
Repurposing the Corporation Through Stakeholder Markets

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Corporate social responsibility (“CSR”) is immensely popular. Rhetorically, nearly all public corporations have committed to it. But corporations don’t act responsibly because no system exists by which CSR can be measured and rewarded.

Thousands of organizations worldwide are engaged in a cooperative effort to build such a system. After two decades of work, the system is almost entirely in place. It may become effective in the next two to three years. When it does, the system will continually measure and report publicly as many as a thousand data points on the CSR of each of thousands of participating corporations. CSR ratings and rankings will become credible. Once that information system is effective, corporations will be able to claim social responsibility credibly only if they act responsibly.

This Article’s main thesis is that the public availability of credible CSR information will enable the corporation’s stakeholders and potential stakeholders to repurpose the corporation. By “repurpose” I mean control the corporation and redirect its employees’ efforts to CSR. Repurposing’s mechanism will be the competitive markets in which corporations acquire resources from their potential stakeholders. The corporation’s potential stakeholders will, for the first time, know and be able to react to, the corporation’s level of responsibility. CSR’s popularity assures that those markets will reward corporations that excel at CSR and punish those that do not.

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Parallel reform efforts will contribute to the repurposing process. They include mandatory CSR reporting, mandatory CSR compliance, changing the law of corporate purpose, employee voting for directors, mutual fund pass-through voting, stewardship codes, and social norm building.

Repurposing's initial target will be the externalization of social costs. But the corporation's potential stakeholders — including its customers — furnish all the resources corporations need to operate. By their market choices, the potential stakeholders can make the corporation's purpose whatever they want it to be.

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What gets measured gets managed.

— Peter F. Drucker, *The Practice of Management* (1954)

INTRODUCTION

Despite the corporation’s financial success, the corporation has failed to deliver a crucial part of what people want from it: a stable planet; livable communities; a safe and sustainable environment; meaningful, secure jobs with benefits; respect for human rights, and steady improvement in peoples’ lives. Corporate efforts to serve those values are generally referred to as “corporate social responsibility” (“CSR”).¹ This Article argues that completion of a system capable of measuring CSR will enable the corporation’s customers, employees, investors, and other stakeholders to compel the corporation to serve those values. The stakeholders would accomplish that “repurposing” by favoring socially responsible corporations in market transactions. Stakeholders cannot repurpose the corporation under current circumstances because comparable information regarding corporations’ CSR performances is not publicly available.

Thousands of organizations worldwide are now engaged in a cooperative effort to build an information system that will provide that information.² CSR is the abstract idea that corporations have a moral responsibility to voluntarily integrate environmental, social, and governance (“ESG”) improvements into their business operations for the benefit of shareholders, other stakeholders, society as a whole, and the environment.³ This Article refers to the system under construction

¹ Although this is not the customary language used to define CSR, I believe it conveys the same meaning. See Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESP. & ENV’T MGMT. 1, 1 (2008) (providing an empirical analysis of various CSR definitions).

² The organizations involved include standard setters such as SASB, GRI, or CDP, raters and rankers such as Newsweek and Greenpeace, proxy advisers, ESG software producers such as Bloomberg or Reuters, the corporations that measure and report ESG information, and auditors who give assurances regarding CSR data.

³ See generally Dahlsrud, *supra* note 1 (analyzing various existing definitions of CSR and identifying five key dimensions).

as the “ESG information system.” When complete, the ESG information system will continually measure and report publicly on the CSR of each participating corporation. As used in this Article, CSR is adherence to the actual values of corporate stakeholders, and ESG is a set of measurements from which conclusions about CSR can be drawn.

A corporation’s “stakeholders” include everyone with an interest in the corporation’s success. Along with shareholders, stakeholders are usually assumed to include employees, managers, customers, suppliers, creditors, and the communities in which the corporation does business.⁴ In this Article, “Potential Stakeholders” are persons considering whether to deal with a particular corporation and on what terms.

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

CSR is immensely popular,⁵ making a socially responsible image already a corporate necessity. Rhetorically, nearly all corporations have committed to CSR. Philip Morris says its purpose is “to deliver a smoke free future.”⁶ Facebook’s mission is “to give people the power to build community and bring the world closer together”⁷ and Tesla’s is “to

⁴ Jason Fernando, *Stakeholder*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/stakeholder.asp> (last visited Sept. 24, 2021) [<https://perma.cc/72XC-5BZ4>] (defining “stakeholder”).

⁵ See *infra* Part I.C.2.

⁶ Philip Morris Int’l Inc., 2020 Proxy Statement 3 (Form DEF 14A) (Mar. 26, 2020), <https://www.sec.gov/Archives/edgar/data/1413329/000119312520085906/d832372ddef14a.htm> [<https://perma.cc/4R9D-JK6H>] (“[I]n 2016 [the Company] announced its new purpose: to deliver a smoke-free future by focusing its resources on developing, scientifically substantiating and responsibly commercializing smoke-free products that are less harmful than smoking, with the aim of completely replacing cigarettes as soon as possible.”).

⁷ *Investor Relations FAQs*, FACEBOOK, <https://investor.fb.com/resources/default.aspx#:~:text=Founded%20in%202004%2C%20Facebook’s%20mission,express%20wh at%20matters%20to%20them> (last visited Sept. 24, 2021) [<https://perma.cc/V77S-U52C>].

accelerate the world's transition to sustainable energy.”⁸ Nearly all public corporations claim a devotion to serving their customers, their employees, the environment, and the public.⁹ Virtually none proclaim the single-minded devotion to shareholder wealth maximization promoted by leading academics and required by Delaware law.¹⁰

This corporate embrace of CSR is recent. To illustrate, the proportion of large, public corporations publishing CSR reports touting their social achievements increased from twenty percent in 2011 to over ninety percent in 2019.¹¹

Of course, CSR's rhetoric is not CSR's current reality. Because no effective system for measuring and comparing CSR currently exists, corporations can, and do, make false CSR claims with little risk of contradiction or censure. As Professor Ann Lipton notes, “publicity campaigns designed to improve the corporation's image . . . may be just as effective at generating public goodwill as real operational changes.”¹² The public seems to know it is being fooled. Only twenty-six percent of Americans are satisfied with “[t]he size and influence of major corporations.”¹³

⁸ *About Tesla*, TESLA, <https://www.tesla.com/about#:~:text=Tesla's%20mission%20is%20to%20accelerate,to%20drive%20than%20gasoline%20cars> (last visited Sept. 24, 2021) [<https://perma.cc/35XV-TXFY>].

