American University Business Law Review

Volume 8 | Issue 3 Article 6

2020

# Discrimination as a Business Policy: The Misuse and Abuse of Corporate Social Responsibility Programs

Marc Greendorfer
*Tri Valley Law*, Marc@TriValleyLaw.com

# DISCRIMINATION AS A BUSINESS POLICY: THE MISUSE AND ABUSE OF CORPORATE SOCIAL RESPONSIBILITY PROGRAMS.

MARC A. GREENDORFER*



* Marc Greendorfer received his Bachelor of Arts degree from the University of California, Davis in 1986. He received his Juris Doctor from Benjamin N. Cardozo School of Law in 1996 and is admitted to practice in California and New York and before the United States Supreme Court. He graduated magna cum laude and served as Articles Editor-Submissions of the Cardozo Law Review from 1995 to 1996. After working at AmLaw 100 law firms in New York and San Francisco as a corporate attorney for more than a decade, Mr. Greendorfer founded Tri Valley Law in 2008, a corporate law practice, where he is currently a partner. Mr. Greendorfer is also the founder and President of Zachor Legal Institute, a non-profit legal foundation that produces scholarship on constitutional matters and works to enhance civil liberties and the rule of law. Zachor Legal Institute's website is www.ZachorLegal.org. Mr. Greendorfer's other scholarly papers, including versions of his Supreme Court briefs, are available for download on his Social Science Research Network page, at http://ssrn.com/author=2133013.

## I. INTRODUCTION AND SUMMARY

The traditional view of for-profit corporations has been that they exist primarily to serve their shareholders and, more specifically, to maximize the value of the shareholders' investment in the corporation.[1] This norm, often referred to as the shareholder primacy theory or norm,[2] has been the

1. *See* Dan Pontefract, *Should Companies Serve Only Their Shareholders Or Their Stakeholders More Broadly?*, FORBES (May 9, 2016, 11:31 AM), https://www.forbes.com/sites/danpontefract/2016/05/09/shareholders-or-stakeholders/#3a54e1b013d2 (citing the mission statements of numerous organizations that state that their primary purpose is to work for the benefit of their shareholders, but also noting a recent trend toward the use of the term "stakeholder" which refers to all parties whose support is so necessary that the organization would cease to exist without them). Business entities can take any number of forms, including limited liability companies or partnerships. Because this article includes an analysis of state corporation law statutes, only incorporated business entities will be discussed herein. Many other legal principles discussed in this article, including those relating to state and federal anti-discrimination laws, would apply to limited liability companies, partnerships and other business entities as well.

2. *See infra* pp. 301–10.

dominant theory since the earliest days of corporation statutes. While state corporation statutes have not expressly enumerated maximizing shareholder value as the primary objective of corporations, the actions of corporate directors and supporting caselaw in relevant states have repeatedly affirmed that corporations exist for the primary objective of benefitting their shareholders.

In recent years, however, other constituencies, including employees, local governments, environmental advocates and social welfare organizations have succeeded in making claims that they, as non-shareholder stakeholders in corporations, should also be considered when the governing bodies of corporations make decisions on how the corporation operates and whose concerns should be added to deliberations. In contrast to the shareholder primacy theory, this developing doctrine is known as the corporate stakeholder theory.[3]

To bridge the gap between the traditional shareholder primacy norm and the burgeoning calls for corporations to elevate stakeholder interests, corporations have implemented so-called corporate social responsibility ("CSR") programs. In some cases, corporations that were faced with boycotts or other public campaigns in response to incidents, such as environmental disasters or labor abuses, adopted narrow CSR programs to address specific complaints while in other cases CSR advocates, backed by activist investors operating under the mantle of "socially responsible investing" platforms, forced law-abiding corporations to adopt CSR programs under the guise of good corporate citizenship.[4] Socially responsible investing programs can be seen as the means through which activist investors compel corporations to adopt and implement CSR.[5] There is no single agency or organization responsible for the socially responsible investment agenda, but a United Nations ("U.N.") affiliated organization known as the Principles for Responsible Investment ("PRI") is a primary driver of the socially responsible investing movement and has over 1,700

3. *See infra* pp. 310–13.

4. *See* Sheila Bonini et al., *Valuing Social Responsibility Programs*, MCKINSEY & COMPANY (July 2009), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/valuing-social-responsibility-programs (stating that companies have responded to concerns ranging from environmental impacts to obesity by implementing social responsibility programs, and these programs help mitigate risks and allow companies to uphold their end of the social contract they have made with the public).

5. *See* Ronald Paul Hill et al., *Corporate Social Responsibility and Socially Responsible Investing: A Global Perspective*, 70 J. BUS. ETHICS 165, 166–67 (2007) (linking corporate social responsibility and firm financial performance, further stating that investors evaluate firms according to their attention to their important stakeholders).

signatories with over $70 trillion of assets under management as of 2017.[6]

In many ways, the rise of CSR programs can be seen as a logical interim development to help boards of directors balance the need to respond to aggrieved constituencies, on the one hand, with the relative paucity of tools meant to deal with such issues available under corporation statutes, on the other hand. Those who promote CSR programs, however, have myriad agendas, some as benign as ensuring that companies are responsible for pollution emitted into local communities and others acting as a facade for political campaigns that punish targeted groups or entities.[7] In the worst of cases, activists have used CSR programs as cover to promulgate campaigns of racial and national origin discrimination.[8]

Beginning in 2010, in response to the rise of CSR programs, a number of American states formally addressed the need for a new corporate form that tempered shareholder primacy and elevated corporate stakeholder interests by creating a new statutory corporate form that allows shareholders to adopt non-financial objectives for the corporation (these entities are known as "Benefit Corporations").[9] A majority of American states now have some form of Benefit Corporation statute.[10]

---

6. *See generally About the PRI*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/about-the-pri (last visited Feb. 9, 2020) (stating that the PRI is a leading advocate for responsible investment and works to act in the long term interests of its signatories and the financial markets in which they operate); *Annual Report 2017*, PRINCIPLES FOR RESPONSIBLE INV. (2017) https://www.unpri.org/download?ac=3976 (providing an overview of the 2017 signatories' activity and assets).

7. *See generally* Pamela N. Danziger, *When Corporate Social Responsibility Veers Into Political Action: Safe Or Sorry?*, FORBES (Mar. 12, 2018, 6:50 PM), https://www.forbes.com/sites/pamdanziger/2018/03/12/when-corporate-social-responsibility-veers-into-political-action-safe-or-sorry/#4fc67b6257d3 (discussing the recent change in corporate responses to political issues which oftentimes now includes contentious social and political activism).

8. *See* discussion *infra* Section V.B.i.

9. *See Certification Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/meet-the-requirements (last visited Feb. 9, 2020) (outlining the requirements necessary to become a certified B corporation and reviewing that a corporation that is not a statutory benefit corporation could attain benefit corporation status by undergoing B-Lab certification, but the non-benefit corporation code of that company's jurisdiction of incorporation would still govern traditional corporate governance matters); *General Questions*, BENEFIT CORP., https://benefitcorp.net/faq (last visited Feb. 9, 2020) (stating that a benefit corporation is a legal tool that allows organizations to create solid foundations built upon mission alignment and value creation and referencing statutory benefit corporations, rather than similarly labeled organizations that are certified by the non-profit organization B-Lab).

10. *See General Questions*, BENEFIT CORP., https://benefitcorp.net/faq (last visited Feb. 9, 2020) (highlighting active legislation regarding benefit corporations in over half the country, and numerous states are working to implement their own as well).

The question of how an American corporation can adopt and abide by a CSR program containing guidelines that conflict with local and federal American laws is one that has received minimal scholarly attention to this point, a task this article tackles.

This Article provides an overview of the shareholder primacy norm and competing theories of the corporation followed by a brief history of CSR programs in Europe and the United States ("U.S."). This Article then examines whether CSR programs are viable under state corporation law generally and, specifically, under Delaware corporation law, where many publicly traded corporations are incorporated and where a strong Benefit Corporation statute exists. Next, this Article examines how CSR programs have been used to compel corporations into adopting discriminatory policies and how those policies constitute violations of state and federal anti-discrimination laws, putting companies that adopt such CSR programs at risk of legal sanction. Finally, this Article examines the legal risks faced by a corporation that adopts a CSR program that incorporates unlawful discrimination.

## II. THEORIES OF THE CORPORATION

Though a full discussion of the history of corporations in the U.S. is beyond the scope of this Article, it is generally acknowledged that private business corporations began forming in the U.S. shortly after the effective date of the Constitution in 1789 and by 1832 the underpinnings of modern American corporation law had been established.[11] The first of what can be described as modern state corporation statutes was enacted in New Jersey in 1888, followed by Delaware in 1899.[12] By the early twentieth century, Delaware's corporation code had become the dominant state code, as it remains today.[13] At present, most corporations are formed pursuant to state

11. *See generally* Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23 (2002) (noting that early American corporations were formed through the establishment of private articles of agreement and special acts of state legislatures, rather than pursuant to state or federal incorporation statutes, and approximately 350 such corporations were created by 1801); *id.* at 44 (setting the publication of the first treatise on American corporations in 1832 as the beginning of the era of modern American corporations); *id.* at 50 (citing JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (1832 ed., New York: Arno Press 1972)).

12. *See* Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 327, 340 (2007) (acknowledging that New Jersey's 1888 statute expressly gave corporations the right to purchase and hold stock in other corporations).

13. *See id*. at 325, 361 (observing that Delaware emerged as the dominant force in the race to have the highest number of companies incorporated within its state borders);

corporation statutes.[14]

Because Delaware is the leading state for incorporations of publicly traded corporations and the corporation code of Delaware, the Delaware General Corporation Law ("DGCL"),[15] is considered the lodestar for American corporate law principles,[16] this article will focus on the DGCL. Moreover, as this article also focuses on corporate legal principles applicable to publicly traded corporations, the DGCL will be deemed to be representative of all state corporation laws, solely for purposes of the legal analysis contained herein.

A corporation is organized by an incorporator who files a certificate of incorporation with the Secretary of State (some states refer to this document as articles of incorporation).[17] The certificate of incorporation can take any number of forms to reflect the founders' reasons for forming the corporation, but it must include the name of the corporation, the name of the incorporator, the address of the registered office of the corporation in the state, the purpose of the corporation (which is frequently nothing more than "any purpose allowed by the DGCL"),[18] and basic details about the capitalization of the

---

Jeffrey W. Bullock, Sec'y of State, *Delaware Division of Corporations 2016 Annual Report*, CORPFILES (2016), https://corpfiles.delaware.gov/2016AnnualReport.pdf (stating that as of 2016, over 65 percent of Fortune 500 companies were incorporated in Delaware and 89 percent of U.S. companies undertaking an initial public offering of securities were incorporated in Delaware). *See generally* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (tracing the history of Delaware's rise to prominence among state corporation statutes).

14. *See, e.g.*, KEVIN R. KOSAR, CONG. RESEARCH SERV., RS22230, CONGRESSIONAL OR FEDERAL CHARTERS: OVERVIEW AND ENDURING ISSUES (2013), https://fas.org/sgp/crs/misc/RS22230.pdf (demonstrating the idea that corporations can be formed with congressional or federal charters).

15. DEL. CODE ANN. tit. 8, §§ 101–398 (2019).

16. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 212–13 (Harv. U. Press, 1996) ("[Delaware's] success comes from its enabling statute, its large body of precedents and sophisticated corporate bar, and its credible commitment to be receptive to corporate needs because of the large percentage of its state revenues derived from franchise fees and taxes."); *see also* Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 145 (2015) (discussing how Delaware has been able to "transform and evolve corporate law into what it has become today").

17. *See How to Form a New Business Entity*, DEL. DIVISION OF CORPS. [hereinafter *How to Form a New Business Entity*], https://corp.delaware.gov/howtoform/ (last visited Feb. 9, 2020) (giving an overview of the incorporation process in Delaware including the "Delaware Incorporation Form").

18. *See, e.g.*, *Certificate of Corporation for Stock Corporation*, DEL. DIVISION OF CORPS., https://corpfiles.delaware.gov/incstk09.pdf (last visited Feb. 9, 2020) (providing a sample certificate of incorporation provided as part of the Delaware Incorporation Form); *How to Form a New Business Entity*, *supra* note 17 (providing additional links and samples for incorporating in Delaware).

corporation, such as how many classes of equity the corporation can issue, preference of those shares, if any, and the number of shares thereof.[19]

After the certification of incorporation has been filed with and accepted by the Secretary of State, the existence of the corporation commences. Thereafter, it is customary for the incorporator to appoint the initial members of the board of directors, adopt bylaws that govern the conduct of the corporation and then resign (thus allowing the newly appointed members of the board of directors to select officers for the corporation), and begin operating the business of the corporation.[20]

Under the DGCL, a business can be formed as either a traditional for-profit corporation where shareholder primacy is the guiding principle ("Traditional Corporation") or as a Benefit Corporation (referred to in the DGCL as a "Public Benefit Corporation").[21] If the corporation is a Public Benefit Corporation, it must include two additional components to its certificate of incorporation: a statement that it is a Public Benefit Corporation and the specific social benefits that the corporation is to provide.[22]

With a Traditional Corporation, unless the certificate of incorporation has specified a corporate purpose, the corporation can conduct any lawful business allowed by the state.[23] A Public Benefit Corporation, on the other hand, is limited under the laws of the jurisdiction of its incorporation to engaging in acts that are in furtherance of the social benefits it was formed to provide. As a result, when compared to a Social Benefit Corporation, a Traditional Corporation might be viewed as having an existential question: if a Traditional Corporation can do anything lawful, what should guide its board of directors in operating the business? The answer to this question can be found in what is known as primacy theory.

---

19. DEL. CODE. ANN. tit. 8, § 102.

20. STEVEN R. GERSZ, LEXISNEXIS ANSWERGUIDE NEW YORK BUSINESS ENTITIES § 5.07 (2018) (stating that incorporators often do not serve on the board but appoint the board soon after filing the certificate of incorporation).

21. *See* DEL. CODE. ANN. tit. 8, §§ 361–368 (governing Public Benefit Corporations).

22. *See id.* § 362(a) (defining a public benefit corporation).

23. *See, e.g.*, Lurie v. Arizona Fertilizer & Chemical Co., 421 P.2d 330 (Ariz. 1996) (finding that certain acts regarding a corporation incorporated to manage hotels and other real property entering into an agreement relating to farming were *ultra vires*). *See generally* Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 67 (2006) (discussing how a generalized corporate purpose statement is so frequently used and therefore there is a dearth of modern caselaw on corporate actions that violate the stated purpose of the corporation, a doctrine known as *ultra vires*).

### A. *The Traditional Shareholder Primacy Norm and Duties of Corporate Directors*

A century's worth of caselaw has demonstrated that maximizing the value of the shareholders' investment in the company is at the core of each Traditional Corporation's being.[24] In *Dodge v. Ford Motor Co.*,[25] decided in 1919, the court explained the importance of shareholder value maximization:

> [a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[26]

Nine decades later, in *eBay Domestic Holdings, Inc. v. Newmark*,[27] the Delaware Chancery Court reiterated that this principle continues to govern the conduct of the Traditional Corporation's board of directors:

> The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. [Its founders] opted to form craigslist, Inc. as a for-profit Delaware corporation and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online

24. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 681 (Mich. 1919) (memorializing the principle of maximizing the value of the shareholder's investment by finding that the board of directors of a Traditional Corporation that gave preference to benefiting non-shareholder interests over paying dividends to shareholders had breached its duty to the shareholder); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 46 (Del. Ch. 2010) (continuing the trend of maximizing the value of the shareholder's investment into the early part of the twenty-first century by finding that the board of directors of a Traditional Corporation that adopted a plan to deter third parties from making offers to acquire the corporation had breached its duty to shareholders).

25. 170 N.W. 668 (Mich. 1919).

26. *Id.* at 684.

27. 16 A.3d 1 (Del. Ch. 2010).

> commerce . . . . Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.[28]

The enduring impact and relevancy of *Dodge* in corporate law was noted by Professor Johnathan Macey, who wrote:

> [t]he case is not a doctrinal oddity. *Dodge v. Ford* still has legal effect, and is an accurate statement of the form, if not the substance, of the current law that describes the fundamental purpose of the corporation. By way of illustration, the American Law Institute's ("ALI") Principles of Corporate Governance ("Principles"), considered a significant, if not controlling, source of doctrinal authority, are consistent with *Dodge v. Ford's* core lesson that corporate officers and directors have a duty to manage the corporation for the purpose of maximizing profits for the benefit of shareholders. Specifically, section 2.01 of the Principles makes clear that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." Significantly, the Principles specify that the goal of the corporation is shareholder wealth maximization . . . . Moreover, the ALI expressly emphasizes shareholder wealth rather than corporate wealth, and specifically excludes labor interests as something that should be maximized . . . .[29]

The principle that a Traditional Corporation exists primarily to maximize the value of its shareholders' investments is the essence of what is often referred to as the "Shareholder Primacy Norm."[30] As with so many other corporate law theories, there are a number of variations of the Shareholder Primacy Norm. The two theories that have garnered the most traction are traditional and radical shareholder primacy theories.[31] Professor David

---

28. *Id.* at 34–35.

29. Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 178 (2008) [hereinafter *Commentary on* Dodge v. Ford]; *see* Sec. Exch. Comm'n v. Transamerica Corp., 163 F.2d 511, 517 (3d Cir. 1947) ("A corporation is run for the benefit of its stockholders and not for that of its managers."); *see also id.* (indicating that federal courts have also concluded that the purpose of a corporation is to serve its shareholders rather than other parties).

30. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) (defining the Shareholder Primacy Norm as shareholder-centric focus of corporate law found specifically within the law relating to fiduciary duties to make decisions that are in the best interests of the shareholders); *see also* Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1899–1907 (1989) (detailing one of the first formal scholarly expositions on the use of the term shareholder primacy and the substance of that term); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1014 (2013) (exploring the contours of radical and traditional shareholder primacy theories).

31. *See, e.g.*, Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-*

Millon, a corporate law scholar who is well known for advancing the premise that social welfare should become a corporate duty,[32] has examined both radical and traditional shareholder primacy and, as part of his analysis, posits that under radical shareholder primacy the board of directors can be considered agents solely of the shareholders with a duty to their interests (the maximization of the value of their investments in the corporation) alone.[33] Millon further explains that under radical shareholder primacy it is the duty of the board of directors to maximize short term shareholder returns at the risk of long term returns, if that is what the shareholders choose.[34] With traditional shareholder primacy, on the other hand, the board of directors may act to achieve objectives other than short term shareholder value maximization, such as expanding market share or developing new products that are expected to hurt short term profits but result in longer term enterprise value increases, so long as the primary longer term objective remains providing benefits to shareholders, rather than third parties.[35]

Professor Millon acknowledges that radical shareholder primacy "enjoys broad currency among corporate executives and major shareholders" and is "widely — though not universally — embraced by legal academics"[36] but concludes that there is no legal basis for radical shareholder primacy, while there is for traditional shareholder primacy (and its focus on ensuring that the board of directors focuses on providing benefits to shareholders, rather than to third parties, even if those benefits are not short-term profit

*Watchman State*, 115 COLUM. L. REV. SIDEBAR 39, 41–42 (2015) (citing Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015)) (noting that Justice Strine and Mr. Walter conflate radical and traditional shareholder primacy theories when they discuss "conservative corporate law theory" and also arguing that Strine and Walter overstate the extent to which Citizens United has resulted in corporations externalizing costs to society in general); Millon, *supra* note 30, at 1014.

32. *See* William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 768 (2017) (highlighting Millon's institutional vision to use corporate law to protect people from the free market).

33. Millon, *supra* note 30, at 1018.

34. *Id.* at 1019 (noting that for many institutional investors, short term returns are of primary importance, and if those shareholders have the requisite vote under the corporation's governing document, they can require the board to forego other matters that the board might otherwise consider, such as employee welfare or long-run sustainability).

35. *Id.* at 1022–23 (distinguishing traditional shareholder primary from radical shareholder primacy by arguing that under the traditional theory, the board of directors are not agents of the shareholders and, in fact, are free to act as they wish subject only to the limitation that they "may not prioritize non-shareholder interests over those of shareholders").

36. *Id.* at 1043.

maximization).[37] In claiming that there is no legal basis for radical shareholder primacy, Professor Millon discusses both *Dodge v. Ford* and *eBay v. Newmark*.[38] Interestingly, when looking at the arc of caselaw traced by these two cases, Professor Millon demonstrates that courts have consistently ruled that in most situations (hostile takeovers being an exception),[39] the board's duty is to maximize shareholder value, but he then argues that radical shareholder primacy theory is nowhere to be found in the text of statutory corporate law.[40] While Millon's statement is literally accurate — corporate statutory law does not explicitly state that short-term profit maximization is the objective that the board must work towards — statutory duties of the board (discussed *infra*), have been consistently interpreted and applied by courts in a manner that is not only consistent with traditional shareholder primacy, but is often also consistent with radical

---

37. *Id.* at 1044.

38. *See id.* at 1034–35 (emphasizing that shareholder power is not grounded in corporate law, but rather in Delaware corporate law highlights that fiduciary duties are owed to "the corporation and its shareholders").

39. *See generally* Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978). A hostile takeover bid is an unsolicited offer by a third party to acquire control of a corporation from then-existing shareholders that is opposed by the board of directors of the target corporation. The potential acquiror appeals directly to the shareholders, generally offering a premium to the then-current price of the shares being sought. Often, the incumbent board of directors of the target corporation will oppose the bid on grounds that it undervalues the future value of the corporation or otherwise is likely to materially and adversely impact shareholders and third-party stakeholders, such as the communities that the corporation operates in. Delaware courts routinely allow the target corporation's board of directors to recommend against the bid and take defensive measures to thwart the acquisition. *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1990) (allowing directors to use defensive measures in response to a merger proposal where an existing corporate transaction that might lead to enhanced long term shareholder value maximization was already under consideration); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (allowing directors to consider the effect of a tender offer on non-shareholder parties); *id.* ("If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally) . . . ."). *Contra* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184–85 (Del. 1986) (holding that defensive measures taken to prevent a hostile takeover that are not considered as measures that also maximize shareholder profit breach the duty of care and are not entitled to deference under the business judgment rule); *see* discussion *infra* note 53.

