Rise of the Shadow
ESG Regulators:
Investment
Advisers,
Sustainability
Accounting, and
Their Effects on
Corporate Social
Responsibility

by Paul Rissman and Diana Kearney

Paul Rissman is Co-Founder of Rights CoLab, where he researches financial tools for advancing environmental and human rights. Diana Kearney is Legal and Shareholder Advocacy Advisor at Oxfam America, where she specializes in business and human rights law.

Summary

Actions that fall under the catchall of “corporate social responsibility” have been viewed with skepticism. In the United States, part of the blame lies with lax laws and regulations surrounding social and environmental disclosure. Disclosure may soon be vastly improved with finalization of the Sustainability Accounting Standards Board’s financially material social and environmental reporting standards. While the standards are voluntary, the fact that they have been endorsed as “material” by many of the world’s largest investment advisers will transform them into legally actionable standards.

Because federal securities law is grounded in the principle of disclosure, one could deduce from the quotes above that the sustainability practices of business might be better regulated if companies reported about them with greater care. Such strengthening would yield important benefits both for environmental protection and the global cause of human rights. Corporate social responsibility (CSR) acquires even more salience in light of the perceived rollback of human rights protections around the world, setbacks to the environmental movement such as the United States’ rejection of the Paris Agreement on climate, and the weakening of U.S. Environmental Protection Agency (EPA) regulations domestically. CSR is growing in importance, both in terms of public awareness.

Authors’ Note: W’d like to thank commenters on earlier versions of the Article: Donna Conforti, Kenneth Gerstein, Jonas Kron, Sanford Lewis, Mark McDivitt, Edwin Rekosh, and Max, Gabe, and Zach Rissman.

References

4. Here, CSR broadly refers to business initiatives that promote environmental and social well-being. This is typically done through assessing and accounting for a company’s human rights and environmental impacts to ensure that they are operating in a responsible manner; some actors also view this as encapsulating provision of services to communities likely to be impacted by private-sector operations.
and in corporate acknowledgement.9 Business managers are aware of the harms of authoritarianism and climate change,10 and have spoken out and undertaken remedial actions.11 But these actions have been halting and unsatisfactory to many in the fields of human rights and environmental protection; “corporate greed” is a phrase yet alive and well in common parlance,12 and business attempts to rectify social and environmental damage are often dismissed as “greenwashing.”13 This disappointing progress is all the more distressing in light of the aforementioned backsliding by government.

The thesis of this Article, however, is that a measure of pessimism surrounding responsible business practices can soon be ameliorated. We predict that corporations are on the cusp of moving along the spectrum from castigation to approval. This will have nothing to do with a sudden change of heart on the part of a company’s directors and officers. These persons will value what they have always valued: a duty to their investors. Rather, it is the attitude of a critical subset of stockholders and bondholders that has begun to change: the largest professional asset managers.

While more than one cause will foment this change,14 the factor that will seal the shift in stockholder attitude, and in turn push CSR to the forefront of corporate consciousness, is the finalization of a set of material disclosure standards for sustainability topics.15 Nonfinancial sustainability reporting, regarding such business impacts as human rights violations or effects upon climate change, has not been considered universally material. The effort to demonstrate material implications for specific firms has been an ongoing project by certain investors and organizations for several decades, yet U.S. corporate issuers seldom face liability if they neglect to report such impacts to shareholders or the public.

The Sustainability Accounting Standards Board (SASB), however, an organization conceived explicitly to formulate standards that comply with the U.S. Supreme Court’s definition of materiality, can soon be instrumentalized to transform these long-standing tenets of corporate practice. Due to the process of consultation and voting utilized by SASB, there will be a clear record of investors publicly endorsing the “materiality” of a range of human rights, environmental, or related standards that they have helped formulate.

Among the investors that have assisted in crafting the standards are a significant group of investment advisers, including six of the 10 largest asset managers globally.16 Released in November 2018,17 the standards are purely voluntary and exist apart from the reporting compendium that is enforced by the U.S. Securities and Exchange Commission (SEC). 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. Conscientious customers, then, can pressure these asset managers that have publicly supported the materiality of the SASB standards, ensuring that best efforts are made to force disclosure of such human rights and environmental issues.

Finally, the evolving nature of the asset management industry itself provides the catalyst to turn fiduciaries into effective de facto regulators. Small shareholders have largely been replaced by large institutional investors; as the concentration of stock ownership into the hands of a few grows, so too does the power wielded by these large owners. Today, the largest asset managers own staggeringly large amounts of stock on behalf of their clients, spread over thousands of companies around the world.18 Once these investors find themselves compelled to consider material sustainability disclosure, they will demand such disclosure from vast swaths of the global corporate world. We predict that this will set off a virtuous circle of disclosure impacting behavior change.

The Article will proceed as follows: first, we describe the current situation in which corporations have a deepening financial interest in fighting against authoritarianism and climate change. Despite some admirable efforts, however, most companies still have far to go in strengthening their

9. Susan McPherson, 6 CSR Trends to Watch in 2017, FORBES, Jan. 19, 2017 (“In the past decade, we’ve witnessed a stunning transition as corporate social responsibility (CSR) evolved from a nice-to-have to a fundamental strategic priority for businesses large and small.”), https://www.forbes.com/sites/susancmpherson/2017/01/19/6-csr-trends-to-watch-in-2017/#2hcbceb1ab1cc.
10. See infra Part I.
11. Id.
14. See infra Part III.
15. Material disclosure refers to information that shareholders would find important when weighing the decision whether or not to invest or vote on a corporate resolution. For a detailed discussion, see infra Part II.
18. Index fund providers are among the largest asset managers. An index fund is a stock mutual fund or separately managed account that is explicitly designed to hold every stock in a given index, such as the Standard & Poor’s (S&P) 500 or the MSCI All Country World Index (comprising approximately 2,500 constituents around the globe). “Closet indexers,” investment advisers that are so large that by virtue of their size they are forced to own diversified portfolios containing a myriad of holdings, are also among the largest asset managers. See infra note 138.
CSR records. In Part II, we highlight a significant root of this problem, which stems from the principle of investor protection: the Supreme Court has decreed that investors should be shielded from immaterial disclosure, and the SEC has presumed that investors regard nonfinancial environmental, social, and governance (ESG) disclosure as largely immaterial. Taken together, these two factors severely limit the ESG achievements and embarrassments that companies reveal. Because federal securities statutes have essentially surmounted state law as the primary regulatory mechanism for a broad range of corporate ethical behavior, effective regulation is impaired. Indeed, even when companies actively seek to be “good actors,” they can be thwarted by their duties to short-term investors priori-

tors to this end.

These practices. Nongovernmental organizations (NGOs) may use to secure their own rights, while lower-income groups may be un-

19. See infra Part II.

I. Multinational Corporations’ Hesitant Embrace of CSR

In many respects, one would expect that the private sector would be a natural ally for social causes. Corporations typically thrive when the rules under which they operate are transparent and predictable, for example20; they should, therefore, all things being equal, support strengthening the rule of law in their jurisdictions. Corporations also thrive when their access to critical information is unimpeded.21 Thus, they should similarly encourage the free flow of data, including data disseminated by the press. Finally, corpora-

tions thrive when they are able to efficiently allocate capital resources, human and otherwise, across their geographies. That is why corporations oppose boundaries that limit capital flows.

In light of these corporate needs, it is striking that gov-

20. Transparent rules usually benefit businesses, allowing them to make the most efficient investment and operational decisions. See generally Michael Ewing-Chow et al., The Facilitation of Trade by the Rule of Law: The Cases of Singapore and ASECAN, in CONNECTING TO GLOBAL MARKETS 129 (Marion Jansen et al. eds., World Trade Organization 2014) (quantifying the positive impact that stable rule of law has upon trade); James Scott, SEEING LIKE A STATE 1999 (detailing the benefits of operating in a “legible society” that has clear rules); Ibrahim Shihata, The World Bank in a CHANGING WORLD 54-56 (1991) (declaring that a prerequisite for development is that rules must be widely known in advance). This holds particularly true in stable societies.

However, corporations can also benefit financially when the rules under which they operate are transparent and predictable as applied to the compa-

21. See, e.g., NIGEL CORBY, INFORMATION TECHNOLOGY & INNOVATION FOUNDA-

TIONS, CROSS-BORDER DATA FLOWS: WHERE ARE THE BARRIERS, AND WHAT DO THEY COST? (2017) (stating that “data localization and other barriers to data flows impose significant costs”), http://www2.itif.org/2017-cross-

22. Interview by Ari Shapiro, supra note 5.

23. Sean Illing, 20 of America’s Top Political Scientists Gathered to Discuss Our Democracy. They’re Scared., Vox, Oct. 13, 2017 (interviewing the na-


human capital allocation and trade are also acutely evident in our own nation. The United States has dealt a further blow to the ability of firms to plan for the future by rejecting the Paris Agreement, drawing us closer to the precipice of catastrophic climate change, a prospect that could prove devastating to business interests. Corporations are not powerless to resist these trends. Governments appreciate that the corporate sector provides jobs, investment and taxes, and partnerships that enrich local elites. These benefits give corporations a formidable voice in shaping policies that can mutually benefit themselves and society at large. In addition to lobbying for openness and environmental protection, companies can ensure that they themselves are not exacerbating authoritarianism, nationalism, and environmental damage through their own actions. Moreover, businesses can bolster NGOs, the private nonprofits that work to promote human rights and ecological health.

Multinational corporations have spoken out with increasing frequency to oppose the harms of authoritarianism, nationalism, and climate change, and it is instructive to examine some of their efforts to combat regressive social agendas. First, companies have taken a stand on government policies that they perceive as harming their ability to cultivate a strong workforce. In March 2017, for example, Apple, IBM Corporation, Microsoft, and 50 other companies filed an amicus curiae brief in the case of Gloucester County School Board v. G.G. for example, Apple, Google, Intel, and Microsoft, filed an amicus brief in the U.S. Court of Appeals for the Ninth Circuit in Washington v. Trump. The brief opposed the Donald Trump Administration's immigration order temporarily barring nationals from seven countries from entering the United States, arguing that the order “hinders the ability of American companies to attract great talent; increases costs imposed on business; makes it more difficult for American firms to compete in the international marketplace; and gives global enterprises a new, significant incentive to build operations—and hire new employees—outside the United States.” More recently, the chief executive officers (CEOs) of JPMorgan Chase, Pepsi, Apple, and other Fortune 500 companies reflected this concern in a letter to the White House, writing that such harsh immigration policies cause “considerable anxiety” for their employees, discourage talented job candidates from moving to the United States, risk upsetting company operations, and present additional “costs and complications for American businesses.” When corporate profit and social justice causes align, companies have proven themselves willing allies.

Attempts to restrict information flow have also generated comment from business interests. After China passed a 2016 cybersecurity law clamping down on access to uncensored information and slashing privacy protections for Internet users, the private sector responded with concern. The American Chamber of Commerce in China complained:

[S]ome of the requirements for national security reviews and data sharing will unnecessarily weaken security and potentially expose personal information . . . some of the measures seem to emphasize protectionism rather than security. But one thing is for sure: the more difficult it is for data to travel across the Chinese border,

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30. Id. at 1.

31. Id. at 2.


33. Id. at 3.


29. Id. at 2.

the more difficult it will be for companies inside those borders to innovate . . . 36

Censorship can be bad for business.

Along similar lines, businesses have also touted the importance of transparency and an honest appraisal of the costs of climate change when they stood to benefit. Apple’s vice president of environment, policy, and social initiatives, Lisa Jackson, observed:

Certainty is what business needs . . . relying on science is something that we do every single day. So now if we’re going to question science, I think it has an impact on more than just some federal rules, or some law, it has a huge impact on human health, the environment, and our economy.37

An April 2017 letter that 16 influential companies38 delivered to President Trump in support of the Paris Agreement echoed this sentiment, arguing that “[b]y setting clearer long-term objectives, and by improving transparency, the agreement provides greater clarity on policy direction, enabling better long-term planning and investment.”39 Yet again, corporate interests aligned with an initiative designed to benefit society at large.

These examples illustrate that company leaders recognize that supporting the rule of law, the free flow of human capital, and access to reliable information, and, conversely, opposing authoritarianism, nationalism, and catastrophic environmental harm, are critical to the success of their operations. It is then odd that their efforts to pursue these aims are not terribly significant, as judged by a series of human rights and sustainability auditors. The 2017 Corporate Human Rights Benchmark Pilot Study, for example, ranked 98 public companies from the agribusiness, apparel, and extractives industries on 100 publicly disclosed indicators.40 The average company met 29% of the benchmark’s hurdles; only three companies met more than 60% of them.41

Along similar lines, the KnowTheChain initiative ranked 120 apparel, food and beverage, and information technology companies on their attempts to combat forced labor. Of 22 indicators, the average apparel company scored a weighted 46 out of 100, the average food and beverage company scored a 30, and the average information technology company scored a 32.42 The 2018 Ranking Digital Rights Index evaluated 22 technology and telecommunications firms on policies affecting users’ freedom of expression and privacy, with the average company scoring 34%.43 The 2016 Access to Nutrition Index ranked 22 food and beverage companies on their approaches to responsible nutrition and efforts to mitigate undernutrition. A single company scored higher than 6 out of 10.44 The 2016 Access to Medicine Index ranked 20 pharmaceutical companies on efforts to improve access to medicines. Only one company scored higher than 3 out of 5.45 While these auditing groups naturally encourage a high bar in order to be able to measure progress over time, the majority of companies across a variety of industries cannot meet even half the levels of disclosure and human rights standards sought by civil society.

Even when companies are required by law to report on human rights performance, compliance remains imperfect. In 2016, Development International found that 1,300 companies complied with an average of only 60% of the disclosure requirements found in the 2010 California Transparency in Supply Chains Act, while their affirmative conduct score was 31%.46 These failures are not unique to the United States: the CORE Coalition analyzed 2,108 submissions to the United Kingdom (U.K.) Modern Slavery Act of 2015 and found only 14% to be compliant.47

Of course, many of these efforts are new, and companies can be expected to improve their scores as they become more familiar with disclosure demands and begin to understand more effective approaches to addressing these human rights issues. Indeed, companies subject to public ranking have already improved: the Oxfam Behind the Brands Index began in 2013, and a 2016 update highlighted significant progress that the world’s 10 largest food and beverage companies made in their social and environmental practices. Nine of the 10 companies improved their scores by at


38. Signatories included the usual suspects, like Apple, Intel, and Microsoft, as well as more surprising parties from the extractive and energy industries, such as BP, Shell, National Grid, PG&E, BHP Billiton, and Rio Tinto.


least 10% over the three-year period. This good news was not easily achieved; it was partly a response to more than 700,000 individual actions by consumers.

Despite glimmers of hope, these surveys by and large point to the inadequacy of corporate social performance relative to NGO expectations, at least insofar as the ability to transform the corporate human rights footprint as rapidly as we may hope to see. We posit that one significant reason that businesses, and specifically U.S. public companies, have unsatisfactorily embraced socially responsible behaviors is the fact that under U.S. securities law, they are considered to be immaterial, leading to ineffective regulation of social and environmental externalities.