⁹ BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION 1 (2019), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf> [<https://perma.cc/WD9U-BM4T>] [hereinafter PURPOSE STATEMENT] (putting “[g]enerating long-term value for shareholders” fifth on the list of fundamental commitments to all stakeholders); see also *One Year Later: Purpose of a Corporation*, BUS. ROUNDTABLE, <https://purpose.businessroundtable.org/> (last visited Sept. 24, 2021) [<https://perma.cc/9J4G-U75Z>].

¹⁰ See Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1316-17 (2021) (“[T]he typical charter provision neither identifies a purpose of maximizing profit nor articulates a broader societal mission.”); see, e.g., Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615, 1616 (2005) (reviewing LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004) (asserting that corporate directors and officers must direct their discretionary powers “towards a single end; namely, the maximization of shareholder wealth”)).

¹¹ GOVERNANCE & ACCOUNTABILITY INST., INC., 2020 FLASH REPORT RUSSELL 1000® 3 (2020), <https://www.ga-institute.com/research-reports/flash-reports/2020-sp-500-flash-report.html> [<https://perma.cc/W9EK-6Q8T>] [hereinafter FLASH REPORT].

¹² Ann M. Lipton, *ESG Investing, or, if You Can't Beat 'Em, Join 'Em*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 1, 18 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

¹³ Lydia Saad, *U.S. Satisfaction Sinks with Many Aspects of Public Life*, GALLUP (Feb. 4, 2021), <https://news.gallup.com/poll/329279/satisfaction-sinks-aspects-public-life.aspx> [<https://perma.cc/6VZP-8W8X>].

The ESG information system will repair the disconnect between CSR claims and CSR reality. The Global Reporting Initiative (“GRI”), a not-for-profit corporation, is the leading promulgator of CSR reporting standards worldwide.¹⁴ The GRI began building the ESG information system in 1997.¹⁵ After twenty-four years, the ESG information system may be within a few years of effectiveness. When the system is effective, each participating corporation will periodically and publicly report about a thousand standardized and audited measurements of their CSR performances.¹⁶ Hundreds of independent organizations will rate and rank those performances transparently,¹⁷ and intermediaries will integrate the ratings and rankings into decision-support software for use by the Potential Stakeholders.¹⁸

The Sustainability Accounting Standards Board (“SASB”), also a non-profit corporation, is a U.S.-based challenger to the European-based GRI. SASB views the ESG information system narrowly, as a response to investors’ demands for the information they need to assess corporations’ sustainability. The GRI views the ESG information system’s purpose broadly, to include providing information to stakeholders and the public.¹⁹ Repurposing could occur under the SASB

¹⁴ INV. RESP. RSCH. CTR. INST. & SUSTAINABLE INVS. INST., STATE OF SUSTAINABILITY AND INTEGRATED REPORTING 2018, at 31 (2018), <https://www.weinberg.udel.edu/IIRCIResearchDocuments/2018/11/2018-SP-500-Integrated-Reporting-FINAL-November-2018-1.pdf> [<https://perma.cc/3BRN-K38V>] (“GRI remains the most used reporting framework for sustainability reports, with 60 percent of all reporters referencing or following it.”); see also ALL. FOR CORP. TRANSPARENCY, 2019 RESEARCH REPORT 34 (2019) (reporting that 54.1 percent of non-financial statements examined specified that they relied on Global Reporting Initiative, higher than any other standards or group of standards); Cynthia A. Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 U.C. IRVINE J. INT’L, TRANSNAT’L, & COMPAR. L. 67, 74 (2016) (“GRI’s voluntary framework for ESG reporting has emerged as the global benchmark.”).

¹⁵ See *Our Mission and History*, GRI, <https://www.globalreporting.org/about-gri/mission-history/> (last visited Sept. 24, 2021) [<https://perma.cc/53C5-6LKR>].

¹⁶ See generally, e.g., GLOB. REPORTING INITIATIVE, CONSOLIDATED SET OF GRI SUSTAINABILITY REPORTING STANDARDS (2020) [hereinafter CONSOLIDATED GRI STANDARDS] (specifying standards that generate more than a thousand data points).

¹⁷ See CHRISTINA WONG & ERIKA PETROY, SUSTAINABILITY, RATE THE RATERS 2020: INVESTOR SURVEY AND INTERVIEW RESULTS 6 (2020), <https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/sustainability-ratetheraters2020-report.pdf> [<https://perma.cc/472R-JS75>] (“The number of ESG standards and frameworks . . . has expanded, with 600+ ESG ratings and ranking existing globally as of 2018 and continuing to grow since.”).

¹⁸ See *infra* Part I.A.

¹⁹ See *infra* Part I.B.1.

view or the GRI view, but would be more likely and more extensive under the GRI view.

Although the ESG information system is not yet functional, nearly all of its elements are in place.²⁰ SASB, GRI, and other organizations have promulgated comprehensive, high-quality standards for measuring ESG performance.²¹ Some corporations are already measuring and reporting to those standards.²² Some of those corporations subject their ESG data to external audit in order to increase their credibility.²³ Hundreds of for-profit and not-for profit organizations rate or rank corporate CSR performances.²⁴ Software that integrates financial and ESG data for use at the point of decision is in widespread use in the securities markets,²⁵ and new ESG information products are continually introduced.²⁶

The ESG information system remains ineffective principally because no single set of reporting standards dominates. Corporations report to a variety of standards or simply invent their own.²⁷ The ESG data currently collected are not comparable across large numbers of corporations, resulting in ratings and rankings that lack credibility.²⁸

In January 2020, BlackRock and State Street, two of the world's largest institutional investors, began openly pressuring U.S. public

²⁰ See *infra* Part I.A.

²¹ See GLOB. REPORTING INITIATIVE, CONSOLIDATED GRI STANDARDS, *supra* note 16. To access the seventy-seven SASB standards, see generally *Download SASB Standards*, SASB, <https://www.sasb.org/standards/download/> (last visited Nov. 17, 2021) [<https://perma.cc/SA9E-D42T>].

