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**CSR STATEMENTS:  
INCENTIVES AND ENFORCEMENT IN THE WAKE OF  
THE BUSINESS ROUNDTABLE'S STATEMENT ON  
CORPORATE PURPOSE**

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ABSTRACT

*Corporate social responsibility (“CSR”) statements—voluntary statements made by a corporation to improve its practices in three broad areas: environmental, social, and governance (“ESG”)—are increasingly expected from companies. Both consumers and investors are interested in whether companies are making efforts at social responsibility. In 2019, the Business Roundtable’s statement focused on CSR, emphasizing corporations’ commitment to stakeholders as well as shareholders. This statement signaled a broader shift away from for-profit companies’ profitability focus, and other prominent industry figures, such as BlackRock’s Larry Fink, continue to voice similar sentiments. The business judgment rule and related corporate law doctrines and cases, such as Dodge v. Ford, provide directors with a great deal of deference—within limits, of course—to make decisions that do not fulfill their primary duty of profit maximization. While CSR statements help companies by providing brand recognition, meeting consumer demand, and creating social good, these companies’ decisions to pursue CSR goals do not always align directly with maximizing profits. This creates a rift between directors’ and companies’ legal obligations and the trend of CSR and stakeholder theory.*

*This Note seeks to close this rift by exploring the incentives behind CSR statements and explaining how directors can fulfill their duties by linking CSR statements to profits. In doing so, it concludes that CSR is a proper corporate purpose. CSR statements, with certain conditions placed on them, benefit both companies and society. If companies get to reap the reputational and financial benefits from making CSR statements, then companies must make good faith efforts to achieve their stated goals. This Note argues that, in general, incentivizing adherence to CSR statements through liability is difficult and disadvantageous. However, if liability is to be imposed, this Note presents a*

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*specific liability threshold to encourage desirable and effective CSR statements. This framework would allow shareholders to sue the company or its directors for failing to meet CSR goals only if the company made a bad-faith CSR statement, made no effort to meet the statement, or lied about something in the statement. In addition, CSR statements may be incentivized and enforced through alternative solutions to liability, such as applying deference to for-profit corporations comparable to that applied to benefit corporations, increasing voluntary reporting, and treating CSR statements similar to forward-looking statements in securities law.*

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## INTRODUCTION

“While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders.”<sup>1</sup> The Business Roundtable’s August 2019 statement solidified many large companies’ commitment to valuing their stakeholders in addition to their shareholders.<sup>2</sup> Many corporations have long focused on maximizing profit, but, over the past few decades, corporate social responsibility (“CSR”) has become a priority for companies, as well.<sup>3</sup> Socially responsible investors have started to support companies that build long-term value by investing in their employees and communities rather than solely focusing on short-term profitability.<sup>4</sup> CSR initiatives are also not a zero-sum game: they can benefit shareholders by creating value through effects on brand differentiation, operational efficiency, access to market capital, and risk mitigation.<sup>5</sup>

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<sup>1</sup> *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUS. ROUNDTABLE (Aug. 19, 2019) [hereinafter *Business Roundtable Statement*], <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/6CUE-WKHV>].

<sup>2</sup> Andrew Ross Sorkin, *Pact Foresees Return to Era of Scruples*, N.Y. TIMES, Aug. 20, 2019, at B1 (discussing Business Roundtable statement’s affirmation that nation’s largest companies—including Amazon, Apple, and Walmart—made “fundamental commitment” to all stakeholders (quoting *Business Roundtable Statement*, *supra* note 1)).

<sup>3</sup> See CORPORATE SOCIAL RESPONSIBILITY 13 (Esben Rahbek Gjerdrum Pedersen ed., 2015) (“A substantial amount of the contemporary CSR literature explicitly or implicitly adopts a stakeholder approach which has become one of the dominant theoretical perspectives of CSR.”); Sara K. Orr & Bart J. Kempf, *Voluntary Sustainability Disclosure and Emerging Litigation*, 19 CLIMATE CHANGE, SUSTAINABLE DEV., & ECOSYSTEMS COMM. NEWSL. (Section of Env’t, Energy, and Res., Am. Bar Ass’n, Washington, D.C.), Nov. 2015, at 1 (“Voluntary disclosure by companies of sustainability, . . . [CSR], and environmental, social, and governance (ESG) issues is becoming a more common practice throughout the world.”).

<sup>4</sup> Michal Barzusa, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1251 (2020) (“In response to competition for money to manage, the largest pools of assets in our economy have turned their power as shareholders to advancing investors’ social agenda.”); Larry Fink, *Larry Fink’s 2019 Letter to CEOs: Purpose & Profit*, BLACKROCK (2019), <https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter> [<https://perma.cc/FS7K-3SQY>] (stating that BlackRock intends to prioritize investing in companies furthering corporate purpose in addition to profit).

<sup>5</sup> See CORPORATE SOCIAL RESPONSIBILITY, *supra* note 3, at 14 (“[I]t is assumed that the shareholders will also be well off by adopting a stakeholder approach: In the long run, at least.”); R. Edward Freeman & Heather Elms, *The Social Responsibility of Business Is to Create Value for Stakeholders*, MIT SLOAN MGMT. REV. (Jan. 4, 2018), <https://sloanreview.mit.edu/article/the-social-responsibility-of-business-is-to-create-value-for-stakeholders/> [<https://perma.cc/GF2M-J3Q5>] (“The new story of business is about creating as much value for all these stakeholders as possible, and this of course includes creating profits for shareholders. In the global economy, customers, suppliers, employees,

Courts allow directors significant deference in their business decisions,<sup>6</sup> but directors also have a background responsibility to their shareholders to ensure that the company is profitable.<sup>7</sup> And while directors may have good intentions in pursuing CSR initiatives, they face two major risks. First, their statements about their goals and initiatives may lead to litigation from shareholders who want the corporation to exclusively pursue its primary duty: maximizing profits.<sup>8</sup> Second, if directors do not uphold the goals they set in their statements or if their statements do not match the corporation's actions, they may risk lawsuits filed by angry shareholders and consumers who invested or purchased a product expecting the corporation to meet these goals.<sup>9</sup> Because moral incentives may not suffice to drive participation in socially responsible efforts, especially if corporations may face the risk of increased litigation because of their voluntary initiatives, further incentives may be necessary.

This Note considers risks stemming from both those shareholders who want to see a focus on profit maximization and those who want to see the corporation employing real efforts to meet its social responsibility goals. This Note will also explore whether pursuing CSR goals is a proper corporate purpose and, if so, whether director liability can strike a successful balance between the incentivizing socially responsible initiatives and holding directors responsible for their commitments to these initiatives.

Part I will discuss the main points of the corporate purpose debate surrounding for-profit companies and the rise of CSR as a common corporate practice. Part

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communities, and financiers — shareholders plus bondholders plus banks and other sources of capital — are all intertwined.”); *see also* Amy Silverstein, Debbie McCormack & Bob Lamm, *The Board's Role in Corporate Social Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2018), <https://corpgov.law.harvard.edu/2018/07/20/the-boards-role-in-corporate-social-purpose/> [<https://perma.cc/8K98-4BBW>].

<sup>6</sup> *See* *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (explaining that directors' decisions are evaluated under the business judgment rule and receive presumption that “the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company”).

<sup>7</sup> *See generally* *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968) (affirming dismissal of order that defendants install lights for night games, in part because plaintiff failed to show that night schedules of other teams were profitable); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684-85 (Mich. 1919) (holding that company must distribute large profit as dividends to shareholders instead of withholding such dividends and lowering prices in order to benefit consumers because “[a] business corporation is organized and carried on primarily for the profit of the stockholders”).

<sup>8</sup> *See Dodge*, 170 N.W. at 685 (affirming principle of shareholder primacy); *see also* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“Although such considerations [of nonshareholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”).

<sup>9</sup> *See infra* notes 132-34 and accompanying text (documenting such lawsuits).

II will address the importance of incentivizing CSR statements, the reasons this needs to be done properly, and the current enforcement mechanisms related to CSR statements and initiatives. Finally, Part III will discuss the challenges of using liability as a way to incentivize successful CSR, propose a threshold for when liability may be desirable, and explore alternatives that could incentivize for-profit corporations to commit to and follow through with socially responsible behavior. Corporate accountability to CSR statements should be calculated to avoid deterring efforts to be socially responsible.

### I. HISTORY OF CSR

CSR initiatives can have many meanings, but as used in this Note, they are voluntary undertakings by a corporation to improve the company's practices in three broad areas: environmental, social, or governance ("ESG").<sup>10</sup> CSR initiatives include lowering carbon emissions, increasing diversity and inclusion, improving employee treatment, and funding political causes.<sup>11</sup> CSR is different from legal compliance because in order to be truly socially responsible, the company must be "fully compliant with all laws that relate to social issues and choose[] to go beyond merely operating within the law and instead take a step towards making a positive impact on one or more social issues."<sup>12</sup> CSR statements reflect a company's choice to conduct its business in a socially and environmentally responsible manner.<sup>13</sup>

Corporations intending to undertake a CSR initiative frequently disclose their goals through a number of means to shareholders and, in many cases, consumers

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<sup>10</sup> Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 172 (2007) ("CSR is an umbrella term that refers to a variety of initiatives ranging from voluntary codes of conduct to programs whereby companies can undergo external audits to verify the adequacy of their practices in a variety of areas of social concern."); *Promoting a European Framework for Corporate Social Responsibility*, at 4 (July 18, 2001), [https://ec.europa.eu/commission/presscorner/detail/en/DOC\\_01\\_9](https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_9) [<https://perma.cc/98AC-WC98>] (defining voluntary CSR as "a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment"); see also Orr & Kempf, *supra* note 3, at 1.

<sup>11</sup> See Silverstein, McCormack & Lamm, *supra* note 5.

<sup>12</sup> Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 857 (2008).

