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REPURPOSING THE CORPORATION THROUGH STAKEHOLDER MARKETS

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INTRODUCTION 2
I. THE ESG INFORMATION SYSTEM 7
A. Current State of the ESG Information System..........8
1. CSR reporting 10
2. CSR rating and ranking..........12
B. Completion of the ESG Information System..........14
1. Standardization 14
2. Reporting levels 17
3. Stakeholder software development..........18
a. The supply chain problem 19
b. The trademark problem..........21
C. ESG Information System Costs 22
1. Cost effects on the prices of goods and services 23
2. Cost effects on Potential Stakeholder power 25
II. RESPONSES TO STANDARDIZATION..........27
A. Strategic Response..........27
1. Corporations..........27
2. Potential Stakeholders..........29
3. Interaction 29
4. Cheating 30
B. Response Magnification 32
1. Ranking's effects 32
2. The prestige hierarchy's effects..........34
III. CORPORATE AND INFORMATION SYSTEM CONTROL 36
A. Corporate Control..........37
B. ESG Information System Control..........39
C. Market Verses Democratic Control 40

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IV. PARALLEL PROCESSES 41
A. Regulation..*41*
B. Changing the Corporation's Purpose *42*
C. Employee Voting for Directors *43*
D. Pass-through Voting *43*
E. Stewardship Codes *46*
F. Suing to Compel SASB Reporting...*46*
G. Social Norm Building...*47*
V. CONCLUSIONS 47

> *What gets measured gets managed.*
>
> —Peter F. Drucker, *The Practice of Management* (1954)

INTRODUCTION

Despite the corporation's financial success, the corporation has failed to deliver a crucial part of what people want from it: a stable planet; livable communities; a safe and sustainable environment; meaningful, secure jobs with benefits; respect for human rights, and steady improvement in peoples' lives. Corporate efforts to serve those values are generally referred to as "corporate social responsibility" (CSR). This Article argues that completion of a system capable of measuring CSR will enable corporations' customers, employees, investors, and other stakeholders to compel the corporation to serve those values. The stakeholders would accomplish that "repurposing" by favoring socially responsibly corporations in market transactions. Stakeholders cannot repurpose the corporation under current circumstances because comparable information regarding corporation's CSR performances is not publicly available.

Thousands of organizations worldwide are now engaged in a cooperative effort to build an information system that will provide that information. CSR is the abstract idea that corporations have a moral responsibility to voluntarily integrate environmental, social, and governance (ESG) improvements into their business operations for the benefit of shareholders, other stakeholders, society as a whole, and the environment.[1] This Article refers to the system under construction as the "ESG information system." When complete, the ESG information system will continually measure and report publicly on the CSR of each participating corporation. As used in this Article, CSR is adherence to the actual values of corporate stakeholders, and ESG is a set of measurements from which conclusions about CSR can be drawn.

A corporation's "stakeholders" include everyone with an interest in the corporation's success. Along with shareholders, stakeholders are usually assumed to include employees, managers, customers, suppliers, creditors, and the communities in which the corporation does business. In this Article, "Potential Stakeholders" are persons considering whether to deal with a particular corporation and on what terms.

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[1] Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions*, 15 CORP. SOC. RESP. ENVTL. MGMT. 1 (2008) (empirical analysis of CSR definitions).

This Article's thesis is that credible, publicly available ESG information, together with ratings and rankings based on it, would enable the corporations' Potential Stakeholders to repurpose the corporation. By "repurpose," I mean control the corporation and redirect a substantial portion the corporation's efforts to service of the stakeholders, the environment, and the public. More specifically, the efforts of millions of employees of thousands of corporations would shift to building an ethical and sustainable world. Repurposing's mechanism will be the competitive markets in which Potential Stakeholders decide which corporations they will deal or associate with and on what terms.

CSR is immensely popular,[2] making a socially responsible image a corporate necessity. Rhetorically, nearly all corporations have committed to CSR. Philip Morris says its "purpose" is "to deliver a smoke free future."[3] Facebook's "mission" is "to give people the power to build community and bring the world closer together"[4] and Tesla's is "to accelerate the world's transition to sustainable energy."[5] Nearly all public corporations claim a devotion to serving their customers, their employees, the environment, and the public.[6] Virtually none proclaims the single-minded devotion to shareholder wealth maximization promoted by leading academics and required by Delaware law.

This corporate embrace of CSR is recent. To illustrate, the proportion of large, public corporations publishing CSR reports touting their social achievements increased from 20% in 2011 to over 90% in 2019.[7]

Of course, CSR's rhetoric is not CSR's current reality. Because no effective system for measuring and comparing CSR currently exists, corporations can and do make false CSR claims with little risk of contradiction or censure. As Ann Lipton notes, "publicity campaigns designed to improve the corporation's image . . . may be just as effective at generating public goodwill as real operational changes."[8] The public seems to know it is

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[2] *Infra* Part I.C.2.

[3] PHILIP MORRIS INTERNATIONAL, INC. PROXY STATEMENT (May 6, 2020) at 3, https://www.sec.gov/Archives/edgar/data/1413329/000119312520085906/d832372ddef14a.htm ("[I]n 2016 [the Company] announced its new purpose: to deliver a smoke-free future by focusing its resources on developing, scientifically substantiating and responsibly commercializing smoke-free products that are less harmful than smoking, with the aim of completely replacing cigarettes as soon as possible.").

[4] Investor Relations FAQs, FACEBOOK, https://investor.fb.com/resources/default.aspx#:~:text=Founded%20in%202004%2C%20Facebook's%20mission,express%20what%20matters%20to%20them (last visited September 13, 2020).

[5] About Tesla, https://www.tesla.com/about#:~:text=Tesla's%20mission%20is%20to%20accelerate,to%20drive%20than%20gasoline%20cars (last visited September 13, 2020).

[6] Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf (last visited Jan. 7, 2020) (putting "generating long-term value for shareholders" fifth on a list of stakeholders to whom the corporations "share a fundamental commitment.").

[7] GOVERNANCE & ACCOUNTABILITY INST., *Flash Report:* 90*% of S&P 500 Index® Companies Publish Sustainability / Responsibility Reports in 2019*, (July 16, 2020) [hereinafter *Flash Report*], https://www.ga-institute.com/research-reports/flash-reports/2020-sp-500-flash-report.html.

[8] Ann M. Lipton, *ESG Investing, or, If You Can't Beat 'Em, Join 'Em, in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson, eds.) (forthcoming 2021).

being fooled. Only twenty-six percent of Americans are satisfied with "the size and influence of major corporations."[9]

The ESG information system will repair the disconnect between CSR claims and CSR reality. The Global Reporting Initiative (GRI), a not-for-profit corporation, the leading promulgator of CSR reporting standards worldwide.[10] The GRI began building the ESG information system in 1997.[11] After twenty-four years, the ESG information system may be within a few years of effectiveness. When the system is effective, each participating corporation will periodically and publicly report about a thousand standardized and audited measurements of their CSR performances.[12] Hundreds of independent organizations will rate and rank those performances transparently,[13] and intermediaries will integrate the ratings and rankings into decision-support software for the Potential Stakeholders.[14]

The Sustainability Accounting Standards Board (SASB), also a non-profit corporation, is a U.S.-based challenger to the European-based GRI. SASB views the ESG information system narrowly, as a response to investors' demands for the information they need to assess corporations' sustainability. The GRI views the ESG information system's purpose broadly, to include providing information to stakeholders and the public. Repurposing could occur under the SASB view or the GRI view, but would be more likely and more extensive under the GRI view.

Although the ESG information system is not yet functional, nearly all of its elements are in place.[15] SASB, GRI, and other organizations have promulgated comprehensive, high-quality standards for measuring ESG performance.[16] Some corporations are already measuring and reporting to those standards. Some of those corporations subject their ESG

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[9] Linda Saad, *U.S. Satisfaction Sinks With Many Aspects of Public Life*, GALLUP (Feb. 4, 2021), https://news.gallup.com/poll/329279/satisfaction-sinks-aspects-public-life.aspx.

[10] THE ALLIANCE FOR CORPORATE TRANSPARENCY, 2019 RESEARCH REPORT 34 (reporting that 54.1% of non-financial statements examined specified that they relied on Global Reporting Initiative, higher than any other standards or group of standards); IRRC INSTITUTE, STATE OF SUSTAINABILITY AND INTEGRATED REPORTING 2018, https://www.weinberg.udel.edu/IIRCiResearchDocuments/2018/11/2018-SP-500-Integrated-Reporting-FINAL-November-2018-1.pdf (reporting that "GRI remins the most used reporting framework for sustainability reports, with 60 percent of all reporters referencing or following it."); Cynthia A. Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 UC IRVINE J. INT'L TRANS. COMP. L. 67, 74 (2010) ("GRI's voluntary framework for ESG reporting has emerged as the global Benchmark.").

[11] *Our Mission and History*, GRI, https://www.globalreporting.org/about-gri/mission-history/ (last visited Jan. 17, 2021).

[12] For example, the GRI standards specify more than a thousand data points. The GRI standards are available at https://www.globalreporting.org/standards/gri-standards-download-center/.

[13] SustainAbility, *Rate the Raters 2020: Investor Survey and Interview Results* 24 (March 2020), https://sustainability.com/our-work/reports/rate-raters-2020/ ("[I]t is estimated that there are now over 600 ESG ratings globally.").

[14] *Infra*, Part I.A.

[15] *Infra*, Part I.A.

[16] *Supra* note 12 (GRI); https://www.sasb.org/standards-overview/download-current-standards/https://www.sasb.org/standards-overview/download-current-standards/ (SASB).

data to external audit in order to increase their credibility.[17] Hundreds of for-profit and not-for profit organizations rate or rank corporate CSR performances.[18] Software that integrates financial and ESG data for use at the point of decision is in widespread use in the securities markets,[19] and new ESG information products are continually introduced.[20]

The ESG information system remains ineffective principally because no single set of reporting standards dominates. Corporations report to a variety of standards or simply invent their own. The ESG data currently collected are not comparable across large numbers of corporations, resulting in ratings and rankings that lack credibility.[21]

In January 2020, BlackRock and State Street, two of the world's largest institutional investors, began openly pressuring U.S. public corporations to report to SASB standards. In roughly eleven months of 2020 and early 2021, the number of corporations reporting to SASB standards nearly quadrupled.[22] A majority of U.S. public corporations say they are planning to adopt SASB standards.[23] If they do, the ESG information system will be functional within the United States. ESG data will be comparable across corporations, ESG ratings and rankings will be credible, capital markets will be informed, and high-quality ESG information will be in the public domain.

Once the ESG information system is effective, corporations will need high CSR ratings and rankings to compete effectively in the stakeholder markets. Because the new ESG information system will make it possible to assess CSR objectively and accurately, corporations will have to achieve high levels of CSR performance before they will be able to credibly claim them.

The corporations that succeed in CSR competition will reap advantages in the markets in which they sell goods and services, hire and retain employees and executives, ally with

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[17] *E.g.*, *Allstate Sustainability Report Downloads*, ALLSTATE, 2019 Sustainability Report at 26, https://www.allstatesustainability.com/download-center/ (last visited August 2, 2020) ("Our information security practices are subject to both internal and external audits.").

[18] *See supra*, note 13.

[19] *See, e.g.*, *Thomson Reuters Eikon: ESG Data on Eikon Quick Start Guide* https://www.esade.edu/itemsweb/biblioteca/bbdd/inbbdd/archivos/QSG_%20ESG_Data_on_Eikon.pdf (guide to using ESG data together with financial data on Thomson Reuters proprietary system).

[20] *Bloomberg Launches Proprietary ESG Scores*, BLOOMBERG (Aug. 11, 2020), https://www.bloomberg.com/company/press/bloomberg-launches-proprietary-esg-scores/; (press release announcing product launch); Ronald P. O'Hanley, *ESG Investing 2.0: Moving Toward Common Disclosure Standards*, STATE STREET (Nov. 7, 2019), https://www.statestreet.com/content/dam/statestreet/documents/Articles/1369%20ESG%20Metric%20and%20Reporting%20Standards.pdf ("In 2019, State Street Global Advisors launched its ESG scoring system called the R-factor.").

[21] *Infra*, Part I.A.2.

[22] The author counted 175 corporations reporting on May 17, 2020 and 536 corporations reporting on January 3, 2021 and estimated 682 as of April 16, 2021. The count and estimate are of logos on the SASB website. https://www.sasb.org/company-use/sasb-reporters/ ("Hundreds of companies around the world and across every sector are using SASB standards to communicate financially material sustainability information to investors. The list below provides a diversity of examples . . . ").

[23] *The Sustainability Imperative: Business and Investor Outlook,* BLOOMBERG (2018) https://data.bloomberglp.com/bna/sites/8/2019/04/The-Sustainability-Imperative-Business-and-Investor-Outlook-2018-Bloomberg-Sustainable-Business-Finance-Survey.pdf, at 4 (survey so finding).

suppliers and other strategic partners, finance their operations, and seek community support. Those advantages will accrue because people and organizations seek to deal with, and associate with, responsible corporations.

I refer to the benefits accruing to corporations in those stakeholder markets by virtue of their CSR ratings and rankings as "ESG Benefit." If ESG Benefit is sufficiently large, it may alone repurpose the corporation. Even if ESG Benefit is not sufficient alone, it will almost certainly be sufficient in combination with parallel efforts to cause the same changes in corporations through regulation, mutual fund pass-through voting, stewardship codes, litigation, and social norm building.[24] A process that may lead to SEC-mandated CSR reporting is already under way.[25] At current levels of public support for CSR, the repurposing of the corporation seems virtually inevitable.

Standardized CSR reporting is most advanced among the largest and most prestigious public corporations.[26] As it develops, however, CSR reporting will repurpose both public and private corporations. The scenario in which CSR reporting extends to private corporations will be largely the same as for public corporations: voluntary reporting to compete for ESG Benefit, the marginalization of non-reporters, their voluntary conversion to reporting, and ultimately, mandatory reporting or direct regulation of CSR to deal with the stragglers.

Repurposing will not conflict with prevailing ideologies regarding corporate purpose. Some leading scholars argue that corporate law, norms, and economic efficiency require corporations to maximize shareholder wealth.[27] Allowing corporations to pursue stakeholder interests, they say, may impair the corporation's ability to generate wealth.[28] But repurposing does not require abandonment of any laws, norms, or putative economic principles. The public demand for CSR is already part of the environment in which corporations

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[24] *Infra* Part IV.

[25] Recommendation of the SEC Investor Advisory Committee Relating to ESG Disclosure, May 21, 2020, at 7, https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf [hereinafter *SEC Committee Recommendation*] (recommending that "the Commission begin in earnest an effort to update the reporting requirements of Issuers to include material, decision-useful ESG factors").

[26] *GRI and Sustainability Reporting*, GLOBAL REPORTING INITIATIVE https://www.globalreporting.org/information/sustainability-reporting/Pages/gri-standards.aspx (last visited May 16, 2020) ("Of the world's largest 250 corporations, 92% report on their sustainability performance and 74% of these use GRI's Standards to do so.").

[27] Stephen M. Bainbridge, *Executive Compensation, Who Decides?*, 83 TEX. L. REV. 1615, 1616 (2005) ("The discretionary powers thus conferred on directors and officers, however, are to be directed towards a single end; namely, the maximization of shareholder wealth."); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36 (1991) (conceptualizing shareholder wealth maximization as the "operational assumption of successful firms."); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 180 (2008) ("I believe, contrary to Professor Stout, that corporate law requires directors to maximize shareholder value . . . ."); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 955 (1984) ("[Profit maximization] is not simply the best, but it is the only operational decision rule that we currently have.").

[28] *E.g.*, Edward Rock, *For Whom is the Corporation Managed in 2020: The Debate Over Corporate Purpose* 28 (European Corporate Governance Inst., Law Working Paper No. 515, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951. ("[T]inkering with the law of "corporate purpose" threatens to disrupt the coherence of the corporate form, a form that has been one of the great wealth generating innovations of the last 150 years.").

compete to achieve their financial goals. It would continue to be. The only difference will be that market participants will be better informed.

What the shareholder wealth maximization advocates miss is that the corporation is controlled not only by directors elected by shareholders, but also by the operation of stakeholder markets. With an effective ESG information system, the stakeholder markets will become the primary determinants of directors' actions. Directors will be able to do the bidding of the shareholders who elected them only after the directors have satisfied stakeholder demands.

In other words, repurposing will not end the corporation's pursuit of profits.[29] It will change what the corporation does to pursue profits. Corporations that now maximize shareholder wealth will remain free to continue doing so, but they will be repurposed along with those that do not maximize shareholder wealth.

At least initially, repurposing will be a market, not a political, process. No one need change their minds about anything, and government need take no action. The ESG information system will provide the necessary information to Potential Stakeholders, Potential Stakeholders will confer the ESG Benefit in accord with the ratings and rankings, and the corporations will voluntarily repurpose themselves.

Part I of this Article describes the current state of the ESG information system and explains what must be done to complete it. Part I also considers the effect of the system's costs on the costs of products and services and on the Potential Stakeholders' power.