II. Promoting the Shareholder’s “Best Interest”: Disclosure and Materiality

A. Disclosure of Material Information as the North Star of U.S. Securities Law

Securities law regulates corporate conduct via requirements that a company disclose information about its operations to the investing public, under the assumption that forced disclosure would decrease the likelihood that a company will behave in unethical ways. This principle is grounded in Justice Louis Brandeis’ famous doctrine that “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Indeed, disclosure has long been the primary lever for the U.S. government to influence corporate ethics.

The legislative debate leading up to the creation of the 1934 Securities Exchange Act underscores this focus, framing the doctrine in this way: “There cannot be honest marketing without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.” The U.S. House of Representatives Committee Report chronicling the Act’s passage reveals congressional intent to instrumentize disclosure not only to check illicit corporate behavior, but to prevent even those practices that were “legal but unseemly.” A corporation exhibiting itself to shareholders was perceived as “the antidote not only to outright fraud, but also to problems of corporate ethics, such as corporate insiders’ failing to appreciate their public responsibilities.”

The Supreme Court continued to embrace this rationale in more modern times, observing that “[t]his Court ‘repeatedly has described the “fundamental purpose” of the [1934] Act as implementing a “philosophy of full disclosure.””

Managements try not to disclose information to the public that would be looked upon unfavorably by their stakeholders. Disclosure can make bad behavior an expensive prospect: potential investors, lenders, or insurers might be frightened away; customers could boycott; politicians could endeavor to pass unfavorable laws; and attorneys could create legal headaches. This holds true not only for information that would embarrass a company in absolute terms (e.g., X Corp’s sneakers are produced in sweatshops), but particularly when that embarrassment is high relative to other companies in the same industry (e.g., X Corp’s sneakers are produced in sweatshops, whereas other apparel companies source their sneakers from factories that pay workers a living wage). When disclosures are required, the natural tendency of management is to try to mitigate unfavorable impressions through promised improvements, for which they can be held accountable.

Disclosure not only forms the bedrock of securities regulation, it has taken on even more importance as a result of what scholars describe as a creeping preemption by the federal securities regime of state-based corporation law. State governments have traditionally served as the primary regulators of corporate behavior. Given that companies incorporate themselves by registering with states, such governance was logical; as the Supreme Court observed in 1987’s “state regulation of corporate governance is regulation of entities whose very existence and attributes are the products of state law.” As such, “no principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations.”

Systemic shocks, however—including the collapse of Enron, WorldCom, and unfolding fraud scandals in corporate governance—spurred a renewed interest in turning to federal regulators to curb corporate excess. With the passage of federal regulations like Sarbanes-Oxley and Dodd-Frank, the U.S. Congress sought to reassert itself as an arbiter of corporate behavior in the place of state corporate law, with an eye toward protecting investors. In sum, “[f]ederal securities law, not state corporate law, plays the most important role in corporate governance in America.

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52. Id. at 1235.
today, primarily because ‘disclosure has become the most important method to regulate corporate managers and disclosure has been predominantly a federal, rather than a state, methodology.’ 65

Because federal law centers on disclosure as the primary lever for influencing corporate ethics, and federal law has surpassed state law in many aspects of corporate governance, the saliency of disclosure is clear.66 Thus has it evolved that the foremost method of controlling corporate ethics in the United States centers on the responsibilities that businesses have in communicating with their investors.

Despite the overarching importance that disclosure has acquired, not all of it is desirable.67 Disclosure can be costly, misleading, uninteresting, or may reveal competitive information. Too much disclosure can even create liability.68 Despite the recognition of the need to tighten what constitutes “material” information, however, the Court’s definition remains ambiguous:

The Supreme Court took up the issue in 1976’s TSC Industries v. Northway.69 In rejecting an earlier formulation of the materiality test as “all facts which a reasonable shareholder might consider important,” the majority determined that prior application of the standard had at times been unnecessarily loose. The Court noted:

Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good . . . if the standard of materiality is unnecessarily low . . . management’s fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision-making.67

Part of the Court’s effort, then, was to protect investors from overly dense disclosure.

Despite the recognition of the need to tighten what constitutes “material” information, however, the Court’s definition remains ambiguous:

What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.68

More recent cases have attempted to flesh out some of the details of this definition. The “reasonable investor” is not a dictator who can demand whatever pleases her or him: as the U.S. Court of Appeals for the Second Circuit observes, “a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.”69 Nonetheless, facts that truly have a bearing on an investment or voting decision fit the conception of materiality. Like obscenity, materiality is difficult to define, but “reasonable shareholders” know it when they see it.70 This refusal to specify materiality, except in terms of disclosures that reasonable investors happen to think are relevant to their decisions, is a unique aspect of U.S. securities law71 and a critical distinction for any potential sea change in corporate responsibility trends.

66. Id. at 445.
67. Id. at 448.
68. Id. at 449; see also Basic v. Levinson, 485 U.S. 224, 232 (1988) (“We now expressly adopt the TSC Industries standard of materiality for the §10(b) and Rule 10b-5 context.”); Haliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2413 (2014) (reaffirming this standard of materiality).
The concept of materiality is further complicated by the notion that while the "reasonable investor," whomever it may be, sets the standard for materiality, it is up to corporate management to decide whether each particular fact satisfies the standard, and, as a result, whether to disclose it. In essence, it is the responsibility of management to place itself in the investor's shoes and to ask itself whether the "reasonable investor" would view a fact as material and, therefore, its omission as misleading. If management guesses the wrong way, it may expose the corporation to accusations of fraud. The Supreme Court recognized the quandary that managements might face in this assessment, but concluded that each instance of determination was situation-specific, and that management was the only entity that was capable of making such a choice: “The determination requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him . . .”

The SEC has echoed the Supreme Court’s observation on the ambiguity of “materiality,”74 and has provided additional guidance to issuers of securities as to what items should be considered material.75 For example, the determination of materiality involves “a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”76 In addition, the SEC has suggested that issuers “eliminate” disclosure of any topic “that does not promote understanding of registrants’ financial condition, liquidity and capital resources, changes in financial condition and results of operations.”77 Here, the SEC has gone beyond the Supreme Court in favoring a restricted version of disclosure based solely on financial, short-term considerations of materiality.

Attitudes Toward the Materiality of ESG Disclosure

The law has never disputed that social and environmental factors that “promote understanding of registrants’ financial condition, liquidity and capital resources, changes in financial condition and results of operations” are appropriate topics for disclosure.78 But the SEC has traditionally declined to go farther than this in its approach to any reporting that bears upon corporate ethics.79 While the SEC might argue that there is no need to move beyond a principles-based regime, critics counter that it “does little to encourage either affirmative disclosures or issuer attention to determining whether sustainability issues are economically significant.”80 Many firms voluntarily disclose sustainability information despite the lack of obligation to do so, but it is thought to be of poor quality by investors.81 For these reasons, socially responsible shareholders

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72. In re Lions Gate Entertainment Corp. Sec. Litig., No. 14-cv-5197 (JGK), 2016 WL 297722, at *17 (S.D.N.Y. Jan. 22, 2016) (“[a]n omission is actionable under federal securities laws only when the [defendant] is subject to a duty to disclose the omitted facts.” Even though Rule 10b-5 imposes no duty to disclose all material, nonpublic information, once a party chooses to speak, it has a “duty to be both accurate and complete.” (citations omitted)).
73. TSC Indus., Inc., 426 U.S. at 450.
74. The SEC remarked: “In the articulation of the materiality standards, it was recognized that doubts as to materiality of information would be commonplace, but that, particularly in view of the prophylactic purpose of the securities laws and the fact that disclosure is within management’s control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect.” (citation omitted). Commission Guidance Regarding Disclosure Related to Climate Change, Security Act Release No. 33-9106, 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010). While this statement and the guidance that follows were issued in the context of reporting about the materiality of climate change, they are generalizable to the materiality of any topic. For a specific discussion of the 2010 climate guidance, see infra note 91 and accompanying text.
75. Commission Guidance Regarding Disclosure Related to Climate Change, supra note 74, at 6293.
76. Id. at 6294 (citation omitted).
77. Id.
78. Corporations are required to discuss social and environmental topics that they deem material primarily in three fora: First, issuers must disclose whether they are in compliance with certain statutes, such as the mine safety rules of §1503 of Dodd-Frank. Second, all U.S. issuers are required to “describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations” in the “[m]anagement’s discussion and analysis of financial condition and results of operations” as part of their annual filings. 17 C.F.R. §229.303(e) (3)(ii). Registrants may disclose material social and environmental impacts here, as well as under the “Description of Business” and “Legal Proceedings” headings of their annual filing.
79. An exception to this statement is the SEC’s Staff assertion that “[a]mong the considerations that may well render material a quantitatively small [otherwise immaterial] misstatement of a financial statement item are . . . whether the misstatement involves concealment of an unlawful transaction.” SEC Staff Accounting Bulletin: No. 99—Materiality (1999), available at https://www.sec.gov/info/account/sab99.htm. The assertion is grounded in the question of whether small examples of illegal behavior, such as commercial bribes, cause the reasonable investor to doubt the integrity of management.
and their supporters have on several occasions requested the SEC to compile mandatory ESG disclosure standards.

The SEC has periodically examined what kinds of environmental and social information ought to be mandatedly disclosed. Following the first social shareholder proposals submitted to Dow Chemical in 1968 (relating to the sale of napalm)82 and General Motors in 1970 (requesting investigations into the company’s policies regarding pollution, safety, mass transit, and minority hiring)83; and in response to a 1971 rulemaking petition by the Natural Resources Defense Council,84 in 1975, the SEC undertook a consideration of environmental and social reporting matters.85 This was followed by a 1977 congressional advisory committee report on corporate disclosure.86 The SEC concluded in 1975 that mandatory reporting of these topics would be burdensome for issuers and of little interest to investors.87

The SEC’s findings were endorsed by the subsequent advisory committee, which recommended the SEC “require disclosure of matters of social and environmental significance only when the information in question is material to informed investment or corporate suffrage decision-making.”88 The advisory committee also “expressed the view that the Commission should classify social and environmental information as material ‘only when it reflects significantly on the economic and financial performance of the company.’”89 In other words, absent a clear impact on financial performance, social and environmental damage is not worth the trouble of reporting.

This attitude has persisted. The aforementioned explication of the nuances of materiality90 was derived from an SEC guidance document produced in response to a series of rulemaking petitions, filed from 2007 to 2009, that bemoaned the adequacy of climate change disclosure.91 The SEC advised that material impacts stemming from climate change could flow to financial statements through legislation and regulation, international accords (e.g., the Kyoto Protocol), indirect consequences of regulation or business trends, and physical impacts. The intent of the document was to clarify disclosure under existing rules, however.

In doing so, the SEC did not satisfy the degree of detail requested by petitioners.92 In 2016, the SEC published a concept release to “seek public comment on modernizing certain business and financial disclosure requirements.”93 In asking for the public’s opinion about ESG reporting, the SEC noted that “[t]he current statutory framework for adopting disclosure requirements remains generally consistent with the framework that the Commission considered in 1975.”94

Views regarding ESG disclosure have been shifting for some time. In 2016, the SEC observed that the “role of sustainability and public policy information in investors’ voting and investment decisions may be evolving as some investors are increasingly engaging on certain ESG matters.”95 Despite this acknowledgment, nonfinancial disclosure requirements would be extremely voluminous, subject to comparisons of different companies, which is of great importance to investors since investment decisions essentially involve a choice between competing investment alternatives . . . Moreover, there appears to be virtually no direct investor interest in voluminous information of this type.

87. As the SEC explains: The proposed disclosures would be extremely voluminous, subjective and costly to all concerned. They also would not lend themselves to comparisons of different companies, which is of great importance to investors since investment decisions essentially involve a choice between competing investment alternatives . . . Moreover, there appears to be virtually no direct investor interest in voluminous information of this type. 40 Fed. Reg. 51662 (Nov. 6, 1975).
88. Advisory Committee on Corporate Disclosure, supra note 86, at D-21.
90. See supra notes 74-77 and accompanying text.
94. Id. at 210.
95. Id. The SEC may one day consider this an undersatedment in light of the comments received in response to the concept release: Of the 272 original [comment] letters [responding to the concept release], 66% discussed sustainability disclosures. This is pretty remarkable, considering that only 3.2% of the Concept Release (11 of 341 pages) discussed sustainability disclosure . . . Of the 149 public comment letters that discussed sustainability, more than half were from investors and investor groups with an aggregate AUM of over $168T. 85% of sustainability-related letters call for improved disclosure of sustainability factors in SEC filings. Jean Rogers, Investors Ask SEC for Better Sustainability Disclosure, SASB, Aug. 17, 2016, available at https://www.linkedin.com/pulse/investors-ask-sec-better-sustainability-disclosure-jean-rogers.
ESG disclosure has generally not been considered to be a mandatory need; given the gloss by the Supreme Court and the costs of accurate and complete disclosure, firms are often affirmatively discouraged from shining a cleansing light on social and environmental externalities. Under existing federal securities disclosure rules, business is currently free to overlook social and environmental issues that it might otherwise feel responsible to correct.

The foregoing discussion begs an important question: despite a statutory lack of interest, if company management feels strongly about responsible behavior and actually wish to embrace a long-term, sustainable outlook; treat their employees well and ensure that their suppliers do the same; shift their business operations to emphasize renewable resources; and engage in positive fashion with their communities, what is holding them back? Theoretically, nothing. While corporate law traditionally emphasizes the sole responsibility of officers and directors to serve any other interests... and that “managers and directors have a legal duty to put shareholders’ interests above all others and [have] no legal authority to serve any other interests...”


renders any prohibition against serving other stakeholders fairly meaningless.99

Nor is there strong evidence that behaving in a responsible fashion undermines financial performance or even shareholder profits; on the contrary, the majority of studies find a (limited) positive relationship between improved CSR performance and a company’s financial returns.100 Concepts such as “shared value” are now widely understood.101 Why, then, aren’t more businesses “doing well by doing good” to a greater extent than we currently find them to be?

Once again, a significant factor concerns the relationship between a corporation and its investors. The term “activist investor” may be confusing—an “activist investor” is not related to an “active investor,” nor to an activist generally—but has become familiar to company management and boards of directors. Activist investors are typically hedge funds that accumulate a large enough stake in a public company that they are able to attempt to change the membership of the board, or alter the strategic direction of the company in some other fashion, such that an anticipated improvement in financial performance can repay the investment.102

Activist investors tend to target companies affected by a lagging stock price, and when successful, portray themselves as champions of the shareholder. Their impact is such that in the words of one industry participant, “No recent development has influenced firms’ strategic and financial decision-making as profoundly as the surge in shareholder activism following the global financial crisis.”103 Indeed, nearly 760 public companies globally were recipients of campaigns in 2016104, household names General Electric105

99. As Forest Reinhardt et al. explain: A Delaware court... ruled that the business judgment rule protected the 1989 decision by Occidental Petroleum to spend $120 million, slightly less than half of the company’s yearly net profit, on an art museum named after its 91 year-old CEO, Armand Hammer... So, are firms in the United States prohibited from sacrificing profits in the public interest? And if so, is the prohibition enforceable? The answers to these two questions appear to be ‘maybe’ and ‘no,” respectively.


103. Id. at 1.


and Procter & Gamble106 capitulated to such campaign demands in 2017.

