Corporate Governance and Sustainability

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§1 Introduction

Corporate governance is the system and structures of rules, practices and processes by which a company is directed and controlled, the goals and objectives of the company are established and the performance of the company is tracked.[1] Traditionally, corporate governance has focused on the owners of the corporation that have supplied the financial capital necessary for the business to operate (i.e., the shareholders), regulation of the duties and responsibilities of the persons that the owners have selected as their agent to deploy their financial capital and generate a reasonable return on their investment (i.e., the directors and the members of the executive team); the control environment, which includes accounting procedures, internal controls and external audits used to track the operational activities of the company selected by the directors as the best means for delivering the anticipated return on investment to the shareholders; and transparency and disclosure, which are needed in order for the shareholders to fully understand how their financial capital has been used and to ensure that their agents, the directors and members of the executive team, have not abused their positions.

As time has gone by, corporate governance has emerged from what often seemed to be an esoteric collection of laws, regulations and contracts to recognition of its role as a primary driver of competitive advantage and profitability and a means for making and executing strategic decisions and ensuring that companies achieve their goals. Writing in 2008, Jamali et al. summed up the importance of corporate governance as follows:

> "The importance of [corporate governance] lies in its quest at crafting/continuously refining the laws, regulations, and contracts that govern companies' operations, and ensuring that shareholder rights are safeguarded, stakeholder and manager interests are reconciled, and that a transparent environment is maintained wherein each party is able to assume its responsibilities and contribute to the corporation's growth and value creation. Governance thus sets the tone for the organization, defining how power is exerted and how decisions are reached."[2]

In 2010, the International Finance Corporation ("IFC") described corporate governance as referring "to the structures and processes for the direction and control of companies"

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[1] For a general introduction to corporate governance, see "Introduction to Corporate Governance" in "Governance: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

[2] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 444 (citing J. Page, Corporate Governance and Value Creation (University of Sherbrooke, Research Foundation of CFA Institute, 2005)).

and limited the coverage of corporate governance to the areas mentioned above (i.e., shareholders, directors, controls, transparency and disclosure). Notably, the IFC made it clear that it did not consider corporate governance to include, although the IFC said it might reinforce, corporate social responsibility ("CSR") and corporate citizenship; socially responsible investing and other elements of what had become to be referred to as "corporate sustainability" such as political governance, business ethics, anti-corruption and anti-money laundering.[3] However, since that time, as the world worked its way through a global financial crisis that called into question the norms of corporate governance that had been in place since the 1970s and serious questions arose regarding the environmental and societal impacts of the decisions of shareholders and directors, there has been a clear shift in perceptions regarding the relationship between corporate governance and sustainability. In its guidance to corporate directors for 2018, one of the world's most prestigious legal advisors to boards on transactions and governance issues nicely described the changing landscape as follows:

> "First, while corporate governance continues to be focused on the relationship between boards and shareholders, there has been a shift toward a more expansive view that is prompting questions about the broader role and purpose of corporations. Most of the governance reforms of the past few decades targeted the ways in which boards are structured and held accountable to the interests of shareholders, with debates often boiling down to trade-offs between a board-centric versus a more shareholder-centric framework and what will best create shareholder value. Recently, efforts to invigorate a more long-term perspective among both corporations and their investors have been laying the ground work for a shift from these process-oriented debates to elemental questions about the basic purpose of corporations and how their success should be measured and defined. In particular, sustainability has become a major, mainstream governance topic that encompasses a wide range of issues such as climate change and other environmental risks, systemic financial stability, labor standards, and consumer and product safety. Relatedly, an expanded notion of stakeholder interests that includes employees, customers, communities, and the economy and society as a whole has been a developing theme in policymaking and academic spheres as well as with investors."[4]

This Research Paper explores some of the issues surrounding the relationship between corporate governance and sustainability, specifically the degree to which consideration of non-financial issues such as environmental and social responsibility should be part of the debates that occur within boardrooms regarding the goals and objectives of companies. The discussion begins with definitions and descriptions of corporate governance with a particular focus on the purpose of the firm and the debate regarding whether the primacy of shareholder interests, which was the dominant theme of corporate governance, at least

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[3] International Finance Corporation, Corporate Governance: List of Key Corporate Governance Terms (2010), 4.

[4] M. Lipton, S. Rosenblum, K. Cain, S. Niles, V. Chanani and K. Iannone, "Some Thoughts for Boards of Directors in 2018" (Wachtell, Lipton, Rosen & Katz, November 30, 2017), 1, accessible at http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.25823.17.pdf.

in the US, for decades, should be rejected in favor of an enlightened view of corporations as being committed to all of its stakeholders including the general economy and the community and redefines and expands the beneficiaries of the directors' fiduciary duties beyond shareholders to other constituencies, or stakeholders, such as employees, customers, members of the local communities in which the corporation operates and society as a whole. If stakeholder primacy is accepted, as appears to be the case, albeit slowly, it opens the door for directors to consider issues and initiatives relating to sustainability, employee welfare, social concerns and environmental stewardship.

In order to better understand the potential relationship between corporate governance and sustainability, the Research Paper continues with definitions and descriptions of both CSR and corporate sustainability. While CSR is generally associated with ensuring the corporations contribute to sustainable economic development at the macro-level, the concept of corporate sustainability can be seen as primarily concerned with the survival, or sustainability, of the corporation itself, something that is necessary in order for the corporation to make the contributions to society that are expected from being a "responsible corporate citizen". Corporate sustainability goals and programs are focused on issues that not only impact society as a whole but must also be addressed by the directors and managers of a corporation in order for it to survive and thrive: climate change; resource scarcity; demographic shifts; and regulatory and political changes. The discussion of these terms allows the Research Paper to move on exploring the relationship between, and slowly evolving convergence of, corporate governance and CSR, and we find that corporate governance and CSR share many common features that are likely to promote good governance while at the same time encouraging greater attention to, and improvements in, CSR initiatives.

The remaining sections of the Research Paper touch on several areas impacted by the convergence of corporate governance and CSR/sustainability. First of all, convergence has influenced both public regulation and self-regulation of corporations, many of which have adopted voluntary standards, such as internal codes of conduct, relating to environmental and social responsibility, stakeholder engagement and non-financial reporting and disclosures. While these steps have been welcomed by proponents of corporate sustainability, there are some that argue that relying on corporations to "do the right thing" is not enough and that new hard laws and public regulations are needed in order to push corporations to proactively address global problems that many feel corporations help to create such as climate change, environmental degradation, exploitative labor conditions and worsening economic inequality. Second, while financial performance has always been important to investors, many of them, particularly large public pension funds and other institutional investors, have become more interested in, and concerned about, environmental protection, human rights, health and safety and diversity and have shown greater appreciation for the benefits of pursuing corporate sustainability as opposed to only rewarding short-term profitability. Among other things, institutional investors have identified long-term corporate strategy and aligning compensation and management incentive to promote long-termism as key topics for engagement with their portfolio companies. Finally, the core responsibilities of board members with respect to guiding and overseeing corporate activities have expanded to include stewardship of corporate sustainability, transparency and disclosure with respect to non-financial activities and performance and stakeholder engagement, all of which has led to the implementation of new organizational structures to ensure that proper attention is paid to environmental and/or social issues, risks and opportunities.

§2 Descriptions of corporate governance

As with almost every topic in the study of organizations, definitions of "corporate governance" vary widely and the choice of the "definition" influences how comparisons among organizations and countries are conducted and how the results and implications of those comparisons are interpreted.[5] A relatively simple definition of corporate governance is that it is "the system by which business entities are monitored, managed and controlled".[6] This notion of a "system" focuses on the relationship, and allocation of responsibilities, between the owners of the firm, the shareholders, and the managers of the firm who are vested with the duties to oversee day-to-day firm operations. The "management group" consists of two different and important classes, both of which are represented on the firm's board of directors elected by the shareholders: the "executives", such as the chief executive officer, who are expected to work full-time on the business of the firm; and the non-executive directors, who are not serving as employees of the firm yet are chosen for the independence and expertise and ability to look out for and protect the interests of the shareholders against attempts by the executives to take advantage of their insider positions. According to Nisa and Warsi, the measure of effectiveness of this system of corporate governance is whether a firm has created an enduring structure "that encourages symbiotic relationship among shareholders, executive directors and the board of directors so that the company is managed efficiently and the rewards are equitably shared among shareholders and stakeholders".[7]

Others have suggested that while definitions of corporate governance do indeed vary widely they can usefully be sorted into two categories.[8] The first set of definitions are primarily concerned with the actual behavior of corporations as measured by indicators of performance (e.g., growth and/or efficiency), financial structure, operations of the board of directors, the relationship between executive compensation and performance, the relationship between labor policies and firm performance and the roles and treatment of shareholders and other stakeholders. This approach is suitable when studying a single country or firms within a single country. The second set of definitions, thought to be appropriate for comparative studies across national borders, are primarily concerned with the "normative framework", which has been defined as "the rules under which firms are

[5] For further discussion of definitions and descriptions of corporate governance, see "Introduction to Corporate Governance" in "Governance: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).
[6] P. Srinivasan and V. Srinivasan, "Status of Corporate Governance Research on India: An Exploratory Study", Indian Institute of Management Working Paper No. 34 (2011), 128.
[7] Id. at 129.
[8] S. Claessens, Corporate Governance and Development (Washington DC: The World Bank (Global Corporate Governance Forum), 2003), 4.

operating—with the rules coming from such sources as the legal system, the judicial system, financial markets, and factor (labor) markets”.[9]

Rahim noted that corporate governance is an “umbrella term” and that it has both a narrow and broad meaning, each of which should be seen as being complementary.[10] In its narrowest sense, corporate governance “describes the formal system of accountability of corporate directors to the owners of companies”.[11] When this concept is used, it looks a lot like the traditional argument that the purpose of the corporation is to maximize shareholder value and that the primary function of corporate governance is to make sure that investors can assure themselves of obtaining a return on their investment. In its broadest sense, the concept of corporate governance “includes the entire network of formal and informal relationships involving the corporate sector and the consequences of these relationships for society in general”.[12] As Rahim explained, the broad conception of corporate governance “is no longer merely about maximizing stock value; rather, it concerns the ‘relationships among the many players involved (the stakeholders) and the goals for which the corporation is governed’”.[13]

The discussion in this Research Paper focuses primarily on corporate governance in the US, where the regulatory framework includes state corporation and securities laws, federal securities law and enforcement bodies and regulated stock exchanges. However, it should not be forgotten that “corporate governance systems vary across nations” when comparisons are made using a variety of dimensions including ownership and board structure, managerial incentives, the role of banks and large financial institutions, the size and development of stock markets, company law, securities regulation and government involvement.[14] Corporate governance researchers have identified several different types of national systems, or models, of corporate governance that can be used for comparisons, to explain why various internal and external governance mechanisms are used and to predict the success and impact of proposed changes to governance rules and

[9] Id.
[10] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 21. Rahim provided the following list of additional resources on corporate governance: A. Shleifer and R. Vishny, “A Survey of Corporate Governance”, Journal of Finance, 52(2) (1977), 737, 3; S. Turnbull, “Corporate Governance: Its Scope, Concerns and theories”, Corporate Governance, 5(4) (1997), 180; O. Hart, “Corporate Governance: Some Theory and Implications”, Economic Journal, 105(430) (1995), 678; M. Becht, P. Bolton and A. Roell, “Corporate Governance and Control”, 1 Handbook of the Economics of Finance (2003), 1; C. Daily, D. Dalton and A. Cannella Jr, “Corporate Governance: Decades of Dialogue and Data” Academy of Management Review, 28(3) (2003), 371; L. Bebchuk, A. Cohen and A. Ferrell, “What Matters in Corporate Governance?”, Review of Financial Studies, 22(2) (2009), 783.
[11] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 21.
[12] Id. (citing M. Blair, Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century (1995) 3).
[13] Id. (citing Corporate Governance, http://en.wikipedia.org/wiki/Corporate_governance at 3 February 2011).
[14] S. Nisa and K. Warsi, “The Divergent Corporate Governance Standards and the Need for Universally Acceptable Governance Practices”, Asian Social Science, 4(9) (2008), 128-136, 129.

practices.[15] While “convergence” is a widely debated topic among corporate governance experts it seems clear that while the corporate model has become a universal framework the business form and system of corporate governance used in particular instances will depend on a variety of social and economic factors such as “national regional and cultural differences; ownership structure and dispersion; the industry and market environment of the corporation; firm size and structure; lifecycle variations, including origin and development, technology and periodic crises and new directions; [and] CEO tenure, attributes and background”.[16]

One of the most common descriptions of corporate governance has been the way in which corporations are directed, administered and controlled and the actual activities of the directors and senior executives have been referred to as steering, guiding and piloting the corporation through the challenges that arise as it pursues its goals and objectives. Jamali et al. explained that the “control” aspect of corporate governance encompassed the notions of compliance, accountability, and transparency, and how managers exert their functions through compliance with the existing laws and regulations and codes of conduct.[17] At the board level, the focus is on leadership and strategy and directors are expected to deliberate, establish, monitor and adjust the corporation’s strategy, determine and communicate the rules by which the strategy is to be implemented, and select, monitor and evaluate the members of the senior executive team who will be responsible for the day-to-day activities associated with the strategy. In addition, directors are expected to define roles and responsibilities, orient management toward a long-term vision of corporate performance, set proper resource allocation plans, contribute know-

[15] For further discussion of the different types of national systems of corporate governance, see “Introduction to Corporate Governance” in “Governance: A Library of Resources for Sustainable Entrepreneurs” prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

[16] T. Clarke, International Corporate Governance: A Comparative Approach (2007), 9 (citing M. Huse, Accountability and Creating Accountability: A Framework for Exploring Behavioral Perspectives of Corporate Governance, 16(s1) British Journal of Management S65, S68 (2005)). For further discussion, see e.g., E. Gedajlovic and D. Shapiro, “Management and ownership effects: Evidence from five countries”, Strategic Management Journal, 19 (1998), 533–553; M. O’Sullivan, Contests for corporate control. Corporate governance and economic performance in the United States and Germany (New York: Oxford University Press, 2000); J. Parkinson and G. Kelly, “The conceptual foundations of the firm” in J. Parkinson, A. Gamble and G. Kelly (Eds.), The political economy of the company (Oxford: Hart Publishing, 2001), 113–140; T. Pedersen and S. Thomsen, “European patterns of corporate ownership: A twelve-country study”, Journal of International Business Studies, 28 (1997), 759–778; S. Prowse, “Corporate governance in an international perspective: A survey of corporate control mechanisms among large firms in the U.S., U.K. and Germany”, Financial Markets, Institutions, and Instruments, 4 (1995), 1–61; A. Shleifer and R. Vishny, “A survey of corporate governance”, Journal of Finance, 52 (1997), 737–783; and S. Thomsen and T. Pedersen, “Ownership structure and economic performance in the largest European companies”, Strategic Management Journal, 21 (2000): 689–705.

[17] D. Jamali, A. Safieddine and M. Rabbath, “Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship”, Corporate Governance, 16(5) (2008), 443, 444 (citing K. MacMillan, K. Money, S. Downing and C. Hillenbrad, “Giving your organization SPIRIT: An overview and call to action for directors on issues of corporate governance, corporate reputation and corporate responsibility”, Journal of General Management, 30 (2004), 15; and A. Cadbury, “The corporate governance agenda”, Journal of Corporate Governance, Practice-Based Papers, 8 (2000), 7).

how, expertise, and external information, perform various watchdog functions, and lead the firm's executives, managers and employees in the desired direction.[18]

§3 Purpose of the firm: the shareholder-stakeholder debate

Setting the strategy for the corporation obviously requires consensus on the purpose of the firm, the goals and objectives of the firm's activities and the parties who are to be the primary beneficiaries of the firm's performance. Traditionally, directors were seen as the agents of the persons and parties that provided the capital necessary for the corporation to operate—the shareholders—and corporate governance was depicted as the framework for allocating power between the directors and the shareholders and holding the directors accountable for the stewardship of the capital provided by investors. While economists and corporate governance scholars from other disciplines recognized that the governance framework involved a variety of tools and mechanisms such as contracts, organizational designs and legislation, the primary question was how to use these tools and mechanisms in the best way to motivate and guarantee that the managers of the corporation would deliver a competitive rate of return.[19] All of this is consistent with what has been described as the "narrow view" of corporate governance, one that conceptualizes corporate governance as an enforced system of laws and of financial accounting, where socio/environmental considerations are accorded a low priority.[20]

While primacy of shareholder interests was the dominant theme of corporate governance, at least in the US, for decades, there is no doubt that one of the most dynamic and important debates in the corporate governance arena, as well as in other areas of society, is the purpose of the firm. Williams described this debate as follows[21]:

> "Is it "simply" to produce products and services that create economic rents to be distributed to rights' holders according to pre-existing contractual, statutory and (possibly) normative obligations? (Given that close to 70% of new companies ultimately fail, that task cannot be taken as too simple.) Or does the firm also have a social obligation to minimize harm to people and the natural environment in its pursuits of profits, or even a positive duty to promote social welfare beyond its creation of economic rents? In corporate governance and law, this debate tracks the competition between a shareholder versus stakeholder view of directors' and officers' fiduciary obligations."

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[18] K. MacMillan, K. Money, S. Downing and C. Hillenbrad, "Giving your organization SPIRIT: An overview and call to action for directors on issues of corporate governance, corporate reputation and corporate responsibility", Journal of General Management, 30 (2004), 15; A. Cadbury, "The corporate governance agenda", Journal of Corporate Governance, Practice-Based Papers, 8 (2000), 7) and J. Page, Corporate Governance and Value Creation (University of Sherbrooke, Research Foundation of CFA Institute, 2005).

[19] H. Mathiesen, Managerial Ownership and Finance Performance (Dissertation presented at Copenhagen Business School, 2002).

[20] K. Saravanamuthu, "What is measured counts: Harmonized corporate reporting and sustainable economic development", Critical Perspectives on Accounting, 15 (2004), 295.

[21] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 34, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784.

For a long time, the most influential voice among academics with respect to the role and primary objective of corporations was Milton Friedman, the Nobel Prize winning economist who famously declared that the exclusive goal of corporate activities was to maximize value for the owners of the corporation (i.e., the shareholders). As history shows, this view was seized upon by investors and CEOs who often used aggressive tactics to drive up share prices and create large, yet often dysfunctional, conglomerates. Friedman and others who shared his view maintained that companies did make a positive social contribution by running a profitable business, employing people, paying taxes and distributing some part of their net profits to shareholders.[22] Another argument often made for the shareholder primacy approach to corporate governance was that requiring management to invest time and effort in devising ways to create additional social benefits beyond the honest pursuit of profits within the boundaries of the law would dilute management's focus, undermine economic performance, and thereby ultimately undermine social welfare.[23] Other supporters of the shareholder-oriented perspective cautioned that corporate responsibility was too much responsibility to impose on directors and pursuing social policy goals was a task best left to the state and not to businesses, which should not get themselves involved with political matters. Another stated concern about expanding the directors' power beyond shareholder interests is that it would undermine director accountability by allowing them to act in their own self-interest while claiming to act in other constituents' interests.[24]

Eventually, other members of the academic community, as well as regulators, politicians, activists and even some of the investors that had grown wealthy during the stock market turbulence over the three decades starting with the 1980s, began to question the primacy of shareholder value and called for rethinking the role of the corporation in society and its duties to their owners and other parties impacted by their operational activities and strategic decisions. Among other things, this meant challenging the long-accepted assumption that the principal participants in the corporate governance framework were the shareholders, management and board of directors. For example, Sir Adrian Cadbury, Chair of the UK Commission on Corporate Governance, famously offered the following description of corporate governance and the governance framework in the Commission's 1992 Report on the Financial Aspects of Corporate Governance: "Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society."