²² See *infra* Part I.B.2.

²³ See, e.g., ALLSTATE, 2019 SUSTAINABILITY REPORT: HOW WE SERVE SOCIETY AND OUR STAKEHOLDERS 26 (2019), https://www.allstatesustainability.com/content/documents/Allstate_2019SustainabilityReport.pdf [<https://perma.cc/69BT-7P3J>] (noting that their information security program is “subject to both internal and external audits”).

²⁴ See WONG & PETROY, *supra* note 17.

²⁵ See, e.g., THOMSON REUTERS, ESG DATA ON EIKON QUICK START GUIDE, https://www.esade.edu/itemsweb/biblioteca/bbdd/inbdd/archivos/QSG_%20ESG_Data_on_Eikon.pdf (last visited Sept. 24, 2021) [<https://perma.cc/WN7B-WWKH>] (providing guidance for using combined ESG and financial data on Thomson Reuters's proprietary system).

²⁶ E.g., RONALD P. O'HANLEY, STATE ST., ESG INVESTING 2.0: MOVING TOWARD COMMON DISCLOSURE STANDARDS 3 (2019), <https://www.statestreet.com/content/dam/statestreet/documents/Articles/1369%20ESG%20Metric%20and%20Reporting%20Standards.pdf> [<https://perma.cc/K4DY-3EWG>] (“In 2019, State Street Global Advisors launched its ESG scoring system called the R-factor.”); *Bloomberg Launches Proprietary ESG Scores*, BLOOMBERG (Aug. 11, 2020), <https://www.bloomberg.com/company/press/bloomberg-launches-proprietary-esg-scores/> [<https://perma.cc/7CP6-45VP>].

²⁷ See *infra* Part I.A.1.

²⁸ See *infra* Part I.A.2.

corporations to report to SASB standards.²⁹ In roughly eleven months of 2020 and early 2021, SASB's claimed number of corporations reporting to SASB's standards nearly quadrupled.³⁰ A majority of U.S. public corporations say they are planning to adopt SASB standards.³¹ If they do, the ESG information system will be functional within the United States. ESG data will be comparable across corporations, ESG ratings and rankings will be credible, capital markets will be informed, and high-quality ESG information will be in the public domain.

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

The corporations that succeed in CSR competition will reap advantages in the markets in which they sell goods and services, hire and retain employees and executives, ally with suppliers and other strategic partners, finance their operations, and seek community support.³² Those advantages will accrue because people and organizations seek to deal with, and associate with, responsible corporations.³³

This Article refers to the benefits accruing to corporations in those stakeholder markets by virtue of their CSR ratings and rankings as “ESG

²⁹ Letter from Cyrus Taraporevala, President & CEO, State St. Glob. Advisors, to Board Members (Jan. 28, 2020), <https://www.ssga.com/library-content/pdfs/insights/CEOs-letter-on-SSGA-2020-proxy-voting-agenda.pdf> [<https://perma.cc/F43R-FYUY>] [hereinafter Letter from Cyrus Taraporevala to Board Members] (“Beginning this proxy season, we will take appropriate voting action against board members at companies [in certain indexes] that are laggards based on their [SASB-standards-based CSR] scores and that cannot articulate how they plan to improve their score.”); *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> (last visited Sept. 26, 2021) [<https://perma.cc/4WES-BES5>] [hereinafter *Larry Fink's 2020 Letter to CEOs*].

³⁰ The author counted 175 corporations reporting on May 17, 2020, and 536 corporations reporting on January 3, 2021, and estimated 682 as of April 16, 2021. These numbers are based on the logos appearing on the SASB website. *Companies Reporting with SASB Standards*, VALUE REPORTING FOUND., <https://www.sasb.org/company-use/sasb-reporters/> (last visited Sept. 24, 2021) [<https://perma.cc/95U5-MRL6>].

³¹ See BLOOMBERG, NUVEEN & BNP PARIBAS, *THE SUSTAINABILITY IMPERATIVE: BUSINESS AND INVESTOR OUTLOOK 4* (2018), <https://data.bloomberglp.com/bna/sites/8/2019/04/The-Sustainability-Imperative-Business-and-Investor-Outlook-2018-Bloomberg-Sustainable-Business-Finance-Survey.pdf> [<https://perma.cc/A9SJ-GY4T>].

³² See *infra* Figure 3.

³³ See *infra* Part II.B.2.

Benefit.” If ESG Benefit is sufficiently large, it may alone repurpose the corporation. Even if ESG Benefit is not sufficient by itself, it will almost certainly be sufficient in combination with parallel efforts to cause the same changes in corporations through regulation, mutual fund pass-through voting, stewardship codes, litigation, and social norm building.³⁴ The SEC now seems poised to require that public companies fully disclose ESG information to commonly accepted disclosure standards of their choosing or explain why they chose not to do so.³⁵ At current levels of public support for CSR, the repurposing of the corporation seems inevitable.

Standardized CSR reporting is most advanced among the largest and most prestigious public corporations.³⁶ As it develops, however, CSR reporting will repurpose both public and private corporations. The scenario in which CSR reporting extends to private corporations will be largely the same as for public corporations: voluntary reporting to compete for ESG Benefit, the marginalization of non-reporters, their voluntary conversion to reporting,³⁷ and ultimately, mandatory reporting or direct regulation of CSR to deal with the stragglers.³⁸

³⁴ See *infra* Part IV.

³⁵ See U.S. SEC. & EXCH. COMM’N, RECOMMENDATIONS FOR ESG 7 (2021), <https://www.sec.gov/files/amac-recommendations-esg-subcommittee-070721.pdf> [<https://perma.cc/G65A-EX7G>].

³⁶ See KPMG, THE TIME HAS COME: THE KPMG SURVEY OF SUSTAINABILITY REPORTING 25 (2020), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/11/the-time-has-come.pdf> [<https://perma.cc/EU5R-22WJ>] (“GRI remains the most commonly used reporting standard or framework, used by around two-thirds of [the one-hundred largest] reporters and around three-quarters of [the 250 largest] reporters.”).