Part II predicts that completion of the ESG information system will trigger an intense competition for high ESG ratings and rankings. Ranking and prestige effects will magnify the impact of even small differences in corporations' CSR performances.

Part III explains how Potential Stakeholders would control repurposed corporations and how government might assert regulatory control. Subpart C of Part III argues that despite repurposing's reliance on markets, repurposing will enhance rather than diminish democratic control of corporations. Part IV describes some parallel reform processes that will work in conjunction with the ESG information system to assure repurposing.

Part V concludes that if ESG Benefit is sufficiently large, the ESG information system will enable the Potential Stakeholders to repurpose the corporation. That repurposing could not only eliminate most corporate externalization of social costs, but could also make the corporation's purpose whatever Potential Stakeholders want it to be.

I. THE ESG INFORMATION SYSTEM

The ESG information system is the system that defines, collects, and conveys ESG information from corporations to Potential Stakeholders. The system's purpose is to enable

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[29] Profit maximization is not the same as shareholder wealth maximization. The classic illustration is Kamin v. American Express, 383 N.Y.S.2d 807 (Sup. Ct. 1976) in which a corporation failed to claim a tax loss worth $8 million (thus reducing shareholder wealth) in order to avoid suffering a loss that would have appeared on its income statement (thus increasing profits). the difference is not relevant to the subject of this Article. Courts and legal scholars usually treat profit maximization and shareholder wealth maximization as synonyms. I do the same, usually referring to both as "shareholder wealth maximization."

Potential Stakeholders to compare relevant aspects of a corporation's ESG performance with those same aspects of the corporation's past performance and the performance of the corporation's competitors. As the GRI put it:

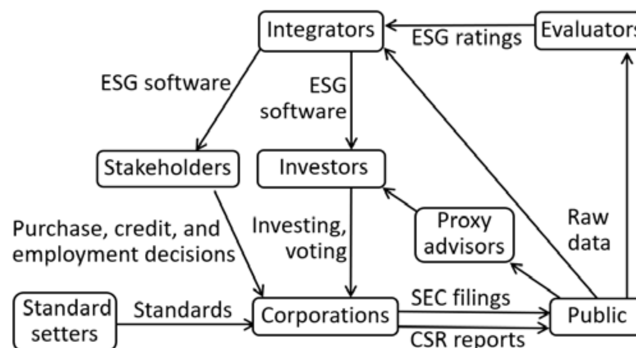
> Comparability is necessary for evaluating performance. It is important that stakeholders are able to compare information on the organization's current economic, environmental, and social performance against the organization's past performance, its objectives, and, to the degree possible, against the performance of other organizations.[30]

Comparison to past ESG performance enables Potential Stakeholders to evaluate the corporation's claims that its performance is improving. Comparison to competitors' performances enables the Potential Stakeholder to take CSR into account in deciding whether to associate with the corporation or with one of its competitors. Recall that Potential Stakeholders' ability to identify and reward high ESG performance will drive repurposing.

A. Current State of the ESG Information System

Figure 1 maps the relationships among the principal subsystems of the ESG information system. The standard setters who appear at the lower left of Figure 1 are the SEC and more than a hundred private organizations that have promulgated standards for CSR reporting or some aspect of CSR reporting.[31] The GRI and SASB are the most important of these organizations, because each has promulgated a comprehensive set of ESG standards that has been widely adopted.

Figure 1. The ESG Information System[32]



"Standards," as used here, are definitions of the data to be collected. For example, this is the GRI standard for Direct (Scope 1) GHG [Greenhouse Gas] emissions:

> The reporting organization shall report the following information:
>
> a. Gross direct (Scope 1) GHG emissions in metric tons of CO2 equivalent.

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[30] GRI 101: Foundation 2016, at 14, https://www.globalreporting.org/standards/media/1036/gri-101-foundation-2016.pdf.

[31] *SEC Committee Recommendation, supra* note 25, at 4 ("As of 2016, there were more than ***125 ESG data providers***, according to The Global Initiative for Sustainability Ratings."). Data providers set standards by wording the survey questions they send to corporations.

[32] Reproduced with permission from LYNN M. LOPUCKI & ANDREW VERSTEIN, BUSINESS ASSOCIATIONS: A SYSTEMS APPROACH 591 (2020).

b. Gases included in the calculation; whether CO_2, CH_4, N_2O, HFCs, PFCs, SF_6, NF_3, or all.

c. Biogenic CO_2 emissions in metric tons of CO_2 equivalent.

d. Base year for the calculation, if applicable, including:

i. the rationale for choosing it;

ii. emissions in the base year;

iii. the context for any significant changes in emissions that triggered re-calculations of base year emissions.

e. Source of the emission factors and the global warming potential (GWP) rates used, or a reference to the GWP source.

f. Consolidation approach for emissions; whether equity share, financial control, or operational control.

g. Standards, methodologies, assumptions, and/or calculation tools used.[33]

The underlining appears in the standard, and each of the underlined terms is defined in a separate standard. Together, the group of standards instructs the corporation what to measure, how to measure it, and how to report the measurement. The measurements reported by all corporations that follow these instructions will be comparable.

To date, the SEC has promulgated principally financial standards. The SEC's standards apply only to public corporations, and reporting is mandatory. The standards promulgated by the private standard setters are principally environmental and social. Their standards apply to public and private corporations, but the reporting is mostly voluntary.

State and federal regulatory agencies require that public and private corporations make specific kinds of ESG information public.[34] Corporations choose whether to make addition ESG information public and what standards to apply in collecting and reporting it. Public corporations may include ESG informaiton in SEC filings, other regulatory filings, and CSR reports of various kinds. Once published, the data are in the public domain.

As shown in Figure 1, three kinds of mediators process the public data. *Evaluators* are organizations that rate and rank corporations overall or with respect to particular elements of CSR that are of interest to them. For example, an evaluator might rank corporations solely on the basis of gross direct (Scope 1) GHG emissions. More likely, the evaluator would define a broader basis for ranking, such as greenhouse gas emissions. If so, it would include indirect (Scope 2) GHG emissions, and perhaps take into account the corporation's industry, the value of the products the corporation is producing, and other information. Evaluators might weigh measurements differently or combine different measurements to

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[33] GLOBAL REPORTING INITIATIVE, GRI 305 EMISSIONS, 305-1 (2016).

[34] *See*, *e.g.*, David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 391-92 (2005) ("Today, virtually every major federal environmental statute requires reporting of environmental data on spills, leaks, regulatory compliance, and related information."); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 564–65 (2020) ("[A]t the federal level, companies must disclose diversity information to the EEOC, environmental information to EPA, workplace hazard and injury information to OSHA and to employees, and hazardous product information to the Consumer Product Safety Commission and FDA.").

calculate rankings or ratings. Potential Stakeholders can choose among evaluations based on their own interests and analyses or on the analyses of evaluators of the evaluators.[35]

Proxy advisers are organizations that advise institutional investors on how to vote the investors' shares. Institutional Shareholder Services and Glass Lewis are examples. The advice may be based on public or private data. The voting may be on the election of directors or shareholder resolutions—including CSR resolutions.

Integrators provide investors, corporate stakeholders, and the public with ESG and financial information when and where needed. Bloomberg and Thomson Reuters are examples. Each provides investors with financial and ESG information on the same computer screen. Investors can combine the information in a wide variety of ways to guide both their investing and the voting of their shares.[36]

At present, the ESG information system is incomplete in three respects that prevent it from repurposing the corporation. First, no single set of dominant standards define the data to be collected. The promulgators of the leading standards have agreed to disagree. Second, the number of corporations reporting to GRI or SASB standards are inadequate to produce meaningful ratings and rankings. As of this writing, however, SASB claims that the number of corporations reporting its standards is increasing rapidly.[37] SASB reporting might alone reach critical mass in the United States.[38] Third, no comprehensive systems exists to furnish ESG information at the point of decision by Potential Stakeholders other than investors. Those Potential Stakeholders will have to use ratings and rankings in available published forms until the software is developed.

1. CSR Reporting

Corporations publish "Corporate Social Responsibility Reports," under that or a similar title, such as "Sustainability Reports," or "Corporate Citizenship Reports." (CSR reports). Because they are not legal documents, CSR reports are often prepared by public relations or marketing personnel.[39] CSR reporting is a recent phenomenon. It increased from about 20% of large, public corporations in 2011 to over 90% in 2019.[40]

Because CSR reports are voluntary and unregulated, corporations can include or omit whatever they choose. Most corporations choose to report on their strengths but not their weaknesses and to define the data most advantageously to themselves. Commentators

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[35] *E.g.*, SustainAbility, *Rate the Raters 2020: Investor Survey and Interview Results* 24 (March 2020), https://sustainability.com/our-work/reports/rate-raters-2020/ (providing analyses of raters and ratings).

[36] *E.g.*, Thomson Reuters Eikon: ESG Data on Eikon Quick Start Guide https://www.esade.edu/items-web/biblioteca/bbdd/inbbdd/archivos/QSG_%20ESG_Data_on_Eikon.pdf.

[37] *Supra*, note 22 and accompanying text. *Id.* ("To be listed on the SASB Corporate Reporters pages, companies must use SASB metric codes in their reporting.").

[38] Rick A. Fleming & Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, 50 ENVTL. L. REP. 10647 (2020) ("Without a critical mass of support for a particular model it may require an act of Congress to determine which standards should become the official metrics for ESG disclosure in the United States.").

[39] Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 950 (2019), at 950 ("These reports are often prepared by public relations or marketing personnel and, as a result, contain disclosures that do not meet the standards applied to securities filings.").

[40] *Flash Report, supra* note 7.

agree that "the existing [CSR] disclosure system is fragmented, unreliable, and incomplete,"[41] and that the data are not comparable across corporations.[42]

These conditions make it difficult for corporations to make substantial investments in CSR.[43] In the absence of an effective ESG information system, neither the corporations, nor anyone else, can measure and compare their efforts meaningfully. The corporations cannot justify the expenditures because the corporations' competitors can make the same CSR claims without making the same expenditures.[44]

As with any other information published by a public corporation, SEC Rule 10b(5) prohibits untrue statements of material fact in CSR reports and the omission of any material fact necessary to make other statements made not misleading.[45] That prohibition provides only limited protection to the users of CSR reports for three reasons. First, the courts tolerate misstatements as "mere puffery or hyperbole." For example, the claim to be a leader in reducing emissions, made by a corporation that was clearly not a leader in reducing emissions, would be considered puffing and so not legally actionable.[46]

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[41] Fisch, *supra* note 39, at 966 (2019). Michael Bloomberg, who chairs the Sustainability Accounting Standards Board, stated in 2015 that "for the most part, the sustainability information that is disclosed by corporations today is not useful for investors or other decision-makers." Bloomberg, Impact Report Update 2015, at 2 (2016), https://data.bloomberglp.com/company/sites/39/2018/03/Impact_Report_2015.pdf. Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 327 (2017) ("[V]oluntary reporting remains inconsistent and relatively costly to integrate into investment analysis."); Georgina Tsagas & Charlotte Villiers, Why 'Less is More' in non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability, at 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623889 ("[C]orporations are provided with considerable freedom to shape the debate by making the choice of *what* they will report on and *how* they will report on it. The end product is a chaotic system of financial reporting, CSR reporting, non-financial reporting and integrated reporting.").

[42] U.S. GEN. ACCOUNTING OFFICE, GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM, 32 (2020) [hereinafter GAO REPORT, PUBLIC COMPANIES], https://www.gao.gov/products/GAO-20-530 (stating that the GAO "identified inconsistencies in how companies disclosed on some of our selected quantitative ESG topics, which may limit investors' ability to compare these disclosures across companies."); *SEC Committee Recommendation, supra* note 25, at 5 ("[D]espite a great deal of information being in the mix, there is a lack of consistent, comparable, material information in the marketplace and everyone is frustrated – Issuers, investors, and regulators.").

[43] *Supra* note 8 and accompanying text.

[44] Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 411 (2004) ("[H]igh-quality corporations seeking to attract capital have strong incentives to distinguish themselves from rivals because investors that cannot distinguish high- from low-quality issuers will not pay more for securities from high-quality issuers. In other words, inadequate disclosure will force issuing corporations to pay higher capital costs.").

[45] 17 C.F.R. § 240.10b-5 ("It shall be unlawful...To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.").

[46] *E.g.*, *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 396 (S.D.N.Y. 2016), judgment entered, No. 14 CIVIL 9624 (PKC), 2016 WL 145867 (S.D.N.Y. Jan. 7, 2016) (holding the statement in a corporate social responsibility report that "[w]e maintain an effective compliance organization" to be nonactionable puffery); *Ruiz v. Darigold, Inc./Nw. Dairy Ass'n*, 2014 WL 5599989 (W.D. Wash. 2014) (dismissing complaint by a consumer for misstatements in a corporate social responsibility report); *but see* In re Massey Energy Sec. Litig., 833 F. Supp. 2d 597 (S.D.W.Va.2012) (not dismissing complaint alleging statements that Massey "was an industry leader in safety" and that "safety at its mines [was] improving.").

Second, misstatements violate Rule 10b(5) only if "a reasonable investor" would view the misinformation "as having significantly altered the total mix of information made available."[47] Many false statements of fact that would mislead investors or others in their opinion of a corporation's CSR performance would not significantly alter the total mix of information available to investors. Those false statements would not violate the rule.[48]

Third, the materiality principle on which securities law is based works in opposition to comparability across corporations. A small corporation that owns only a factory might be required to report the factory's emissions as material, while a large corporation that owns an identical factory with identical emissions might not be required to report them because the factory's emissions are not material for the large corporation's investors.[49] In that circumstance, a potential stakeholder seeking to compare the two corporations' emissions might be unable to obtain the information necessary to do so.

Some corporations choose, or are required, to report ESG information to third-party standards. As a result, the data on some issues in some industries may be comparable across significant numbers of corporations.[50] But in most industries and on most issues, the data contained in CSR reports are not comparable. Fisch provides this example:

> [B]oth General Motors and Ford provide differing information on the same topic: their respective electric vehicle developments. General Motors describes the number of electric vehicles it intends to bring to market by 2023 and the number of miles driven in its electric vehicles. Ford reports on the number of hybrid and fully-electric vehicles it intends to bring to market by 2022, the size of its investment in electric vehicles, and the progress of several specific global partnerships on electrified vehicles.[51]

2. CSR Rating and Ranking

As many as six hundred organizations collect ESG information from CSR reports, survey the corporations and other sources, and use the information to rate or rank the corporations.[52] The raters and rankers include the Bloomberg ESG Data Service, the Dow

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[47] *In re* Ford Motor Co. Sec. Litig., Class Action, 381 F.3d 563, 570 (6th Cir. 2004).

[48] *Id.* (providing examples). Lipton, *supra* note 34, at 560 ("[B]ecause the securities laws define materiality and harm in terms of financial impact, there is no penalty when companies disclose *false* information about their sustainability.").

[49] George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602 (2017).

[50] Greenhouse Gas Protocol, Standards https://ghgprotocol.org/standards (last visited July 8, 2020) ("In 2016, 92% of Fortune 500 companies responding to the CDP used GHG Protocol directly or indirectly through a program based on GHG Protocol. It provides the accounting platform for virtually every corporate GHG reporting program in the world."); *but see* GAO REPORT, PUBLIC COMPANIES, *supra* note 42, at 32 ("Most [of the 32]companies combined carbon dioxide and other greenhouse gases when reporting emission data, but a few reported carbon dioxide emissions alone."); Liesen, *infra* note 88, at 1051 (empirical study finding that "the majority of corporate GHG emissions disclosures are incomplete" and opining that "it is unlikely the information can allow for meaningful benchmarking and comparison across firms."); Fisch, *supra* note 39, at 10639 ("Climate change disclosure remains limited due in large part to the vagueness of the disclosure obligation and issuers' ability to determine, in their judgment, that a given issue is not material enough to warrant disclosure.").

[51] Fisch, *supra* note 39, at 966.

[52] *Supra* note 13.

Jones Sustainability Index, MSCI ESG Research, Greenpeace, the Business and Human Rights Resource Center, Newsweek Magazine (Green Ranking), Sustainalytics Company ESG Reports, and Thomson Reuters ESG Research Data.[53] All purport to be measuring CSR performance, or some aspect of it.

None of those rating or ranking systems exerts much influence,[54] however, because their findings are not correlated with one another.[55] The same corporation may be near the top in one CSR ranking and near the bottom in another.[56] Many users ignore the ratings and rankings; they instead work from the underlying data.[57]

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[53] *See* Fisch, *supra* note 39, at 945-46 (describing other ranking systems).

[54] Florian Berg et al., Aggregate Confusion: The Divergence of ESG Ratings, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533 ("ESG ratings do not, currently, play as important a role as they could in guiding companies toward improvement."); Aaron K. Chatterji et al., *Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers,* 37 STAT. MGMT. J. 1597, 1609 (2016) ("[T]here is not enough overlap among the raters themselves in terms of how to measure CSR . . . . Hence, [socially responsible investment] ratings will have limited impact on driving rated firms toward any particular shared behaviors."); Cherie Metcalf, *Corporate Social Responsibility As Global Public Law: Third Party Rankings As Regulation by Information*, 28 PACE ENVTL. L. REV. 145, 196 (2010) (results of an event study of share price impact of ESG rankings of Fortune Magazine "somewhat equivocal"); *id.* at 165-67(citing studies finding that corporate rankings do impact stock returns).