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[22] Id. at 35.
[23] Id. at 35 (citing H. Hansmann and R. Kraakman, "The End of History for Corporate Law", Georgetown Law Journal, 89 (2001), 439, 442-443).
[24] Id. at 36-37 (citing D. Engel, "An Approach to Corporate Social Responsibility", Stanford Law Review, 32 (1979), 1; D. Fischel, "The Corporate Governance Movement", Vanderbilt Law Review, 35 (1982), 1259; and S. Bainbridge, "Corporate Social Responsibility in the Night-Watchman State", Colorado Law Review Sidebar, 115 (2015), 39, 49).

Cadbury's formulation of corporate governance brought an array of other participants, referred to as "stakeholders", into the conversation: employees, suppliers, partners, customers, creditors, auditors, government agencies, the press and the general community. As described by Goergen and Renneboog: "[a] corporate governance system is the combination of mechanisms which ensure that the management (the agent) runs the firm for the benefit of one or several stakeholders (principals). Such stakeholders may cover shareholders, creditors, suppliers, clients, employees and other parties with whom the firm conducts its business."[25] The principles of corporate governance of the Organisation for Economic Cooperation and Development clearly state that the corporate governance framework should recognize the rights of stakeholders (i.e., employees, customers, partners and the local community) as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

Colin Mayer of the University of Oxford has written and lectured about the need to reject shareholder value primacy and reconceive corporations as being committed to all of its stakeholders including the general economy and the community.[26] Hart and Zingales have argued that the appropriate objective of the corporation is shareholder welfare rather than shareholder wealth. While retaining Friedman's shareholder-centered model, Hart and Zingales elected to focus on the ability of corporations to accomplish objectives that shareholders could not reasonably pursue on their own and called on corporations to consider activities other than wealth creation that enhance the welfare of shareholders as a whole.[27] This opened the door to considering issues and initiatives relating to sustainability, employee welfare, social concerns and environmental stewardship and, as Hart and Zingales advocated in their proposed "constituency theory" of governance, expanding the beneficiaries of the directors' fiduciary duties beyond shareholders to other constituencies, or stakeholders, such as employees, customers, members of the local communities in which the corporation operates and society as a whole.[28]

Approval of the constituency theory can often be seen in the statements of institutional shareholder groups such as the Investor Stewardship Group (www.isgframework.org), which has included the following in Endorsement Statement for its Corporate Governance Principles for U.S. Listed Companies: "[I]t is the fiduciary responsibility of all asset managers to conduct themselves in accordance with the preconditions for responsible engagement in a manner that accrues to the best interests of stakeholders and society in general, and that in so doing they'll help to build a framework for promoting long-term value creation on behalf of U.S. companies and the broader U.S. economy."[29]

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[25] M. Goergen and L. Renneboog, "Contractual Corporate Governance", Journal of Corporate Finance, 14(3) (June 2008), 166.
[26] See C. Mayer, Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It (Oxford: Oxford University Press, 2013); and C. Mayer, Prosperity: Better Business Makes the Greater Good (Oxford: Oxford University Press, 2018).
[27] O. Hart and L. Zingales, "Should a Company Pursue Shareholder Value?" (October 2016), available at https://www8.gsb.columbia.edu/leadership/sites/leadership/files/Zingales-Hart--Share_value.pdf
[28] Id.
[29] https://www.isgframework.org/become-an-endorser-internationalorganizations-only/. The Principles Affirm that boards are accountable to shareholders; however, they also require that boards be responsive to

Calvert Asset Management also pointed out that while the fiduciary duties of directors set out by statute do explicitly run to shareholders, the statutes also include similar duties to the corporation itself and thus allows, if not requires, directors to take into account more than just shareholder value when making decisions and be attentive to promoting the welfare of the corporation and the interests of all of its stakeholders.[30]

The focus on interested parties beyond shareholders is the hallmark of a broader view of corporate governance that emphasizes the responsibilities of business organizations to all of the different stakeholders that provide it with the necessary resources for its survival, competitiveness, and success.[31] In this conception, managers remain primarily accountable to the stockholders who have placed their wealth in the hands of those managers; however, managers, particularly the members of the board of directors, are also responsible to groups of stakeholders that have made equally significant contributions to the corporation and these stakeholder responsibilities impose additional constraints on managerial action and the primacy of shareholder rights.[32] Rahim, noting that the roles and responsibilities of directors have been described as the "board as manager", pointed out that the duties of board members have been vastly extended as corporate social responsibility has moved from the margins to the center of corporate governance attention, a trend which is discussed in more detail below.[33]

Commentators such as Bower and Paine have written about the fallacies underlying the economic theories used to support the maximization of shareholder value rule and argued that short-termism and hedge fund activism have not actually created value but rather has simply shifted value among a small group of wealthy parties, encouraged corporations to park idle funds offshore and reduce long-term investments in innovation that would benefit future generations, and triggered crises that have drained public funds and harmed workers, consumers and communities.[34] Bower and Paine advocated an alternative model for corporations based on the health of the enterprise rather than short-term returns to shareholders and encouraged directors and managers to pay more attention to innovation, strategic renewal and investment in projects that ensure future sustainability.

The stakeholder approach to corporate governance arose out of a growing sense that more consideration had to be given to "the whole set of legal, cultural, and institutional

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shareholders and be proactive in order to understand their perspectives and that boards develop management incentive structures that are aligned with the long-term strategy of the company.

[30] Board Oversight of Environmental and Social Issues: An Analysis of Current North American Practice (Calvert Asset Capital Management Inc. and The Corporate Library, 2010), 8.

[31] K. MacMillan, K. Money, S. Downing and C. Hillenbrad, "Giving your organization SPIRIT: An overview and call to action for directors on issues of corporate governance, corporate reputation and corporate responsibility", Journal of General Management, 30 (2004), 15

[32] J. Page, Corporate Governance and Value Creation (University of Sherbrooke, Research Foundation of CFA Institute, 2005); and N. Kendall, "Good corporate governance", Accountants' Digest, 40 (1999).

[33] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 22 (citing M. Eisenberg, "The Modernization of Corporate Law: An Essay for Bill Cary", University of Miami Law Review, 37 (1982), 187, 209-210).

[34] J. Bower and L. Paine, "The Error at the Heart of Corporate Leadership", Harvard Business Review, 95(3) (May-June 2017), 50.

arrangements that determine what public corporations can do, who controls them, how that control is exercised, and how the risks and return from the activities they undertake are allocated."[35] The impact and importance of corporate governance was emphasized by Gourvevitch and Shinn in the following quotes from their book on the "new global politics of corporate governance"[36]:

> "Corporate governance–the authority structure of a firm–lies at the heart of the most important issues of society"… such as "who has claim to the cash flow of the firm, who has a say in its strategy and its allocation of resources." The corporate governance framework shapes corporate efficiency, employment stability, retirement security, and the endowments of orphanages, hospitals, and universities. "It creates the temptations for cheating and the rewards for honesty, inside the firm and more generally in the body politic." It "influences social mobility, stability and fluidity… It is no wonder then, that corporate governance provokes conflict. Anything so important will be fought over… like other decisions about authority, corporate governance structures are fundamentally the result of political decisions. Shareholder value is partly about efficiency. But there are serious issues of distribution at stake – job security, income inequality, social welfare."

Jamali et al. noted that corporate governance "is also intimately concerned with honesty and transparency, which are increasingly expected of the public both in corporate dealings and disclosure".[37] They pointed out that investor confidence and market efficiency has always depended on the disclosure of accurate information about corporate performance and regulators and corporate activists have insisted that companies prepare and disseminate reports that are clear, consistent and comparable. The growing interest in CSR and the broader view of corporate governance has slowly transformed the concept of disclosure and transparency to include non-shareholder stakeholders of the corporation. For example, Jamali et al. pointed out that transparency and disclosure of information between managers and employees is essential to earning employee trust and commitment. As for external stakeholders, such as the members of the communities in which the company operates and society as a whole, transparency has become a fundamental principle underlying the notion that firms need to be "good citizens".[38] An additional byproduct of the aspiration for transparency is the creation of reporting systems that provide directors with the information necessary for them to discharge their leadership and strategic duties and ensure that the corporate governance framework works efficiently.

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[35] M. Blair, Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century (Washington DC: The Brookings Institute , 1995).

[36] P. Gourvevitch and J. Shinn, Political Power and Corporate Control: The New Global Politics of Corporate Governance (Princeton NJ: Princeton University Press, 2007) (as compiled by J. McRichie at https://www.corpgov.net/library/corporate-governance-defined/)

[37] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 444 (citing J. Page, Corporate Governance and Value Creation (University of Sherbrooke, Research Foundation of CFA Institute, 2005)).

[38] Id. at 444.

Williams clearly described the rationale for the stakeholder perspective to corporate governance as follows[39]:

> "From a stakeholder perspective, successful companies incorporate and rely upon multiple social and natural inputs, such as an educated work-force, the physical infrastructure for the production, transportation and distribution of goods, an effective legal system, and natural capital inputs of water, air, commodities, and so forth. Since some significant portion of the inputs of corporate success, including financial inputs, have been contributed by parties other than shareholders, those parties also have interests to be considered in determining the responsibilities of managers and directors and in distributing the outputs of corporate action. Some, perhaps many, of those interests will be protected by contractual or regulatory arrangements, but others cannot be specified ex ante, and so must depend on corporate participants to fairly balance multiple parties' legitimate claims ex post".

The Australian Parliamentary Joint Committee on Corporations and Financial Services, in its 2006 report on "corporate responsibility", announced that it endorsed the "enlightened self-interest interpretation" of directors' duties, which acknowledges that investments in corporate responsibility and corporate philanthropy can contribute to the long term viability of a company even where they do not generate immediate profit. The Committee felt that it was necessary and appropriate for directors to consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation and noted that addressing some of the driving factors of corporate responsibility (e.g., community license to operate, reputational factors, avoidance of regulation, attraction and retention of staff and attraction of investment from ethical funds) by undertaking activities that contribute to social wellbeing and environmental protection are clearly in the best interests of the company from a commercial perspective (and thus well within the bounds of directors' duties).[40]

§4 Descriptions of corporate social responsibility and sustainability

Masuku briefly described the evolution of thought on the role of business in society, beginning with the observation that the traditional profit centered approach to management originated during the Industrial Age with the presumption that capital formation was the only legitimate role of business and that managers were obligated

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[39] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 38-39, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784 (citing M. Blair and L. Stout, "A Team Production Theory of Corporate Law", Virginia Law Review, 85 (2003), 248).

[40] Parliamentary Joint Committee on Corporations and Financial Services, Corporate responsibility: Managing risk and creating value (2006), 52-53. The Committee also found that the then-current version of the Australian Corporations Act, first adopted in 2001, actually permitted directors to have regard for the interests of stakeholders other than shareholders and recommended that no further amendment to clarify directors' duties in that regard was required. Id. at 63.

above all other things to pursue profits to enhance the wealth of their shareholders.[41] The 1960s and 1970s saw the slow ascendency of the social responsibility approach to management which was based on the assumption that businesses were actors in a broader environment and thus had responsibilities to respond to social pressures and demands and treat their stakeholders in a manner that complied with both law and ethics.[42] Writing in the 1970s, Davis defined CSR as “the firm’s considerations of, and response to, issues beyond the . . . economic, technical, and legal requirements of the firm to accomplish social benefits along with the traditional economic gains which the firm seeks”.[43] By the 1980s, the notion that corporations had a duty to behave ethically had achieved broad acceptance and attention then began to turn to what ethical behavior actually entailed, how companies should respond to business-related social issues and how “corporate social performance” should be measured. Beginning in the 1990s, a new economic theory of the firm, the “corporate community model:, put stakeholders at the center of corporate strategy. Masuku explained: “... the organization is viewed as a socioeconomic system where stakeholders are recognized as partners who create value through collaborative problem solving. It is the role of the organization to integrate the economic resources, political support, and special knowledge each stakeholder offers ‘not to do well’, but because it provides a competitive advantage.” [44]

The ISO 26000 standard for corporate responsibility, which was developed in 2010 by the International Standards Organization, defined “social responsibility as:

> “the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behavior that contributes to sustainable development, including health and the welfare of society, takes into account the expectations of stakeholders, is in compliance with applicable laws and with international norms of behavior, and is integrated throughout the organization and practiced in its relationships.”

In 2011 the European Commission provided a simple, yet expansive and important, definition of CSR as being “the responsibility of enterprises for their impacts on society” and went on to explain that “[e]nterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business

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[41] C. Masuku, Corporate Social Responsibility Literature Review and Theoretical Framework, available at https://www.academia.edu/2172462/CORPORATE_SOCIAL_RESPONSIBILITY_LITERATURE_REVIEW_AND_THEORETICAL_FRAMEWORK

[42] For further discussion of the evolution of corporate social responsibility and the various definitions and descriptions of the concept that have been suggested, see “Introduction to Corporate Social Responsibility” in “Corporate Social Responsibility: A Library of Resources for Sustainable Entrepreneurs” prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

[43] K. Davis, “The Case For and Against Business Assumption of Social Responsibilities”, American Management Journal, 16 (1973), 312.

[44] C. Masuku, Corporate Social Responsibility Literature Review and Theoretical Framework, available at https://www.academia.edu/2172462/CORPORATE_SOCIAL_RESPONSIBILITY_LITERATURE_REVIEW_AND_THEORETICAL_FRAMEWORK (citing W. Halal, “Corporate community: a theory of the firm uniting profitability and responsibility”, Strategy & Leadership, 28(2) (2000), 10).

operations and core strategy in close collaboration with their stakeholders."[45] The World Business Council for Sustainable Development ("WBCSD"), an organization established and led by chief executive officers of companies focused on sustainability, has defined CSR as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".[46] This definition recognizes the traditional role of corporations in seeking economic benefits and then expands the responsibilities of corporations to include the voluntary pursuit, as a matter of ethical conduct as opposed to compliance with legal requirement, of wellbeing for a broad range of non-investor constituencies including employees and their families, the local communities in which the business is operated and society as a whole (e.g., environmental responsibility).

The World Economic Forum has identified the concerns for responsible business as follows:

> ". . . To do business in a manner that obeys the law, produces safe and cost-effective products and services, creates jobs and wealth, supports training and technology cooperation and reflects international standards and values in areas such as the environment, ethics, labor and human rights. To make every effort to enhance the positive multipliers of our activities and to minimize any negative impacts on people and the environment, everywhere we invest and operate. A key element of this is recognizing that the frameworks we adopt for being a responsible business must move beyond philanthropy and be integrated into core business strategy and practice."[47]

According to the Australian Parliamentary Joint Committee on Corporations and Financial Services, the concept of CSR should be examined from the following standpoints: (a) considering, managing and balancing the economic, social, and environmental impacts of companies' activities; (b) assessing and managing risks, pursuing opportunities, and creating corporate value beyond the traditional core business; and (c) taking an "enlightened self-interest" approach to consider the legitimate interests of the stakeholders in corporate governance.[48]

Garriga and Mele´ suggested that it was possible and useful to create a classification of corporate social responsibility ("CSR") theories based on the perspective of how the

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[45] European Commission, A Renewed European Union Strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681, ¶ 3.1.

[46] World Business Council for Sustainable Development, Corporate Social Responsibility: Meeting Changing Expectations, 3, available at wbcsd.org.

[47] World Economic Forum, Global Corporate Citizen: The Leadership Challenge for CEOs and Boards (2002) http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf at 21 February 2009.

[48] Australian Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Corporate Responsibility and Triple-Bottom-Line reporting for incorporated entities in Australia (2005). http://www.philanthropy.org.au/pdfs/advocacy/pa_jpicr_0905.pdf at 31 October 2013.

interaction phenomena between business and society are focused. They argued that CSR theories could be classified into the following four groups[49]:

- *Instrumental Theories:* Theories placed in this group are based on the assumption that corporations are instruments for wealth creation and that this is their sole social responsibility. If this view is accepted, then CSR or any other social activity undertaken by the corporation is only a means to the end of profits and such activities should not occur unless they are consistent with wealth creation.
- *Political Theories:* Theories placed in this group emphasize the social power of corporations and the obligation of corporations to accept social duties and rights and/or participate in certain social cooperation.
- *Integrative Theories:* Theories in this group are based on fundamental argument that businesses, including corporations, depend on society for continuity, growth and survival and as such are obligated to integrate the demands of society into their operations.
- *Ethical Theories:* Theories in this group see the relationship between business and society as embedded with ethical values and that corporations need to accept social responsibilities, such as CSR, as ethical obligations above any other consideration.

Instrumental CSR Theories: Reconciling Wealth Creation and Doing Good

Instrumental theories of corporate social responsibility ("CSR") are based on the fundamental assumption that the sole social responsibility of corporations is wealth creation and that only the economic aspects of interactions between business and society should be considered when setting strategy and making operational decisions. These theories do not necessarily prohibit CSR activities; however, CSR programs and initiatives are seen as a means to the end of profits and thus should not be undertaken unless they are consistent with wealth creation. The questions below demonstrate how certain of the instrumental theories can be integrated into decision making relating to a particular CSR program or initiative:

- Does the project involve investment in an activity would produce an increase in shareholder value acting without deception and fraud? For example, it may be worthwhile for a company that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government if the investment will make it easier to attract desirable employees, reduce the wage bill, lessen losses from pilferage and sabotage or have other worthwhile effects.
- Does the project involve investment in an environmentally- or socially-responsible activity that will result in long-term maximization of the value of the company and satisfaction of certain interests of people with a stake in the firm (i.e., the "stakeholders")? This criterion assumes that "enlightened value maximization" has supplanted the traditional goal of "shareholder value maximization".
- Does the project involve a philanthropic activity consistent with the skills and resources that is aligned with the company's mission and may enhance the company's competitive advantage? For example, when a telecommunications company teaches computer network administration to students in the communities where the company operates it not only improves life in those communities and the company's image in those communities but also provides the company with more skilled workers to choose from in the future.
- Does the project involve the creation and/or maintenance of social and ethical resources and capabilities which can be a source of competitive advantage? Competitive advantage can be derived from implementing processes of moral decision-making and capacity for adaptation and the development of proper relationships with primary stakeholders such as employees, customers,

[49] E. Garriga and D. Mele´, "Corporate Social Responsibility Theories: Mapping the Territory", Journal of Business Ethics, 53 (2004), 51, 52.

suppliers and communities.

- Does the project involve the development of new capabilities and resources to overcome anticipated constraints and challenges posed by the natural biophysical environment? Important strategic capabilities include pollution prevention, product stewardship and sustainable development, and critical resources include the capacity for continuous improvement, stakeholder integration and shared vision.
- Does the project implement strategies that can serve the poor and improve the social and economic conditions at the "base of the pyramid" while simultaneously making profits and creating a competitive advantage for the company? Companies may attempt "disruptive innovation" through the development of products or services that do not have the same capabilities and conditions as those being used by customers in the mainstream markets and introducing them only for new or less demanding applications among non-traditional customers, with a low-cost production and adapted to the necessities of the population (e.g., a telecommunications company inventing a small cellular telephone system with lower costs but also with less service adapted to the base of the economic pyramid).
- Does the project involve cause-related marketing that can enhance the company's brand and reputation for reliability and honesty while helping customers satisfy their own individual objectives? For example, the company may offer to contribute a specified amount to a designated cause when customers engage in a revenue-providing exchange. Making such an offer enhances the company's reputation, causes customers to view the company's products as being high quality and secures a competitive advantage for the company.