³⁷ Many private companies already report. Novanta is a start-up benefit corporation funded in part by the Ford Foundation that aims “to form a centralized system for reporting on private companies’ environment, social and governance performance.” Chris Cumming, *Platform Launched to Track ESG Data*, WALL ST. J. (Oct. 7, 2021, 5:30 AM ET), <https://www.wsj.com/articles/foundations-private-equity-firms-create-esg-reporting-platform-11633599002> [<https://perma.cc/9TGK-94G2>]. See generally *ESG Solution Made for Private Markets*, NOVATA, <https://www.novata.com> (last visited Nov. 17, 2021) [<https://perma.cc/U6MD-MFE2>] (explaining Novata’s intended role in private company ESG reporting).

³⁸ The discussion of extension to private companies has already begun. E.g., Jean Eaglesham & Shane Shifflett, *How Much Carbon Comes from a Liter of Coke? Companies Grapple with Climate Change Math*, WALL ST. J. (Aug. 10, 2021, 11:12 AM ET), <https://www.wsj.com/articles/climate-change-accounting-for-companies-looms-with-all-its-complexities-11628608324> [<https://perma.cc/2WUC-GY7F>] (“Some investors and companies want [the SEC] to apply climate disclosure rules to private companies, too, saying that otherwise it would be harder for public companies to report on emissions generated by suppliers and customers.”).

Repurposing will not conflict with prevailing ideologies regarding corporate purpose. Some leading scholars argue that corporate law, norms, and economic efficiency require corporations to maximize shareholder wealth.³⁹ Those scholars argue that allowing corporations to serve stakeholder interests may impair the corporation's ability to generate wealth.⁴⁰ But, unlike efforts to change corporate purpose by law, stakeholder market repurposing does not require abandonment of any laws, norms, or putative economic principles. The public demand for CSR is already part of the environment in which corporations compete to achieve their financial goals. It would continue to be. The only difference will be that market participants will be better informed.

What the shareholder wealth maximization advocates miss is that the corporation is controlled not only by directors elected by shareholders, but also by the operation of stakeholder markets. With an effective ESG information system, the stakeholder markets will become the primary determinants of directors' actions. Directors will be able to do the bidding of the shareholders who elected them only after the directors have satisfied stakeholder demands.⁴¹

In other words, repurposing will not end the corporation's pursuit of profits.⁴² It will change what the corporation does to pursue profits. Corporations that now maximize shareholder wealth will remain free to continue doing so, but they will be repurposed along with those that do not maximize shareholder wealth.

³⁹ E.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36 (1991) (conceptualizing shareholder wealth maximization as the "operational assumption of successful firms"); Bainbridge, *supra* note 10, at 1616; Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 180 (2008) ("[C]orporate law requires directors to maximize shareholder value."); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 955 (1984) ("[Profit maximization] is not simply the best, but it is the only operational decision rule that [courts, legislators, and economists] currently have.").

⁴⁰ See, e.g., Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363, 394 (2021) ("[T]inkering with the law of corporate purpose threatens to disrupt the coherence of the corporate form, a form that has been one of the great wealth generating innovations of the last 150 years.").

⁴¹ See *infra* Part III.A.

⁴² Profit maximization is not the same as shareholder wealth maximization. The classic illustration is *Kamin v. American Express*, 383 N.Y.S.2d 807 (Sup. Ct. 1976), in which a corporation failed to claim a tax loss worth \$8 million (thus reducing shareholder wealth) in order to avoid suffering a loss that would have appeared on its income statement (thus increasing profits). *Id.* at 811. The difference is not relevant to the subject of this Article. Courts and legal scholars usually treat profit maximization and shareholder wealth maximization as synonyms. This Article does the same, usually referring to both as "shareholder wealth maximization."

At least initially, repurposing will be a market process, not a political process. No one need change their minds about anything, and government need take no action. The ESG information system will provide the necessary information to Potential Stakeholders, Potential Stakeholders will confer the ESG Benefit in accord with the ratings and rankings, and the corporations will voluntarily repurpose themselves.⁴³

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

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

Part III explains how Potential Stakeholders would control repurposed corporations and how the government might assert regulatory control. Part III also argues that despite repurposing's reliance on markets, repurposing will enhance rather than diminish democratic control of corporations.

Part IV describes the previously referenced parallel reform processes that will work in conjunction with the ESG information system to assure repurposing.

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

I. THE ESG INFORMATION SYSTEM

The ESG information system is the system that defines, collects, and conveys ESG information from corporations to Potential Stakeholders. The system's purpose is to enable Potential Stakeholders to compare aspects of a corporation's current ESG performance with the corporation's past performance and the current ESG performance of the corporation's competitors. As the GRI explained:

Comparability is necessary for evaluating performance. It is important that stakeholders are able to compare information on the organization's current economic, environmental, and social

⁴³ See *infra* Figure 1 and accompanying text.

performance against the organization's past performance, its objectives, and, to the degree possible, against the performance of other organizations.⁴⁴

Comparison to past ESG performance enables Potential Stakeholders to evaluate the corporation's claims that its performance is improving. Comparison to competitors' performances enables the Potential Stakeholder to take CSR into account in deciding whether to associate with the corporation or with one of its competitors. Recall that Potential Stakeholders' ability to identify and reward high ESG performance will drive repurposing.⁴⁵

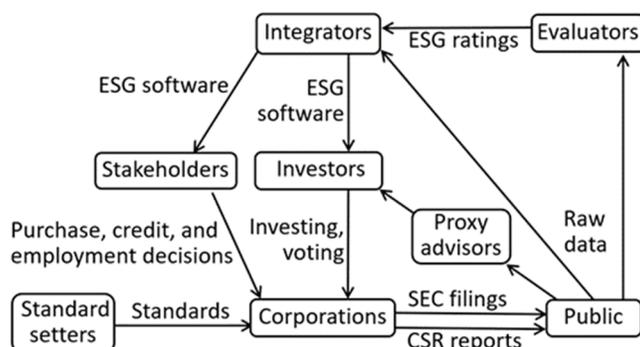
A. *Current State of the ESG Information System*

Figure 1 maps the relationships among the principal subsystems of the ESG information system. The standard setters who appear at the lower left of Figure 1 are the SEC and more than a hundred private organizations that have promulgated standards for CSR reporting or some aspect of CSR reporting.⁴⁶ The GRI and SASB are the most important of these organizations, because each has promulgated a comprehensive and widely adopted set of ESG standards.