Among the many targets of activist investors have been corporations that consider themselves to be long-term, sustainable, and responsible in outlook. Unfortunately, two of the highest-profile of these corporations, Whole Foods Market and Etsy, have been forced to remove directors or officers in response to activist campaigns in the recent past. Any company management planning to burnish its sustainability reputation must carefully consider the implications of these examples:

John Mackey, co-founder and current CEO of Whole Foods Market, literally wrote the book on CSR with the publication of Conscious Capitalism in 2013.107 Whole Foods’ core values include supporting team member happiness, serving local and global communities, advancing environmental stewardship, creating ongoing win-win partnerships for suppliers, and promoting customer health through nutritional education.108 Unfortunately, the company posted declining sales for the seven quarters ending in April 2017.

This prompted activist investor JANA Partners, a group that perceived itself as a champion of shareholders’ rights, to accumulate an 8% position in the company, which it leveraged to replace the chairman and add five independent directors to the board. This led to a drastic shift in purchasing practices, as “the company jettisoned its unique purchasing model that wove together a network of autonomous regional production hubs of small farmers and mom-and-pop food startups. It’s now prioritizing a centralized, bulk-buying strategy that looks a lot like, well, Walmart.”109 Prioritizing community well-being and partnership with local farmers, a respectable but more costly business model, was buried in favor of profit maximization.

Online craft marketplace Etsy had been a certified B Corporation, a designation assigned by a nonprofit organiza110 that “measures companies on the treatment of their workers, the benefit they provide to the community and the environment, and their overall governance and transparency.”111 According to one Bloomberg account, the company features “an elegant Brooklyn headquarters with Manhattan views, art installations, and a ‘breathing room,’ along with salaries and benefits common at much, much more profitable tech companies.”112

Activist investor black-and-white Capital, after accumulating a 2% position in the company, complained publicly about Etsy’s high costs and lower-than-peer growth rate.113 Its pressure resulted in the removal of the chairman and CEO Chad Dickerson and a layoff of 8% of its workforce.114 Etsy has since allowed its B Corporation status to lapse.115 Noting that Etsy was one of only two B Corporations traded on a major public exchange, Bloomberg explained that “[p]ublic-market B Corps are rare because investors hate them.”116

Investors that grow weary of what they perceive to be costly forms of socially responsible engagement can sabotage a company’s efforts to embrace those principles in their operations. Management’s rising fear of activist investors tracks the rising frequency of such campaigns.117 Bloomberg reported that 65 public companies cited “shareholder activism” as a risk factor in their SEC filings in the first six months of 2017; this number increased from 52 in the same period of 2016, 23 in 2015, and 12


110. B Lab, The B Corp Declaration of Interdependence (“We envision a global economy that uses business as a force for good. This economy is comprised of a new type of corporation—the B Corporation—which [sic] is purpose-driven and creates benefit for all stakeholders, not just shareholders.”), https://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration (last visited Dec. 5, 2018).


114. Chaflkin & Cao, supra note 112.

115. David Gelles, “We envision a global economy that uses business as a force for good. This economy is comprised of a new type of corporation—the B Corporation—which [sic] is purpose-driven and creates benefit for all stakeholders, not just shareholders.”


117. Of more than 2,200 certiﬁed B Corporations, only one appears to be currently traded on major U.S. exchanges. See, e.g., B Lab, B Corp Directory (providing a search engine for B Corps), https://www.bcorporation.net/community/find-a-b-corp (last visited Dec. 5, 2018).
The foregoing discussion suggests that much of the disappointment in corporate social and environmental progress can be laid at the door of the investor. The Supreme Court restricts disclosure through its materiality test in the name of investor protection, and the SEC has historically determined that there is insufficient investor interest in nonfinancial social and environmental issues to compel firms to report on them. Given the increasing reliance upon the federal securities statutes in the general field of corporate law, government is unable to sufficiently regulate the social and environmental behavior of business. In addition, profit-maximizing activists have sent powerful signals to managements, forcing high-profile companies that exemplified the long-term advantages of sustainability efforts to place more emphasis on short-term returns.

The desire of both government and the private sector to pursue what they presume to be investors’ financial interests has greatly hobbled the CSR movement. But a problem that has been (at least indirectly) caused by investors can be solved by investors.

III. Overcoming the Anti-ESG Biases: Potential Solutions and Their Shortcomings

Prevailing attitudes about investors’ needs are driving the corporate sector’s failure to meet the expectations of the human rights and environmental communities. However, the recent explosive growth of the responsible investing movement begs the question of whether change may come as a result of shifting shareholder attitudes. “Responsible investing” can encompass many things, such as the avoidance of bad actors in a portfolio, the provision of capital to firms making a positive social or environmental impact, or working with existing holdings to help improve their behavior.

One illustration of the increasing popularity of these methods is the expansion of financial entities endorsing the United Nations Principles for Responsible Investment (UN PRI). The six principles, drafted by a group of institutional investors, intergovernmental organizations, and civil society representatives, were launched in April 2006. The voluntary principles encompass doctrines such as incorporating ESG issues into investment analysis and decisionmaking; seeking appropriate disclosure of ESG issues; and reporting on these efforts. Upon launch, 63 funds and fund companies representing $6.5 trillion under management had signed onto the principles; by 2018, the principles had been endorsed by 1,905 signatories managing more than $89 trillion in assets.

This underscores that it is difficult, if not impossible, to continue to claim that investors as a group are only interested in short-term financial optimization to the exclusion of longer-term, nonfinancial ESG concerns. It is therefore reasonable to believe that notions of corporate obligation to CSR are evolving alongside investor attitudes, and that regulators and management will be responsive to this new investor paradigm, causing the CSR problem to resolve itself. But within both the regulatory regime of the United States and the workings of the asset management industry lie obstacles that may prevent rapid and widespread behavior change in the absence of a further catalyst. These will be considered in turn.

A. Potential Changes by the SEC

The most direct way to remediate the lack of corporate ESG regulation is, of course, to regulate. As mentioned above, the SEC issued a 2016 concept release regarding the modernization of disclosure requirements. The response by commenters was striking:

Of the 227 original [comment] letters [responding to the concept release], 66% discussed sustainability disclosures. This is pretty remarkable, considering that only 3.2% of the Concept Release (11 of 341 pages) discussed sustainability disclosure. [cite to data on 7.1% of comments discussed sustainability]. Of the 149 public comment letters that discussed sustainability, more than half were from investors and investor groups with an aggregate AUM of over $168T. 85% of sustainability-related letters call for improved disclosure of sustainability factors in SEC filings.

Given that one of the most cogent arguments the SEC cited in 1975 in pronouncing upon the materiality of ESG reporting was that there was little investor interest, a sig-

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119. Id.
120. Here, we echo Prof. Ian Lee: [cite to corporate law discussion].
121. UN PRI, About the PRI, https://www.unpri.org/about (last visited Dec. 5, 2018).
122. Id.
123. Id.
125. AUM refers to “assets under management.”
126. Rogers, supra note 95.
127. Williams explains: The SEC and the Court of Appeals were on firmer analytic ground when they concluded that there was not enough investor interest in
significant obstacle in any undertaking of mandatory disclosure has been kicked aside.

A timely rule proposal by the SEC would be welcomed, but one has cause to be skeptical for several reasons. First, the Trump Administration is virulently antiregulatory, implementing far fewer rules in its first year than did those of previous presidents. There is reason to believe that this fervor extends to the SEC; in a statement regarding the nomination of SEC Chair Jay Clayton, President Trump pledged to “undo many regulations which have stifled investment in American businesses.” Clayton himself acknowledged that he favored scaling back regulations during his U.S. Senate confirmation hearing. Finally, Clayton’s failure to mention social or environmental reporting as a priority during a March 8, 2018, speech to the SEC Investor Advisory Committee does not bode well for the potential passage of new rules.

Moreover, there may be significant opposition from business interests regarding ESG disclosure. Organizations such as the American Bankers Association, American Chemistry Council, American Petroleum Institute, U.S. Chamber of Commerce, National Association of Manufacturers, Business Roundtable, and the National Investor Relations Institute submitted comment letters to the SEC, expressing concerns that (1) the disclosure burden for corporations is already high; (2) broad-brush disclosure rules for industries as diverse as coal and educational services would cause a significant portion of reporting to be rendered irrelevant for investors; and (3) the current principles-based disclosure regime, in which information must be reported if its omission would cause other statements to be materially misleading, works well and does not need mandatory line item enhancements.

While the SEC must consider investors’ heightened interest in ESG as a factor in deciding whether this type of disclosure should be made mandatory, it must consider other factors as well: Congress in the 1933 Securities Act mandated that the SEC consider not only investor protection, but also the promotion of efficiency, competition, and capital formation when engaged in a public interest rulemaking. This means that even acknowledgement of ESG disclosure as important to the investor does not even—

While the SEC’s definitions of materiality refer only to the significance of information to a reasonable investor, in fact the SEC considers a broader range of issues in determining what is “material,” including the costs to issuers and society in making more information available, and the net benefits to society from expanded disclosure.

There is no guarantee that the SEC would place investor interest above costs to issuers in requiring mandatory ESG disclosure.

Finally, even if the SEC did decide to undertake a rulemaking procedure, there could be no certainty as to timing or outcome. It is best not to rely on the SEC and its disclosure regime to drive any improvement in CSR.

B. Allow the Capital Markets to Work Their Magic Through the Increased Clout of Responsible Investors

As the power of activist investors illustrates, shareholders can have profound influence over corporate behavior if so inclined. But they need not wage war in order to influence management. They can profoundly affect corporate behavior through letters, meetings, and other forms of communicating gentle persuasion (“engagement”), and by submitting resolutions and voting at every public corporation’s annual general meeting. As the “reasonable investor” grows ever more interested in the long-term financial benefits of sustainable business practices, it is possible that shareholders will impose their own discipline on corporate behavior. This potential solution is considered next.

While it was once true that investors could only confront unacceptable management behavior with virtually

128. SEC, Rulemaking, How It Works (“When approved by the Commission, a rule proposal is published for public notice and comment for a specified period of time, typically between 30 and 60 days. A rule proposal typically contains the text of the proposed new or amended rule along with a discussion of the issue or problem the proposal is designed to address. The public’s input on the proposal is considered as a final rule is drafted.”), https://www.sec.gov/fast-answers/answersrulemakinghtm.html (last modified Apr. 6, 2011).


134. 15 U.S.C. §77b(b) (“Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”).

135. Williams, supra note 51, at 1264.
one tactic—namely, washing their hands of the issue and selling their stock—changes in the structure of shareholding have closed off this option for many. One reason for this is the growth of index funds, which own companies solely by virtue of their inclusion in an index such as the Standard & Poor’s (S&P) 500. These funds cannot remove companies from their portfolios unless such issues are removed from the index altogether. Stock index funds have rapidly assumed a significant portion of all equity assets; in the case of mutual funds, the proportion that is indexed grew from 10% in 2001 to 25% in 2016. Even for investors that are free to buy and sell based on their expectations for financial returns (“active” as opposed to “activist” investors), the largest among them tend to act as “quasi-indexers,” “closet indexers,” or “index huggers.”

Government actions in the early 1990s opened other avenues for investors to influence firms, however. In 1992, the SEC reformed the shareholder voting process (the “proxy” system) to remove onerous and costly provisions that prevented investors from communicating to the public and each other about voting. This caused one observer to remark, “[O]n October 15, 1992, the SEC approved a package of reforms that . . . significantly relaxed proxy filing requirements for shareholders. As a result . . . future corporate change will be effectuated largely through the proxy system: a battle of words among shareholders, management, and dissidents.”

In 1994, the U.S. Department of Labor (DOL) reinforced the viability of using proxy voting as an avenue for shareholders to influence management by emphasizing to pension plan sponsors covered by the Employment Retirement Income Security Act (ERISA) that voting their shares was a fiduciary duty, this rendered such proxy voting an actual obligation. Further, DOL stated:

Active monitoring and communication [in other words, engagement] with corporate management is consistent with a fiduciary’s obligations under ERISA where the responsible fiduciary concludes that there is a reasonable chance that such activities . . . are likely to enhance the value of the plan’s involvement, after taking into account the costs involved.

In this way, voting and engagement became the tools of necessity in any attempt to influence managerial behavior.

The early 2000s presented shareholders with the opportunity to use these tools: the pop of the dot-com bubble in 2000 and the 2001/2002 scandals at Enron, WorldCom, and Tyco seemingly were catalysts for investors to begin to exercise their muscle, focusing on the “G” in ESG. Shareholders have been strikingly successful since then in breaking down the insular practices of management and strengthening their own voices. The litany of victories includes, first and most importantly, the widespread adoption of majority-voting schemes for board directors, a move that has bolstered shareholder influence: corporate bylaws or policies can specify board ratification either with a plurality of votes, or by a majority of the shareholder votes cast. Prior to 2004, virtually all directors were elected under the plurality system. Directors nominated by management generally run unopposed. Unopposed candidates in a plurality regime can be elected with even a single “yes” vote, since they have received at least one more vote than their nonexistent opponent, foreclosing an important route to express dissatisfaction with corporate behavior.

Shareholders revolted against the perceived lack of fairness via a wave of resolutions calling for majority voting regimes, and as of 2018, approximately 90% of companies in the S&P 500 and 70% of those in the S&P 600 small companies index specified majority voting schemes. Under the majority system, new nominees that receive more “withhold support” and “abstain” votes than “yes” votes cannot be seated on the board; if they are incum-
bents, in most cases, they must offer to resign.149 Among 100 of the largest public U.S. companies in 2015, 80 have policies forcing incumbent directors to tender their resignations under such circumstances, while a further five state that unapproved directors must leave the board within 90 days of the vote.150

Some scholars have raised the issue that because boards are free to either accept or reject tendered resignations depending upon a variety of factors—including the business judgment rule—there is no actual bite to the sanction.151 Further, instances of directors failing to win majority support are rare152 (there are, however, documented cases of directors being forced off boards,153 as well as changes in corporate behavior, even when resignation offers are rejected).154 In any case, directors will always find reputational damage distasteful. Given the power this wields, majority voting makes exercise of the shareholder franchise to withhold support the “nuclear option” when investors wish to emphasize their displeasure with a board of directors.

Second, increased shareholder power is evident as annual board elections increasingly replace “classified” or “staggered” boards. Under staggered board rules, not every director stands for election each year, making it difficult for shareholders to make wholesale board changes. A 1998 study of more than 2,400 U.S. companies found a 53% incidence of staggering.155 The situation as of 2015 is that approximately 90% of S&P 500 companies, and 55% of the companies in the Russell 2000 small companies index, hold elections for all of their directors annually.156 Thus, today, unhappy shareholders can threaten to make sweeping changes in corporate leadership in ways previously unavailable to them.