<sup>13</sup> See, e.g., Shiro Hori, Mami Shinozaki, Daisuke Nogata & Toshiyuki Fujita, *The Role of CSR in Promoting Companies' Energy-Saving Actions in Two Asian Cities*, 69 ENERGY POL'Y 116, 116-17 (2014) ("CSR involves actions that extend beyond mere compliance or the fulfillment of responsibilities beyond actions dictated by markets or laws. Thus, CSR can be described as companies' social responsibility to engage in voluntary actions as members of the societies to which they belong." (citation omitted)); Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 415 (2014) (defining CSR initiatives as "efforts that seek to convince corporations to voluntarily take into account corporate social responsibility in their own decision-making" (emphasis omitted)).

before they take action. These means of disclosure include CSR reports, sections of their websites, statements to the press, wording on their products and packaging, and Securities and Exchange Commission (“SEC”) filings.<sup>14</sup> These CSR statements are a way to publicize and document companies’ commitments. Currently, some companies use the same thorough measurements and reports for their CSR performance as they do for their financial performance.<sup>15</sup> Others take a less rigorous approach to sharing information about their socially responsible activities.<sup>16</sup> Shareholders rely on CSR statements to make investment and consumer decisions;<sup>17</sup> therefore, some level of accuracy and authenticity in these statements is important.

#### A. *Corporate Purpose Debate*

As two scholars put it, “For centuries legal, political, social, and economic commentators have debated [CSR] *ad nauseam*.”<sup>18</sup> This debate stems from the tension between shareholder-primacy theory<sup>19</sup> and stakeholder theory.<sup>20</sup> In other words, there is a tension between a value-maximization model, supported by scholars such as Milton Friedman,<sup>21</sup> and a corporate-citizenship model, endorsed by others such as John Mackey,<sup>22</sup> the founder and chief executive officer

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<sup>14</sup> SOC’Y FOR CORP. GOVERNANCE & GIBSON, DUNN & CRUTCHER LLP, LEGAL RISKS AND ESG DISCLOSURES: WHAT CORPORATE SECRETARIES SHOULD KNOW 2 (2018).

<sup>15</sup> See Orr & Kempf, *supra* note 3, at 1 (discussing companies’ use of “open reporting, external and independent auditing, and verification processes”).

<sup>16</sup> See *id.* (discussing how some companies choose to share “information about their corporate sustainability-related activities in a more protective posture, taking into account potential environmental exposure or competitive considerations”).

<sup>17</sup> See Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate “Greenwashing” or a Corporate Culture Game Changer?*, 21 FORDHAM ENV’T L. REV. 1, 72-73 (2010).

<sup>18</sup> Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999).

<sup>19</sup> Shareholder primacy “expresses the idea that shareholders have the priority interest in both economics and governance of the corporation: shareholders are said to be the principal in a principal-agent relationship on whose behalf the corporate enterprise serves.” Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951-52 (2018).

<sup>20</sup> “[Stakeholder] theory considers business to be about the relationships between the groups and individuals that have a ‘stake’ in the business activities. . . . Employees, suppliers, customers, media, local communities, NGOs etc. all affect and in turn are affected by the company’s operations.” CORPORATE SOCIAL RESPONSIBILITY, *supra* note 3, at 13 (citation omitted). Stakeholders include consumers, NGOs, local communities, investors, shareholders, government agencies, retailers, and downstream suppliers. See Orr & Kempf, *supra* note 3, at 1.

<sup>21</sup> Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

<sup>22</sup> Milton Friedman, John Mackey & T.J. Rodgers, *Rethinking the Social Responsibility of*

(“CEO”) of Whole Foods.<sup>23</sup> Proponents of a corporate-citizenship model (or stakeholder theory) argue that corporations are citizens to which directors owe a duty, that corporations should prioritize all stakeholder interests, and that they have a duty that runs to “society” at large.<sup>24</sup> “[S]takeholder advocates also argue that the companies’ responsibilities to society stretch beyond shareholders.”<sup>25</sup> Three senior employees at Deloitte explained,

A corporate social purpose perspective expands the definition of a corporation’s stakeholders to include not just investors, but also employees, customers, suppliers, communities in which it operates, and the environment, both now and into the future. It also requires making strategic and responsible decisions with both the short and long terms in mind.<sup>26</sup>

Therefore, under this view, CSR is a valid corporate purpose. Both business factors, such as consumer demand, brand loyalty, and shareholder preferences, and social-good factors, such as when a company engaging in a CSR goal related to lowering carbon emissions actually accomplishes this goal, support CSR’s validity.<sup>27</sup>

On the other hand, value-maximization theorists argue that shareholders essentially hire companies to seek profit for them within the confines of the law, and the corporation’s money belongs to shareholders, rather than directors or the

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*Business*, REASON, Oct. 2005, at 28, 29-33 (discussing Whole Foods as model for social responsibility because its customers value social responsibility over price so that CSR practices create competitive advantage).

<sup>23</sup> Whole Foods’s CSR initiatives include “reduc[ing] packaging, composting and water and energy conservation” and “support[ing] sustainable agriculture.” *Declaration of Interdependence*, WHOLE FOODS MKT., <https://www.wholefoodsmarket.com/mission-values/core-values/declaration-interdependence> [<https://perma.cc/2LFY-F8FV>] (last visited Feb. 15, 2021). In addition to Milton Friedman’s and John Mackey’s theories, the team production theory, which Margaret Blair and Lynn Stout proposed in 1999, attempts to bridge the gap between the stakeholder theory and shareholder primacy. *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). Blair and Stout argue, “Executives, rank-and-file employees, and even creditors or the local community may also make essential contributions and have an interest in an enterprise’s success.” *Id.* at 250. This theory utilizes a “mediating hierarchy” internal governance approach, which views public companies as a network of “firm-specific investments made by many and varied individuals who give up control over those resources to a *decisionmaking process* in hopes of sharing in the benefits that can flow from team production.” *Id.* at 285.

<sup>24</sup> CORPORATE SOCIAL RESPONSIBILITY, *supra* note 3, at 14 (describing stakeholder theory as being based on the “assumption that company concerns for stakeholders’ economic, social, and environmental demands are the best way to generate long-term value for both business and society”).

<sup>25</sup> *Id.* at 13.

<sup>26</sup> Silverstein, McCormack & Lamm, *supra* note 5.

<sup>27</sup> *See infra* notes 48-52 and accompanying text (explaining that CSR can improve profitability as well as social goals).



corporation itself.<sup>28</sup> Accordingly, the shareholders should choose how to allocate the profit that they may receive via dividends. This theory conceives of corporate directors as the employees of the shareholders; a director's engagement in CSR would mean that she is to act against the interest of her employers. Supporters of value-maximization theory also argue that social responsibility undermines free-market capitalism by taking the focus away from profitability and gives CEOs too much discretion over where they invest the corporation's capital.<sup>29</sup> Friedman famously said, "[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."<sup>30</sup> Stakeholder theory responds to the value-maximization theory's narrow concerns about theft of profits from shareholders and director discretion by noting that shareholders can sell their stock if they disagree with a corporation's social goals; however, this does not always work in reality.<sup>31</sup>

While many states now *allow* directors to consider stakeholders when making decisions,<sup>32</sup> every state still *requires* directors to consider shareholders, with many considering the duty to shareholders the primary motivation for corporate decision-making.<sup>33</sup> CSR thus exists in a legal gray area, in which many

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<sup>28</sup> See Juliet P. Kostritsky, *One Size Does Not Fit All: A Contextual Approach to Fiduciary Duties Owed to Preferred Stockholders from Venture Capital to Public Preferred to Family Business*, 70 RUTGERS U. L. REV. 43, 55 (2017); see also 1 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (AM. L. INST. 1994) ("[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." (citation omitted)).

<sup>29</sup> Friedman, *supra* note 21, at 33.

<sup>30</sup> MILTON FRIEDMAN WITH ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).

<sup>31</sup> See James J. Park, *The Limits of the Right to Sell and the Rise of Federal Corporate Law*, 70 OKLA. L. REV. 159, 168 (2017) ("Even if shareholders prefer a particular governance measure, if it does not have a direct impact on the stock price, shareholders will not have an economic incentive to sell their shares.").

<sup>32</sup> Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1085-86 (2000) (explaining states' adoption of constituency statutes, which allow directors of public corporations to consider interests other than shareholder wealth maximization in corporate decision-making).

<sup>33</sup> Delaware Supreme Court Chief Justice Leo E. Strine, Jr. made it clear that, in his view, Delaware law still requires shareholder primacy when he said, "[A] clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare." Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015); see also Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) ("Norms in American business circles, starting with business school education, emphasize the value,

companies are careful to ensure that they can show a connection between their CSR statements and anticipated profitability.

Courts are also extremely deferential to directors making business decisions. The business judgment rule instructs courts to presume that a director acted reasonably when evaluating the legality of their business decisions.<sup>34</sup> For example, the Delaware Supreme Court applied the business judgment rule in *Shlensky v. Wrigley*<sup>35</sup> and found that, although the director refused to install lights for night baseball games, some business rationale existed to support the director's decision;<sup>36</sup> therefore, shareholder primacy was not violated. The court thus established that it would not interfere with directors' reasonable business decisions when there was no evidence of fraud, illegality, or a conflict of interest.<sup>37</sup>

However, there are limits to this discretion. In the 1919 case *Dodge v. Ford Motor Co.*,<sup>38</sup> the Michigan Supreme Court reinforced the existence of a duty to maximize shareholder wealth.<sup>39</sup> Ford was not allowed to keep money that would have been given to shareholders as dividends in order to pursue a long-term goal of making its cars cheaper and more broadly distributed.<sup>40</sup> The court concluded that a corporation must use corporate profits for its primary purpose: profitability for shareholders.<sup>41</sup> Similarly, in *eBay Domestic Holdings, Inc. v. Newmark*,<sup>42</sup> the Delaware Court of Chancery analyzed the staggered board amendments to eBay's charter at issue under the business judgment rule and reiterated that directors must maximize shareholder value.<sup>43</sup>

Therefore, directors cannot completely turn away from their responsibilities to shareholders in their pursuit of social responsibility goals. In discussing the CSR debate, three Skadden partners noted that "a for-profit Delaware corporation is not precluded from taking social issues into account in the conduct of its business, so long as the corporations' consideration of those social issues has a sufficient nexus to shareholder welfare and value enhancement or protection."<sup>44</sup> In a claim that directors breached their fiduciary duties to the

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appropriateness, and indeed the justice of maximizing shareholder wealth . . .").