Source: E. Garriga and D. Mele´, "Corporate Social Responsibility Theories: Mapping the Territory", Journal of Business Ethics, 53 (2004), 51, 53-55 (see text of article for relevant citations for each of the questions above).

One of the most important byproducts of their extensive survey of the approaches to CSR was the conclusion of Garriga and Mele´ that most of the current theories focus on four main aspects: "(1) meeting objectives that produce long-term profits, (2) using business power in a responsible way, (3) integrating social demands and (4) contributing to a good society by doing what is ethically correct".[50] Embedded in all of this are a number of duties and ideas that are finding their way into a new kind of corporate governance framework including long-termism, stakeholder engagement, transparency and disclosure, responsible consumption of natural resources, fair dealings with workers and consumers and attention to the needs of local communities and society as a whole. In addition, many of the emerging approaches to CSR, particularly those falling within the ethical theories identified by Garriga and Mele´, argue, as referenced in the Caux Roundtable Principles for Business discussed below, that legal and market forces are necessary but insufficient guides for conduct, and that it is also incumbent upon businesses to take ethical and moral values into consideration in their decision making.

Another way to look at CSR was suggested by Jamali et al., who observed that many scholars had conceived of CSR as encompassing two dimensions: internal and external.[51]

[50] E. Garriga and D. Mele´, "Corporate Social Responsibility Theories: Mapping the Territory", Journal of Business Ethics, 53 (2004), 51, 65. The various CSR approaches are described, including key references, in Table 1 ("Corporate social responsibilities theories and related approaches") included in the article at 63-64.

[51] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 446.

On the internal level, companies "revise their in-house priorities and accord due diligence to their responsibility to internal stakeholders, namely employees, addressing issues relating to skills and education, workplace safety, working conditions, human rights, equity considerations, equal opportunity, health and safety, and labor rights".[52] On the external level, which has generally received the most attention, companies focus on assumption of their extended duties as "corporate citizens" and afford "due diligence to their external–economic and social–stakeholders and the natural environment"[53] Through initiatives to ensure that the corporate operations have a positive impact on the environment and initiatives to address community issues and foster social justice.[54] Jamali et al. explained that "[t]he environmental component addresses primarily the impacts of processes, products, and service on the environment, biodiversity, and human health, while the social bottom line incorporates community issues, social justice, public problems, and public controversies".[55] Jamali et al. observed that "[a]ddressing these two CSR dimensions often implies difficult adjustments and willingness to consider multiple bottom lines … [and] … requires good communication of CSR objectives and actions, new standards, control and performance metrics, and the successful integration of CSR into the culture of the organization".[56]

Hopkins argued that treating the stakeholders of the firm ethically or in a socially responsible manner is an economic responsibility of companies.[57] Similarly, Marsden emphasized that "CSR is not an optional add-on nor is it an act of philanthropy. A socially responsible corporation is one that runs a profitable business that takes account of all the positive and negative environmental, social and economic effects it has on society."[58] Andersen's definition of CSR was also based on a broader societal approach that called for firms to extend "the immediate interest from oneself to include one's fellow citizens and the society one is living in and is a part of today, acting with respect for the future generation and nature".[59] Ward also had a broad understanding of CSR as a

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[52] Id. (citing P. Jones, D. Comfort and D. Hillier, "Corporate social responsibility and the UK's top ten retailers", International Journal of Retail and Distribution Management, 33 (2005), 882).

[53] Id. (citing L. Munilla and M. Miles, "The corporate social responsibility continuum as a component of stakeholder theory", Business and Society Review, 110 (2005), 371).

[54] S. Deakin and R. Hobbs, "False dawn for CSR: Shifts in regulatory policy and the response of the corporate and financial sectors in Britain", Corporate Governance: An International Review, 15 (2007), 68.

[55] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 446.

[56] Id. (citing D. Jamali, "Insights into triple bottom line integration from a learning organization perspective", Business Process Management Journal, 12 (2006), 809; J. Hancock (Ed.), Investing in Corporate Social Responsibility: A Guide to Best Practice, Business Planning & the UK's Leading Companies (London:,Kogan Page, 2005); G. Lantos, "The boundaries of strategic corporate social responsibility", Journal of Consumer Marketing, 18 (2001), 595; and J. Elkington, "Governance for sustainability", Corporate Governance: An International Review, 14 (2006), 522).

[57] M. Hopkins, Corporate Social Responsibility: An Issue Paper (Working Paper No. 27, Policy Integration Department, World Commission on Social Dimension of Globalization, 2004).

[58] C. Marsden, "The Role of Public Authorities in Corporate Social Responsibility" (2001) in A. Dahlsrud, "How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions", Corporate Social Responsibility and Environmental Management, 15(1) (2008), 1, 9.

[59] K. Andersen, The Project (2003) in A. Dahlsrud, "How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions", Corporate Social Responsibility and Environmental Management, 15(1) (2008), 1, 11.

commitment by companies to “contribute to sustainable economic development—working with employees, their families, the local community and society at large to improve the quality of life, in way that [is] also good for business.”[60] In 2013, Rahim summed up the results of a survey of definitions and conceptions with the following:

> “. . . [T]here is no conclusive definition of CSR and that it can have different meanings to different people and different organizations as an ever-growing, multifaceted concept. Nevertheless, it may be said that the concept of CSR is consistent and converges on certain common characteristics and elements. More precisely, if CSR as defined above is examined from a practical and operational point of view, it converges on two points. CSR requires companies (a) to consider the social, environmental, and economic impacts of their operations and (b) to be responsive to the needs and expectations of their stakeholders. These two points are also embedded in the meaning of the three words (i.e., ‘corporate’, ‘social’, and ‘responsibility’) of the phrase ‘corporate social responsibility’. The word ‘corporate’ generally denotes business operations, ‘social’ covers all the stakeholders of business operations, and the word ‘responsibility’ generally refers to the relationship between business corporations and the societies within which they act together. It also encompasses the innate responsibilities on both sides of this relationship. Accordingly, CSR is an integral element of business strategy: it is the way that a company should follow to deliver its products or services to the market; it is a way of maintaining the legitimacy of corporate actions in wider society by bringing stakeholder concerns to the foreground; and a way to emphasize business concern for social needs and actions that go beyond philanthropy.”[61]

While much of the discussion of CSR in this Research Paper focuses on trends in the US, CSR is clearly a global phenomenon. Rahim surveyed steps that had been taken around the globe to integrate the core principles of CSR into the policy objectives of different economies and global companies. Global companies in Europe have been guided by the EU Commission’s Green Paper on Promoting a Framework for CSR and the European Code of Conduct Regarding the Activities of Transnational Corporations Operating in Developing Economies. A number of individual countries in Europe have also taken action driven, at least in part, by a series of resolutions adopted by the European Parliament to facilitate the development of the incorporation of CSR principles in its member economies: the UK established a post of CSR Minister to encourage greater social responsibility in UK companies and the UK’s Companies Act of 2006 included specific reporting requirements on environmental and social issues; Belgium passed legislation requiring pension fund managers to disclose the extent to which they consider ethical, social and environmental criteria in their investment policies; France required listed companies to disclose their impact on social and environmental issues in their annual reports and accounts; and each of the Scandinavian countries mandated

[60] H. Ward, Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock (2004), 3.
[61] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 24 (citing A. Gill, “Corporate Governance as Social Responsibility: A Research Agenda” (2008), 464).

environmental disclosures. There have also been a number of important quasi-legal initiatives for the promotion of CSR at the national level throughout Europe including the International Business Leaders Forum, the Ethical Trading Initiative and Partnership for Global Responsibility.[62]

Rahim noted that, in contrast to Europe, the US has been slower in using formal regulation to incorporate CSR into the business strategies and operations of corporations, an approach that is consistent with the preference in the US for minimal legislative control of business. According to Rahim, the US has emphasized developing specialized organizations that set rules and standards, and provide enforcement regimes, for certain aspects of CSR including the Occupational Safety and Health Administration, Equal Employment Opportunity Commission, Consumer Product Safety Commission and the Environmental Protection Agency. A variety of industry and other non-governmental organizations have also contributed guidelines that can be referenced for the self-regulatory initiatives of individual companies including the US Model Business Principles and the work of the Center for Corporate Ethics and the Fair Labor Association. Trade associations in specific sectors, such as automobile manufacturing and paper products, have promulgated guidelines for their members on environmental management practices for themselves and their suppliers.[63]

Principles of CSR have been important in Japan since the post-war reconstruction period, during which the resolution "Awareness and Practice of the Social Responsibility of Business" was adopted and stated the fundamental principal that businesses should not simply pursue corporate profit, but must seek harmony between the economy and society, combining factors of products and services, and that social responsibility is a better way to pursue this goal.[64] Various cabinet ministries have undertaken initiatives to promote and achieve CSR including the Cabinet Office;, the Ministry of Agriculture, Forestry, and Fisheries; the Ministry of Health, Labor, and Welfare; and the Ministry of Environment. For example, the Cabinet Office issued its "Corporate Code of Conduct" in 2002 to build consumer confidence in businesses and set guidelines to promote the establishment and implementation of corporate codes of conduct.[65] The influential Ministry of Economy, Trade and Industry collaborated with the Japanese Standards Association on the creation of a working group to develop CSR standards in Japan and Japan has been an active participant in the development of intergovernmental initiatives relating to CSR. The result of all this activity has been that Japanese companies have been global leaders in disclosures of CSR activities, investment in internal resources to oversee CSR commitments and adoption of codes of conduct based on international standards.[66]

A 2017 article in *The Economist* succinctly described the evolution of CSR up to that time as follows:

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[62] Id. at 34-38.
[63] Id. at 38-39.
[64] Id. at 40 (citing M. Kawamura, The Evolution of Corporate Social Responsibility in Japan (Part 1)—Parallels with the History of Corporate Reform (NLI Research institute, 2004), 156).
[65] Id. (citing Asian Productivity Organisation, Policies to Promote Corporate Social Responsibility (Report of the Asian Productivity Organisation Top Management Forum, 2006)).
[66] Id. at 41-42.

> "Between the 1950s and 1970s, CSR took shape in the form of pre-corporate philanthropy, a largely disparate approach involving support for domestic nonprofits at the discretion of CEOs with little transparency or oversight. In the 1980s, intense foreign competition and a greater focus on shareholders led many publicly traded corporations to adopt more stringent quality and cost controls. This created greater demands to tie corporate philanthropy to financial performance through efforts like cause-related marketing and practices more aligned with a company's business. Throughout the 1990s, CSR became more international in scope, but was typically reactive in nature and often a response to negative publicity. During this time, a holistic, triple-bottom-line accounting framework of sustainability also began to emerge. Since the 2000s, CSR has grown increasingly strategic, and a broader concept of sustainability has gained ground. Public pressure to address negative corporate externalities, and pressing social, economic, and environmental issues drove the evolution of these practices. Over time, they have blurred the lines between the public, private, and civil sectors, and redefined traditional roles and structures in the process."[67]

While CSR is generally associated with ensuring the corporations contribute to sustainable economic development at the macro-level, the concept of corporate sustainability can be seen as primarily concerned with the survival, or sustainability, of the corporation itself, something that is necessary in order for the corporation to make the contributions to society that are expected from being a "responsible corporate citizen".[68] Corporate sustainability goals and programs are focused on issues that not only impact society as a whole but must also be addressed by the directors and managers of a corporation in order for it to survive and thrive: climate change; resource scarcity; demographic shifts; and regulatory and political changes.[69]

Coblentz argued that "sustainability" in the context of a corporation or any other similar type of organization, means "continuation" through the acquisition and maintenance of the elements necessary for it to carry on and constantly enhance its activities in pursuit of a defined mission.[70] According to Colblenz, there are actually three key aspects of organizational sustainability—institutional, financial and moral:

- Institutional sustainability comes from having a mission, a process in place to develop long-term strategic plans, an annual planning process, a process for managing the operational activities included in the strategic and annual plans and, finally, processes for monitoring and evaluating the flow of work to ensure that it is contributing to the organization's goals and objectives.

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[67] J. Cramer-Montes, "Sustainability: A New Path to Corporate and NGO Collaborations", The Economist (March 24, 2017), http://www.economist.com/node/10491124

[68] For further discussion of the various definitions and descriptions of corporate sustainability, see "Corporate Sustainability" in "Entrepreneurship: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

[69] RobecoSAM, Corporate Sustainability, available at sustainability-indices.com.

[70] J. Coblentz, "Organizational Sustainability: The Three Aspects that Matter" (Washington DC: Academy for Educational Development, 2002).

- Financial sustainability means having access to the financial resources that the organization needs in order to collect the resources—human, physical and technological—necessary for it to carry out its mission. This does not mean that the organization is self-sufficient with regard to capital (i.e., it can fund operations out of its own cash flow), but rather that it can obtain needed funds from outside sources without compromising its mission. A financially sustainable organization also practices prudent financial management to ensure that its resources are used efficiently.
- Moral sustainability requires that organizational leaders have a clear vision of, and commitment to the mission, and communicate it effectively to all stakeholders; that all staff rally around the organizational leaders and become committed to the mission as well; that staff who are committed to the mission are rewarded by career development opportunities, adequate compensation and dynamic work environment, all of which improves morale and builds a unity of purpose and commitment that will overcome challenges; and that leadership, management and staff act ethically and are perceived as doing so.

While Coblenz's model of organizational sustainability does not explicitly mention environmental and social issues, it does paint a picture of a deliberative process throughout an organization that operates on a vision of a mission that is clearly communicated and shared by everyone and which understands that results will take time and require steady and prudent general and financial management and a commitment to acting in an ethical manner. Financial sustainability in the model includes engaging with investors that understand the company's mission and do not place conditions on funding that will conflict with the mission. For example, when the mission of the organization is to achieve environmental efficiencies that may not be realized for several years, investors will refrain from applying pressure for short-term economic returns provided that management is transparent about progress and acts in an ethical manner in its engagement and relationships with investors.

A 2017 article in *The Economist* described "sustainability" in the corporate context as follows:

> "The term "sustainability" is often used interchangeably with CSR or viewed exclusively through an environmental lens. Thought leaders, however, generally describe it as a business strategy that creates long-term stakeholder value by addressing social, economic, and environmental opportunities and risks material to a company. It is integral to a company's business and culture, rather than on the periphery. Optimizing waste reduction, or water or energy consumption, for example, can help a company reduce operational costs. Sustainability can drive innovation by reconceiving products and services for low-income consumers, opening new lines of business and boosting revenue in the process. Finally, being socially responsible can help a company earn license to operate in new markets, and attract and retain talent."[71]

[71] J. Cramer-Montes, "Sustainability: A New Path to Corporate and NGO Collaborations", The Economist (March 24, 2017), http://www.economist.com/node/10491124

While the terms "CSR" and "corporate sustainability" are often used interchangeably, there are real and important distinctions between the two concepts; however, corporations can and should pursue both CSR and sustainability in order to generate the most value for all of their stakeholders:

- Avoiding environmental harm from operational activities is not only a socially responsible way to conduct business but also ensures that the corporation has sufficient natural resources available to it to survive and thrive in the future;
- Monitoring the environmental and social impact of the activities of members of the corporation's supply chain not only protects natural and human resources it also ensures that the corporation will have reliable partners and a stable stream of inputs for its products;
- Treating employees and their families fairly and providing them with a living wage not only enhances their wellbeing but also makes it easier for the corporation to attract and retain the talent necessary to create and commercialize innovative products and services needed to maintain long-term competitiveness;
- Honest engagement with local communities and environmental and social activists promotes mutual understanding and problem solving while reducing potential distractions for directors and members of the management team; and
- Products that are developed in an environmentally and socially responsible manner not only reduce the burden on natural and human resources but also improve the corporation's reputation and brand and reduce the risk of consumer disenchantment and product recalls.

Porter and Kramer argued that sustainability and responsible business practices are integral parts of a corporate strategy that can create "shared value" for the company, its shareholders and other key stakeholders of the company.[72] Porter, along with others such as McWilliams and Segal, has also maintained that companies should use the CSR initiatives as part of their business strategies to promote competitive advantage and, in fact, a large percentage of Global 250 firms have explicitly identified issues such as climate change and material resource scarcity as opportunities for the development of new products and services.[73]

One threshold issue for directors with respect to embracing "corporate sustainability" is that it remains a broad topic when the time comes to putting together a framework for implementation. For example, when the subject is environmental responsibility, issues can range from climate change to carbon footprints, water and energy. Social responsibility can involve issues and projects relating to supply chain management, product stewardship and consumer protection and human rights. CSR and corporate sustainability requires attention to risk management and stakeholder engagement and

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[72] M. Porter and M. Kramer, "Creating Shared Value", Harvard Business Review (January-February 2011).
[73] See M. Porter and M. Kramer, "Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility", Harvard Business Review, 78 (December 2006); and A. McWilliams and D. Siegel, "Creating and Capturing Value: Strategic Corporate Social Responsibility, Resource-Based Theory, and Sustainable Competitive Advantage", Journal of Management 37 (2011), 1480.

investment of resources in new management and information systems that can generate data needed to track performance and prepare the reports necessary to meet expectations of investors and other stakeholders with respect to transparent disclosure of the nature and effectiveness of the company's CSR and corporate sustainability initiatives.

§5 Relationship between corporate governance and CSR

According to Rahim, there is an evolving interplay between corporate governance and CSR, both of which hold economic and legal features that may be altered through socio-economic processes in which competition within the product market is the most powerful force.[74] Rahim stressed that corporate governance and CSR are complimentary and closely linked with market forces and that while their objectives are not concurrent they may act as tools for attaining each other's goals. Winberg and Randolph also agreed that "CSR is related to and overlaps in some respects with the concepts of corporate governance and ethics", however, they believed that: "it is nevertheless distinct….governance programs tend to be internally focused and generally retain heavy rules based favor. In contrast CSR tends to be more value-based and externally focused."[75] The Australian Parliamentary Joint Committee on Corporations and Financial Services noted that the terms "corporate responsibility" and "corporate governance" were sometimes confused with each other and explained its position that corporate governance referred to broader issues of company management practices (i.e., the conduct of the board of directors;, the relationships between the board, management and shareholders; transparency of major corporate decisions; and accountability to shareholders) and that corporate responsibility is only one aspect of an organization's governance and risk management processes.[76]

A somewhat contrary view of the relationship between CSR and corporate governance was taken by Walsh and Lowry, who wrote that "corporate governance is an increasingly important aspect of CSR.... to provide the more solid foundation on which broader CSR principles and business ethics can be further enhanced".[77] Their approach was based on the assumption that "corporate governance" was to be construed narrowly, thus limited to enhancement of shareholder value and the protection of the interests of shareholders, and that the obligations of corporations with respect to the environment, employees and consumers could be assigned to the separate domain of CSR even though some of those obligations were becoming based in law regulation. All of this illustrates the importance

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[74] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 21 (citing L. Mitchell, "The Board as a Path toward Corporate Social Responsibility" in D. McBarnet, A. Voiculescu and T. Campbell, The New Corporate Accountability: Corporate Social Responsibility and the Law (2007), 279). See also M. Rahim, "Corporate Governance as Social Responsibility: A Meta-regulation Approach to Incorporate CSR in Corporate Governance" in S. Boubaker and D. Nguyen (Eds.), Board of Directors and Corporate Social Responsibility (London: Palgrave Macmillan, 2012).