40. *See* Millon, *supra* note 30, at 1014, 1023 (noting that radical shareholder primacy differs from traditional shareholder primacy, which still claims to privilege shareholders, but is weaker than under the radical version that has no ground in statutory law or common law).

shareholder primacy.[41]

Even in the unusual doctrinal situation of corporate takeover law, where the board of directors is allowed to deviate from radical shareholder primacy, traditional shareholder primacy is still the rule and, as will be discussed in more detail in this Article, there are no cases that say a Traditional Corporation can sacrifice shareholder wealth maximization to further the aims of third parties.[42]

According to Professor Millon, the clear language of *eBay* regarding the board's duty to elevate shareholder interests over external matters should be seen as an anomaly because the opinion does not cite to precedent[43] and it is a case where a board blatantly eschewed profit to pursue a social mission, rather than a more difficult case of a board choosing one form of shareholder benefit over another, such as long term versus short term wealth maximization.[44] This, again, is an accurate analysis of the case, and while Millon may not have intended to do so, and because he shows no case where traditional shareholder primacy and its requirement that the board only work to promote shareholder interests is denigrated in Delaware in favor of non-shareholder interest advocacy, he has bolstered the case for shareholder primacy over corporate stakeholder theory.[45]

Other scholars have explicitly noted that "in no case has the all-important Delaware Supreme Court held that directors will be permitted to prefer the interests of other constituencies over shareholders or that they ought, as a normative matter, to take such interests into account."[46] To put an

41. *See* Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEXAS L. REV. 911, 917 (2013) [hereinafter *Sublime Myths*] (reviewing LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012)) (noting that the shareholder primacy norm is an ideology, rather than black letter law but "it is an ideology with a basis in reason and in fact."); *id.* at 918–19 (exposing the flaws in Professor Stout's groundless derogation of the shareholder primacy norm); *id.* ("A lot of important legal doctrines, like the corporate opportunity doctrine, the duty of loyalty, and the duty of care are anchored in the shareholder value-maximization model/myth. It would be bad simply to jettison these doctrines because, notwithstanding that they may be grounded in the myth of shareholder primacy, these doctrines reduce managerial pilfering and negligence and make corporations more valuable than they would be if they did not exist.").

42. *See Corporate Social Responsibility*, *infra* note 46 and accompanying text.

43. Millon, *supra* note 30, at 1036.

44. *Id.* (reading the facts of the case narrowly to endorse the shareholder primacy idea in a highly unusual manner).

45. Bratton, *supra* note 32, at 786 (spotting that Professor Millon's colleague concluded "shareholder maximization is confirmed as the firm's theoretical objective function.").

46. Jonathan R. Macey, *Corporate Social Responsibility: A Law & Economics Perspective*, 17 CHAP. L. REV. 331, 344 (2014) [hereinafter *Corporate Social*

exclamation point on the certainty of the shareholder primacy norm, the legendary corporate law scholar and current Chief Justice of the Delaware Supreme Court, Leo E. Strine, explicitly stated that "American corporate law makes corporate managers accountable to only one constituency — stockholders — and that accountability has been tightened because of market developments concentrating voting power in institutional investors and information technology innovations easing communication and joint action among stockholders."[47] Chief Justice Strine predicted that progressive scholars and activists would try to divine exceptions to the shareholder primacy norm in favor of a form of stakeholder theory from Strine's own words,[48] and in a 2017 law review article he rebutted these attempts by referring to the projection of stakeholder theory into Delaware law as "wish-fulfillment" and equating these positions to a "dream world" exercise in arguing what the law ought to be rather than what it actually is.[49]

This is not to say that the board of directors of a Traditional Corporation are utterly handcuffed to the will of shareholders. As long as the board acts in a manner that fulfills its duties to shareholders, it can have wide latitude in making corporate decisions as it sees fit.[50] To wit, a board of directors of a Traditional Corporation is under an obligation to fulfill two general duties to the corporation and its shareholders: the duty of loyalty and the duty of

*Responsibility*].

47. Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 241–42 (2014) [hereinafter *Do the Right Thing*].

48. 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, 766–67 (2015) [hereinafter *The Dangers of Denial*] (taking to task those who claim that Delaware statutory and caselaw do not really enshrine the shareholder primacy norm into law by noting that "these commentators argue that the business judgment rule is cloaking a system of law giving directors the ability to act for any reason they deem appropriate. These commentators argue that cases with contrary holdings have simply been misinterpreted and misunderstood. For example, these scholars argue that one of the most important cases in Delaware law history, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, is really a marginally important decision, and that it has been misinterpreted. Indeed, these commentators essentially argue that Delaware judges do not understand the very law they are applying, and the Delaware General Assembly does not understand the law it has created. It is not only hollow but also injurious to social welfare to declare that directors can and should do the right thing by promoting interests other than stockholder interests.").

49. Leo E. Strine, Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1174 (2017) [hereinafter *Corporate Power is Corporate Purpose II*].

50. William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN. ST. L. REV. 837, 841–42 (2012) (explaining the general fiduciary duties that the board of directors owe to the shareholders of a company).

care.[51]

Under the duty of loyalty, the board of directors must put the interests of the corporation and its shareholders above any interests of the board, as a whole, or individual directors.[52] Under the duty of care, the board is required to ensure that it makes decisions through a deliberative process where appropriate information is obtained and considered[53] and, as needed, experts are consulted,[54] though there is no expectation that the board of directors will be informed of every fact or make a perfect decision.

Indeed, an entire doctrine known as the "Business Judgment Rule" exists to protect the board of directors of a Traditional Corporation from judicial second-guessing.[55] The Delaware Court of Chancery artfully explained the balancing act between duties of the board and inevitable negative outcomes represented by the Business Judgement Rule in a 2005 opinion:

---

51. *See id.* at 841, 847–48 (stating that there are also ancillary duties that derive from the duties of loyalty and care: the duties of good faith, confidentiality and disclosure); *see also* DEL. CODE ANN. tit 8, § 141(a) (2019) (stating that duties are not statutory; rather, they have been judicially derived from the statutory requirement that the board of directors manage the business and affairs of the corporation); Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) ("Thus, a director's duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty."); MODEL BUS. CORP. ACT § 8.30(b) (AM. BAR ASS'N 2016) ("The members of the board of directors or a board committee, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.").

52. *See* Lafferty et al., *supra* note 50, at 845 ("In general, the duty of loyalty means that directors of Delaware corporations may not (i) cause the corporation to engage in an interested transaction which is not entirely fair to the corporation; (ii) profit from the use of confidential corporate information; (iii) take any action solely or primarily to entrench themselves in office; or (iv) otherwise place benefits to themselves or to affiliated entities ahead of benefits of the corporation.").

53. *See id.* at 842–43 ("Determining directors' compliance with the duty of care is a fact-specific inquiry. Factors considered by Delaware courts addressing this issue include whether directors (i) are supplied in advance with notice of the purpose of the meeting and documentation describing the essentials of the matters to be considered, (ii) are informed of all developments relevant to the issue under consideration, (iii) conduct extensive discussions with competent and independent legal and financial advisors, (iv) review relevant or key documents or summaries thereof, (v) make reasonable inquiry and receive a knowledgeable critique of the proposal, and (vi) take sufficient time under the circumstances and act in a deliberative manner to consider and evaluate the pending decision.").

54. DEL. CODE ANN. tit. 8, § 146.

55. *See generally* Robert Sprague & Aaron J. Lyttle, *Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy*, 16 STAN. J.L. BUS. & FIN. 1 (2010–2011) (describing the history of the business judgment rule and explaining how the business judgment rule does not hold the board of the directors accountable for not maximizing shareholder profits).

> The decision-makers entrusted by shareholders must act out of loyalty to those shareholders. They must in good faith act to make informed decisions on behalf of the shareholders, untainted by self-interest. Where they fail to do so, this Court stands ready to remedy breaches of fiduciary duty.
>
> Even where decision-makers act as faithful servants, however, their ability and the wisdom of their judgments will vary. The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court. Should the Court apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value. The entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disastrous results for shareholders and society alike. That is why, under our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate, free of post hoc penalties from a reviewing court using perfect hindsight. Corporate decisions are made, risks are taken, the results become apparent, capital flows accordingly, and shareholder value is increased.[56]

In other words, courts will not substitute their judgement for that which was made by the board of directors so long as the board adhered to their fiduciary duties in making the ultimately unsatisfactory corporate decision.[57] Here, again, we see the court explicitly endorsing the shareholder primacy norm, and charging shareholders, rather than the courts, with the obligation to reward or punish directors for the consequences of their actions. While maximizing shareholder value may not be a statutory duty of the board, it is clearly the governing principle of corporate behavior.[58] Some scholars, acknowledging that the shareholder primacy norm is the guiding principle in American corporate law, note that shareholders can be left without sufficient power to protect their financial interests in a Traditional Corporation due to the breadth of the business judgment rule and the undemocratic nature of the board nomination process (where the board itself selects nominees), both of

56. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

57. *See id.*

58. *See, e.g.*, Sprague & Lyttle, *supra* note 55, at 3–4 (noting that the interplay of the shareholder primacy norm and the Business Judgment Rule results in the board of directors having an incentive to prioritize short term gains over long term viability of the corporation, for example share repurchases and permissible accounting "tricks" such as accelerating income recognition while deferring expenses, lead to short term share price spikes but have little or no long-term benefits).

which conspire to entrench incumbent directors.[59] While this concern may have validity, it is a critique of established law and a call for future reforms that give sharper teeth to shareholder rights, rather than an argument that the shareholder primacy norm and its directive that a corporation exists to maximize shareholder value are not currently the guiding principle in corporate law. Until such reforms are enacted, the shareholder primacy norm prevails.[60]

It is at this juncture that the interplay of certain state corporation statutes and the shareholder primacy norm may appear to be in conflict. Among the significant deviations from the DGCL in other states' corporation codes is the "constituency statute" concept, which allows a board of directors to consider how decisions will impact third parties, such as employees, local and national economies, and other societal considerations.[61] Importantly,

---

59. *See id.* at 38 ("The shareholder primacy norm remains the 'bedrock principle of U.S. corporate law.' And under the business judgment rule, unless shareholders can rebut the presumption directors were not acting in the best interests of the corporation, those shareholders have no legal recourse against those directors no matter how stupid, egregious, or irrational board decisions may be. Shareholders not only lack recourse in the courts, they lack recourse in the selection and retention of directors."); *see also* Grant M. Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2076–77 (2010); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 722–23 (2007).

60. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC 24–25 (Berrett-Koehler Publishers, 2012) (attempting to argue that the shareholder primacy norm does not guide American corporate law theory by conflating prospective policy arguments for replacing shareholder primacy with stakeholder theory with claims that stakeholder theory is, in fact, already the guiding principle); Millon, *supra* note 30, at 1036 (discussing the eBay case and noting that the court ruled in favor of eBay's claim of breach of duty because the board of directors of Craigslist had chosen to "eschew profit in order to pursue a social mission"). *But see* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interests*, 80 N.Y.U. L. REV. 733, 738 (2005) (basing his argument that shareholder wealth maximization is not the guiding principle for the board of directors by noting that boards "have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interests"). This is typical of progressive scholars' arguments against shareholder primacy and it is a hollow argument. An exception on the fringe of a rule, such as the ability of a board of directors to engage in minor acts of social philanthropy with corporate assets, does not vitiate the rule. Just as a board that donates a small amount of corporate profits to, say, a local school, can do so without fear of claims it has breached its duties, a board that managed the corporation in a way that favored giving to local schools over producing returns for shareholders would most certainly run afoul of the applicable corporate law statute of its jurisdiction of incorporation.

61. *See, e.g.*, OHIO REV. CODE ANN. § 1701.59(F) (2019). *See generally* Mark J. Loewenstein, *A New Direction for State Corporate Codes*, 68 U. COLO. L. REV. 453 (1997) (describing the various forms of state constituency statutes); Joseph R. Shealy, *The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*, 94 N.C. L. REV. 686 (2016).

while constituency statutes give directors of a Traditional Corporation discretion to consider non-shareholder interests, they do not vest third parties with legally enforceable rights and do not obligate directors to consider third party interests.[62] Connecticut, prior to amendments to its corporation code in 2010, was one state that required directors of publicly traded corporations to consider third party interests in making decisions relating to business combinations, but that requirement was considered antithetical to traditional theories of the corporation and was eliminated.[63]

Furthermore, while constituency statutes exist, they have rarely been used to support board actions that favor stakeholder theory over shareholder primacy, and it is likely the case that constituency statutes would not survive challenges if a board were to ever use one as a basis for denigrating the financial interests of shareholders in favor of third parties.[64]

Finally, the fact that states have had to enact constituency statutes, and corporations have had to adopt provisions in governing documents (all of which require shareholder approval), to allow for deviations from the shareholder primacy norm reinforces the notion that absent explicit statutory and shareholder action to permit the consideration of third-party stakeholders, American corporate law, and Delaware's in particular, does not allow the board of directors to favor non-shareholder constituencies over shareholders.

### *B. Stakeholder Theory*

Under U.S. corporate law, stakeholder theory is not a legal doctrine other than in several isolated situations, such as Benefit Corporation statutes, states with constituency provisions of their corporate codes (which generally do not apply to publicly traded companies since most such companies are

62. Shealy, *supra* note 61 (arguing policy arguments for and against the implementation of constituency statutes).

63. David A. Swerdloff, *Connecticut Updates Business Corporation Act; Clarifies Director Obligations, Shareholders Rights*, DAY PITNEY LLP (May 17, 2010), https://www.daypitney.com/insights/publications/2010/05/connecticut-updates-business-corporation-act-cla__.

64. *See* Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute,* 4 ELON L. REV. 209, 223 (2012) (citing Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land*?, 42 LOY. L.A. L. REV. 765, 784 (2009)) ("In the states that have enacted constituency statutes, very few judicial opinions have evaluated and interpreted these statutes. The opinions concerning constituency statutes appear to conform them to the Delaware common law. These courts have hesitated to deviate from the longstanding principle of shareholder primacy, even though state legislatures have enacted statutes that purport to change the longstanding principle. Instead, 'constituency statutes currently function only to the extent that they do not conflict with shareholder primacy.'").

incorporated in Delaware), or in Delaware under the specific circumstance when the board of directors of a Traditional Corporation is defending against a hostile takeover.[65] As a general rule, though, stakeholder theory under U.S. corporate law is nothing more than an aspirational progressive policy goal; something without enforceable legal effect under corporate law.[66]

One example of the few exceptions to the shareholder primacy norm for Traditional Corporations is the allowance for the board to consider third party interests in defense of a hostile takeover attempt (that is, a scenario where a potential acquirer makes an offer to acquire control of a company in spite of the fact that the board of directors is opposed to the potential transaction).[67] While Delaware courts initially indicated that the impact of a transaction on non-shareholder constituencies could be considered by the board of directors when faced with a hostile takeover (known as the "*Unocal* Exception"), subsequent decisions rendered that exception much narrower than originally thought.[68] At this point, while there is still some applicability of the general contours of the *Unocal* Exception for stakeholder theory in Delaware corporate law, it is not at all clear that the doctrine has any practical impact on the incorporation of stakeholder theory into Delaware corporate law.[69]

---

65. *See* Fischel, *supra* note 39, at 30–40; discussion *supra* note 39 (hostile takeover defenses).

66. *See* Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes*?, 9 RICH. J. GLOBAL L. & BUS. 249, 249 (2010) ("Notwithstanding the fact that the United States, United Kingdom, and other Anglo-American jurisdictions regularly embrace shareholder primacy, there are many who feel that some of these jurisdictions are moving towards more of a stakeholder approach to corporate governance."); *id.* (hypothesizing that stakeholder theory may become the corporate law standard in the U.S. in the future, but shareholder primacy occupies that position until such time).

67. *See* Fischel, *supra* note 39 (describing the remedial defense tactics in order to prevent hostile takeover of a corporation).

68. *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 980–84 (1992) (analyzing case law pertaining to structural decisions made by a board of directors in a corporate control contest).

69. *See id.* at 981 (posing, after examining the post-*Unocal* decision of Revlon, Inc. v. MacAndrews and Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), the hypothetical of a corporate raider making an otherwise fairly valued offer for a company but indicating that she planned to lay off the a large part of the workforce upon consummation of the acquisition, and asking whether under *Unocal* the court would allow the board of directors could determine that the harm to the workforce outweighed the benefits to shareholders.); *id.* (concluding that the board in his hypothetical could not favor the workforce over shareholders and stating that *Revlon* modified *Unocal* in the following ways: "First . . . any management action benefiting stakeholders must produce ancillary shareholder benefits. In other words, directors may only consider stakeholder interests if doing so would benefit shareholders. Second, where a corporate control auction triggering the so-called Revlon duties has begun, stakeholders become entirely irrelevant. Instead, shareholder wealth maximization is the board's only appropriate

Stakeholder theory recognizes shareholders as just one of the many parties that have an interest in a corporation and, as such, must be heard by the directors when corporate decisions are to be made.[70] Under stakeholder theory, constituencies such as employees, the local community, creditors, and even governments[71] constitute the body to which the board of directors is responsible.[72] The board of directors must balance the interests of all stakeholders when making decisions, taking a role that has been described as the mediator for stakeholder interests.[73] As for what comprises the universe of stakeholders, Professor Andrew Keay has reviewed the work of other scholars on this question and concludes that the primary universe of corporate stakeholders is made up of "employees, shareholders, suppliers, financial institutions and lenders, general creditors, customers, the local community, local and national governments, and the environment."[74]

As for what the directors of a stakeholder-oriented corporation should attend to when making decisions, Professor Keay cites to the work of Janice Dean, who proposed the following:

> A director of a public limited company shall in all his/her conduct and decision making so act as to advance the development of the company in the interests of its customers, its employees and its shareholders and with proper regard for the effect of its operations on the environment and on the community. The interests to which a director of a public company should give due consideration include:
>
> - The provision for customers of safe and effective goods and services of good quality at fair prices;
> - The provision for employees of fair remuneration and secure work with reasonable opportunity for their interests to be heard within the company and for their promotion and development of skills;
> - The provision for shareholders of fair returns to remunerate

concern. As such, when the business judgment rule does not apply to insulate the directors' decisions from judicial review, the board will violate its fiduciary duty of shareholder wealth maximization if it considers any interests other than those of the shareholders. In turn, this confirms that the duty to maximize shareholder wealth is the principal obligation of directors, albeit one as to which judicial scrutiny is sometimes barred by the business judgment rule."); *id.* (concluding that, even where Delaware courts provided an opening for stakeholder theory, they quickly narrowed it in favor of shareholder primacy).

70. *See* Keay, *supra* note 66, at 255–56 (explaining stakeholder theory and listing the diverse parties that have an interest in a corporation, stockholders being one of these parties).

71. *See id.* at 257–58.

72. *See id.*

73. *See id.* at 257.

74. *Id.* at 260.

past investment and encourage future investment in the company;

- The provision for key business associates including suppliers of goods and services of secure relationships and ongoing co-operation where such connections offer advantages to both parties;
- The provision for the community of programmes to monitor and minimise the environmental impact of the company's operations and advance responsible conduct towards the company's neighbours.[75]

These prescriptions are at once specific in language yet vague in prescription, to the point of being incapable of implementation.[76] The only way for a board to successfully carry out Dean's menu is to either be micromanaged by some superior power (which does not exist in corporate law) or to have the latitude to alter, ignore, and add to the directives at their core, which would result in the board having the same duties as they would have under the shareholder primacy norm. Professor Keay reaches a similar conclusion, stating that

> [t]he point has been made that stakeholder theory has failed to provide any normative foundations for its justification. In particular, it fails to provide a normative base on which to ascertain who can be a stakeholder and what weight ought to be given to each stakeholder. Consequently, there is no basis for a manager, in running the corporation, to prefer stakeholderism to other moral approaches.[77]

Though stakeholder theory is primarily a policy goal for progressive scholars and activists in the U.S., it is a core principle of corporate law in a number of foreign jurisdictions.[78] In Germany, employees (without having

75. *Id.* at 261–62 (citing JANICE DEAN, DIRECTING PUBLIC COMPANIES: COMPANY LAW AND THE STAKEHOLDER SOCIETY 138 (2001)).

76. *See id.* (explaining that a fair return for shareholders, without further quantification, is a directive without context. Would a fair return be a set number of basis points above long-term U.S. Treasury yields? If so, how would the returns be adjusted for early stage, unprofitable high growth corporations as compared to an established, profitable, low-growth corporation?).

77. *Id.* at 270.

78. *See* Fabian Brandt & Konstantinos Georgiou, *Shareholders vs Stakeholders Capitalism*, COMP. CORP. GOVERNANCE AND FIN. REG. (2016), http://scholarship.law.upenn.edu/fisch_2016/10 (discussing, as case studies, methods used by the U.S. and Germany to mediate the tensions between shareholder interests and stakeholder interests); *see also* PAUL KRÜGER ANDERSEN & EVELYNE J.B. SØRENSEN, THE PRINCIPLE OF SHAREHOLDER PRIMACY IN COMPANY LAW FROM A NORDIC AND EUROPEAN REGULATORY PERSPECTIVE, THE EUROPEAN FINANCIAL MARKET IN TRANSITION (Hanne Birkmose et al. eds., Kluwer Law International, 2011) (analyzing trends in the U.S. and Europe that have promoted increased shareholder influence in corporate decision-making).

to be shareholders of the company) are given a say in matters of corporate governance and are also represented on the boards of directors.[79] Similarly, employees in Japanese companies have broad board representation and stakeholder rights, though this is through immutable custom rather than statute.[80] A full review of the role of stakeholder theory in jurisdictions outside of the U.S. is beyond the scope of this Article, but as a general principle it can be said that stakeholder theory has more of a legal foundation outside the U.S., while shareholder primacy norms prevail to the exclusion of stakeholder theory in the U.S.