<sup>34</sup> See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

<sup>35</sup> 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>36</sup> *Id.* at 780.

<sup>37</sup> *See id.*

<sup>38</sup> 170 N.W. 668 (Mich. 1919).

<sup>39</sup> *Id.* at 681-82.

<sup>40</sup> *Id.* at 685.

<sup>41</sup> *Id.* at 681.

<sup>42</sup> 16 A.3d 1 (Del. Ch. 2010).

<sup>43</sup> *Id.* at 33 ("Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders.").

<sup>44</sup> Peter A. Atkins, Marc S. Gerber & Edward B. Micheletti, *Putting to Rest the Debate Between Corporate Social Responsibility and Current Corporate Law*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Aug. 27, 2019), <https://www.skadden.com/insights>

company in pursuing CSR goals, namely a breach of the duty to maximize profits for shareholders, the plaintiffs have the burden to show that the challenged decision was not made based on the potential benefit, though intangible in value, to stockholders from the company pursuing corporate citizenship.<sup>45</sup> While investors may care about things other than profitability, a concern exists that

if these institutions admit that their concerns extend beyond the financial, they risk running afoul of their legal obligations . . . . [O]pen admissions by large investors that they are advocating for non-wealth-maximizing action would only hand managers additional leverage in the fight to persuade state and federal regulators to minimize shareholder power.<sup>46</sup>

Companies continue to grapple with this balance because shareholders often care about more than just short-term profits, such as sustainability efforts or the company's long-term performance.<sup>47</sup>

Additionally, taking account of stakeholder concerns can benefit shareholders and profitability while, at the same time, being the moral and right thing to do.<sup>48</sup> The famous case *Paramount Communications, Inc. v. Time Inc. (In re Time Inc. Shareholder Litigation)*<sup>49</sup> can be viewed as rejecting the shareholder-primacy norm and allowing CSR as part of corporate governance.<sup>50</sup> In *Time Inc.*, the Delaware Supreme Court stated that, absent a few circumstances, “a board of directors . . . is not under any *per se* duty to maximize shareholder value” and that directors “are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon.”<sup>51</sup> Thus, choosing to take on more socially responsible initiatives likely falls within the boundaries of the business judgment rule because it is reasonable that these initiatives would further shareholders' interests, including profitability, and would be in the best interests of the company.<sup>52</sup>

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/publications/2019/08/putting-to-rest-the-debate [https://perma.cc/Z9JV-6W4N].

<sup>45</sup> See Michael J. Vargas, *Dodge v. Ford Motor Co. at 100: The Enduring Legacy of Corporate Law's Most Controversial Case*, 75 BUS. LAW. 2103, 2112-14 (2020) (explaining that this burden under business judgment rule would result in different outcome in *Dodge v. Ford Motor Co.* today).

<sup>46</sup> Ann M. Lipton, *Mixed Company: The Audience for Sustainability Disclosures*, 107 GEO. L.J. ONLINE 81, 85 (2018).

<sup>47</sup> See Rebecca M. Henderson, *More and More CEOs Are Taking Their Social Responsibility Seriously*, HARV. BUS. REV. (Feb. 12, 2018), <https://hbr.org/2018/02/more-and-more-ceos-are-taking-their-social-responsibility-seriously>.

<sup>48</sup> Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 348 (2018) [hereinafter Vargas, *In Defense of E. Merrick Dodd*].

<sup>49</sup> 571 A.2d 1140 (Del. 1989).

<sup>50</sup> See Vargas, *In Defense of E. Merrick Dodd*, *supra* note 48, at 352.

<sup>51</sup> *Time Inc.*, 571 A.2d at 1150.

<sup>52</sup> See *id.*

Another layer to the corporate purpose debate comes from the creation of benefit corporations. Benefit corporations, such as Patagonia,<sup>53</sup> have explicit permission to focus on stakeholder interests in addition to shareholder interests.<sup>54</sup> Benefit corporations first emerged as a new type of business entity in Maryland,<sup>55</sup> and many other states have gone on to adopt some form of benefit corporation legislation, including Delaware, which added provisions to allow for the formation of “public benefit corporations” in 2013.<sup>56</sup> Delaware’s laws “specifically modify the shareholder primacy principle by requiring directors to *balance* the pecuniary interests of shareholders, the interests of those materially affected by the corporation’s conduct and the public benefits identified by the corporation in its charter.”<sup>57</sup> Shareholders can still bring derivative suits against public benefit corporations for breaches of fiduciary duties<sup>58</sup> or sue their directors through a benefit enforcement action for failing to uphold socially beneficial commitments.<sup>59</sup> So far, a benefit enforcement action challenging a company’s failure to fulfill a stated mission has yet to occur.<sup>60</sup> This may be due to the ambiguity still surrounding the extent to which benefit corporations’ directors may prioritize stakeholder interests over profit<sup>61</sup> or because many states try to ensure that benefit corporations meet their goals by requiring an annual assessment of their CSR performance.<sup>62</sup> B-Corp certification is separate from benefit corporation status and, therefore, provides another avenue for for-profit corporations to demonstrate their commitment to CSR.<sup>63</sup> As of October 2015, 822 B-Corps had registered nationwide, and thirty-nine benefit corporations, which were not B-Corp certified, had registered in Delaware since the Public Benefit Corporation legislation took effect in August 2013.<sup>64</sup>

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<sup>53</sup> Elissa Loughman, *Benefit Corporation Update: Patagonia Passes B Impact Assessment, Improves Score to 116*, PATAGONIA, <https://www.patagonia.com/stories/benefit-corporation-update-patagonia-passes-b-impact-assessment-improves-score-to-116/story-17871.html> [https://perma.cc/ADT5-RBUW] (last visited Feb. 15, 2021).

<sup>54</sup> Jaime Lee, Note, *Benefit Corporations: A Proposal for Assessing Liability in Benefit Enforcement Proceedings*, 103 CORNELL L. REV. 1075, 1081 (2018).

<sup>55</sup> See MD. CODE ANN., CORPS. & ASS’NS § 5-6C-03 (West 2020).

<sup>56</sup> DEL. CODE ANN. tit. 8, §§ 361-368 (2020).

<sup>57</sup> Atkins, Gerber & Micheletti, *supra* note 44 (emphasis added).

<sup>58</sup> See, e.g., DEL. CODE ANN. tit. 8, § 327.

<sup>59</sup> Lee, *supra* note 54, at 1095-96.

<sup>60</sup> *Id.* at 1096.

<sup>61</sup> *Id.*

<sup>62</sup> David A. Katz & Laura A. McIntosh, *Wachtell Lipton Discusses the Corporate Form for Social Good*, CLS BLUE SKY BLOG (May 29, 2019), <https://clsbluesky.law.columbia.edu/2019/05/29/wachtell-lipton-discusses-the-corporate-form-for-social-good/> [https://perma.cc/H83S-UT9T].

<sup>63</sup> See *id.* at 173.

<sup>64</sup> Kennan El Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 183-84 (2015).

Some argue that it is problematic to provide corporations with the option of becoming benefit corporations because this corporate form “wrongly presumes benefit corporations’ capability of generating more social and environmental impact than traditional for-profits.”<sup>65</sup> That is, benefit corporations may make it appear as though traditional for-profit companies should be focused exclusively on profit maximization because if they were going to focus on social goals, they would become a benefit corporation.<sup>66</sup> This may disincentivize directors of traditional for-profit corporations from pursuing socially responsible goals out of fear of litigation risks, given that they receive less protection from shareholder derivative suits than do benefit corporations.<sup>67</sup> However, benefit corporations are really just another option for companies to publicly self-identify as socially responsible. There seem to be enough reputational, social good, and monetary benefits for traditional for-profit corporations to pursue CSR, even if it is to a lesser extent than benefit corporations may.<sup>68</sup>

#### B. *Increasing Support of CSR*

Over the past decade, there has been a societal shift toward CSR initiatives. Today, most major U.S. corporations engage in some form of CSR<sup>69</sup>—according to one study, almost 90% of corporate managers reported that their companies include CSR goals as a part of their core business values.<sup>70</sup> In March 2019, *Fortune* conducted a poll that showed that 41% of Fortune 500 CEOs believed that “solving social problems should be ‘part of [their] core business strategy.’”<sup>71</sup>

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<sup>65</sup> *Id.* at 174.

<sup>66</sup> See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 16-17 (2012); Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 183 (2012).

<sup>67</sup> Dustin Womack, Note, *Solely Beneficial: How Benefit Corporations May Change the Duty of Care Analysis for Traditional Corporate Directors in Delaware*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 151, 152 (2018) (“[T]he advent of benefit corporations may be responsible for inadvertently limiting the freedom of traditional (non-benefit) corporate directors, hindering their ability to consider the public interest.”).

<sup>68</sup> *Cf. supra* notes 48-52 and accompanying text.

<sup>69</sup> See, e.g., *16 Brands Doing Corporate Social Responsibility Successfully*, DIGIT. MKTG. INST. (Feb. 25, 2019), <https://digitalmarketinginstitute.com/en-us/blog/corporate-16-brands-doing-corporate-social-responsibility-successfully> [<https://perma.cc/NYJ7-A2BT>] (discussing various companies’ commitments to CSR, including Coca-Cola, Google, Pfizer, Starbucks, and TOMS); see also Susan McPherson, *6 CSR Trends to Watch in 2017*, FORBES (Jan. 19, 2017, 11:38 AM), <http://www.forbes.com/sites/susanmcperson/2017/01/19/6-csr-trends-to-watch-in-2017> (describing growth in CSR practices over past decade as a “stunning transition”).