[55] OECD, ESG Investing: Practices, Progress and Challenges 27 (2020), https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf ("ESG scores from major ratings providers (for which data is commercially available) can vary greatly from one ESG provider to another."); Florian Berg et al., *supra* note 54, at 32 ("divergence [among ESG assessments] occurs not only at the aggregate level but is actually even more pronounced in specific sub-categories of ESG performance . . ."); Feifei Li & Ari Polychronopoulos, *What a Difference an ESG Ratings Provider Makes!*, RESEARCH AFFILIATES 13 (Jan. 2020), https://www.researchaffiliates.com/en_us/publications/articles/what-a-difference-an-esg-ratings-provider-makes.html (noting "the lack of correlation and consistency in ratings produced by the different providers."); *id.* at 10 ("Provider 1 ranks Wells Fargo in the top-third by governance in their universe, whereas Provider 2 ranks it in the bottom 5%"); *id.* at 11 ("Facebook [is] rated as a top firm by one provider and a below-average firm by the other provider."); Jim Hawley, *ESG Ratings and Rankings: All Over the Map. What Does it Mean?*, TRUVALUE LABS (2017), https://www.truvaluelabs.com/wp-content/uploads/2017/12/ESG-Ratings-and-Rankings-All-Over-the-Map.pdf ("[A] comparison of KLD (MSCI) against Fortune magazine's 'Best 100 Firms' . . . has correlation of only r=14%."). *See also*, Fisch, *supra* note 39, at 749-50 (citing additional sources and providing additional examples).

[56] Li & Polychronopoulos, *supra* note 55, at 10 ("Provider 1 ranks Wells Fargo in the top-third by governance in their universe, whereas Provider 2 ranks it in the bottom 5%"); *id.* at 11 ("Facebook [is] rated as a top firm by one provider and a below-average firm by the other provider.").

[57] SustainAbility, *supra* note 52, at 24 ("Most investors described using ESG ratings more for the underlying data and not the scores. Those that have their own internal scoring methodologies and [key performance indicators] do not need the scores.").

The lack of correlation among ratings and rankings results from the fact that raters and rankers consider different categories of corporations' performance,[58] take different measurements of performance to establish the same category,[59] and weigh the measurements differently in combining them into CSR ratings or rankings.[60] Until a substantial number of corporations report to a single set of standards, the ESG information system will remain ineffective.

B. Completion of the ESG Information System

Nearly the entire structure of the ESG information system is already in place. A large majority of corporations has committed to CSR. GRI and SASB have promulgated competing sets of high-quality, comprehensive reporting standards. Thousands of corporations are reporting to at least one of the standards in those sets. As many as six hundred organizations are rating and ranking corporations on the basis of their CSR.[61] Software that integrates financial information with CSR ratings and rankings is in wide use in the securities markets.

Three additional developments are necessary to make the system effective. First, to render ESG information comparable across corporations, a single set of standards must become dominant. Second, a sufficient number of corporations must report to the dominant set of standards. Third, integrators must develop and distribute software that enables buyers of goods and services, job seekers, government, and the public to apply the ESG information in everyday decision making. This Subpart examines those needed developments in more detail.

1. Standardization

The principal missing piece necessary for the ESG information system to become effective is an agreed set of comprehensive reporting standards. Standards are "comprehensive" if they are broad enough to support CSR ratings or rankings as opposed to ratings or rankings with respect to some aspect of CSR—such as human rights. The most widely

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[58] Aaron K. Chatterji et al., *Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers,* 37 STAT. MGMT. J. 1597, 1599 (2016) ("For example, KLD and Asset4 rate firms according to their products' safety, while other raters do not. Asset4 and DJSI explicitly consider financial metrics, while other raters do not. KLD, Asset4, FTSE4Good, and Innovest consider Corporate Governance as part of CSR, while Calvert and DJSI do not.").

[59] *Id.* at 1601 ("Some raters measure environmental performance with indicators of a firm's environmental processes, while others will concentrate on the firm's environmental outcomes. For example, raters such as KLD give credit for products with beneficial impact on the environment, while others, such as FTSE4Good, employ metrics that assess the procedures to identify and fix environmental hazards . . .").

[60] For example, Berg notes:

> There are substantial differences in the weights for different raters. For example, the three most important categories for KLD are Climate Risk Management, Product Safety, and Remuneration. For Vigeo Eiris, they are Diversity, Environmental Policy, and Labor Practices. This means there is no overlap in the three most important categories for these two raters. In fact, only Resource Efficiency and Climate Risk Management are among the three most important categories for more than one rater.

Berg, *supra* note 54, at 18.

[61] *Supra* note 13.

adopted comprehensive standards are those of GRI and SASB. GRI was founded in 1997, developed the first corporate sustainability reporting framework, and promulgated it in 2000.[62] GRI reports that "[o]f the world's largest 250 corporations, 92% report on their sustainability performance and 74% of these use GRI's Standards to do so."[63] GRI standards are widely used in Europe. Worldwide, 2,500 corporations report based on GRI standards.[64] GRI makes the reports publicly available through its Sustainability Disclosure Database.[65] Although "GRI's standards are used by the majority of companies reporting sustainability information,"[66] probably all the statistics in this paragraph include corporations reporting to any one of GRI's more than one-thousand standards.[67]

SASB was founded in 2011 with the support of Michael Bloomberg and Bloomberg Philanthropies.[68] It promulgated its standards in November 2018. As of January 2021, about six hundred corporations were listed on the SASB website as "reporting with SASB Standards."[69] Reflecting SASB's quick rise, that number is nearly four times the one-hundred seventy-five listed eight months earlier.[70] In a 2018 Bloomberg survey, 57% of U.S. respondents and 83% of European respondents said their corporations "were either very likely or likely to adopt the SASB standards in their company reporting."[71]

GRI and SASB maintain that "[r]ather than being in competition, GRI and SASB are designed to fulfill different purposes for different audiences"—SASB for investors and GRI for a wide variety of stakeholders. In a coauthored op-ed, representatives of GRI and SASB wrote:

> GRI and SASB are intended to meet the unique needs of different audiences.

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[62] *Our Mission and History*, GRI, https://www.globalreporting.org/information/about-gri/gri-history/Pages/GRI's%20history.aspx.

[63] GRI and Sustainability Reporting, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/sustainability-reporting/Pages/gri-standards.aspx (last visited May 16, 2020).

[64] Raj Gnanarajah, *Accounting and Auditing Regulatory Structure: U.S. and International*, CONG. RSCH. SERV. (2017). *See also* FBRH consultants, *About the Global Reporting Initiative*, https://www.globalreporting.org/information/about-gri/gri-history/Pages/GRI's%20history.aspx ("In total, more than 5,000 organizations worldwide have used the GRI Standards for their sustainability reporting.").

[65] *Sustainability Disclosure Database*, GLOBAL REPORTING INITIATIVE, https://database.globalreporting.org/ (last visited June 9, 2020).

[66] Tim Mohinof & Jean Rogers, *How to approach corporate sustainability reporting in 2017*, GREENBIZ, Mar. 16, 2017.

[67] I base this conclusion on examination of reports contained in the GRI database and the total number of reports contained in that database. GRI 101, Standard 3.3 specifically contemplates partial reporting. That standard provides in relevant part that "[i]f the reporting organization uses selected GRI Standards, or parts of their content to report specific information . . . the organization . . . shall include . . . a statement that . . . indicates which specific content from the Standard has been applied." GRI 101, https://www.globalreporting.org/standards/media/1036/gri-101-foundation-2016.pdf.

[68] *See, e.g.*, Editorial, *Bloomberg's Business Nanny*, WALL ST. J., February 15, 2020, at A16 ("Michael Bloomberg founded SASB in 2011 as a shadow regulator for his policy agenda.").

[69] *Supra*, note 22 and accompanying text.

[70] *Id.*

[71] Bloomberg, The Sustainability Imperative: Business and Investor Outlook, https://data.bloomberglp.com/bna/sites/8/2019/04/The-Sustainability-Imperative-Business-and-Investor-Outlook-2018-Bloomberg-Sustainable-Business-Finance-Survey.pdf, at 4 (2018).

> The GRI standards are designed to provide information to a wide variety of stakeholders and consequently, include a very broad array of topics. SASB's are designed to provide information to investors and consequently, focus on the subset of sustainability issues that are financially material.[72]

In 2020, SASB, GRI, and others reiterated this understanding of their respective roles in a joint statement.[73]

SASB's materiality focus is disadvantageous in that it tailors the information for investors' use—making it less useful to other stakeholders.[74] It may also reduce the comparability of the information across corporations.[75] SASB's materiality focus is advantageous in that materiality is the "cornerstone" of the federal securities laws.[76] ESG standards based on materiality are more likely to appeal to investors and the SEC.

Although GRI and SASB claim to have identified "a few corporations that were using both approaches,"[77] reporting the same variable to different standards is awkward and uncommon. A GRI representative described the alignment problem as it existed between SASB and GRI in 2018:

> In many cases, our standards are identical. In others, the SASB has defined disclosures that represent issues that are narrowly defined for certain industries. There is alignment work to be done in the third category where the two frameworks have similar disclosures with different characteristics. For this group, we are working together on a technical level with an aim to create better alignment.[78]

The Better Alignment Project was a two-year effort announced by GRI, SASB, the Climate Disclosure Standards Board (CDSB), and the Integrated Reporting Council (IIRC) in November, 2018. Its purpose was to drive "better alignment of sustainability reporting frameworks."[79] The CDSB publishes a "framework" for climate disclosure that has three-

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[72] Tim Mohinof & Jean Rogers, *How to approach corporate sustainability reporting in 2017*, Mar. 20, 2017, https://www.sasb.org/blog/blog-sasb-gri-pen-joint-op-ed-sustainability-reporting-sychronicity/ (last visited July 25, 2020).

[73] Statement of Intent to Work Together Towards Comprehensive Corporate Reporting, Sept. 2020, https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf (hereafter Statement of Intent) at 8.

[74] Lipton, *supra* note 34, at 561 ("[S]takeholders have identifiable needs that are best served by a generalized disclosure system designed for their interests.").

[75] *See supra* note 49 and accompanying text.

[76] Business Roundtable, The Materiality Standard for Public Company Disclosure: Maintain What Works, Oct. 2015, at https://s3.amazonaws.com/brt.org/archive/reports/BRT.The%20Materiality%20Standard%20for%20Public%20Company%20Disclosure.2015.10.29.pdf ("Materiality Is the Cornerstone of the Federal Securities Laws.").

[77] Dunstan Allison-Hope, Can the GRI and SASB reporting frameworks be collaborative? GREENBIZ, Jan. 2, 2018, https://www.greenbiz.com/article/can-gri-and-sasb-reporting-frameworks-be-collaborative.

[78] *Id.*

[79] Corporate Reporting Dialogue, Driving Alignment in Climate-related Reporting, https://corporatereportingdialogue.com/better-alignment-project/ (last visited July 13, 2020) (principally comparing CDP, CDSB, GRI, IIRC, and SASB standards to the TCFD recommended disclosures).

hundred seventy four users.[80] The IIRC is an NGO that advocates integrated reporting of financial and other "value creation" information.[81]

Although more than two years have elapsed, the Better Alignment Project has issued no final report. Circumstances have changed. In September 2020, the International Financial Reporting Standards Foundation (IFRS) issued a "Consultation Paper" suggesting that it "[c]reate a Sustainability Standards Board and become a standard-setter working with existing initiatives and building on their work."[82] IFRS's power grab is apparently backed by the International Organization of Securities Commissions (IOSCO).[83] But reporting to SASB standards is booming, and SASB has announced its "intention to merge" with IIRS to become the Value Reporting Foundation.[84] Instead of reporting their progress on alignment, the Better Alignment Project's members issued a Statement of Intent to Work Together Towards Comprehensive Corporate Reporting.[85] A SASB-GRI alignment no longer appears imminent. The SEC Investor Advisory Committee has already recommended that the SEC promulgate CSR reporting standards.[86]

2. Reporting Levels

Settling on a single set of standards may require regulatory intervention. In the interim, corporations are experimenting with a variety of standards. As a result, comparable, comprehensive data are available for only small numbers of corporations.

The levels of reporting to GRI or SASB standards are difficult to assess. First, both

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[80] Denise Puca, *Infographic: CDSB Framework Users*, Dec. 1, 2017, Climate Disclosure Standards Board, https://www.cdsb.net/cdsb-framework/750/infographic-cdsb-framework-users (last visited, July 25, 2020.

[81] Integrated Reporting, The IIRC, https://integratedreporting.org/the-iirc-2/ ("The International Integrated Reporting Council (IIRC) is a global coalition of regulators, investors, companies, standard setters, the accounting profession, academia and NGOs. The coalition promotes communication about value creation as the next step in the evolution of corporate reporting.").

[82] IFRS Foundation, Consultation Paper on Sustainability Reporting, Sept. 2020, https://cdn.ifrs.org/-/media/project/sustainability-reporting/consultation-paper-on-sustainability-reporting.pdf, at 8.

[83] Erik Thedéen's speech at Driving Global Standards on Sustainable Finance, Sept. 30, 2020, https://www.fi.se/en/published/presentations/2020/erik-thedeens-speech-at-driving-global-standards-on-sustainable-finance/?utm_medium=email&_hsmi=103263094&_hsenc=p2ANqtz-8fGUk8OAVAKGiEQNimYlBIeJPVyMc6NxVmImW3bx-1joJJZyg-yuG4N0keLseu9YEDejM7IkhLktfe55mv3xcNBrJOSiQ&utm_content=103263094&utm_source=hs_email#dela ("I believe IOSCO has a unique position to help and facilitate that process. In fact, IOSCO played a similar role in the development of the financial reporting, the IFRS, almost 20 years ago.").

[84] SASB, Press Release, Nov. 25, 2020, https://www.sasb.org/wp-content/uploads/2020/11/IIRC-SASB-Press-Release-Web-Final.pdf?utm_medium=email&_hsmi=103263094&_hsenc=p2ANqtz-80mFwzDwOobhOyxia2_hGYTSndnGr_VdHi-aks5_GQ8SnLtiMPltc1QzfyNftpcKMocJ3zKg5I1WlpBZgcJwthOzHK9YA&utm_content=103263094&utm_source=hs_email

[85] Statement of Intent, *supra* note 73.

[86] *SEC Committee Recommendation, supra* note 25, at 7 ("[T]oday we are recommending that the Commission begin in earnest an effort to update the reporting requirements of Issuers to include material, decision-useful, ESG factors.")

organizations report statistics for the number of corporations reporting to any of their standards, not the number of corporations reporting to their entire set of standards.[87] Second, corporations frequently claim to report to a standard when in fact they merely produce data similar to that required by the standard.[88] When that occurs, it is usually not in the interests of the standard-promulgator to correct them. The promulgators are competing to portray their standards as widely adopted. Once a set of standards dominates, promulgator over-claiming probably will subside.

Institutional investors are ratcheting up the pressure on corporations to report to dominant standards. In his January 2020 letter to CEOs, Larry Fink, CEO of BlackRock, the world's largest investor, made this request:

> This year, we are asking the companies that we invest in on behalf of our clients to: (1) publish a disclosure in line with industry-specific SASB guidelines by year-end . . . or disclose a similar set of data in a way that is relevant to your particular business; and (2) disclose climate-related risks in line with the [the Task Force on Climate-related Financial Disclosure's] recommendations . . .[89]

Fink added this thinly veiled threat:

> Last year BlackRock voted against or withheld votes from 4,800 directors at 2,700 different companies. Where we feel companies and boards are not producing effective sustainability disclosures or implementing frameworks for managing these issues, we will hold board members accountable.[90]

Voting against or withholding votes from directors embarrasses the directors and may even result in their removal from office.

Two weeks later, the world's fourth largest investor, State Street Global Advisers, issued a similar threat.[91] Since the publication of those threats, reporting to SASB standards has accelerated sharply.[92]

3. Stakeholder Software Development

Software that provides ESG information for investors is readily available. The same is not true of software for other stakeholders. To take ESG information into account, the other

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[87] *Supra* note 67 and accompanying text.

[88] Andrea Liesen, *et al., Does stakeholder pressure influence corporate GHG emissions reporting? Empirical evidence from Europe*, 28 ACCT. AUDITING & ACCOUNTABILITY J. 1047, 1051 (2015) ("[O]ur finding that the majority of corporate GHG emissions disclosures are incomplete suggests that it is unlikely the information can allow for meaningful benchmarking and comparison across firms. As such, the potential for the disclosure to induce improved corporate climate change performance is at best, questionable.").

[89] Larry Fink's Letter to CEOs; A Fundamental Reshaping of the Future, Jan. 14, 2020, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter?cid=ppc:CEO-Letter:PMS:US:NA (last visited July 18, 2020).