## III. THE EMERGENCE OF THE CORPORATE SOCIAL RESPONSIBILITY DOCTRINE

As a general concept, CSR can be defined as a set of principles whereby corporations consider the environmental and social impacts inherent in their business activities.[81] The European Union, a leader in CSR implementation, has defined CSR as

> 'the responsibility of enterprises for their impacts on society.' Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:
>
> - maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large; [and]
> - identifying, preventing and mitigating their possible adverse impacts.[82]

As one would expect for any guideline issued by a bureaucratic committee, the European Union's definition of CSR is exceedingly vague and is phrased more in the manner of an aspirational concept rather than a substantive policy that can be implemented with some level of certainty.

---

79. Mark J. Loewenstein, *What Can We Learn From Foreign Systems? Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673, 1675–77 (2002).

80. *Id.* at 1686 (noting that as a matter of custom, directors of Japanese corporations tend to be employees or former employees of that corporation).

81. *See* Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011–14 for Corporate Social Responsibility, at 6 COM (2011) 681 final (Oct. 25, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681 (elaborating on the European Commission's definition of CSR).

82. *Id.*

### *A. European Union CSR Guidelines*

While not helping to clarify what CSR is, the European Union has stated that its CSR strategy is based on five guidelines and principles consisting of the U.N. Global Compact ("UNGC"), the U.N. Guiding Principles on Business and Human Rights ("UNGP"), ISO 26000 Guidance Standard on Social Responsibility ("ISO 26000"), the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy ("ILO Declaration"), and the OECD Guidelines for Multinational Enterprises ("OECD Guidelines").[83] Because European Union CSR policy strongly influences both CSR advisors and U.S. companies and regulators, a brief overview of the guidelines and principles is presented below.

#### *i. UNGC*

The UNGC is a voluntary corporate citizenship initiative of the U.N., intended to promote globalization through leadership, policy dialogue, learning, partnership projects, and outreach activities.[84] The primary parties to the UNGC are governments, companies, labor, civil society organizations, and the U.N.[85] While the operational mechanisms and intended goals of the UNGC are fairly opaque, they have been generally described as "establish[ing] the business case for doing the right thing. By setting examples within its own sphere of influence, it hopes to generate positive impulses that in turn can contribute towards governance and public responses that contribute to a more beneficial relationship between business and society."[86] To accomplish these ends, the UNGC has ten principles: two principles relating to human rights, four principles on labor, three principles on the environment, and one principle on corruption.[87]

---

83. *Corporate Social Responsibility*, EUR. COMMISSION, http://ec.europa.eu/growth/industry/corporate-social-responsibility_en (last visited Feb. 9, 2020).

84. Georg Kell, *The Global Compact: Origins, Operations, Progress, Challenges*, 11 J. CORP. CITIZENSHIP 35, 35 (2003) (recognizing Mr. Kell as one of the primary architects of the UNGC).

85. *Id.* at 37.

86. *Id.* at 41.

87. *See The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Feb. 9, 2020) (stating that the two human rights principles are businesses should "support and respect the protection of internationally proclaimed human rights" and "make sure that they are not complicit in human rights abuses;" the four labor principles are businesses should uphold "the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation;" the three environmental principles are

*ii. UNGP*

The UNGP are a set of thirty-one principles spread over three categories: the state duty to respect human rights, the corporate responsibility to respect human rights, and victim access to remedies.[88] Among the thirty-one principles are requirements that "[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises . . . taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication"; "[b]usiness enterprises should respect human rights . . . they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved"; and "[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[89]

While the UNGP was unanimously endorsed by the U.N. Human Rights Council and nominally applied to all businesses, without regard to size, location, or structure, they explicitly state that "[n]othing in these Guiding Principles should be read as creating new international law obligations . . . ."[90] Of particular interest for purposes of this article is the admonition in the opening to the UNGP: "[t]hese Guiding Principles should be implemented in a non-discriminatory manner . . . ."[91]

The UNGP have been criticized by left-leaning groups for not giving governments compliance and enforcement powers over corporations and instead relying upon businesses to police their own conduct, while others have defended the UNGP as a workable compromise that creates a regulatory framework where public and private governance work together.[92]

businesses should "support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technologies;" and the anti-corruption principle is businesses should "work against corruption in all its forms, including extortion and bribery").

88. *See generally* United Nations Human Rights Office of the High Comm'r, *Guiding Principles on Business and Human Rights,* HR/PUB/11/4 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (providing the language of the thirty-one Guiding Principles on Business and Human Rights, accompanied by commentary).

89. *Id.* at 3, 13, 27.

90. *Id.* at 1.

91. *Id.*

92. *See, e.g.*, Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, HUMAN RIGHTS WATCH, at 1 (2013), https://www.hrw.org/sites/

*iii. ISO 26000*

ISO 26000 is a benchmark for CSR developed by the nongovernmental organization International Organization for Standardization ("IOS"). IOS has a long history of using member input to achieve a consensus on the establishment of relevant standards in technology, food safety, healthcare, and manufacturing, as well as other areas.[93] IOS standards are not only used by members, but also are often incorporated into laws and treaties.[94] The U.N. granted ISO general consultative status with the U.N. Economic and Social Council, which allows ISO to participate in U.N. activities, including the right to speak before the U.N. and its constituent bodies. [95]

> IOS describes ISO 26000 as being intended to assist organizations in contributing to sustainable development. It is intended to encourage them to go beyond legal compliance, recognizing that compliance with law is a fundamental duty of any organization and an essential part of their social responsibility. It is intended to promote common understanding in the field of social responsibility, and to complement other instruments and initiatives for social responsibility, not to replace them.[96]

ISO 26000 provides guidance on organizational governance, human rights,

---

default/files/related_material/business.pdf ("Much of the problem lies with companies themselves-even though that think of themselves as ethical. Too many still deal with human rights problems on the fly, without forethought and often in a de factor regulatory vacuum that they lobby vigorously to maintain . . . the lion's share of the responsibility to prevent and address company-driven human rights abuses lies with governments."). *But see,* John Ruggie, *Progress in Corporate Accountability*, INSTIT. FOR HUMAN RIGHTS AND BUS. (Feb. 4, 2013), https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability_(rebutting Albin-Lackey's criticism, noting that adopting Albin-Lackey's position of international government having unilateral control over business activity would violate national sovereignty and inhibit competition, among other things). John Ruggie developed the UNGP when he was the U.N. Secretary-General's Special Representative for Business and Human Rights.

93. *All About ISO*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/about-us.html (last visited Feb. 9, 2020) ("ISO has published 22542 International Standards and related documents, covering almost every industry, from technology, to food safety, to agriculture and healthcare. ISO International Standards impact everyone, everywhere.").

94. JAMES ROBERTS, HOW CORPORATE SOCIAL RESPONSIBILITY (ISO 26000) MANDATES UNDERMINE FREE MARKETS 1, 5 (May 3, 2010), https://www.heritage.org/markets-and-finance/report/how-corporate-social-responsibility-iso-26000-mandates-undermine-free.

95. *Civil Society Participation: International Organization for Standardization,* UNITED NATIONS DEP'T OF ECON. AND SOC. AFFAIRS, http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=468 (last visited Feb. 9, 2020) (indicating that ISO has had general consultative status with the U.N. Economic and Social Council since 1947).

96. *ISO 26000: 2010, Guidance on Social Responsibility*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/standard/42546.html (last visited Feb. 9, 2020).

labor practices, the environment, fair operating practices, consumer issues, and community involvement, and development.[97]

Some commentators have warned that while ISO 26000 is a voluntary standard and, unlike other IOS standards, there is no certification possible under ISO 26000, it is nonetheless a push by globalist groups such as Amnesty International, Greenpeace, Oxfam, ActionAid, and Social Watch to force mandatory adoption of the UNGC by implementing CSR through voluntary adoption of IOS standards.[98] Indeed, in 2004, then-U.N. Secretary General Kofi Annan stated

> [l]et me also commend ISO for broadening the scope of its work in the area of social and environmental performance. In this way, too, you are making an important contribution towards a more sustainable world. I welcome, in particular, ISO's recent decision to develop a standard on social responsibility — *an initiative which dovetails well with the universal principles of the U.N. Global Compact on human rights, labour conditions, the environment and anti-corruption*.[99]

*iv. ILO Declaration*

According to the International Labour Organization, a U.N. agency consisting of employers, employees and governments, the ILO provides "guidelines to [multinational enterprises], governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations. Its provisions are reinforced by certain international labour Conventions and Recommendations . . . ."[100] Specific policy guidelines are provided on improving employment opportunities, expanding social security, eliminating forced labor, abolishing child labor,

---

97. INT'L ORG. FOR STANDARDIZATION, DISCOVERING ISO 260000 1, 12–13, https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100258.pdf (last visited Feb. 9, 2020) (outlining the core subjects and issues addressed by ISO).

98. ROBERTS, *supra* note 94, at 5–7 (acknowledging that in many cases CSR can be "discrete, transparent and voluntary, [and] have the potential to make a positive contribution to employees, employers, consumers and investors," Roberts cautions that ISO 26000 is a politically charged mutation of CSR that "seems to recite anew a laundry list of grievances and daunting societal problems facing impoverished, developing countries before establishing vague, all-encompassing, and impossible-to-meet responsibilities to be imposed on each multinational firm, [which is] expected to foot the substantial bills for rectifying the seeming endless list of problems outlined in each ISO 26000 chapter.").

99. Katie Bird, *ISO Standards 'Crucial' to Sustainable Development, Says UN Secretary-General*, INT'L ORG. FOR STANDARDIZATION (Sept. 15, 2004) (emphasis added), https://www.iso.org/news/2004/09/Ref930.html.

100. *ILO Declarations*, INT'L LABOR ORG., https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm (last visited Feb. 9, 2020).

promoting equal opportunity and treatment, ensuring employment stability and security, and expanding rights to worker organization and collective bargaining. As with other principles and guidelines, the ILO Declaration is not a binding obligation on its own.[101]

*v. OECD Guidelines*

The OECD Guidelines are a code of conduct for multinational enterprises, establishing non-binding standards of business ethics.[102] Developed by the Organisation for Economic Cooperation and Development, a forum of thirty-six countries that strategizes on economic, social and environmental measures and an observer at the U.N., the OECD Guidelines

> . . . provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards . . . [and] . . . express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest multinational enterprises. The Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide.[103]

The OECD Guidelines contain general principles on sustainable development, human rights, and compliance with applicable laws and regulations, and more specific guidance on providing useful disclosure on all aspects of the enterprise's activities, respecting and promoting human rights, treating workers fairly (including taking into account the effect of corporate decisions on workers and the community), being good environmental stewards, combatting corruption and other unethical activities, acting in the best interests of consumers, developing technology with a focus on promoting local interests, promptly and fully paying taxes as due, and promoting competition in the market.[104]

*B. United States CSR Guidelines*

In support of fostering CSR adoption by American corporations, the U.S. government, after consulting with the private sector and other stakeholders,

---

101. *See generally* Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 6 MISKOLC J. INT'L L. 24 (2009) (discussing the non-binding nature of the ILO Declaration).

102. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

103. *Id.*

104. *Id.* at 27–56.

published a document in late 2016 known as the National Action Plan.[105] Like the European Union, the U.S. supports the UNGP and the OECD Guidelines.[106] The National Action Plan is comprised of five elements.

The first National Action Plan element, labeled "Leading by Example," speaks to U.S. support for various international initiatives that the U.S. has and will continue to support, such as the Inter-American Convention against Corruption and the OECD's anti-bribery monitoring program.[107] Many of the components of the first element (and the other four elements as well) are vague or simply restate existing U.S. obligations.[108]

The second element, labeled "Collaborating with Stakeholders," describes the U.S. government's efforts to facilitate dialogue and cooperation among businesses and other stakeholders, such as employees and other stakeholders.[109] Examples given of such collaboration are the Fair Labor Association, the Voluntary Principles on Security and Human Rights, and the Extractive Industries Transparency Initiative.[110]

The third element, "Facilitating RBC by Companies," outlines the government's production and dissemination of relevant information to encourage businesses to comply with the CSR programs such as the UNGP and OECD Guidelines.[111] In large part, the information produced under this element is intended to allow U.S. corporations to examine how international business partners are complying with various CSR guidelines, such as

---

105. U.S. Dep't of State, RESPONSIBLE BUSINESS CONDUCT FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2016) [hereinafter NATIONAL ACTION PLAN], https://www.state.gov/documents/organization/265918.pdf.

106. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 3–5 (2013) [hereinafter 2013 STATE DEPARTMENT REPORT]; *see also* NATIONAL ACTION PLAN, *supra* note 105, at 5.

107. NATIONAL ACTION PLAN, *supra* note 105, at 7–12.

108. *See, e.g.*, Int'l Corp. Accountability Roundtable, *Assessment of the United States National Action Plan (NAP) on Responsible Business Conduct* 2 (2017), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58da9da11b10e3e2a23498 3c/1490722210495/US+NAP+assessment+FINAL.pdf [hereinafter ICAR Critique] (discussing how the absence of significant new, material obligations in the National Action Plan has been noted by a number of international organizations); *id.* ("One negative aspect of the U.S. NAP is that many of the government action points are overly vague, making it difficult to discern the concrete steps the NAP is committing specific government agencies or ministries to take. This difficulty hampers the ability for stakeholders, including internal government actors, to hold responsible government entities accountable for their commitments. Moreover, the NAP is strongly lacking in commitments to new regulatory measures.").

109. NATIONAL ACTION PLAN, *supra* note 105, at 13–16.

110. *Id.* at 13.

111. *See id.* at 17 (stating that the government produces various reports on subjects such as human rights, labor rights, commercial conditions, investment conditions, and company information).

eliminating child labor and complying with anti-bribery standards.[112]

The fourth element, "Recognizing Positive Performance," is a pledge to reward companies that achieve CSR objectives.[113]

The fifth element, "Providing Access to Remedy," reiterates the UNGP requirement of establishing a process by which victims of human rights abuses can petition for redress.[114] The National Action Plan states that the U.S. will continue to support the grievance procedures in the OECD Guidelines and the World Bank's Stolen Asset Recovery Initiative.[115]

Overall, while the National Action Plan sets out a wide range of CSR related goals, it mostly speaks of existing programs with very little in the way of new laws or regulations that would compel CSR activity by U.S. corporations.

### *C. CSR Compliance by Corporations*

CSR compliance is a mix of voluntary adoption of CSR programs by corporations and mandatory reporting on individual corporation performance of specified CSR guidelines. The European Union recently implemented such mandatory reporting obligations on certain publicly traded companies, with the reports being a required element of each company's annual report to shareholders.[116] While the mandatory reporting scheme goes further than any prior regulatory scheme, it is rife with loopholes and has no penalties for non-compliance.[117] Some member-states of the European Union have adopted laws implementing CSR through socially responsible investing initiatives.[118] Belgium, for example, prohibits

112. *Id.* at 8–9, 17–21.

113. *Id.* at 22.

114. *See id.* at 23 (discussing the remedies that victims of human rights abuses can seek).

115. *Id.*

116. Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 on Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups (L 330) 6, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 (stating that this directive requires public companies that have more than 500 employees to provide information on environmental, social and workers' concerns as well as reports on measures relating to human rights and corruption).

117. Jerome Chapalier, *EU to Force Large Companies to Report on Environmental and Social Impacts*, THE GUARDIAN (Feb. 28, 2014), https://www.theguardian.com/sustainable-business/eu-reform-listed-companies-report-environmental-social-impact.

118. REINHARD STEURER, THE ROLE OF GOVERNMENTS IN CORPORATE SOCIAL RESPONSIBILITY: CHARACTERISING PUBLIC POLICIES ON CSR IN EUROPE 13 (2010), https://www.wiso.boku.ac.at/fileadmin/data/H03000/H73000/H73200/InFER_Discussion_Papers/InFER_DP_10_2_The_Role_of_Governments_in_Coporate_Social_Responsibility_Characterising_Public_Policies_on_CSR_in__Europe.pdf.

investments in companies involved in the production of certain weapons including cluster munitions.[119]

In the U.S., certain CSR principles have been incorporated into a handful of federal[120] and state[121] laws, but for the most part CSR compliance and reporting is entirely voluntary. Indeed, the International Corporate Accountability Roundtable criticized the National Action Plan for being "heavily skewed towards voluntary measures, guidance, trainings, outreach, funding, and dialogue, and is severely lacking in commitments to new regulatory measures . . . ."[122]

### *i. Trends in CSR Reporting by Corporations*

In 2017, KPMG International Cooperative conducted a survey on CSR reporting by the world's largest companies and found that approximately 75 percent of the companies included in the study issue CSR reports of some nature.[123] For companies in the survey that were domiciled in the U.S., the rate of reporting was 81 percent.[124] These data are overall figures based on a general definition of CSR for four subject areas: climate change, U.N. Sustainable Development Goals, human rights, and carbon emissions.[125]

---

119. *Id.*

120. *See* Securities and Exchange Act of 1934, 15 U.S.C. § 78a (2018) (requiring disclosure of risks related to climate change in filings by companies); 19 U.S.C. § 3901 (2018) (noting that perhaps the best-known law that reflects CSR principles is regulation on "conflict diamonds"); 31 C.F.R. § 537.311 (2016) *repealed by* Exec. Order 13742, 3 C.F.R. § 13742 (Oct. 7, 2016) (discussing that in 1997 the federal government enacted a reporting requirement on investments in, and sanctions on, Burma); Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1504 (2010) (repealed 2017) (requiring public companies report on payments made to foreign governments in an attempt to curb corruption related to oil, gas and mining activities); Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 33-9106, 34-61469, FR-82, (Feb. 8, 2010).

121. *See, e.g.*, CAL. CIV. CODE §1714.43 (West 2019) (requiring large retailers and manufacturers doing business in the state to disclose how they act to eliminate slavery and human trafficking in their supply chains).

122. ICAR Critique, *supra* note 108, at 8, 13 ("The new action points in the NAP are almost entirely voluntary. Of the new actions only one clearly involves regulation, and it is arguably not a commitment to new action . . . . Apart from this one action, the new commitments in the NAP are heavily focused on providing guidance, tools, trainings, and funding; convening and entering into dialogue with other stakeholders; and continuing to implement existing laws and policies . . . . While these new commitments are welcome, without pairing these efforts with legal demands and mandatory measures on companies, they are insufficient to drive real change.").

123. KPMG INTERNATIONAL COOPERATIVE, *The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017* 4 (2017), https://assets.kpmg/content/dam/kpmg/be/pdf/2017/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf.

124. *Id.* at 22.

125. *Id.* at 2.

Looking solely at companies comprising the Standard & Poor's 500 Index, the Governance and Accountability Institute found that 85 percent of the companies in the index reported on corporate responsibility and sustainability in 2017.[126]

The lack of uniformity in CSR standards, however, renders CSR reporting data *sui generis* in many cases. The *Harvard Business Review* examined this problem and noted that the criteria making up CSR ranking systems have extreme variability not only in what criteria are included, but also how each is weighted.[127] Furthermore, the question of whether criteria have been satisfied is often difficult to answer and the underlying data are often unreliable.[128] In other words, under two different CSR ranking systems the same company could have diametrically opposed results due to the underlying ranking methodology variability. Because of this, it is difficult to accurately assess the impact of CSR programs in a manner that would lead one to be able to determine that one corporation's CSR program is more effective than another corporation's program.[129] Unless and until a uniform system of terms, measurements, and criteria are adopted, CSR ratings will generally have very little practical use.

A uniform system of terms, measurements, and criteria for CSR ratings might look similar to Generally Accepted Accounting Principles ("GAAP") and International Financial Reporting Standards ("IFRS"). By way of comparison, GAAP and IFRS have made the preparation and analysis of financial statements reliable and uniform, facilitating the preparation of accurate financial statements and allowing a wide range of constituencies to examine those statements to understand the financial condition of the reporting corporation.[130] ISO 26000 may be the starting point for a CSR

126. *Flash Report: 85% of S&P 500 Index Companies Publish Sustainability Reports in 2017*, GOVERNANCE AND ACCOUNTABILITY INST., https://www.ga-institute.com/press-releases/article/flash-report-85-of-sp-500-indexR-companies-publish-sustainability-reports-in-2017.html (last visited Feb. 9, 2020).

127. Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 81 (2006).

128. *Id.*

129. *See* N.M. NASRULLAH & M.M. RAHIM, CSR IN PRIVATE ENTERPRISES IN DEVELOPING COUNTRIES EVIDENCES FROM THE READY-MADE GARMENTS INDUSTRY IN BANGLADESH 11 (2014) ("In defining CSR, there is no overall agreement or consensus. There is a lack of an all embracing definition. Moreover, there is no universal definition of CSR. As a result, there remains an uncertainty about what CSR exactly is; how it can be defined accurately or conclusively. The reason may be rooted in its interchangeable and overlapping character with other terminologies . . . .").

130. *See* Daniel Tschopp & Michael Nastanski, *The Harmonization and Convergence of Corporate Social Responsibility Reporting Standards*, 125 J. BUS. ETHICS 147, 147 (2014) (suggesting that the Global Reporting Initiative be the basis for a standardized

analog to GAAP or IFRS, but because it is merely guidance, and has not been uniformly adopted, it is nothing more than a starting point.

*ii. How Corporations Implement CSR Programs*

On a macro level, it may be difficult to compare CSR rankings among various corporations, but it is possible to conduct useful analysis on corporate CSR compliance when one set of criteria is applied to a sufficient sample size. To this end, third party service providers create CSR compliance methodologies and then apply those methodologies to a wide range of corporations.[131] The reports that are produced from these studies are then used by investors, stakeholders, and governments to measure CSR performance. To illustrate the workings of these third-party CSR reports, this Article will briefly review two of the largest third-party service providers for CSR evaluation:[132] MSCI ESG Research, LLC[133] ("MSCI") and ISS-Ethix[134] ("ISS-Ethix").