<sup>70</sup> SOPHIA A. MUIRHEAD, CHARLES J. BENNETT, RONALD E. BERENBEIM, AMY KAO & DAVID J. VIDAL, CONF. BD., CORPORATE CITIZENSHIP IN THE NEW CENTURY: ACCOUNTABILITY, TRANSPARENCY, AND GLOBAL STAKEHOLDER ENGAGEMENT 5 (2002).

<sup>71</sup> Alan Murray, *A New Purpose for the Corporation*, FORTUNE, Sept. 2019, at 88, 94

While citizenship goals have been in place for a while, “an emphasis on a broader citizenship approach—including the environment and sustainable development—is emerging as a new model.”<sup>72</sup> Reasons for this societal shift include the growing role in the workforce of millennials who have a greater interest in corporations’ impact on the environment and society and business executives’ declining confidence that the government will take action to fix problems such as climate change.<sup>73</sup> A worldwide survey in 2014 showed a strong and growing demand among employees and consumers for corporations to engage in responsible behavior as well as a willingness to pay extra for responsibly produced goods.<sup>74</sup> Another survey by Net Impact in 2012 found that 59% of millennials, 49% of Gen-Xers, and 52% of baby boomers—compared with 72% of college students—indicated that they wanted to work for a company where they could “make an impact.”<sup>75</sup> Somewhat surprisingly, 45% of those surveyed reported that they would be willing to accept a decrease in their salary of up to 15% if their employer were dedicated to social or environmental impacts.<sup>76</sup> These reports indicate that companies may gain a competitive advantage in getting the best employees through cultivating a strong reputation for engaging in CSR practices.

Corporations have also added CSR to their business models due to branding for consumers. One study found that “[c]onsumers say that they are more likely to be loyal to a company that is well-known for being socially responsible than to a company that offers a lower price or shares their values.”<sup>77</sup> Additionally, large corporate scandals, such as the BP Oil Spill of 2010, which caused an explosion and massive oil leak into the Gulf of Mexico,<sup>78</sup> the Wells Fargo account fraud scandal,<sup>79</sup> and Cambridge Analytica’s stealing of personal profile

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(alteration in original).

<sup>72</sup> MUIRHEAD ET AL., *supra* note 70, at 5.

<sup>73</sup> See Henderson, *supra* note 47.

<sup>74</sup> See NIELSEN, *DOING WELL BY DOING GOOD* 2, 5-6 (2014).

<sup>75</sup> JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS, THE STATE UNIV. OF NEW JERSEY; CLIFF ZUKIN & MARK SZELTNER, *NET IMPACT TALENT REPORT: WHAT WORKERS WANT IN 2012*, at 16 (2012), <https://netimpact.org/sites/default/files/documents/what-workers-want-2012.pdf> [<https://perma.cc/2P28-Y26W>].

<sup>76</sup> *Id.* at 12.

<sup>77</sup> FLEISHMAN-HILLARD & NAT’L CONSUMERS LEAGUE, *RETHINKING CORPORATE SOCIAL RESPONSIBILITY* 45 (2006), <https://www.greenbiz.com/sites/default/files/document/CustomO16C45F69502.pdf> [<https://perma.cc/8JRG-9FKQ>] (emphasis omitted).

<sup>78</sup> See Richard Pallardy, *Deepwater Horizon Oil Spill*, BRITANNICA, <https://britannica.com/event/Deepwater-Horizon-oil-spill> [<https://perma.cc/R8EV-JD4W>] (last updated Nov. 2, 2020).

<sup>79</sup> See Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), <https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/> [<https://perma.cc/LY46-KHZR>].

data from Facebook,<sup>80</sup> have driven responses from companies that include publicly dedicating efforts to CSR.<sup>81</sup> These companies have used CSR initiatives to repair their reputations and make reparations to offset the harm they caused to both society and their brands from these scandals.

One of the most prominent shifts toward prioritizing CSR initiatives and corporate purpose has come from socially conscious investors. Socially responsible investing (“SRI”) is a strategy that puts CSR together with positive investment returns.<sup>82</sup> SRI funds have significant power through their ownership rights and influence management’s decisions “by attending shareholder meetings, filing proposals, writing letters to management and exercising voting rights.”<sup>83</sup> In 2019, BlackRock’s CEO, Larry Fink, made it clear in his well-known letter to CEOs that purpose and profit should both be part of corporations’ goals.<sup>84</sup> Specifically, Fink stated,

Purpose is not a mere tagline or marketing campaign; it is a company’s fundamental reason for being – what it does every day to create value for its stakeholders. Purpose is not the sole pursuit of profits but the animating force for achieving them.

Profits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked. Profits are essential if a company is to effectively serve all of its stakeholders over time – not only shareholders, but also employees, customers, and communities. Similarly, when a company truly understands and expresses its purpose, it functions with the focus and strategic discipline that drive long-term profitability. Purpose unifies management, employees, and communities. It drives ethical behavior and creates an essential check on actions that go against the best interests of stakeholders. Purpose guides culture, provides a framework for consistent decision-making, and, ultimately, helps sustain long-term financial returns for the shareholders of your company.<sup>85</sup>

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<sup>80</sup> See Josh Constine & Taylor Hatmaker, *Facebook Admits Cambridge Analytica Hijacked Data on up to 87M Users*, TECHCRUNCH (Apr. 4, 2018, 2:30 PM), <https://techcrunch.com/2018/04/04/cambridge-analytica-87-million/> [<https://perma.cc/85HN-V8KU>].

<sup>81</sup> Cf. Sally Percy, *What Lies Behind the Façade of Corporate Responsibility?*, FORBES (May 29, 2018, 7:11 AM), <https://www.forbes.com/sites/sallypercy/2018/05/29/what-lies-behind-the-facade-of-corporate-responsibility/> (questioning whether large companies are really as responsible as they claim to be).

<sup>82</sup> Shauna Carther Heyford, *Socially Responsible Mutual Funds*, INVESTOPEDIA (Nov. 3, 2020), <https://www.investopedia.com/articles/mutualfund/03/030503.asp> [<https://perma.cc/7AMF-BHHH>].

<sup>83</sup> *Id.* (citation omitted).

<sup>84</sup> Fink, *supra* note 4.

<sup>85</sup> *Id.* (emphases omitted).

This statement is influential because it came from BlackRock, the world's largest asset manager, which controlled \$7.8 trillion in assets as of the end of the third quarter of 2020.<sup>86</sup> The 2016 Global Sustainable Investment Review found that over \$22 trillion in professionally managed global investment assets now have some type of ESG as part of their portfolios as negative screenings or positive integrations.<sup>87</sup> Recently, a record 631 investors that manage over \$37 trillion signed an investor statement to governments on climate change, urging investors and governments to implement the Paris Agreement<sup>88</sup> and urging companies to improve climate-related financial reporting.<sup>89</sup> Financial Times Stock Exchange ("FTSE") and Dow Jones companies may also be listed on the FTSE4Good index and Dow Jones Sustainability Index ("DJSI") if they meet certain environmental, sustainability, human-and-labor-rights, and stakeholder-relations conditions.<sup>90</sup>

In August 2019, the Business Roundtable released a statement on the importance of companies' valuing stakeholders as well as shareholders.<sup>91</sup> The statement opined that companies have a corporate responsibility to educate and invest in their employees, deal ethically with their suppliers, respect their communities, and protect the environment by embracing sustainable practices, in addition to generating value for shareholders.<sup>92</sup>

Some, including the Council of Institutional Investors, have not signed onto the Business Roundtable's idea or do not think that it will change much in the corporate landscape.<sup>93</sup> But others believe that the statement is significant

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<sup>86</sup> Nathan Reiff, *How BlackRock Makes Money*, INVESTOPEDIA (Dec. 3, 2020), <https://www.investopedia.com/articles/markets/012616/how-blackrock-makes-money.asp> [https://perma.cc/VS6X-6LVB].

<sup>87</sup> GLOB. SUSTAINABLE INV. ALL., 2016 GLOBAL SUSTAINABLE INVESTMENT REVIEW 3 (2016), [http://www.gsi-alliance.org/wp-content/uploads/2017/03/GSIR\\_Review2016.F.pdf](http://www.gsi-alliance.org/wp-content/uploads/2017/03/GSIR_Review2016.F.pdf) [PERMA].

<sup>88</sup> Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16,1104.

<sup>89</sup> ASIA INV. GRP. ON CLIMATE CHANGE, CDP, CERES, INV. GRP. ON CLIMATE CHANGE, INSTITUTIONAL INVS. GRP. ON CLIMATE CHANGE, PRINCIPLES FOR RESPONSIBLE INV. & UN ENV'T PROGRAMME FIN. INITIATIVE, GLOBAL INVESTOR STATEMENT TO GOVERNMENTS ON CLIMATE CHANGE 2 (2019), <https://theinvestoragenda.org/wp-content/uploads/2019/12/191201-GISGCC-FINAL-for-COP25.pdf> [https://perma.cc/3CD9-TJVA].

<sup>90</sup> See Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 341 (2004) (citing *FTSE4Good Index Series*, FTSE RUSSELL, <https://www.ftserussell.com/products/indices/ftse4good> [https://perma.cc/H5XQ-PTNJ] (last visited Feb. 15, 2021)).

<sup>91</sup> See *Business Roundtable Statement*, *supra* note 1.

<sup>92</sup> *Id.* (asking lead investors to support companies that build long-term value by investing in their employees and communities).

<sup>93</sup> Press Release, Council of Institutional Invs., Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose (Aug. 19, 2019), [https://www.cii.org/aug19\\_brt\\_response](https://www.cii.org/aug19_brt_response) [https://perma.cc/298E-4ADD] (criticizing Business Roundtable's statement, and arguing that government, rather than corporations, should take



“because it opens the door for more discussion of the idea of corporate purpose.”<sup>94</sup> And there has been more discussion already. In his 2020 letter, Larry Fink again chose to focus on encouraging companies to pursue CSR initiatives, this time discussing the impact of climate change and sustainability initiatives.<sup>95</sup> The letter warned, “Where we feel companies and boards are not producing effective sustainability disclosures or implementing frameworks for managing these issues, we will hold board members accountable.”<sup>96</sup> This warning demonstrates that BlackRock is willing to vote against or withhold votes from directors who do not pursue CSR goals—specifically, those confronting climate change.<sup>97</sup> The letter may serve as a sort of permission for CEOs to more highly prioritize sustainability in their corporate strategy even if it hurts their short-term profits.