⁴⁴ GLOB. REPORTING INITIATIVE, GRI 101: FOUNDATION 14 (2016), <https://www.globalreporting.org/standards/media/1036/gri-101-foundation-2016.pdf> [<https://perma.cc/X3DF-L78V>].

⁴⁵ See *supra* text accompanying notes 32–33; *infra* Figure 3 and Part II.B.2.

⁴⁶ Tommaso Motta, *Top 5 ESG Data Providers, Surprises and Certainties*, FINSCIENCE (Oct. 7, 2020), <https://finscience.com/en/news/top-5-esg-data-providers-rating-and-report/> [<https://perma.cc/2JUP-2VCC>] (“As of 2016, there were more than 125 ESG data providers, according to The Global Initiative for Sustainability Ratings.”). Some data providers set standards by wording the survey questions they send to corporations. WONG & PETROY, *supra* note 17, at 7.

Figure 1. The ESG Information System⁴⁷

“Standards,” as used here, are definitions of the data to be collected. For example, this is the GRI standard for Direct (Scope 1) greenhouse gas (“GHG”) emissions:

The reporting organization shall report the following information:

- a. Gross direct (Scope 1) GHG emissions in metric tons of CO₂ equivalent.
- b. Gases included in the calculation; whether CO₂, CH₄, N₂O, HFCs, PFCs, SF₆, NF₃, or all.
- c. Biogenic CO₂ emissions in metric tons of CO₂ equivalent.
- d. Base year for the calculation, if applicable, including:
 - i. the rationale for choosing it;
 - ii. emissions in the base year;
 - iii. the context for any significant changes in emissions that triggered recalculations of base year emissions.
- e. Source of the emission factors and the global warming potential (GWP) rates used, or a reference to the GWP source.
- f. Consolidation approach for emissions; whether equity share, financial control, or operational control.

⁴⁷ Reproduced with permission from LYNN M. LOPUCKI & ANDREW VERSTEIN, BUSINESS ASSOCIATIONS: A SYSTEMS APPROACH 592 (2021).

g. Standards, methodologies, assumptions, and/or calculation tools used.⁴⁸

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

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

State and federal regulatory agencies require that public and private corporations make specific kinds of ESG information public.⁴⁹ Corporations choose whether to make additional ESG information public and what standards to apply in collecting and reporting it. Public corporations may include ESG information in SEC filings, other regulatory filings, and CSR reports of various kinds.⁵⁰ Once published, the data are in the public domain.

As shown in Figure 1, three kinds of mediators process the public data. *Evaluators* are organizations that rate and rank corporations overall or with respect to particular elements of CSR that are of interest

⁴⁸ GLOB. REPORTING INITIATIVE, GRI 305: EMISSIONS 7 (2016), <https://www.globalreporting.org/standards/media/1012/gri-305-emissions-2016.pdf> [<https://perma.cc/57FG-P69X>] (Disclosure 305-1).

⁴⁹ See David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 391-92 (2005) (“[V]irtually every major federal environmental statute requires reporting of environmental data on spills, leaks, regulatory compliance, and related information.”); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 564-65 (2020) (“[A]t the federal level, companies must disclose diversity information to the EEOC, environmental information to EPA, workplace hazard and injury information to OSHA and to employees, and hazardous product information to the Consumer Product Safety Commission and FDA.” (footnotes omitted)).

⁵⁰ See Era Anagnosti, Colin J. Diamond, Maia Gez, Danielle Herrick, Seth Kerschner, Laura Mulry, Henrik Patel, Victoria Rosamond, Clare Connellan & Emily Holland, *ESG Disclosure Trends in SEC Filings*, WHITE & CASE (Aug. 13, 2020), <https://www.whitecase.com/publications/alert/esg-disclosure-trends-sec-filings> [<https://perma.cc/FML3-6LH3>] (“[T]he decision whether to include ESG information in an SEC filing or instead provide it on a corporate website is a nuanced one that should be assessed with care.”).

to them.⁵¹ For example, an evaluator might rank corporations solely on the basis of gross direct (Scope 1) GHG emissions. More likely, the evaluator would define a broader basis for ranking, such as greenhouse gas emissions. If so, it would include indirect (Scope 2) GHG emissions, and perhaps take into account the corporation's industry, the value of the products the corporation is producing, and other information. Evaluators might weight measurements differently or combine different measurements to calculate rankings or ratings. Potential Stakeholders can choose among evaluations based on their own interests and analyses or on the analyses of evaluators of the evaluators.⁵²

Proxy advisers are organizations that advise institutional investors on how to vote the investors' shares. Institutional Shareholder Services and Glass Lewis are examples.⁵³ The advice may be based on public or private data. The voting may be on the election of directors or shareholder resolutions — including CSR resolutions.⁵⁴

Integrators provide investors, corporate stakeholders, and the public with ESG and financial information when and where needed. Bloomberg and Thomson Reuters are examples. Each provides investors with financial and ESG information on the same computer screen.⁵⁵ Investors can combine the information in a wide variety of ways to guide both their investing and the voting of their shares.⁵⁶

At present, the ESG information system is incomplete in three respects that prevent it from repurposing the corporation. First, no single set of dominant standards define the data to be collected. The promulgators of the leading standards have agreed to disagree.⁵⁷

⁵¹ "Evaluator" as the term is used in this Article, includes organizations that either rate or rank corporations based on CSR or aspects of CSR.

⁵² E.g., WONG & PETROY, *supra* note 17, at 24 (evaluating raters and ratings).

⁵³ PAUL ROSE, PROXY ADVISORS AND MARKET POWER: A REVIEW OF INSTITUTIONAL INVESTOR ROBOVOTING 4 (2021), <https://media4.manhattan-institute.org/sites/default/files/proxy-advisors-market-power-review-investor-robovoting-PR.pdf> [<https://perma.cc/24S4-9G42>].

⁵⁴ See *id.* at 5, 9.

⁵⁵ See, e.g., LOPUCKI & VERSTEIN, *supra* note 47, at 591 fig.31.2 (showing Bloomberg terminal with both financial and ESG information visible).

⁵⁶ E.g., THOMSON REUTERS, *supra* note 25, at 1.