MSCI has designed its rankings systems for use by investors who use CSR ratings, in whole or part, to screen potential investments as well as investments already in their portfolios.[135] MSCI ranks a corporation on a scale of AAA to CCC, with AAA being the highest rating and CCC being

---

CSR reporting mechanism).

131. *What Is a CSR Assessment?*, ECOVADIS, https://www.ecovadis.com/us/csr-assessment/ (last visited Feb. 9, 2020).

132. *See generally ESG Reports and Ratings: What They Are, Why They Matter?*, DAVIS POLK & WARDWELL (July 12, 2017), https://www.davispolk.com/files/2017-07-12_esg_reports_ratings_what_they_are_why_they_matter_0.pdf.

133. MSCI, *ESG Integration*, http://www.msci.com/esg-integration, (last visited Feb. 9, 2020) (noting that MSCI ESG Research LLC ("MSCI") is a subsidiary of MSCI, Inc., a provider of financial market index and portfolio tools).

134. *See* ISS, *Ethix Clients to Receive Integrated Environmental, Social, and Governance (ESG) Solutions*, ISS GOVERNANCE (Sept. 15, 2015), https://www.issgovernance.com/ethix-sri-advisors-acquired-by-institutional-shareholder-services-in-responsible-investment-business-expansion/ (discussing Institutional Shareholder Services, Inc. ("ISS"), acquisition of Scandinavian Ethix SRI Advisors AB in 2015 and subsequent renaming to ISS-Ethix); *What Sets ISS Apart*, ISS GOVERNANCE, https://www.issgovernance.com/about/about-iss/ (stating that ISS is the largest domestic and global proxy advisory, specializing in providing institutional investors with advice on corporate governance and shareholder voting matters); *see also* James R. Copland et al., *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, ROCK CENTER FOR CORPORATE GOVERNANCE AT STANFORD UNIVERSITY CLOSER LOOK SERIES: RESEARCH PAPER NO. 18-27 (2018), https://ssrn.com/abstract=3188174.

135. *ESG Ratings Methodology: Executive Summary*, MSCI (Feb. 2017) (noting how raw data are collected, reviewed under specific CSR criteria, and ultimately rated on a defined scale) (obtained by the author anonymously from MSCI in researching this article) (on file with author).

the lowest.[136] Ratings are not absolute; rather, they are determined relative to the performance of corporations that are deemed to be industry peer corporations.[137] Each corporation is ranked on thirty-seven key CSR issues[138] that roll up into one of three categories: Environmental, Social, or Governance.[139] Here, it should be noted that MSCI does not include a "human rights" category, yet, as will be demonstrated later in this Article, activists who misuse CSR standards often base their discriminatory goals on the claim that illusory human rights norms are being violated.[140] Using publicly available data, media reports, and specialized datasets, MSCI first assigns a raw score for each CSR issue for a given corporation, and then each issue is assigned a weight, and a weighted average score is determined. The weighted average scored is then normalized within each industry and using a three-year average for all members of a particular industry, a corporation's rank (AAA to CCC) is calculated to show investors how the corporation compares to its peers in each of the thirty-seven categories. Throughout the process, subject corporations are invited to provide feedback on the facts contained in each report.

ISS-Ethix also uses a proprietary CSR ranking methodology. For purposes of this Article, the focus will be on the type of ranking related to what ISS-Ethix calls "Norms-Based Research."[141] Norms-Based Research reflects the principles in the UNGC and covers over 15,000 publicly traded corporations.[142] Through Norms-Based Research, ISS-Ethix investigates allegations that a corporation has violated UNGC principles and uses two inter-related ranking systems.[143] The first system consists of a "traffic light" spectrum, where red represents a verified failure to abide by the applicable

---

136. MSCI, *ESG Ratings*, https://www.msci.com/esg-ratings (last visited Feb. 9, 2020).

137. *See* ERIC MOEN, MSCI ESG RATINGS 3 (2018), https://www.msci.com/documents/1296102/1636401/MSCI+ESG+Rating+Brochure-V3.pdf/f2b4a27a-58f5-42c7-880b-cf8201039eaa.

138. Included in the thirty-seven key CSR issues are carbon emissions, toxic waste emissions, land use, labor management, product safety, business ethics, and corruption.

139. Within the Environmental category are climate change, natural resources, pollution and waste and environmental opportunities. Within the Social category are human capital, product liability, stakeholder opposition, and social opportunities. Within the governance category are corporate governance and corporate behavior.

140. *See infra* pp. 340–41; *see* discussion *infra* Section V.B.ii.

141. ISS-ETHIX, AN INTRODUCTION TO NORM-BASED RESEARCH (June 2017), https://www.issgovernance.com/file/products/ISS-Ethix-Norm-Based-Research-Methodology-Process.pdf?elqTrackId=380c3f4392324ff7a06f5d173491355c&elq=69d0f1c2d6fa403298d5aaecb7982606&elqaid=669&elqat=1&elqCampaignId=.

142. *Id.*

143. *Id.*

norm and green represents no current failure to abide by the applicable norm.[144] The second system is a score between one and ten, corresponding to the traffic light spectrum between red and green.[145] A numerical score of ten represents the highest level of a failure to abide by a norm while a score of one represents no allegations that the norm has been violated.[146] Thus, if a company is given a ranking of amber/5, it ranks in the middle of the failure to abide by a norm spectrum and is said to be "under observation."[147] A company given a ranking of green/1 is not alleged to have violated a norm, while a company with a red/10 ranking has a verified failure to abide by an established norm.[148]

ISS-Ethix begins its evaluation by monitoring over 4,000 publicly available sources of what it deems "controversial corporate news" for potential violations of the UNGC or the OECD Guidelines within either the Human/Labor Rights, Labor Standards, Environment, or Anti-Corruption categories.[149] Once a potential violation has been detected, ISS-Ethix determines the nature of the violation (whether it is severe, systematic, or systemic) and the level of complicity for the subject company.[150] From there, ISS-Ethix confirms that the alleged violation is of a recent date and then determines whether there has been reliable information provided to support the allegation of a violation.[151]

By way of example, one of the norms ISS-Ethix ranks companies on is "failure to respect the right to self-determination," which ISS-Ethix says is rooted in UNGC principles and OECD Guidelines IV.[152] To determine whether this norm has been violated by a company, ISS-Ethix looks into whether the company "benefit[s] from the suppression of a people's rights, when this people is under colonial or comparable rule (such as indigenous groups, a population under occupation).[153] This category applies *when a company is complicit in the dispossession of these peoples.*"[154] Similarly, the norm of "forced displacement" will be deemed to have been violated if a there is "forced displacement of communities to *make way for a large scale*

144. *Id.* at 1–2.
145. *Id*.
146. *Id*.
147. *Id.*
148. *Id.*
149. *Id.* at 3.
150. *Id.* at 7.
151. *Id.* at 7–8.
152. *Id.* at 16.
153. *Id*.
154. *Id.* (emphasis added).

*project the company is involved in*."[155] It is crucial to note here that for these two human rights norms, the company itself has to be complicit in the purported violation of human rights.[156] If a third party, including a government, is the party allegedly violating human rights, a company operating in the midst of the locale would not be complicit without some form of tangible action between the government and the company, such as would be the case if a company lobbied a government to displace indigenous people to allow the company to build a dam on the land traditionally occupied by such people.[157] This point becomes particularly relevant in the section of this Article titled "CSR Programs that Advance Discriminatory and Unlawful Initiatives: A Case Study."[158]

### D. *Can CSR Co-exist with the Shareholder Primacy Norm?*

On its face, CSR, as the embodiment of stakeholder theory, would seem to be incompatible with the shareholder primacy norm, especially under the radical expression of the norm. This result is mandated only if one rigidly views CSR as requiring the board of directors of a Traditional Corporation to subordinate shareholder interests to the social responsibility agenda. In fact, though, it is possible, at least theoretically, for CSR to exist as a secondary consideration of the board, one that is considered only to the extent it does not interfere with the board's obligation to maximize shareholder value.

In jurisdictions outside of the U.S. where the shareholder primacy norm is not the controlling theory, it is certainly possible for CSR to thrive as a corporate policy that takes precedence over maximizing shareholder wealth, even at corporations with publicly traded securities. Scholars at the Institut Européen d'Administration des Affaires recently published a paper examining the possibility of how CSR could be implemented in a way that does not violate shareholder primacy norms.[159] One theory covered in that paper resulted in "the integration of social, ethical, and ecological aspects into business operations and decision-making, *provided it contributes to the financial bottom line*."[160] The Article examines CSR in the context of a

155. *Id.* (emphasis added).

156. *Id.* at 7.

157. *Id.*

158. *See infra* Section V.B.i.

159. *See* N. Craig Smith & David Rönnergard, *Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools*, 134 J. BUS. ETHICS 463, 463 (2016) (advocating for the extension of fiduciary duties and changes in business school teaching).

160. *See id.* at 464 (citing M. Van Marrewijk, *Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion*, 44 J. BUS. ETHICS 95, 102

system where shareholder wealth maximization constrains the board of directors of a Traditional Corporation and notes that this expression of the shareholder primacy norm necessarily relegates CSR initiatives to a strategic role, where CSR must satisfy a "business case" that results in shareholder wealth appreciation, rather than the provision of benefits to non-shareholder constituencies.[161]

Other scholars have proposed theories under which a Traditional Corporation's board of directors can fulfill their duties to the corporation and shareholders while still advancing a CSR agenda that conflicts with the shareholder primacy norm. One of the leading scholars promoting this view is Professor Lynn Stout, who argues that not only is the traditional understanding of the shareholder primacy norm requiring the board to maximize shareholder value a fiction, but it is also harmful to corporations and shareholders.[162] Professor Stout deems the wealth maximization language in *Dodge v. Ford* and its progeny "mere dicta"[163] and tries to explain away decades of judicial opinions and scholarly works that build on this language with distinctions that are nothing more than a scholarly dance upon the head of a pin. For example, Professor Stout claims that the *Revlon* doctrine is an exception, rather than the rule, when it comes to shareholder wealth maximization and goes on to counter the established understanding of board conduct by asserting that a board of directors can essentially waste corporate assets under the protection of the business judgment rule in all cases other than one where a public company is being taken private:

> As long as [directors] do not take those assets for themselves, they can give them to charity; spend them on raises and health care for employees; refuse to pay dividends so as to build up a cash cushion that benefits creditors; and pursue low-profit projects that benefit the community, society, or the environment. They can do all these things even if the result is to decrease—not increase—shareholder value.[164]

Professor Stout, here, engages in what Chief Justice Strine described as dream world "wish-fulfilment" (with the dream being progressive stakeholder theory supplanting the shareholder primacy norm).[165]

Professor Thomas Clarke similarly has argued that concerns such as

---

(2003)) (emphasis added).

161. *Id.* at 465.

162. *See* STOUT, *supra* note 60, at 24–32, 48.

163. *Id.* at 26.

164. *Id.* at 31.

165. *The Dangers of Denial*, *supra* note 48*; see also Sublime Myths*, *supra* note 46 (disagreeing with the substance of Professor Stout's arguments and pointing out that she makes a fundamental error in describing shareholder primacy as law, and further defending the shareholder primacy ideology as well-based in law and tradition).

climate change have broadened the scope of the duties of the board of directors of a Traditional Corporation to the point that a "reevaluation of fiduciary duty is presently taking place and will prove to be profound."[166] To support this position, Professor Clarke argues that climate change is not just an environmental concern for certain groups, it can have a direct impact on the financial condition of a company if that company has not prepared to mitigate the risks inherent in climate change theory.[167] To that end, Professor Clarke argues, a board of directors that manages the corporation to minimize the corporation's contributions to climate change will help the corporation to minimize the costs it incurs to remediate those contributions and avoid regulatory penalties, all of which work to increase shareholder wealth.[168]

Ultimately, however, the position that board actions that ignore shareholder wealth maximization in favor of the promotion of third-party stakeholder interests are a proper corporate goal is a fringe, aspirational position, rather than a reflection of what the law and weight of scholarship articulate.[169]

The esteemed economist, Milton Friedman, provided the most succinct theory of the corporation and strongly implied that CSR has no place in a traditional corporation other than as a means to the end of wealth maximization: "In [a free economy] there 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 . . . ."[170] Nonetheless, there is a perverse accuracy to the position

---

166. Thomas Clarke, *The Widening Scope of Directors' Duties: The Increasing Impact of Corporate Social and Environmental Responsibility*, 39 SEATTLE U. L. REV. 531, 570 (2016).

167. *Id.*

168. *Id.* at 549, 570 (emphasizing the financial and strategic importance of board action on environmental matters that include pollution prevention resulting in lower costs and sustainability, help to pre-empt competitors, and position the company for future growth).

169. Citizens United v. FEC, 558 U.S. 310, 365, 372 (2010) (finding that corporate funding of political messages is protected by the First Amendment); *see* Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 390 (2015) (noting how Citizens United has been inaccurately described as giving personhood rights to corporations and that if the case is read to provide corporations with rights of natural persons, it should also impose on them the corresponding social obligations of natural persons, which would support the stakeholder theory over the shareholder primacy norm). *But see* Bainbridge, *supra* note 31, at 40–41 (noting that Citizens United has not unmoored corporations from regulatory oversight as Strine argued and moreover, corporate law theory still favors shareholder primacy over CSR).

170. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (University of Chicago Press, 40th Anniversary ed. 2002).

espoused by Professor Stout. While there is no question that the shareholder primacy norm precludes the implementation of CSR other than as a strategy to increase shareholder wealth, as a practical matter courts tend to take a passive approach to board abdication of their duties, often relying on shareholders to provide redress through director elections and applying the business judgment rule so broadly as to rubber-stamp virtually all board action. While the fact that courts have been hesitant to hold directors accountable for their wrongful elevation of CSR principles above shareholder interests does not vest that practice with any legal foundation, it is also true that in many applications the business judgment rule serves as an uncodified judicial loophole allowing a board to divert corporate assets to third parties so long as the board action can be justified as being reasonable at some de minimis level.[171]

If courts have been reluctant, absent statutory guidance, to second guess boards to determine when CSR activity crosses into murky corporate law waters, one established method that courts have used to decide similar questions, and that could apply in the context of questionable CSR activity, is the doctrine of corporate waste.

The traditional definition of corporate waste is a transaction where "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[172] While claims of corporate waste have been made for a wide range of matters, the most typical subjects of the claims are excessive compensation, charitable donations, and political contributions.[173]

---

171. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) ("[W]here the business judgment [rule] presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose.") (internal quotation marks omitted)*; see also* Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U.J.L. & BUS. 27, 62 (2017) (explaining how scholars such as Professor Stout advance extremist theories that use the business judgment rule to protect directors who undermine the rights of shareholders in favor of non-shareholder constituencies); Lori McMillan, *The Business Judgment Rule as An Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 535, 571 (2013) (arguing that because the business judgment rule is not codified, it has become amorphous as a legal standard and even puts the burden on plaintiffs, rather than directors as defendants, and positing that the proper implementation of the rule would require directors to first establish that they have met the preconditions to the rule before being allowed to claim it for immunity, essentially shifting the burden to directors, rather than aggrieved shareholders); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 128 (2004) (contending that the business judgment rule is actually a doctrine that has allowed courts to abstain from reviewing director action, rather than review that action to determine whether it was made with the requisite process to establish that the board was acting for legitimate and rational business purposes).

172. Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).

173. Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L.

The most logical analog to CSR initiatives of the three classic examples of corporate waste would be charitable donations, and it is here that a workable limitation on CSR activity can be discerned. In the typical case, a corporate charitable contribution will be found to not constitute corporate waste if it is "reasonable."[174] This is, on its own, a nearly useless definition due to the numerous possible definitions of "reasonable," but Delaware courts provided specific guidance when they tied the determination of "reasonable" to the amount of the contribution that the corporation could deduct under the federal tax code.[175] The import of this is to demonstrate that while charitable giving in general is motivated by altruism, for a corporation, charitable giving has to be tied to a tangible and quantifiable financial benefit that the corporation and its shareholders receive.[176] A similar standard should be assumed to exist with regard to CSR (as the shareholder primacy norm would require).

Furthermore, if a board of directors of a Traditional Corporation were to commit the company to a CSR program that effectively used company assets to advance the board's own desires to promote causes without shareholder ratification, a claim of conversion could be colorable. Under Delaware law, "the necessary elements for a conversion . . . are that a plaintiff had a property interest in the converted goods; that the plaintiff had a right to possession of the goods; and that the plaintiff sustained damages."[177] Conversion in Delaware has also been described as "any distinct act of dominion wrongfully exerted over the property of another, in denial of [the plaintiff's] right, or inconsistent with it."[178] While it may be unprecedented for a shareholder to claim that the board of directors of a Traditional Corporation has tortiously converted the corporation's assets for the director's own benefit by adopting a CSR program, it would not be without legal foundation. Delaware law restricts tortious conversion claims to situations where the property does not consist of cash and further limits claims that are associated with contract rights (requiring that the plaintiff's right to the property arose from an obligation not governed by that contract, as such a claim would be based on a theory of breach of contract, rather than

---

REV. 1239, 1249–50 (2017).

174. Theodora Holding Corp. v Henderson, 257 A.2d 398, 405 (Del. Ch. 1969).

175. Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991).

176. *See Theodora Holding Corp.*, 257 A.2d at 405 (explaining that when looking at the reasonableness of a charitable donation by a corporation the IRS deduction limitation is a helpful guide).

177. Goodrich v. E.F. Hutton Grp., Inc., 542 A.2d 1200, 1203 (Del. Ch. 1988).

178. Drug, Inc. v. Hunt, 168 A. 87, 93 (Del. 1933).

conversion).[179] Obligations and duties of the board of directors of a Traditional Corporation are governed by statute and common law, except in the specific circumstances where a contract right is asserted,[180] so if the shareholders could demonstrate that the complained-of CSR program constituted an act of dominion by the board of directors that was inconsistent with the rights the shareholders had in corporate assets, a conversion claim would be viable.

What this means for CSR programs at Traditional Corporations is that where a CSR initiative can be shown to either have no material negative effect or is reasonably expected to have an overall benefit to the value of shareholder investments in the corporation, that company's directors are on firm legal footing in adopting the initiative. The decision, however, cannot be based on mere speculation or attenuated theories that depend on magical thinking or a horizon of such indeterminate duration as to make the results of the action impossible to determine.[181]

By way of example, the board of directors of an automobile manufacturer might review a plan to introduce a new type of vehicle that is claimed to have significant environmental benefits. There will be significant start-up costs for the new vehicle line, but based on deliberative market research and financial analysis, the board is informed that within a set and realistic timeframe the new vehicle division is expected to have sales that provide sufficient revenue to pay the start-up expenses and achieve a level of profitability that is at least as substantial as could have been achieved through other investments of corporate assets. In such a case, even though a component of the board's decision was for the benefit of non-shareholder constituencies, the board will not have violated their duties to the corporation and its shareholders.

179. Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 889–90 (Del. Ch. 2009) (dismissing conversion claim that was duplicative of breach of contract claim); *see also* Khushaim v. Tullow Inc., No. N15C-11-212-PRW, 2016 WL 3594752, at *21–23 (Del. Super. Ct. 2016).

180. For example, some corporations are bound by agreements with shareholders relating to when and how the shareholders can sell stock issued by the corporation. If the board of directors of the corporation were to violate the terms of a shareholders' agreement in a manner that deprived the shareholder of property rights, it would be a situation where both a conversion and a breach of contract claim might stand. *Kuroda*, 971 A.2d at 889–90 (highlighting that although the defendant was an LLC rather than a corporation, the legal principles on conversion and breach of contract claims against a business entity are equally applicable).

181. *See* Parnes v. Bally Entm't Corp., 722 A.2d 1243, 1246 (Del. 1999) ("The presumptive validity of a business judgment is rebutted in those rare cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'").

Contrast the foregoing example with a decision by the board of directors of that same automobile manufacturer to refuse to do business with a country that is one of the company's prime markets but is under attack by environmental activists for contributing to environmental harms. The board has been pressured by activists to divest from and refuse to conduct business in the country with the theory that if put under enough economic pressure, the country will change its way. If the company does as the activists' demand, it will lose ten percent of global automobile sales and it will also incur higher costs to relocate manufacturing and research facilities from that country to one that is not being targeted by activists. The only business justification given to the board of directors for adopting the CSR initiative to blacklist the country is that such action might bolster the company's reputation among consumers who are environmental activists and, at some point in the future, if the campaign is successful, the country will reduce the harm it causes to the environment, which might provide benefits to a wide range of non-shareholder constituencies. These considerations are entirely speculative, as opposed to the sum-certain costs to the company of lower sales and relocation expenses. In this case, if the board nonetheless adopts the CSR initiative, it will have violated its duties to the corporation and its shareholders.[182]

## IV. BENEFIT CORPORATIONS AND THE FUTURE OF CORPORATE SOCIAL RESPONSIBILITY PROGRAMS.

As adoption of CSR programs has expanded, states realized that there was a need for a corporate structure to fill the gap between non-profit corporations and Traditional Corporations. The co-founder of B Lab,[183] a leader in the Benefit Corporation movement, summarized the problem as:

> [c]urrently, individuals and groups seeking to establish organizations with a public mission can either organize themselves as not-for-profit corporations, or use a traditional for-profit corporate form. In the case of non-profits, there are numerous restrictions on the nature of their activities, and non-profits are thus extremely limited in their ability to attract capital to allow them to achieve their mission at scale. In the case of traditional for profit corporations, such businesses are generally required under the current statutory and case law to be conducted for the benefit of the shareholders to whom the directors owe a fiduciary duty to maximize shareholder value, thus limiting their ability to consider the

182. *See supra* notes 24–36 and accompanying text (deciding to take action that is not going to directly maximize shareholder value of in the corporation).