[90] *Id.*

[91] State Street Global Advisors, CEO's Letter on our 2020 Proxy Voting Agenda, Jan. 28, 2020, https://www.ssga.com/library-content/pdfs/insights/CEOs-letter-on-SSGA-2020-proxy-voting-agenda.pdf ("Beginning this proxy season, we will take appropriate voting action against board members at companies [included in certain indexes] that are laggards based on their [SASB-standards-based CSR] scores and that cannot articulate how they plan to improve their score.").

[92] *Supra* note 22 and accompanying text.

stakeholders must retrieve the information themselves and integrate it into their decision making processes. That may be practical in large transactions, such as the purchase of a house or the acceptance of a job offer. It is unlikely, however, in the large bulk of small transactions, such as consumer product purchases. The ESG information system will be fully effective only when stakeholder software that links the ESG information on corporations to their products and services is available at the point of sale.

Some ESG information systems do provide information about products at the point of sale. For example, LEED (Leadership in Energy and Environmental Design) is a "green building rating system."[93] The U.S. Green Building Council certifies the resource efficiency of particular buildings. Sellers who have obtained certification of their buildings make potential buyers aware of it. The U.S. Green Building Council claims that "LEED-certified buildings command the highest rents, while lease-up rates typically range from average to 20% above average; vacancy rates for green buildings are an estimated 4% lower than non-green properties."[94]

Similarly, Consumers Union, UL, and Good Housekeeping have certified a wide variety of products for an average of more than a century. Although UL certifies products for "low chemical emissions"[95] and Good Housekeeping makes "sustainability" awards,[96] none of those three organizations report whether the corporations that produce the products are socially responsible. Their systems facilitate customer control of products through product markets, but not control of the corporations that manufacture or sell the products.

The buyers of goods and services can use ESG information about their sellers effectively only if the information is available at the point of sale. Some scholars assume that the information will be there without considering how the system would accomplish that.[97] But the system can make corporate ESG information available only if the system can link products and services to the corporations that produce and distribute them.

No system currently delivers comprehensive ESG ratings or rankings of product or service sellers to buyers at the point of sale. Two additional problems inhibit the creation of such a system. The first is the supply chain problem; the second is the trademark problem.

a. The Supply Chain Problem

The supply chain problem is that several corporations, each with its own ESG ratings

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[93] What is LEED?, LEED https://www.usgbc.org/help/what-leed (last visited July 25, 2020).

[94] Why LEED? LEED https://www.usgbc.org/leed/why-leed (last visited May 15, 2020).

[95] GREENGUARD Certification, UL, https://www.ul.com/offerings/greenguard-certification#:~:text=GREENGUARD%20Certified%20products%20are%20recognized,building%20codes%20around%20the%20world. ("GREENGUARD Certified products are recognized, referenced or preferred by more than 450 federal purchasers, retailers, green building rating tools and building codes around the world.").

[96] Frequently Asked Questions About Good Housekeeping's Sustainability Awards, GH, Mar. 18, 2020, https://www.goodhousekeeping.com/institute/about-the-institute/a24483277/good-housekeeping-sustainability-awards-faqs/.

[97] *E.g.*, Min Yan & Daoning Zhang, *From Corporate Responsibility to Corporate Accountability*, 16 HAST. BUS. L.J. 43, 46 (2020) ("The assumption is that the product, capital and labour markets will influence corporate behavior by penalizing poor performers (i.e., social irresponsibility) and rewarding good ones (*i.e.*, social responsibility).

and rankings, may participate in making a single product or service available. For example, Amazon may sell chocolate manufactured by Godiva from the cocoa beans of numerous growers in Ghana and Cote d'Ivoire, some of whom use child labor and deforest. For Godiva or Amazon to provide the chocolate buyer with information about all of the corporations in the supply chain is impractical. Some growers may use child labor while others do not. But a box of Godiva chocolate purchased on Amazon cannot be identified to a particular grower.

GRI standards address this problem by requiring corporations to report the risk that child labor is present in their supply chains.[98] In effect, that holds corporations responsible for their worst suppliers' actions and incentivizes them to remove their worst suppliers from their supply chain. That may solve the problem for a product available through a single source.

Supply chains are not, however, so simple. To illustrate, Godiva recently received the lowest possible rating from Green America on child labor in supply chains.[99] Godiva sells chocolate through Amazon, but also through other channels. Should customers who seek to avoid facilitating child labor avoid purchasing chocolate—or all products—from Amazon?

To answer that question, the customer would need to compare the customer's alternatives.[100] Those alternatives might include buying some other brand of chocolate through Amazon, buying Godiva chocolate through one of Amazon's competitors, buying some other brand of chocolate through one of Amazon's competitors, or not buying chocolate at all. Which would best implement the customers' values might depend not just on the CSR of the corporations involved, but also on then-current consumer strategies for combating child labor. For example, successively boycotting alternative supply chains might be the strategy most likely to induce competition to eliminate child labor.

GRI standard 408-1 would require Amazon to report "suppliers considered to have significant risk for incidents of . . . child labor" and "measures taken by [Amazon] intended to contribute to the effective abolition of child labor." SASB's supply chain standard would not apply to Amazon. Amazon would be in SASB's Multiline and Specialty Retailers & Distributors' industry, for whom SASB deems "Supply Chain Management" immaterial.[101] The closest SASB accounting metric applicable to Amazon is CG-MR-410a.1. That metric does not address child labor directly. Instead, it requires that the entity "disclose its

[98] GRI 408: Child Labor 2016, at 6 (requiring the reporting of "Operations and suppliers considered to have significant risk for incidents of i. child labor; ii. young workers exposed to hazardous work.").

[99] 2020 Chocolate Company Scorecard, GREEN AMERICA, https://www.greenamerica.org/spring-2020-chocolate-scorecard (last visited July 24, 2020) (giving Godiva the lowest ranking for "child labor" of the eight companies included on its "Chocolate Scorecard" because Godiva did not report).

[100] Lisa A Neilson, *Boycott or buycott? Understanding political consumerism*, 9 J. CONSUMER BEHAV. 214 (2010) (finding that gender and philosophy affect the choice between boycotting and boycotting).

[101] SASB Materiality Map, https://materiality.sasb.org/ (intersection of "Consumer Goods, Multiline and Specialty Retailers & Distributors" and "Business Model and Innovation", Supply Chain Management).

revenue from products that are third party certified to an environmental or social sustainability standard."[102]

SASB's decision not to require Amazon or other multiline retailers to report child labor in their supply chains, apparently reflects SASB's judgment that markets would not hold Amazon responsible for that child labor. At the same time, however, SASB's decision would make it impossible for market actors to hold Amazon responsible in a hypothetical world in which SASB standards were dominant. The market would not have the necessary information.

Amazon reports to neither the GRI nor the SASB standard. Instead, Amazon reports to its own "exacting standards" which are "derived from the United Nations Guiding Principles on Business and Human Rights, and the Core Conventions of the International Labour Organization (ILO)."[103] Amazon requires its direct suppliers "to engage workers who are (i) 15 years old, (ii) the age of completion of compulsory education, or (iii) the minimum age to work in the country where work is performed, whichever is greater."[104] Amazon does not make this standard applicable to Amazon's indirect suppliers. Instead, "[i]n order to ensure these standards are cascaded throughout our supply chain, we expect suppliers to consistently monitor and enforce these standards in their own operations and supply chain."[105]

As applied to the Godiva example, Amazon requires and expects that Godiva not use child labor and requires that Godiva require and expect Godiva's growers not to use child labor. That leaves it to Godiva to address the child labor problem in Ghana and Cote d'Ivoire. Amazon states that it is "committed to working with our suppliers to improve protections for their workers," but Amazon's supply chain standards impose no public reporting requirements.[106] In the absence of public reporting, no sound basis for supply chain comparisons among multiline retailers exists.

Thus, the adoption of SASB standards would not require Amazon and other multiline retailers to report on child labor in their supply chains. The adoption of GRI standards would. Ultimately, the solution to the supply chain problem would be to require all of the corporations in the supply chain to report, but that level of reporting is probably decades away.

b. The Trademark Problem

Some corporations sell goods or services in their own names. Examples include Apple, Inc., Facebook, Inc., and Microsoft Corporation. But the large majority of all brand names

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[102] SASB, Multiline and Specialty Retailers & Distributors: Sustainability Accounting Standard, https://www.sasb.org/wp-content/uploads/2018/11/Multiline_and_Specialty_Retailers_Distributors_Standard_2018.pdf.

[103] Amazon Supply Chain Standards at 1, https://sustainability.aboutamazon.com/people/supply-chain?workerCount=true&engagementProgram=true&productCategory=true

[104] *Id.* at 2.

[105] *Id.* at 1.

[106] *Id.* at 1.

are not the names of corporations. They are trademarks.[107] Consumers see the trademarks when they shop, but usually do not know the names of the corporations operating under them.[108] The corporations selling under the trademarks may or may not be the manufacturers of the products sold or even the owners of the marks.[109] For many of the products sold on Amazon, the product description does not include the name of the trademark owner or the manufacturer.[110]

To furnish ESG information about sellers at the point of sale would require that the information system link brands or product descriptions to those sellers and thus to their ESG ratings and rankings. Although the owners of most trademarks publicly acknowledge their ownership, some do not. For each trademark, an owner's name is shown on the United States Patent and Trademark Office online records. But that record owner may be a corporate employee who holds the trademark in trust for an unnamed beneficiary, a subsidiary not identified as such, or a trademark licensor.[111] Under current law, it may be impossible to link trademarks to corporations comprehensively without the corporations' cooperation. The solution may be to link the products for which information is available and see whether market pressure is sufficient to compel the others to disclose.

C. ESG Information System Costs

Repurposing will affect the corporation's costs. Those costs may in turn affect the prices of the corporation's products and services and their market competitiveness. In addition, the ESG information system will affect the ease with which Potential Stakeholders can obtain and used CSR information in their decision making. I consider each effect separately. I conclude that repurposing will increase the corporations' costs in the short run, but reduce them in the long run.[112] If that conclusion is correct, repurposed corporations will not need to raise the prices of their products or services. They should instead treat the increased costs they will incur in the short run as an investment that will pay out in the long run.

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[107] For example, Doctors' Associates, Inc. franchises the Subway sandwich stores. Forest 500, Subway Profile, https://forest500.org/rankings/companies/doctors-associates-inc.

[108] Robert W. Emerson, *Franchisors' Liability When Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 653 (1992) (survey finding that "only 9.9% of the respondents correctly answered that most Chevron gas stations are locally owned and operated, while 57.0% erroneously believed that they were mostly nationally owned and operated, and 28.0% incorrectly concluded that most were dually owned and operated both nationally and locally").

[109] Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1100-01 (2002) (providing examples).

[110] https://tinyurl.com/yam4mdaf (Webcam Camera listing only "FFGY" as the "brand name"). That mark does not appear in the United States Patent and Trademark Office's Trademark Database, http://tmsearch.uspto.gov/bin/gate.exe?f=searchss&state=4805:uddyhq.1.1.

[111] LOPUCKI & VERSTEIN, *supra* note 32, at 57-68 (explaining the lack of congruency between the public's view and the lawyer's view of legal actors).

[112] Saura Masconale & Simone M. Sepe, Mar. 15, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793035, at 12 ("While CSR initiatives might engender short-term costs, they tend to deliver long-term returns.").

1. Cost Effects on the Prices of Goods and Services

Participation in the ESG information system will impose three new costs on each participating corporation. The first is the cost of measuring and auditing the corporation's CSR performance. The second is the cost of deciding whether the corporation should improve its CSR performance. The third is the cost of improving the corporation's CSR performance if the corporation decides to do that. Those costs may be substantial. They will tend to increase the prices of the participating corporations' products and services.[113]

Participation will also tend to reduce some of the participating corporations' costs and thus reduce the prices of their products and services.[114] For example, reporting comprehensively under a single set of standards may be less expensive than reporting under the current system. Under the current system more than a hundred ESG "data providers" compete to obtain information from corporations and provide it to investors, raters, and rankers.[115] "Many provide lengthy questionnaires to companies (some with many hundreds of questions). Responding to these forms takes a great deal of time and effort . . . ."[116]

Corporations' cost of evaluating and improving CSR performance may be partly or entirely offset by ESG Benefit. High CSR-performing corporations may have lower marketing costs because their CSR ratings and rankings sell their products for them. High CSR-performing corporations may achieve higher sales volumes and benefit from economies of scale. High CSR-performing corporations' greater appeal to Potential Stakeholders may reduce their costs of hiring and retaining employees,[117] reduce their costs of finding and contracting with strategic partners, increase their access to capital while reducing its cost,[118] and improve their relationships with the communities in which they operate.

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[113] *See, e.g.*, Desiree Hanford, *Do Green Buildings Cost More?* FACILITIESNET, June 1, 2008, https://www.facilitiesnet.com/green/article/Do-Green-Buildings-Cost-More--8954 (discussing costs of green buildings).

[114] Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 527 (2020) ("Corporations may generate goodwill from customers, employees, and surrounding communities if they are perceived as good citizens, which may translate into higher sales, better employee retention, and productive relationships with regulators.").

[115] *Id.*, at 4.

[116] *Id.*

[117] *E.g.*, George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639, 663 (2021) ("In a resource constrained environment, being able to attract and retain human capital is an important part of a firm's competitive strategy."); Philipp Krueger et al., The Sustainability Wage Gap, Jan 4, 2021https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672492 32 ("Using administrative employer-employee matched data from Sweden and sustainability measures at the firm- and sector level, we provide evidence that firms with better sustainability characteristics tend to pay lower wages (about 10%) and attract and retain workers that are more skilled.").

[118] Dan S. Dhaliwal, et al., *Voluntary non-financial disclosure and the cost of equity capital: The Initiation of Corporate Social Responsibility Reporting*, 86 Acct. Rev. 59 (2011) (finding that the voluntary issuance of a sustainability report leads to a reduction in the firm's cost of capital and that firms with superior CSR performance attracts institutional investors and analyst coverage); *SEC Committee Recommendation, supra* note 25, at 9 (arguing that "[r]equiring disclosure of [ESG information] directly by the Issuer will facilitate the flow of capital to US Issuers of all sizes with or without ESG-related investment mandates.").

Because high-CSR-performing corporations will externalize fewer social costs, they will tend to meet less resistance from regulators, plaintiffs' attorneys, labor organizations, and other hostiles. High-CSR corporations' brands will be more valuable.

CSR's potential to reduce corporations' costs is even more easily visible from the perspective of society as a whole. "CSR" and "sustainability" are often used interchangeably. Sustainability is the ability to exist continually. Corporations can achieve sustainability only by internalizing their social costs.[119] If all actors in the economy do the same, the result is economic efficiency. If the human race exists over the long run, economic efficiency—sustainability—is the cheapest method of accomplishing that, not a source of additional costs. If social costs are lower and allocated appropriately, each corporation's costs will be lower.

CSR costs that corporations internalize will tend to be more than offset by reduction of society's costs of dealing with externalizations. When corporations externalize their social costs, government often responds by paying remediation costs and trying to recover them from the wrongdoer, the wrongdoer's industry, or the public.[120] The transaction costs of that process are high. Preventing externalization eliminates the need for remediation and recovery. For example, if the ESG information system prevents corporations from releasing the greenhouse gases that cause rising sea levels, that may eliminate the need for flood control measures in coastal cities or the relocation of those cities to higher ground. To the extent public expenses were lower, governments could reduce taxes.

Lastly, total risk will be lower in a transparent economy because economic actors will face less uncertainty. Risk is the lack of ability to predict. Prediction is easier with more information. For all these reasons, the ESG information system is more likely to reduce the cost of goods and services than to increase them.

Once the ESG information system is effective, CSR's benefits will probably accrue disproportionately to the first corporations to report and spend on CSR improvements. Stakeholders and the public will be more likely to notice and react enthusiastically to their efforts. Those corporations will tend to win high CSR rankings and then benefit from the stickiness of ESG Benefit[121] and the feedback loop in CSR rankings.[122] Even if the first-movers' initial costs are higher, the government may impose equally high costs on their competitors by mandating the same CSR reporting and improvements. The laggards will incur the costs without receiving the accolades.

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[119] Geoffrey Heal, *Corporate Social Responsibility: An Economic and Financial Framework*, 30 GENEVA PAPERS 387, 393 (2005) ("The issues raised provide us with an implicit definition of CSR, which we now formalize. CSR involves taking actions which reduce the extent of externalized costs or avoid distributional conflicts."); Alessio M. Pacces, Sustainable Corporate Governance: The Role of the Law, at 13 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697962 ("From an economic standpoint, sustainability implies inter alia reducing the negative externalities of production on the environment.").

[120] *See, e.g.*, Law Insider, Definition of Environmental Surcharge, https://www.lawinsider.com/dictionary/environmental-surcharge#:~:text=Environmental%20Surcharge%20means%20and%20include,governmental%20agency%20or%20entity%20now, last visited Nov. 6, 2020 (defining environmental surcharge and providing examples).