[75] D. Winberge and P. Randolph, "Corporate Social Responsibility: What every In-House Council Should Know", ACC Docket (May 2004), 72.

[76] Parliamentary Joint Committee on Corporations and Financial Services, Corporate responsibility: Managing risk and creating value (2006), 6-7.

[77] M. Walsh and J. Lowry, "CSR and Corporate Governance" in R. Mullerat (Ed.), Corporate Social Responsibility: The Corporate Governance of the 21st Century (Amsterdam: Kluwer, 2005), 38-39.

of how corporate governance is conceptualized, narrowly or broadly, on the degree of overlap and convergence between CSR and corporate governance.

A number of commentators have suggested that there are actually two models of corporate governance.[78] The first model, which is based in the economic tradition of Friedman, is the "shareholder governance" system in which the directors and managers of the corporation are the agents for the shareholders as the principals of the corporation and the responsibility of the agents is to maximize shareholder value. The second model is the "stakeholder governance" system, which does not ignore shareholders but also extends the responsibility of directors and managers to different groups of stakeholders upon which the corporation is dependent for its operations and survival. The second model has been used as the basis for the argument that CSR is, in fact, an extended corporate governance system whereby the responsibilities of corporations and their directors range from fiduciary duties towards the owners to the analogous fiduciary duties towards all of the firm's stakeholders.[79] Certain of these duties, primarily those that have been imposed by law, are enforced by litigation and activities of governmental regulators, while the "softer" duties associated with social and environmental issues are being enforced by self-regulatory codes of conduct and stakeholder activism (including pressure from institutional shareholders).

Jamali et al. examined several models that have posited a relationship between corporate governance and CSR.[80] The first model depicted corporate governance as a pillar of CSR and requires that an effective corporate governance system be in place to serve as a foundation for solid and integrated CSR activities. This model could be illustrated by Hancock's "Key Pillars of Corporate Responsibility", which was based on the argument that investors and senior management should focus their attention on four core pillars that account for most of the company's true value and future value creation[81]:

- **Strategic Governance:** Strategic scanning capability; agility/adaptation; performance indicators/monitoring; traditional governance concerns; and international "best practice"
- **Stakeholder Capital:** Regulators and policy makers; local communities/NGOs; customer relationships; and alliance partners
- **Human Capital:** Labor relations; recruitment/retention strategies; employee motivation; innovation capacity; and knowledge development
- **Environment:** Brand equity; cost/risk reduction; market share growth; process efficiencies; customer loyalty; and innovation effect

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[78] See, e.g., C. Mayer, "Corporate Governance, Competition, and Performance", Journal of Law and Society, 24 (March 1997), 152, 154.
[79] L. Sacconi, Corporate Social Responsibility (CSR) as a Model of "Extended" Corporate Governance. An Explanation based on the Economic Theories of Social Contract, Reputation and Reciprocal Conformism (UE Research Project, 2004).
[80] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 447-448.
[81] J. Hancock (Ed.), Investing in Corporate Social Responsibility: A Guide to Best Practice, Business Planning & the UK's Leading Companies (London: Kogan Page, 2005).

In this model, corporate governance is one of the basic building blocks of CSR and suggests that when boards are exercising their responsibility over CSR they need strategic good corporate governance practices in place in order to effectively leverage the company's crucial sources of capital: human, stakeholder and environmental.[82]

The second model visualized CSR as being an attribute or dimension of corporate governance, thus widening the scope of corporate governance to incorporate non-financial risks into the risk mitigation dimension of corporate governance activities. This approach could be illustrated by Ho's depiction of the following attributes of good corporate governance and the activities and topics associated with each attribute[83]:

- **Strategic Leadership:** Set corporate objectives, direct competitive focus, make major decisions, measure performance and determine executive pay
- **Stewardship:** Legislative safeguards, governance policy and governance committee, director participation, regular reviews and "ask tough questions and demand answers"
- **Social Responsibilities:** Adopt policies, enforce and audit and report on conformance
- **Board Structure:** Separate supervisory and executive roles, nonexecutive directors, election procedure and committees (i.e., nomination, audit and compensation committees)
- **Capital Structure and Market Relations:** Capital concentration, satisfy shareholders and research and development, continuous dialogue with investors and markets

Ho explained that her framework viewed corporate governance more holistically and Jamali et al. observed that this was consistent with the work of other scholars, such as Kendall[84], who considered good corporate governance as "ensuring that companies are run in a socially responsible way and that there should be a clearly ethical basis to the business complying with the accepted norms of the society in which it is operating".[85] It is interesting to note that Ho's study provided evidence that higher commitments to CSR were strongly and positively related to the qualifications and terms of directors, boards that exercise strong stewardship and strategic leadership roles and the management of capital market pressures, all of which are also hallmarks of good corporate governance.[86]

The third model, suggested by Bhimani and Soonawalla, portrayed corporate governance and CSR as complementary constituents of the same corporate accountability continuum that could be illustrated as follows[87]:

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[82] J. Elkington, "Governance for sustainability", Corporate Governance: An International Review, 14 (2006), 522.
[83] C. Ho, "Corporate governance and corporate competitiveness: An international analysis", Corporate Governance: An International Review, 13 (2005), 211.
[84] N. Kendall, "Good corporate governance", Accountants' Digest: The ICA in England and Wales, 40 (1999).
[85] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 447.
[86] Id.
[87] A. Bhimani and K. Soonawalla, "From conformance to performance: The corporate responsibilities continuum", Journal of Accounting and Public Policy, 24 (2005), 165.

Corporate Conformance<-->Performance Corporate

Corporate Financial Reporting	Corporate Governance	Corporate Social Responsibility	Stakeholder Value Creation

Jamali et al. explained that "the continuum reflected varying degrees of compliance with laws and legally enforceable standards, with stress placed on corporate conformance on the left end of the continuum and attention shifting to corporate performance on the right end, where codes/standards are extremely difficult to apply, and oversight mechanisms are much less evident".[88] The continuum approach also illustrates that companies approach their expanding corporate governance responsibilities must understand and balance "binding" legal requirements that require formal compliance and reporting and the self-regulatory initiatives commonly associated with CSR that, while still technically "voluntary", have increasingly become expectations of investors and other stakeholders.

§6 Convergence of CSR and corporate governance

The growing importance of, and the relationships between, social and environmental issues and governance practices was emphasized in "Who Cares Wins: Connecting Financial Markets to a Changing World", a report prepared by the UN Global Compact and released in 2004:

> "In a more globalized, interconnected and competitive world, the way that environmental, social and corporate governance issues are managed is part of companies' overall management quality needed to compete successfully. Companies that perform better with regard to these issues can increase shareholder value by, for example, properly managing risks, anticipating regulatory action or accessing new markets while at the same time contributing to the sustainable development of the societies in which they operate. Moreover these issues can have a strong impact on reputation and brands, an increasingly important part of company value."[89]

Rahim observed that the convergence of CSR and corporate governance has been slowly but surely evolving over a number of decades beginning with "the sophistication of consumers in the 1960s, the environmental movement of the 1970s and the increasing interest in the social impacts of business in the 1990s".[90] While these changes and

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[88] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 447.

[89] Who Cares Wins: Connecting Financial Markets to a Changing World (UN Global Compact, 2004), i.

[90] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 22 (citing A. Bagi, M. Krabalo and L. Narani, "An Overview of Corporate Social Responsibility in Croatia" (2004); and T. Pinckston and A. Carroll, "A Retrospective Examination of CSR Orientations: Have They Changed?", Journal of Business Ethics, 15(2) (1996), 199). See also N. Kakabadse, C. Rozuel and L. Lee-Davies, "Corporate Social

movements did not always trigger specific CSR initiatives, they did set the stage along with "the global social urge to include the previously excluded social costs of production and the hidden costs incurred by the environment as a result of business activities with the corporate balance sheet; the lack of confidence in the institutions of the market economy; and the demand for ensuring sustainable development".[91] According to Rahim, the result of all this was increased pressure to update and extend the narrower meaning of corporate governance to enable companies to demonstrate their responsibility to all of their stakeholders and society in general through their performance. As time has gone by, CSR has become recognized as "[a] business strategy to make the ultimate goals of corporations more achievable as well as more transparent, demonstrate responsibility towards communities and the environment, and take the interests of groups such as employees and consumers into account when making long-term business decisions."[92]

Jamali et al. argued that the convergence of CSR and corporate governance could be illustrated by identifying and acknowledging discernable overlaps between the two concepts.[93] For example, the broader concept of corporate governance, which entails responsibility and due regard to the wishes of all key stakeholders and ensuring that companies are answerable to all stakeholders, is quite similar to the stakeholder conception of CSR that views businesses as being accountable vis-à-vis a complex web of interrelated stakeholders that sustain and add value to the firm. When corporate governance is viewed in a narrower manner, such as focusing on ensuring accountability, compliance and transparency, one can see the need for firms to meet their responsibilities to internal stakeholders by addressing issues related to skills, and education, workplace safety, working conditions, human rights, equity/equal opportunity and labor rights. Jamali et al. mentioned other links between CSR and corporate governance including the duty of companies to assume their fiduciary and moral responsibilities toward stakeholders; a common grounding in transparency, accountability and honesty; opportunities to regain the trust of clients and society at large; and sources of important long-lasting benefits and sustainability for the business.[94]

Szabó and Sørensen noted that corporate governance and CSR shared many common features that are likely to promote good governance while at the same time encouraging greater attention to, and improvements in, CSR initiatives.[95] Some of the specific common features that they mentioned included regulatory approach, which is both cases has largely been based on voluntary codes and self-regulation; transparency, which has been integrated into corporate governance through reporting requirements on financial

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Responsibility and Stakeholder Approach: A Conceptual Review", International Journal of Business Governance and Ethics, 1(4) (2005), 277, 279 (identifying 'consumerism' and 'corporate scandals' as the most important drivers underpinning the growth in interest and acceptance of CSR).

[91] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 22.

[92] Id. (citing A. Gill, "Corporate Governance as Social Responsibility: A Research Agenda" (2008)).

[93] D. Jamali, A. Safieddine and M. Rabbath, "Corporate Governance and Corporate Social Responsibility Synergies and Interrelationship", Corporate Governance, 16(5) (2008), 443, 446.

[94] Id. at 446-447.

[95] D. Szabó and K. Sørensen, "Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU", European Business Law Review, 2013(6), 1, 5-8.

performance and now appears in connection with the voluntary disclosure and reporting on CSR initiatives and topics such as environmental, labor and human rights matters; independent directors, which have traditionally been used as a means for ensuring that the interests of shareholders are protected but could also be proponents for taking into account a broader group of stakeholder interests and could therefore play an important role in advancing CSR; greater diversity of board members, which could enhance both corporate governance and CSR; risk management, an obligation of the board of directors that have always been part of corporate governance but which has been expanded to include the risk and opportunities associated with key topics of CSR (i.e., climate change, the environment, health, safety, human rights etc.); and "whistleblowing" procedures for employees and other stakeholders that can be used to report both corporate governance and regulatory compliance problems and activities of the company that are unethical and/or likely to have adverse environmental and/or social impacts.

Many agree that CSR principles are typically embedded into governance practices such as disclosure and reporting, risk management oversight, board composition and diversity and compensation. Disclosure and reporting on social, environmental and ethical issues has become commonplace among larger companies and has expanded to include specific details on policy implementation and stakeholder engagement. In addition, the main standards developed for non-financial reporting, such as the Global Reporting Initiative, have incorporate several disclosure items relating to the internal governance framework including the independence and expertise of directors; board-level processes for overseeing the identification and management of economic, environmental and social risks and opportunities, and the linkage between executive compensation and achievement of financial and non-financial goals. Risk management is a fundamental duty of the board and CSR encourages directors to take a broad view of the challenges that their companies face in maintaining performance and surviving in the marketplace. The growing emphasis on CSR also means that boards need to be able to draw on the skills, knowledge and experiences of a more diverse group of members, a requirement that is consistent with calls for better gender and ethnicity diversity in the boardroom. Finally, boards need to develop new compensation and rewards systems that take CSR into account and prioritize metrics and success indicators that are broadly defined from a longer-term perspective.[96]

Strandberg interviewed a group of international thought-leaders regarding their views on the convergence of CSR and corporate governance and found the respondents to be divided into two groups: one group who saw convergence at the level of values, with good governance going beyond the traditional core governance functions and becoming more broadly defined to include ethical considerations due to a large number of significant governance oversight failures in the late 1990s and early 2000s and CSR being an external expression of ethical values; and the other group who believed that CSR only connected to corporate governance at the operational risk level and that

[96] C. Strandberg, The Convergence of Corporate Governance and Corporate Social Responsibility: Thought-Leaders Study (Canadian Co-operative Association, March 2005), 9-10.

engaging in CSR is part of the directors' broader fiduciary duty to identify, address and manage the risks that impact the financial performance of the corporation.[97]

All of the respondents agreed that CSR was an emergent area of risk in the broadening portfolio of risk management and many of the respondents agreed that CSR had taken its place at the core of a new type of enterprise risk management that was more holistic in nature and used the tools of CSR, such as stakeholder engagement and non-financial reporting, to reduce operational risks. For example, engaging with employees and customers and preparing and disseminating non-financial reports can reduce the risk that the company will be drawn down by work stoppages, lawsuits, boycotts and investor activism. At the same time, focusing more on social and environmental issues can help companies identify new opportunities that will allow them to maintain competitiveness in the marketplace. When viewed from this perspective, the portfolio of issues that may enter the boardroom expands significantly to include the kinds of products and services the company produces, how they are produced and the environmental and social impact of those decisions.[98]

Strandberg found that the further one got from shareholders and employees, the less widely accepted stakeholder engagement was as a pillar of governance, except perhaps as a derivative of the risks and strategic opportunities faced by a company.[99] Among the thought leaders who preferred a values-based governance model there was more consideration of stakeholder engagement given the importance of measuring the impact of operational activities on society and the environment; however, at that point in time few boards were known to have a robust stakeholder relations policy. The dominant view of the thought leaders at that time was summed in the following quote provided by Strandberg: "Companies are driven by one thing: share price. If doing something nice to stakeholders improves share price, they are all for it. If those stakeholders can damage share price the company will manage the stakeholders and if this means paying lip service or doing something more fundamental they will do it."[100]

The drive toward, and pace of, convergence of CSR and corporate governance has turned on a variety of key factors. Strandberg found that drivers of CSR at the values level included improvements in information technology and a surge of globalization that has resulted in greater interconnection between stakeholders and companies, recognition of the role that CSR and taking a values-based approach to governance and decision making on improving motivation and productivity among employees, the desire of companies to protect their reputation and build trust in an era of corporate scandals; the need to take steps to ensure that the benefits of globalization are shared more broadly and the ascendency of new types of corporate leaders dedicated to advancing CSR competencies in their organizations and linking CSR issues with mainstream business issues. At the risk level, the main drivers of CSR have been the recognition of investors that CSR can and does have a positive impact on the financial and overall performance of their

[97] Id. at 4-5.
[98] Id. at 6 and 13-14.
[99] Id. at 11.
[100] Id. at 12.

portfolio companies and the growing attention that directors have paid to social and environmental responsibility which developing their governance frameworks. In addition, governments have become more involved with regulating activities in CSR areas such as the environment, labor relations and reporting, which means that companies have had to expand the scope of their compliance operations.[101]

Williams reported that the topic of corporate responsibility has been given increasing academic attention in the past decades, citing data collected and analyzed by Devinney that showed that the number of articles relating to the topic had risen significantly in various journals devoted to environmental sciences, economics, management, sociology, psychology and law.[102] One of the most popular topics among academics has been the relationship between corporate responsibility and financial performance, an important question given the consistent need for advocates of corporate responsibility initiatives to make a strong "business case" beyond the ethical arguments.[103] Williams noted that as studies have become more sophisticated in identifying the mediating variables and the quality of data has improved, the results have been more consistent in showing positive financial results from corporate responsibility, an outcomes that many who have studied the issue can be attributed to the fact that corporate responsibility strategies and operating procedures positively influence certain key intangibles that are significantly related to corporate financial performance such as innovation, human capital improvements, reputation and corporate culture.[104] While studies have identified improvements on a range of performance metrics, such as lowering the cost of capital, positive influence on stock price performance and better operational performance, the specific linkages between particular corporate responsibility-related operational and managerial competencies and specific performance outcomes are still unclear.[105]

Researchers have also been interested in assessing the connection between board composition and committees and measurable corporate social performance. While it can logically be assumed that creation of a specific board committee dedicated to corporate responsibility would have a positive impact on a company's social performance, the

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[101] Id. at 8-9.

[102] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 20, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784.

[103] For further discussion, see A. Carroll and K. Shabama, "The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice", International Journal of Management Reviews, 12(1) (2010), 85.

[104] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 25, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784 (citing J. Surroca, J. Tribó and S. Waddock, "Corporate Responsibility and Financial Performance: The Role of Intangible Resources", Strategic Management Journal, 31 (2010), 463).

[105] Id. at 26 (citing G. Clark, A. Feiner and M. Viehs, "From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281; and T. Devinney, "Is the Socially Responsible Corporation a Myth? The Good, the Bad and the Ugly of Corporate Social Responsibility", Academic Management Perspectives (May 2009), 44).

results from studies have been mixed.[106] William cited several factors that may come into play such as whether the committee was established to promote better environmental or social performance or as a reaction to a particular issue or problem.[107] One survey found that independent, larger and less diverse boards were associated with worse environmental performance, an outcome that could be attributed to a lack of in-depth knowledge of the environmental risks confronting the company, and it has been suggested that environmental performance would be better improved by reducing board independence and oversight by a separate committee and allowing a powerful CEO to develop and execute his or her vision for positive environmental impacts through managerial strategies.[108] On a related note, Williams observed that the presence of sustainability disclosures on company websites, just like the presence of corporate responsibility committees at the board level, should not be understood as an unambiguous signal of actual corporate responsibility, pointing out that companies had often touted their dedication to sustainability while being embroiled in real world controversies relating to income inequality, contribution to public health problems and illegal and unethical corporate behavior.[109]

Other areas of interest to researchers have included the relationship between the types of investors in a company and the company's environmental and social performance and the impact of the corporate governance system in which the company operates. For example, several studies have found that companies with higher percentages of long term, pension fund investors had significantly better environmental and social performance than companies with lower percentages and that environmental and social performance suffered when companies were forced to deal with short-term shareholder activism from mutual funds and investment banks.[110] As for cross-jurisdictional research, one study found that: "among different legal origins, the English common law—widely believed to be mostly shareholder oriented—fosters CSR the least; within the civil law countries, firms of countries with German legal origin outperform their French counterparts in terms of ecological and environmental policy, but the French legal origin firms outperform German legal origin companies in social issues and labor relations. Companies under the

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[106] Id. at 27.

[107] Id. at 27 (citing J. Walls, P. Berrone and P. Phan, "Corporate Governance and Environmental Performance: Is there Really a Link?", Strategic Management Journal, 33 (2012), 885).