Some of the nation’s largest companies—which BlackRock invests in—signed onto the Business Roundtable statement.<sup>98</sup> Currently, big players in the corporate sphere are debating this statement’s future impact.<sup>99</sup> Based on these trends, the current projection is that a majority of all global investment capital will include CSR and ESG criteria within the next ten years.<sup>100</sup> This shows that investors recognize the link between stakeholder and shareholder interests. The increasing number of companies making these CSR statements will likely escalate the already steady push toward liability related to voluntary CSR statements, which may endanger the promotion of CSR generally.

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responsibility for societal issues).

<sup>94</sup> Leslie Silverman, Arthur Kohn & David Lopez, *Corporate Purpose Debate Hinges on Enhanced Board Role*, LAW360 (Aug. 23, 2019, 6:05 PM), <https://www.law360.com/articles/1191975/corporate-purpose-debate-hinges-on-enhanced-board-role>; see also Martin Lipton, *Stakeholder Corporate Governance Business Roundtable and Council of Institutional Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 21, 2019), <https://corpgov.law.harvard.edu/2019/08/21/stakeholder-corporate-governance-business-roundtable-and-council-of-institutional-investors/> [<https://perma.cc/4ZYC-AQ4U>] (stating that following Business Roundtable principles will preserve corporate system that relies on free and open markets and that failing to recognize inequality and climate change threats will lead to legislative regulation of corporations and investors).

<sup>95</sup> Larry Fink, *Larry Fink’s 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> [<https://perma.cc/L28X-4DPH>] (last visited Feb. 15, 2021).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See Sorkin, *supra* note 2, at B1; see also Mark R. Kramer, *Larry Fink Isn’t Going to Read Your Sustainability Report*, HARV. BUS. REV. (Jan. 20, 2020), <https://hbr.org/2020/01/larry-fink-isnt-going-to-read-your-sustainability-report> (explaining Fink’s 2020 letter to CEOs).

<sup>99</sup> See Sorkin, *supra* note 2, at B1.

<sup>100</sup> See Vargas, *In Defense of E. Merrick Dodd*, *supra* note 48, at 368.

## II. INCENTIVES AND ENFORCEMENT MECHANISMS

The idea behind incentivizing and enforcing CSR statements is not new. The term “corporate social responsibility” originated in the 1990s when the public learned about Nike sweatshops and has become more commonplace since then.<sup>101</sup> In the past few decades, events like the BP oil spill in 2010 have also sped up the shift toward CSR.<sup>102</sup> Much of this shift is in recognition of the fact that corporations cause a variety of other problems within society; for instance, just twenty-five corporations and state producers are responsible for over half of global industrial emissions.<sup>103</sup> As few as 100 companies are responsible for over 70% of global emissions,<sup>104</sup> and the top 3,000 firms contribute \$2.2 trillion in environmental damage every year.<sup>105</sup> Corporations also commit or facilitate gross human rights violations each year.<sup>106</sup> These corporations should take responsibility for the harm that they cause to the environment, human rights, and society as a whole, and they should use their power to positively contribute to society. Corporations can combat these negative externalities through, among other measures, implementing more CSR initiatives.

### A. *Why Monitoring CSR Is Important*

Generally, incentivizing corporations to engage in socially responsible efforts and to share what they are doing is both morally and ethically sound.<sup>107</sup> Because consumers have clearly shown that part of what they consider when purchasing products are CSR factors and reputations, Friedman’s argument collapses in on itself.<sup>108</sup> Companies have a unique capability to implement CSR initiatives in order to combat issues that they perpetuate because they have access to

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<sup>101</sup> See Muhammad Azizul Islam, *What Is Corporate Social Responsibility – and Does It Work?*, CONVERSATION (Aug. 7, 2018, 7:42 AM), <http://theconversation.com/what-is-corporate-social-responsibility-and-does-it-work-89710> [<https://perma.cc/2J9P-VS7W>]. See generally *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002) (holding that statements about working conditions for Nike employees and whether Nike met its own code of conduct in prohibiting sweatshop labor were not protected by the First Amendment and thus could violate California’s unfair competition and false advertising laws).

<sup>102</sup> See Islam, *supra* note 101.

<sup>103</sup> PAUL GRIFFIN, CDP, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017, at 8 (2017).

<sup>104</sup> *Id.*

<sup>105</sup> Juliette Jowit, *World’s Top Firms Cause \$2.2tn of Environmental Damage, Report Estimates*, GUARDIAN (Feb. 18, 2010, 1:19 PM), <https://www.theguardian.com/environment/2010/feb/18/worlds-top-firms-environmental-damage> [<https://perma.cc/L48A-W9ZP>].

<sup>106</sup> *Corporate Human Rights Abuses*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses> [<https://perma.cc/4TA9-C3X7>] (last visited Feb. 15, 2021).

<sup>107</sup> See Percy, *supra* note 81. *But see* Friedman, *supra* note 21, at 33.

<sup>108</sup> See FLEISHMAN-HILLARD & NAT’L CONSUMERS LEAGUE, *supra* note 77, at 45.

resources, capital, and influence. Additionally, CSR regulations can never truly be comprehensive, and this type of self-regulation by companies is generally consonant with other policies and values, such as free-market capitalism.

CSR encourages companies to engage in “positive labor-management relationships, environmental stewardship, corporate philanthropy, and community engagement.”<sup>109</sup> Social responsibility includes initiatives related to committing to renewable energy sources, paying employees more than minimum wage, and making sure their vendors’ way of doing business aligns with the company’s goals.<sup>110</sup> CSR may even affect employee behavior when employees believe that their employers are “doing good” and may serve as a tool to reduce employee misconduct.<sup>111</sup> A company can be successful “not just in spite of but *because of these commitments*” to socially responsible goals.<sup>112</sup>

While companies should be encouraged to make these statements, they should also be required to actually meet the goals and promises set forth in their statements regarding their socially responsible efforts.<sup>113</sup> There is an inherent tradeoff in providing companies incentives to be socially responsible, such as positive branding opportunities: the risk that they engage in “greenwashing,”<sup>114</sup> a practice whereby companies release voluntary CSR statements just to help their brand image but do not actually achieve any purposeful goals.<sup>115</sup> For example, Walmart appears to have engaged in greenwashing; its environmental policies for 2005 included goals such as “[t]o be supplied 100 percent by renewable energy,” “create zero waste,” and “sell products that sustain our resources and environment.”<sup>116</sup> Its initiatives fell short when Walmart’s own suppliers did not meet this green standard. There seem to have been no legal consequences related to these statements, and Walmart has continued to engage

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<sup>109</sup> Vargas, *In Defense of E. Merrick Dodd*, *supra* note 48, at 348.

<sup>110</sup> See Henderson, *supra* note 47.

<sup>111</sup> Vanessa Burbano & Bennett Chiles, Corporate Social Responsibility and Employee Misconduct 1-3 (Oct. 2018) (unpublished manuscript) (on file with the Boston University Law Review).

<sup>112</sup> Henderson, *supra* note 47 (emphasis added).

<sup>113</sup> See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 4 (paperback ed. 2006).

<sup>114</sup> CorpWatch defines greenwashing as corporations’ disseminating disinformation “so as to present an environmentally responsible public image” in an attempt to “expand their markets by posing as friends of the environment and leaders in the struggle to eradicate poverty.” *Greenwash Fact Sheet*, CORPWATCH (Mar. 22, 2001), <https://corpwatch.org/article/greenwash-fact-sheet> [<https://perma.cc/C3K4-AX77>].

<sup>115</sup> Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere “Puffery”?*, 45 *ECOLOGY L.Q.* 703, 707 (2018).

<sup>116</sup> Lee Scott, Former President & CEO, Wal-mart Stores, Inc., Address to Employees and Suppliers: Twenty First Century Leadership (Oct. 23, 2005), [https://corporate.walmart.com/\\_news\\_/executive-viewpoints/twenty-first-century-leadership](https://corporate.walmart.com/_news_/executive-viewpoints/twenty-first-century-leadership) [<https://perma.cc/K22V-PECZ>].

in greenwashing since then.<sup>117</sup> As a result of one instance of its alleged greenwashing in 2017, Walmart paid \$1 million to settle claims that arose under California state law for labeling plastic products as biodegradable without disclaimers of how quickly the product will biodegrade.<sup>118</sup> So, the question is: What is the best way to create accountability for greenwashing, and who should we hold responsible in these situations?

B. *Enforcement Mechanisms Thus Far: Guidelines, Legislation, and Litigation*

While CSR is meant to be based on deregulation and voluntary cooperation, it needs to be incentivized properly. Directors should in some way be responsible for making CSR statements on behalf of their companies. Additionally, companies rarely release information about their CSR initiatives for purely moral reasons. They want to get something out of it, such as reputational benefits. This makes it more likely that, without any type of enforcement surrounding the information that companies release to the public on these initiatives, directors will not ensure that their statements are accurate or that the company is actually carrying out its CSR goals. Enforcement may even be beneficial to corporations because “corporations themselves wish to publicly communicate to their stakeholders their good corporate behavior in a verifiable, reliable and accessible manner.”<sup>119</sup>

Currently, CSR mainly relies on market forces for enforcement.<sup>120</sup> For example, information provided by whistleblowers—corporate insiders who report wrongdoing for rewards—enables socially responsible investors to know whether companies are actually committed to CSR.<sup>121</sup> Then, the investors can base their investment decisions on that information, and companies may face capital-raising problems as a consequence that would hopefully encourage them to make CSR goals in good faith. Additionally, the U.N. Global Compact<sup>122</sup> and

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<sup>117</sup> See Stacy Mitchell, *Walmart’s Promised Green Product Rankings Fall Off the Radar*, GRIST (Nov. 22, 2011), <https://grist.org/business-technology/2011-11-21-walmart-promised-green-product-rankings-fall-off-radar/> [<https://perma.cc/BDF7-8J57>].