⁵⁷ See Press Release, Sustainability Acct. Standards Bd., IIRC and SASB Announce Intent to Merge in Major Step Towards Simplifying the Corporate Reporting System (Nov. 25, 2020), <https://www.sasb.org/wp-content/uploads/2020/12/IIRC-SASB-Press-Release-Web-Final.pdf> [<https://perma.cc/RH6H-H9BD>] [hereinafter IIRC and SASB Announce Intent to Merge]; CDP, CLIMATE DISCLOSURE STANDARDS BD., GLOB. REPORTING INITIATIVE, INT'L INTEGRATED REPORTING COUNCIL & SUSTAINABILITY ACCT. STANDARDS BD., STATEMENT OF INTENT TO WORK TOGETHER TOWARDS COMPREHENSIVE CORPORATE REPORTING 8 (2020), <https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/>

Second, the number of corporations reporting to GRI or SASB standards are inadequate to produce meaningful ratings and rankings. As of this writing, however, SASB claims that the number of corporations reporting its standards is increasing rapidly.⁵⁸ SASB reporting might alone reach critical mass in the United States.⁵⁹ Third, no comprehensive systems exists to furnish ESG information to Potential Stakeholders other than investors at the point of decision. Those Potential Stakeholders will have to use ratings and rankings in available published forms until the software is developed.

1. CSR Reporting

Corporations publish “Corporate Social Responsibility Reports,” under that or a similar title, such as “Sustainability Reports,” Environmental, Social, and Governance Reports,” or “Corporate Citizenship Reports” (“CSR reports”).⁶⁰ Because they are not legal documents, CSR reports are often prepared by public relations or marketing personnel.⁶¹

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

wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf [https://perma.cc/AXW4-CW6H] [hereinafter STATEMENT OF INTENT]; INT’L FIN. REPORTING STANDARDS FOUND., CONSULTATION PAPER ON SUSTAINABILITY REPORTING 8 (2020), <https://cdn.ifrs.org/-/media/project/sustainability-reporting/consultation-paper-on-sustainability-reporting.pdf> [https://perma.cc/AF74-6LQK] [hereinafter SUSTAINABILITY REPORTING].

⁵⁸ See Carlos Martinez, SASB and Companies’ False Claims of Reporting to SASB Standards 19 (May 2021) (unpublished manuscript) (on file with the author) (“[T]hrough the content and language on its website, SASB claims that the companies listed in the ‘Companies Reporting with SASB’ webpage are all companies that are reporting to their applicable SASB standard”); *supra* note 30 and accompanying text.

⁵⁹ See Rick A. Fleming & Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, 50 ENV’T L. REP. 10647, 10647-48 (2020) (noting that unless investors coalesce around one preferred set of standards, “it may require an act of . . . Congress to determine which standards should become the official metrics for ESG disclosure”).

⁶⁰ Of seventy-three randomly selected reports by S&P 500 companies for the year 2020, the titles of twenty-seven (37%) contained the word “sustainability,” twenty (27%) contained the word “Responsibility,” and fourteen (19%) contained the abbreviation “ESG” or the words “Environmental, Social, and Governance.” Lynn M. LoPucki, *Keyword Study.xlsx 1* (2021) (unpublished data) (on file with the author).

⁶¹ Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 924, 950 (2019).

most advantageously to themselves. Commentators agree that “the existing [CSR] disclosure system is fragmented, unreliable, and incomplete,”⁶² and that the data are not comparable across corporations.⁶³

These conditions make it difficult for corporations to make substantial investments in CSR.⁶⁴ In the absence of an effective ESG information system, neither the corporations, nor anyone else, can measure and compare their efforts meaningfully. The corporations cannot justify the expenditures because competitors can gain advantage over them by making the same CSR claims without making the same expenditures.⁶⁵

⁶² *Id.* at 966. Michael Bloomberg, who chairs the Sustainability Accounting Standards Board, stated in 2015 that “for the most part, the sustainability information that is disclosed by corporations today is not useful for investors or other decision-makers.” BLOOMBERG, IMPACT REPORT UPDATE 2 (2015), https://data.bloomberglp.com/sustainability/sites/6/2016/04/16_0404_Impact_Report.pdf [<https://perma.cc/87ED-V5PZ>]; see also Virginia Harper Ho, “*Comply or Explain*” and the Future of Nonfinancial Reporting, 21 LEWIS & CLARK L. REV. 317, 327 (2017) (“[V]oluntary reporting remains inconsistent and relatively costly to integrate into investment analysis.”); Georgina Tsagas & Charlotte Villiers, *Why ‘Less Is More’ in Non-Financial Reporting Initiatives: Concrete Steps Towards Supporting Sustainability 3* (Univ. of Oslo Fac. Of L. Legal Stud., Research Paper No. 2020-15, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623889 [<https://perma.cc/CV48-WZFT>] (“[C]orporations are provided with considerable freedom to shape the debate by making the choice of *what* they will report on and *how* they will report on it. The end product is a chaotic system of financial reporting, CSR reporting, non-financial reporting and integrated reporting.”).

⁶³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 32 (2020), <https://www.gao.gov/assets/gao-20-530.pdf> [<https://perma.cc/N2UH-UVEW>] (“[I] GAO identified inconsistencies in how companies disclosed on some of [its] selected quantitative ESG topics, which may limit investors’ ability to compare these disclosures across companies.”); Allison Bennington, *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 28, 2020), <https://corp.gov.law.harvard.edu/2020/05/28/recommendation-from-the-investor-as-owner-subcommittee-of-the-sec-investor-advisory-committee-relating-to-esg-disclosure/> [<https://perma.cc/JFR9-PRUA>] (“[D]espite a great deal of information being in the mix, there is a lack of consistent, comparable, material information in the marketplace and everyone is frustrated — Issuers, investors, and regulators.”).

⁶⁴ See *supra* notes 11–13 and accompanying text.

⁶⁵ See Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 411 (2004) (“[H]igh-quality corporations seeking to attract capital have strong incentives to distinguish themselves from rivals because investors that cannot distinguish high- from low-quality issuers will not pay more for securities from high-quality issuers. In other words, inadequate disclosure will force issuing corporations to pay higher capital costs.”).