[108] Id. at 27 (citing J. Walls, P. Berrone and P. Phan, "Corporate Governance and Environmental Performance: Is there Really a Link?", Strategic Management Journal, 33 (2012), 885, 902). See also J. Surroca and J. Tribó, "Managerial Entrenchment and Corporate Social Performance", Journal of Business Finance and Accounting, 35(5-6) (2008), 748 (arguing that corporate responsibility is a strategy for management entrenchment and that CEOs establish stronger ties with internal and external constituencies, such as employees and community elites, in order to insulate themselves from accountability mechanisms at the board level).

[109] Id. at 29.

[110] Id. at 30-31 (citing R. Johnson and D. Greening, "The Effects of Corporate Governance and Institutional Investor Types on Corporate Social Performance", Academy of Management Journal, 42:5 (1999), 564; and D. Neubaum and S. Zahra, "Institutional Ownership and Corporate Social Performance: the Moderating Effects of Investment Horizon, Activism, and Coordination", Journal of Management, 32:1 (2006), 108).

Scandinavian legal origin score highest on CSR (and all its subfields)".[111] Williams observed that "where, as in the common law system, the state's role in the economy is understood to be more limited in addressing economic inequality or promoting and protecting labor or environmental interests than among Scandinavian countries or those based on civil law legal families, there is more pressure for voluntary corporate responsibility issues to address these issues . . . [however] . . . evidence suggests those voluntary initiatives are less effective in promoting social and environmental social welfare than are the types of laws and institutional arrangements found in the Scandinavian and civil law legal contexts".[112]

Writing in 2005, Strandberg summed up the state of convergence of CSR and corporate governance at that time as follows:

> "There is an overall trend towards greater accountability of corporations, not just in financial matters, but regarding impacts on society. Institutional investors are pushing non-financial issues more and more. As companies come to understand looking for loopholes will not serve them in the longer term they will drift to a principles-based approach to governance—the bridge between CSR and governance. Up until recently a lot of resources and effort have been spent on spin—marketing CSR—getting the message out that companies are doing the right thing without necessarily doing so. It is becoming more important that a company's decisions stand up to scrutiny than in the past and this will drive CSR convergence at both the risk management and the values level of a corporation."[113]

Rahim summed up the evolution of corporate responsibility and its relationship to corporate governance as follows:

> "The basis of corporate responsibility has transitioned from why companies must be socially responsible to how they can become socially responsible. CSR is now a major component of new business and CG models for long-term sustainability. It has converged with the new trend of CG and contributed to the shifting of the traditional notion of CG to a vehicle for pushing corporate management to consider broader social issues. CSR defines corporate responsibilities to society as follows: firstly, that companies have a responsibility for their impact on society and the natural environment, which on occasion goes beyond legal compliance and the liability of individuals; secondly, that companies have a responsibility for the behavior of others with whom they do business; and thirdly, that business

[111] Id. at 31-32 (citing and quoting from H. Liang and L. Renneboog, "The Foundations of Corporate Social Responsibility", Tilberg Law and Economics Center Discussion Paper No. 2013-023, available at http://ssrn.com/abstract=2371103).
[112] Id. at 33.
[113] C. Strandberg, The Convergence of Corporate Governance and Corporate Social Responsibility: Thought-Leaders Study (Canadian Co-operative Association, March 2005), 13.

needs to manage its relationship with wider society, whether for reasons of commercial viability or to add value to society."[114]

§7 Impact of convergence on corporate regulation

In order to understand the impact of the convergence of CSR and corporate governance on corporate regulation, one must first be familiar with the three most prominent regulatory systems found within the corporate governance landscape[115]:

- *Public Regulation:* Rahim explained "public regulation" as denoting "the traditional form of regulation where public authorities set the relevant legislation or other forms of binding actions for the purpose of achieving public policy aims".[116] The subject matter of the legislation and accompanying administrative rules including means for monitoring compliance and imposing sanctions to aid in enforcing these actions. In many cases, private citizens and organizations are actively involved through various structures and means in the implementation of the rules established by the state; however, the ultimate responsibility for implementing these rules remains with the state.[117]
- *Self-Regulation:* According to Rahim, "self-regulation is the opposite of public regulation" and is well defined by Black, who said that self-regulation is "the situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority".[118] In a self-regulatory system, "private parties take the responsibility for monitoring compliance, and public authorities usually do not interfere in the regulatees' self-monitoring strategies".[119]
- *Co-Regulation:* In its widest sense, the term co-regulation means "cooperative forms of regulation that are designed to achieve public authority objectives—the cooperation being performed by public authority and civil society."[120] In its narrowest sense, co-regulation means "the regulator and the regulatee are linked by a regulatory scheme designed to reach a public policy goal as well as to fulfil the interests of the regulatee"[121]. Rahim explained that a co-regulatory scheme combines

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[114] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 44 (citing M. Blowfield and J. Frynas, "Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World", International Affairs, 81(3) (2005), 499, 504).
[115] The following summaries are adapted from the discussion in M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 25-27.
[116] Id. at 26.
[117] C. Palzer and A. Scheuer, "Self-Regulation, Co-Regulation, Public Regulation", Promote or Protect (2003), 165.
[118] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 26 (citing J. Black, "Constitutionalising Self Regulation", Modern Law Review, 59(1) (1996), 24, 27).
[119] Id. at 26.
[120] Id. at 26 (citing C. Palzer and A. Scheuer, "Self-Regulation, Co-Regulation, Public Regulation", Promote or Protect (2003), 170).
[121] Id. at 26.

> elements of self-regulation, self-monitoring and traditional public regulation strategies; however, in actual practice the public authority generally lays down the the legal basis so that the system can begin to function and then private parties work to develop and implement the rules that describe its functioning.

Attempts to regulate corporate governance can be illustrated by the various corporate governance codes that have been adopted throughout Europe. Szabó and Sørensen reviewed and analyzed the corporate governance codes of each of the European countries in the "EU27", as well as the codes of Norway, Iceland and Switzerland, as of the end of 2011.[122] Among the 30 codes, 21 addressed various stakeholder issues; 14 addressed ethical issues; and 15 addressed issues related to the social responsibility of the company or social and environmental matters. The researchers noted that the most common recommendations among the codes related to increasing transparency internally or externally as a means for facilitating CSR; however, apart from transparency most of the recommendations were vague and generally lacking in specifics, thus making them soft in character and frequently open to interpretation.

Rahim observed that the potential convergence of CSR and corporate governance has affected the modes of corporate regulation and that "hierarchical command-and-control" regulation dictated by the state is being replaced by a mixture of public and private, state and market, traditional and self-regulation institutions that are based on collaboration among the state, business corporations, and NGOs.[123] In fact, Rahim argued that the impact of the convergence of CSR and corporate governance has mostly been reflected by the development of self-regulatory regimes in the business environment which include both attempts by organized groups to regulate the behavior of its members and efforts by individual companies to exercise control over themselves to maintain the stability of their function and achieve certain organizational goals.[124] While self-regulation can be mandated or coerced by the state, most of the self-regulatory initiatives to date relating to CSR have been voluntary systems initiated and operated by corporations, often acting collectively with input from stakeholders. All of this seems to be consistent with the erosion of the authority and power of the nation-state that has occurred due to globalization and the accompanying rise of the influence of non-state actors and transnational bodies in constructing regulatory schemes and devices for businesses.[125]

Rahim noted that individual companies have been self-regulating their CSR-related activities through their own codes of conduct and/or through incorporation of a multi-stakeholder initiative or guidelines prepared by another social or commercial organization.[126] When corporations create their own codes of conduct they are

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[122] D. Szabó and K. Sørensen, "Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU", European Business Law Review, 2013(6), 1.
[123] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 23 (citing A. Gill, "Corporate Governance as Social Responsibility: A Research Agenda" (2008), 464).
[124] Id.
[125] Id. at 27 (citing J. Cioffi, "Governing Globalisation? The State, Law, and Structural Change in Corporate Governance", Journal of Law and Society, 27(4) (2000), 572).
[126] Id.

simultaneously acting as both "regulator", responsible for the rules, and the "regulate", responsible for implementation of those rules. Acting in this fashion provides the corporation with the flexibility to frame its own internal strategies for pursuit of broader public policy goals taking into account its specific circumstances and resources. On the other hand, when corporations adopt technical and qualitative standards provided by multi-stakeholder initiatives and other external organizations, the regulator is separated from the regulate, although corporations are generally encouraged to get involved in standard-setting exercises to ensure that their concerns are heard and addressed. While acting in this manner arguably increases the costs associated with implementation and compliance, it does provide corporations with the opportunity to access emerging best practices amongst their peers and enhance their brand and reputation by being associated with widely-respected standards.

G20/OECD Principles of Corporate Governance

Elements of CSR, including recognition of the rights of stakeholders along with shareholders and the need for regular and transparent reporting of the corporation's governance practices and performance, found their way into the G20/OECD Principles of Corporate Governance, which call on corporations to:

- Distribute duties and responsibilities among different supervisory, regulatory and enforcement authorities;
- Protect and facilitate the exercise of shareholder rights and ensure equitable treatment of all shareholders, including minority and foreign shareholders;
- Recognize the rights of stakeholders established by law or through mutual agreements and ensure that where stakeholder interests are protected by law that stakeholders have the opportunity to obtain effective redress for violation of their rights;
- Encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises;
- Permit mechanisms for employee participation to develop;
- Ensure that stakeholders participating in the corporate governance process have access to relevant, sufficient and reliable information on a timely and regular basis and are able to freely communicate their concerns about illegal or unethical practices to the board and to the competent public authorities without compromising their rights;
- Publish regular and accurate disclosure concerning the company's financial situation, performance, ownership and governance that includes, among other things, company objectives and non-financial information in accordance with high quality standards including policies and performance relating to business ethics, the environment and, where material to the company, social issues, human rights and other public policy commitments; foreseeable risks factors including business conduct risks; and risks related to the environment; key issues relevant to employees and other stakeholders that may materially affect the performance of the company or that may have significant impacts upon them; and governance structures and policies, including the content of any corporate governance code or policy and the process by which it is implemented;
- Implement a corporate governance framework that ensures the strategic guidance of the company, the effective monitoring of management by the board, the board's accountability to the company and the shareholders and effective disclosures and communications to stakeholders; and
- Ensure that the board applies high ethical standards and takes into account the interests of stakeholders through the adoption, implementation and enforcement of company-wide codes of conduct that serve as a standard for conduct by both the board and key executives and set the framework for the exercise of judgement in dealing with varying and often conflicting constituencies.

Source: Organisation for Economic Co-operation and Development, G20/OECD Principles of Corporate Governance, (Paris: OECD Publishing, 2015) http://dx.doi.org/10.1787/9789264236882-en

The codes of conduct referred to above began to appear during the 1990s, often adopted by large companies with a strong presence in developing economies with weak state-based regulatory systems and companies engaged in sectors where brand reputation and export orientation were critical (e.g., apparel, sporting goods, toy and retail sectors, oil, chemicals, forestry and mining).[127] In general, these codes addressed corporate ethics, moral guidelines, and key CSR issues like human rights, labor, the environment and sustainable development.[128] Notably, the codes generally extended outward to include supply chain participants and included restrictions on doing business with suppliers that did not respect workers' rights (e.g., freedom of association) and ensure fair pay and treatment for their workers. Suppliers were also expected to support sustainability and use ethical practices to ensure their product quality and processing efficiency (e.g., refrain from using child labor and provide for environmentally-friendly manufacturing methods). In many cases, companies supplemented their codes by providing training programs for suppliers and creating mandatory environmental management systems.[129]

Codes of conduct have been criticized as tools used by corporations to pursue their own interests rather than public policy goals and for failing to actually improve corporate behavior worldwide absent accompanying changes in business culture and decision making.[130] Companies have also been criticized for creating codes of conduct that are complex and difficult to interpret and then ignoring them in practice or failing to ensure that they are prioritized through proactive communications from the independent directors and the members of the senior executive team.[131] In turn, proponents of codes of conduct argue that the codes can positively affect sales, purchasing and recruitment of new staff, secure the company's reputation, create innovation, increase motivation among their employees and improve risk management and compliance, all of which ultimately leads to the increased sustainability of their company.[132] Codes of conduct have also been praised for their potential positive impact on internal governance including clarification of the company's mission, values and principals and their value as a guide and source of reference for the day-to-day decision making of employees.

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[127] Id. at 29 (citing H. Arthurs, "Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation", Labour Law in an Era of Globalisation: Transformative Practice and Possibilities (2005), 471; and United Nations Research Institute for Social Development, Corporate Social Responsibility and Business Regulations: How should Transnational Corporations be Regulated to Minimise Malpractice and Improve their Social, Environmental and Human Rights Record in Developing Economies? (2004), available at www.unrisd.org at 29 June 2010).

[128] E. Wymeersch, "Corporate Governance Codes and their Implementation" (Gent University, 2006).

[129] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 29-30.

[130] Id. at 30 (citing A. Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct", Indiana Journal of Global Legal Studies, 8 (2000), 401; and R. Locke and M. Romis, Beyond Corporate Codes of Conduct: Work Organisation and Labour Standards in Two Mexican Garment Factories (2006)).

[131] See, e.g., P. Smalera, "The valley's mess: why codes of conduct don't work", Fortune (September 1, 2010)

[132] M. Rahim, Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy (Berlin: Springer, 2013), 13, 31.

Rahim noted that another trend in self-regulation has been the growing attention to non-financial reporting, a trend that began in the 1990s in response to a series of environmental disasters and continued thereafter to expand to include a wider range of corporate policies and CSR-related issues.[133] At the beginning, these reports primarily focused on informing the public of the company's existing CSR policies; however, as time went by companies began to use the reporting process as a means for creating channels of communication with their stakeholders. As this so-called sustainability reporting has become more sophisticated, incorporating metrics to be used to track the company's CSR performance, it has become a driver of corporate governance practices and pushes boards toward considering and incorporating better mechanisms for long-term accountability to their constituencies. While sustainability reporting has been largely voluntary, there is now a trend among legislators and regulators to require such reporting alongside traditional disclosures of financial results.

Rahim noted that both codes of conduct and non-financial reporting have been significantly influenced by external stakeholders eager to be involved in the formulation of codes and reporting practices and "supervise" the way in which businesses have chosen to self-regulate their CSR activities. One important byproduct of all of this has been the development of a "standardization regime" (i.e., "an agreement based on the principles that guide the standards of activities") in both areas including multi-stakeholder codes and principles used as guidelines for codes of conduct and reporting frameworks, such as the Global Reporting Initiative, available for consultation in presenting the content and results of CSR initiatives and programs.[134] Rahim explained that the multi-stakeholder initiatives involved companies, trade unions and other workers' associations, government agencies, NGOs and academics and included not only a framework of rules and guidelines for operations but also mechanisms for monitoring and verification and evaluation of the CSR performance of companies.

While standardization arguably undermines the latitude of businesses as to how they "self-regulate", it does allow companies to demonstrate, through accepted performance measurement and reporting standards, their efforts towards fulfilling their social, economic, environmental and ethical responsibilities.[135] Standardization also makes it easier to companies to implement certain CSR initiatives. For example, Goyder and Desmond argued that companies that have integrated standards into their selection and management of strategic suppliers will be able to reduce their transaction costs, increase their profitability, reduce costs as a result of a reduced need to switch suppliers and increase their competitiveness in the marketplace through improved relationships with the

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[133] Id. at 31. For further discussion of the evolution of voluntary sustainability reporting, see A. Kolk, "Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices", Business Strategy and the Environment, 17(1) (2008), 1; D. Hess, "Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency", Business Ethics Quarterly, 17 (2007), 455, 458; and J. Elkington, The Triple Bottom Line for 21st-Century Business, The Earthscan Reader in Business and Sustainable Development (2001).
[134] Id. at 32.
[135] Id. at 33.

ultimate consumers of their products.[136]

Williams explained the tensions between proponents of the traditional shareholder-focused model of corporate governance and those who have pushed the emerging stakeholder view of the corporation:

> "In important respects corporate responsibility is both too strong and too weak: too strong an assertion of a social role for the corporation and its directors to coexist comfortably with the view of the purely economic role of the corporation within shareholder-focused corporate governance systems, and yet too weak for academics taking a stakeholder view of the corporation who are concerned with global problems they view companies as having helped to create, including climate change, environmental degradation, exploitative labor conditions and worsening economic inequality."[137]

Williams noted that some stakeholder theorists have argued that the current version of "corporate responsibility", which generally emphasizes disclosure and voluntarism, is too modest and has failed to make a significant impact on addressing human rights issues, many of which remain in an extreme form all around the world in the communities in which corporations continue to pursue their profit-making strategies.[138] These theorists believe that even though much is made of the "business case" for "voluntary" corporate responsibility (i.e., acting responsibly enhances the "intangible" value of the corporation, which has been estimated to account for anywhere from 70% to 80% of total market value, by improving brand reputation and goodwill and creating intellectual property necessary for innovation), the reality is that substantial economic disincentives remain for corporations and that they are likely to be unwilling to incur higher labor costs and/or make expensive investments in pollution abatement unless there is a supportive regulatory framework that creates a level playing field for competition (i.e., all of the participants in the market will be required by law to increase wages and reduce the harm that their activities cause to the environment).[139]

After evaluating the arguments made by proponents of both the shareholder and stakeholder perspective, Williams pointed out that the proposition that corporations should stay out of the politics associated with making social policies made no real sense in a world in which businesses spend heavily on lobbying, litigating to narrow and adapt

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[136] Id. at 34 (citing M. Goyder and P. Desmond, Is Ethical Sourcing Simply a Question of Good Supply Chain Management?", Visions of Ethical Sourcing (2000), 28).
[137] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 4, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784.
[138] Id. at 39.
[139] Id. at 40. Williams also noted that the business case for corporate responsibility depends on several other assumptions that have yet to be empirically confirmed such as consumers being willing to pay more for goods produced in socially-responsible fashion, employees being selective about where they will work and choosing only the most responsible employers, and investors generally investing and disinvesting based on social parameters; however, as time goes by more and more studies are appearing that provide support for the reasonableness of these assumptions.

regulations to their benefit and contributing to electoral campaigns.[140] As for the concerns about self-interested actions of directors if the stakeholder view was adopted, Williams stated that "the prioritizing of shareholders' interests as it has been instantiated in the U.S. over the last three decades has itself masked self-interest and created new agency problems" and explained that stock option compensation that rewards managers for taking a short-term perspective has enriched executives while doing little to improve underlying corporate value.[141] In addition, the need to appease activist investors has pushed management to engage in share buy-backs or special dividends, sales of premium assets, ill-advised mergers and acquisitions and increasing leverage that generally destroy longer-term value and cripple the ability of the corporation to invest in the sustainability of the business. Moreover, the push to drive share prices upward has driven management of many businesses to engage in shady financial reporting practices.[142]

Williams then turned to the law relating to corporate governance itself, beginning with the long-standing argument that directors' fiduciary duties flowed only to the shareholders and thus prohibited consideration of the interests of other constituencies. If this were true then the stakeholder perspective was out of the question, barring a fundamental shift in duties that would presumably require legislative action. On that point, Williams provided the following interpretation of the precedents of decisions by the Delaware Supreme Court from 1992 to 2004 by that Court's former Chief Justice:

> "[I]t is important to keep in mind the precise content of this "best interests" [of the corporate entity] concept—that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of stockholders [citing Revlon and Paramount Comms. v. QVC]. But, in general, the directors owe fiduciary duties to the corporation, not to the stockholders. (Emphasis added)"[143]

Williams also argued that scholars such as Stout were correct that "the protection of the business judgment rule allows directors to make decisions that are in the longer-term interests of the corporation, such as investing in research and development, building new plants, or paying employees well, notwithstanding some shareholders who would rather have the company's money spent on them".[144] The upshot of this position is that directors should not fear liability for breach of their fiduciary duties if they take actions that arguably frustrate the short-term interests of certain shareholders, such as pay

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[140] Id. at 44.
[141] Id. at 49-50.
[142] Id. at 50-51.
[143] Id. at 47 (citing E. Norman Veasey and C. DiGuglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004?: A Retrospective on Some Key Developments", University of Pennsylvania Law Review, 153 (2005), 1399, 1431).
[144] Id. at 47 (citing L. Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public (2010)).

employees more than the minimum wage required by law or reducing the prices on certain of its products so that more employees could buy those products.[145]

Based on her review of the case law and the opinions of a variety of scholars, Williams concluded that "… shareholders are important beneficiaries of fiduciary obligations in Delaware, of course, but only so long as their interests and the corporation's long-term interests are in harmony. Corporate responsibility initiatives are one type of strategy to promote the corporation's long-term financial well-being, as the empirical evidence shows, and thus there is no fiduciary breach".[146] Williams praised the corporate responsibility initiatives for the many ways in which they had improved conditions of employment, brought attention to environmental problems and motivated firms to develop innovative products and solutions to address these problems, and noted the empirical evidence that responsibility is generally a good business strategy; however, she cautioned that "corporate responsibility does not fundamentally change underlying power relationships between companies and citizens"; that companies can volunteer to act to address social and environmental problems—or not; and that corporate responsibility may dissuade governments from regulating, thus leaving gaping holes into which corporations may decide to march at great cost to the environment and the lives of millions of people around the world.[147] Williams also noted that while economic development has improved the overall standard of living, billions of people would benefit from greater access to productive enterprise and it is important that the underlying normative and material conditions of that access matter be managed properly, a role that should not be left to corporations themselves.