[121] *Infra*, text accompanying note 145.

[122] *Infra*, notes 169, 170 and accompanying text.

Generally speaking, corporations will have to report and improve before they will receive ESG Benefit. That means costs are likely to increase before they decline. CSR should thus be thought of as an investment. The ESG information system will provide investors with the information they need to assess that investment.

2. Cost Effects on Potential Stakeholder Power

Potential Stakeholders and the organizations that design and control the ESG information system will share the power that system generates. The organizations' power will be derived from their ability to determine what gets measured and by what standards. The Potential Stakeholders' power will be derived from their freedom—to the extent of their financial ability—to confer ESG benefit on whatever corporations they chose on whatever bases they choose.[123] Through their choices of what corporations to deal or associate with, Potential Stakeholders can reward corporations that express the Potential Stakeholders' values. Those dealings and associations—ESG Benefit—are the corporations' incentives to repurpose themselves to the Potential Stakeholders' values.

To exercise their power effectively, Potential Stakeholders must make the effort necessary to inform themselves. With the right software, that effort may be trivial. A consumer may choose between otherwise virtually identical products on the basis of ESG information that appears on the same computer screen, turn into the higher-ranked gas station rather than the lower-ranked one, or click to see the relevant rankings before buying a corporation's shares at the market price. Eighty-five percent of Americans and ninety-one percent of millennials say that they would switch brands to one associated with a cause.[124]

A substantial literature reports that Potential Stakeholders are willing to incur substantially higher costs to transact with high-CSR performers. Consumers not only state in surveys a willingness to pay more for socially responsible products,[125] they actually buy more

[123] *E.g.*, Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727, 749–50 (2019) ("These stakeholders rely on reputation when deciding whether to provide a corporation with something it needs in order to succeed: investors provide capital, employees provide talent, consumers provide revenue, suppliers provide product sourcing and support, and communities provide the social license to operate.").

[124] Cone Communications, 2015 Cone Communications Millennial CSR Study, Sept. 23, 2015 at 4, https://www.conecomm.com/research-blog/2015-cone-communications-millennial-csr-study (finding that eighty-five percent of Americans and ninety one percent of millennials say that they would switch brands to one associated with a cause.).

[125] *E.g., 2017 Cone Communications CSR Study* 12 (2017), https://www.conecomm.com/research-blog/2017-csr-study (reporting that seventy-nine percent of product buyers say that they seek out products that are socially or environmentally responsible); Unpacking the Sustainability Landscape, NIELSEN REPORT (Nov. 9, 2018), https://www.nielsen.com/us/en/insights/report/2018/unpacking-the-sustainability-landscape/ (thirty-eight percent say they would pay more for products made with sustainable materials); Kendall Park, *Understanding Ethical Consumers: Willingness-To-Pay By Moral Cause*, 35 J. CONSUMER MARKETING 157, 163 (2018). ("With each additional year of education, respondents are willing to pay 10 cents more [for products advertised as sustainably made]. Holding all other variables constant, a college graduate would pay 39 cents more for the same pair of sustainable socks than a high school graduate, and a medical doctor would pay 78 cents more."); globalwebindex, Corporate Social Responsibility (2019), https://www.globalwebindex.com/reports/corporate-social-responsibility ("The number of consumers who would pay more for sustainable and eco-friendly products has risen dramatically between 2011 and 2019, reaching almost 60%.").

socially responsible products[126] and pay more for them.[127] Corporations devote substantial resources to vetting the corporations with whom they deal[128] and deselecting corporations from their supply chains based on CSR performance.[129] Fifty-five percent of surveyed Americans and seventy-five percent of millennials say they would take a pay cut to work for a responsible company.[130] Forty-four percent of Americans "worry a great deal about climate change."[131] Twenty-six percent of total US-domiciled assets under management—$12 trillion—are invested using socially responsible investment strategies,[132] despite the lack of persuasive evidence that such strategies produce higher returns.[133] The most sophisticated institutional investors are examining ESG risks for *all* the corporations in which they invest.[134] Although the available data may not be adequate to estimate the ESG Benefit that Potential Stakeholders can confer, it appears to be substantial.

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[126] Ryan W. Buell & Basak Kalkanci, *How Transparency into Internal and External Responsibility Initiatives Influences Consumer Choice*, MANAGEMENT SCIENCE 1, 12 (May 2020) (report of field experiment finding grocery store customers 85% more likely to buy a coffee brand when exposed to information about the company's composting and sustainability practices); *id.* at 8 (university bookstore customers 19% more likely to buy an apparel brand when exposed to information about the brand's commitment to paying a living wage.).

[127] Jens Hainmueller, et al., *Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. STATISTICS 242, 253 (2015) (grocery store sales of sales of the two most popular bulk coffees rose by 10% in field experiment when the coffees carried a Fair-Trade label); .

[128] Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020).

[129] CDP, *Cascading Commitments: Driving Ambitious Action Through Supply Chain Engagement* (2019), https://www.cdp.net/en/research/global-reports/global-supply-chain-report-2019 (In a survey of 115 major purchasing organizations belonging to the CDP Supply Chain Program (a global sustainability disclosure organization), "43% . . . confirmed that they currently deselect existing suppliers based on their environmental performance. And a further 30% are considering implementing this in the near future."); Min Zhange et al., *Do Suppliers Applaud Corporate Social Performance?* 121 J. BUS. ETHICS 543-553 (2014) (In an analysis of Chinese corporations over a seven-year period, "enterprises which exhibit better CSR enjoy a closer relationship with the [supplier] stakeholder groups and more trade credit from the groups.").

[130] *Millennial Employee Engagement Study*, CONE COMMUNICATIONS 1 (2016) https://www.conecomm.com/research-blog/2016-millennial-employee-engagement-study. For millennials, the proportion was 75%. *Id.* David B. Montgomery & Catherine A. Ramus, *Calibrating MBA Job Preferences for the 21st Century*, 10 ACAD. MGMT. LEARNING AND ED. 9, 17 (2011) (finding, in a study of MBA job hunters, "[e]thical Reputation rates as over 95% as important as Financial Package.").

[131] Lydia Saad, *Americans as Concerned as Ever About Global Warming*, Gallup, Mar. 25, 2019 ("45% think global warming will pose a serious threat in their own lifetime and 44% say they worry a great deal about it").

[132] US | SIF Foundation, 2018 Report on US Sustainable, Responsible and Impact Investing Trends 1, https://www.ussif.org/files/2018%20_Trends_OnePager_Overview(2).pdf ("Total US-domiciled assets under management (AUM) using SRI strategies grew from $8.7 trillion at the start of 2016 to $12.0 trillion at the start of 2018, a 38 percent increase. This represents 26 percent—or 1 in 4 dollars—of the total US assets under professional management.").

[133] OECD, ESG Investing: Practices, Progress and Challenges 41 (2020) ("[H]igh scoring ESG portfolios, even when using a best-in class approach that limits the concentration from reducing exposure to lower ESG scores, do not seem to outperform traditional indices.").

[134] For example, BlackRock now requires that each of its portfolio managers take ESG information into account. Larry Fink, Larry Fink's Annual Letter to CEOs: Sustainability as BlackRock's New Standard for Investing (2020) https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter ("By the

Once the ESG information system is complete and functioning, Potential Stakeholders will be able to see the ESG information available to them and assess the difficulty of incorporating it into their decision making. Potential Stakeholders' responses to that difficulty will initially determine the extent to which the corporation is repurposed.

II. RESPONSES TO STANDARDIZATION

The standardization of CSR reporting will make repurposing possible. The newly effective ESG information system will provide information to corporations, Potential Stakeholders, and the public. The system's effect will depend on the recipients' collective response to that information. In this part, I analyze that response strategically.[135] I have divided the analysis into two parts: (1) the corporations' and Potential Stakeholders' strategic responses and their effects, and (2) the magnification of those effects by ESG rankings and CSR prestige.

A. Strategic Response

The existence of the ESG information system will create a system of incentives for corporations and Potential Stakeholders. The strength of those incentives will increase as the system's effectiveness increases. This section speculates on the strategies corporations and Potential Stakeholders are likely to employ in response to the incentives. I conclude that the interaction of those strategies will cause a substantial majority of large corporations to report voluntarily to the dominant set of standards. Some will report to the dominant standards as a whole while others will report to them only in part. Large majorities of Potential Stakeholders will shift some or all of their associations to confer ESG Benefit based on ESG information comparisons.

1. Corporations

When a standards set becomes dominant, corporations will face two categories of choices. The first is the manner in which, and the extent to which, they report. At present, corporations can report to some GRI or SASB standards without reporting to others.[136] They can also choose whether to respond to proprietary surveys and questionnaires. But to be rated and ranked for CSR on data reported to a dominant standard set will require that a corporation report to all or substantially all of the raters' or rankers' criteria.[137]

Corporations' incentives will be to report to all standards if that will result in beneficial

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end of 2020, all active portfolios and advisory strategies will be fully ESG integrated – meaning that, at the portfolio level, our portfolio managers will be accountable for appropriately managing exposure to ESG risks and documenting how those considerations have affected investment decisions."). *E.g.*, GAO REPORT, PUBLIC COMPANIES, *supra* note 42, at 9 ("Institutional investors with whom we spoke generally agreed that ESG issues can have a substantial effect on a company's long-term financial performance.").

[135] *See* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 507-509 (1997) (explaining the relationship between strategic analysis and the systems approach).

[136] *See supra* note 67 and accompanying text.

[137] GRI 101: Foundation (2016) at 23 (Table stating the "criteria to claim a report has been prepared in accordance with the GRI Standards.").

rating or ranking, to report to only particular standards if that will result in beneficial ratings or ranking on those particular criteria, or to report to no standards if the corporations would not be beneficially rated or ranked on any.[138] To enhance their own ability to get information, raters and rankers encourage Potential Stakeholders to assume the worst about non-reporters.[139] A likely result would be reporting principally by corporations that would rank above the average of all corporations for the type of reporting. Overall, a large majority of corporations may choose to report to all or some standards, making voluntary reporting viable.

The securities law requirement that public corporations "state a *material* fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" limits corporations' ability to report selectively.[140] A corporation will either have to remain ignorant of facts that may be crucial to the management of its business or collect those facts and risk having to disclose them. Corporations will err on the side of over-collection and reporting because remaining ignorant would itself endanger the corporations.

The second category of corporate choice is the direction and magnitude of the corporation's effort to improve its CSR performance. Corporations concerned only with profit maximization will seek to capture available ESG Benefit because ESG Benefit is profit. That is, having collected and reported their ESG information, corporations will assess investment in various aspects of CSR improvement on the same criteria by which they assess competing deployments of their capital.

Corporations may improve their CSR performances by divesting irresponsible operations. If the operations remain in the corporation group, the divestment will be ineffective, because reporting is by group. If the corporations spin the operations off or sell them, but continue to receive products or services from the operations, the corporations may be required to report on them as part of the corporations' supply chains.

Even complete divestment may not result in a net improvement in the environment if the buyer continues the operations. For example, BP lowered its greenhouse gas emissions by sixteen percent by selling its Alaskan operations to Hilcorp Energy Co. and others[141] Because the buyers continued the operations, a Bloomberg investigation later found that "overall emissions from former BP facilities will likely be unchanged or even rise under new owners."[142]

If the ESG information system had been complete, it would have moderated the effect of BP's divestment in at least two ways. First, under SASB standards, BP would have been

[138] Consistent with this prediction, Lopez-de-Silanes et al., found a correlation between the quantity of companies' reporting and their CSR performances. Florencio Lopez-de-Silanes, et al., ESG Performance and Disclosure: A Cross-Country Analysis (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506084 ("We find a strong relationship between the extent of ESG disclosure and the quality of a firm's disclosure.").

[139] *E.g., Companies Scores*, CDP (2020) https://www.cdp.net/en/companies/companies-scores (system scoring reporting companies A through D- and assigning a grade of F for "Failure to provide enough information to be evaluated"); *e.g.*, note 99 and accompanying text.

[140] 17 C.F.R. §240.10b-5 (2003).

[141] Rachel Adams-Heard, *What Happens When an Oil Giant Walks Away*, BLOOMBERG (Apr. 15, 2021), https://www.bloomberg.com/graphics/2021-tracking-carbon-emissions-BP-hilcorp/.

[142] *Id.*

encouraged to report the method of its divestment. BP did so, and that may be how Bloomberg discovered the problem.[143] Second, potential customers would be reluctant to purchase from Hilcorp, because purchasing would add a non-reporting company to their supply chain.[144] Once the other major oil companies were similarly divested, they would be inclined to support a regulatory crackdown on their non-reporting competitors.

2. Potential Stakeholders

Potential Stakeholders' most basic strategy will be to associate with highly rated and ranked corporations. In doing so, they may be seeking the financial advantage of beneficial CSR associations or merely expressing and promoting their values.

Some Potential Stakeholders will be more interested in the corporation's performance on specific issues than in its overall CSR performance. Potential employees may be most concerned with the corporation's treatment of employees, communities with its treatment of other communities, customers with its treatment of customers, or any of them with the corporation's record on human rights, carbon emissions, or the race and gender of directors, officers, or employees.[145] The effect will be to make ESG Benefit available to corporations that perform well on a few CSR criteria even if they don't perform well overall. Thus, a large majority of public corporations may benefit from reporting to the dominant standards on at least some issues. Their selective reporting will contribute to the standards' credibility.

Potential Stakeholders can change some associations quickly and easily. Investors can trade in or out of a corporation's shares in minutes. Customers who buy consumable products can easily switch to similar products from other corporations. Other associations, such as employment or the corporation's location of operations in a community, will require more time and effort to change. This stickiness will slow the market's reaction to changes in ESG information and cause that reaction to be incomplete.

Consumer expenditures constitute 68% of gross domestic product,[146] making consumers potentially the most important distributors of ESG Benefit. Repurposing may depend on consumers' levels of enthusiasm for and participation in the process of directing ESG Benefit. Those levels will depend largely on the availability of software to support consumer decision making and the promotion of repurposing by the media.

3. Interaction

A corporation that takes CSR action to gain ESG Benefit will likely face two consec-

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[143] *See* BP, BP SASB INDEX 2020 3 (Mar. 2021); SASB, Oil & Gas – Exploration & Production Sustainability Accounting Standard EM-EP-110a.3 (Oct. 2018).

[144] *Id.* ("[N]one of the three buyers on the other side of BP's recent divestment deals discloses overall carbon data or has meaningful climate plans.").

[145] *E.g.*, Paul Sullivan, *How Investors Can Address Racial Injustice*, N.Y. TIMES, July 4, 2020 at B5 (describing socially responsible investing intended to promote gender and racial diversity).

[146] Federal Reserve Bank of St. Louis, Economic Research, https://fred.stlouisfed.org/release/tables?rid=53&eid=13146#snid=13148 (last visited Jan. 20, 2021) (table showing "Personal consumption expenditures were 68% of gross domestic product in the third quarter of 20200.

utive delays. The first is the delay between the action and its reflection in ratings and rankings. The second is the delay between its reflection in ratings and rankings and the corporation's receipt of ESG Benefit. For a given company, each delay may be years.

The delays will have two systemic effects. First, CSR is an investment. Corporations will have to invest years before they receive the benefits. Second, corporations must act early on the basis of their guesses about the future. Corporations that hold off in their own investment to see how others fare could fall years behind in a period of rapid change. That may in part explain why some corporations are already reporting to dominant standards when little comparison is possible and little ESG Benefit available. When comparison becomes possible, those corporations will already have the knowledge and experience needed to compete.

The result could be a stampede to report to the dominant standards even before the ESG information system is fully in place. Once corporations have collected and reported the information, they will use it to make CSR improvements that will produce ESG Benefit.

Some corporations will choose to compete on the traditional bases of price and quality and externalize as much of their social costs as is permitted by law. As Part IV explains, those corporations will be battling on multiple fronts. Mutual funds and activist shareholders will be pressing them to measure and report ESG information and threatening to fire directors who don't go along. The corporations' public images and reputations will be tarnished by their failure to adhere to "stewardship codes," ethics rules, and business norms. Their continued externalization of social costs will not only appear, but will actually be, irresponsible.

Even price-and-quality corporations who persevere ultimately have no future. If the number and sizes of the nonreporting corporations remain large enough to affect the markets for products and services, the reporting corporations and their stakeholders will demand that government level the playing field by mandating reporting and improvement.

4. Cheating

Some corporations will try to obtain ESG Benefit by exploiting ambiguities in the standards or reporting false data.[147] This problem is not materially different from the analogous problem with the financial reporting system. The solution is in part the same as the solution to cheating in the financial reporting system: third party auditing, whistleblower protections, government regulations, government enforcement, and securities and consumer class actions. The use of these techniques in combination may be more effective than the use of each alone.[148]

A financial audit is an examination and evaluation of the financial statements of a

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[147] Office of the Investor Advocate, U.S. Securities and Exchange Commission, Report on Activities, Fiscal Year 2020, at 9, https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2020.pdf ("Greenwashing is likely to grow increasingly problematic as companies and funds viewed as ESG-friendly continue to attract assets at an accelerating pace.").