Third, the separation of the chair of the board and CEO positions is thought to impart a greater degree of accountability to the board,157 as a board with dual power centers would be less likely to act in autocratic fashion, especially if the chair is independent. Among S&P 500 companies in 2005, 29% had separated the CEO and chair positions, and 9% had a chair who was unaffiliated with company management. In 2017, the figures had climbed to 51% and 28%, respectively.158

Finally, shareholders have assumed more power through proxy access, a concept that refers to the ability of a group of long-term, large-scale shareholders (who typically have owned at least 3% of a firm’s shares for at least three years) to place a minority of their own director nominees on the company’s ballot.159 This practice eliminates the need for the challenger shareholder group to conduct its own costly communication campaign. Virtually nonexistent among firms as late as 2010, by 2017, proxy access rules were incorporated into 60% of the S&P 500.160

In each of these cases, investors successfully broke down the walls around management and enhanced their own power vis-à-vis officers and directors. It is difficult to determine if these victories were the result of behind-the-scenes engagement, since engagements are private affairs where the substance of conversations goes unreported. But it is easier to gauge the impact of resolutions filed by shareholders, whether or not they come to a vote or are withdrawn in a settlement.161 For example, shareholder proposals seeking the appointment of an independent board chair were filed with only two companies in 2000, but rose steadily to be filed with 62 companies in 2014. Ernst & Young opines:

Shareholder proposals seeking the appointment of an independent board chair, as well as company-investor engagement on this topic, are drivers of change in board

149. This is assuming that a quorum has been reached.
151. Choi et al., supra note 145, at notes 15-16.
152. The third-party proxy processing firm Broadridge Financial Solutions reports that among their 4,000-plus U.S. clients, the rate of directors failing to receive majority support has recently ranged from 1.5%-2%. The information can be found in a series of publications. See, e.g., Broadridge & PwC Governance Insights Center, ProxyPulse, https://www.broadridge.com/proxypulse/all-reports (last visited Dec. 6, 2018).
153. In Kimberly Gladman et al.’s study, between 2009 and 2012, one-half of the incumbents who failed to gain majority approval at majority voting companies left the board, although the sample was very small. Kimberly Gladman et al., IRRC Institute & GMI Ratings, The Election of Corporate Directors: What Happens When Shareowners Withhold a Majority of Voters From Director Nominees 2 (2012), available at http://files.cctcdn.com/2014xe85b001/bd76ce3o-916c-4ee2-a61f-86b4a6f4-d33f2.pdf.
154. Jay Cai et al., A Paper Tiger? An Empirical Analysis of Majority Voting, 21 J. Corp. Fin. 119, 133 (2013). It is important to note that the proportion of “no” votes that can force a director to leave a board has diminished in the era of activist investing: “W[e] find that director turnover starts happening as soon as directors are getting 30% dissent votes . . . . Just twenty/thirty percent dissent votes can start making a difference.” SEC, Unofficial Transcript of Proxy Voting Roundtable 9 (Feb. 19, 2015), https://www.sec.gov/spotlight/proxy-voting-roundtable/proxy-voting-roundtable-transcript.txt; see also id. at 102 (“You didn’t have Say on Pay ten years ago, you didn’t have to vote no campaigns ten years ago and twenty to thirty is the new fifty”).
160. Id.
161. Most corporate resolutions are slated by management. Shareholders are allowed to put forth their own proposals under certain conditions. While shareholder resolutions are nonbinding, it has become more common for a board of directors to implement one that has received majority support. Ertimur et al., supra note 143, at 1. The influential proxy advisory firm Institutional Shareholder Services recommends withholding support for one or more directors when management is deemed insufficiently responsive to a prior shareholder vote. In 2018, the number of directors who received a negative recommendation on this basis increased nearly fourfold over the prior year, and the average director received only 64% approval. See Sullivan & Cromwell LLP, supra note 147, at 3. Cf. supra note 154.
leadership structures. The increase in independent board chair shareholder proposals from 2000 to 2013 mirrors the significant increase in the appointment of independent board leaders over the same time period.162

Board declassification (destaggering) proposals coming from shareholders have, on average, received majority support every year that they have been filed since 2004, and resolutions advocating majority voting for directors have, on average, been approved every year since 2007.163 The 89 proxy access resolutions filed in 2015 and the 86 resolutions filed in 2016 received an average of 52% approval both years, helping to cause the stunning adoption of the rule at most of the large companies in America.164 This has prompted shareholders to engage and vote, winning battle after battle to enhance their influence over governance. Will analogous power now be applied to environmental and social issues? This question is harder to answer given that a significant governmental impediment—guidance that discouraged pension plans from considering public policy issues in their investing, engagement, and voting, discussed below—has only recently been removed. There is reason to believe, however, that the current equivocal body of evidence will not be resolved in favor of strong shareholder motivation and pressure, without the additional leverage provided by the SASB standards.

Although environmental and social shareholder resolutions have been filed regularly since the 1970s,166 they have rarely received significant vote totals. The Proxy Monitor Annual Report on Corporate Governance and Shareholder Activism of 2016 frames the issue:

In 2016, five shareholder proposals relating to environmental issues received the support of at least 40% of shareholders, compared with only two total in all of 2006-15. Although a political-spending-related shareholder proposal won majority support in 2016, and although the percentage of shareholders supporting certain environment-related shareholder proposals has increased, most shareholders continue to vote against these proposals. Since 2006, shareholders at Fortune 250 companies have voted on 445 board-opposed shareholder proposals relating to corporate political spending or lobbying and 439 board-opposed shareholder proposals relating to environmental policy. Only one of those 884 shareholder proposals has received majority shareholder support. Thus, increasing activity on the part of certain shareholders pursuing social and policy agendas should not be confused with broad shareholder support for these activists’ pet issues.167

One should be careful in adopting such a pessimistic view, however. The above analysis oversimplifies the shareholder resolution process in omitting a significant alternative outcome: the withdrawal of the resolution upon agreement with the filer.168 Though scholars have lamented the poor quality of data concerning withdrawals,169 the NGO Ceres has compiled a partial database of environmental and social shareholder resolutions, including withdrawals, dating back to 2009.170 Among 1,241 environmental and social shareholder proposals in the database spanning the years 2009-2017, the greatest number, 244, advocate for publishing a sustainability report.

164. Id.
165. There is controversy as to whether insular management are actually good or bad for shareholder returns. Proponents of insular boards argue that they create consistency and predictability in board decisions, and that “relatable, like-minded and known entities [are] the most logical strategy to build a board. After all, the purpose of the board [is] to support the chief executive officer’s (CEO) plan and assure the shareholders that the experienced, intelligent people [are] looking out for their interests.” Russell Reynolds Associates, Different Is Better: Why Diversity Matters in the Boardroom, http://www.russellreynolds.com/insights/thought-leadership/different-is-better-why-diversity-matters-in-the-boardroom (last visited Dec. 6, 2018). There is some evidence supporting this theory: for example, one study found that Massachusetts companies forced to adopt a staggered board experienced an increase in firm value over the next 15 years. Robert Daines et al., Can Staggered Boards Improve Value? Evidence From the Massachusetts Natural Experiment 4 (John M. Olin Program in Law and Economics, Stanford Law School, Working Paper No. 498, 2017), available at https://ssrn.com/abstract=2836463.

Detractors counter that insular boards can create situations in which entrenched members may behave in ways that may be the best for themselves personally, but that are not in the best interest of the shareholder. These critics can point to studies that reveal greater board independence correlates with improved decisions regarding executive compensation and the timing of stock option grants, and lowers the incidence of fraud. Lucian A. Behchuk & Michael S. Weisbach, The State of Corporate Governance Research 7-8 (National Bureau of Economic Research, Working Paper No. 15537, 2009), available at http://www.nber.org/papers/w15537.pdf. The validity of each argument is beyond the scope of the Article. Rather, the important observation is that because shareholders generally believe insular management are unhealthy, they try to ensure a greater degree of diversity and independence. See Behchuk et al., supra note 155, at 890 (“the more common view has been that . . . boards’ decisions to remain independent . . . generally benefit shareholders”).
166. See supra Section II.B.
168. Once a resolution is filed, the target has several alternative responses besides placing it on the proxy ballot for a vote. It may desire to omit the resolution from the ballot and request a “no action” letter from the SEC regarding the matter. SEC Division of Corporation Finance, Shareholder Proposals: Staff Legal Bulletin No. 141 (CF) (Nov. 1, 2017), https://www.sec.gov/interp/l/legal/cflb14i.htm. Alternatively, it may choose to negotiate with the filer in the hopes that it will satisfy the filer’s concerns such that the resolution is withdrawn before it comes up for a vote. Robert Boylan et al., An Analysis of Omitted Shareholder Proposals, J. Fin. & Accnt. (draft), https://www.cabri.com/manuscripts/141834.pdf; Ertimur et al., supra note 143.
169. Ertimur et al., supra note 143, at note 7.
Forty-five percent of these proposals were withdrawn by the filer following an engagement with management that produced a commitment to publish, and therefore never came to a vote.

Shareholder pressure has been a contributing factor to the almost ubiquitous production of sustainability reports among large public companies in the United States.171 The Ceres database is self-reported and therefore subject to methodological limitations, but it indicates that shareholder influence upon corporate environmental and social behavior has made significant improvements in disclosure practices by some companies, while failing to produce marketwide, consistent disclosure of ESG data.

The issue of shareholder influence over CSR behavior is further muddied in light of DOL’s negative guidance on environmental and social engagement and proxy voting from 2008 until 2016. When DOL issued its 1994 opinion establishing engagement and voting as consistent with the duties of an ERISA fiduciary, in a companion bulletin, it discussed what it called “economically targeted investments,” or public policy “investments selected for the economic benefits they create apart from their investment return to the employee benefit plan.”172 While reminding fiduciaries that they were prohibited from “subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives,”173 DOL advised that these were acceptable holdings as long as they exhibited a similar risk and return pattern to alternatives.

In 2008, however, DOL changed its guidance regarding economically targeted investments. It stipulated that these could only be pursued after a qualitative and quantitative analysis concluded that the risk-return patterns were “truly equal” to alternative investments.174 Moreover, it stated that “[v]otes shall only be cast in accordance with a plan’s economic interests . . . objectives, considerations, and economic effects unrelated to the plan’s economic interests cannot be considered.”175 This bulletin caused practitioners to counsel their clients to avoid any attempt to further public policy objectives through the proxy voting process.176 It was not until 2015 that ERISA guidance was relaxed to treat economically targeted investments as they had originally been in 1994,177 and not until late 2016 before DOL permitted fiduciaries to engage with management and vote proxies based on the long-term effects of public policy issues upon portfolio value.178

Because DOL’s stricter language was rescinded only at the end of 2016, the spring 2017 annual general meeting season was the first since 2008 in which ERISA fiduciaries, and public pension plans that look to ERISA for fiduciary guidance, could freely exercise their concerns around long-term environmental and social portfolio impacts.179 This brave new world yielded encouraging signs, discussed below. While it is possible that a new era has dawned, certain structural aspects of the asset management industry indicate that shareholder pressure will improve the corporate CSR situation, but not as broadly and as quickly as desired. These impediments to the rise of the shadow regulators will be discussed next.

171. KPMG INTERNATIONAL, supra note 81, at 11. Unfortunately, investors and civil society groups frequently perceive such sustainability reports to be of very low quality. See infra note 278 and accompanying text; supra note 81. Other types of resolutions have yielded a lower withdrawal rate. The second most common class of resolution, to adopt a greenhouse gas reduction target, was withdrawn with a commitment 27% of the time; resolutions that ask management to report on lobbying, or to provide an analysis of how a two-degree temperature change could impact operations, were withdrawn after a successful engagement in 10% or less of all cases (with regard to the two-degree resolutions, environmentalists generally argue that a rise in global temperatures above two degrees Celsius from preindustrial levels will induce catastrophic climate change; investors fear that this will prompt widespread taxation of carbon emitters or other forms of onerous regulation).

172. 29 C.F.R. §2509.94-1.

173. Id.

174. Id. §2509.08-1.

175. Id. §2509.08-2(1).

176. SEFYARTH SHAW LLP, MANAGEMENT ALERT: DEPARTMENT OF LABOR ISSUES ADDITIONAL GUIDANCE ON INVESTING BENEFIT PLAN ASSETS (2008) (“The DOL strongly states that a plan fiduciary risks violating ERISA’s exclusive purpose rule if it exercises its fiduciary authority in an attempt to further legislative, regulatory or public policy issues through the proxy process. Use of pension plan assets to further policy or political issues through proxy resolutions that have no connection to enhancing economic value of the investment violate the prudence and the exclusive purpose requirements.”), http://www.sefyarth.com/dir_docs/news_item/9e12e4e-94c4-45bd-82b0-9eda299f775_documentupload.pdf.

177. DOL Issues New ERISA Interpretive Bulletin Regarding Economically Targeted Investments and Proxy Voting, PAUL HASTINGS, Oct. 2008 (“[F]iduciaries should be particularly fastidious about conducting and documenting . . . the proposed course of action on purely economic grounds prior to adopting or taking action that is motivated in part by social or shareholder activist considerations.”), available at https://www.paulhastings.com/docs/default-source/PDFS/1058.pdf. In any case, the result of the guidance was confusion. BRIAN TOMLINSON ET AL., FIDUCIARY DUTY IN THE 21ST CENTURY—U.S. ROADMAP 12 (“The Shareholder Rights Bulletin has had the effect of raising doubts as to the circumstances in which ERISA fiduciaries are able to engage with investee companies and vote proxies.”), https://www.genfound.org/media/1388/fiduciary-duty-in-the-21st-century-us-roadmap-1.pdf.


179. ERISA is the law only for private pension plans, but as referred to supra note 141, is often modeled by state and local pension plans. Mutual funds, regulated by the Investment Advisers Act and the Investment Company Act, need not comply. Nevertheless, many asset managers have chosen to centralize the proxy voting function across all of their various funds, and it is easier to distill voting to the lowest common denominator. In addition, there have long existed studies that link ESG performance to enhanced equity value; these studies can be cherry picked to support a contention that voting for public policy resolutions would reasonably be expected to economically benefit plan participants. If fiduciaries felt strongly enough about the virtues of environmental and social responsibility, they could have acted, even in the period between 2008 and 2016.
IV. The Sustainability Interests of the “Universal Owner”

A. The Increasing Influence of Large Investment Advisers Over the U.S. Stock Market

The aforementioned index and closet index funds, rather than individuals, are the typical shareholders of today. The proportion of U.S. public equities controlled by institutional investors has risen from less than 10% in 1950 to 70% currently. Further, the asset management industry has become highly concentrated. For example, among mutual fund and exchange-traded fund (ETF) providers, which represented 31% of total U.S. equity in 2015, the percentage of assets held by the 10 largest fund families grew from 44% in 2000 to 56% in 2015. For the five largest, the percentage grew from 32% in 2000 to 45% in 2015. This trend toward increased concentration of ownership shares in the hands of a few—and, in turn, the increased authority that these owners can exercise over business—shows no signs of stopping.

The combination of the growth of institutional investing with the increasing concentration of the asset management industry means that the leading asset management firms are enormous. The scale of large managers’ ownership of the stock market can be framed in this way: the total equity capitalization of the world’s public companies was $79.2 trillion at the end of 2017, while the equity assets managed by the 10 largest investment advisers totaled $14.2 trillion, accounting for 18% of the global stock market. Concentrated ownership is even higher among U.S. companies, where it has been estimated that the three largest asset managers (BlackRock, Vanguard, and State Street Global Advisors (SSGA)) control on average almost 18% of the stock of nearly 1,700 corporations. This outsized ownership positions large asset managers to exert inordinate influence over the corporations they own—including what disclosures are deemed “material,” as will be explained below.

Large institutional investors have a completely different set of incentives than a smaller shareholder. This stems from their nearly ubiquitous ownership stakes: not only do they own the shares of XYZ Company, they also own shares of XYZ’s competitors, customers, and suppliers. Because large asset managers are accurately characterized as having a stake in the entire economy, they are known as “universal owners” (this phenomenon may also be referred to as “investor capitalism,” “horizontal shareholding,” or “agency capitalism”).