For Williams, the solution was to seriously consider more "hard law" regulating social responsibility, thus giving directors more guidance for decisions in the area and satisfying those who have complained that corporate responsibility based primarily on disclosure is too weak, and she suggested that the best place to look for guidance would be the self-regulatory initiatives that businesses had already chosen to participate in.[148] More regulation is allowed by economic theory when necessary to address market failures such as the negative externalities associated with irresponsible behavior of businesses and, as Williams pointed out, "[e]ven Friedman believed that business has an obligation to conform 'to the basic rules of the society, both those embodied in law and those

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[145] Id. at 48. Henry Ford's decision to reduce the cost of the cars sold by Ford Motor Company, in part so that more of its employees could buy them, was the fact pattern in the much discussed case of Dodge v. Ford, 204 Mich. 459, 170 N.W. 668 (1919). In that case, the Michigan Supreme Court provided the oft-quoted language in its opinion that "[a] business corporation is organized and carried on primarily for the profit of its stockholders"; however, Williams pointed out that the quote was dicta and that the Court ultimately refused to enjoin Ford's plans, finding them to fall within the protected scope of the business judgment rule. Williams argued that the opinion of the Court could be cited as support for the view that "there is great latitude for company directors to act to promote the welfare of their employees, the communities in which they operate, their customers and suppliers, or even the environment, but only so long as there is a plausible justification for how that advances the company's long-term financial well-being". Id.

[146] Id. at 49.

[147] Id. at 54-55.

[148] Id. at 53.

embodied in ethical custom'".[149] In addition, actions by governments to make environmental and social responsibility a legal obligation for businesses may be necessary in order to ensure that the positive changes associated with corporate responsibility become sustainable.

§8 Investor interest in CSR and sustainability

Customers, employees and corporate activists, including socially conscious investors, have been focusing on issues now commonly associated with CSR and corporate sustainability for several decades, particularly in the areas of environmental protection and human rights; however, CSR has taken on a new urgency for corporate directors and managers as institutional investors, including large public pension funds, have become more interested in, and concerned about, environmental protection, human rights, health and safety and diversity and have shown greater appreciation for the benefits of pursuing corporate sustainability as opposed to only rewarding short-term profitability. The submission by the BT Governance Advisory Service to the Australian Parliamentary Joint Committee on Corporations and Financial Services in 2006 provided an illustration of how and why institutional investors seek out companies that understand the need for a longer term approach to risk:

> "Long term investors expect organizational decision makers to have a regard for the interests of stakeholders other than shareowners when those stakeholder interests have the capacity to influence shareowners' interests. We believe that companies that manage their stakeholders' interests are managing their shareowners' interests, especially over the long-term. This arises from the fact that risks to companies arise not just from typical financial risks but also from regulatory, community and litigation risks."[150]

Sustainability has become an important issue for the major institutional investors and asset managers and the marketplace is seeing an increase in smaller, more specialized investment funds that are primarily oriented toward providing capital to companies that excel in their environmental, social and governance ("ESG") practices and which focus on ESG-oriented activities such as climate change and impact investing. The goal of investors is to encourage their portfolio companies to contribute to the successful pursuit of environmental and social outcomes which continuing to provide investors with a suitable financial return.

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[149] Id. at 52 (citing M. Friedman, "The Social Responsibility of Business is to Increase its Profits", New York Times Magazine (September 13, 1970), 6). See also Section 2.01(b) of the American Law Institute's Principles of Corporate Governance and Structure: Analysis and Recommendations, which provides that: "Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: (1) is obliged, to the same extent as a natural person, to act within the boundaries set by law; (2) may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and (3) may devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes."

[150] Parliamentary Joint Committee on Corporations and Financial Services, Corporate responsibility: Managing risk and creating value (2006), 68.

A number of factors have contributed to the surge in the interest of investors in corporate sustainability and the ESG practices of their portfolio companies[151]:

- Recognition in the financial community that ESG factors play a material role in determining risk and return;
- Understanding and acceptance that incorporating ESG factors is part of investors' fiduciary duty to their clients and beneficiaries;
- Concern about the impact of short-termism on company performance, investment returns and market behavior;
- Increased legal requirements protecting the long-term interests of beneficiaries and the wider financial system;
- Pressure from competitors seeking to differentiate themselves by offering responsible investment services as a competitive advantage;
- Increasing activism of beneficiaries who are demanding transparency about where and how their money is being invested; and
- Concern regarding value-destroying reputational risk associated with environmental and social issues such as climate change, pollution, working conditions, employee diversity, corruption and aggressive tax strategies in a world of globalization and social media.

A reported prepared by The Conference Board in November 2017 highlighted several important market and regulatory drivers of increased ESG activism among institutional investors.[152] First, there seems to be a clear shift in expectations among institutional investors' own shareholders with respect to ESG voting and engagement and institutional investors must now contend with the demands of their shareholders to support environmental and social proposals in line with their fiduciary duties. Second, in 2015 the US Department of Labor amended its guidelines interpreting the "prudent investor" standard for Employee Retirement Income Security Act ("ERISA") fiduciaries to affirm that although ERISA does not allow fiduciaries to sacrifice the economic interests of their beneficiaries to promote public policy goals, fiduciary duties do permit consideration of ESG factors in investment analysis and voting practices when necessary to advance beneficiaries' economic interests.[153] The DOL's change in position aligned the US with guidelines that had already been approved in a growing number of other countries that directly endorsed or encouraged public pension funds and other investment fiduciaries' incorporation of ESG considerations in investment analysis.[154] Third, consortiums of

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[151] https://www.unpri.org/about/what-is-responsible-investment

[152] V. Harper Ho, Director Notes: Sustainability in the Mainstream--Why Investors Care and What It Means for Corporate Boards (The Conference Board, November 2017), 10-12, electronic copy available at: https://ssrn.com/abstract=3080033 (based on information available at UNPRI, Signatories, https://www.unpri.org/signatory-directory/).

[153] Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments, 29 C.F.R. § 2509.15-01 (October 26, 2015). The guidance in effect prior to October 26, 2015, which had been in place since 2008, generally prohibited ERISA from selecting investments on the basis of any non-economic factors. Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61,734 (October 17, 2008).

[154] According to the Report, many jurisdictions in the midst of changing their conceptions of fiduciary duty to permit, or even impose a positive duty on, investors to incorporate financially material ESG factors into

investors are being formed to exert influence on their peers to promote better oversight of ESG risk. One example is the voluntary Framework of US Stewardship and Governance formed in 2017 by a group of institutional investors representing over $20 trillion in US equity investments to encourage investors "to continue to engage directly with companies and to make their proxy voting and engagement practices and policies more transparent as part of a balanced approach to corporate and shareholder accountability".[155]

The consensus today among institutional investors is that "corporate sustainability" is no longer limited to the environmental practices of the company, but should be broadly construed to include all of the challenges that should be overcome--economic, environmental and social--and all of the actions that should be taken in order for the corporation's business model to survive and thrive currently and into the future. The President and CEO of State Street Global Advisors ("SSGA") has informed the directors of SSGA's portfolio companies that SSGA defines sustainability "as encompassing a broad range of environmental, social and governance issues that include, for example, effective independent board leadership and board composition, diversity and talent development, safety issues, and climate change."[156]

The potential benefits to institutional investors have been highlighted by the Conference Board, which has argued that CSR enhances market and accounting performance, lowers the cost of capital, improves business reputation, and fosters new revenue growth when it is channeled toward product innovation.[157] Similarly, the Chairman and CEO of BlackRock, Inc., the largest asset manager in the world, wrote in his 2016 Annual Letter to the CEOs of BlackRock's portfolio companies that "[o]ver the long-term, environmental, social and governance (ESG) issues—ranging from climate change to diversity to board effectiveness—have real and quantifiable financial impacts".[158] While many investors argue that focusing on corporate sustainability is necessary in order for companies to identify and mitigate the risks to current operations due to climate change, shortages of natural resources and ignoring basic human rights issues, investors also believe that developing and implementing innovating solutions to environmental problems, improving workplace conditions and forging strong relationships with local communities will lead to better economic performance for the business.

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their investment decision making. Sources cited included UNEP-FI, A legal framework for the integration of environmental, social, and governance issues into institutional investment (2005), http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf; UNEP-FI, Fiduciary Duty in the 21st Century (2015), http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf; and OECD, Investment governance and the integration of environmental, social, and governance factors, (2017), 48-50.

[155] Investor Stewardship Group, "Framework for U.S. Stewardship and Governance", https://www.isgframework.org/. Stewardship codes have also been introduced in a number of foreign countries as a means for encouraging or requiring institutional investors as asset owners or managers to disclose how their investment strategy contributes to the medium and long-term performance of the investor's assets.

[156] Letter from Ronald P. O'Hanley, President and CEO, SSGA, to Board Members, 1-2 (January 26, 2017), available at ssga.com.

[157] M. Tonello, Corporate Investment in ESG Practices (The Conference Board, Inc.: August 5, 2015).

[158] Annual Letter from Larry Fink, Chairman and CEO, BlackRock, to CEOs (February 1, 2016), available at blackrock.com.

Investors are embracing "responsible investment", which has been described in the Principles for Responsible Investment (https://www.unpri.org/about/the-six-principles) backed by the United Nations ("PRI") as "an approach to investing that aims to incorporate environmental, social and governance ("ESG") factors into investment decisions, to better manage risk and generate sustainable, long-term returns". Investors that have committed to adherence to the PRI have undertaken to incorporate ESG issues into their investment analysis and decision making processes, be "active owners" of the companies in which they invest, incorporate ESG issues into their own ownership policies and practices, seek appropriate disclosure on ESG issues from their portfolio companies and report on their own activities and progress toward implementing the Principles. The PRI are based on the assumption that institutional investor have a fiduciary duty to act in the best long-term interests of their beneficiaries and that ESG issues can affect the performance of investment portfolios and must be attended to in order for the investors, and their portfolio companies, to improve their risk management and generate sustainable, long-term returns. In other words, attention to ESG not only helps investors achieve better long-range investment returns, thereby meeting the goals of their beneficiaries, but also aligns investor priorities with broader societal goals.

The Principles for Responsible Investment

The Principles for Responsible Investment ("PRI"), which is supported by, but not part of, the United Nations, considers itself to be the world's leading proponent of responsible investment. The PRI has explained its work as understanding the investment implications of environmental, social and governance ("ESG") factors and supporting its international network of investor signatories in incorporating these factors into their investment and ownership decisions. Signatories to the PRI commit to the following six principles and the accompanying possible actions for incorporating ESG issues into their investment analysis and decision making processes and their relationships with portfolio companies:

Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.

Possible actions:

- Address ESG issues in investment policy statements.
- Support development of ESG-related tools, metrics, and analyses.
- Assess the capabilities of internal investment managers to incorporate ESG issues.
- Assess the capabilities of external investment managers to incorporate ESG issues.
- Ask investment service providers (such as financial analysts, consultants, brokers, research firms, or rating companies) to integrate ESG factors into evolving research and analysis.
- Encourage academic and other research on this theme.
- Advocate ESG training for investment professionals.

Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices.

Possible actions:

- Develop and disclose an active ownership policy consistent with the Principles.
- Exercise voting rights or monitor compliance with voting policy (if outsourced).
- Develop an engagement capability (either directly or through outsourcing).
- Participate in the development of policy, regulation, and standard setting (such as promoting and

protecting shareholder rights).

- File shareholder resolutions consistent with long-term ESG considerations.
- Engage with companies on ESG issues.
- Participate in collaborative engagement initiatives.
- Ask investment managers to undertake and report on ESG-related engagement.

Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest.

Possible actions:

- Ask for standardized reporting on ESG issues (using tools such as the Global Reporting Initiative).
- Ask for ESG issues to be integrated within annual financial reports.
- Ask for information from companies regarding adoption of/adherence to relevant norms, standards, codes of conduct or international initiatives (such as the UN Global Compact).
- Support shareholder initiatives and resolutions promoting ESG disclosure.

Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.

Possible actions:

- Include Principles-related requirements in requests for proposals (RFPs).
- Align investment mandates, monitoring procedures, performance indicators and incentive structures accordingly (for example, ensure investment management processes reflect long-term time horizons when appropriate).
- Communicate ESG expectations to investment service providers.
- Revisit relationships with service providers that fail to meet ESG expectations.
- Support the development of tools for benchmarking ESG integration.
- Support regulatory or policy developments that enable implementation of the Principles.

Principle 5: We will work together to enhance our effectiveness in implementing the Principles.

Possible actions:

- Support/participate in networks and information platforms to share tools, pool resources, and make use of investor reporting as a source of learning.
- Collectively address relevant emerging issues.
- Develop or support appropriate collaborative initiatives.

Principle 6: We will each report on our activities and progress towards implementing the Principles.

Possible actions:

- Disclose how ESG issues are integrated within investment practices.
- Disclose active ownership activities (voting, engagement, and/or policy dialogue).
- Disclose what is required from service providers in relation to the Principles.
- Communicate with beneficiaries about ESG issues and the Principles.
- Report on progress and/or achievements relating to the Principles using a comply-or-explain approach.
- Seek to determine the impact of the Principles.
- Make use of reporting to raise awareness among a broader group of stakeholders.

Source: https://www.unpri.org/about/the-six-principles

Pronouncements regarding the importance of CSR by institutional investors are tremendously impactful on the decisions made by management since those investors are among the largest shareholders of the companies they follow. CEOs must be mindful of surveys showing that CSR issues play a pivotal role in investment decisions for 90% of investors.[159] The BlackRock Chairman's 2017 Annual Letter to CEOs put the executive leaders of BlackRock's portfolio companies on notice that they would be expected to consider sustainability of operations, environmental factors that affect the business, and the company's role as a member of the community.[160] State Street Global Advisors ("SSGA"), in a letter from its President and CEO to the directors of its portfolio companies, has made it clear that SSGA believes that CSR issues can have a material impact on a company's ability to generate revenues over the long term and that whether the companies "clearly [communicate] their approach to sustainability and its influence on strategy" impacts how they will be classified by SSGA.[161] A few days earlier, SSGA announced that it would consider the following issues when evaluating companies' CSR and corporate sustainability efforts and the actions of board members in overseeing and management and setting long-term strategy[162]:

- The company has identified the sustainability issues material to the business.
- The company has analyzed and incorporated sustainability issues, where relevant, into its long-term strategy.
- The company considers long-term sustainability trends in capital allocation decisions.
- The board is equipped to adequately evaluate and oversee the sustainability aspects of the company's long-term strategy.
- The company's reporting clearly articulates the influence of sustainability issues on strategy.
- The board incorporates key sustainability drivers into performance evaluation and compensation programs.

SSGA has also opined: "Today's investors are looking for ways to put their capital to work in a more sustainable way, one focused on long-term value creation that enables them to address their financial goals and responsible investing needs. So, for a growing number of institutional investors, the environmental, social and governance (ESG) characteristics of their portfolio are key to their investment strategy."[163] In the same vein, an article distributed by the consulting firm PwC in October 2016 noted that "[m]ore and more, stakeholders are considering environmental, social and governance (ESG) factors when they evaluate a company's strategy, risk profile, and ultimately, its plan for creating

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[159] Tomorrow's Investment Rules: Global Survey of Institutional Investors on Non-Financial Performance, 5 (Ernst & Young, 2014).
[160] Annual Letter from Larry Fink, Chairman and CEO, BlackRock, to CEOs (January 24, 2017), available at blackrock.com.
[161] Letter from Ronald P. O'Hanley, President and CEO, SSGA, to Board Members, 1-2 (January 26, 2017), available at ssga.com.
[162] SSGA, Incorporating Sustainability Into Long-Term Strategy (January 23, 2017), available at ssga.com.
[163] SSGA, Performing for the Future: ESGs Place in Investment Portfolios Today and Tomorrow (2017), available at ssga.com.

long-term value".[164] The Forum for Responsible and Sustainable Investment (www.ussif.org) provided further insights on changing investor motivations leading to the surging interest in sustainable, responsible and impact ("SRI") investment:

> "There are several motivations for sustainable, responsible and impact investing, including personal values and goals, institutional mission, and the demands of clients, constituents or plan participants. Sustainable investors aim for strong financial performance, but also believe that these investments should be used to contribute to advancements in social, environmental and governance practices. They may actively seek out investments—such as community development loan funds or clean tech portfolios—that are likely to provide important societal or environmental benefits. Some investors embrace SRI strategies to manage risk and fulfill fiduciary duties; they review ESG criteria to assess the quality of management and the likely resilience of their portfolio companies in dealing with future challenges. Some are seeking financial outperformance over the long term; a growing body of academic research shows a strong link between ESG and financial performance."[165]

As for the specific CSR and corporate sustainability issues that are most important to investors, and which should therefore be priorities for directors and members of the executive team, reference can be made to surveys of CSR-related shareholder proposals compiled by organizations such as the Institutional Shareholder Services Inc. ("ISS") Governance Analytics Database. In 2016 and early 2017, for example, the most popular topics among shareholder activists included lobbying disclosure, climate change reporting, political contributions disclosure, gender pay gap disclosure and sustainability reporting, a list that highlighted a decided shift in shareholder engagement toward sustainability and away from some of the issues that had dominated in previous years such as proxy access.[166] A little more than half of the CSR-related shareholder proposals submitted to companies in 2016 were actually voted upon since some did not meet the criteria for voting established by the company and others were removed from the ballot before the meeting based on undertakings by the company following engagement with the proponents of the proposal to voluntarily provide expanded CSR-related disclosures. Average support for those proposals that were voted upon was around 20%; however, nine proposals focusing on the following topics received majority support: board diversity, political contributions disclosure, methane emissions management, sustainability reporting, animal welfare, prohibition of sexual orientation and gender identity discrimination and gender pay gap disclosure. Companies can gather further insights by closely reviewing the proxy materials of other firms in their industry and the

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[164] http://www.pwc.com/us/ne/governance-insights-center/publications/esg-environmental-socai-governance-reporting.html,

[165] https://www.ussif.org/sribasics. The Forum for Responsible and Sustainable Investment is a valuable online resource with information and educational materials on sustainable and responsible investing trends, performance and sustainable investment, proxy voting, shareholder proposals and community investing.