<sup>118</sup> Sarah Ravani, *Walmart to Pay \$1M in Suit Over Misleading Labels on Products*, SFGATE (Feb. 1, 2017, 5:30 PM), <https://www.sfgate.com/bayarea/article/Walmart-to-pay-1M-to-settle-suit-over-10901772.php> [<https://perma.cc/E9ZE-8M49>].

<sup>119</sup> Bantekas, *supra* note 90, at 336.

<sup>120</sup> See Vargas, *In Defense of E. Merrick Dodd*, *supra* note 48, at 348.

<sup>121</sup> *Using Whistleblower Laws to Uphold Social Responsibility Commitments*, WHISTLEBLOWER NETWORK NEWS (June 14, 2018), <https://www.whistleblowersblog.org/2018/06/articles/dodd-frank-whistleblowers/using-whistleblower-laws-to-uphold-social-responsibility-commitments/> [<https://perma.cc/YN2B-DCT5>].

<sup>122</sup> U.N. GLOB. COMPACT, <https://www.unglobalcompact.org/> [<https://perma.cc/8JST-6N8Y>] (last visited Feb. 15, 2021) (providing companies with guiding principles for socially responsible business activities and sustainability goals). The Global Compact has become the world’s largest voluntary corporate initiative with participation from over 5,100 participants

OECD Guidelines for Multinational Enterprises (“OECD Guidelines”)<sup>123</sup> are two major public international guidelines for CSR. Specifically, the OECD Guidelines provide that multinational enterprises should “‘consider the views of other stakeholders’ while they ‘contribute to economic, environmental and social progress with a view to achieving sustainable development.’”<sup>124</sup> The Global Reporting Initiative released another set of widely adopted sustainability reporting guidelines in 1999 that are constantly evolving.<sup>125</sup> The Sustainability Accounting Standards Board (“SASB”), formed in 2011, also tries to help public companies identify and disclose important information relating to CSR and sustainability that investors may want to factor into their investment decisions.<sup>126</sup> However, liability does not attach to any of these guidelines.

The probability of legal responsibility related to stakeholder-focused corporate governance and CSR statements is currently unclear and difficult to predict.<sup>127</sup> Generally, “there exists a patchwork of corporate social responsibility regulations as a result of the various resources and lobbying efforts made on behalf of particular social goals.”<sup>128</sup> In the United States, no broad regulatory mandates exist requiring comprehensive sustainability disclosure either. “The push for sustainability reporting and disclosure comes from a broad set of stakeholders who are increasingly asking for more detailed information from companies on ESG issues.”<sup>129</sup>

A variety of enforcement mechanisms through regulatory bodies and courts have started to form to address statements about corporations’ social responsibility programs. For example, federal and state laws mandate some forms of CSR in the environmental sphere,<sup>130</sup> and such CSR may also be subject to the threat of shareholder derivative suits. Some disclosure requirements are also in place generally, which may lead to the creation of more disclosure requirements specifically related to voluntary statements. For example, in 2010,

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and stakeholders from over 130 countries. *See* Kerr, *supra* note 12, at 865.

<sup>123</sup> OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/8WFW-S6GH>].

<sup>124</sup> Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 187 (2018) (quoting OECD, *supra* note 123, at 19).

<sup>125</sup> *See generally* GLOB. REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES (2013), <https://respect.international/wp-content/uploads/2017/10/G4-Sustainability-Reporting-Guidelines-Reporting-Principles-and-Standard-Disclosures-GRI-2013.pdf> [<https://perma.cc/96MN-WU2V>].

<sup>126</sup> SASB, <http://www.sasb.org> [<https://perma.cc/Q6BL-AAME>] (last visited Feb. 15, 2021).

<sup>127</sup> *See* Lipton, *supra* note 94; Silverman, Kohn & Lopez, *supra* note 94.

<sup>128</sup> Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1670 (2015).

<sup>129</sup> Orr & Kempf, *supra* note 3, at 1.

<sup>130</sup> *See id.*

California passed the California Transparency in Supply Chain Act, which requires companies to disclose the actions they take to tackle modern slavery, child labor, and human trafficking.<sup>131</sup>

There has also been an increase in litigation related to a corporation's failure to act on commitments made in its voluntary CSR statements.<sup>132</sup> So far, such litigation has "challeng[ed] companies' CSR-related statements as false and misleading under various state consumer protection laws."<sup>133</sup> This includes misstatements and omissions about supply chains, factory safety, and working conditions.<sup>134</sup> Most of these cases are class actions on behalf of consumers and shareholders seeking injunctive relief in the form of modifications to disclosures, damages, restitution, and attorneys' fees and costs.<sup>135</sup> Securities fraud lawsuits have also been filed, including a claim against Sanofi, a pharmaceutical company that published statements in its Corporate Social Responsibility Report, such as, "[w]e maintain an effective compliance organization" and "[o]ur strategy focuses on establishing and enforcing clear rules . . . while seeking to go beyond regulatory compliance through our efforts toward transparency, accountability, and disclosure."<sup>136</sup> The district court did not find these statements actionable under federal securities laws because the statements were too general for a reasonable investor to rely on them.<sup>137</sup> In a different § 10(b) action,<sup>138</sup> however, CSR statements were found actionable against BP after the Deepwater Horizon incident because BP, in its sustainability reports, annual reports, and analyst calls, said that it was making safety reform efforts that it did not actually make.<sup>139</sup> At the very least, companies should now be on notice that they need to make accurate statements about their CSR efforts.

With the voluminous amount of CSR data that companies have made easily accessible to the public, shareholders and consumers may look to inconsistencies

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<sup>131</sup> CAL. CIV. CODE § 1714.43 (West 2020).

<sup>132</sup> Jason Meltzer, Elizabeth Ising, Andrew Tulumello, David Debold, Perlette Jura, Lori Zyskowski & Bryson Smith, *Corporate Social Responsibility Statements – Recent Litigation and Avoiding Pitfalls*, GIBSON DUNN (Mar. 9, 2017), <https://www.gibsondunn.com/corporate-social-responsibility-statements-recent-litigation-and-avoiding-pitfalls/> [<https://perma.cc/G29W-NWBC>].

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See, e.g.*, Nat'l Consumers League v. Wal-Mart Stores, Inc., No. 2015-CA-007731, 2016 WL 4080541, at \*1 (D.C. Super. Ct. July 22, 2016) (order denying motion to dismiss claim under the District of Columbia Consumer Protection Procedures Act based on defendants' CSR statements).

<sup>136</sup> *In re* Sanofi Sec. Litig., 155 F. Supp. 3d 386, 396 (S.D.N.Y. 2016) (first and second alterations in original).

<sup>137</sup> *Id.* at 401.

<sup>138</sup> Alameda Cnty. Emps.' Ret. Ass'n v. BP p.l.c. (*In re* BP p.l.c. Sec. Litig.), No. 4:12-cv-01256, 2013 WL 6383968 (S.D. Tex. Dec. 5, 2013).

<sup>139</sup> *Id.* at \*23.

between companies' statements and their actions. Under Section 220 of the Delaware General Corporation Law, shareholders can request books and records for shareholder derivative actions based on companies' CSR statements.<sup>140</sup> In one 2013 case, *Louisiana Municipal Police Employees' Retirement System v. Hershey Co.*,<sup>141</sup> shareholders requested Hershey's books and records as "evidence of mismanagement and possible breaches of fiduciary duty related to the use of child labor on West African cocoa farms in Hershey's supply chain."<sup>142</sup> Hershey signed onto a statement released by the Chocolate Manufacturers Association highlighting the chocolate industry's goal to "develop and implement [by July 1, 2005] . . . industry-wide standards of public certification . . . that cocoa beans and their derivative products have been grown and/or processed without any of the worst forms of child labor."<sup>143</sup>

The signatories did not achieve this goal by July 1, 2005.<sup>144</sup> And more importantly, documents in the complaint included Hershey's 2011 Corporate Social Responsibility Progress Report and other public promises "that [Hershey] would certify that its chocolate products were free of cocoa tainted with child labor and human trafficking violations by 2020, as evidence that Hershey's board of directors was aware of at least some instances of child labor use in its supply chain."<sup>145</sup> Hershey had failed to assure that its cocoa was sourced without the use of forced child labor as it reported that it would do.<sup>146</sup> The court denied Hershey's motion to dismiss, opening the possibility of director liability for not following through on voluntary CSR efforts and promises.<sup>147</sup>

Recently, two NGOs filed a lawsuit in France against Samsung alleging misleading advertising practices related to voluntary ethical commitments that the company published and that are inconsistent with its labor practices.<sup>148</sup> The NGOs argue that voluntary pledges Samsung made on its website are just as legally binding as a company's marketing practices.<sup>149</sup> Shareholders in the

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<sup>140</sup> DEL. CODE ANN. tit. 8, § 220 (2020).

<sup>141</sup> Rulings of the Court from Oral Argument on Exceptions to the Master's Final Report, *La. Mun. Police Emps. Ret. Sys. v. Hershey Co.*, No. 7996-ML (Del. Ch. Mar. 18, 2014) [hereinafter *Rulings of the Court*], <https://lawprofessors.typepad.com/files/hershey-ruling.pdf> [<https://perma.cc/W9NG-B5V3>].

<sup>142</sup> SOC'Y FOR CORP. GOVERNANCE & GIBSON, DUNN & CRUTCHER LLP, *supra* note 14, at 10 (citing *Rulings of the Court*, *supra* note 141).

<sup>143</sup> *Rulings of the Court*, *supra* note 141, at 6 (alterations in original).

<sup>144</sup> *Id.* at 6-8.