Universal ownership was originally thought to be a great boon to CSR. As one conference concluded:

Because universal owners own cross-sections of the economy, they inevitably find that some of their holdings are forced to bear the cost of other sectors’ or firms’ externalities. This creates an incentive for universal owners to minimize negative externalities and maximize positive ones across portfolio holdings. Typically, the cost of negative externalities significantly exceeds the cost of their mitigation, resulting in a “dead weight loss” to universal owners if corrective action is not taken.

Adding to the optimism surrounding the role of universal owners in promoting CSR is the fact that many of them are signatories to the UN PRI signaling their acquiescence to the CSR philosophy. Of the five largest global equity managers, BlackRock signed the principles in 2008, Vanguard in 2014, SSGA in 2012, Capital Group in 2010, and Fidelity in 2017. Universal owners therefore are not only incentivized to prevent externalities across the economy; in addition, the most salient of them have publicly committed to promoting sustainable behavior among their vast holdings.

Moreover, universal owners have a business imperative to make social responsibility an explicit and significant aspect of their brand. Here, we refer to the “$30 trillion” problem. This figure estimates the magnitude of the wealth transfer from baby boomers to millennials and members of Generation X over the next 30 years. This transfer is...
fraught with danger for asset managers; a 2015 survey of advisers found that children fire their parents’ wealth managers upon inheritance 66% of the time.196

As asset managers try to preserve what they currently oversee and jockey for an extra share of the money that will change hands, the shifting preferences of those newly coming into wealth loom large. Surveys indicate that millennials and women—two groups that will inherit much of this wealth—place higher value on social responsibility in their investment considerations than their boomer male counterparts who currently control the lion’s share of U.S. assets.200 This means that asset managers will likewise begin to prioritize these same ESG considerations to attract clients.

A universal owner that chooses social responsibility to differentiate itself from the competition may be realizing that some of the more established points that traditionally generate competitive distinction—the quality of a product or cost, for example—no longer apply to the extent they once did. Universal owners, by virtue of their extensive holdings, exhibit high degrees of overlap in their portfolios with other major asset managers. It is therefore difficult to distinguish themselves from competitors based on what managers own, and, by extension, relative investment performance.198 The similarity of performance among managers also helps drive compression in asset management fees throughout the industry,209 diminishing the ability to use pricing as a competitive advantage.200 Marketing socially responsible bona fides would be one of the few ways for prescient universal owners to build loyalty with the future beneficiaries of the $30 trillion transfer.

B. Dissecting the CSR Effort Lag

Despite these factors that suggest that universal owners should be leading the way in pressing for more corporate social and environmental responsibility, the evidence for this is not at all obvious. For example, universal owners rarely, if ever, file shareholder resolutions, even for governance issues.201 Even more confounding, perhaps, is the tendency of universal owners to vote against environmental and social shareholder resolutions filed by others.202 Perhaps, universal owners make up for these shortfalls in their engagement activities, but as these are private communications, it is impossible to know. At any rate, given that sustainability disclosure is still considered to be minimally compliant, the engagement that has taken place has yet to yield satisfactory results.203

Hypotheses for this seeming indifference to promoting responsible environmental and social behavior focus on structural impediments within the asset management industry. One suggestion is that some asset managers may not want to develop a reputation for voting against company recommendations because they seek business from corporate pension funds.204 In a second scenario, CSR advocacy efforts are stymied by the uneven distribution of (concentrated) costs and (dispersed) benefits among shareholders.205 For example, among active funds, which seek to outperform indices, success relative to other firms wins customers, rather than absolute performance. Engagement is expensive.206


197. See supra note 170. Universal owners will vote on these resolutions, but will not file themselves for fear of antagonizing managers (see infra notes 207-09 and accompanying text). These actors have developed a symbiotic relationship with universal owners: they serve a purpose that the behemoth asset managers rely upon, but cannot perform it in their own right. Filers have essentially developed their own cottage industry, composed of a handful of large pension funds (New York State, New York City, California Teachers), a shareholder advocacy nonprofit (As You Sow), small asset managers (Calvert Funds, Trillium Asset Management, Walden Asset Management, Zevin Asset Management, and a few others), and a collection of church funds. These actors are occasionally joined by various labor unions and a gaggle of individuals.

198. The three pension funds, the four cited asset managers, As You Sow, and the various religious groups generally account for two-thirds to three-quarters of all E&S resolutions filed in any given year, according to the Ceres database. Ceres, supra note 170. Universal owners will vote on these resolutions, but will not file themselves for fear of antagonizing managing agents (see infra notes 207-09 and accompanying text). These actors have developed a symbiotic relationship with universal owners: they serve a purpose that the behemoth asset managers rely upon, but cannot perform it themselves. Incidentally, this pattern did not change during the 2017 and 2018 filing seasons.

200. See supra note 81 (describing the drawbacks of sustainability reports and other ESG disclosure).

201. James R. Copeland & Margaret M. O’Keefe, Proxy Monitor 2017: Season Review, Proxy Monitor, Fall 2007, fig. 3, http://www.proxymonitor.org/Forms/prm_15.aspx; COPLAND & O’KEEFE, supra note 167, fig. 5. The filing of environmental and social shareholder resolutions is a fascinating topic in its own right. Filer have essentially developed their own cottage industry, composed of a handful of large pension funds (New York State, New York City, California Teachers), a shareholder advocacy nonprofit (As You Sow), small asset managers (Calvert Funds, Trillium Asset Management, Walden Asset Management, Zevin Asset Management, and a few others), and a collection of church funds. These actors are occasionally joined by various labor unions and a gaggle of individuals.

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204. Gerald F. Davis & E. Han Kim, Business Ties and Proxy Voting by Mutual Funds, 85 J. Fin. Econ. 552 (2007).

205. See supra note 170. Universal owners will vote on these resolutions, but will not file themselves for fear of antagonizing managing agents (see infra notes 207-09 and accompanying text). These actors have developed a symbiotic relationship with universal owners: they serve a purpose that the behemoth asset managers rely upon, but cannot perform it themselves. Incidentally, this pattern did not change during the 2017 and 2018 filing seasons.

206. Gideon & Gordon, supra note 191.

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Since a number of universal owners likely own stakes in any given company that they would target for CSR practices, any improvement in company performance, and hence potential improvement in stock price, accrues to both the asset manager and its competitors. Any universal owner that engages in this way bears all of the costs of the engagement but is forced to share the benefits, providing little, if any, incentive to promote ESG issues. In the case of index funds, the only goal for the manager is to reduce costs. In this instance, there is absolutely no incentive for a fund to spend money on engagement.

A third explanation rests on the idea that asset managers value communication with officers and directors of their holdings, and fear that the quality of that communication could be impaired if boards are put off by a perceived adversarial relationship. As one scholar notes, “Companies reward the large and loyal investor with privileged access; they punish the critical or inaccurate analyst with the cold shoulder.”207 BlackRock is explicit about the goal of good relations hindering a more aggressive engagement approach: “We do not engage in filing shareholder resolutions either directly or on behalf of clients. As a long-term investor, we are patient and persistent in working with our portfolio companies to build trust and develop mutual understanding.”208 As a portfolio manager for a large public pension fund recently remarked, when asked the institutional view as to the value of shareholder proposals, “[W]e do sometimes submit shareholder proposals to companies, [but] we always like to send a letter and engage with the company first. I mean, our goal isn’t to get our name in the proxy, we don’t think that serves anyone.”209

The management team of a universal owner that is uneasy about the $30 trillion problem but remains concerned with corporate pension asset gathering, the potentially wasted costs of engagement, and the preservation of good relations with its portfolio companies faces a dilemma. One solution would be to trumpet its commitment to CSR (e.g., by joining UN PRI) while avoiding any real action on the issue. This is exactly what the Seattle City Employees’ Retirement System (SCERS) alleged against BlackRock.

The tale is instructive: BlackRock, as mentioned, became a signatory to the UN PRI in 2008. Since that time, the firm has spoken about its willingness to defend for Incorporating ESG Considerations Into Corporate Interactions 1 (2017), https://www.ceres.org/sites/default/files/reports/2017-03/21stCentury%20Engagement%20-%20Investor%20%20Strategies.pdf.

210. BlackRock, Global Corporate Governance and Engagement Principles 7 (2014), available at https://www.sec.gov/Archives/edgar/data/1181249/000119312515334876/d21155dex9cprgov.htm. A 2016 report to the UN PRI adopted a slightly different gloss: “[W]e prefer to engage with boards and management on environmental and social factors, as matters of operational efficiency and risk management. . . . We will vote against management when we judge that direct engagement has failed.” UN PRI, supra note 208.


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with their policies and public pronouncements and limited transparency on investment stewardship activities.”

The pension fund’s investment consultants, Mercer and NEPC, supported SCERS in its actions. Consulting firms advise a wide range of pension clients on investment policy and the hiring and firing of asset managers, ensuring that this controversy could potentially infect the thinking of other pension funds. Following a dialogue with the filers, BlackRock promised to improve its focus on ESG when engaging with companies, and the resolution was withdrawn.219 Soon after, BlackRock disclosed on its website that climate risk would be a priority in its conversations with management and boards.220

BlackRock’s new attitude was displayed when, on May 12, 2017, it voted for a shareholder resolution calling for the Occidental Petroleum Corp.’s board to produce “an assessment of long-term portfolio impacts of plausible scenarios that address climate change. . . . The assessment . . . should explain how capital planning and business strategies incorporate analyses of the short- and long-term financial risks of a lower carbon economy.”221 The resolution, cosponsored by a group of pension funds and asset managers, received 65.7% approval,222 and marked the first time a proposal of this type had been passed over a board’s objections. BlackRock, owner of 7.8% of the shares, issued a statement that, “‘[w]hen we do not see progress despite ongoing engagement, or companies are insufficiently responsive to our efforts to protect the long-term economic interests of our clients, we will not hesitate to exercise our right to vote.”223 As Bloomberg noted, “This year’s vote marks the first time BlackRock has supported a climate-change related shareholder proposal, according to spokesman Ed Sweeney.”224

BlackRock’s behavior is consistent with a hypothesis that some universal owners will advertise their concern for CSR, but will not act on it meaningfully unless forced by the threat of monetary loss or adverse publicity. This pressure again surfaced when BlackRock also voted for a similar resolution at ExxonMobil,225 which passed with 62% of the vote,226 and additionally voted against one director at Occidental Petroleum and two directors at Exxon.227 Though BlackRock has not quieted all of the skeptics,228 its practices marked a significant shift in willingness to influence business into advancing CSR.

This transformative approach to climate-related shareholder resolutions caused 2017 to become a watershed year for environmental proposals. A third resolution, similarly worded to those of ExxonMobil and Occidental, passed at the electric utility PPL Corp., and other proposals received 40% vote levels or higher at six energy and utility companies.229 It must also be mentioned, though, that 41 of the 50 environmental resolutions tracked by Proxy Monitor (a universe of the 250 largest U.S. companies by revenue) received less than 40% support, more than four-fifths of those submitted.230 Among other universal owners, Vanguard, another Walden target, supported two resolutions

230. Proxy Monitor, supra note 222.
(ExxonMobil and Occidental); State Street supported 33 of the 90 proposals tracked by Ceres231; Fidelity 15 of 90; and Capital Group 10 of 90. Of the “big five” universal owners, four of them supported environmental resolutions for the first time.232

In general, however, social proposals did not fare well in 2017: 23 proposals tracked by Fund Votes referring to non-discrimination and equal employment received an average approval level of 16%.233 Fourteen resolutions on the Holy Land Principles234 garnered on average 4% support.235 Nine proposals regarding various human rights issues achieved an average approval level of 9%.236

 CSR initiatives also extended beyond shareholder resolution advocacy, and likewise illustrate the bipolar nature of large asset managers’ approaches toward important ESG issues. Take SSGA’s stance on gender, for example, the most significant 2017 action a major asset manager took to advance the “S” in ESG. In March of that year, in honor of International Women’s Day, the firm issued guidance to its portfolio holdings in the United States, the U.K., and Australia—totaling more than 3,500 companies—pressing for increased board gender diversity.237 The asset manager isolated approximately 470 companies with all-male boards, and sent letters in an attempt to engage over the issue. Ultimately, 42 boards made commitments to enhance diversity, and SSGA withheld votes for a director on a governance or nominating committee at 400 businesses that ignored the issue.

The $30 trillion problem may have figured into this campaign; also in March, SSGA sponsored the famous Fearless Girl statue that appeared on Wall Street opposite the Charging Bull.238 One controversy generated by the statue concerned an embedded plaque touting the firm’s SSGA Gender Diversity ETF, traded under the ticker symbol “SHE.”239 Fearless Girl was, in fact, an advertisement. This marketing campaign was ultimately undermined, however, when SSGA reached a $5 million settlement with DOL in September 2018.

SSGA’s actions exhibit a calculated inconsistency with regard to its approach to CSR issues.242

Despite the uneven progress, if one is accustomed to seeing glasses as half-full, the events of late 2016 and 2017 present themselves in a very positive fashion. Following the restatement of ERISA fiduciary guidance, environmental shareholder proposals received an unprecedented level of support, generating a certain amount of behavioral change.243 Directorial voting was used as a broad cudgel to support a social issue for the first time as well. Precedent for shareholders leading change can be observed in the truly startling transformation of board governance. Optimists may therefore be prompted to allow the capital markets to take their natural course, content to watch the evolution of CSR as a reflection of the ongoing progress of society.

In this regard, 2018 could have made an interesting test case: Have the floodgates of shareholder power over sustainable corporate behavior truly opened? Or has the tension that universal owners feel between appearing responsible and minimizing engagement expense while remaining on good terms with their portfolio companies led to only incremental advancement? The evidence suggests the latter. Various analyses of 2018 environmental and social proxy voting patterns differ in their choice of universe244 and categorization245 of resolutions, but agree that shareholder support has increased only somewhat. For example, one study found that five environmental resolutions passed in 2018 compared to three in 2017, while average support for these resolutions grew to 31% from 29% one year earlier.246 In light of support levels of 24% in 2016 and 18% in 2015, there is no evidence of a 2018 acceleration in shareholder support.247 The same analysis found


242. To SSGAs credit, the firm has targeted more than 1,200 companies worldwide as of September 2018, of which more than 300 added a female director. Press Release, State Street Corporation, State Street Global Advisors Reports Fearless Girl’s Impact: More Than 300 Companies Have Added Female Directors (Sept. 27, 2018), https://www.busineswire.com/news/home/20180927005518/en/State-Street-Global-Advisors-Reports-Fearless-Girls.

243. Id.; see generally supra note 229.

244. “Universe” refers to the group of stocks that were reviewed—S&P 500, Russell 3000, and so forth.

245. “Categorization” refers to the resolution’s topic, such as board diversity, which is sometimes classified as a social issue, other times a governance issue, and so on.