As with other information published by a public corporation, SEC Rule 10b(5) prohibits untrue statements of material fact in CSR reports and the omission of any material fact necessary to make other statements made not misleading.⁶⁶ That prohibition provides only limited protection to the users of CSR reports for three reasons. First, the courts tolerate misstatements as “mere puffery or hyperbole.”⁶⁷ For example, the claim to be a leader in reducing emissions, made by a corporation that was clearly not a leader in reducing emissions, would be considered puffing and thus not legally actionable.⁶⁸

Second, misstatements violate Rule 10b(5) only if “a reasonable investor” would view the misinformation as “having significantly altered the total mix of information made available.”⁶⁹ Many false statements of fact that would mislead investors or others in their opinion of a corporation’s CSR performance would not significantly alter the total mix of information available to investors.⁷⁰ Those false statements would not violate the rule.⁷¹

Third, the materiality principle on which securities law is based works in opposition to comparability across corporations. A small corporation that owns only a factory might be required to report the factory’s emissions as material, while a large corporation that owns an identical factory with identical emissions might not be required to report them because the factory’s emissions are not material for the large

⁶⁶ 17 C.F.R. § 240.10b-5 (2021).

⁶⁷ *E.g.*, *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004) (concluding that a reasonable investor would not view such statements, even if misleading, as material).

⁶⁸ *Cf. In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 401-02 (S.D.N.Y. 2016) (holding that the defendants’ statement about maintaining “an effective compliance organization” was nonactionable puffery); *Ruiz v. Darigold, Inc.*, No. C14-1283, 2014 WL 5599989, at *4-5 (W.D. Wash. Nov. 3, 2014) (dismissing action challenging defendants’ statements about animal welfare and employee treatment). *But see* *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1960-61 (2021) (reasoning that “courts may consider expert testimony and use their common sense in assessing whether a generic misrepresentation had a price impact”); *cf. In re Massey Energy Co. Sec. Litig.*, 833 F. Supp. 2d 597, 617-18 (S.D. W. Va. 2012) (denying motion to dismiss complaint concerning false and misleading statements that defendant “was an industry leader in safety” and that “safety at its mines [was] improving”).

⁶⁹ *In re Ford Motor Co. Sec. Litig.*, 381 F.3d at 570 (quoting *In re Sofamor Danek Grp.*, 123 F.3d 394, 400 (6th Cir. 1997)).

⁷⁰ *In re Ford Motor Co. Sec. Litig.*, at 570-71.

⁷¹ *Id.* (providing examples); *see* Lipton, *supra* note 49, at 560 (“[B]ecause the securities laws define materiality and harm in terms of financial impact, there is no penalty when companies disclose *false* information about their sustainability.”).

corporation's investors.⁷² In that circumstance, a potential stakeholder seeking to compare the two corporations' emissions might be unable to obtain the information necessary to do so.

Some corporations choose, or are required, to report ESG information pursuant to third-party standards. As a result, the data on some issues in some industries may be comparable across significant numbers of corporations.⁷³ But in most industries and on most issues, the data contained in CSR reports are not comparable. Professor Jill Fisch provides this example:

[B]oth General Motors and Ford provide differing information on the same topic: their respective electric vehicle developments. General Motors describes the number of electric vehicles it intends to bring to market by 2023 and the number of miles driven in its electric vehicles. Ford reports on the number of hybrid and fully-electric vehicles it intends to bring to market by 2022, the size of its investment in electric vehicles, and the progress of several specific global partnerships on electrified vehicles.⁷⁴

2. CSR Rating and Ranking

As many as six hundred organizations collect ESG information from CSR reports, survey the corporations and other sources, and use the

⁷² George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 640-41 (2017).

⁷³ See *Standards*, GREENHOUSE GAS PROTOCOL, <https://ghgprotocol.org/standards> (last visited Sept. 24, 2021) [<https://perma.cc/QPC5-8S3G>] [hereinafter GHG PROTOCOL] ("In 2016, 92% of Fortune 500 companies responding to the CDP used GHG Protocol directly or indirectly through a program based on GHG Protocol. It provides the accounting platform for virtually every corporate GHG reporting program in the world."). But see U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 63, at 32 ("Most [of the thirty-two] companies combined carbon dioxide and other greenhouse gases when reporting emission data, but a few reported carbon dioxide emissions alone."); Fisch, *supra* note 61, at 937 ("Climate change disclosure remains limited due in large part to the vagueness of the disclosure obligation and issuers' ability to determine, in their judgment, that a given issue is not material enough to warrant disclosure."); Andrea Liesen, Andreas G. Hoepner, Dennis M. Patten & Frank Figge, *Does Stakeholder Pressure Influence Corporate GHG Emissions Reporting? Empirical Evidence from Europe*, 28 ACCT. AUDITING & ACCOUNTABILITY J. 1047, 1051 (2015) (empirical study finding that "the majority of corporate GHG emissions disclosures are incomplete" and opining that "it is unlikely the information can allow for meaningful benchmarking and comparison across firms").

⁷⁴ Fisch, *supra* note 61, at 927 n.15 (citations omitted).

information to rate or rank the corporations.⁷⁵ The raters and rankers include the Bloomberg ESG Data Service, the Dow Jones Sustainability Index, MSCI ESG Research, Greenpeace, the Business and Human Rights Resource Center, Newsweek Magazine (Green Ranking), Sustainalytics Company ESG Reports, and Thomson Reuters ESG Research Data.⁷⁶ All purport to measure CSR performance, or some aspect of it.

None of those rating or ranking systems exerts much influence,⁷⁷ however, because their findings are not correlated with one another.⁷⁸ The same corporation may be near the top in one CSR ranking and near

⁷⁵ See WONG & PETROY, *supra* note 17, at 6.

⁷⁶ See Fisch, *supra* note 61, at 945-46.

⁷⁷ See Aaron K. Chatterji, Rodolphe Durand, David I. Levine & Samuel Touboul, *Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers*, 37 STRATEGIC MGMT. J. 1597, 1609 (2016) (“[T]here is not enough overlap among the raters themselves in terms of how to measure CSR Hence, [socially responsible investment] ratings will have a limited impact on driving rated firms toward any particular shared behaviors”); Cherie Metcalf, *Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information*, 28 PACE ENV’T L. REV. 145, 196 (2010) (noting that results of a study of ESG impacts on share price were “somewhat equivocal”); Florian Berg, Julian F. Koebel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings* 32 (MIT Sch. of Mgmt., Working Paper No. 5822-19, 2020) (“ESG ratings do not, currently, play as important a role as they could in guiding companies toward improvement.”). *But see* Metcalf, *supra*, at 165-67 (citing studies suggesting that corporate rankings might impact stock returns).