<sup>145</sup> SOC'Y FOR CORP. GOVERNANCE & GIBSON, DUNN & CRUTCHER LLP, *supra* note 14, at 10.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Samsung Could End Up in French Court Over Ethics Pledges: NGOs*, MALAYSIAN RSRV. (July 3, 2019), <https://themalaysianreserve.com/2019/07/03/samsung-could-end-up-in-french-court-over-ethics-pledges-ngos/> [<https://perma.cc/5KZP-R3EE>].

<sup>149</sup> *Id.*

United States may follow this lead and sue corporations for these types of practices.

### III. HOW TO PROPERLY INCENTIVIZE CSR STATEMENTS

Properly incentivizing adherence to CSR statements is tricky. There are advantages and disadvantages to enforcing them in the first place because of the fear that overenforcement will disincentivize companies from making CSR statements at all.<sup>150</sup> The Council of Institutional Investors' executive director worries that "[a]ccountability to everyone means accountability to no one";<sup>151</sup> enforcing companies' obligations to both stakeholders and shareholders may create confusion about to which parties the board is accountable and what priority these parties should take in directors' decisions.<sup>152</sup> Because social responsibility is a proper corporate purpose, any solution must allow for-profit corporations to simultaneously be socially responsible, profitable, and accountable.

Liability may potentially be effective in holding corporations to their commitments. Corporations may work harder to achieve CSR goals once they set them if they know that they are subject to liability for not trying to meet or not actually meeting them. However, liability may also disincentivize corporations from making CSR statements altogether. Therefore, it is important that enforcement mechanisms strike a balance between disincentivizing bad-faith CSR, such as greenwashing, and not deterring good-faith efforts that just ultimately fall short. Focusing on the quality of information that corporations release to shareholders and the actual steps taken to achieve the goal, rather than penalizing corporations solely for falling short, may strike such a balance.

#### A. *Why Liability May Not Work as a CSR Enforcement Mechanism*

While corporate and director liability may seem useful for holding corporations to their statements and encouraging them to follow through with what they claim they will do, it has quite a few downsides. First, liability may not achieve its intended goal. If companies are held liable for failing to meet an overly optimistic CSR goal, for example, they may not make further sustainability goals or other CSR statements out of fear of liability and litigation costs.<sup>153</sup> More liability will lead to less protection under the business judgment rule.<sup>154</sup> And even when liability is a risk, corporations often do not see the risk

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<sup>150</sup> Press Release, Council of Institutional Invs., *supra* note 93.

<sup>151</sup> *Id.* ("It is government, not companies, that should shoulder the responsibility of defining and addressing societal objectives with limited or no connection to long-term shareholder value.").

<sup>152</sup> *Id.*

<sup>153</sup> See Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 527 (2013).

<sup>154</sup> See *id.* at 526-28 (explaining business judgment rule's implications).



as worth changing their ways if that change would conflict with profit maximization.<sup>155</sup> Thus, linking CSR efforts and liability may not lead to the desired result of corporations' trying to avoid this liability by following through on CSR goals if doing so would get in the way of their profits. For example, if Google will be more profitable if it breaks a CSR commitment, it may take the risk of liability for the tradeoff of increased profits and pleasing a different set of investors than those interested in CSR. Liability in that case would not succeed at incentivizing Google to follow through on its commitment. Director and officer liability may also play a role here if there is public backlash in response to a company's failure to follow through with its CSR plans or misrepresentation of its CSR initiatives, which may in turn decrease profits.<sup>156</sup> Liability in this case may not be a bad option if directors and officers are concerned about being sued directly, but it may just lead to companies taking out larger director and officer insurance policies rather than actively pursuing CSR in a more socially beneficial way.<sup>157</sup>

Liability is also difficult in this situation because it opens the door for many, often unanswerable, logistical problems. One of the biggest issues would be how to impose or measure damages. If voluntary CSR statements were to trigger liability, the damages that attach may be unquantifiable. Other types of discouraged behaviors, such as self-dealing, usually have a clear economic effects.<sup>158</sup> But, in the hypothetical above, Google made *more* money by breaking its CSR commitment. Would the corporation then have to disgorge the profit? Directors have to deal with an already difficult tension between maintaining their CSR commitments and making decisions that are not too economically irrational. Further, who would receive the disgorged profits? There are two opposing sets of shareholders in these situations: those who wanted the CSR goal to be met and those who care exclusively about profitability. Those who wanted the CSR goal to be met would be the group expected to receive damages in a CSR liability matter, but this would be unfair to the other set of shareholders.

The directors are the ones who make these social responsibility statements, but the corporation would have to pay if it is held liable for failing to meet its statements in securities litigation. Directors are really the ones who should be made to pay for their actions or inactions that led to their companies' failure to achieve CSR goals. In a case where the corporation is sued directly and the

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<sup>155</sup> See Ryznar & Woody, *supra* note 128, at 1693.

<sup>156</sup> See Kevin LaCroix, *Guest Post: Potential D&O Risks Arising from Corporate Social Responsibility*, D&O DIARY (Feb. 4, 2020), <https://www.dandodiary.com/2020/02/articles/director-and-officer-liability/guest-post-potential-do-risks-arising-from-corporate-social-responsibility/> [<https://perma.cc/KEA8-JRSD>].

<sup>157</sup> Cf. Priya Cherian Huskins, *D&O Liability Insurance: An Overview*, BOARDSPAN, <https://boardspan.com/users/0/library/d-o-liability-insurance-an-overview> [<https://perma.cc/NA5T-TZ37>] (last visited Feb. 15, 2021).

<sup>158</sup> Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 430-37 (2008).

plaintiffs seek profit disgorgement, the plaintiffs would argue that because the company made money by breaking its commitment to CSR, it should pay them. Forcing the company to pay for this would ultimately only punish the shareholders, exactly whom liability is meant to *protect*, by taking profits from the company. Thus, there may not really be a deterrence principle here—or at least not enough incentive for directors to meet CSR goals.

Courts often award punitive damages for punishment and deterrence purposes in cases of fraud or malice, so a court could potentially award such damages in a bad-faith CSR lawsuit.<sup>159</sup> Punitive damages related to broken CSR commitments would generally be hard to determine, though. For example, if a company missed its CSR goal by 5%, the amount of damage a company did to the environment by being 5% less sustainable would be very hard to measure in order to determine compensatory damages. Moreover, many CSR statements do not even include numerical values. Therefore, it seems almost impossible to consistently apply a method for these calculations. Because of this uncertainty, corporations may even try to put a type of liquidated damages clause in their CSR reports or statements such as, “We will reduce Carbon emissions by 50% or donate \$50,000 to a nonprofit focused on lowering carbon emissions.” Liquidated damages clauses in CSR statements may be enforceable if they are reasonable in relation to the amount of damage that plaintiffs would incur if the company did not uphold its promise.<sup>160</sup> However, because this intangible harm is incredibly hard to quantify, it may be difficult to determine whether the liquidated damages amount is reasonable.

It may also be difficult to determine which types of CSR should trigger liability. Does a company have to commit to achieving a CSR goal through a certain public forum or merely make a casual statement about it to be held liable for not achieving it? Companies’ CSR information is disbursed through multiple forums that may not all require enforcement. At one extreme, enforcement may be more desirable when a company puts a CSR goal in its SEC filings, especially if it includes target numbers that the company plans to achieve.<sup>161</sup> But, at the other end, if a CEO tweets or says in a speech that her company is going to hire more diverse employees this year, it seems unfair to hold the company liable for not following through with this. It would be difficult to achieve any sort of consistency with respect to which types of CSR information, statements, or goals lead to liability.

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<sup>159</sup> See Tyler Atkinson, *Punitive Damages: A Brief Comparison of Federal and California Practice*, JDSUPRA (Dec. 4, 2018), <https://www.jdsupra.com/legalnews/punitive-damages-a-brief-comparison-of-99031/> [<https://perma.cc/QJ2G-HRUY>].

<sup>160</sup> See Christine Mathias, *What Is a Liquidated Damages Provision?*, NOLO, <https://www.nolo.com/legal-encyclopedia/when-are-liquidated-damage-provisions-enforceable.html> [<https://perma.cc/DHV9-XQVV>] (last visited Feb. 15, 2021).

<sup>161</sup> See *infra* notes 178-79 and accompanying text (discussing requirement that SEC filings be accurate and resulting tendency of companies to only report achievable goals they are actually pursuing).

Additionally, liability may be unnecessary, since socially responsible institutional investors who do diligence to investigate whether corporations do what they claim to do may independently be sufficient to incentivize corporations to follow through with CSR goals.<sup>162</sup> Dozens of mutual funds make it their fund managers' jobs to research this information about corporations and ensure that their investments align with their goals.<sup>163</sup> Information gets absorbed into the stock price extremely quickly, and even a report about a company's CSR failures in a news outlet such as the *Wall Street Journal* or *New York Times* may cause investors to stay away from that company.<sup>164</sup> For example, Google could announce that it will reduce its carbon footprint by 30%, and certain investors may buy Google shares because they approve of that goal. If Google reduces its carbon footprint by less than 30% or abandons that goal entirely, those institutional investors will presumably sell their shares or try to vote out the directors who failed to meet that sustainability goal.

The counter to this is that unsophisticated investors may not have the resources or incentive to do a thorough analysis of companies' socially responsible actions.<sup>165</sup> While many companies use social responsibility indices such as the FTSE4Good and DJSI, there should be even more incentives to encourage investors to seek out and publicize how well companies are meeting their statements and initiatives.<sup>166</sup>

Directors also already have fiduciary duties such as the duty of care; they must act with appropriate information on, for example, who receives the corporation's philanthropy, and they have to research CSR endeavors in order to avoid shareholder derivative suits.<sup>167</sup> Thus, additional liability measures may be neither necessary nor the best way to create more profitable, socially responsible companies.