246. SULLIVAN & CROMWELL LLP, supra note 147, at 7.

that human rights resolutions have stalled at support levels of 79%-90% over the past four years.248

The one discontinuity that characterized 2018 surrounded the negotiated withdrawals of resolutions, which increased significantly.249 Estimates of environmental and social resolutions withdrawn range from one-third250 to nearly one-half.251 While this has been portrayed as a shareholder victory,252 one should view negotiated withdrawals with caution.253 These cases of “private ordering” (the sharing of regulatory authority with private actors) are rarely disclosed, obliquely framed if they are, and difficult to enforce.254 At least some of the 2018 climate settlements did not achieve shareholders’ ultimate goals. 255 Indeed, negotiated withdrawals are currently recommended as a strategic tool by corporate legal advisors.256 It seems that shareholder engagement will continue to make steady, but slow, improvement as a tool for creating greater corporate responsibility in the absence of a faster catalyst.257


249. As Meaghan Kilroy reports: 63% of 27 sustainability proposals were withdrawn or not in proxy/not presented this year, while that happened for 50% of 38 greenhouse gas emissions proposals. Last season, the figures were 50% of 24 sustainability proposals and 48% of 31 greenhouse gas proposals. ...76% of 29 board diversity proposals were withdrawn or not in proxy/not presented this year, while that was the case in 68% of 25 gender/race/ethnicity pay gap proposals. Last year, the figures were 70% of 34 board diversity proposals and 38% of 21 pay gap proposals. Meaghan Kilroy, Environmental, Social Issues Big in Proxy Season, PENSIONS & INVESTMENTS, July 9, 2018, https://www.pionline.com/article/18007099/ PRINT/180709989/environmental-social-issues-big-in-proxy-season.


251. EY CENTER FOR BOARD MATTERS, supra note 248, section 3, key board takeaway.

252. SULLIVAN & CROMWELL LLP, supra note 147, at 8.

253. Estimates of these proposals include a number that were withdrawn due to the uncertainties posed by the November 1, 2017, Staff Legal Bulletin No. 141. A number of proponents engaged in tactical withdrawals to avoid adverse decisions on long-standing models of proposals, due to the vagaries of the new staff legal bulletin and changing staff decisionmaking approaches. E-mail from Sanford Lewis, Director, Shareholder Rights Group, to Paul Rissman (Sept. 26, 2018, 2:29 p.m.) (on file with author).


255. This Year’s Quiet Shareholder Season Demonstrates Investor Strength on Climate Action, Responsible-Investor.com, July 12, 2018, https://www.responsible-investor.com/home/article/2018s_quiet_shareholder_season_demonstrates_investor_strength_on_climate_ac/.

256. Investors agree that materiality is a critical factor in their ESG engagement and voting behavior. As BlackRock has stated, “The trigger for engagement on a particular SEE concern is our assessment that there is potential for material economic ramifications for shareholders.”260 In Vanguard’s words, “When evaluating shareholder proposals, we ask questions such as: Does the proposal ask for disclosure of material information? Is there a significant risk of non-compliance if the proposal is not adopted? Is there a reasonable probability that the proposal will lead to financial benefits for shareholders?”259

257. See supra Section IV.B.

258. See supra Section IV.B.

259. V. The Creation of the SASB Principles and Their Effect on Fiduciary Duty

As previously mentioned, the SEC has long stated that non-financial matters, including ESG matters, can be material, but because companies make this determination internally, and there is little guidance from the SEC regarding how such materiality arises, disclosure of these issues is honored in the breach. The preceding discussion of SEC and Supreme Court views of materiality suggest that, unless it can be shown that environmental and social disclosures are items that reasonable shareholders would find important in their decisionmaking, managers should not be held liable in disclosing (or not) these issues. Indeed, management should avoid disclosing them, lest they “bury the shareholders in an avalanche of trivial information.”259

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In contrast to the optimists, those who tend to view the glass as half-empty will be dissatisfied with a pace of corporate social and environmental change seen as too feeble, and shareholder pressure seen as too feeble. They will take account of the structural biases that universal owners face258 that may cause them to pay lip service to CSR while doing what they may feel is the minimum required to stave off public sanction and continue to attract assets. In perceiving that the more things change, the more they stay the same, this group will demand further action to ensure that large investment advisers feel meaningful pressure to take real and extensive actions. For this group we offer the SASB, and its effect on the fiduciary duties of the universal owners who have affiliated with the organization.

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258. See supra Section IV.B.


sure that is material and relevant to the company’s long-term value.”261 SSGA echoes these sentiments, explaining that “[a]s a fiduciary, SSGA considers the financial and economic implications of environmental and social issues first and foremost.”262 Since material disclosure has become the central regulating mechanism for corporate behavior in the United States, would it not be useful to craft a set of sustainability disclosure standards that BlackRock, Vanguard, SSGA, and other investors agree to be material, so that they know exactly what information to press for? This is the raison d’être of the SASB.

Formed in 2011,263 the SASB standards-setting process has been undertaken with the specific goal of advancing what information a reasonable investor considers “material” to his or her decisionmaking.264 In order to create support and ensure the standards reflected industry understandings of materiality, SASB conducted broad consultations with key players between 2012 and 2015, hosting industry working groups (IWGs) to provide market feedback on its standards. Participation in IWGs was balanced among 2,800 professionals with at least five years of industry experience, including approximately one-third corporate experts, one-third investors, and one-third market intermediaries.

“These professionals vetted the evidence and weighed consensus regarding the likely materiality of each topic, with generally a 75 percent approval benchmark for inclusion in the standards.”265 Each topic was rigorously tied to financial impact.266 In eight of 11 sectors, more than 80% of respondents agreed on the likely materiality of all proposed disclosure topics, exceeding the 75% benchmark.267 Nearly 90% of “reasonable investors” agreed that the disclosure topics were likely to constitute material information.268 These encouraging figures hint at broad-based support for the materiality of the standards, a key to their successful implementation.269

After releasing provisional industry-specific ESG disclosure standards, SASB concluded a consultation phase in March 2017,270 and conducted a public comment period until January 2018.271 SASB published the standards in November 2018.272 The standards, which range across 11 sectors and 79 industries,273 encourage companies to disclose information on a variety of topics, including greenhouse gas emissions, water usage, engagement with neighboring communities, security and human rights impacts, indigenous rights, labor relations, and analogous issues.274

The SASB standards will join a bewildering array in the compendium of voluntary sustainability reporting. One source, for example, cites 13 sustainability frameworks, 7 sets of standards, and 9 ratings schemes in use as of 2015.275 The proliferation has led to widespread dissatisfaction with reporting schemes276; corporate officers and directors “can be swamped with questionnaires and surveys from investors, ratings agencies, media outlets, and others regarding their company’s ESG performance,”277 while investors in a recent survey registered only a 21% satisfaction level in the quality of ESG disclosures provided by their portfolio holdings.278 Large corporations have typically settled on the link to financial impact could not be demonstrated for a particular topic, the topic was not included in the standards.


264. SASB, SASB’S Approach to Materiality for the Purpose of Standards Development, Staff Bulletin No. SB002-01102017 (copy on file with authors).


266. Letter from SASB, to Brent J. Fields, Secretary, SEC 15 (July 1, 2016) (Re: Concept Release on Business and Financial Disclosure Required by Regulation 5-K): [Any]topics identified as likely being material have undergone a rigorous analysis of the likelihood and magnitude of its effect on the financial condition or operating performance of a company, or on the entire industry. Direct evidence was sought to establish a link between performance on the sustainability-related factor and financial performance. Actual or potential financial impacts were characterized by their impact on revenue and growth, operating expenses, the cost of capital, and/or the value of assets or liabilities. Where possible, SASB analysts modelled [sic] the range of impact using a typical discounted cash flow analysis to understand possible impacts within a five-year time horizon. If financial materiality and
the Global Reporting Initiative (GRI) framework, with surveys citing up to 80% compliance, but investors seem to be generally displeased with it.

What will SASB add to this brew that will make it superior (in the eyes of investors)? Its exclusive focus on materiality as it benefits the reasonable shareholder. This is best illustrated by contrasting the GRI definition of materiality: “Material Aspects” are those that reflect the organization’s significant economic, environmental and social impacts; or that substantively influence the assessments and decisions of stakeholders. In comparing this definition with the Supreme Court’s attempt to restrict material facts to those that bear on a shareholder’s decision to invest or vote, one can imagine that GRI disclosure may be found overly broad. In 2016, BlackRock reviewed the various disclosure regimes and urged policymakers to understand “the distinction between social, mission or ‘values’ driven goals and investment (‘value’) goals.” For good measure, the firm praised SASB as a “preeminent example of an industry body seeking standardized ESG disclosures that are relevant to business performance.” One of the aforementioned surveys found that investors preferred the SASB to the GRI standards by a factor of 2:1, even though the SASB standards were not yet circulating.

When the standards were released in November 2018, they assumed a unique status: they are material, but they are also voluntary. The SEC has agreed to enforce material standards compiled by other private organizations such as the Financial Accounting Standards Board for financial reporting to investors, and the Public Company Accounting Oversight Board, which oversees accounting professionals who provide independent audit reports for publicly traded companies. SASB itself suggested that, “unlike these other examples where non-governmental rulemaking has been incorporated into the SEC’s rules themselves, we are merely urging that the SEC acknowledge the appropriateness of the SASB standards for use by companies seeking to make more fulsome and complete MD&A [management’s discussion and analysis] and risk factor disclosures.”

We have previously pointed to suggestions that the current stance of the SEC may be more antiregulatory than in the past. Speculating on the implications if the SEC accepts the standards as material, and the liability opportunities that will arise if corporations then omit material facts that are “necessary in order to make the statements made . . . not misleading,” makes one’s head spin. We would think that unless the SEC decides to incorporate SASB’s standards into its own rules, the SEC would acknowledge the appropriateness of the standards in a subtle way, if at all.

How, then, could these standards possibly be effective in shaping corporate behavior? We argue that the “reasonable investors” who have formulated, voted on, and promoted the standards will drive their adoption across corporate America, because it is their fiduciary duty to reasonably attempt to do so.

A. Fiduciary Duty and the SASB Standards

1. Fiduciary Duty and Fiduciary Breach

Fiduciary duties—which generally refer to a service provider’s obligation to handle another’s property with care and loyalty—derive from a variety of legal sources, and vary depending upon the particular service provider in question. The contours of an asset manager’s fiduciary duty to act in the client’s best interest emerge from a web of statutes and common law: the Investment Advisers Act of 1940 regulates the behavior of investment advisers and protects their customers from any deceptive behavior, while subsequent case law from the Supreme Court and lower courts alike affirm that this protection specifically creates fiduciary duties of care and loyalty on investment advisers.

For an asset manager, these obligations mean


290. For example, statutes create the fiduciary duty between partners in corporate partnerships, courtroom proceedings govern the fiduciary duty in administrator-heir interactions, and contracts prescribe the fiduciary duties in a range of contractual relationships. Robert A. Kutcher, Breach of Fiduciary Duties, in Business Torts Litigation 3 (Ann Georgehead et al. eds., American Bar Association 2005), available at https://apps.americanbar.org/abastore/products/books/abstracts/5310354_chap1_abs.pdf.


293. These fiduciary duties also attach to asset owners, in other words trustees technically did not assign asset managers the title “fiduciaries,” but acknowledging that subsequent case law has interpreted it as such).


290. For example, statutes create the fiduciary duty between partners in corporate partnerships, courtroom proceedings govern the fiduciary duty in administrator-heir interactions, and contracts prescribe the fiduciary duties in a range of contractual relationships. Robert A. Kutcher, Breach of Fiduciary Duties, in Business Torts Litigation 3 (Ann Georgehead et al. eds., American Bar Association 2005), available at https://apps.americanbar.org/abastore/products/books/abstracts/5310354_chap1_abs.pdf.


293. These fiduciary duties also attach to asset owners, in other words trustees of both defined benefit and defined contribution pension funds, and other employee benefit plans. In the case of public pension funds, these duties are created by state law; T. Leigh Anenson, Public Pensions and Fiduciary Law: A View From Equity, 50 MICH. J.L. REFORM 251, 258 (2016): All fifty states authorize the assets of public retirement systems to be held in trust. . . . The respective fiduciary duties of designated governing bodies and third parties may arise under state constitutions, statutes, and common law. The obligations imposed on the
that he or she “owes the duty of fidelity to a principal in carrying out the duties with which he or she is charged. Anything less than the highest ethical conduct can result in liability.”

The broad responsibility to abide by the “highest ethical conduct” has been interpreted in a multitude of ways, with more concrete guidance on what constitutes “ethical behavior emerging from the specific facts of the case at hand. Courts have found that fiduciaries can breach this ethical duty through myriad forms of misconduct, including misappropriation of funds, self-dealing, abusing a superior or influential position, or even a generalized failure to act in another’s best interest.” Importantly, such a failure is a breach in equity, meaning that a customer does not have the burden of establishing harm: “Thus, in addition to damages—a remedy in common law—fiduciaries must account for ill-gotten profits even if their entrustors suffered no injury—a remedy in equity.”

A would-be plaintiff has no requirement to establish that but for the asset manager’s failure, he or she would have earned higher returns. All an aggrieved customer has to demonstrate is that the fiduciary failed to act in his or her best interest.

2. The Duty to Investigate

One of the primary fiduciary duties, the duty of care, is represented by the common-law prudent person standard. Implicit in the concept of prudence is the duty to use such facilities or skill than that of a person of ordinary prudence, the trustee has a duty to administer the trust as a prudent person and reasonable care that are at the core of fiduciary law. The fiduciary duty for private pension and employee benefit plans, by contrast, is created by ERISA. ERISA, 29 U.S.C. §1102(a)(1) (“Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.”). Common-law duties of loyalty and care are also imposed upon ERISA plan trustees. See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985) (finding the fiduciary duties that apply to pension plan advisers by virtue of ERISA track those same duties that apply to other fiduciaries under the common law of trusts).

It should be noted that employee benefit plans often display some combination of in-house management of their assets and an outsourced portion to outside investment advisers. Charles McGrath, Public Plans Managing In-House, Pensions & Investments, Oct. 13, 2017, http://www.pionline.com/article/20171013/INTERACTIVE/171019896/public-plans-managing-in-house. Whether assets are managed in-house or are outsourced, the duties of loyalty and care apply.

294. Kucher, supra note 290, at 15.
295. Id. at 11.
296. “Equity” refers to “the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men.” BLACK’S LAW DICTIONARY, https://thelawdictionary.org/equity/ (last visited Dec. 7, 2018). Unlike typical tort claims, which require the plaintiff to show a demonstrable injury, claims in equity have no such requirement.
297. Frankel, supra note 289.
298. As noted by Tamar Frankel and Arthur Laby:

The Restatement (Third) of Trusts §77 (2007) provides: (1) The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. (2) The duty of prudence requires the exercise of reasonable care, skill, and caution. (3) If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill.

As noted by Tamar Frankel and Arthur Laby, The Uniform Prudent Investor Act, adopted by the Uniform Law Commissioners in 1994, outlines a number of duties that trustees have when managing money on behalf of clients. These include rules pertaining to the duty of loyalty, portfolio diversification and risk management, periodic review of investments, and more. Uniform Prudent Investor Act (1994), 7B U.L.A. 16 (Supp. 1995).

303. Id. at 8.
304. Furbush & Cartmell, supra note 300.
306. Furbush & Cartmell, supra note 300.
Consistent with these common law principles, the courts measure section 1104(a)(1)(B)’s “prudence” requirement according to an objective standard, focusing on a fiduciary’s conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.