[148] *See, e.g.*, Fernan Restrepo, Hedge fund regulation, performance and risk-taking: Re-examining the effect of the Dodd-Frank Act, Mar. 16, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541916 (concluding empirical results "suggest that mandatory disclosure, enforcement intensity, and auditors perform a complementary role" in the setting of financial reporting).

corporation to determine whether it "present[s] fairly in conformity with generally accepted accounting principles" the corporation's financial performance or position.[149] The financial statements of public corporations must be audited annually by Certified Public Accountants (CPAs). CPAs are licensed professionals paid by the audited corporations. The purpose of an audit is to provide "an independent opinion about whether the financial statements are presented fairly in all material respects."[150] Audits are conducted in accord with standards that "require that the auditor plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether due to error or fraud."[151]

Although the word "audit" is used principally with respect to financial audit in the United States, CPA and other types of firms also audit nonfinancial—including ESG—information and provide "reasonable" or "limited" assurance for the benefit of third parties. At the higher, "reasonable," level of assurance, the auditor would use "a combination of inspection, observation, confirmation, re-calculation, re-performance, analytical procedures and inquiry including, where applicable, obtaining corroborating information, and depending on the nature of the subject matter, tests of the operating effectiveness of controls."[152] That is, they inspect and test the corporation's ESG information collection system to make sure it is reporting accurate data and then put their own reputations on the line by providing assurances to third parties.

Studies differ sharply on the current extent of third-party assurance of reported ESG data.[153] By compiling a sample of convenience that included thirty-one CSR reports, I found that five (16%) reported reasonable assurances, nineteen (61%) reported limited assurances, and the remaining seven (23%) did not mention assurances. What is most important at this stage of the ESG information system's development is that CPA firms and others stand ready to provide reasonable assurance regarding ESG information. They do.[154]

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[149] N.E. Kirk, "True and Fair View" Versus "Present Fairly in Conformity with Generally Accepted Accounting Principles," Discussion paper, 1.27 (2001), https://www.massey.ac.nz/massey/fms/Colleges/College%20of%20Business/School%20of%20Accountancy/Documents/Discussion%20Papers/208.pdf.

[150] PCAOB Release No. 2017-001 at n.2.

[151] *Id.*, at A1-5 (AS 3101).

[152] International Auditing and Assurance Standards Board, International Framework for Assurance Engagements, March 2008 at 21-22, https://www.ifac.org/system/files/downloads/International_Framework_for_Assurance_Engagements.pdf.

[153] KPMG, The road ahead: The KPMG Survey of Corporate Responsibility Reporting 2017 at 26, https://home.kpmg/xx/en/home/insights/2017/10/the-kpmg-survey-of-corporate-responsibility-reporting-2017.html ("Assurance of CR data is now accepted standard practice among G250 companies with more than two thirds (67 percent) of these companies seeking assurance."); IRRC Institute, State of Integrated and Sustainability Reporting in 2018, at 29, https://www.weinberg.udel.edu/IIRCiResearchDocuments/2018/11/2018-SP-500-Integrated-Reporting-FINAL-November-2018-1.pdf ("A minority (about 38 percent) of reports obtain external assurance, and 90 percent of these pertain only to some data, in most cases GHG emissions. below. . . . Only 3 percent of reporters assert their reports or ES performance data are completely externally verified.").

[154] SMETA Audit is a widely used ethical audit format for the areas of labour, health and safety, environment, and business ethics. https://www.sedex.com/smeta-audit/. *See also Allstate Sustainability Report Downloads*, ALLSTATE, 2019 Sustainability Report at 26, https://www.allstatesustainability.com/download-

As discussed in Part I.A.1, public corporations' liability for the publication false ESG information is limited by the puffing, total-mix-of-information, and materiality doctrines. But public corporations that publish materially false ESG information that does affect the total mix can be held liable in securities class actions.[155] False ESG information may also create liability under federal and state consumer protection and anti-fraud statutes and regulations.[156] As ESG information is standardized and becomes more credible these actions will become easier to win because materiality and reliance will be more common.[157]

Lastly, the structure of the ESG information system will itself deter cheating. The evaluators are independent market actors who are free to impose any penalties they consider appropriate for cheating. For example, U.S. News has punitively lowered the rankings of law schools that have given them incorrect information.[158] The ESG information system's purpose is to assess and communicate CSR. Cheating on ESG information is not only the antithesis of CSR, it is a threat to the power of Potential Stakeholders to repurpose the corporation. Potential Stakeholders will likely support evaluators who discover cheating and impose draconian penalties.[159]

B. Response Magnification

Two aspects of the ESG information system will magnify the effects on corporations of even small differences in their levels of CSR. First, by making rankings credible, high-quality ESG information will enable CSR ranking and ignite CSR competition. Second, CSR's pre-existing association with wealth and social status will increase the payoffs for corporations and Potential Stakeholders who make high-CSR associations.

1. Ranking's Effects

Hundreds of organizations already rank corporations for CSR or some aspect of it. Those rankings have limited effect because they lack credibility.[160] Completion of the ESG information system will, however, enable the ranking systems that survive to become credible.

Credible ranking systems can induce competition among ranked organizations[161] and

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center/ (last visited August 2, 2020) ("Our information security practices are subject to both internal and external audits.").

[155] In re BP plc, Sec. Litig., 2013 WL 6383968 (S.D. Tex. 2013); In re Massey Energy Sec. Litig., 833 F.Supp. 2d 597 (S.D.W.Va.2012).

[156] Cal. Civ. Code §§ 1750, *et seq.*(Consumers Legal Remedies Act).

[157] Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U.L. REV. --, -- (2021) (stating that "event-driven" securities litigation . . . have increased in prevalence in recent years, and SEC-mandated ESG disclosure would only accelerate this trend").

[158] Scott Jaschik, *Oklahoma Gave False Data for Years to 'U.S. News,' Loses Ranking*, INSIDE HIGHER ED, May 28, 2019, https://www.insidehighered.com/admissions/article/2019/05/28/university-oklahoma-stripped-us-news-ranking-supplying-false (ranking penalties imposed on Oklahoma and other schools).

[159] *See supra*, note 139.

[160] *Supra* Part I.A.2.

[161] *See, e.g.*, Jelena Brankovic, et al., *How Rankings Produce Competition: The Case of Global University Rankings*, 47 ZEITSCHRIFT FÜR SOZIOLOGIE 270, 270 (2018) ("[R]ankings are almost routinely recognized as an important driver of [increasing competition].").

cause their behavior to conform to the ranking criteria.[162] The process of ranking organizations involves three parties: the organizations ranked, the organizations ranking them, and the audience for whom they are ranked. By achieving credibility, the rankers and the audience gain power over the ranked organizations.[163] In the context of university rankings, it has been shown that reactions to rankings redistribute resources, redefine organizational purpose, and induce responsive strategies.[164]

The power that *U.S. News and World Report* gained over law schools by ranking them demonstrates the ability of rankings to transform the nature of ranked institutions. Sociologists studying law school rankings have found that they "changed the fundamental activities of schools transforming, for instance, how actors make decisions, do their jobs, and think about their schools."[165] Sauder and Espeland found that "rankings have become naturalized and internalized as a standard of comparison and success. In changing how law schools think about themselves and pressuring scholars toward self-discipline, rankings are now deeply embedded within schools, directing attention, resources, and interventions."[166]

Continual ranking magnifies differences among the ranked organizations in two ways. First, ranking emphasizes the order of the ranked subjects and deemphasizes the amounts of the differences among them. Aside from rankers' limited use of "ties," only one ranked organization can be first—even if many are excellent. The amounts of the differences are usually reported ineffectively or not at all. As Brankovic, et al., put it, "by producing, visualizing and publicizing often minimal differences in performance, rankings "scarcify" reputation.[167] Espeland and Sauder also note this capacity to magnify small differences.[168]

Second, ranking procedures usually contain a feedback loop. That is, this year's rankings are in part based on the ranked organization's perceived reputation among the audience. That perceived reputation is in part determined by the prior year's rankings.[169] The feedback loop not only magnifies differences over time, but also makes initially low rankings difficult for organizations to escape. Anticipation of these effects forces organizations

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[162] *See, e.g.*, Luis L.Martins, *A Model of the Effects of Reputational Rankings on Organizational Change*, 16 ORGANIZATION SCIENCE 701 (2005) ("[T]here appears to be a consensus in the literature that rankings are sources of normative pressure on organizations that push them to conform to the criteria used by the rankings.").

[163] Alice M.M. Miller & Simon R. Bush, *Authority without credibility? Competition and conflict between ecolabels in tuna fisheries*, 107 J. CLEANER PRODUCTION 137 (2015) ("[O]nce a label is deemed credible by those-to-be-governed, the standards and institutions used to verify compliance to them can exercise power through exclusion.").

[164] Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 3 2007) ("We then identify three important effects of reactivity: there distribution of resources, redefinition of work, and proliferation of gaming strategies.").

[165] Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63, 64 (2009).

[166] *Id.* at 79.

[167] *See, e.g.*, Brankovic, s*upra* note 161, at 282.

[168] Espeland & Sauder, *supra* note 164, at 12 ("Although the raw scores used to construct USN rankings are tightly bunched, listing schools by rank magnifies these statistically insignificant differences in ways that produce real consequences for schools, since their position affects the perceptions and actions of outside audiences.").

[169] *See, e.g., id.* at 11-12 (characterizing rankings as "self-fulfilling prophecies").

to respond earlier and more decisively to the invitation to compete for rankings.[170]

CSR ranking is likely to have an even greater impact on corporations than *U.S. News* ranking has had on law schools, because corporation managers have less reason to resist CSR rankings than law school deans had to resist law school rankings. First, while *U.S. News* largely dictated its standards, GRI and SASB sought consensuses among investors and corporate leaders. Second, corporate leaders have good reason to prefer CSR to shareholder wealth maximization as their primary objective: service to CSR will place them in higher social esteem. The point was captured perfectly in a New Yorker cartoon in which a director tells the other board members "I too hate being a greedy bastard, but we have an obligation to our shareholders."[171] By contrast, law school deans do not regard *U.S. News* rankings as benefitting either themselves or their schools.[172]

2. The Prestige Hierarchy's Effects

CSR is prestigious.[173] Like rankings, CSR's prestige will amplify the effects of ESG information. CSR is prestigious because it reflects widely shared, pro-social values: preservation of the planet and environment; fair treatment of customers, employees, and suppliers; contribution to the community; charity; and respect for human rights. Even corporate

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[170] *See, e.g.*, Martins, *supra* note 162, at 712 (finding that "business schools were more likely to undertake organizational change the more their top managers perceived an identity-reputation discrepancy relative to the rankings").

[171] The cartoon is reproduced in LOPUCKI AND VERSTEIN, *supra* note 32, at 585.

[172] Alex Wellen, *The $8.78 Million Maneuver*, N.Y. TIMES (July 31, 2005) https://www.nytimes.com/2005/07/31/us/education/the-878-million-maneuver.html (quoting then Stanford Law School Dean Larry Kramer, "These rankings are corrosive to the actual education mean because this poll takes the following 12 criteria and now you have to fetishize them."); Louis H. Pollak, *Why Trying to Rank Law Schools Numerically is a Non-Productive Undertaking: An Article on the U.S. News & World Report 2009 List of "The Top 100 Schools,"* 1 DREXEL L. REV. 52 (2009) ("I am convinced that [the U.S. News & World Report] is an incubus, bad for the health of legal education."); *Interview with Kevin Johnson, Dean of the University of California Davis, School of Law*, TOP LAW SCHOOLS (Sept. 2009), https://www.top-law-schools.com/kevin-johnson-interview.html (quoting Dean Johnson, "Virtually every law school dean loves to hate the U.S. News & World Report law school rankings. I can assure you that law school deans across the country dread the rankings released every April.").

[173] Christopher J. Waples & Benjamin J. Brachle, *Recruiting Millennials: Exploring the Impact of CSR Involvement and Pay Signaling on Organizational Attractiveness*, 27 CORP. SOC. RESP. & ENVTL. MGMT. 870 (2020) ("Young job seekers rated companies higher in prestige (the perception that many others would probably like to work at the company) and attractiveness (the belief that the company would be a good place to work) when the companies' CSR information was emphasized"); David A. Jones et al., *Illuminating the Signals Job Seekers Receive from an Employer's Community Involvement and Environmental Sustainability Practices*, 7 FRONTIER PSYCH. 426 (2016) ("When an employer is known for its CSR practices, researchers have argued, it signals to job seekers that the organization is prestigious and well-regarded by others."); Tara S. Behrend, et al., *Effects of Pro-Environmental Recruiting Messages: The Role of Organizational Reputation*, 24 J. BUS. PSYCHOL. 341, 347 (2009) ("The analysis demonstrates that an environmental message on a company's web site has the effect of improving the perceived reputation of the company, and in turn the enhanced reputation of a company makes it more attractive to prospective employees.").

CEOs[174] and scholars who advocate shareholder wealth maximization[175] rush to associate themselves with CSR values. Most people prefer being the good guys to being the bad guys.

The result is a prestige hierarchy of corporations, with the most socially responsible corporations at the top and the least socially responsible at the bottom. This prestige hierarchy coincides with the prestige hierarchies based on corporate financial success and size. That is, even without a credible ESG information system, high-CSR ranking already correlates with high-reputational ranking.[176]

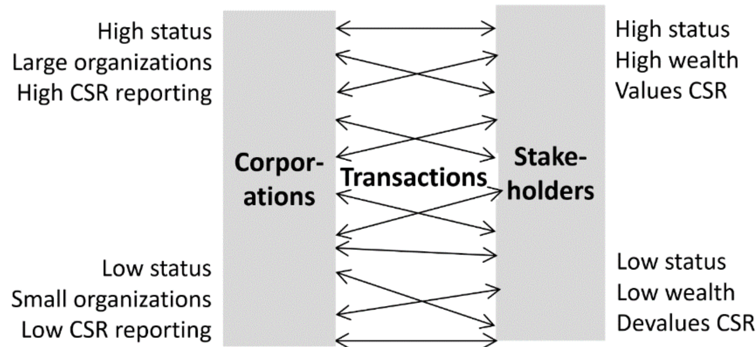

Figure 2. The CSR Prestige Hierarchy

A similar prestige hierarchy exists among Potential Stakeholders. The most highly qualified job candidates tend to be wealthier, better educated, and value CSR more

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[174] *E.g.*, Business Roundtable, *supra* note 6. (corporate CEOs endorsing CSR).

[175] *E.g.*, Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance at 52, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3544978 (forthcoming Cornell Law Review) (acknowledging that corporations "contribute to a wide array of society's problems and impose serious negative externalities on employees, communities, consumers, and the environment"); Rock, *supra* note 28, at 30 ("Finally, we should never forget that many of our problems require regulatory solutions and that we should not fool ourselves into thinking that tinkering with "corporate objective" can begin to substitute for regulation to control climate change, assure decent wages and working hours, and decent health care, as well as social insurance against the various downsides from competitive global markets."). *See, e.g.*, Parella, *supra* note 123, at 735 (noting that in the human rights context "a disgraced corporation . . . associates itself with one or more reputable organizations" to restore its legitimacy by adopting the reputable organization's rules).

[176] Chi-Shiun Lai et al., *The Effects of Corporate Social Responsibility on Brand Performance: The Mediating Effect of Industrial Brand Equity and Corporate Reputation*, 95 J. BUS. ETHICS 456, 465 (2010). ("The empirical results support our hypotheses and indicate that CSR and corporate reputation have positive effects on industrial brand equity and brand performance."); Clara Pérez-Comejo et al., *Reporting as a Booster of the Corporate Social Performance Effect on Corporate Reputation*, 27 CORP. SOC. RESP. & ENVTL. MGMT. 1252, 1258 (2020) ("Our results based on an international sample of firms for six years show all of the CSP dimensions (social, environmental, and economic) positively affect corporate reputation."); Zia ur Rehman et al., *Corporate Social Responsibility's Influence on Firm Risk and Firm Performance: The Mediating Role of Firm Reputation*, CORP. SOC. RESP. & ENVTL. MGMT. (forthcoming 2020) ("[T]here is a greater possibility that better CSR performance leads to a firm being inducted in Fortune's reputation list . . .").

highly.[177] As they seek jobs with the largest, wealthiest, and most socially responsible corporations, size, wealth, and social responsibility reinforce one another.[178]

The mutual desire of corporations and Potential Stakeholders to associate with CSR, combined with the hierarchical organization of both groups, produces a pattern of transactions like that shown by the nearly horizontal arrows in Figure 2. Wealthy, high-status, CSR-valuing stakeholders tend to transact with large, high-status, high-CSR-reporting corporations, leaving the poorer, low-status stakeholders who devalue CSR to transact with the low-status, smaller organizations that tend not to CSR report.

The correlation of CSR with those other measures of status enhances CSR's prestige and promotes CSR. To move up in that system, Potential Stakeholders must associate with more responsible corporations and one way to do that is to be more responsible.