#### B. *Potential Liability Framework*

As discussed above, liability in general would likely get too complicated to implement effectively. However, if liability in this area ends up becoming more

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<sup>162</sup> See Barzuza, Curtis & Webber, *supra* note 4, at 1251; Fink, *supra* note 4.

<sup>163</sup> See Heyford, *supra* note 82.

<sup>164</sup> See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 383 (1969); see also Casey Dougal, Joseph Engelberg, Diego García & Christopher A. Parsons, *Journalists and the Stock Market*, 25 REV. FIN. STUD. 639, 640 (2012) (studying media's effect on stock market performance using *Wall Street Journal* columnists).

<sup>165</sup> See Barzuza, Curtis & Webber, *supra* note 4, at 1265-69 (discussing reticence of certain companies to engage in socially responsible changes to their board of directors' hiring process).

<sup>166</sup> See Oren Perez, *The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes*, 17 MINN. J.L. SCI. & TECH. 153, 160 (2016) (arguing that FTSE4Good's and DJSI's capacity to "facilitate pro-sustainability changes is limited by deeply entrenched structural barriers").

<sup>167</sup> See Atkins, Gerber & Micheletti, *supra* note 44.

prevalent, companies should certainly not be liable for certain levels of inaccuracy related to CSR. This rationale aligns with the reasons that the federal securities laws do not create a liability regime that pulls every statement into it; securities law tolerates a certain amount of intentionally false and misleading statements before liability is triggered.<sup>168</sup> For example, in order to be actionable securities fraud, false or misleading statements must be material, and courts are often reluctant to conclude that a statement was material.<sup>169</sup> With voluntary CSR statements, courts may want to set some requirement for the significance of the statements in order to let shareholders state an actionable claim while preventing every statement by the corporation from becoming the basis of potential liability. The goal of any sort of civil liability regime should be to deter bad behavior, not to create a system of insuring losses. Disclosure and compliance can be expensive and time-consuming for companies, and litigation is even more costly. Therefore, not all situations should lead to liability, and companies should not be liable for being unsuccessful in achieving every CSR goal that they set.

One way to view CSR statements is to segment them into those made in good faith and those made in bad faith. The benefits of liability are most prevalent when companies make bad-faith efforts to pursue their CSR goals because deterring bad-faith actors is desirable. When a company has no intention of following through with its CSR goals or inaccurately reports the result of its CSR initiatives, that is much more likely to lead to a fraud action,<sup>170</sup> and liability should attach. Other bad-faith situations are trickier. Under current law, companies often get away with greenwashing if it is not fraudulent. However, deterring all greenwashing is desirable because greenwashing exploits both consumers who purchase products and investors who provide the company with capital because they approve of its purported CSR practices.<sup>171</sup> This is a very gray area, though, because companies should arguably be able to freely tout their CSR initiatives, even if they involve greenwashing, in marketing tactics to increase profits and simultaneously please investors who care more about profitability. When consumer trust is prioritized over investor trust and a plaintiff can prove that the defendant made a bad-faith effort in meeting its publicized CSR plans, liability may be satisfactory.

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<sup>168</sup> See *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (finding that materiality standard under securities laws should not “set too low a standard of materiality” so as to address concern “that a minimal standard might bring an overabundance of information within [a court’s] reach”); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining material omission or statement as one that “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available”).

<sup>169</sup> See, e.g., *Pub. Sch. Tchrs.’ Pension & Ret. Fund of Chi. v. Ford Motor Co. (In re Ford Motor Co. Sec. Litig.)*, 381 F.3d 563, 570-71 (6th Cir. 2004).

<sup>170</sup> See *supra* text accompanying notes 138-139 (describing such a case).

<sup>171</sup> See *supra* note 114 and accompanying text (defining greenwashing).

Companies that made good-faith CSR statements will have either successfully or unsuccessfully followed through with them. In situations of successful follow-through in which a company made accurate CSR disclosures, the corporate-purpose and shareholder-primacy debate could be implicated because of the company's strong pursuit of CSR. Friedman would likely argue that CSR is not part of the corporation's purpose or that benefit corporations now exist to function as the exclusive vehicle to pursue CSR.<sup>172</sup> However, assuming no improper self-dealing, the business judgment rule's deference would protect these initiatives as long as the corporation still considered the shareholders.<sup>173</sup> Therefore, liability would be unlikely to attach in good faith and successful follow-through situations.

The situation is slightly different when a company makes good-faith efforts to achieve the goals in its CSR statements but is unsuccessful in actually meeting them. For instance, if a company's CSR report says that it will reduce its carbon emissions by 40% this year and the company only reduces them by 35% during the year, liability would not likely incentivize CSR. As discussed in Part II, if the company happens to be more profitable because it did not hit its target CSR numbers, damages would be externalized and particularly difficult to quantify.

Liability, which would essentially be strict liability, should not attach in any cases in which companies make good-faith efforts because it would have few benefits and increase the risk of deterring companies from engaging in CSR. Plaintiffs would possibly only have to show that the defendant company's CSR promise was not met, no matter what external circumstances arose. It is already challenging to actually make CSR goals come to fruition in a large company with many moving parts.<sup>174</sup> Elements outside of a corporation's control may cause it to fall short of the goal. For example, if a company partnered with a specialized environmental group to lower its carbon emissions in the next year and the environmental group loses its funding from other sources halfway through the year, causing it to cease its operations, the company should not be forced to pay damages for failing to lower its emissions.

A challenge in applying this framework would be clearly defining good faith and bad faith so that companies would know where they fall within the liability regime based on their actions. If a defendant proves that it tried to meet the goal, even if it was unsuccessful, does that automatically qualify as making a good-faith effort? Which actions are evaluated in determining whether the company tried? Courts would need to come up with a way to quantify these standards, and

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<sup>172</sup> See Friedman, *supra* note 21, at 33.

<sup>173</sup> See *supra* notes 34-41 and accompanying text (discussing business judgment rule and requirement to consider shareholders).

<sup>174</sup> See V. Kasturi Rangan, Lisa Chase & Sohel Karim, *The Truth About CSR*, HARV. BUS. REV., Jan.-Feb. 2015, at 40, 42 (“[A]lthough many companies embrace this broad vision of CSR, they are hampered by poor coordination and a lack of logic connecting their various programs.”).

steep litigation costs due to making these fact-specific determinations such as materiality may make courts more reluctant to adopt these standards.

C. *Alternatives to Liability*

Assuming that the threat of shareholder suits itself is insufficient to enforce CSR initiatives, a few potential alternatives to liability exist that would also encourage effective CSR statements. But none of these alternatives comes without its own set of issues.

First, socially responsible behavior in for-profit companies may be incentivized by looking to benefit corporations as a model. The benefit corporation “explicitly creates an affirmative duty to consider nonshareholders and gives directors no explicit preference in the weighing of all the stakeholders.”<sup>175</sup> There is no difference between a cause of action for a positive law violation against a benefit corporation and a traditional for-profit corporation, so the classification as a benefit corporation just gives shareholders the ability to enforce a duty to consider stakeholders.<sup>176</sup> Traditional for-profit corporations should be able to pursue social goals without being classified as a benefit corporation.<sup>177</sup> This can be done by applying the same deference to for-profit companies as to benefit corporations and creating a new standard that requires directors to pay more attention to these social goals in addition to profitability.

Additionally, voluntary reporting approaches, such as including CSR statements in SEC filings, will help to further incentivize meaningful social responsibility efforts. For example, the SASB’s voluntary reporting mechanism “encourages companies to identify sustainability issues material to their business and discuss their performance on those issues in their SEC filings.”<sup>178</sup> Because corporations’ SEC filings must be accurate,<sup>179</sup> corporations will be more likely to only include CSR initiatives and statements with which they have actually followed through and will also reap the benefits of publishing this information about their companies.

Finally, CSR statements could be approached similarly to the way that the securities laws approach forward-looking statements.<sup>180</sup> When public companies make statements about the future, they may avoid certain securities fraud liability for false or misleading statements if the statements are accompanied by

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<sup>175</sup> Kyle Westaway & Dirk Sampelle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1033-34 (2013).

<sup>176</sup> *See id.* at 1045.

<sup>177</sup> *See* Khatib, *supra* note 64, at 174 (arguing that the existing legal framework accommodates for-profit companies that want to engage in socially responsible behavior and that benefit corporation model may lead to more greenwashing).

<sup>178</sup> Meltzer et al., *supra* note 132, at n.3.

<sup>179</sup> 15 U.S.C. § 78j.

<sup>180</sup> *See, e.g.*, 17 C.F.R. § 229.303 (2020).

meaningful cautionary language.<sup>181</sup> Voluntary CSR statements generally convey the company's action to advance its CSR goals or plans for how it will implement more CSR. Companies making and publicizing these statements could generally be required to accompany them with meaningful cautionary language to warn consumers and investors about the risks that may come with trying to meet these goals and, specifically, why they may not be able to do so.

#### CONCLUSION

The rise of CSR initiatives has been beneficial for consumers, companies' reputations and profits, and society as a whole. It is important to continue to encourage companies to incorporate CSR into their goals because it promotes social good without necessarily giving up profitability for shareholders. However, corporations that make CSR statements are exposing themselves to uncertain risk levels. For many corporations, this risk is worth undertaking in order to reap the benefits of having a reputation as a socially responsible company. In order to encourage other corporations, a legal framework should be created that is more transparent about risks and that creates clear incentives for CSR. If unhappy shareholders sue a company or its directors for failing to meet CSR goals, they should only be able to succeed if the company made its CSR statement in bad faith, did not even try to achieve the CSR goal it set, or lied about said goal. Narrowing liability to these situations will encourage trust between corporations and their shareholders and consumers, while simultaneously ensuring that liability does not prevent companies from choosing to pursue CSR initiatives in the first place.

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<sup>181</sup> See *Kaufman v. Trump's Castle Funding (In re Donald J. Trump Casino Sec. Litig.)*, 7 F.3d 357, 371-73 (3d Cir. 1993) (discussing bespeaks caution doctrine); see also 15 U.S.C. §§ 77z-2, 78u-5(c).