There is wide agreement in the law that the duty to investigate is an integral component of the duty of care. The staff of the SEC has affirmed that this duty applies to any investment adviser registered under the Investment Advisers Act, stating that an adviser must “make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.” The model legislation for state fiduciary law, the Uniform Prudent Investor Act, discusses “the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment.”

Any investment decision must be undertaken only after investigating a stock’s or bond’s risks and potential future returns. Failure to investigate the financial implications of any particular investment decision can lead to a breach of an asset manager’s fiduciary duty. Importantly, this demands conducting investigations not only before the initial investment decision is made; rather, there is an ongoing duty to monitor the investment, which is a “continuing duty [that] exists separate and apart from the trustee’s duty to exercise prudence in selecting investments at the outset.” This continuing fiduciary duty to investigate extends long after that initial purchase, such that an asset manager must reevaluate a holding’s value whenever a change in circumstances suggests that the investment’s worth may have changed.

reconsider whether to hold, sell, or modify the ownership. Investment advisers have a continuing obligation to investigate even those stocks that they have owned on behalf of clients for decades, not just new shares they consider purchasing.

The ongoing duty to investigate does not mean that fiduciaries are burdened with daily investigations of all of their long-owned holdings, however. The duty to investigate after initial purchase may be triggered by certain “red flags,” or warning signs that would make a reasonably prudent person suspect that something might be amiss. While there is no bright-line rule for what constitutes a red flag, David Furbush and Nathaniel Cartmell explain:

[A]nything that gives rise to a suspicion of misstatement, concealment, misappropriation, negligence, incompetence, violation of rules or policies or other form of irregularity should be investigated. In addition, as a general rule, prudent inquiry should be made into anything that is unexpected or contradictory, or that is accompanied by an explanation that doesn’t make sense, or that appears to lack appropriate documentation.

It bears emphasis that the duty to investigate extends beyond signs of more egregious actions like intentional deception of shareholders; even inadequate documentation of a company’s statements about any material information would trigger a fiduciary’s duty to investigate. Indeed, the staff of the SEC subscribes to this view, having stated that an investment adviser has a duty to “make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.”

But what exactly does “investigation” mean in concrete terms? Broadly speaking, “investigation” refers to uncovering all material facts that can reasonably be expected to impact a stock’s value. While the particular steps of what constitutes an adequate investigation will vary depending upon the context and stock in question, investigations demand more than simply absorbing information issued by management. While that remains one important source of information, “the adviser must [also] verify assertions by the issuer’s management with great care by examining financial statements and additional evidence.” Examining “additional evidence” can refer to analyzing any documents that are likely to influence a holding’s value or stability, such as audit reports.

In cases where key information is missing or unclear, the duty to investigate might require the fiduciary follow up with the company for clarification, or to request additional information on a particular point. However, when the fiduciary encounters troubling issues that raise “concerns about the honesty or integrity of persons to whom responsibility has been delegated, or involving complex legal or accounting issues, it will be advisable to engage independent counsel to conduct the investigation.” Thus, the duty to investigate extends beyond a simple box-ticking activity, in which the asset manager accepts a company’s own statements about its stock without question; rather, the asset manager has an active duty to investigate beyond these statements, and pore over financial statements and any appropriate additional evidence.

This duty does not demand that literally every last imaginable avenue for finding material information has been exhausted. Rather, fiduciary guidelines stemming from common law variously refer to “reasonable effort,” “appropriate consideration,” or “reasonable investigation.” The “prudent-person” standard requires a fiduciary to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use.” As long as the fiduciary can establish that his or her investigative efforts were in line with those of a prudent asset manager faced with an analogous set of facts, he or she would not have to prove that every possible means of uncovering information about the stock’s prospects had been attempted. However, the failure to look beyond a company’s cursory statements about material information, or to reasonably investigate a material matter that has gone undisclosed, may constitute a breach of the fiduciary duty of care, exposing the asset manager’s liability to aggrieved customers.

B. The SASB Standards and Investigation

The implications of an asset manager’s duty to investigate information that could materially affect its decisions about investment and corporate suffrage, and the lack of a requirement to show actual financial harm, loom large. Any time a fiduciary affirms that it believes a certain type of information is material, it legally commits itself to reasonably examine the information that a company issues on those topics, and to press that company for additional information whenever it issues unsatisfactory disclosure about those material topics. Reasonable investigation would include engagement with the company’s officers and directors; and if the engagement did not produce the desired result, withholding support from directors would be the next reasonable and permissible step. This investigation requirement not only holds true for any new pur-

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307. Tibble, 135 S. Ct. at 1828 (“Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones.”); see also id.
308. Furbush & Cartmell, supra note 300, at 2.
310. Frankel & Laby, supra note 298, at 72.
311. Id.
312. Furbush & Cartmell, supra note 300, at 3.
313. Id.
315. 29 C.E.R. §2550.404a-1.
316. SEC, supra note 301, at 21.
318. See supra note 142.
chases, but similarly applies to existing holdings whenever a change in circumstances means that previously immaterial information has suddenly become material.

The adoption of the SASB standards has the potential to create a seismic shift in the type of information that the world’s most powerful asset managers might now be required to investigate. Because industry behemoths like BlackRock, Vanguard, and SSGA have not only embraced but helped to create the SASB standards, which redefine “material” information to encompass social and environmental topics, their belief in the materiality of those ESG standards would be challenging to dispute. All three investment advisers, as well as other sizable asset managers such as Capital Group, Nuveen/TIARA, and the investment management divisions of Goldman Sachs, Morgan Stanley, and Bank of America Merrill Lynch, are members of the SASB Investor Advisory Group (IAG).319 As SASB notes on the IAG web page:

> Investors can play an important role in enhancing disclosure effectiveness by expecting companies to disclose performance on material ESG factors and by participating in the development of disclosure standards...[The IAG] comprises leading asset owners and asset managers who are committed to improving the quality and comparability of sustainability-related disclosure to investors.321

IAG members subscribe to various statements disclosed on its web page, involving participation in ongoing standards development, encouragement of companies to disclose material ESG information, and the belief that SASB’s approach, “which is industry-specific and materiality-focused,” will help provide investors with “decision-useful” information.322 Those asset managers have now committed themselves to upholding the standards. By endorsing the standards, these managers implicitly have (1) affirmed that they view the information called for in the standards to be material; (2) created for themselves a duty to investigate such information; and (3) exposed themselves to the risk of potential liability to aggrieved clients, if those managers have failed adequately to investigate material facts.

And as mentioned above, because such a failure would be a breach in equity, a plaintiff would have no need to prove financial harm; the failure to investigate alone would be enough to establish a fiduciary breach. Moreover, because the adoption of the SASB standards represents a change of circumstances that impacts what type of information is “material,” asset managers could be hauled into court not only for failure to investigate the ESG performance of new acquisitions, but also for failure to investigate ESG performance of any existing holdings.

The SASB standards can, therefore, be viewed as creating a new basis for potential liability that asset managers must now take into account when determining whether they have reasonably pushed for material disclosure, or adequately evaluated and verified the ESG information published in a company’s corporate statements. If it can be shown that an asset manager has accepted the SASB standards as “material,” that manager arguably is now obligated to investigate the social and environmental practices of every company in which client assets are invested, regardless of whether the company is headquartered in the United States or abroad. Anything short of a reasonably prudent investigation could well expose such an asset manager to claims that it has breached its fiduciary duty.323 Given how many socially conscientious investors each of these asset managers is likely to count among its client base—and how that figure stands to rise over the coming years—an asset manager’s failure to investigate holdings to ensure compliance with SASB’s material ESG criteria could land that asset manager in court. For asset managers who have embraced SASB standards,324 ignoring the social and envi-

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319. SASB, supra note 16.
321. SASB, supra note 16 (emphasis added).
322. Id.
323. There is nothing in this argument specific to ESG disclosure in and of itself. If the phases of the moon were some day determined to have a material effect on values of stocks, and an investment adviser acknowledged the materiality of this factor, then the adviser’s fiduciary duty would include the duty to investigate the phases of the moon.
324. There are potential layers of liability connected to SASB involvement. At the pinnacle is BlackRock, whose efforts to promote SASB include not only membership in the IAG, but also public statements endorsing the standards (supra note 284) and even membership on the SASB Standards Board. SASB, Standards Board, https://www.sasb.org/about-the-sasb/the_sasb/ (last visited Dec. 7, 2018). A BlackRock vice president serves as co-chair of SASB and chairs the committee that writes standards for the extractive sector, while serving on the committees that write standards for the infrastructure, financials, and technology/communications sectors. SASB, SASB Board Meeting Agenda 1 (July 11, 2018), https://www.sasb.org/wp-content/uploads/2018/07/SASB-BoardMtg-July-071118-PUBLIC.v2.pdf. The next level would include universal owners such as Vanguard, SSGA, and Capital Group, members of the IAG whose representatives (in Vanguard’s case, the CEO and chairman) have opined about the standards as speakers at SASB Symposia. SASB, Symposium Agenda, http://using.sasb.org/symposium-agenda/ (last visited Dec. 7, 2018). The third layer comprises members of the SASB IAG.
325. The fourth level includes firms such as J.P. Morgan, which are not members of the IAG, but whose employees sit on several of the industry working groups that formulated the standards. In J.P. Morgan’s case, analysts participated in the Services and Transportation Working Groups. SASB, TRANSPORTATION WORKING GROUPS BY INTEREST GROUP (2014), http://www.sasb.org/wp-content/uploads/2014/11/Transportation_Participants_List.pdf. Although SASB cautions that participation in these groups was on an individual basis (SASB, Industry Working Groups Orientation Material, http://www.sasb.org/wp-content/uploads/2014/02/SASB-IWG-Orientation-Materials.pdf), it would be difficult to claim that participation took place without the knowledge and acceptance of the employer. Lastly would be asset managers such as Fidelity, for which the authors could find no official connection. However, if SASB standards become widely accepted as de facto material, there is the potential that even those asset managers that have not yet explicitly endorsed them could be held liable for falling beneath the prudent-person standard of care, should they fail to investigate their holdings for these ESG standards. All fiduciaries must act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use.” ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B).
vironmental performance of their holdings will become an expensive prospect.\textsuperscript{325}

This is the mechanism that will likely transform universal owners into shadow ESG regulators. If the legal theory espoused in this Article has merit, many of the largest universal owners will have no prudent option other than to demand enhanced ESG disclosure from the issuers of all of their holdings. This group of universal owners has, in the aggregate, a stake in virtually every public company in the world.

Issuers that are unwilling to provide such disclosure will leave themselves exposed to the risk of shareholder challenges to their nominees for election as directors. While this is admittedly a “soft” sanction, it may result in directors being forced off corporate boards or at least facing substantial embarrassment, and for recalcitrant bad actors, the threat of customer reaction and work force dissatisfaction. The disadvantage of a weaker sanction might well be more than compensated by its scope. The perhaps unwilling rise of the shadow ESG regulators could thus have powerful and far-reaching effects upon corporate environmental and social disclosure and, if electric light is truly the most efficient policeman, then upon corporate responsibility as well.

VI. Implications of the Rise of the Shadow Regulators

There are a number of potential implications for the increased power that asset managers can exercise over corporations. These include a decreasing urgency of government-mandated ESG disclosure; the ability of asset managers to counterbalance the power of activist investors, like black-and-white Capital, that are bent on driving corporations away from “expensive” attention to ESG issues; and a rise in the value of engaging with companies, as opposed to threatening divestment. When taken together with the new incentives these managers will have to push for transparency in their holdings’ human rights and environmental performances, this increased power bodes well for improved social outcomes.

A. The Need for Mandatory Line Item ESG Disclosure

In its 2016 concept release, the SEC posed the following question: “Are there sustainability or public policy issues for which line item disclosure requirements would be consistent with the Commission’s rulemaking authority and our mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation . . . ?”\textsuperscript{326} Many commenters replied in the affirmative.\textsuperscript{327} As previously noted, however, the SEC seems in no mood to commit to mandatory ESG disclosure. Further, SASB itself did not request a mandatory disclosure rulemaking.\textsuperscript{328} Once universal owners are forced into the role of shadow regulators, however, the current inadequacies of mandatory line item sustainability disclosure are somewhat ameliorated. De jure regulations can be augmented by the de facto oversight of the largest investment advisers.

B. Countervailing Power Versus Activist Investors

While directors of U.S. companies may be growing more fearful of activist investors such as black-and-white Capital, the influence of activists may prove insignificant compared to the potential clout of the shadow regulators. The shareholder services consulting firm Morrow Sodali discussed this point with the two heads of BlackRock’s Global and Americas Investment Stewardship Teams, charged with communicating about ESG issues to company management. Their advice is:

Talk to shareholders before agreeing to a settlement with an activist. The BlackRock team wants companies targeted by activists to engage directly with shareholders . . . there is a real concern among investors that standard negotiated settlements—such as giving board seats to a dissident or announcing a stock buyback—may favor short-term gains at the expense of long-term performance.\textsuperscript{329}

BlackRock’s CEO Laurence Fink reiterated that “a central reason for the rise of activism—and wasteful proxy fights—is that companies have not been explicit enough

\textsuperscript{326} Business and Financial Disclosure Required by Regulation S-K, supra note 89.


\textsuperscript{328} Letter from SASB, supra note 266.

about their long-term strategies . . . Where activists do offer valuable ideas . . . we encourage companies to . . . engage with shareholders like BlackRock . . .”330 The aggregated power of the shadow regulators, holders of large blocks of stock for the long term, is of the size to counteract the influence of activist investors.331

C. Invest or Divest?

The rise of the shadow regulators implies that engagement will be greatly strengthened relative to divestment as a tool of shareholder influence. At first glance, it appears that the divestment strategy is trending up: fossil fuel divestment, for example, appeared to gain momentum in late 2017/early 2018 after the central bank of Norway,332 which administers the world’s largest sovereign wealth fund333; the governor of New York,334 speaking for the nation’s fourth-largest pension fund335; and the mayor of New York City,336 with reference to its five public employees’ pension funds, collectively fifth-largest in the United States, all delivered high-profile announcements that they intended to remove fossil fuel companies from their portfolios.

Yet, there is less here than meets the eye. The Norwegian wealth fund is the recipient of all of the cash flow from the country’s oil production,337 which is then invested in a global index. Norway also owns two-thirds of the national oil company, Statoil (renamed Equinor).338 In recommending divestment, the central bank noted:

The market value of the government’s holding in Statoil is currently around the same as the market value of the fund’s investments in oil and gas companies. When the fund’s investments and the holding in Statoil are taken together, we find that exposure to oil and gas stocks in the government’s overall equity portfolio is around twice what it would have been had this portfolio been invested in line with a broad global stock index.339

The bank found that the nation’s investments were therefore overexposed to energy risks by a factor of two. It emphasized that the divestment advice “is based solely on financial arguments and does not reflect any particular view of future movements in the oil prices or the profitability or sustainability of the sector.”340 Thus, Norway’s announcement cannot be ascribed to ethical considerations, and the attempt to balance a skewed portfolio rather than pursue a sustainability agenda may have muted the divestment announcement’s ultimate impact.