183. *See* discussion *supra* note 134 and accompanying text (discussing B Lab).

interests of their employees, communities, or the environment.[184]

### *A. Overview of Benefit Corporation Status.*

The Benefit Corporation first came into existence in the U.S. in late 2010 when the State of Maryland[185] used a Model Benefit Corporation code produced in connection with the non-profit B Lab[186] to create a new, hybrid entity that at once could pursue social benefits, much like a non-profit corporation, while still working to provide profits to its shareholders.[187]

In certain basic ways, Benefit Corporations and traditional corporations (both for-profit and non-profit) share a common core in that they are all creatures of state corporation codes. To wit,

> [t]he benefit corporation laws of each state position the benefit corporation statutory regime within the context of the state's general corporations law, unlike the flexible purpose corporation (FPC), which has been adopted as a standalone entity with no necessary relationship to the general corporations law. This is advantageous for the benefit corporation because it allows each state's body of corporate governance law—most of which is useful to the operation of any business—to still apply to benefit corporations. Moreover, it allows the benefit corporation's body of corporate governance law to interact with and, to the extent that they are consistent, be updated by the cases and developments in other areas of the state's corporate governance law. While the benefit corporation statute is new, and therefore inheres some legal risk in the uncertainty of how courts will interpret the statute, there is, arguably, comparatively much less risk

184. Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures,* 62 EMORY L.J. 999, 1012 (2013) (quoting Jay Coen Gilbert, Remarks on White/Leach Benefit Corporation Bill upon Introduction to the Pennsylvania State Senate 1 (Feb. 7, 2011)).

185. *FAQ*, B LAB (Mar. 9, 2019, 2:15 PM), https://benefitcorp.net/faq.

186. *See generally* MODEL BENEFIT CORPORATION CODE (B LAB 2017) [hereinafter MODEL BENEFIT CORPORATION CODE] https://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf.

187. *See About B Lab*, FLYNNER DESIGN + BUILD, http://www.flynnerhomes.com/about-us/bcorp (last visited Aug. 18, 2019) ("[A] nonprofit organization dedicated to using the power of business to solve social and environmental problems. B Lab drives systemic change through three interrelated initiatives: 1) building a community of Certified B Corporations to make it easier for all of us to tell the difference between 'good companies' and just good marketing; 2) accelerating the growth of impact investing through use of B Lab's GIIRS Ratings and Analytics platform; and 3) promoting legislation creating a new corporate form – the benefit corporation – that meets higher standards of corporate purpose, accountability, and transparency."); *see also The Model Legislation*, BENEFITCORP, https://benefitcorp.net/attorneys/model-legislation (last visited Aug. 18, 2019) (explaining that a Benefit Corporation is formed under state law, totally unrelated to B Lab, though the model legislation that is the basis for most Benefit Corporation legislation was promulgated in connection with efforts by B Lab).

> than in an FPC because the benefit corporation statute still sits upon the bedrock of the remainder of the corporate governance laws.[188]

While a Benefit Corporation is also a for-profit corporation, it differs from a Traditional Corporation in that the shareholder primacy norm has been statutorily written out of its governance. Instead of focusing on maximizing shareholder value, the board of directors of a Benefit Corporation is required to consider the effects of its decisions on a range of constituencies that can include employees, suppliers, customers, communities, society as a whole, and the environment.[189]

The drafters of the Model Benefit Corporation Code saw the duty to maximize profits as a relic of Traditional Corporation corporate governance and acted to unshackle Benefit Corporations from solely pecuniary goals and explicitly rejected shareholder primacy caselaw such as *Dodge v. Ford Motor Co.* and *eBay v. Craigslist*.[190] The comment to Section 301(a)(1) of the Model Benefit Corporation Code states:

> [t]his section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in *Dodge v. Ford* . . . and *eBay Domestic Holdings, Inc. v. Newmark* . . . that directors must maximize the financial value of a corporation.[191]

While a Traditional Corporation usually has few limitations on corporate purpose, a Benefit Corporation is, by its nature, required to fulfill prescribed corporate goals. A Benefit Corporation is limited to creating a general public benefit, typically defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation taking into account the impacts of the benefit corporation as reported against a third-party standard."[192] In addition to the general public benefit purpose, a Benefit Corporation can list additional specific purposes, and the Model Benefit Corporation Code lists the following as possible specific purposes:

> (1) providing low-income or underserved individuals or communities with beneficial products or services;
> (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

188. Westaway & Sampselle, *supra* note 181, at 1033.

189. Model Benefit Corp. Code § 301(a)(1) (B Lab 2017).

190. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684–85 (Mich. 1919) (requiring a corporation to distribute excess profits to shareholders); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33–34 (Del. Ch. 2010) (rejecting the notion that the corporation can put aiding communities over shareholder value).

191. Model Benefit Corp. Code § 301 cmt.

192. *Id.* § 102.

(3) protecting or restoring the environment;
(4) improving human health;
(5) promoting the arts, sciences, or advancement of knowledge;
(6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and
(7) conferring any other particular benefit on society or the environment.[193]

To further distance the Benefit Corporation from the shareholder primacy norm, "[t]he Model [Benefit Corporation Code] explicitly states that '[t]he creation of a general public benefit and specific public benefit . . . is in the best interests of the benefit corporation.' *This serves to protect against the presumption that the financial interests of the corporation take precedence over the public benefit purposes*, which maximizes the benefit corporation's flexibility in corporate decision-making."[194]

Not only does a Benefit Corporation have to specify in its certificate of incorporation the benefits that it is obligated to perform, but it must also provide an annual report on its progress in performing those benefits[195] that includes an analysis of the Benefit Corporation's performance of its social benefit goals compared to a third-party standard for performance. The comments to the Model Benefit Corporation Code's definition of "third-party standard" describes the obligation as follows:

> The requirement in section 401 that a benefit corporation prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection against the abuse of benefit corporation status. The performance of a regular business corporation is measured by the financial statements that the corporation prepares. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether the directors should be retained in office or the shareholders should take other action to

193. *Id.*

194. William H. Clark & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFITCORP 17 (2013), https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf (emphasis added).

195. MODEL BENEFIT CORP. CODE § 401 (requiring each Benefit Corporation to prepare and publicly publish an annual report consisting of a narrative describing the progress made in providing the stated benefit as well as a report that measures the Benefit Corporation's progress against a third-party standard).

> change the way the corporation is managed. The annual benefit report is also intended to reduce "greenwashing" (the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.[196]

This requirement, and the admonition to avoid "greenwashing" activity, is consistent with stakeholder theory and addresses concerns some have raised about CSR programs.[197] Additionally, a Benefit Corporation may have a "Benefit Director," a member of the board of directors responsible for preparing an opinion describing any failures of the board or officers to fulfill their obligations in providing the Benefit Corporation's stated benefits.[198]

In the event that a Benefit Corporation fails to properly pursue its stated benefit, the Model Benefit Corporation Code provides for a "benefit enforcement proceeding" as a remedy.[199] A "benefit enforcement proceeding" can be initiated by either the Benefit Corporation itself or by shareholders derivatively.[200] As a further protection, a Benefit Corporation cannot change its status as a Benefit Corporation without the affirmative vote of two-thirds of the Benefit Corporation's shareholders.[201] The penalty for a failure to fulfill the purpose of a Benefit Corporation includes, but is not limited to, a "benefit enforcement proceeding," which could conceivably include intervention by the state's attorney general to compel performance of the Benefit Corporation's stated beneficial purpose.[202]

Overall, Benefit Corporation governance procedures provide a guarantee that the entity will be guided by a commitment to public benefit over profit that is at least as robust as the rules that govern non-profits.

---

196. *Id.* § 102 cmt.

197. *See generally* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TULANE L. REV. 983 (2010) (arguing that greenwashing is just rhetoric that is aimed at improving the company's image to the public, which could be helpful to corporations, without actually being a socially responsible company).

198. MODEL BENEFIT CORP. CODE § 302.

199. *See id.* § 102 (defining "benefit enforcement proceeding" as a result of either a failure of a benefit corporation to follow the benefit purpose defined it its articles, or a violation of the model rules).

200. *Id.* § 305(c).

201. *See id.* § 102 (defining "minimum status vote" to include a requirement that any major change to corporation, including a change in its status, requires a two-thirds vote from its shareholders).

202. *See* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1020–23 (2013).

### *B. Why a Traditional Corporation That Seeks a Stakeholder Theory Based CSR Program Must Convert to Benefit Corporation Status.*

Because Delaware is a state with a Benefit Corporation statute and a corporation can elect to be governed by either Traditional Corporation principles or Benefit Corporation principles and not both, a Traditional Corporation with a shareholder base that supports the stakeholder theory and has a desire to adopt a CSR program that is not limited by the strictures of shareholder wealth maximization has no choice but to convert to Benefit Corporation status. If the board of directors and shareholders of that Traditional Corporation choose to remain a Traditional Corporation, however, they cannot pursue a CSR program that conflicts with the shareholder primacy norm. This conclusion is supported by scholars who advocate for CSR, where they note that under the American corporate law system, as embodied by Delaware law with maximization of shareholder value as the model, CSR must have a strategic financial justification and must be supported by a business, rather than a moral, case.[203]

Assuming that a company's CSR program is not otherwise unlawful, requiring Traditional Corporations that reject the shareholder primacy norm in favor of a stakeholder-based CSR program to convert to a Benefit Corporation is also good corporate governance. Converting to a Benefit Corporation requires a supermajority vote of shareholders,[204] a higher statutory threshold than is required for a merger or other significant corporate transaction.[205] Only through a referendum of this nature, where shareholders are directly asked to allow the board of directors to abandon the shareholder primacy norm and its focus on maximizing shareholder value in favor of third party interests such that the company will no longer have profit as the primary objective, can a stakeholder-based CSR program be countenanced under traditional theories of corporate law.[206] Abandonment of the shareholder primacy norm is a disenfranchisement of the shareholders' exclusive rights to the assets of the corporation (subject to any encumbrances or security interests held by third parties) and should be viewed as a change in the rights of shareholders no less fundamental than that occasioned by a merger or sale of all or substantially all of the corporation's assets. Adoption of a stakeholder-based CSR program is the functional equivalent of conversion to Benefit Corporation status.[207]

---

203. *See, e.g.*, Smith & Rönnegard, *supra* note 157, at 6.

204. DEL. CODE ANN. tit. 8, § 363 (2015).

205. *See id.* §§ 251, 271 (requiring only a simple majority vote of shareholders to approve a merger or the sale of all or substantially all corporate assets).

206. *See, e.g.*, Smith & Rönnegard, *supra* note 157, at 6.

207. *See id.*

## V. THE POTENTIAL FOR CONFLICT BETWEEN STATE AND FEDERAL LAWS AND CORPORATE SOCIAL RESPONSIBILITY PROGRAMS

In many cases, the objectives and implementation of CSR programs result in social benefits without violations of law (either laws relating to corporate governance or other laws that may be applicable). A CSR program that furthers the environmental goals set out in the UNGC by committing a Traditional Corporation to using renewable energy if such use does not materially increase expenses or otherwise materially and adversely affect the financial condition of the company is an example of this. Reducing the use of fossil fuels is generally in line with local, federal, and international guidelines and other than an obscure law that might be contorted to apply, there are no notable laws that prohibit the replacement of fossil fuels with renewable energy by Traditional Corporations.[208]

There are, however, cases where CSR objectives can conflict with laws that govern the activities of a Traditional Corporation. The obvious example of this under Traditional Corporation corporate governance law is that of a CSR program that materially harms shareholder value in order to provide benefits to non-shareholder stakeholders, where the board would likely be in breach of its state corporation law duties.[209] Then there are harder cases, such as when a Traditional Corporation makes business decisions to mollify political activists and those business decisions have an unknown or immaterial impact on the value of the corporation. In that scenario, there likely is no redress for shareholders under state corporation laws.[210] Lost in the rush to adopt CSR programs, though, are the many other ways that CSR programs, especially those rooted in international protocols, can unintentionally violate U.S. federal and local laws, particularly those aimed

208. *See, e.g.*, S.B. 100 (Cal. 2018) (requiring all sources of electricity sold in the state of California to be sourced 100% from renewable resources); *see also* H.B. 263, 28th Leg. (Haw. 2015) (enacting legislation similar to California's legislation in the state of Hawaii).

209. *See* discussion *infra* Section V.B.i.

210. *See, e.g.*, Austen Hufford et al., *Dick's Sporting Goods Stops Selling Assault-Style Weapons, Raises Age for Gun Buyers*, WALL ST. J. (Feb. 28, 2018), https://www.wsj.com/articles/dicks-raises-age-for-gun-buyers-will-stop-selling-assault-weapons-1519824569 (describing how the sporting goods retailer Dick's Sporting Goods Inc. succumbed to political pressure following a school shooting and ended sales of the most commonly owned sporting rifles and also raised the minimum age for firearms purchases to twenty-one years of age). Intentionally eliminating sources of profitable sales is facially antithetical for a Traditional Corporation, but unless the change has a material and adverse effect on profits over a sustained period it is likely not a breach of duty for the board of directors to make politically motivated decisions such as the board of Dick's made.

at combatting discrimination.[211]

Imagine a CSR program that requires companies to refuse to do business with any country or state that allows same-sex cohabitation. The originators of the CSR program in this hypothetical are countries with strong religious institutions and they seek to impose economic burdens that are intended to force a change in the policies of those countries that provide equal rights to homosexuals. Further assume that a CSR advisor with a religious affiliation adopts the aforementioned CSR program and advises its clients to avoid doing business with the identified countries and companies that do business in those countries. If an American real estate leasing company that has pledged to support CSR initiatives were to follow this CSR program and refused to lease dwelling units to same-sex couples, would it be in violation of federal and state anti-discrimination laws[212] or could it claim that because it was simply following CSR guidelines, its actions cannot be seen as a form of discrimination?

International guidelines, such as U.N. principles relied upon by European CSR firms, do not insulate American companies from liability for acts that violate domestic law unless those guidelines are contained in a treaty that has been ratified by the Senate in accord with Article II of the Constitution or approved by Congress and the President in a customary manner.[213] Further, unless the agreement has been ratified by Congress, a state cannot enter into binding international agreements.[214] While some have argued that

211. *See* discussion *infra* Section V.A.

212. *See, e.g.*, Smith v. Avanti, 249 F. Supp. 3d 1194, 1202–03 (D. Colo. 2017) (holding that the property owners violated the Fair Housing Act, 42 U.S.C. §§ 3601–19, by discriminating based on sexual orientation); *see also* Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2019) (citing a California law that prohibits housing discrimination on the basis of sexual orientation); N.Y. EXEC. Law § 296 (McKinney 2019) (citing New York's human rights law that prohibit housing discrimination on the basis of sexual orientation).

213. U.S. CONST. art. II, § 2; *see* Oona A. Hathaway, *Treaties End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1321, 1327 (2008) (explaining the difference between a self-executing treaty, which requires no further action by Congress to be effective as the supreme law of the land, and non-self-executing treaties, which only become the supreme law of the land if Congress enacts implementing legislation); *id.* at 1317 (discussing how, in addition to the process enumerated in Article II of the Constitution, "congressional-executive agreements," which are the result of majority votes by each house of Congress and execution by the President, are also considered binding international agreements and are treated as the supreme law of the land pursuant to U.S. CONST. art. VI, cl. 2); *id.* at 1286 (clarifying that, while this may be an accurate statement of how congressional-executive agreements have been treated, because it is an extra-constitutional custom it can only be acknowledged as a practice rather than given the full status of Article II treaty ratification).

214. *See* U.S. CONST. art. I, § 10, cl. 3; *see also* Duncan B. Hollis, *Unpacking the*

individual states have some level of autonomy with regard to complying with international law,[215] even under these theories state action that either frustrates federal foreign policy or conflicts with federal law would necessarily fail due to the Constitution's foreign affairs[216] and supremacy clauses.[217] Thus, in the event of a conflict between foreign or international standards and laws, on the one hand, and federal or state laws, on the other hand, the federal and state laws will prevail absent a specific international agreement on the subject that has been properly enacted and executed under the Constitution.

### *A. CSR Programs and General Anti-Discrimination Laws.*

There are hundreds of anti-discrimination laws in the U.S. at the federal and state levels. At the federal level, the earliest significant anti-discrimination law was the Fourteenth Amendment's Equal Protection Clause,[218] which was supplemented by the Civil Rights Act of 1964[219] and its progeny, including the Age Discrimination in Employment Act of 1967,

---

*Compact Clause*, 88 TEX. L. REV. 741, 761 (2010) (characterizing Article I, § 10, clause 3 of the U.S. Constitution as a provision that gives Congress a veto power of state agreements with foreign nations, rather than one that makes such agreements *void ab initio*).

215. *See, e.g.*, Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C.L. REV. 457, 475–76 (2004) (arguing that individual states play an important role in the development of customary international law and even play a role in executing treaty obligations).

216. *See id.* at 466–67 ("The United States Supreme Court has often endorsed a nationalist conception that assumes the exclusion of states from any activities relating to foreign affairs."); *id.* at 467 ("*Zschernig*, therefore, announced openly what the Court had only suggested in its previous holdings: not only are Congress and the President authorized to override state activities that interfere with foreign affairs, but the states are excluded from any such activities even in the absence of congressional or executive action."); *see also* Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 429 (2003) (invalidating a state law that intruded upon the President's power to conduct foreign affairs).

217. *See* Jordan J. Paust, *Medellín, Avena, the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 318–19 (2008) (analyzing Supreme Court caselaw and concluding that states have no authority to enact laws that conflict with treaties, and state action must be subordinated to the supreme law of the land, including duly ratified treaties).

218. U.S. CONST. amend. XIV, § 1; *see also* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 440 (2002) (tracking the history of federal anti-discrimination laws starting with the Equal Protection Clause).

219. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. *See generally* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U.L. REV. 527 (2014) (exploring the history and legacy of the Civil Rights Act).

[220] the Equal Employment Act of 1972,[221] the Pregnancy Discrimination Act of 1978,[222] the Americans with Disabilities Act of 1990[223] and the Civil Rights Act of 1991,[224] among others. These federal anti-discrimination laws prohibit differential treatment in a wide range of circumstances, including voting, the application of law and opportunities for and conditions of employment on the basis of, inter alia, age, race, color, religion, national origin, and sex.[225]

At the state level, all fifty states have enacted some form of anti-discrimination laws, though some states generally defer to federal anti-discrimination laws[226] while others aggressively regulate in this field.[227] The National Council of State Legislatures has reported that on the specific concern of public accommodation discrimination, forty-five states have laws prohibiting the practice[228] and all states have laws that prohibit employment discrimination.[229]

In the case of the hypothetical scenario of a boycott aimed at same-sex cohabitation referenced in the introduction to this section,[230] any company

---

220. 29 U.S.C. §§ 621–34 (2018).

221. 42 U.S.C. §§ 2000e–2000e-17 (2018).

222. 42 U.S.C. § 2000e(k) (2018).

223. 42 U.S.C. §§ 12101–03 (2018); *see also* Americans with Disabilities Amendments Act (ADA Amendments Act) of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

224. 42 U.S.C. §§ 1981–96b.

225. *See* 42 U.S.C. § 2000. The panoply of protections afforded by federal anti-discrimination laws is outside the scope of this article.

226. *See, e.g.*, ALA. CODE §§ 25-1-20 to 25-1-40 (2019) (displaying general deference to federal anti-discrimination laws, despite state law prohibiting employment-related age discrimination); Robinson v. Alabama Cent. Credit Union, 964 So. 2d 1225 (Ala. 2007) (adopting federal age discrimination jurisprudence to decide the state age discrimination claim, despite state having an independent law on the subject matter and acknowledging the state's reliance on federal anti-discrimination laws).

227. *See, e.g.*, Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900–96 (West 2019) (prohibiting discrimination in employment and housing); *see also* Family Rights Act, CAL. GOV'T CODE § 12945.2 (2018) (prohibiting discrimination against parents seeking to take leave); Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2016) (requiring business establishments to provide equal accommodations); The Ralph Civil Rights Act, CAL. CIV. CODE § 51.7 (2019) (prohibiting hate violence or the threat of hate violence); Disabled Persons Act, CAL. CIV. CODE § 54–55.32 (2017) (prohibiting discrimination against disabled persons).

228. *State Public Accommodations Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 8, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

229. *Discrimination — Employment Laws*, NAT'L CONF. ST. LEGISLATURES (July 27, 2015) http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.

230. *See supra* pp. 352–53.

that complied with the calls for such a boycott would be in violation of federal law and any applicable state law on the subject. Using the example of a large, publicly traded real estate leasing company operating in the U.S., if an international CSR organization created a "blacklist" of companies that leased dwelling units to same-sex couples and foreign companies and countries refused to deal with all companies included in that blacklist, the targeted company would not be excused from complying with anti-discrimination laws. This would be the case even if refusing to comply with the CSR guideline resulted in material and adverse financial consequences as CSR compliant companies, investment funds and consumers ceased doing business with the targeted company. There are simply no financial hardship exceptions to domestic anti-discrimination laws that would apply in this scenario.[231]

### *B. CSR Programs and Anti-Discrimination Laws Specifically Applicable to Boycott Movements.*

Of particular interest for the purposes of this article are the anti-boycott provisions of the federal Export Administration Act[232] and certain anti-discrimination laws enacted by twenty-seven states in the past several years (collectively, the "Anti-Boycott Laws").[233] These laws were enacted to

---

231. *See, e.g.*, 29 C.F.R. § 1630.15(d) (2018) (stating that, under the Americans with Disabilities Act, if an employer would suffer "undue hardship" in implementing an accommodation for an employee the employer may be excused from compliance); *id.* § 1630.2(p) (stating that an undue hardship requires a showing of a significant difficulty or expense for the employer, and not allowing a party to engage in discrimination if it is financially beneficial to the party); *id.* (implying that the undue hardship exception is directly related to the types of accommodation an employer may make and establishing a balancing test for that decision). There are some examples of hardship exemptions from anti-discrimination laws, but these are generally balancing tests to determine whether making an accommodation for a particular individual would impose a significant burden on an employer, landlord, or other party and are not black line tests used to allow discrimination if the discriminatory act improves the financial condition of the party discriminating. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002) ("Not every court has used the same language, but their results are functionally similar. In our opinion, that practical view of the statute, applied consistently with ordinary summary judgment principles, *see* Fed. R. Civ. P. 56, avoids Barnett's burden of proof dilemma, while reconciling the two statutory phrases ('reasonable accommodation' and 'undue hardship').").