[166] H. Gregory, "Corporate Social Responsibility, Corporate Sustainability and the Role of the Board", Practical Law Company (July 1, 2017), 5-6 (citing Institutional Shareholder Services Inc., United States 2016: Proxy Season Review—Environmental and Social Issues (October 26, 2016), available at isscorporatesolutions.com (subscription required)).

published voting records and pronouncements of their major institutional investors.

In the 2017 proxy season, shareholders at ExxonMobil, Occidental Petroleum, and PPL Corp. voted by overwhelming majorities in favor of proposals urging these boards to assess and report on the financial risks their companies face as a result of climate-related regulation. These proposals passed with the support of BlackRock, State Street Global Advisors, and Vanguard, all of whom have voting and investment policies that include environmental, social, and governance ("ESG") considerations and risk assessment. In 2017, Fidelity followed suit and revised its proxy voting guidelines to state that it "may support shareholder proposals calling for reports on sustainability, renewable energy and environmental impact issues" as well as proposals on board and workplace diversity.[167]

The published voting guidelines of ISS for the 2017 proxy season reflected the growing support among institutional investors for ESG-related proposals. Among other things, the guidelines called for generally supporting resolutions requesting that a company disclose information on the risks related to climate change on its operations and investments, such as financial, physical, or regulatory risks; generally voting for proposals requesting that a company report on its policies, initiatives, and oversight mechanisms related to social, economic, and environmental sustainability; and supporting proposals seeking reports of company's efforts to respond on a range of ESG issues, including climate impact mitigation, board and workplace diversity. Proposals that called for the adoption of GHG reduction goals from products and operations were to be considered on a case-by-case basis and proposals seeking a company's endorsement of social/environmental issue principles that support a particular public policy position were opposed.[168]

Institutional investors are themselves under increasing pressure from their own investors, as well as peers, activist groups and non-governmental organizations, to proactively embrace CSR and corporate sustainability. For example, in 2006 investors with over $2 trillion in assets under management pledged to commit to the UN Principles for Responsible Investment ("PRI"), which require that environmental, social and governance issues be incorporated into investment analysis and decision making and that shareholders committed to the Principles proactively engage their portfolio companies regarding CSR and corporate sustainability issues and goals. At the time the Principles were first announced, the then-UN Secretary General observed:

> "In signing on to these principles, you are publicly committing yourselves to adopt and live up to them. And you are expressing your intent to channel finance in ways that encourage companies and other assets to demonstrate corporate responsibility and sustainability. In short, you have given a vote of confidence to

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[167] V. Harper Ho, Director Notes: Sustainability in the Mainstream--Why Investors Care and What It Means for Corporate Boards (The Conference Board, November 2017), 2, electronic copy available at: https://ssrn.com/abstract=3080033. See also V. Harper Ho, "'Comply or Explain' and the Future of Nonfinancial Reporting", Lewis & Clark Law Review, 21 (2017), 318; and V. Harper Ho, "Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk", Journal of Corporate Law, 41 (2016), 648.

[168] https://www.issgovernance.com/file/policy/2017-us-summary-voting-guidelines.pdf, 57-63.

corporate responsibility – not as a luxury, not as an afterthought, not as a goal to be achieved someday, but as an essential practice today."[169]

By 2016, more than half of all publicly traded debt and equity worldwide was held by investors who were signatories to the PRI, and US signatories accounted for nearly 20% of the total participation and included both traditional backers of environmental and social proposals and mainstream investment companies like BlackRock, Fidelity, State Street and Vanguard.[170] Not to be forgotten is that in addition to the assets managed by these well-known mainstream investors, more than 20% of all assets under management in the US were invested based on sustainable, responsible or impact investing strategies.[171]

A survey of whether institutional investors affected a firm's commitment to CSR for a large sample of firms from 41 countries over the period 2004 through 2013 found that institutional ownership was positively associated with firm-level environmental and social commitments.[172] A July 2017 report issued by US SIF Foundation indicated that managers of $8.72 trillion of the overall total of $40 trillion assets under management in the US, about 22%, included sustainability in their investment decision making.[173] A November 2017 reported by The Conference Board stated that surveys of institutional investors by major consulting firms since at least 2014 have found, on average, that 70% to 80% saw ESG information as important or essential to their investment analysis.

§9 Long-termism

Interest in CSR and corporate sustainability among institutional investors has logically been accompanied by a sharper focus on whether and how companies are adopting the long-term perspective necessary for committing resources to projects that will likely have the highest value to the business at some point beyond the traditional short-term performance window. A study published in 2017 by the McKinsey Global Institute claimed to provide systematic evidence that companies that adopted a "long-term approach" outperformed companies that emphasized the short-term strategies typically associated with maximizing shareholder value on a range of key economic and financial metrics including

[169] Ban Ki Moon, UN Secretary General Speech at the NYSE announcing the UN Principles for Responsible Investment (April 26, 2006).

[170] V. Harper Ho, Director Notes: Sustainability in the Mainstream--Why Investors Care and What It Means for Corporate Boards (The Conference Board, November 2017), 3 and Table 1, electronic copy available at: https://ssrn.com/abstract=3080033 (based on information available at UNPRI, Signatories, https://www.unpri.org/signatory-directory/).

[171] Id.

[172] A. Dyck, K. Lins, L. Roth and H. Bocconi, "Do Institutional Investors Drive Corporate Social Responsibility? International Evidence" (November 18, 2015). Interestingly, the researchers found that while domestic institutional investors and non-U.S. foreign investors accounted for the identified positive associations, U.S. institutional investors' holdings are not related to environmental and social scores. Similarly, higher scores are associated with long-term investors such as pension funds but not with hedge funds.

[173] http://www.ussif.org/files/Infographics/Overview%20Infographic.pdf

revenue and earnings, investment, market capitalization, and job creation.[174]

Institutional investors have identified long-term corporate strategy and aligning compensation and management incentive to promote long-termism as key topics for engagement with their portfolio companies. For example, over 100 companies from around the world have signed on to the "Compact for Responsive and Responsible Leadership A Roadmap for Sustainable Long-Term Growth and Opportunity", which has been sponsored by the International Business Council of the World Economic Forum as a means for corporations, their chief executive officers and boards of directors, as well as leading investors and asset managers to create a corporate governance framework with a focus on the long-term sustainability of corporations and the long-term goals of society. The Compact calls on companies to commit to[175]:

- Ensuring the board oversees the definition and implementation of corporate strategies that pursue sustainable long-term value creation.
- Encouraging periodic review of corporate governance, long-term objectives and strategies at the board level as well as clear communication between corporations, investors and other stakeholders about the outcomes.
- Promoting meaningful engagement between the board, investors and other stakeholders that builds mutual trust and effective stewardship, and promotes the highest possible standards of corporate conduct.
- Publicly supporting the adoption of the Compact and implement policies and practices within my organization that drive transformation towards the adherence to long-term strategies and sustainable growth for the benefit of all stakeholders.

Similarly, the corporate governance principles for US listed companies endorsed by the Investor Stewardship Group include guidance that boards should develop management incentive structures that are aligned with the long-term strategy of the company.[176]

One interesting approach to instilling long-termism into mainstream corporate governance is the call for the creation of a "Long-Term Stock Exchange" (www.ltse.com) which would supplement existing requirements imposed by the Securities and Exchange Commission and other exchange regulators with additional conditions such as tenured shareholder voting power (i.e., permitting shareholder voting to be proportionately weighted by the length of time the shares have been held), mandated ties between executive pay and long-term business performance and disclosure requirements informing companies who their long-term shareholders are and informing investors of what companies' long-term investments are.[177]

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[174] Discussion Paper: Measuring the Economic Impact of Short-Termism (McKinsey Global Institute, February 2017), available at file:///C:/Users/Alan/Downloads/MGI-Measuring-the-economic-impact-of-short-termism.pdf

[175] http://www3.weforum.org/docs/Media/AM17/The_Compact_for_Responsive_and_Responsible_Leadership_09.01.2017.pdf

[176] https://www.isgframework.org/corporate-governance-principles/

[177] M. Lipton, S. Rosenblum, K. Cain, S. Niles, V. Chanani and K. Iannone, "Some Thoughts for Boards of Directors in 2018" (Wachtell, Lipton, Rosen & Katz, November 30, 2017), 7, accessible at http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.25823.17.pdf.

While sentiment for encouraging long-termism and promoting a broader range of stakeholder interests has been around in some form for decades, the attacks on the primacy of shareholder value creation have never been as strident and are likely to accelerate in the future and become a permanent fixture among governance issues. Politicians in more than 30 states and the District of Columbia have formalized the constituency theory by adopting statutes that permit the formation of "benefit corporations", a new form of for-profit corporation that explicitly expands the fiduciary duties of directors beyond maximizing shareholder value, which is still one of the primary goals of a corporation, to include consideration of whether or not the corporation's activities have an overall positive impact on society, their workers, the communities in which they operate and the environment. While the rate of adoption of benefit corporation status has been slow, particularly among public companies, the recognition of benefit corporations has contributed to sharpened focus on the separate interests of non-shareholder stakeholders and created a host of new issues and challenges for directors of all types of corporations such as how to measure and compare non-financial performance aspects of corporate activities; how to hold corporations accountable to stakeholders who do not have the rights to vote that are held by shareholders; and how to structure incentive packages for executives and managers tied to complex multi-stakeholder goals and commitments.

§10 Expectations for board oversight of sustainability

A discussion paper on board adoption and oversight of corporate sustainability prepared by The Global Compact LEAD included the following observation[178]:

> "Sustainability is increasingly recognized as a strategic imperative for businesses globally. Far more than when the Global Compact was launched in 1999, companies recognize that their sustainability performance affects their strategy, financial performance, resilience, access to essential resources, reputation, and license to operate. Peter Senge, noted strategy theorist and faculty member at the Sloan School of Business at MIT wrote in 2009 that "people are starting to suspect that these are really strategic issues that will shape the future of our businesses." And as sustainability is being recognized more and more as a strategic business question, Boards are increasingly considering sustainability as part of their core responsibility of guiding and overseeing corporate activities."

The paper also noted that: "more and more investors are looking for corporate boards to steward corporate sustainability in order to both adequately manage risks and maximize business opportunities related to sustainability. Indeed, engagement activities are on the rise in many quarters, and like- minded investors are increasingly pooling resources to create a stronger and more representative shareholder voice and to ensure that company

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[178] The Global Compact LEAD, Discussion Paper: Board Adoption and Oversight of Corporate Sustainability.

engagement becomes more effective.[179]

Calvert Asset Management, in its 2010 survey of board oversight of environmental and social issues in North America, explained the rationale for the board's role as follows:

> "The question of whether boards of directors should have responsibility for corporate sustainability matters is sometimes debated. Some critics of the idea argue that social and environmental issues are by their nature managerial and operational issues which makes them inefficient for the board to address. However, many investors have come to believe that these issues have implication for capital investments, corporate strategy, brand and reputation. From this perspective, boards of directors are the appropriate bodies to provide long-term perspective and guidance on these matters, and the absence of board responsibility can raise questions about whether a company is managing these factors appropriately. Conversely, board-level oversight of corporate responsibility can set a meaningful "tone at the top" and provide investors and other stakeholders with a deeper understanding of how the company assesses its challenges and prioritizes issues relevant to its success."[180]

A March 2014 study of board oversight of sustainability issues among S&P 500 companies commissioned by the IRRC Institute and authored by the Sustainable Investments Institute found that just a little over half of the companies had implemented board oversight of sustainability issues.[181] The sustainability executives surveyed in a report released by The Conference Board in June 2016 found that 55% of the respondents said that their boards of their companies met only once a year or never on sustainability issues and 69% of the respondents said that their boards spend four hours or less per year on sustainability issues.[182] Identifying, acknowledging and addressing corporate sustainability issues create new and significant challenges for directors and the management team that range from setting high-level goals and adopting strategies to achieve those goals to extensive changes in day-to-day operational activities. Directors must not only ensure that their companies are conducting full assessments of the entire lifecycle of their products and services but must also provide the resources and incentives to collect, analyze and report information relating to the progress of the company's corporate sustainability initiatives. Institutional investors and other stakeholders will not be satisfied with vague promises and aspirational principles from their companies, nor will companies be able to simply continue to adopt a reactive approach to ESG-related

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[179] Id. For further discussion of board oversight of sustainability, see "Board Oversight of Sustainability" in "Governance: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

[180] Board Oversight of Environmental and Social Issues: An Analysis of Current North American Practice (Calvert Asset Capital Management Inc. and The Corporate Library, 2010), 8.

[181] P. DeSimone, Board Oversight of Sustainability Issues: A Study of the S&P 500 (IRRC Institute, March 2014).

[182] The Seven Pillars of Sustainability Leadership: CEO Business Implications (The Conference Board, June 2016), 4 (as cited and discussed in V. Harper Ho, Director Notes: Sustainability in the Mainstream--Why Investors Care and What It Means for Corporate Boards (The Conference Board, November 2017), 15, electronic copy available at: https://ssrn.com/abstract=3080033).

concerns (i.e., waiting until a shareholder proposal on an ESG-topic is imminent before engaging with the shareholder to resolve the concern). In fact, directors should expect that stakeholders demand that companies demonstrate a proactive approach to developing and implementing sustainability strategies, allocating capital to sustainability-related initiatives and managing the risks associated with failure to respond to ESG issues.

Harper Ho suggested that investor activism around ESG issues and investors' growing demand growing demand for investment-grade ESG information has important implication for how directors should approach corporate governance, investor engagement, compliance and disclosure practices.[183] First of all, the broadened scope of risks that directors must consider in light of ESG activism means that boards must have new capacities to support oversight of ESG risk. Second, investors want their companies to integrate ESG performance metrics and long-term benchmarks into executive compensation. Third, directors should ensure that investor engagement encourages dialogue and learning and confirm that senior management and investor relations personnel are aware of the increasing overlap between corporate governance and environmental and social concerns. Finally, directors need to improve the quality and formatting of their sustainability-related reporting and ensure that ESG materiality is being considered as part of their company's financial reporting process. According to Harper Ho, companies that can improve their practices in these areas are likely to see improved financial and operational performance, improved focus on long-term risk and return, better access to "patient capital" (i.e., investors that are less fixated on quarterly earnings and more supportive of R&D and other investments in the company's future) and be able to identify and exploit new sources of value for the company and keep ahead of emerging risks and opportunities.[184]

CSR and corporate sustainability are broad and challenging topics and the directors must carefully consider how the board's duties and responsibilities will be discharged and allocated among board members. One well-known corporate governance advisor has counseled that directors should begin the process of developing an oversight framework for CSR and corporate sustainability by asking and answering the following questions[185]:

- How should concerns regarding CSR and corporate sustainability be integrated into the board's discussions on strategy and risk oversight? Strategy and risk oversight are two topics that all board members should be working on and actively discussing during each board meeting and investors are looking to see whether CSR and corporate sustainability have been formalized as priorities in the board's governance guidelines and overall goals.
- To what extent should CSR and corporate sustainability topics be included as standalone agenda items for board meetings?

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[183] V. Harper Ho, Director Notes: Sustainability in the Mainstream--Why Investors Care and What It Means for Corporate Boards (The Conference Board, November 2017), 13-14, electronic copy available at: https://ssrn.com/abstract=3080033 (based on information available at UNPRI, Signatories, https://www.unpri.org/signatory-directory/).

[184] Id. at 15.

[185] H. Gregory, "Corporate Social Responsibility, Corporate Sustainability and the Role of the Board", Practical Law Company (July 1, 2017), 3.

- What information should be provided to directors (e.g., data on how the company's efforts compare to those of its peer companies, leading industry standards, and the CSR-related priorities of key shareholders and proxy advisory firms)?
- Which metrics should the board and members of the executive team focus on in considering progress against CSR and corporate sustainability goals (e.g., goals involving reduction of water usage and emissions, reducing on-the-job injuries and employee turnover, or improving workforce diversity and employee retention)?
- What process should be used for drafting and reviewing public disclosures about the company's CSR and corporate sustainability efforts?

In addition, the board should also consider how the company's current efforts and activities with respect to CSR and corporate sustainability compare to its peers, how investors and other stakeholders perceive the company's engagement with and disclosure of CSR and corporate sustainability and whether or not the company has been effectively communicating its CSR and corporate sustainability strategies, goals and actions to investors and other stakeholders.[186]

Recognition of the importance of stakeholders in corporate governance calls on directors and managers of corporations to develop new skills in order to integrate the values and expectations of external and internal stakeholders into the overall strategic management process. Digman et al. pointed that strategic management is "inseparable from the strategic management of relationships" and Masuku advised: "A strategy should be in place for each stakeholder group their key issues and willingness to expend resources helping or hurting the organization on those issues must be understood. For each major stakeholder, managers responsible for that stakeholder relationship must identify the strategic issues that affect the stakeholder and must understand how to formulate, implement and monitor strategies for dealing with that group."[187]

In addition to the steps needed to integrate CSR and corporate sustainability at the board level, including allocating various responsibilities and activities among board committees, the directors need to ensure that the company has an effective internal organizational structure. Many companies are creating an additional position among the members of the senior executive team that is specifically focused on corporate sustainability. Appointing these "chief sustainability officers" demonstrates a high level of commitment to the area by the directors and also helps everyone inside and outside the company to identify the person who will likely be the company's spokesperson on corporate sustainability issues and responsible for managing the resources provided by the board to implement sustainability strategies and satisfy the company's disclosure obligations. The chief sustainability officer must be prepared to support the board as it considers CSR and corporate sustainability issues, engage with the company's

[186] D. Kuprionis and P. Styles, "Translating Sustainability into a Language Your Board Understands", The Corporate Governance Advisor, 25(5) (September/October 2017), 13, 15.

[187] C. Masuku, Corporate Social Responsibility Literature Review and Theoretical Framework, available at https://www.academia.edu/2172462/CORPORATE_SOCIAL_RESPONSIBILITY_LITERATURE_REVIEW_AND_THEORETICAL_FRAMEWORK (citing L. Digman, Strategic management: concepts, decisions, cases (Homewood IL: BPI/Irwin, 1990).

stakeholders and, not unimportantly, effectively coordinate the efforts of all of the various departments within the company that should be involved in sustainability initiatives (e.g., investor relations, legal, operating heads and risk management).[188]

Advice for Directors on Meeting Stakeholder Expectations Regarding Sustainability

Kuprionis and Styles suggested that directors ask "How prepared is my company to respond to increased sustainability expectations from investors, customers and employees? and then be prepared to do each of the following seven things:

- Add sustainability discussions to the board agenda.
- Focus on what sustainability means for the company.
- Ask for briefs on industry developments, both in substance and in governance.
- Engage with the company's chief sustainability officer and investor relations officer.
- Establish an effective board oversight approach.
- Look for balanced perspectives among differing constituencies and stakeholders.
- Consider the appropriate sustainability disclosures for the company.