The press around U.S. divestment likewise has proven less momentous than it may have initially seemed: the sole trustee of the New York State Common Retirement Fund, the State Comptroller Thomas DiNapoli, responded to the governor’s announcement, stating “there are no immediate plans to divest our energy holdings.”341 In the same statement, he touted the benefits of engagement, noting, “We’ve shown that shareholders have the power to compel major corporations, like ExxonMobil, to address climate change.”342 The chief investment officer of the pension fund also went on record shortly afterward promoting engagement over divestment.343 New York City’s efforts have had

332. Clifford Krauss, Norway’s Wealth Fund Considers Divesting From Oil Shares, N.Y. TIMES, Nov. 16, 2017. A government-appointed commission contradicted this recommendation, however, reasoning that it would harm the fund’s diversification, that there is no need to “change an institution that has worked very well,” and that Norway’s declining oil reserves mitigates against what might otherwise be overexposure. Norway’s $1 Trillion Wealth Fund Should Keep Oil Stocks—Commission, REUTERS, Aug. 24, 2018, https://www.reuters.com/article/norway-swf/norways-1-trillion-wealth-fund-should-keep-oil-stocks-commission-idUSKBN1J71D3. The chief investment officer of the pension fund emphasized that the divestment advice “is based solely on financial arguments and does not reflect any particular view of future movements in the oil prices or the profitability or sustainability of the sector.”340 Thus, Norway’s announcement cannot be ascribed to ethical considerations, and the attempt to balance a skewed portfolio rather than pursue a sustainability agenda may have muted the divestment announcement’s ultimate impact.
somewhat more traction: at board meetings of the five pension funds, a resolution to study the fiscal implications of divestment was passed by three of the plans, but tabled by the Firemen and defeated by Police Pension Fund.\textsuperscript{344} Taken together, these examples illustrate that what initially appeared to be changes that were poised to generate far-reaching impact may yield more modest effects.

Indeed, there are good reasons why U.S. pension funds may not wish to use divestment as a tool. These relate to notions of the fiduciary duties of trustees. The prohibition on the use of pension assets for any purpose other than to serve the economic interest of the beneficiary is well-established in trust law, the basis of both ERISA and public pension statutes.\textsuperscript{345} Another pillar of trust law is diversification of assets.\textsuperscript{346} Both of these duties could be breached in the event that a fund trustee decides to divest from a substantial sector of the market, such as the fossil fuel value chain (which includes exploration and production, transport, refining and marketing; divesting an insignificant industry in terms of market capitalization, such as fire arms manufacturers, would not apply to this discussion).

The pension consultant NEPC detailed the economic disadvantages of fossil fuel divestment to the San Francisco Employees’ Retirement System in a memorandum dated January 24, 2018.\textsuperscript{347} It noted that divestment would likely cause the system’s investment performance to exhibit greater volatility via reduced diversification, diminishing overall risk-adjusted returns.\textsuperscript{348} NEPC asserted that in surveying 11 of the largest U.S. pension consultants, none had recommended full fossil fuel divestment.\textsuperscript{349} The city pension plan ultimately decided not to divest.\textsuperscript{350} A similar conflict is brewing in Norway, where a government-appointed commission recommended against the central bank’s move to divest from fossil fuels, contending that “[i]f energy stocks are excluded from the Fund, the composition of the investments will differ from market weights, and the Fund will be expected to either achieve lower return or higher risk.”\textsuperscript{351} Thus, divestment strategies, owing to reasons of diversification and economic impact to beneficiaries, are unlikely to become widespread.\textsuperscript{352}

On the other hand, engagement and voting on environmental and social issues, as they are currently practiced, have also been unsatisfactory in the eyes of many. The central argument of this Article is that the universal owners affiliated with SASB, in recognizing their new fiduciary duties to consider environmental and social factors that they have declared must, must undertake reasonable attempts to investigate these material factors, thereby forcing disclosure—and investigation requires engagement, not divestment. ERISA has recognized monitoring and communication as reasonable investigatory methods, and fiduciaries are required both to engage and vote on resolutions and directors if they perceive that the result can increase the economic well-being of their beneficiaries. This process, as it plays out, will tip the scales in favor of engagement and away from divestment as tools to improve corporate behavior.\textsuperscript{353}

\textbf{D. The Need for Client Pressure}

Given asset managers’ obligation to investigate, and the adoption of the newly minted “material” SASB standards,


\textsuperscript{346} Restatement (Third) of Trusts §90(b) (2003) (“In making and implementing investment decisions, the trustee has a duty to diversify the investment of the trust unless, under the circumstances, it is prudent not to do so.”). See infra note 348 for an explanation of the outsized importance of the fossil fuel sector in a well-diversified portfolio.


\textsuperscript{348} Id. at 7. The energy sector is particularly well-suited as a diversifying influence on a broad portfolio, as the Allan Martin et al. memorandum argues. First, price fluctuations of energy stocks are among the least correlated to the broader stock market of any sector (with correlation of 0.61 from 1989 to 2017). Id. at 8. Second, “energy equities are one of a limited set of assets which perform well in higher inflation environments.” Id. at 10. Third, the energy sector is a significant proportion of a number of popular, specialized benchmarks, constituting, for example, 11% of the Russell 1000 Value Index as of the third quarter of 2017. Id. at 9.

\textsuperscript{349} Id. at 16.


\textsuperscript{352} Notably, the New York City divestment press release stated that “[t]he trustees will also seek legal opinion as to whether carrying out the divestment would be consistent with trustees fiduciary duties to beneficiaries. Assuming a favorable legal opinion, the trustees would then instruct BAM [Bureau of Asset Management] to carry out the divestment with specified steps and timelines.” News Release, Office of the Mayor of New York City, supra note 336.

\textsuperscript{353} The goal of divesting fossil fuels from the New York State and New York City pension funds, if successful, will deprive shareholders of two of their major advocates for environmental progress. The two funds together have submitted more than 15% of all shareholder resolutions in the Ceres database. Ceres, supra note 170. As mentioned, non-shareholders cannot submit resolutions, nor vote on them.
these managers must soon engage with their corporate holdings to evaluate their adherence to the social and environmental criteria that SASB demands. As discussed above, this investigation should push (virtually all publicly held) companies to improve their policies and practices across a spectrum of human rights and environmental concerns. Those asset managers that fail to engage, despite having publicly declared these standards material, will find themselves in potential breach of their fiduciary duty of care.354

Regardless of the expanded scope of investigative duties that SASB has created, we predict that many of these fiduciaries will initially have little appetite for engaging with companies over the requirements detailed in the SASB standards. Asset managers may have little interest in absorbing the costs associated with creating whatever institutional capacity is necessary to understand the standards, and then pressing their holdings for transparency on the myriad environmental and social issues that SASB regulates. Engagement, we have observed, is expensive.

Fortunately, so is litigation. A customer has standing to file a claim against his or her asset manager for embracing the SASB standards as “material,” yet failing to investigate whether these standards are upheld. The anticipated reluctance of asset managers to investigate means that this lever will very likely have to be pulled. Given that breach of fiduciary duty is a breach in equity—meaning that no actual financial loss has to be proven in order for a plaintiff to prevail—and the enormous number of customers that these asset managers serve, there will be no shortage of potential litigants who can drag the world’s largest asset managers into court.

Any socially conscientious customer of these managers will find himself or herself with the power to indirectly enforce the adoption of the SASB standards. Considering the aforementioned rise in assets controlled by millennials and women, and the high value they place on social responsibility, the pool of likely plaintiffs only stands to grow. Whether it only takes a single landmark case for asset managers to understand that what constitutes “material” information has seeped into the social and environmental sphere, or it takes a series of claims to spur them to investigate their holdings, litigation may be a necessary tool in driving the rise of the shadow regulators.

Of course, progress does not always have to be achieved at the point of a gun. Though an adversarial approach may be necessary to ignite the CSR transformation that we predict the SASB standards will generate, collaborative approaches will likewise have a significant role to play. Universal owners can partner with civil society groups that are focused on promoting strong human rights and environmental performance in the private sector in order to (1) understand the substance of the SASB standards within each industry; and (2) determine what their corporate holdings must be doing, in concrete terms, in order to adhere to these standards. Such partnerships will prove critical, as the standards require specific behavior and performance benchmarks on many technical issues that sit far outside an asset manager’s expertise.

For example, the Mining & Metals guidelines detail disclosure about levels of greenhouse gas emissions, due diligence regarding indigenous land rights in line with international human rights norms, and measurement of operations near active conflict zones. Ensuring that companies have adhered to those standards will require environmental scientists, human rights lawyers, and other civil society experts that can evaluate corporate performance on such issues. Universal owners would be ill-equipped to grade corporate performance on their own. By the same token, it hardly merits mention that civil society groups will benefit enormously from the added leverage that these universal owners exercise over companies they own.356

The stage is thus set for the rise of the shadow regulators to progress the CSR landscape: asset managers that embrace the SASB standards as material will have created for themselves a fiduciary duty to investigate their holdings for compliance with these standards. This new obligation, in turn, provides socially conscientious customers with a legal hook to force asset managers to engage with these companies to ensure that they are, in fact, reporting transparently on the human rights and environmental topics that SASB governs. Then, to the extent that universal owners are able to influence disclosure, and disclosure acts to govern business behavior, we can anticipate a far-reaching change in the way that corporations view their social and environmental obligations.

354. See supra Section V.B.
355. As discussed in note 324, the extent to which various asset managers have embraced the SASB standards, and thus could be found to have endorsed them as material, varies. These tiers, ranging from BlackRock (which forcefully advocates for the standards) to Fidelity (which is silent on the issue), may lead a prospective plaintiff to decide that those asset managers who have most ardently trumpeted the standards as “material” make ideal initial defendants.

356. There has been some grumbling from the human rights field that the SASB standards have emphasized environmental concerns over social issues. See, e.g., NYU Stern Center for Business and Human Rights & the International Corporate Accountability Roundtable (ICAR), Public Comment on SASB Exposure Draft Standards (Jan. 30, 2018) (claiming that “SASB’s limited view of human rights leads to uneven disclosure requirements”), https://static1.squarespace.com/static/583f3fc3275e256cfe453a4460d/t/5a71ece271c1068bbad6b2d2/1517415651715/NYU-Stern__ICAR__SASB-Comments-Final.pdf. The authors suspect that part of this problem lies with the challenges of obtaining sufficient data on human rights performance, given the rigorous financial materiality tests that SASB standards require. See, e.g., Letter from SASB, supra note 266.

Human rights NGOs have begun to quantify the financial effects of corporate human rights violations. See, e.g., Rachel Davis & Daniel Franks, Costs of Company-Community Conflict in the Extractive Sector (Harvard Kennedy School CSR Initiative Report No. 66, 2014), https://sites.hks.harvard.edu/e-mrcgb/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf. It is hoped that a larger volume of such work will shift SASB’s standards toward a more balanced distribution between the “E” and the “S.” In this regard, it is notable that ICAR has put out a request for its members to join SASB’s new sector advisory groups, which will provide SASB feedback about emerging issues in the standards development process. Letter from Amol Mehta, Former Executive Director, ICAR (Apr. 11, 2018) (copy on file with author).
VII. Conclusion

These are problematic times for those of us who believe that freedom and human rights are in danger due to the rise of authoritarian and nationalist governments around the world, and for those of us who worry about the prospect of catastrophic climate change. Where do we turn for solutions? Not reliably to government, as government (at least, our government) is a source of the problem. We could turn to NGOs, but the influence of human rights-focused NGOs may diminish in proportion to the strength of authoritarianism: in many parts of the world, NGOs are under attack by governments hostile to the further opening of their societies, putting the ability of the NGO sector to promote freedom, human rights, and environmental health in decline. Are we overlooking the corporate sector, the “greedy fat cats” who have, until now, done so little to take responsibility for healing the world? Private-sector actors, which exercise increasing power over global affairs and the enjoyment of human rights, may be best positioned to push for positive change.

If we can accept the premise that multinationals are not inherently evil, but are simply motivated to please their investors, then we can construct a chain of logic that takes current investment trends as its inputs and leads to a situation in which corporations become actual champions of liberty and ecological health. First, we must recognize that authoritarianism, nationalism, and catastrophic climate change construct an unpredictable business environment where it is difficult to trust laws, obtain reliable information, allocate resources, and accurately forecast profit. This environment is detrimental to the management of any corporation, and, by extension, to the returns of its shareholders. Second, insofar as corporations are held back from being more responsible because they are either worried about activist shareholders, or neglect to disclose information—and hence hinder transparency—because social and environmental information is not considered material, these two factors may shortly change.

Because of the actions of SABS, universal owners are about to declare that environmental and social disclosures will be much more material than they are presently. Their fiduciary duties of care will cause them to demand material disclosure from their holdings. And, since their holdings are substantially the entire public corporate sector, the actions of a small number of universal shareholders will have large ramifications throughout the economy. SASB has managed to harness the ambiguity of the materiality standard to the power of the universal owner. The world may never be the same.

This potentially happy circumstance does not mean that those with retirement savings in pension or mutual funds are able to declare victory and walk away. It will be necessary to constantly remind those who invest on our behalf that we demand they consider all material disclosure, including environmental and social disclosure, in their investment decisions.

The routes to attaining enhanced levels of corporate responsibility are diverse. BlackRock’s votes against Occidental and Exxon illustrate that the chain of causality to create positive change can comprise a number of links: a small, socially responsible asset manager who owned shares of a universal owner teamed up with a socially responsible pension fund who was a client of the universal owner, in order to jointly pressure the target. The universal owner, in turn, pressured a corporate board. Other variations of this chain will proliferate. The old model of the corporate gadfly launching single-issue shareholder proposals and receiving little outside support is morphing.

The new model will resemble a flow chart in which individuals demand material compliance from their pension sponsors, funds, and directly owned corporations; pension sponsors demand compliance from their asset managers and their direct corporate holdings; and asset managers engage with companies on behalf of their pension and individual customers. The companies, then, will ultimately adopt stronger human rights and environmental standards or risk shareholder retaliation, such as voting against boards—a transformation that stands to yield concrete benefits for communities across the globe. As this model progresses, shareholder engagement about material disclosure; the shareholder resolution, whether voted upon or agreed to and withdrawn before voting; and, finally, withholding votes for a director, will attain unprecedented power in forcing the corporate sector into positive social and environmental effort.

The global environment that corporations and investors face, and the motivations and challenges that develop along with it, are changing at a rapid pace. Significant news about human rights, environmental threats, corporate responses, and socially responsible investor behavior spews forth every week. Much of the material, events, and ideas cited herein are just months or weeks old. The juxtaposition of this dizzying pace with the glacial progress heretofore seen is truly astonishing. It is entirely possible that sometime in the near future, the corporate sector will be seen as the primary channel for the improvement of human rights and environmental protection throughout the world. Wouldn’t that be interesting?

357. See, e.g., Cathal Gilbert, It’s Time for G-20 Leaders to Embrace Civil Society, Al-Jazeera, July 4, 2017:

The restrictions on civil society are no longer confined to “authoritarian” parts of the world, but are now also prevalent in many democracies too. In 2015, UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein tried to list all of the countries currently persecuting civil society but said: “There are now too many countries on that list for me to name them here today. This is a grim indictment...” The High Commissioner’s list included several G20 members such as China, Australia and Brazil. https://www.aljazeera.com/indepth/opinion/2017/07/time-g20-leaders-embrace-civil-society-170704111743621.html.

358. See Kaisershut & Connolly, supra note 3.