232. Export Administration Act of 1979, 50 U.S.C. §§ 4601–23 (2018), *repealed in part by* John S. McCain National Defense Authorization Act for Fiscal Year 2019, 115 P.L. 232, 132 Stat. 1636 § 1766(a).

233. Hannah Allam, *U.S. Denies Entry To Leader of Movement to Boycott Israel*, NAT'L PUB. RADIO (Apr. 11, 2019), https://www.npr.org/2019/04/11/712189791/u-s-denies-entry-to-leader-of-movement-to-boycott-israel; *see also* Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 30–31 n.1 (2018)

combat the discriminatory boycott campaign against Israel first launched by the Arab League and recently assumed by the Boycott, Divestment and Sanctions ("BDS") movement[234] (collectively, the "Foreign Boycott Campaign").[235] The Anti-Boycott Laws impose penalties ranging from imprisonment and significant fines for violations of the federal Anti-Boycott Law[236] to the loss of eligibility to enter into contracts with states and divestment of state investments in boycott participants for state Anti-Boycott Laws.[237]

In addition to being promoted by groups affiliated with the BDS movement, elements of the Foreign Boycott Campaign have recently been adopted by CSR advisors and companies that employ CSR programs.[238] As a result, the Foreign Boycott Campaign represents the intersection of several strains of discrimination with CSR.

Since 2010, the U.S. Department of State has utilized a working definition of anti-Semitism[239] that was recently incorporated into the U.S. Department of Education's definition of discrimination[240] for purposes of Title VI of the Civil Rights Act of 1964, as amended (the "Federal Definition of anti-Semitism").[241] The Federal Definition of anti-Semitism provides a number of examples of such discrimination, including "denying the Jewish people their right to self-determination, e.g., by claiming that the existence of the

---

[hereinafter *Greendorfer*, CAMPBELL] (stating a list of state laws).

234. *See infra* note 236.

235. *See* Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, is Still Illegal*, 22 ROGER WILLIAMS U.L. REV. 1, 5–40 (2017) [hereinafter *Greendorfer*, ROGER WILLIAMS].

236. *Office of Antiboycott Compliance*, BUREAU OF INDUS. & SEC., https://www.bis.doc.gov/index.php/enforcement/oac#penalties (last visited Feb. 8, 2020).

237. *See Greendorfer*, CAMPBELL, *supra* note 229, at 37 (providing a summary of the provisions of the state Anti-Boycott Laws).

238. Samantha Marcus, *Why Jewish Group Says N.J. Should Dump This Pension Investment*, NJ.COM (Oct. 5, 2017) https://www.nj.com/politics/index.ssf/2017/10/pension_investment_violates_anti-israeli_boycott_l.html; *see* Benjamin Weinthal, *New Jersey Fails to Enforce its Anti-BDS Law with Danish Bank*, JERUSALEM POST (Sept. 19, 2017), https://www.jpost.com/BDS-THREAT/New-Jersey-fails-to-enforce-anti-BDS-law-with-Danish-bank-505480 (describing the influence of CSR advisors on Danske Bank's boycott of certain companies in Israel).

239. *Defining Anti-Semitism*, U.S. DEP'T. OF ST. (May 26, 2016), https://www.state.gov/s/rga/resources/267538.htm.

240. Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Susan B. Tuchman, Zionist Organization of America (Aug. 27, 2018), [hereinafter OCR Letter], https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5bae6de471c10b08c080420a/1538158057692/US+Department+of+Education+and+Working+Definition%5B1%5D+%281%29.pdf.

241. 42 U.S.C. §§ 2000d–2000d-7 (2018).

State of Israel is a racist endeavor", "applying double standards by requiring of [Israel] a behavior not expected or demanded of by any other democratic nation" and "holding Jews collectively responsible for actions of the State of Israel."[242]

The Foreign Boycott Campaign is predicated on the claim that Israel is nothing more than a colonial and racist initiative undertaken by Jews and explicitly states that the State of Israel is a racist, illegitimate entity that should not exist.[243] In making the calls to boycott Israel, the Foreign Boycott Campaign holds academics, entertainers, and businesses in Israel — and academics, entertainers, and businesses abroad that support Israel — responsible for the actions of Israel and in selecting objects for the boycott campaign, applies a unique standard not applied to any other country.[244]

The Foreign Boycott Campaign satisfies a number of prongs of the test set out in the Federal Definition of anti-Semitism and should thus be considered to be a form of national origin and race discrimination in accord with the federal government's longstanding policy.[245]

*i. CSR Programs That Advance Discriminatory and Unlawful Initiatives: Two Case Studies.*

A recurring theme in CSR ideology is the notion that, in addition to the benefits to society, the environment and other non-shareholder constituencies, CSR programs are accretive to the profitability and financial condition for Traditional Corporations.[246] Because the shareholder primacy

---

242. *See* OCR Letter, *supra* note 236, at 3.

243. *See* Grassroots Palestinian Anti-Apartheid Wall Campaign, *Towards a Global Movement: A Framework for Today's Anti-Apartheid Activism*, BDS MOVEMENT viii (June 2007) [hereinafter BDS Manifesto], https://bdsmovement.net/files/bds%20report%20small.pdf (stating that the BDS Movement's campaign against Israel is a "struggle against colonialism, racism, and expulsion."); *id.* at 16 ("From their inception, Zionist thinkers and ideologues propagated the need to cleanse the indigenous [Arab] population of Palestine if their dream of a Jewish state was to become a reality.").

244. *Id.* at 52–53 (calling for a wide range of boycotts against Israel and its supporters). *But see* OFFICE OF INT'L RELIGIOUS FREEDOM, *Defining Anti-Semitism*, https://www.state.gov/defining-anti-semitism/ (last visited Feb. 8, 2020) (noting that "criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic.").

245. *See* OCR Letter, *supra* note 236, at 2 (stating explicitly that anti-Semitism is a form of national origin and race discrimination).

246. Porter & Kramer, *supra* note 127, at 2 ("If, instead, corporations were to analyze their prospects for social responsibility using the same frameworks that guide their core business choices, they would discover that CSR can be much more than a cost, a constraint or a charitable deed — it can be a source of opportunity, innovation and competitive advantage."); *see also* Michael L. Barnett & Robert M. Salomon, *Does it Pay to be Really Good? Addressing the Shape of the Relationship Between Social and Financial Performance*, 33 STRATEGIC MGMT. J. 1304, 1304–05 (2012) (examining the

norm is the guiding principle for Traditional Corporations in the U.S., the financial case for CSR is the only one that can be used to defend the implementation of any CSR program in this jurisdiction.

Some have argued that a well-designed and implemented CSR program can mitigate regulatory risks and costs for a Traditional Corporation.[247] McKinsey & Company has studied this issue and concluded that CSR programs not only can positively impact regulatory settlements, price premiums, sales, the risk of boycotts, and employee retention, but they also "can create value in many other ways that support growth, improve returns on capital, reduce risk, or improve management quality."[248]

But what if a particular CSR initiative, one that purports to promote laudable goals such as human rights advocacy and that is allowed, or even encouraged, by foreign governments and non-governmental organizations, demonstrably creates material financial costs to a Traditional Corporation with little to no financial benefits?[249]

The popularly called BDS movement is a timely case study on this point. The BDS movement is a recent mutation of the longstanding Arab League's effort to harm the State of Israel through economic, academic and cultural

---

financial impact of CSR programs and finding that while relatively modest CSR programs do not generally provide material financial benefits, aggressive CSR programs can provide significant financial benefits); Adriana Galant & Simon Cadez, *Corporate Social Responsibility and Financial Performance Relationship: A Review of Measurement Approaches*, 30 ECON. RES.-EKONOMSKA ISTRAŽIVANJA 676, 680–88 (2017) (discussing various ways of measuring the financial impact of CSR programs on participating companies). *But see* Gérard Hirigoyen & Thierry Poulain-Rehm, *Relationships Between Corporate Social Responsibility and Financial Performance: What is the Causality?*, 4 J. BUS. & MGMT. 18, 38 (2014) (arguing that an analysis of the data show that CSR has a demonstrated negative financial impact on companies); *id.* ("This study seems to confirm the Managerial Opportunism Hypothesis identified by Preston and O'Bannon (1997) which postulates that corporate social responsibility has a negative influence on financial performance.").

247. *See* Charles J. Fombrun et al., *Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational Risk*, 105 BUS. & SOC'Y REV. 85, 98 (2000).

248. Sheila Bonini et al., *Valuing Social Responsibility Programs*, MCKINSEY QUARTERLY (July 2009), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/valuing-social-responsibility-programs.

249. *See* Alexander B. Traum, *Applied Anti-Semitism: The BDS Movement and the Abuse of Corporation Social Responsibility*, 34 TOURO L. REV. 1025, 1051–52 (2018) ("The movement's boycotts of Israeli academics and artists target those citizens of Israel who are most amendable to challenging Israel's current policies vis-a-vis the Palestinians. By censuring and boycotting such individuals, the BDS movement alienates potential allies. Israeli hospitals and medical technology companies serve those suffering from illness beyond Israel's borders, including, of course, Palestinians. The BDS movement's targeting of these individuals and institutions further reveals the disingenuousness of the movement's claim to support peace and prosperity for the Palestinians.").

attacks on Israel and those who are affiliated with Israel.[250] The BDS movement identifies businesses, entertainers, academics, and others that are based in or work with Israel as part of a campaign to compel governments, companies, educational institutions and religious and social groups to either boycott or otherwise terminate relationships with the Israeli and Israel-affiliated parties. Though the stated goal of the BDS movement is to promote what the Federal Definition of anti-Semitism considers national origin and racial discrimination,[251] and it has numerous ties to terrorist organizations that share the goal of destroying Israel,[252] the BDS movement and its supporters allege that they are a human rights organization devoted to protesting purported Israeli human rights violations.[253] Using this claim as

---

250. *See* MARTIN A. WEISS, CONG. RESEARCH SERV., RL33961 ARAB LEAGUE BOYCOTT OF ISRAEL (2013), https://fas.org/sgp/crs/mideast/RL33961.pdf; MARTIN A. WEISS ET AL., CONG. RESEARCH SERV., R44281 ISRAEL AND THE BOYCOTT, DIVESTMENTS, AND SANCTIONS (BDS) MOVEMENT (2017), https://fas.org/sgp/crs/mideast/R44281.pdf. *See generally Greendorfer*, CAMPBELL, *supra* note 229. The author of this paper has published two other law review articles that relate to the legality of the BDS movement in the U.S.: Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. de.novo 112 (2016); Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018). On behalf of Zachor Legal Institute, the author has also advised governments, companies, individuals and others on legal issues arising out of BDS activity and has also been instrumental in helping states to enact anti-discrimination statutes and defending those state laws in federal courts.

251. *See Greendorfer*, CAMPBELL, *supra* note 229, at 29–40.

252. Bret Stephens, Opinion, *The Anti-Israel Money Trail,* WALL ST. J. (Apr. 25, 2016, 6:44 PM), https://www.wsj.com/articles/the-anti-israel-money-trail-1461624250?ns=prod/accounts-wsj; *see also* STATE OF ISRAEL MINISTRY OF STRATEGIC AFF. & DIPL., *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations*, https://4il.org.il/wp-content/uploads/2019/02/MSA-Terrorists-In-Suits-English-1.pdf (last visited Feb. 8, 2020); *Israel Imperiled: Threats to the Jewish State: Joint Hearing Before H. Foreign Affairs Comm., Subcomm. on Terrorism, Nonproliferation, and Trade and the Subcomm. on the Middle East and North Africa*, 114th Cong., 2d Sess. (2016) (statement of Jonathan Schanzer, Vice President of Research Foundation for Defense of Democracies), http://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf (outlining the ties between supporters of the BDS movement and supporters of designated foreign terror organizations); *Israel, the Palestinians and the United Nations: Challenges for the New Administration: Hearing Before H. Foreign Affairs Comm., Subcomm. on the Middle East and North Africa and Africa, Global Health,Global Human Rights, and International Organizations*, 115th Cong., 1st Sess. (2017) (statement of Jonathan Schanzer, Senior Vice President for Research, Foundation for Defense of Democracies), http://docs.house.gov/meetings/FA/FA13/20170202/105508/HHRG-115-FA13-Wstate-SchanzerJ-20170202.pdf (stating that the Palestine Liberation Organization's treasury is likely the key source of BDS movement funding and that the Palestine Liberation Organization coordinates BDS activity worldwide).

253. *See* al-Shabaka, *The "S" in BDS: Lessons of the Elbit Systems Campaign*, BDS (Aug. 24, 2016), https://bdsmovement.net/news/%E2%80%9Cs%E2%80%9D-bds-

cover, BDS activists have promoted their cause as one that properly belongs within the CSR world and have had success in encouraging governments, NGOs, CSR advisors and CSR advisory clients to boycott and/or divest from Israeli businesses and institutions.[254]

*a) Case Study Number One: Danske Bank.*

One example of this campaign has been directed at Elbit Systems Ltd. ("Elbit"), an international defense electronics company headquartered in Israel with securities traded on various international exchanges, including in the U.S. on the Nasdaq Stock Market exchange ("Nasdaq").[255] Elbit has been targeted by a number of international BDS affiliates who characterize Elbit's activities as being in violation of human rights norms.[256] These groups have successfully coerced some institutional and sovereign investors to divest from Elbit's securities.[257] As a result of BDS affiliates pressuring them, CSR

---

lessons-elbit-systems-campaign ("For years, Palestinians and their supporters – global figures such as Desmond Tutu, Adolfo Peres Esquivel, Naomi Klein, and Noam Chomsky – have called for an immediate and comprehensive military embargo against Israel to hold it accountable for its violations of Palestinian human rights. Tens of thousands of people have signed petitions and activists have demonstrated against companies tied to the Israeli military. For the last decade, activists have run a campaign against Elbit Systems, one of Israel's largest military companies. The effort ranges from governmental lobbying to blockading Elbit subsidiaries in such countries as Australia, the United Kingdom (UK), and Brazil. A dozen financial institutions, including almost all major Scandinavian pension funds, are no longer investing in Elbit Systems."); Alexander B. Traum, *Applied Anti-Semitism: The BDS Movement and the Abuse of Corporation Social Responsibility,* 34 TOURO L. REV. 1025, 1030 (2018) ("The BDS movement's purported goals are often presented in cryptic terms, with such ambiguity serving to obscure the movement's underlying aim of destroying the State of Israel (as opposed to positively seeking Palestinian statehood alongside a State of Israel, such pursuit the so-called 'two state solutions')."); *see also* Benjamin Joffe-Walt, *Swedish Pension Giant Divests from Elbit*, JERUSALEM POST (Mar. 31, 2010), https://www.jpost.com/printarticle.aspx?id=172146 (quoting BDS Movement co-founder Omar Baghouti on the decision by Swedish pension funds to comply with BDS demands to divest from Elbit, "This is the beginning of when the BDS movement begins to bite . . . [t]he BDS movement is turning Israel into the world's pariah state, as South Africa was during apartheid."); *Elbit Systems*, BDS LIST, http://bdslist.org/security-and-weapons/elbit-systems/ (last visited Feb. 8, 2020).

254. *See* Joffe-Walt, *supra* note 249. *See generally* NGO MONITOR, DENMARK CORPORATE SOCIAL RESPONSIBILITY (CSR) REPORT (2015), https://ngo-monitor.org/data/images/File/Denmark.pdf (discussing how NGOs and CSRs are supporting BDS in Denmark).

255. BDS LIST, *supra* note 249 (explaining Elbit Systems' history and business).

256. *See id.* (explaining how the BDS campaign against Elbit Systems has led different companies to divest from Elbit Systems due to the company's human rights violations).

257. *See* Benjamin Weinthal, *New Jersey Fails to Enforce Anti-BDS Law with Danish Bank*, JERUSALEM POST (Sept. 19, 2017, 4:00 AM), https://www.jpost.com/BDS-

advisors such as ISS-Ethix and their clients, such as Danske Bank, include Elbit on their restricted investment lists and state pension funds in European countries[258] have included Elbit on their divestment lists as well.[259] One must ask what it is about Elbit that could cause such institutionalized disapprobation?

In filings made with the U.S. Securities and Exchange Commission ("SEC"), where the U.S. government imposes significant monetary and criminal penalties for misstatements or omissions,[260] Elbit has described its operations as

> [A]n international high technology company engaged in a wide range of programs throughout the world. We develop and supply a broad portfolio of airborne, land and naval systems and products for defense, homeland security and commercial applications. Our systems and products are installed on new platforms, and we also perform comprehensive platform modernization programs. In addition, we provide a range of support services.
>
> Our major activities include:
>
> - military aircraft and helicopter systems;

THREAT/New-Jersey-fails-to-enforce-anti-BDS-law-with-Danish-bank-505480 (stating that Danske Bank excluded Elbit Systems' customer's investments, even though the bank admits it was not "legally required to divest from any Israeli company").

258. *See* Adri Nieuwhof, *Scandinavian Financial Institutions Drop Elbit Due to BDS Pressure*, ELECTRONIC INTIFADA (Feb. 19, 2010), https://electronicintifada.net/content/scandinavian-financial-institutions-drop-elbit-due-bds-pressure/8685 ("In early September, Norway's Minister of Finance Kristin Halvorsen announced that the Norwegian State Pension Fund had sold its shares in Elbit, worth $5.4 million . . . . Following the decision by the Norwegian State Pension Fund, Kommunal Landspensjonkasse (KLP), one of the largest life insurance companies in Norway, also divested from Elbit. The move by heavyweights Halvorsen and KLP to divest led Danwatch, the Danish financial watchdog, to add last month Elbit to its blacklist of 35 companies that are disqualified from investments due to ethical considerations . . . . The largest bank in Denmark and a leading player in the Scandinavian financial markets, Danske Bank followed suit a week later."); *see also Impact of the Boycott, Divestment and Sanctions Movement, Hearing Before H. Comm. On Oversight and Gov't. Reform, Subcomm. on Nat'l. Security*, 114th Cong., 1st Sess. (July 28, 2015) (statement of Mark Dubowitz, Executive Director, Foundation for Defense of Democracies, documenting the spread of BDS activity targeting Elbit).

259. A restricted investment list is a generic term for a list of securities that may not be invested in by institutional or sovereign investment funds. *See, e.g.*, DANSKE BANK INVESTMENT RESTRICTIONS (2019) [hereinafter RESTRICTION LIST], https://danskebank.com/-/media/danske-bank-com/file-cloud/2019/3/danske-bank---investment-restrictions-2019.pdf.

260. *See, e.g.*, 17 C.F.R. § 240.10b-5 (2019) (providing both a government and private right of action for any material misstatement or omission in connection with the purchase or sale of a security). *See generally* Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1 (2014) (reviewing the criminal penalties that may be imposed for violations of this rule).

- commercial aviation systems and aerostructures;
- unmanned aircraft systems and unmanned surface vessels;
- electro-optic and countermeasures systems;
- land vehicle systems;
- command, control, communications, computer and intelligence (C4I) systems;
- electronic warfare and signal intelligence systems; and
- commercial cyber security products and other commercial activities.

> Many of these major activities have a number of common and related elements. Therefore, certain of our subsidiaries, divisions or other operating units often jointly conduct marketing, research and development, manufacturing, performance of programs, sales and after sales support among these major activities.[261]

If this description sounds like it could be applicable to any other international high-technology defense company like Lockheed Martin Corporation or Rockwell Collins, Inc., it is because they are so similar in what they do as to be named competitors by the Nasdaq.[262] So why have some countries, CSR advisors, and CSR clients focused on placing Elbit on their restricted investments lists while ignoring other companies in the same field? The evidence points to one key difference: it is the only Israeli company.[263]

Some CSR guidelines do, in fact, put high-technology defense companies on a restricted investments list, but there is a crucial, substantive difference in those cases. Those CSR programs identify specific activities, such as the production of nuclear weapons or cluster munitions, as outside of societal norms, even for defense companies.[264] Robeco Institutional Asset

261. ELBIT SYSTEMS LTD., *Annual Report* 13 (Form 20-F) (Mar. 20, 2018), https://www.sec.gov/ix?doc=/Archives/edgar/data/1027664/000162828018003366/eslt1231201720-fdoc.htm.

262. *Elbit Systems Ltd. Competitors*, NASDAQ, https://www.nasdaq.com/symbol/eslt/competitors (last visited Feb. 8, 2020); *see* ELBIT SYSTEMS LTD., *supra* note 257, at 26 (listing as its competitors Boeing, Lockheed Martin, Northrop Grumman, Raytheon, General Dynamics, BAE Systems, Rockwell Collins, L-3 Communications, Thales, Airbus, Leonardo, Saab, Harris, Textron, FLIR Systems, Orbital ATK, AeroVironment, Rhode and Schwartz, Rheinmetall, Kongsberg, Safran, CMC, CAE, Aselsan, Bharat Electronics, Cubic and Verint).

263. *Compare About Lockheed Martin*, LOCKHEED MARTIN, https://www.lockheedmartin.com/en-us/who-we-are.html (last visited Feb. 8, 2020) (headquartered in Bethesda, Maryland U.S.A.), *and Contact Us*, COLLINS AEROSPACE, https://www.rockwellcollins.com/Contact-Us.aspx (last visited Feb. 8, 2020) (headquartered in West Palm Beach, Florida U.S.A.), *with Contact Us*, ELBIT SYSTEMS, http://elbitsystems.com/contact-us/ (last visited Feb. 8, 2020) (headquartered in Haifa, Israel).