Source: D. Kuprionis and P. Styles, "Translating Sustainability into a Language Your Board Understands", The Corporate Governance Advisor, 25(5) (September/October 2017), 13, 17.

§11 Transparency and disclosure

As interest in CSR and corporate sustainability has grown, companies have found that they are subject to heightened scrutiny and that the traditional disclosure practices that focused primarily, if not exclusively, on financial information and performance and related risks are no longer adequate. Companies must now be prepared to provide disclosures that address the specific concerns and expectations of multiple stakeholders beyond investors including customers, employees, business partners, regulators and activists. This means that the board of directors must understand existing and emerging disclosure requirements and ensure that the company has the necessary resources to collect and analyze the required information and present it in a manner that is clear and understandable. At the same time, however, the directors need to be mindful of the risks of expanded disclosure include the possibility of providing too much strategic information, exposing the company to heightened risk of litigation from stakeholders that believe the company has not vigorously pursued its promised CSR and corporate sustainability goals and the need to invest additional time and resources in creating and maintaining the internal reporting process necessary to support CSR and corporate sustainability disclosures.[189]

While, as discussed below, certain CSR and corporate sustainability disclosures have now become minimum legal requirements in some jurisdictions, in general such

[188] D. Kuprionis and P. Styles, "Translating Sustainability into a Language Your Board Understands", The Corporate Governance Advisor, 25(5) (September/October 2017), 13, 16.
[189] For further discussion of non-financial disclosures and reporting, see "Sustainability Reporting and Auditing" in "Corporate Social Responsibility: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

disclosures are still a voluntary matter and directors have some leeway as to the scope of the disclosure made by their companies and how they are presented to investors and other stakeholders. Some companies continue to limit their disclosures to those are specifically required by regulators; however, most companies have realized that they need to pay attention to the issues raised by institutional investors and other key stakeholders and make sure that they are covered in the disclosure program. At the other extreme, there are companies that have embraced sustainability as integral to their brands and have elected to demonstrate their commitment by preparing and disseminating additional disclosures that illustrate how they have woven sustainability into their long-term strategies and day-to-day operational activities. These companies understand that not only are investors paying more attention but that more and more people everywhere are considering ESG performance when deciding whether to buy a company's products and/or work for a particular company and that it is therefore essential to lay out their specific CSR and corporate sustainability goals and the metrics used to track performance and provide regular reports to all of the company's stakeholders on how well they are doing against those goals.[190]

Williams noted that to the extent that governments have regulated corporate responsibility *per se*, such regulation has focused on disclosure and during the period 2000-2015 over 20 countries enacted legislation to require public companies to issue reports including environmental and/or social information.[191] Many of these countries are in Europe and the EU has implemented a directive that requires approximately 6,000 large companies and "public interest organizations," such as banks and insurance companies, to "prepare a nonfinancial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters."[192] In addition, several stock exchanges around the world require social and/or environmental disclosure as part of their listing requirements including exchanges in Australia, Brazil, India, South Africa and the London Stock Exchange.[193] Also, pension funds in countries such as Australia, Belgium,

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[190] As mentioned above, expansive disclosure of this type increases the risk of litigation and/or adverse market reaction in the event that the company fails to meet its stated CSR and corporate sustainability goals, even if the disclosures are accompanied by appropriate disclaimers and are not included in regulatory filings that typically are covered by anti-fraud standards. Disclosure of actual or potential links between CSR and corporate sustainability goals and compensation must also be handled carefully, similar to links between short-term financial goals and compensation.

[191] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 15, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784 (citing Initiative for Responsible Investment, Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges (March 12, 2015), available at http://hausercenter.org/iri/wpcontent/uploads/2011/08/CR-3-12-15.pdf). These countries included Argentina, China, Denmark, the EU, Ecuador, Finland, France, Germany Greece, Hungary, India, Indonesia, Ireland (specific to state-supported financial institutions after the 2008 financial crisis), Italy, Japan, Malaysia, The Netherlands, Norway, South Africa, Spain, Sweden, Taiwan, and the U.K.

[192] See ¶ 6 of Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal of the European Union L330/1-330/9.

[193] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 16,

Canada, France, Germany, Italy, Japan, Sweden and the UK are required to disclose the extent to which the fund incorporates social and environmental information into their investment decisions.[194] All things considered, surveys show that more and more jurisdictions are implementing mandatory ESG disclosure requirements and that "there is a clear trend towards an increasing number of environmental and social disclosure requirements around the world".[195]

As of 2013, over 90% of the Global 250 companies had decided to voluntarily disclose more environmental, social and governance information than required by law[196] and Williams noted in 2016 that "[v]oluntary, transnational standards of best social and environmental practices are proliferating in virtually every industry, many with associated certification schemes and requirements for third-party attestation or auditing … [and] … [t]hese voluntary initiatives are increasingly being supplemented by domestic and multilateral government actions to encourage, or in some cases require, companies to pay closer attention to the social and environmental consequences of their actions and to disclose more information about those consequences.[197]

The US, which has comprehensive reporting requirements relating to a broad range of corporate governance matters, has been a notable laggard with respect to establishing a comprehensive general ESG disclosure framework; however, there are certain specific federal and state disclosure requirements in certain contexts such as releases into the environment, management through recycling, median employee pay, mine safety disclosure and "conflict minerals" disclosure.[198] Public companies in the US are required to make certain of their CSR and corporate sustainability disclosures in their SEC filings, which means that those disclosures are being made with a higher potential risk of

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available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784 (citing Initiative for Responsible Investment, Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges (March 12, 2015), available at http://hausercenter.org/iri/wpcontent/uploads/2011/08/CR-3-12-15.pdf).

[194] Id.

[195] Id. at 19 (citing KPMG, UNEP, Global Reporting Initiative and Unit for Corporate Governance in Africa, Carrots and Sticks: sustainability reporting policies worldwide 8 (2013), available at https://www.globalreporting.org/resourcelibrary/carrots-and-sticks.pdf.).

[196] KPMG, The KPMG Survey of CR Reporting 2013, available at http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporateresponsibility/Documents/corporate-responsibility-reporting-survey-2013-exec-summary.pdf. In addition, in 2013 76% of the top 100 companies in the Americas published a separate corporate responsibility report, as did 73% of top 100 companies in Europe and 71% in Asia. Also, 59% of the Global 250 had their reports "assured" typically by the specialist bureaus of the major accountancy firms. As reported in C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 5, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784

[197] C. Williams, "Corporate Social Responsibility and Corporate Governance" in J. Gordon and G. Ringe (Eds.), Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2016), 2-3, available at http://digitalcommons.osgoode.yorku.ca/scholarly_works/1784 (citing M. Blair, C. Williams and Li-Wen Lin, "The New Role for Assurance Services in Global Commerce", Journal of Corporate Law, 33 (2008), 325).

[198] Id. at 16-19. See also C. Williams, The Securities and Exchange Commission and Corporate Social Transparency, Harvard Law Review, 112 (1999), 1197. The federal Securities and Exchange Commission has also occasionally issued guidance on selected ESG topics such as disclosures related to climate change.

liability. Apart from mandatory disclosure, several studies have found that about 80% of larger US public companies have voluntarily provided some form of disclosures on their CSR and corporate sustainability initiatives in the form of published CSR/sustainability reports and/or disclosures on the company website; however, the quality of these disclosures has been criticized by the Sustainability Accounting Standards Board, which found that 52% of a sample of almost 600 companies that had made disclosures of CSR-related risks had done so using boilerplate language and has failed to disclose their plan to address such risks.[199] Directors need to be involved in decisions regarding placement of CSR and corporate sustainability disclosures including links in SEC filings to online sustainability reports and adding sustainability information to proxy statements as part of the company's investor-focused communication efforts. Companies can, and often do, rely on communications professionals to prepare sustainability reports; however, even when such reports are not included in the company's SEC filings they should be subject to the same level of scrutiny applied in procedures established by the board's disclosure committee.

Proposals from shareholder activists often help create the list of CSR and corporate sustainability topics that garner the most attention from companies and trigger movement toward greater transparency and disclosure. In recent years, companies have frequently been required to respond to call for changes in corporate policies and activities with respect to political and lobbying activity, sustainability reporting, gender pay gap reporting, and child labor issues.[200] In many cases, companies have been able to calm the concerns of activists, sometimes getting them to withdraw their proposals, by promising to provide fuller disclosure; however, once a commitment is made to expanded disclosure the company needs to fulfill its promises and allocate sufficient resources to the effort since activists will be watching closely to ensure that their expectations are satisfied. When formulating voluntary CSR-related disclosures it is important to engage with activists to ensure that they understand the approach that the company is willing to take and the company's need to balance disclosure against the need to protect sensitive and strategically important information.

A large number of parties providing non-form comments to the Securities and Exchange Commission ("SEC") on its April 2016 concept release on disclosure required by Regulation S-K, the prescribed regulation under the Securities Act of 1933 that provides the framework for mandated disclosures in filings with the SEC, recommended that CSR disclosure be expanded and strengthened.[201] While it is not likely that more CSR-related disclosures will be formally mandated in the immediate future, companies must nonetheless give greater consideration to CSR and corporate sustainability when

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199 See Flash Report: Eighty One Percent (81%) of the S&P 500 Index Companies Published Corporate Sustainability Reports in 2015 (Governance & Accountability Institute, Inc., 2016), available at ga-institute.com; and Sustainability Accounting Standards Board, The State of Disclosure Report 2016, available at sasb.org. The percentage is particularly striking given that less than 20% of the companies in the same group in 2011 published sustainability reports in that year.

200 H. Gregory, "Corporate Social Responsibility, Corporate Sustainability and the Role of the Board", Practical Law Company (July 1, 2017), 4.

201 Sustainability Accounting Standards Board, "Business and Financial Disclosure Required by Regulation S-K—the SEC's Concept Release and Its Implications", (2016), 3-4, available at sasb.org.

responding to several current items in Regulation S-K include those related to describing the business activities of the company (Item 101); legal proceedings (Item 103); disclosures of material known events and uncertainties in the Management's Discussion and Analysis (Item 303) and risk factors (Item 503(c)). Public companies must also be mindful of the SEC's guidance regarding disclosures relating to climate change, which was issued in 2010[202], and Rule 13p-1 under the Securities Exchange Act of 1934 relating to conflicts materials disclosure.

In addition, companies may be subject to disclosure requirements under the laws of foreign countries in which they operate as well as various state and local laws. For example, under the California Transparency Supply Chains Act of 2010[203], which went into effect on January 1, 2012, every retail seller and manufacturer doing business in California and having annual worldwide gross receipts that exceed $100 million is required to disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale. The disclosures must be posted on the retail seller's or manufacturer's website with a conspicuous and easily understood link to the required information placed on the business' homepage. In the event the retail seller or manufacturer does not have a website, consumers must be provided the written disclosure within 30 days of receiving a written request for the disclosure from a consumer. At a minimum, the disclosures should disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

- Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure must specify if the verification was not conducted by a third party.
- Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure must specify if the verification was not an independent, unannounced audit.
- Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
- Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

The exclusive remedy for a violation of the disclosure obligations is an action brought by the California Attorney General for injunctive relief.

When companies were first attempting to provide voluntary disclosures relating to their CSR and corporate sustainability initiatives they often struggled with the format and depth of their reporting. Fortunately, as time went by, a consensus began to emerge about the benchmarks that companies should use for guidance in preparing their CSR and

[202] SEC Release Nos. 33-9106, 34-61469, FR-82 (February 8, 2010).
[203] California Civil Code § 1714.43.

corporate sustainability reports. Of particular note is the Global Reporting Initiative ("GRI") (www.globalreporting.org), which is a multi-stakeholder developed international independent organization that helps businesses, governments and other organizations understand and communicate the impact of business on critical sustainability issues such as climate change, human rights, corruption and many others. The Global Sustainability Standards Board ("GSSB") issues and maintains the GRI Standards for organizations to use in their "sustainability reporting", described by the GSSB as "an organization's practice of reporting publicly on its economic, environmental, and/or social impacts, and hence its contributions–positive or negative–towards the goal of sustainable development".[204] GRI has pioneered sustainability reporting since the late 1990s, transforming it from a niche practice to one now adopted by a growing majority of organizations. The GRI Standards are the world's most widely used standards on sustainability reporting and disclosure and available for use by public agencies, firms and other organizations wishing to understand and communicate aspects of their economic, environmental and social performance.[205]

The International Integrated Reporting Council, or "IIRC" (integratedreporting.org), which was founded in August 2010, released its International Integrated Reporting Framework in December 2013 as a guide that companies could use to describe how their governance structure creates value in the short, medium and long term; supports decision making that takes into account risks and includes mechanisms for addressing ethical issues; exceeds legal requirements; and ensures that the culture, ethics and values of the company are reflected in its use of and effects on the company's "capitals" (described to include financial, manufactured, intellectual, human, social and relationship, and natural (i.e., the environment and natural resources) forms of value) and stakeholder relationships.[206] Guiding principles for preparation of integrated reports include strategic focus and future orientation, connectivity of information, stakeholder relationships, materiality, conciseness, reliability and completeness and consistency and comparability, and integrated reports prepared using the Framework are expected to include the following common elements[207]:

- Organizational overview and external environment: What does the organization do and what are the circumstances under which it operates?
- Governance: How does the organization's governance structure support its ability to create value in the short, medium and long term?
- Business model: What is the organization's business model?
- Risks and opportunities: What are the specific risks and opportunities that affect the

[204] GRI 101: Foundation 2016 (Amsterdam: Stichting Global Reporting Initiative, 2016), 3.
[205] For detailed discussion of the GRI Standards, see "Sustainability Reporting and Auditing" in "Corporate Social Responsibility: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).
[206] P. DeSimone, Board Oversight of Sustainability Issues: A Study of the S&P 500 (IRRC Institute, March 2014), 7.
[207] The International <IR> Framework (London: The International Integrated Reporting Council, December 2013), 5. For detailed discussion of the International Integrated Reporting Framework, see "Sustainability Reporting and Auditing" in "Corporate Social Responsibility: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

organization's ability to create value over the short, medium and long term, and how is the organization dealing with them?

- Strategy and resource allocation: Where does the organization want to go and how does it intend to get there?
- Performance: To what extent has the organization achieved its strategic objectives for the period and what are its outcomes in terms of effects on the capitals?
- Outlook: What challenges and uncertainties is the organization likely to encounter in pursuing its strategy, and what are the potential implications for its business model and future performance?
- Basis of presentation: How does the organization determine what matters to include in the integrated report and how are such matters quantified or evaluated?

Other helpful resources are available from the Sustainability Accounting Standards Board, or "SASB" (www.sasb.org), which publishes the SASB Implementation Guide for Companies that provides the structure and the key considerations for companies seeking to implement sustainability accounting standards within their existing business functions and processes.[208] The Guide helps companies to select sustainability topics; assess the current state of disclosure and management; embed SASB standards into financial reporting and management processes; support disclosure and management with internal control; and present information for disclosure. The SASB's online resource library also includes annual reports on the state of disclosure, industry briefs and standards and guidance on stakeholder engagement. Companies should monitor CSR disclosures by their peers and the SASB library has examples of disclosures made by companies in annual reports filed with the SEC on Form 10-K. Companies can also follow the reporting practices of competitors by reviewing sustainability reports that have been registered with the GRI.

While the efforts of the GRI and the SASB indicate that some progress has been made regarding the development of measurement and disclosure frameworks relating to corporate sustainability and ESG practices, companies and their stakeholders are not yet able to rely on universally accepted guidelines. Hurdles that still much be overcome, and which may never be totally resolved, include variations in ESG rating methodologies and a lack of uniformity in disclosure expectations and requirement across jurisdictions. For the time being, the most effective approach for directors and their companies may be engaging with their own key investors and other stakeholders to understand how those parties view and prioritize ESG issues and their preferences regarding measurement and disclosure with respect to the initiatives taken by the company relating to those issues. Such an approach not only reduces the likelihood of misunderstanding between the company and its primary stakeholders but will also contribute to the improvement of measurement and disclosure tools and the development of best practices that can be widely disseminated. In the meantime, work continues among corporate governance groups and consulting to develop performance measurement tools and disclosure frameworks that integrate traditional measures of financial value with new metrics that

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[208] For detailed discussion of the activities of the SASB, see "Sustainability Reporting and Auditing" in "Corporate Social Responsibility: A Library of Resources for Sustainable Entrepreneurs" prepared and distributed by the Sustainable Entrepreneurship Project (www.seproject.org).

afford proper weight to projects launched primarily to pursue and achieve long-term value creation.

About the Author

Dr. Alan S. Gutterman is the Founding Director of the Sustainable Entrepreneurship Project (www.seproject.org). In addition, Alan's prolific output of practical guidance and tools for legal and financial professionals, managers, entrepreneurs and investors has made him one of the best-selling individual authors in the global legal publishing marketplace. His cornerstone work, *Business Transactions Solution*, is on online-only product available and featured on Thomson Reuters' Westlaw, the world's largest legal content platform, which includes almost 200 book-length modules covering the entire lifecycle of a business. Alan has also authored or edited over 40 books on sustainable entrepreneurship, management, business law and transactions, international law business and technology management for a number of publishers including Thomson Reuters, Kluwer, Aspatore, Oxford, Quorum, ABA Press, Aspen, Sweet & Maxwell, Euromoney, CCH and BNA. Alan has over three decades of experience as a partner and senior counsel with internationally recognized law firms counseling small and large business enterprises in the areas of general corporate and securities matters, venture capital, mergers and acquisitions, international law and transactions, strategic business alliances, technology transfers and intellectual property, and has also held senior management positions with several technology-based businesses including service as the chief legal officer of a leading international distributor of IT products headquartered in Silicon Valley and as the chief operating officer of an emerging broadband media company. He has been an adjunct faculty member at several colleges and universities, including Boalt Hall, Golden Gate University, Hastings College of Law, Santa Clara University and the University of San Francisco, teaching classes on a diverse range of topics including corporate finance, venture capital, corporate law, Japanese business law and law and economic development, He received his A.B., M.B.A., and J.D. from the University of California at Berkeley, a D.B.A. from Golden Gate University, and a Ph. D. from the University of Cambridge. For more information about Alan, his publications or the Sustainable Entrepreneurship Project, please contact him directly at alangutterman@gmail.com, and follow him on LinkedIn (https://www.linkedin.com/in/alangutterman/).

About the Project

The Sustainable Entrepreneurship Project (www.seproject.org) engages in and promotes research, education and training activities relating to entrepreneurial ventures launched with the aspiration to create sustainable enterprises that achieve significant growth in scale and value creation through the development of innovative products or services which form the basis for a successful international business. In furtherance of its mission the Project is involved in the preparation and distribution of Libraries of Resources for Sustainable Entrepreneurs covering Entrepreneurship, Leadership, Management, Organizational Design, Organizational Culture, Strategic Planning, Governance, Corporate Social Responsibility, Compliance and Risk Management, Finance, Human Resources, Product Development and Commercialization, Technology Management, Globalization, and Managing Growth and Change. Each of the Libraries include various Project publications such as handbooks, guides, briefings, articles, checklists, forms, forms, videos and audio works and other resources; management tools such as checklists and questionnaires, forms and training materials; books; chapters or articles in books; articles in journals, newspapers and magazines; theses and dissertations; papers; government and other public domain publications; online articles and databases; blogs; websites; and webinars and podcasts.

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