metrics in MD&A disclosures); SEC. & EXCH. COMM’N PHIL., SEC MEMORANDUM CIRCULAR NO. 4: SUSTAINABILITY REPORTING GUIDELINES FOR PUBLICLY-LISTED COMPANIES (2019), <http://www.sec.gov/wp-content/uploads/2019/10/2019MCNo04.pdf> [<https://perma.cc/HNQ7-VY73>] (including guidance on materiality and suggestions for referencing ESG metrics).

<sup>278</sup> See *supra* notes 213–215 and accompanying text.

At the very least, the SEC should be more encouraging of voluntary CSR and ESG disclosures, for example, through the adoption of a safe harbor rule.

In May 2020, a subcommittee of the SEC Investor Advisory Committee recommended that the Commission issue guidelines for standardizing ESG-related disclosures.<sup>279</sup> The subcommittee's recommendations support mandating ESG disclosures using a principles-based approach<sup>280</sup> and standardizing ESG disclosures.<sup>281</sup> The current lack of standardization can confuse investors.<sup>282</sup> The subcommittee's call for increased SEC involvement was echoed by a report from the U.S. Government Accountability Office that analyzes the various ways to enhance ESG disclosures.<sup>283</sup>

One possible approach would be mandating disclosures through specifically drafted disclosures, listing the items to be disclosed. This approach generally is referred to as line-item disclosure.<sup>284</sup> The challenge in creating such a requirement would be identifying the specifics of what must be disclosed. In

<sup>279</sup> INVESTOR-AS-OWNER SUBCOMM., U.S. SEC. & EXCH. COMM'N INV. ADVISORY COMM., RECOMMENDATION RELATING TO ESG DISCLOSURE 2, 8 (May 14, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf> [<https://perma.cc/N8E8-QF9A>].

<sup>280</sup> As a part of its recommendations, the subcommittee proposed that the SEC fill an existing gap in disclosure requirements:

The SEC should take the lead on this issue by establishing a principles-based framework that will provide the Issuer-specific material, decision-useful, information that investors (both institutional and retail) require to make investment and voting decisions. This disclosure should be based upon the same information that companies use to make their own business decisions. If the SEC does not take the lead, it is highly likely that other jurisdictions will impose standards in the next few years that US Issuers will be bound to follow, either directly or indirectly, due to the global nature of the flow of investment into the US markets.

*Id.* at 9; *see also, e.g.*, U.S. SEC. & EXCH. COMM'N INV. ADVISORY COMM., RECOMMENDATION RELATING TO ESG DISCLOSURE (May 21, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf> [<https://perma.cc/8BAL-K43D>].

<sup>281</sup> Specifically, the report makes five key points. First, "investors require reliable, material ESG information upon which to base investment and voting decisions." INVESTOR-AS-OWNER SUBCOMM., *supra* note 279, at 7. Second, companies should provide material ESG disclosures. *Id.* at 8. Third, standardized ESG disclosures would level the playing field between large, medium, and smaller public companies. *Id.* Fourth, the standardized ESG disclosures would increase capital flowing into the United States. *Id.* at 9. Fifth, the United States should "take the lead" with respect to material ESG disclosures. *Id.*

<sup>282</sup> *Id.* at 7; U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 5-9 (2020), <https://www.gao.gov/assets/710/707949.pdf> [<https://perma.cc/2ESN-QH7L>] (analyzing the lack of standardization with respect to the ways in which public companies measure ESG and frame their disclosures).

<sup>283</sup> *Id.* at 38.

<sup>284</sup> *See, e.g.*, SEC Form 10-K, 17 C.F.R. § 249.310 (2020) (providing the form for annual reports, referencing line-item disclosure requirements).

contrast, a principles-based approach, focusing on materiality alone without more specific line-item guidance, would not provide a suitable threshold.<sup>285</sup> This dynamic is because, as pointed out above,<sup>286</sup> materiality is highly factual and does not provide a bright-line test. Thus, materiality as the sole benchmark would not provide sufficient guidance in identifying the scope of required ESG disclosures. At least two SEC Commissioners have indicated their skepticism about mandating ESG disclosures.<sup>287</sup>

Item 303 of Regulation S-K (Item 303) sets forth Management's Discussion and Analysis of financial conditions and reports of operations, and directs management to analyze operations.<sup>288</sup> Among other things, Item 303 requires management to discuss "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."<sup>289</sup> A parallel approach for ESG and CSR matters would be for the SEC to adopt an ESG or CSR discussion and analysis requirement. For example, the SEC could require a company to discuss its approach to ESG and CSR to the extent to which ESG and CSR impact corporate decision-making, and to the extent to which these policies have had or are likely to have a material impact on company operations.<sup>290</sup> The ESG or CSR discussion and analysis also could require disclosure of company guidelines and the extent to which they have been complied with. This principles-based approach to mandated disclosure would leave it to companies to decide how to frame their ESG and CSR disclosures, without unduly exposing companies to liability under the securities laws' antifraud provisions.