264. *See* WHITNEY RAUSCHENBACH, GLOBAL CLUSTER MUNITIONS LEGISLATION AND IMPLICATIONS FOR INVESTORS 1 (2011), https://www.msci.com/documents/10199/

Management, an international asset management company, is one such company with a transparent procedure for adding companies to its restricted investments list. Under Robeco's "Exclusion Policy," companies that are involved in the production of "controversial weapons," which include nuclear weapons, cluster munitions, anti-personal mines, chemical and biological, and depleted uranium weapons, will not be invested in.[265] In furtherance of that policy, Robeco lists eleven companies in its Exclusion Policy.[266] Four companies are listed due to their involvement with the production of nuclear weapons, three companies are listed due to their involvement with the production of cluster munitions, another three companies are listed due to their involvement with the production of depleted uranium weapons, and one company is listed due to its involvement with the production of anti-personnel mines.[267]

Danske Bank, on the other hand, seems to have had a policy that can charitably be deemed arbitrary, and possibly be called discriminatory, when it comes to its defense company restricted investments list. In a document dated January 2, 2017, based on the recommendations provided by ISS-Ethix, Danske published its list of companies ("Danske Exclusion List") that it will not invest in due to alleged conflicts between Danske's "Responsibility" policy (a CSR program that Danske acknowledges is based on the U.N. Principles for Responsible Investments) and the activities of the listed companies.[268] Twenty-seven companies, including Elbit, are on this list.[269] Elbit is included on the list due to its purported involvement "in supplying electronic equipment in conflict with human rights norms."[270] When Danske first added Elbit to the Danske Exclusion List in 2010, it acknowledged that the decision was political and was made because Elbit worked on Israel's security wall.[271] This is a rationale for inclusion on the

---

ef83b474-22c0-4fa4-947b-f287adcf0175 (describing how CSR advisor MSCI evaluates companies for possible inclusion on restricted investment lists based on their ties to the manufacture of cluster munitions); *see also* Aime Williams, *Mutual Funds Have Exposure to Controversial Weapons*, FIN. TIMES (Mar. 27, 2017), https://www.ft.com/content/fcb7e956-0f18-11e7-a88c-50ba212dce4d (noting that as a result of screening for "controversial weapons" done by CSR firms such as MSCI, the world's largest sovereign pension fund will not invest in Boeing or Honeywell, due to those companies' involvement in the production of nuclear weapons).

265. ROBECO, EXCLUSION POLICY ROBECO (2019), https://www.robeco.com/docm/docu-exclusion-policy-and-list.pdf.

266. *Id.* at Annex 2.

267. *Id.*

268. *See* RESTRICTION LIST, *supra* note 255.

269. *Id.*

270. *Id.*

271. *See* Nicolai Raastrup, *Danske Bank Cuts Out Controversial Israeli Companies*,

excluded companies list that is *sui generis* and is nothing more than a thin smokescreen for what is likely compliance with the BDS movement's boycott list.[272] At the end of 2015, at least 65 countries (including Israel) had secured border walls, many of them erected in response to terrorism threats.[273]

Elbit is an electronics company that produces systems that can be used by states to, among other things, defend their borders electronically.[274] According to its latest annual report filed with the SEC, Elbit is active in only two product lines that can be described as electronic border surveillance equipment: command, control, communications, computer and intelligence ("CI") systems, and electro-optic systems.[275] The particular Elbit product that has been the focus of attention for CSR purposes is known as "TORCH,"[276] a system that Elbit provides to other countries, including the

---

BERLINGSKE (Jan. 25, 2010), https://www.business.dk/finans/danske-bank-frasorterer-omstridte-israelske-selskaber (translated by author from Dutch to English by Google translate) (the head of Danske's CSR program stated "[b]ut our [CSR] policy goes further than that and incorporates standards prepared by the U.N. and also analyzes the political context. In the U.N., the EU and in the Nordic region there is an attitude that the settlements are illegal and an obstacle to a peace solution. On this basis, we can see that there are violations of our SRI policy.").

272. *See infra* notes 272–74 and accompanying text.

273. Simon Tomlinson, *World of Walls: How 65 Countries Have Erected Fences on Their Borders – Four Times as Many as When the Berlin Wall Was Toppled – as Governments Try to Hold Back the Tide of Migrants*, DAILY MAIL, https://www.dailymail.co.uk/news/article-3205724/How-65-countries-erected-security-walls-borders.html (last updated Aug. 22, 2015).

274. Numerous other defense companies operate in the "electronic equipment market segment," and specifically the "C4I" segment that appears to be the basis for Danske's boycott of Elbit. Thales Group, a publicly traded French defense company that Elbit lists as a competitor. *See, e.g.*, Thales Group, *2017 Registration Document* 126 (2017), https://www.thalesgroup.com/sites/default/files/database/document/2018-07/2017_registration_document%20EN.pdf (acknowledging that Thales operates in the C4I market and listing Elbit as a competitor in C4I); *see also* BDS LIST, *supra* note 251, at 26 (listing Leonardo S.p.A., a publicly traded Italian defense company, as a competitor of Elbit in C4I); RESTRICTION LIST, *supra* note 255 (refraining from including Thales Group or Leonardo from Danske's Exclusion List).

275. BDS LIST, *supra* note 251, at 18 (describing C4I systems as "integrated and coastal border C4I surveillance systems, broadband communication systems, cyber intelligence solutions, border control systems, 'safe city' [integrated communications, monitoring and intelligence systems within a defined political subdivision] systems, emergency and first responder communications systems and homeland security and emergency response training and simulation systems."); *id.* at 17 (defining electro-optic systems as "surveillance systems, 'safe city' projects, facility perimeter security products, electronic fences, fiber optic intrusion detection systems and transportation protection systems."). Because of the overlap between the components of C4I systems and electro-optic systems, this article will use the term C4I to include electro-optic systems.

276. NORWEGIAN COUNCIL OF ETHICS, RECOMMENDATION TO THE NORWEGIAN

U.S., for border security.[277]

No other company was included in Danske's Exclusion List on the basis that it supplies electronic equipment used in border defense (which Danske inexplicably puts in the same category as nuclear weapons, anti-personnel mines, and cluster munitions).[278] Indeed, the Norwegian Council on Ethics explicitly stated that it had made its recommendation to boycott Elbit upon its consideration of opinions from U.N. related entities that singled out an Israeli company's work on Israel's border wall for scrutiny while ignoring other non-Israeli companies that had also worked on the border wall.[279] Under the Federal Definition of anti-Semitism, the way Elbit has been held to a standard not applied to similar companies from other jurisdictions is a clear case of discrimination.[280]

Why did Danske create an exclusion category that is comprised of a single company that happens to be Israeli for producing a product that is widely available and only problematic when used in Israel? The answer can be found at various BDS websites which call for boycotts of Elbit.[281] While Danske denies participating in BDS, its boycott of Elbit can only be

---

MINISTRY OF FINANCE 9 (May 15, 2009), https://www.regjeringen.no/contentassets/f507de70bf0b4235bf760746452cf192/elbit_engelsk.pdf (recommending divestment from Elbit for work on Israel's security wall while acknowledging that many other companies were involved in the project, including the American company Caterpillar, which supplied heavy equipment used in construction of the wall).

277. *See* Jill Aitoro, Elbit Systems of America, *CBP in Talks for Expanded Surveillance Along US-Mexico Border*, DEFENSENEWS.COM (Oct. 11, 2017), https://www.defensenews.com/digital-show-dailies/ausa/2017/10/11/elbit-systems-of-america-cbp-in-talks-for-expanded-surveillance-along-us-mexico-border/ ("Elbit Systems of America, the U.S. subsidiary of Elbit Systems headquartered in Israel, won the contract from U.S. Customers and Border Protection in 2014 to install a technology-based system – a combination of towers, sensors, radars, cameras, and communications linked into the company's TORCH command and control center for 24/7 surveillance capability."); *see also Homeland Security*, ELBIT SYSS. OF AM., http://www.elbitsystems-us.com/homeland-security (last visited Feb. 8, 2020) (describing the TORCH project as a C4I system built from the ground up that meets real world needs for border security).

278. *See* RESTRICTION LIST, *supra* note 255 (listing, in order of frequency used, ten companies for production of cluster weapons, eight companies for production of nuclear weapons, four for natural resource violations, two for supplying military equipment used in conflicts in violations of human rights norms, and one each for violations of environmental and labor norms); *id.* (including as one of the ten companies included for producing cluster weapons Aryt Industries Ltd., an Israeli defense company).

279. NORWEGIAN COUNCIL OF ETHICS, *supra* note 272, at 9 (recommending divestment from Elbit for work on Israel's security wall while acknowledging that many other companies were involved in the project, including the American company Caterpillar, which supplied heavy equipment used in construction of the wall).

280. *See Defining Anti-Semitism*, *supra* note 235 (defining anti-Semitism as a perception of Jewish people that is expressed as hatred).

281. *See, e.g.*, al-Shabaka, *supra* note 249; BDS LIST, *supra* note 251.

explained by compliance with the Foreign Boycott Campaign. This conclusion is further supported by pro-BDS organizations who released public statements applauding Danske's adherence to calls to boycott of Elbit as well as testimony before the U.S. Congress.[282]

This conclusion is further supported by the fact that there are only twenty-seven companies on Danske's Exclusion List, and somehow companies in the tiny country of Israel represent 7.5% of the list. Compared to China, which has two companies on the excluded companies list and Russia, which has only one company on the list, it defies any rational explanation that Israel can have two companies on this list. The only explanation is that Danske has complied with the BDS movement's Foreign Boycott Campaign against Elbit.[283]

*b) Case Study Number Two: Airbnb.*

On November 19, 2018, Airbnb, Inc. ("Airbnb"), a Delaware corporation, released a statement announcing its decision to remove all of its approximately 200 listings from "Israeli settlements" in the West Bank region of territories controlled by Israel.[284] Airbnb stated that the territories in question "are the core of the dispute between Israelis and Palestinians" but also openly acknowledged that they are "not the experts when it comes to the historical disputes" in the territories claimed by Israel and the Palestinians and further acknowledged "conflicting views" on the dispute.[285] Nevertheless, after consulting with "various experts," Airbnb adopted a policy to remove Jewish-owned properties in these territories from its listing platform while leaving properties owned by Palestinian Arabs available.[286]

Airbnb stated in its justification for its decision that "as a global

---

282. *See* Nieuwhof, *supra* note 254.

283. Following the intervention of the author of this article in the State of Colorado's enforcement of its anti-boycott law, as described in the following subsection, Danske restructured its Exclusion List and removed Elbit. *See* DANSKE BANK INVESTMENT RESTRICTIONS (2018), https://danskebank.com/-/media/danske-bank-com/file-cloud/2018/3/investment-restrictions.pdf. Danske made no public comments regarding the removal of Elbit and still maintains on its website its 2017 Exclusion List. *See* DANSKE BANK INVESTMENT RESTRICTIONS (2017), https://danskebank.com/-/media/danske-bank-com/file-cloud/2017/2/excluded-companies.pdf. However, the most recent list includes "controversial weapons" as a category as well as thermal coal and tar sands, and most of the defense companies on the 2017 list are still listed on the most recent list. A logical reading of the two lists leads the reader to assume that the more recent list supersedes and replaces the older list, but Danske has not responded to requests for comment.

284. *See* Press Release, AIRBNB, *Listings in Disputed Regions* (Nov. 19, 2018) [hereinafter Airbnb Disputed Regions], https://press.airbnb.com/listings-in-disputed-regions/ (giving Airbnb's statement on Listings in Disputed Regions, published).

285. *See id.*

286. *See id.*

platform . . . we must consider the impact we have and act responsibly."[287] In furtherance of that policy, Airbnb outlined five points which make up a "framework for how [Airbnb] should treat listings in occupied territories." Two of the most salient points were:

> 1) Evaluate whether the existence of listings is contributing to existing human suffering.
>
> 2) Determine whether the existence of listings in the occupied territory has a direct connection to the larger dispute in the region.[288]

There is ample evidence that Airbnb's policy decision regarding Israeli settlements was the result of a multi-faceted campaign carried out over the past three years[289] by a BDS movement group known as "StolenHomes."[290]

In 2016, members of this BDS affiliate began a concerted effort to influence Airbnb by exerting pressure on one of the company's key investors and other platforms.[291] The group staged protests outside the San Francisco office of Fidelity Investments, an Airbnb investor,[292] as well as at its Chicago office.[293] Concurrently, another BDS affiliate known as "Uplift"[294] targeted the international subsidiary service of Airbnb in its Dublin, Ireland office.[295] In conjunction with the protests, BDS activists launched a strong online and written media campaign aimed at raising public awareness of their assault on Airbnb.[296]

Further proof of BDS coordination on the Airbnb campaign is demonstrated by a letter sent directly by Saeb Erekat, the secretary general

---

287. *See id.*

288. *See id.*

289. *See StolenHomes.Org Domain Information*, WHOIS (last updated Aug. 11, 2018), https://www.whois.com/whois/stolenhomes.org.

290. *See* Sonya E. Meyerson-Knox, *Breaking: Airbnb Commits to Removing Rentals in Illegal Israeli Settlements in the West Bank*, JEWISH VOICE FOR PEACE (Nov. 19, 2018), https://jewishvoiceforpeace.org/airbnb-victory/ (acknowledging the efforts of StolenHomes as a factor affecting Airbnb's decision).

291. *See id*.

292. *See Fidelity Tell Airbnb: Stop Profiting From Stolen Homes*, CODEPINK, https://www.codepink.org/protest_airbnb_in_san_francisco (last visited Feb. 8, 2020).

293. *See* Greg Hinz, *Airbnb Fight Opens on New Front: West Bank*, CHI. TIMES (June 2, 2016), https://www.chicagobusiness.com/article/20160602/BLOGS02/160609941/airbnb-protests-planned-for-chicago-over-rentals-in-israeli-occupied-areas.

294. *See* UPLIFT, https://uplift.ie/ (last visited Feb. 8, 2020).

295. *See* Ciaran D'Arcy, *Protest at Airbnb Europe HQ in Dublin over West Bank Rentals*, IRISHTIMES (June 3, 2016), https://www.irishtimes.com/business/retail-and-services/protest-at-airbnb-europe-hq-in-dublin-over-west-bank-rentals-1.2671641.

296. *See Stolen Homes by Illegal Settlers*, SUMOFUS, http://airbnb.sumofus.org/ (last visited Feb. 8, 2020); *see also* Steven Erlanger, *West Bank Settlers' Listings on Airbnb Draw Palestinian Anger*, N.Y. TIMES (Feb. 7, 2016), https://www.nytimes.com/2016/02/08/world/middleeast/airbnb-west-bank-israel-settlements.html.

of the Palestine Liberation Organization's Executive Committee (a member of the committee that founded and manages the BDS movement),[297] to Airbnb's CEO, Brian Chesky, imploring him to direct Airbnb to terminate all business with Jewish property owners in the West Bank in early 2016.[298]

Just one day after the press release announcing Airbnb's boycott of Jewish property owners was published, a joint report by Human Rights Watch and the Israeli organization Kerem Navot on the issue was also published.[299] The report, which slammed Airbnb for permitting rentals in the West Bank, was likely intended to lend credence to Airbnb's claim that its decision had been taken in accordance with international law and in the pursuance of human rights.

Airbnb demonstrates double standards by continuing to permit listings in areas which have long been the subject of territorial dispute or internationally-recognized occupation such as Chinese-occupied Tibet,[300] Turkish-occupied Northern Cyprus,[301] or Moroccan-occupied Western Sahara.[302] Airbnb continues to allow listings in all of these locations and offers no explanation as to why listings in the West Bank are any more directly linked to the "larger dispute" than listings in these locations.

---

297. *See Greendorfer*, CAMPBELL, *supra* note 229, at 48.

298. *See* Adam Chandler, *The Bright, Cozy Airbnb Listings in West Bank Settlements*, THE ATLANTIC (Jan. 20, 2016), https://www.theatlantic.com/international/archive/2016/01/airbnb-israel-west-bank-settlements/424836/?utm_source=SFTwitter.

299. *Bed and Breakfast on Stolen Land*, HUMAN RIGHTS WATCH (Nov. 20, 2019), https://www.hrw.org/report/2018/11/20/bed-and-breakfast-stolen-land/tourist-rental-listings-west-bank-settlements.

300. *Tibetan-style villa, Located in the Barkhor Street Jokhang Temple Edge, Quiet, Suitable for Family Travel or Friends Go Hand in Hand*, AIRBNB, https://www.airbnb.com/rooms/13446030?location=Tibet%2C%20China&adults=1&guests=1&s=uRhdMdi8 (last visited Aug. 19, 2019) (describing the apartment location as being in Tibet); *see* COUNCIL ON FOREIGN RELATIONS, *The Question of Tibet* (last updated Dec. 5, 2008), https://www.cfr.org/backgrounder/question-tibet (noting that the United States has contradictory policies toward the China-Tibet conflict because the United States officially recognizes Tibet as a part of China but funded Tibetan independence efforts during the Cold War).

301. *Relaxing Location with Sea Views*, AIRBNB, https://www.airbnb.ca/rooms/5179967?locAIRBNB tion=Louroujina&s=a91hWubk&guests=1&adults=1 (last visited Feb. 8, 2020) (describing the apartment location as being in Kirenia, Cyprus); *see Cyprus Country Profile,* BBC NEWS (Nov. 12, 2018), https://www.bbc.com/news/world-europe-17217956 (stating that the island is divided between a Turkish Cypriot and a Greek Cypriot governments).

302. *Cool Appart in Laayoune City*, AIRBNB, https://www.airbnb.ca/rooms/29310138?location=Western%20Sahara&adults=0&children=0&infants=0&guests=0&s=R7KBuPRU (last visited Feb. 8, 2020) (describing the apartment location as being in Laayoune, Western Sahara); *see Western Sahara Profile*, BBC NEWS (May 14, 2018), https://www.bbc.com/news/world-africa-14115273 (referring to a territorial dispute between Morocco and Sahara's indigenous people).

In the "Further Information" section of its website published after the original statement, Airbnb cited its current prohibition of listings in Crimea as evidence that no discriminatory policy vis-à-vis Israel exists.[303] However, the crucial difference between Israeli settlements and Crimea lies within the statement itself and should be emphasized: Airbnb is forbidden by U.S. regulations from operating in Crimea.[304] The boycott of Israeli developments in the West Bank, by contrast, was a policy decision which Airbnb was not obliged to implement in compliance with U.S. regulations and is, in fact, in conflict with longstanding U.S. policies against participation in foreign boycotts of Israel.[305] The discriminatory nature of the decision against Israel is accentuated by Airbnb's own statement which says: "U.S. law permits companies like Airbnb to engage in business in these territories" and "[i]n the past, we made clear that we would operate in this area *as allowed by law.*"[306]

Further, Airbnb stated that it evaluated "whether the existence of listings is contributing to existing human suffering" and as such, determined the Israeli settlements needed to be removed.[307] However, Airbnb continues to allow hosting in a number of areas where human rights violations are rife such as Tibet, where human rights violations by Chinese forces have been repeatedly condemned by international bodies in a string of resolutions and declarations issued by, inter alia, the European Parliament, the U.S. Congress and the Australian Parliament.[308] Moreover, China's numerous human rights violations have been documented and condemned by U.N. human rights experts.[309]

---

303. *See* Airbnb Disputed Regions, *supra* note 280 ("There are conflicting views regarding whether companies should be doing business in the occupied territories that are the subject of historical disputes between Israelis and Palestinians . . . . The global framework will be applied in an ongoing manner. Airbnb has *previously removed listings in Crimea as a result of international sanctions* and they are currently not available on the Airbnb platform.") (emphasis added).

304. *Id.*; *Ukraine-/Russia-Related Sanctions*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/pages/ukraine.aspx (last visited Feb. 8, 2020); U.S. DEP'T TREASURY OFFICE FOREIGN ASSETS CONTROL, UKRAINE/RUSSIA-RELATED SANCTIONS PROGRAM 5, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine.pdf (last updated June 16, 2018).

305. *See* discussion *supra* Section V.B.

306. *See* Airbnb Disputed Regions, *supra* note 280 (emphasis added).

307. Nora Barrows-Friedman, *Airbnb Drops Israel Settlements from Listings*, ELECTRONIC INTIFADA (Nov. 19, 2018), https://electronicintifada.net/blogs/nora-barrows-friedman/airbnb-drops-israeli-settlements-listings.

308. *See generally* INT'L RESOLUTIONS & RECOGNITION ON TIBET (1959–2004), https://tibet.net/wp-content/uploads/2014/10/International-rsolutions-on-Tibet.pdf.

309. *See, e.g.*, *UN Human Rights Experts to China: Disclose the Fate and Whereabouts of Kirti Monks*, INT'L CAMPAIGN FOR TIBET (June 9, 2011),

Not only is Airbnb's policy demonstrative of a double standard, it fails to demonstrate neutrality in the conflict by allowing Palestinian Arab-owned rentals in the West Bank to remain on its listing, despite acknowledging that the area lies "at the core of the dispute between Israelis and Palestinians."[310] By failing to do so, it has chosen to discriminate against Israelis and favor Palestinians. Therefore, Airbnb's boycott is discriminatory. Airbnb's policy on "listings in disputed territories" is an Israel-specific policy, strictly concerning Israel and Jewish landowners.

In the supplementary section of its statement, Airbnb also attempts to refute claims of discrimination by highlighting the fact that it continues to allow listings in East Jerusalem and in the Golan Heights, areas which are considered occupied territories by the international community.[311] However, the varying degree of implementation of the policy does not detract from the fact that a specific area and a specific demographic in Israel is being voluntarily boycotted.