For example, assume that green buildings cost more to build and, as a result, cost more to rent.[179] ESG-reporting corporations will place a relatively high value on owning such buildings because ownership may contribute to their ESG ratings and rankings. Because those corporations are larger and wealthier, they can better afford the buildings. Tenants who value CSR will prefer to rent in those buildings because it will improve their ESG ratings and rankings and associate them with the high-status landlord. Those tenants can afford the green buildings because they are wealthier and more successful.

The prestige derived from associating with more responsible Potential Stakeholders is also an end in itself. That is, CSR prestige is an ESG Benefit available to high-CSR performers.

III. Corporate and Information System Control

This Part considers how the repurposed corporation will be governed and the ESG information system regulated. My thesis is that Potential Stakeholders will control the corporation by conferring ESG Benefit. Even if they do not gain sufficient leverage from the ESG information system to repurpose the corporation, the government or parallel processes will complete the repurposing. Once CSR is measured, CSR will be managed.

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[177] Daniel Hedblom et al., Toward an Understanding of Corporate Social Responsibility: Theory and Field Experimental Evidence (NBER Working Paper 26222, 2019). (In a field experiment studying responses to ads for data-entry workers in 12 major U.S. cities, "[a]dvertising the firm's CSR endeavors during recruiting increase[d] application rates by almost as much as an increase of hourly wages from $11 to $15."); Krueger et al., *supra* note 117, at 2 ("[M]ost individuals do care about the sustainability characteristics of their jobs and these preferences are generally more pronounced for highly educated workers and for more recent cohorts."); Park, *supra* note 125 (study showing education associated with CSR).

[178] Behrend, *supra* note 173, at 347 ("One possible explanation for this relationship [between reputation and the effect of a pro-environmental response] is that job-seekers associate pro-environmental activities with successful and lucrative companies.").

[179] Desiree Hanford, *Do Green Buildings Cost More?* FACILITIESNET, June 1, 2008, https://www.facilitiesnet.com/green/article/Do-Green-Buildings-Cost-More--8954 (presenting arguments that green buildings do and do not cost more).

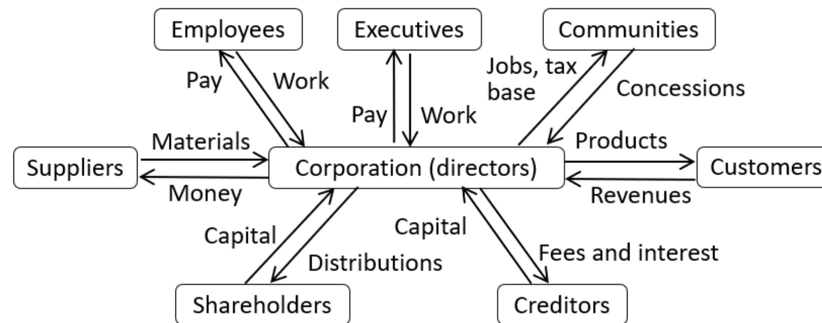
A. Corporate Control

One of the few mandatory rules of corporate law is that shareholders must have the right to elect the directors.[180] When a single shareholder or group owns a majority of the voting power, that shareholder or group is said to "control" the corporation. It can, as a practical matter, cause the corporation to pursue any objective it chooses.[181] That objective may or may not be the maximization of shareholder wealth.

By the majority-of-the-voting-power test, however, only about seven percent of U.S. public corporations are "controlled" by shareholders[182] When the voting power is dispersed, directors and executives gain varying measures of control and influence.[183] Repurposing will not change that voting control structure or the dynamics of that control.

Corporations are also controlled through markets. The function of a corporation is to organize some aspect of the production and distribution of goods and services. What the corporation does is to bring stakeholders together in a sustainable web of contractual and noncontractual relationships. Figure 3 diagrams those relationships.

Figure 3. The Corporation as a System



Each of the stakeholder relationships shown on the figure is formed in the context of a market. In those markets, Potential Stakeholders' preferences limit and thus control, the directors' actions. In repurposed corporations, this market control will be primary. In responding to shareholder voting control, the directors will be able to act only within narrow limits set by the stakeholder markets.

Although the ESG information system will benefit the reporting corporations, their stakeholders and Potential Stakeholders will be the primary beneficiaries. They will have

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[180] *See, e.g.*, Model Bus. Corp. Act §6.03(c) (2016) ("[O]ne or more shares that together have full voting rights . . . must be outstanding."); DEL. CODE tit. 8, §151(b) ("[I]mmediately following any such redemption the corporation shall outstanding 1 or more shares . . . which . . . shall have full voting powers.").

[181] Rock, *supra* note 28, at 28 ("So long as shareholders retain the sole voting rights, corporations will largely be managed for the benefit of the shareholders, whatever the interpretation of the weaker bonds of fiduciary obligation.").

[182] Edward Kamonjoh, *Controlled Companies in the Standard & Poor's 1500* (2016), at 15; Barbara Novick, *"The Goldilocks Dilemma": A Response to Lucian Bebchuk and Scott Hirst*, 120 COLUM. L. REV. F. 80, 82 (2020) (asserting that in "the majority of U.S. public companies—and certainly "large-cap" public companies—the largest shareholder holds only a single digit percentage of shares outstanding").

[183] LOPUCKI & VERSTEIN, *supra* note 32, at 315 (explaining the shifting control among shareholders, directors, and officers).

more market power because their choices can better express their preferences. The corporation will learn more about itself by collecting ESG information about itself. Some stakeholders, including suppliers, customers, shareholders, and creditors, will themselves be CSR reporters and so will reveal new information about themselves, to the benefit of the corporation. But ESG information about the relatively small proportion of Potential Stakeholders who are business corporations will not be nearly as useful to the corporation as ESG information about the corporation will be to numerous Potential Stakeholders.

Like the unrepurposed corporation, the repurposed corporation may or may not seek to maximize shareholder wealth. Whether it does will depend on the preferences of the persons in control of the corporation as control is conventionally defined. They may be officers, directors, or shareholders.[184]

Whether a repurposed corporation seeks to maximize shareholder wealth will have little effect on the corporation's incentives to benefit its stakeholders and the public. That is because the pursuit of ESG Benefit will be primarily a profit-seeking strategy, equally available to shareholder-wealth-maximizing and non-shareholder-wealth-maximizing corporations. To win ESG Benefit and profit, corporations of either type will have to excel at CSR.

The corporation will receive its ESG Benefit in the stakeholder markets. Potential Stakeholders will choose to associate with, and thereby benefit, the repurposed corporation because the corporation's ratings and rankings indicate that the corporation (1) treats stakeholders of the Potential Stakeholder's type fairly or generously or (2) shares the stakeholder's values with respect to the corporation's treatment of other stakeholders and the public. That is, Potential Stakeholder decision making will be both selfish and altruistic.

Stakeholder markets will constantly pressure the corporation to benefit stakeholders and the public in ways that Potential Stakeholders approve. Those markets will remain far from perfect. The system cannot report every policy-relevant variable, and shoppers on Amazon are not capable of evaluating a seller's greenhouse gas emissions. But an effective ESG information system can report more variables than can actually achieve salience in Potential Stakeholder decision making,[185] and shoppers can be shown a credible third party's rating or ranking of the seller's climate change performance. So long as the stakeholder markets press corporations in the right directions, the corporations will move in the right directions.

Environmental and social activists will continue to use boycotts, protests, labor organizing, engagement, and information campaigns to redirect corporate efforts. The ESG information system will facilitate the tasks of discovering the need for redirection and persuading the activists' followers of that need.

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[184] LoPucki & Verstein, *supra* note 32, at page 315 (explaining the shifting of corporate control among shareholders, directors, and officers).

[185] Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 Chi. L. Rev. 1203 (2003) (arguing that parties to standard form contracts are able to take into account only a limited number of terms with the result that less salient terms do not reflect an actual agreement).

B. ESG Information System Control

This section considers who will control the ESG information system. That system consists of essentially four subsystems. They are the systems for (1) promulgating reporting standards, (2) collecting and auditing corporate-level ESG data, (3) processing corporate-level ESG data into ratings and rankings, and (4) delivering ratings and rankings at the points of decision-making.

Promulgating reporting standards. Initially, the organizations that promulgated the dominant standards will have the ability to modify them.[186] For example, if SASB's standards dominate, SASB's board of directors will be able to modify them. But the federal government would be the ultimate standards controller, because it has the power to substitute any standards it chooses.[187] As a Congressional Research Service report put it

> One option is to let the markets determine what should be disclosed within the existing regulatory structure. If in the long run there is sufficient interest by investors, and SASB standards become widely accepted, then Congress could direct the SEC to require corporate disclosures in compliance with standards promulgated by SASB and standardize the reporting structure. Similarly, federal, state, and local governments might consider utilizing SASB disclosures in their annual reports. Another option is to require the SEC to undertake a cost-benefit study and assess investor interest in sustainability disclosures in order to formalize and standardize sustainability disclosure as part of SEC filings.[188]

If SASB standards become dominant, SASB will probably act much as the government would if the government had control, perhaps making it unnecessary for the government to actually take control.

A requirement that corporations report ESG information is the most likely government intervention. Cynthia Williams and Jill Fisch petitioned the SEC for that intervention,[189] and the SEC Investor Advisory Committee has recommended it.[190]

Collecting and auditing data. The corporations themselves will control the systems that collect data at the corporate level. The reasons are that data collection is expensive, requires the involvement of corporate employees, and must occur at locations controlled by the corporations. The government will likely regulate only the auditing function and do so in a manner similar to its regulation of financial information auditing.

Rating and ranking. Government ratings or rankings of CSR are highly unlikely. The ESG information system's purpose it to provide investors—nearly half of all Americans—

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[186] Fisch, *supra* note 39, at 951 ("[S]ustainability is a moving target, meaning that the issues that arguably warrant disclosure and their importance continue to evolve.").

[187] *See, e.g.*, Michal S. Gal & Daniel L. Rubinfeld, *Data Standardization*, 94 N.Y.U. L. REV. 737, 767 (2019) (listing the government's options, including "supervised delegation to an industry-based [standards setting organization], comprised of professional data scientists").

[188] Raj Gnanarajah, Accounting and Auditing Regulatory Structure: U.S. and International, Congressional Research Service (2017) at 31-32, https://fas.org/sgp/crs/misc/R44894.pdf.

[189] *E.g.*, Cynthia A. Williams & Jill E. Fisch, Request for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure, U.S. SEC. & EXCH. COMM'N (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf (last visited July 25, 2020); Fisch, *supra* note 39, at 956-59 (proposing that each public corporation include a "sustainability disclosure analysis" in its annual report).

[190] *SEC Committee Recommendation, supra* note 25, at 7.

with the information they need to allocate ESG Benefit. Consequently, ESG information must be public. Once it is public, the First Amendment would prevent the government from banning its use in ratings and rankings. Thus, government ratings or rankings would have to compete with private sector rankings. The government would be reluctant to enter a credibility competition it might lose, and I foresee no harm from the possibility the government might enter and win.

Delivering ratings and rankings. Delivering ratings and rankings to product and service purchasers at the point of decision making may present greater challenges. At the point of decision making, about 35% of ecommerce purchasers are looking at a screen controlled by Amazon.[191] In response to competitive pressures and consumer demand, that screen might show third-party ESG ratings and rankings. Alternatively, (1) Amazon might try to leverage its market power to impose a rating and ranking system Amazon controls,[192] or (2) Amazon's customers might obtain product-matched ESG information through another application or device while shopping on Amazon.

C. Market Verses Democratic Control

An effective ESG information system will shift corporate control from the narrow group of controlling shareholders, directors and managers to millions of Potential Stakeholders. Thus it would, in its overall effect, be democratic.

Because the Potential Stakeholders would be acting through markets, their preferences would be weighted by the dollar amounts of their transactions—what Masconale and Sepe have colorfully dubbed "a moral tyranny of the capitalist majority."[193] The wealthy would count more than the poor. That is not, however, a change in policy. The stakeholder markets are already operating and preferences are already measured in dollars. The reform would merely provide Potential Stakeholders with the information they need to express their preferences effectively.

Nor is the political system more democratic. The wealthy—including corporations—spend large amounts of money to enhance their influence in the political system. Despite CSR's overwhelming popularity, the political system has been unable to require it. Stakeholder markets may be able to do what the political system could not.

SASB's standards are designed to provide the information *investors* need.[194] If SASB's standards prevail, other stakeholders will receive the same ESG information. That

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[191] Benedict Evans, *What's Amazon's Market Share*, Dec. 19, 2019, https://www.ben-evans.com/benedictevans/2019/12/amazons-market-share19 ("Amazon has about 35% of US ecommerce.").

[192] Amazon already sells an Alexa skill called "fair shopping." "Fair shopping aggregates thousands of products in categories such as fashion, home decor, body care, and jewelry. Products are considered "fair" because they are produced with organic, fair trade materials, labor is ethical, and or the products are sustainably sourced." https://www.amazon.com/dp/B07JL9LM7T?tag=skill-enabled-20 (last visited Sept. 21, 2020).

[193] Masconale & Sepe, Mar. 15, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793035, at 7.

[194] *E.g.*, SASB, Proposed Changes to the SASB Conceptual Framework and Rules of Procedure, Aug. 28, 2020, at 25, https://www.sasb.org/wp-content/uploads/2020/08/Invitation-to-Comment-SASB-CF-RoP.pdf ("The SASB Standards are designed primarily to facilitate disclosure that is useful to investors,

information will not, however, be designed to meet the other stakeholders' needs or be in forms convenient for their use. Among other deficiencies, the information will not link products and services to the CSR of their manufacturers and sellers.

But even if SASB's standards prevail, completion of the ESG information system would advance democratic values. First, it would provide some of the information non-investor stakeholders would need. Second, it would provide a model for a broader system that might later serve all stakeholders. Third, it could prove the concept of controlling corporations through stakeholder markets.

An effective ESG information system would provide government with the information government would need to regulate. But if politics renders government incapable of requiring CSR—which it apparently does—market repurposing is the second-best solution. The current system gives the public almost no control over CSR.

IV. Parallel Processes

CSR is an idea whose time has come. "Society is demanding that companies, both public and private, serve a social purpose."[195] Building an ESG information system based on voluntary participation is just one of several possible ways to repurpose the corporation. Others include mandatory CSR reporting, mandatory CSR improvement, changing the law governing corporate purpose, giving employees the right to elect directors, mutual fund pass-through voting, lawsuits to compel SASB reporting, and the adoption of norms and stewardship codes.

CSR advocates are pursuing all these reforms. Each reform complements the others by making their adoption more likely.[196] A plethora of CSR proposals have attracted a wide array of supporters. Because all seek the same result, the supporters of all are pushing in the same direction. Those efforts are changing corporations' expectations and strategies. CSR now appears inevitable.

A. Regulation

The most likely regulation of CSR would be the imposition of additional mandatory reporting. For example, Cynthia Estlund has argued for the mandatory disclosure of a variety of the "terms and conditions" of employment.[197] Möslein and Sørensen would require that companies "formulate and disclose more specific targets [for their sustainability efforts], outlining how they will achieve them, and finally they should report on what has

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lenders, and other creditors for the purpose of making investment decisions on the basis of these users' assessments of short-, medium-, and long-term financial performance and enterprise value . . . .").

[195] Larry Fink, 2018 Letter to CEOs: A Sense of Purpose, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter (Jan. 17, 2018).

[196] *E.g.*, Yan & Zhang, *supra* note 97, at 64 ("[S]ome legal mechanisms such as disclosure requirements under corporate law may in turn strengthen the market force in disciplining corporate behaviour by increasing transparency.").

[197] Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 403 (2011). (arguing for mandatory disclosure of work-related information about corporations).

been achieved."[198]

The promulgation and acceptance of SASB standards has made it easier for the SEC to impose mandatory CSR reporting. Before SASB, the SEC would have faced a several-year project to develop reporting standards. The issue of whether to mandate reporting would have been debated in the abstract. Today, the SEC could mandate CSR reporting simply by adopting GRI's, SASB's, or TCFD's standards.[199] The debate could address the standard set chosen instead of all forms CSR reporting might take. If the SEC adopts SASB's standards, the SEC presumably will assume the authority to amend them.

Once corporations are reporting, it will be easier to mandate CSR improvements. Congress would have data quantifying the need for improvements, and each of the corporations affected would be in a position to calculate the impact of the legislation on it.

B. Changing the Corporation's Purpose

The law of Delaware and perhaps that of a few other states facially requires that corporations maximize shareholder wealth.[200] Numerous commentators propose to eliminate that requirement and substitute a requirement that corporations serve the interests of stakeholders and perhaps the public.[201] That change would not significantly increase directors' ability to serve the other stakeholders' interests. Directors already have virtually unlimited discretion to provide benefits to stakeholders in the amounts the directors believe to be in the corporation's long-run interest.[202] The long-run interest condition is toothless because the business judgment rule presumes it satisfied. Directors can do whatever they choose,

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[198] Florian Möslein & Karsten Engsig Sørensen, Sustainable Corporate Governance: A Way Forward, Apr. 29, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761711.