A preferred way to encourage ESG disclosure, short of a disclosure mandate, would be to follow the course that the SEC has taken with respect to forward-looking statements. The SEC adopted safe harbor rules to encourage companies to make forward-looking statements.<sup>291</sup> These rules, which have

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<sup>285</sup> See, e.g., Rissman & Kearney, *supra* note 222, at 10,156 (suggesting that "the factor that will seal the shift in stockholder attitude, and in turn push CSR to the forefront of corporate consciousness, is the finalization of a set of material disclosure standards for sustainability topics").

<sup>286</sup> See *supra* note 204 and accompanying text.

<sup>287</sup> See Peirce, *supra* note 43 (suggesting that there is too much focus on ESG).

<sup>288</sup> Item 303 of Regulation S-K, 17 C.F.R. § 229.303. For a more complete analysis of the MD&A requirement, see 2–3 HAZEN, *supra* note 202, §§ 9:50, 12:70.

<sup>289</sup> Item 303(a)(3)(ii) of Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii); see Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, 85 Fed. Reg. 10,568, 10,569 (Feb. 25, 2020) (to be codified at 17 C.F.R. pts. 211, 231, 241); Certain Investment Company Disclosures, 54 Fed. Reg. 22,427, 22,427–22,428 (May 24, 1989) (to be codified at 17 C.F.R. pts. 211, 231, 241, 271).

<sup>290</sup> See Fisch, *supra* note 206, at 929 (recommending that the SEC adopt a sustainability disclosure and analysis requirement).

<sup>291</sup> SEC Rule 175, 17 C.F.R. § 230.175; SEC Rule 3b-6, § 240.3b-6.

since been codified by Congress, provide that forward-looking statements made in good faith and with a reasonable basis will not be actionable.<sup>292</sup> With an increasing number of investors having shown interest in ESG-related disclosures, it would be appropriate for the SEC to adopt a safe harbor rule encouraging ESG disclosures made in good faith and with a reasonable basis.<sup>293</sup> The good faith and reasonable basis requirements would provide substantial protection to companies making CSR and ESG disclosures. A safe harbor could have a significant impact on encouraging ESG disclosures without unduly exposing the company to risks of liability.

### CONCLUSION

The past fifty years have produced a sea change in the corporate paradigm. At one time, the prevailing view was that profitability and wealth maximization was the primary if not the sole purpose of the business corporation in America and the law seemed to support this view. Over the last fifty years, corporate policy and the law have experienced a tectonic shift increasingly towards CSR. The SEC and the courts have made limited progress in embracing CSR's role in securities law compliance. The time has come for the SEC to take a more meaningful role in promoting CSR and ESG disclosures.

The opportunities for increased SEC involvement in CSR are limited to publicly held companies that are subject to the securities laws' disclosure requirements. The SEC rules in this area have no impact on non-publicly held companies that want to effectively include social responsibility as part of their mission. State corporate law is the venue for addressing the issue with respect to companies that are not publicly held.

State corporate law also provides an opportunity for any public company that elects to signal its commitment to social responsibility. The stated corporate purpose and its companion *ultra vires* doctrine play a significant role in this shift towards increasing corporate responsibility. Most states adopted constituency statutes and then expanded that effort by adopting statutes to recognize a new category of for-profit corporation—the benefit corporation. As is the case with constituency statutes, incorporation as a benefit corporation allows the goal of profitability to be tempered by furthering sustainability and other socially desirable conduct. This Article suggests an alternative and superior way to accomplish the same result. A well-drawn corporate purpose clause

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<sup>292</sup> 1933 Act § 27A, 15 U.S.C. § 77z-2; 1934 Act § 21E, 15 U.S.C. § 78u-5.

<sup>293</sup> The rationale for adopting this safe harbor was that investors would consider forward-looking statements important. See Safe Harbor Rule for Projections, 44 Fed. Reg. 38,810, 38,810 (July 2, 1979) (to be codified at 17 C.F.R. pts. 230, 240, 250, 260).

can accomplish the same type of balance without opting to qualify as a statutory benefit corporation.

With the growing significance of the CSR and ESG movements, corporations should consider whether a well-drawn purpose clause could help establish the parameters of this balance. This is something to consider even for those companies that opt into a benefit corporation statute. Also, corporations wanting to single out particular ESG goals as their focus for branding purposes or otherwise should consider a well-drawn purpose clause to serve that function.<sup>294</sup>

This Article does not recommend a government mandate that corporations be socially responsible. Instead, the recommendations focus on the ways in which the law can better accommodate those who want to promote CSR. With respect to the securities laws, enhancing CSR and ESG disclosures would enable investors focusing on social responsibility to make more informed investment decisions, which, after all, is the purpose of the federal securities laws. There is a division of opinion as to whether the securities laws should require social responsibility and ESG disclosures. Although not going as far as requiring ESG disclosures, a safe harbor rule should be adopted to encourage these disclosures. The recommendations regarding state corporate law involve better use of corporate purpose clauses to define the corporate mission. Use of a well-drawn purpose clause as enforced by the *ultra vires* doctrine provides a path toward allowing corporations to define and enforce their mission, including the desired balance between social responsibility and profitability in formulating corporate policy.

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<sup>294</sup> Even aside from CSR issues, some closely held corporations may also want to consider specific purpose clauses if they want to limit the scope of the corporation's business. Also, for those smaller businesses established as partnerships or LLCs, purpose clauses in the partnership or operating agreement can similarly incorporate CSR or limit the scope of permissible business activity.