Since Israeli settlements are populated exclusively by Jews, the decision to remove properties in these areas from Airbnb's listing service blatantly discriminates against Jews in violation of Airbnb's own terms prohibiting users from assisting or enabling others to "discriminate against or harass anyone on the basis of race, national origin, religion . . . ."[312] Airbnb's own policy regarding settlements has rendered it the chief culprit of violating its own fundamental principles.

As a result of Airbnb's discriminatory actions against Jewish property owners, lawsuits were filed against Airbnb,[313] American politicians demanded that Airbnb end its discriminatory policy,[314] and several states with laws regulating BDS activity threatened to take action against

---

https://www.savetibet.org/un-human-rights-experts-to-china-disclose-the-fate-and-whereabouts-of-kirti-monks/; INT'L RESOLS. & RECOGNITION ON TIBET, *supra* note 304.

310. Airbnb Disputed Regions, *supra* note 280.

311. *Id.*

312. *Terms of Service*, AIRBNB, https://www.airbnb.com/terms#sec14 (last updated Jan. 21, 2019); *see also Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, https://www.airbnb.ca/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect (last visited Feb. 8, 2020).

313. *See, e.g.*, Jonathan Stempel, *Jewish Americans Sue Airbnb Over West Bank Listing Ban*, REUTERS (Nov. 28, 2018), https://www.reuters.com/article/us-airbnb-lawsuit-israel/jewish-americans-sue-airbnb-over-west-bank-listing-ban-idUSKCN1NX2V1.

314. Adam Kredo, *Trump Admin, Congress Slam Airbnb Boycott of Israel as "Anti-Semitic"*, WASH. FREE BEACON (Nov. 28, 2018, 12:20 PM), https://freebeacon.com/national-security/trump-admin-congress-slam-airbnb-boycott-israel-anti-semitic/print/.

Airbnb.[315] In April 2019, the litigation against Airbnb was terminated pursuant to a settlement agreement that provided, inter alia, for the termination of the discriminatory policy against Jewish property owners.[316]

*ii. Case Study Conclusions*

While Danske's and Airbnb's actions against Israeli businesses present a concise case study of the intersection of CSR and discriminatory campaigns, many other companies have complied with the Foreign Boycott Campaign to harm Israel and Israeli businesses without a direct connection to a CSR program. As prominent recent examples of companies basing business decisions on political pressure from the Foreign Boycott Campaign rather than CSR-related financial considerations, Orange S.A., the French telecommunications company, echoing the allegations against Israel made by the BDS movement, undertook a campaign against its Israeli affiliate that ultimately led to a termination of the business relationship[317] and CRH plc, an international building materials company, complied with calls from the BDS movement to end its participation in the Israeli market.[318]

The Foreign Boycott Campaign also abuses and misuses standards, such as those promulgated by ISS-Ethix, that clearly state a company cannot be found to be violating a human rights norm if a government is the party allegedly violating a norm and the company is simply a third party tangentially related to the purported violation.[319] If it is the case that a company like Elbit is guilty of violating human rights norms simply because it provided materials and expertise used by Israel in the construction of a wall near refugee populations, it would also have to be the case that companies in Lebanon, Syria, Jordan, Egypt, and other nearby countries should also be deemed similarly guilty for the work they do to support government border security projects, yet no campaign to boycott such companies is known to exist. This fact highlights the obvious conclusion

---

315. *See, e.g.*, Reid Wilson, *Florida Governor Threatens Airbnb over West Bank Settlements*, THE HILL (Jan. 16, 2019, 11:31 AM), https://thehill.com/homenews/state-watch/425628-florida-governor-threatens-airbnb-over-west-bank-settlements.

316. *See* Julia Jacobs, *Airbnb Reverses Policy Banning Listings in Israeli Settlements in West Bank*, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/world/middleeast/airbnb-israel-west-bank.html.

317. Ali Abunimah, *Campaigners Hail "Inspiring" BDS Victory as Orange Quits Israel*, ELECTRONIC INTIFADA (Jan. 11, 2016), https://electronicintifada.net/blogs/ali-abunimah/campaigners-hail-inspiring-bds-victory-orange-quits-israel.

318. John Mulligan, *CRH Sells Controversial Stake in Israel's Only Cement firm Mashav*, IRISH INDEPENDENT (Jan. 8, 2016, 7:53 AM), https://www.independent.ie/business/crh-sells-controversial-stake-in-israels-only-cement-firm-mashav-34345981.html.

319. *See* ISS-ETHIX, *supra* note 140, at 1 (discussing ISS-Ethix norms standards).

that the Foreign Boycott Campaign is nothing more than a discriminatory campaign with a thin veneer of faux human rights activism.

The Danske and Airbnb case studies demonstrate the problems of discriminatory acts being propagated by CSR campaigns, but Danske and Airbnb are simply two easily outlined instances of the problem, and Elbit and Jewish property owners in the West Bank are simply two obvious examples of Israeli businesses that are being harmed by CSR programs. CSR programs generally are susceptible to abuse that transforms an otherwise admirable attempt to provide for a balance between profit and societal needs into an unlawful and destructive co-option of the corporate franchise. This is particularly dangerous when the discriminatory campaign hiding behind a CSR program becomes systemic and institutionalized in government, non-governmental organization and third-party advisor guidelines that base CSR principles on purely political platforms.

### *C. Discriminatory Campaigns Adopted by International Organizations Do Not Sanitize Unlawful Domestic Discrimination.*

At the heart of many CSR campaigns, particularly those adopted by foreign companies, is some form of international imprimatur. In his role as the founder of a non-profit legal institute that combats discrimination, the author of this article has filed governmental complaints against companies that participate in discriminatory boycotts.[320] The typical scenario in which such complaints have been filed involves a state with a law that requires state pension funds to divest from companies that boycott Israel.[321] State laws of this nature have a form of due process in which companies that have been identified for divestment are first informed of the determination and then given an opportunity to dispute the determination.[322] Only after the appeal process has been completed with a finding that the company has engaged in the prohibited activity will the divestment occur.[323]

A recent interaction between a state regulator and Danske (an interaction in which the author of this article requested that a state agency enforce the divestment provisions of the state's anti-discrimination law) is illustrative of

320. Letter from Zachor Legal Institute to California Public Employees' Retirement System (May 17, 2018) (on file with author); Letter from Zachor Legal Institute to SEC (Nov. 28, 2018), https://www.sec.gov/comments/s7-18-18/s71818-4699792-176614.pdf.

321. *See supra* Section V.B.i.

322. *See, e.g.*, FLA. STAT. § 215.4725(3)(a) (2018) (outlining the required steps the state fund must take to engage with a company identified as engaging in prohibited boycott activity and providing such company with a 90 day window to demonstrate that it is not engaging in the prohibited activity).

323. *See id.*

how discriminatory campaigns can infect CSR with the support of CSR adherents. In late 2017, the State of Colorado Public Employee Retirement Association ("PERA") notified Danske that it was in violation of Colorado's anti-boycott law (the "CO BDS Law")[324] and would be subject to divestment. Through its counsel, Danske acknowledged that under the Danske Exclusion Policy it boycotts two Israeli companies (Elbit and Aryt Industries Ltd.), but claimed that the exclusion was not a boycott as that term is defined in the CO BDS Law.[325] To argue this, Danske parsed the text of the CO BDS Law to opine that a prohibited boycott has to have a politically motivated intent to inflict harm on Israel.[326] Danske stated that its boycott of Elbit was not politically motivated to inflict harm on Israel but was, instead, part of its CSR program and pointed to the fact that it was simply complying with its own "Responsible Investing"[327] policies, which in turn were developed on the basis of the UNGC and U.N. Guiding Principles on Business and Human Rights with the advice and counsel of MSCI and ISS-Ethix,[328] and thus had no political motivation to harm Israel.[329]

Responding to that argument, the author of this article reminded PERA that compliance with international CSR guidelines does not absolve a company of liability for violating valid laws of the U.S. and individual states:

> The [CO BDS Law] does not contain exemptions for boycotts that have been undertaken as part of a company's voluntary compliance with the guidance of an international political organization. As an initial matter, the international organization that has issued the standards Danske

324. COL. REV. STAT. §§ 24-54.8-201 to 24-54.8-204 (2018).

325. *See* JTA, *New Jersey Divests from Danish Bank to Comply with State Anti-BDS Law*, TIMES OF ISRAEL (Jan. 14, 2018, 11:23 PM), https://www.timesofisrael.com/new-jersey-divests-from-danish-bank-to-comply-with-state-anti-bds-law/ (discussing how Danske Bank denies that its exclusion policy, which prevents it from doing business with Israeli companies Aryt Industries and Elbit System, constitutes a boycott).

326. *See* COL. REV. STAT. § 24-54.8-201 (looking to the definition of economic prohibitions against Israel, which means "engaging in actions that are politically motivated and are intended to penalize, inflict economic harm . . . .").

327. *Sustainable Investment Policy*, DANSKE BANK, https://www.danskeinvest.dk/w/show_download.hent_fra_arkiv?p_vId=didken_responsible_investment_policy_dima.pdf (last visited Feb. 8, 2020).

328. Letter from Charles E. Borden, Allen & Overy LLP, to Jennifer Schreck, Senior Staff Attorney, PERA (Oct. 10, 2017) (on file with author)[hereinafter Borden Letter].

329. *See* Benjamin Weinthal, *Colorado Sanctions Danish Bank for BDS Activity Against Israel Companies*, FOUNDATION FOR DEFENSE OF DEMOCRACIES (Sept. 26, 2017), https://www.fdd.org/analysis/2017/09/26/colorado-sanctions-danish-bank-for-bds-activity-against-israel-companies/ (stating that Danske's head of responsible investments said "Danske Bank does not boycott Israel or Israeli companies as such, and we do not take part in this so-called BDS campaign targeting Israel."). Danske used the UNGP to explain its actions when the UNGP states that its principles should not be applied in a discriminatory manner. *See supra* notes 87–91 and accompanying text.

> complies with [the U.N.] is notoriously anti-Israel. Danske chooses to comply with the standards promulgated by this biased entity. There is certainly no binding authority under which Danske is forced to comply with the UN standards in the manner it has and no law otherwise obligates Danske to boycott the two Israeli companies. In fact, the international standards are a political message that Danske has volitionally adopted and complied with.[330]

Particularly problematic is when CSR guidelines are based on U.N. actions or determinations. U.N. biases, especially against Israel, are well documented.[331] In 2017, all 100 U.S. Senators called for the U.N. to eliminate its bias against Israel.[332] The fact that any topic was able to get bipartisan, unanimous support of the Senate is strong evidence of the pervasiveness of U.N. bias. Further, Secretary of State Mike Pompeo and U.S. Permanent Representative to the U.N. Nikki Haley, in announcing the withdrawal of the U.S. from the U.N. Human Rights Council, highlighted the organization's lengthy and deep bias against Israel and stated:

> [T]he council's continued and well-documented bias against Israel is unconscionable. Since its creation, the council has adopted more resolutions condemning Israel than against the rest of the world combined . . . . Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel – more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.[333]

What this documented bias against Israel by the U.N. and its affiliated agencies demonstrates is the risk of international guidelines being weaponized and deployed as CSR programs. Foes of Israel have pushed the Foreign Boycott Campaign not only at the local level, but by infiltrating U.N. agencies that publish standards used as a benchmark to set CSR policies, these groups have been able to create a de facto international boycott

---

330. Borden Letter, *supra* note 324.

331. *See infra* notes 322–323 and accompanying text; *see also* S.C. Res. 2334, ¶¶ 1–9 (Dec. 23, 2016) (showing the U.N.'s bias against Israel by condemning Israel).

332. *See* Letter from the U.S. Senate to António Guterres, Secretary-General of the United Nations (Apr. 27, 2017), https://www.rubio.senate.gov/public/_cache/files/f6c7c142-8655-4c34-907b-ffe91b033f34/83A98BDD8379F7A35D6207DCB0D74B38.4-27-2017-rubio-coons-ltr-to-unsg-re-israel.pdf.

333. Mike Pompeo, Sec'y of State, & Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks on the U.N. Human Rights Council (June 19, 2018) (transcript available at https://www.state.gov/secretary/remarks/2018/06/283341.htm).

campaign directed at Israel. Put another way, CSR is being used, in part, to sanitize discrimination.

As noted in the previous section of this article, the U.S. Department of State further defines anti-Semitism as, inter alia, "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor," "[a]pplying double standards by requiring of it a behavior not expected of or demanded of any other democratic nation" and "[h]olding Jews collectively responsible for actions of the State of Israel."[334] The U.S. Department of Education's Office for Civil Rights has adopted the Department of State's definition of anti-Semitism and is applying it in a civil rights complaint against Rutgers University.[335]

By their own admission, Danske, and other companies and European bodies issuing CSR guidelines, brand Israel as a racist endeavor,[336] hold Israeli companies to a double standard and hold Jews, including Jewish-controlled companies, collectively responsible for the acts of the State of Israel. As such, these entities discriminate on the basis of national origin and race.[337]

To be certain, Danske is hardly the only company that has incorporated discriminatory CSR guidelines into its own activities, but it is a very telling example of how CSR is used as a trojan horse to carry BDS into Traditional Corporations. Danske's advisors, ISS-Ethix and MSCI, each having thousands of clients relying on them for CSR guidance, presumably advise all of their CSR customers in a manner consistent with how it advised Danske on investing in Israeli companies, so the scope of unlawful

334. Defining Anti-Semitism, *supra* note 235.

335. OCR Letter, *supra* note 238, at 3.

336. *See* NGO MONITOR, *supra* note 250, at 2 ("Ultimately Danske Bank and Ethix rely on distorted legal narratives that falsely accuse Israel of human rights violations and erroneously argue that conducting business with Israel amounts to furthering these alleged violations. As part of this anti-Israeli narrative, they promote the claim that it is illegal and unethical to conduct business with Jews over the 1949 armistice lines. Courts in France, Canada, and the UK have explicitly found that there is no international law prohibiting business operations over the 1949 armistice lines. A court in France and the advertising board in the Netherlands also found that it was defamatory to claim a company selling goods or operating over armistice lines was acting "illegally" or in violation of international law.").

337. *See* OCR Letter, *supra* note 238, at 2 ("However, as OCR has repeatedly indicated previously, discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics — which may include discrimination against Jewish or Muslim students — is discrimination on the basis of national origin or race in violation of Title VI. In determining whether students face discrimination on the basis of actual or perceived Jewish ancestry, we rely where appropriate upon widely established definitions of anti-Semitism.").

discrimination in companies with CSR policies is likely significant.

Moreover, a Traditional Corporation that incorporates BDS principles in its CSR policies is also acting in violation of the Shareholder Primacy Norm. While CSR advocates argue that CSR programs ultimately lead to increased shareholder value, these claims are vague and speculative. In fact, Professor Stephen Bainbridge examined the question of how the adoption of BDS affects investment performance and concluded that it is "nearly certain to result in poorer performance" of investment plans.[338] To this point, Israel has been named "Startup Nation" in response to its prolific entrepreneurial nature[339] and in a research paper distributed in 2018 by Jeffries LLC, Israel's technology sector was described as one of the top ten most technologically advanced countries in the world.[340] Only the U.S. and China have more companies listed on Nasdaq.[341] Adopting an investing program that prohibits investments in one of the world's leading investment markets[342] is clearly at

---

338. Stephen Bainbridge, *Did Harvard Divest From Israel?*, PROFESSORBAINBRIDGE.COM (Aug. 15, 2010), https://www.professorbainbridge.com/professorbainbridgecom/2010/08/did-harvard-divest-from-israel.html; *see also* Stephen Bainbridge, *Those Divesting Presbyterians*, PROFESSORBAINBRIDGE.COM (July 21, 2004), http://www.professorbainbridge.com/professorbainbridgecom/2004/07/those-divesting-presbyterians.html.

339. *See generally* DAN SENOR & SAUL SINGER, START-UP NATION: THE STORY OF ISRAEL'S ECONOMIC MIRACLE (2011).

340. THE ISRAELI TECHNOLOGY IMPERATIVE: INVESTING AT THE CROSSROADS OF INNOVATION, BLUESTAR INDEXES (June 2018), https://www.fa-mag.com/userfiles/stories/whitepapers/2018/The-Israeli-Technology-Imperative-June_2018-sm.pdf; *see also Israel's Technology Sector Continues to Grow*, THE ECONOMIST (Feb. 9, 2018), http://www.eiu.com/industry/article/1796420563/israels-technology-sector-continues-to-grow/2018-02-09 ("Israel is riding on a global surge in high-tech investment. In the U.S., venture-capital firms deployed US$84bn in more than 8,000 companies in 2017, the highest number since the dot.com era around 2000 . . . ."); Sam Shead, *The 25 Coolest Tech Companies in Israel*, BUS. INSIDER (May 25, 2017, 3:30 AM), https://www.businessinsider.com/coolest-tech-startups-in-israel-2017-5 ("Israel continues to produce an impressive number of highly successful tech companies for a country with a population of just 9 million people. The Middle Eastern country is sometimes referred to as 'Startup Nation' thanks to the sheer number of entrepreneurs building businesses there, particularly in cities like Tel Aviv. Multinational tech companies like Google, Apple, Facebook, and Microsoft all have research centres in Israel . . . .").

341. Rory Cellan-Jones, *Next Silicon Valleys: What Makes Israel a Start-Up Nation*, BBC NEWS (Feb. 10, 2014), https://www.bbc.com/news/technology-26071818.

342. Coco Liu, *Why Israel is the Next Promised Land for Chinese Investors*, SOUTH CHINA MORNING POST (Nov. 26, 2017, 9:45 AM), https://www.scmp.com/week-asia/business/article/2121498/why-israel-new-promised-land-chinese-investors ("China's total investment in Israel almost tripled last year to US$16 billion (HK$125 million), largely driven by a surge in funding in Israel's hi-tech industry . . . ."); *see also* Steven Scheer, *U.S. Intel Plans $5 Billion Investment in Israeli Plant*, REUTERS (Feb. 21, 2018), https://www.reuters.com/article/us-intel-israel-expansion/u-s-intel-plans-5-billion-investment-in-israeli-plant-minister-idUSKCN1G51ET; PWC ISRAEL HI-TECH

odds with the fiduciary duties of any Traditional Corporation's board of directors, yet this is exactly what happens when a board signs on to a CSR program with BDS elements. In addition, in a jurisdiction that has enacted legislation that prohibits the state from entering into contracts with, or investing in, companies that boycott Israel, the financial cost of adopting any form of BDS program can be significant.[343]

Under accepted shareholder primacy theories, whether radical or traditional, directors ultimately have a duty to enhance the value of the company. Adhering to a CSR policy that includes BDS elements turns the corporation from one that is primarily focused on enhancing shareholder returns to one that is acting for a political or social constituency, something that is not permissible for a non-benefit corporation. The boycotting of Israeli companies can only provide "social justice" returns (that is, appeasement of a radical base), something at odds with traditional notions of Shareholder Primacy.

## VI. CONCLUSION

CSR programs can be both legal and beneficial, but they are not immune from the application of federal and state laws. As CSR has become an important element considered by the boards of Traditional Corporations it has also caught the attention of groups that see the opportunities to embed

EXIT REPORT 2017 1 (2018), https://www.pwc.com/il/en/assets/pdf-files/exit-report-en-2017.pdf (noting that 2017 merger and acquisition deal value for Israeli companies was up 110% over 2016, with a total value of $23.8 billion, and concluding " . . . one should not overlook the fact that more global corporations now choose Israel as the place where they can buy the right technologies to help them shape their own future.").

343. BDS activists have targeted a number of large, publicly traded corporations with demands that they terminate business relationships with Israel. *See Global BDS Week of Action Against HP November 25 - December 3*, BDS MOVEMENT, https://bdsmovement.net/boycott-hp/week-of-action (last visited Feb. 8, 2020). As an example, the Hewlett Packard Enterprise Company has been a frequent focus for BDS activists. Hewlett Packard Enterprise Company also has a number of contracts with states, including the State of California. *See LPA Contract Detail*, CA.ORG, https://caleprocure.ca.gov/PSRelay/ZZ_PO.ZZ_CTR_SUP_CMP.GBL?Page=ZZ_CTR_SUP_PG&Action=U&SETID=STATE&CNTRCT_ID=3-16-70-3223A (last visited Feb. 8, 2020). The State of California prohibits state agencies from entering into contracts with entities boycotting Israel and if Hewlett Packard Enterprise Company were to participate in BDS boycotts of Israel, they would be disqualified from entering into contracts with the State of California (as well as other states with anti-BDS laws). *See* CAL. PUB. CONT. CODE § 2010 (West 2017). As the State of California has an economy that would be the fifth largest in the world if it were an independent country, a company like Hewlett Packard Enterprise Company would be excluded from participating in a trillion dollar economy if it became a BDS participant. *See* Lisa Marie Segarra, *California's Economy Is Now Bigger Than All of the U.K.*, FORTUNE (May 5, 2018), https://fortune.com/2018/05/05/california-fifth-biggest-economy-passes-united-kingdom/.

their own agendas into the boardroom. The most relevant current example is that of CSR being used by BDS activists to co-opt the corporate franchise into becoming yet another tool to further the discriminatory BDS movement. When CSR is implemented in such a manner it becomes an unlawful form of national origin and race discrimination. Furthermore, abuse of CSR in this way leaves the boards of Traditional Corporations in violation of state corporate law principles on shareholder primacy and the obligation of corporate boards to maximize the value of the company. In addition to shareholder liability, companies that adopt discriminatory CSR programs should be exposed to liability under anti-discrimination laws and should also be subject to shareholder lawsuits based on breach of fiduciary duty under relevant state laws.

To the extent a Traditional Corporation adopts a CSR program that benefits non-shareholder parties and is not facially discriminatory, to avoid shareholder lawsuits for breach of fiduciary duty the company should convert to a Benefit Corporation status, which would subject the matter to a vote of all shareholders and require the company to be transparent as to its decision to focus on social and political matters, rather than profit.