[199] *SEC Committee Recommendation, supra* note 25, at 10 (mentioning those three as "useful standards" that "may help shape [the SEC's] thinking."). The reference is puzzling because TCFD has not published standards. TCFD is the Task Force on Climate-related Financial Disclosure. https://www.fsb-tcfd.org/.

[200] *E.g.*, Frederick Hsu Living Tr. v. ODN Holding Corp., 2017 WL 1437308 (Del. Ch. 2017) ("[T]he fiduciary relationship requires that the directors . . . maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital.").

[201] *E.g.,* Accountable Capitalism Act, S. 3348, 115th Cong. (2018) §5(c)(1)(A) ("[D]irectors . . . shall manage or direct the business and affairs of the . . . corporation in a manner that— (i) seeks to create a general public benefit; and (ii) balances the pecuniary interests of the shareholders . . . with the best interests of persons that are materially affected by the conduct of the . . . corporation."); Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1061 (2008) ("I believe we should extend [legal] protections to stakeholders."); Jaap Winter, Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board (Apr. 13, 2020) at 11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574681 ("Corporate law could formulate a duty of the board and the directors to ensure that the corporation acts responsibly with a view to the interests of society and the way it uses investor, human, social and natural capital."); Amir Licht, Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporations 23-24 (Dec. 17, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3459450 ("[D]irectors . . . will be obliged to treat the company's stakeholders impartially when they make business judgments in the best interest of the company as a whole—an obligation that will be discharged by considering the interests of the company's various stakeholders.").

[202] Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770-01 (2005) ("[U]nder the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) on the ground that they may conceivably maximize profits (at least in the long run.").

provided only that they refrain from announcing that they are providing stakeholder benefits that they don't believe to be in the corporation's best interests.

Legal recognition of stakeholder and public interests in corporations would, however, have symbolic importance. Reforms that required CSR reporting and improvement could be argued to, and adopted by, boards on their merits. The reforms would not have to be phrased to satisfy the convoluted fiction that they were in the interests of "the corporations and its shareholders."[203]

Stavros Gadinis and Amelia Miazad propose that the Delaware courts declare that the failure to provide adequate staff and resources to the "ESG function" breaches the directors' duty of good faith.

> Delaware courts should recognize that, by failing to build up their companies' ESG function, directors and officers are exposing their shareholders to increased risks. If that failure is due to bad faith, it should be treated as a violation of the duty of loyalty. To clear the bad faith hurdle, boards should ensure that the company has a well-established ESG function. This would consist of an internal governance mechanism with adequate staff and resources, a well-defined substantive scope, and, most importantly, a robust effort for outreach to stakeholders.[204]

Similarly, Parella would place on the corporation a duty, when contracting, to "take into account the interests of stakeholders when performance of the contract creates a risk of physical harm to them."[205]

C. Changing Who Elects Directors

Some reformers propose that employees share voting control with shareholders. Senator Elizabeth Warren's Accountable Capitalism Act would allow employees to elect forty percent of the directors of any corporation with over one billion dollars in revenues.[206] Grant Hayden and Matthew Bodie have proposed several alternatives under which employees would participate in the election of directors.[207] Michael Simkovik proposes to allocate more votes to shareholders who are natural persons.[208]

D. Pass-through Voting

Mutual funds are a form of investment in which numerous investors purchase shares of a fund and the fund purchases the shares of numerous public corporations. The result is a high level of investment diversification. Each investor in a mutual fund is the beneficial owner of infinitesimal slices of the shares of hundreds or thousands of corporations. Those

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[203] N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007).

[204] Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1414 (2020).

[205] Kishanthi Parella, Contractual Stakeholderism, -- B.U. L. Rev.— (2022) (manuscript 26).

[206] Accountable Capitalism Act, S. 3348, 115th Cong. (2018) at §6(b)(1) ("Not less than 2⁄5 of the directors of a United States corporation shall be elected by the employees of the United States corporation.").

[207] Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419 (2020).

[208] Michael Simkovik, Natural Person Shareholder Voting (unpublished manuscript, 2021).

investors include about 46% of American households.[209]

The funds are fiduciaries, each obligated to vote the shares it holds consistent with the best interests of the fund and the fund's shareholders.[210] Some mutual funds believe those interest are to maximize the *shares'* values.[211] The effect is that those funds vote the fund investors' money for corporations to maximize shareholder wealth.

The proposed reform is that mutual funds should instead vote the shares they hold in accord with the *actual* preferences of the funds' investors.[212] The funds could inexpensively determine the preferences of their investors by survey, using sampling.[213] The shares voted in accord with a single set of fund shareholder preferences might be those of hundreds or thousands of corporations. Given the overwhelming popularity of CSR, for nearly every fund the preferences voted would include CSR reporting and improvement.[214]

In the aggregate, mutual funds own sufficiently large minorities of the shares of most public corporations effectively to control them.[215] Thus, mutual funds' adoption of pass-

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[209] Jennifer Rudden, Share of households owning mutual funds in the U.S. 1980-2019, STATISTICA, May 7, 2020 https://www.statista.com/statistics/246224/mutual-funds-owned-by-american-households/ (last visited July 20, 2020).

[210] Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Securities Act Release No. 8188, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. pts. 239, 249, 270, 274) ("An investment adviser voting proxies on behalf of a fund, therefore, must do so in a manner consistent with the best interests of the fund and its shareholders.").

[211] Larry Fink, 2017 Letter to CEOs (Jan. 27, 2017), https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter ("As a fiduciary, I write on [our investors'] behalf to advocate governance practices that BlackRock believes will maximize long-term value creation for their investments.").

[212] Caleb Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 MD. L. REV. 954 (2020) (proposing general, annually updated voting instructions from investors); Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 893 (2009) ("[T]he real owners of publicly traded institutions should have the right to forgo profit in the short or long term in the interest of other principles. Giving the true investors a voice on shareholder resolutions, governance, or otherwise is a step in that direction."). Lynn Stout and Sergio Gramitto propose creation of a Universal Fund Portfolio with shares owned by the public and voted on the shareholders' behalf by proxy advisors chosen by shareholder vote. Lynn Stout & Servio Gramitto, *Corporate Governance and Privately-Ordered Public Policy: A Proposal,* 41 SEATTLE UNIV. L. REV. 551 (2018).

[213] Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 238 (2018) (suggesting that funds use survey sampling to determine their investors' preferences).

[214] Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 893 (2009) ("Then, when we look to these underlying investors, they say overwhelmingly (in their capacities as citizens, neighbors, people of faith, and so on) that they do not want to support genocide, or environmental damage, or poor labor standards."); Toby A. Cox, *How Corporate Social Responsibility Influences Buying Decisions*, Clutch (Jan. 7, 2019), https://clutch.co/pr-firms/resources/how-corporate-social-responsibility-influences-buying-decisions (survey of 420 consumers finding that "fewer people (44%) say price is among the most important attributes of a company compared to environmentally-friendly business practices (71%), social responsibility (68%), and giving back to the local community (68%)."); *Corporate Social Responsibility: Reputation and Consumers – Part 2*, Reason Digital (Jan. 13, 2017), https://reasondigital.com/blog/corporate-social-responsibility-and-the-consumer/ ("96% of [500] survey participants agreed that it is important for companies to have good social and environmental policies.").

[215] For example, three fund managers, BlackRock, Vanguard, and State Street, alone own more than twenty percent of the shares of S&P 500 companies. Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019).

through voting might alone repurpose public corporations.

Even after mutual funds adopted pass-through voting, corporate voting procedures might remain a significant problem. Corporate law does not allow shareholders to make corporate policy. Instead, it gives the authority to manage corporations to the boards of directors.[216] Shareholders have the right to elect the directors, but not to require the directors to pursue a pro-CSR agenda.[217]

The work-around for that problem is for the mutual fund to announce what it wants the directors to do and then vote against the reelection of any director who does not do it. The largest funds already use this work-around.[218] Votes against reelection do not directly remove directors from office, but as a practical matter, corporations find it easier to do the shareholders' bidding than to go to war with them.[219] War could result in a proxy fight that *would* remove the directors from office. In essence, pass-through voting would simultaneously threaten directors in virtually all large, public corporations with removal from office if they failed to implement mutual fund investors' CSR preferences.

Completion of the ESG information system and the adoption of pass-through voting would align the legal power of directors with the market power of the Potential Stakeholders. Both would favor CSR reporting and improvement.

Imposition of the same CSR obligations on huge numbers of corporations would be both the strength and weakness of the reform. Imposition would assure the corporations a level playing field. Those spending money on CSR would not be at a cost disadvantage, because their competitors would be forced to incur the same costs.

Some scholars argue that a mutual fund's imposition of the same CSR obligations on all corporations in which the mutual fund invests would constitute an antitrust violation.[220] Mutual funds are an example of "horizontal shareholding"—ownership of the shares of corporations that are supposed to compete with one another. Horizontal shareholding has

[216] DGCL §141(a) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."); Model Bus. Corp. Act §8.01 ("[T]he business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of the board of directors.").

[217] *See, e.g.*, CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008) ("[I]t is well established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation . . . .").

[218] *See, e.g.*, *supra* notes 89-91 and accompanying text.

[219] *See* LOPUCKI & VERSTEIN, *supra* note 32, at 244-46 (explaining the use of shareholder resolutions as a work around).

[220] *E.g.*, Einer Elhauge, *Essay, Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1316-17 (2016) (concluding that institutional investors' horizontal holdings violate current antitrust law); i*d.* at 1268 ("[T]he problem of horizontal shareholding is pervasive across our economy because institutional investors like BlackRock, Vanguard, Fidelity, and State Street now own around 80% of all stock in S&P 500 corporations.").

antitrust implications because some research purports to show that it leads to less competition and higher prices in product markets.[221] But the empirical showing is disputed,[222] the legal arguments speculative, and the function of mutual funds so important[223] that the antitrust argument is not a serious threat to mutual funds or to pass-through voting.[224] The antitrust theme does, however, provide a rhetorical counter to the pass-through voting proposal.

E. Stewardship Codes

Stewardship codes are laws or voluntary sets of principles that guide and legitimize activist shareholder participation in corporate governance. They "reflect the view that engagement by institutional investors is an integral part of any corporate governance system."[225] The codes are relevant here because some of them expressly endorse CSR reporting.[226] All the codes provide additional paths and justifications for mutual fund advocacy of CSR reporting.

F. Suing to Compel SASB Reporting

Paul Rissman and Diana Kearney argue persuasively that promulgation of the SASB standards legally obligates the largest institutional investors to require the corporations whose stock they hold to report to those standards.[227] Their argument is that the fund managers, "including six of the 10 largest asset managers globally" participated in drafting the SASB standards.[228] By doing so, the fund managers accepted SASB's premise that SASB

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[221] Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026, 2032 (2018) ("A growing empirical body of evidence suggests that horizontal shareholding has led to higher prices in product markets.").

[222] Thomas A. Lambert & Michael E. Sykuta, *The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms*, 13 VA. L. & BUS. REV. 237-48 (2019) (challenging the findings of the underlying research).

[223] Mutual funds hold 24% of U.S. corporate equity. Statistica, Share of mrket securities held by mutual funds in the United States in 2019, by security type. https://www.statista.com/statistics/255547/percentage-of-total-market-securities-held-by-investment-companies/.

[224] Douglas H. Ginsburg, *Why Common Ownership Is not an Antitrust Problem*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, Dec. 4, 2018, https://corpgov.law.harvard.edu/2018/12/04/why-common-ownership-is-not-an-antitrust-problem/ (noting that U.S. antitrust enforcers remain unconvinced" and that "the current empirical evidence that common ownership causes anti-competitive harm is limited and hotly disputed") [LML: Original source article requested from library January 7, 2021].

[225] Jennifer G. Hill, *Good Activist/bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506 (2018).

[226] Investor Stewardship Group, The Stewardship Principles https://isgframework.org/stewardship-principles/ (stewardship principles that make no mention of ESG); International Corporate Governance Network, Global Stewardship Principles https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf (last visited July 21, 2020) ("Principle 6: Investors should promote the long-term performance and sustainable success of companies and should integrate material environmental, social and governance (ESG) factors in stewardship activities.").

[227] Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and their Effects on Corporate Social Responsibility*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10155 (2019).

[228] *Id.* at 10156.

was identifying the information legally material to investors.[229] Thus, the fund managers have a fiduciary duty of care to their investors—the holders of the funds' shares—to vote the shares owned by the fund, and otherwise engage with the corporations, to require the corporations to provide that material information through SASB reporting.[230] BlackRock, State Street, and others seem to be doing exactly that.[231] Consistent with this Article's argument, Rissman and Kearney predict that, if their argument prevails in court, "corporations [may] become actual champions of liberty and ecological health."[232]

G. Social Norm Building

Numerous scholars and organizations have stressed the importance of norm building to repurposing corporations.[233] For example, the British Academy sought to change the purpose of the corporation by publishing eight "principles for purposeful business." In essence, the principles recommend a change in the law to require corporations to state their purposes and to impose "high duties of engagement, loyalty and care to public interests where [the corporations] perform important public functions."[234] The remaining six principles are exhortations for the corporations to adopt practices voluntarily.

V. CONCLUSIONS

The ESG information system may be operational in just a few years. A substantial portion of public corporations will then continually report hundreds of measurements of their CSR performances in the same standardized formats. Those performances will be compared, analyzed, rated, and ranked. If SASB standards prevail, the information collected will be tailored solely to the needs of investors. But the information, ratings, and rankings will be available to all Potential Stakeholders, who will use them to determine what corporations they should deal with and on what terms. If GRI standards prevail, the information collected will be tailored to the needs of the other Potential Stakeholders.

Repurposing will depend on Potential Stakeholder buy-in to the idea that they can control corporations and that it is legitimate for them to do so. The likelihood of that buy-in is high, however, because repurposing the corporation is the Potential Stakeholders' best hope for achieving a sustainable, reasonably democratic, and fair society.

Potential Stakeholders' use of ESG information in their decision making will confer ESG Benefit on high-CSR performing corporations. If that ESG Benefit is large enough,

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[229] *Id.* (describing SASB as "an organization conceived explicitly to formulate standards that comply with the U.S. Supreme Court's definition of materiality").

[230] *Id.* ("We argue, however, that by endorsing the materiality of the standards, these specific investors will have created for themselves an extension of their fiduciary duty of care to their customers: an implied duty to ask for, and evaluate, reporting that satisfies the standards.").

[231] *Supra* note 89-90 and accompanying text.

[232] *Id.* at 10187.

[233] Beate Sjåfjell & Mark Taylor *Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose*, 13 INT'L & COMP. CORP. L.J. (forthcoming 2020) ("Law is most effective when it is designed to leverage the regulatory power of other modes of regulation: markets, social norms and architecture.").

[234] British Academy, Principles for Purposeful Business, at 8 (2019) https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business.

more corporations will report to more standards, and corporations will begin repurposing themselves to attract more ESG Benefit. If the prospect of ESG Benefit is not large enough to cause widespread reporting, the government will almost certainly mandate ESG reporting.

The repurposing of the corporation may seem like a magic trick. The creation of an ESG information system converts the shareholder wealth maximizing corporation into its opposite: a generator of social benefit. The illusion results from the failure of corporate law scholars to see that the modern corporation has always been controlled through the market decisions of stakeholders as well as through its formal governance process. The ESG information system will merely improve the functioning, and thus the influence, of those stakeholder markets. Prior stakeholder models of the corporation have missed the existence of these markets by conceptualizing stakeholders as groups that allegorically negotiate based on their financial interests instead of as individuals who make decisions based on their values.[235]

The corporation's failure to deliver the benefits that stakeholders and the public want from the corporation results from the lack of a system that can measure and reward the corporations' CSR performances. Instead, corporations focus on what can be measured: financial performance. They deliver the false appearance of social responsibility, externalize their social costs, and leave it to society to clean up after them.

The ESG information system will measure the externalization of a variety of social costs.[236] Once those externalizations are measured, Potential Stakeholders could shun the externalizers, or government could reimpose the externalized costs on the externalizers.[237] Either course could reduce or eliminate future externalizations.

To serve any of its stakeholders, the corporation must survive, and to survive, it must meet its financial obligations. But aside from that, there are no inherent limitations on the purposes to which the business corporation can be applied. In the aggregate, the Potential Stakeholders control *all* of the resources corporations need to operate. By their market choices, the Potential Stakeholders can make the corporation's purpose whatever they want it to be.

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[235] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999) ("[S]hareholders, managers, employees, and other groups that make firm-specific investments yield control over both those investments and the resulting output to the corporation's internal governing hierarchy.").

[236] William Hubbard, *Communicating Entitlements: Property and the Internet*, 22 YALE L. & POL'Y REV. 401, 417 (2004) ("For a legal regime to impose a price, however, the regime must be able to adequately measure the externalized costs.").

[237] Federal Reserve Bank of San Francisco, *What is the difference between private and social costs, and how do they relate to pollution and production?*, Nov. 2002 ("Society is better off when production and consumption decisions are based on social costs that include external costs, because external costs really do matter in the real world.").