⁷⁸ RICCARDO BOFFO & ROBERT PATALANO, ORG. FOR ECON. COOP. & DEV., *ESG INVESTING: PRACTICES, PROGRESS AND CHALLENGES* 27 (2020), <https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf> [<https://perma.cc/4762-LSX6>] (“ESG scores from major ratings providers (for which data is commercially available) can vary greatly from one ESG provider to another.”); *see also* JIM HAWLEY, TRUVALUE LABS, *ESG RATINGS AND RANKINGS: ALL OVER THE MAP. WHAT DOES IT MEAN?* 3 (2017), https://cdn2.hubspot.net/hubfs/4137330/White%20Papers/WP_ZeroCorrelation.pdf [<https://perma.cc/6X3K-2Y9E>]; Fisch, *supra* note 61, at 949-50 (providing additional examples); Berg et al., *supra* note 77, at 35 (noting that divergence among ESG assessments “occurs not only at the aggregate level but is actually even more pronounced in specific sub-categories of ESG performance”); Feifei Li & Ari Polychronopoulos, *What a Difference an ESG Ratings Provider Makes!*, RSCH. AFFILIATES (Jan. 2020), https://www.researchaffiliates.com/en_us/publications/articles/what-a-difference-an-esg-ratings-provider-makes.html [<https://perma.cc/G7AZ-U9R5>] (noting “the lack of correlation and consistency in ratings produced by the different providers”).

the bottom in another.⁷⁹ Many users ignore the ratings and rankings; instead, they work from the underlying data.⁸⁰

The lack of correlation among ratings and rankings results from the fact that raters and rankers consider different categories of corporate performance,⁸¹ take different measurements of performance to establish the same category,⁸² and weigh the measurements differently in combining them into CSR ratings or rankings.⁸³ Until a substantial number of corporations report to a single set of standards, the ESG information system will remain ineffective.

B. Completion of the ESG Information System

Nearly the entire structure of the ESG information system is already in place. A large majority of corporations has committed to CSR. GRI and SASB have promulgated competing sets of high-quality, comprehensive reporting standards. Thousands of corporations are reporting to at least one of the standards in those sets.⁸⁴ As many as six hundred organizations are rating and ranking corporations on the basis

⁷⁹ One study found, for example, that one provider ranked Wells Fargo in the top third of the examined corporations, while a second provider ranked Wells Fargo in the bottom five percent. Li & Polychronopoulos, *supra* note 78. Similarly, Facebook was near the top of one provider's ranking but was considered below-average by the other ranking. *Id.*

⁸⁰ WONG & PETROY, *supra* note 17, at 24.

⁸¹ Chatterji et al., *supra* note 77 at 1599-1600 (“For example, KLD and Asset4 rate firms according to their products’ safety, while other raters do not. Asset4 and DJSI explicitly consider financial metrics, while other raters do not. KLD, Asset4, FTSE4Good, and Innovest consider Corporate Governance as part of CSR, while Calvert and DJSI do not.”).

⁸² *Id.* at 1601 (“Some raters measure environmental performance with indicators of a firm’s environmental processes, while others will concentrate on the firm’s environmental outcomes. For example, raters such as KLD give credit for products with beneficial impact on the environment, while others, such as FTSE4Good, employ metrics that assess the procedures to identify and fix environmental hazards” (citations omitted)).

⁸³ For example, Berg, Koelbel, and Rigobon note there are substantial differences in the weights for different raters. Berg et al., *supra* note 77, at 19 (“[T]he three most important categories for KLD are Climate Risk Management, Product Safety, and Remuneration. For Vigeo Eiris, they are Diversity, Environmental Policy, and Labor Practices. This means there is no overlap in the three most important categories for these two raters. In fact, only Resource Efficiency and Climate Risk Management are among the three most important categories for more than one rater.”).

⁸⁴ See *supra* Part I.A.

of their CSR.⁸⁵ Software that integrates financial information with CSR ratings and rankings is in wide use in the securities markets.⁸⁶

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

1. Standardization

The principal missing piece necessary for the ESG information system to become effective is an agreed set of comprehensive reporting standards. Standards are “comprehensive” if they are broad enough to support CSR ratings or rankings as opposed to ratings or rankings with respect to a component of CSR — such as human rights. The most widely adopted comprehensive standards are those of GRI and SASB. GRI was founded in 1997, developed the first corporate sustainability reporting framework, and promulgated it in 2000.⁸⁷ “GRI remains the most commonly used reporting standard or framework, used by around two-thirds of [the one-hundred largest] reporters and around three-quarters of [the 250 largest] reporters.”⁸⁸ GRI standards are widely used in Europe. Worldwide, 2,500 corporations report based on GRI standards.⁸⁹ GRI makes the reports publicly available through its Sustainability Disclosure Database.⁹⁰ Although “GRI’s standards are used by the majority of companies reporting sustainability

⁸⁵ WONG & PETROY, *supra* note 17, at 6.

⁸⁶ See *supra* notes 55–56 and accompanying text.

⁸⁷ *Our Mission and History*, *supra* note 15.

⁸⁸ KPMG, *supra* note 36, at 25 (alterations in original).

⁸⁹ RAJ GNANARAJAH, CONG. RSCH. SERV., R44894, ACCOUNTING AND AUDITING REGULATORY STRUCTURE: U.S. AND INTERNATIONAL 30 (2017), <https://sgp.fas.org/crs/misc/R44894.pdf> [<https://perma.cc/4Q7T-D9F6>]; see also *About the Global Reporting Initiative*, FBRH CONSULTANTS, <https://www.fbrh.co.uk/en/about-the-global-reporting-initiative> (last visited Sept. 26, 2021) [<https://perma.cc/NR3P-VAN9>] (“In total, more than 5,000 organizations across more than 90 countries have used the GRI Standards for their sustainability reporting.”).

⁹⁰ *Sustainability Disclosure Database*, GRI, <https://database.globalreporting.org/> (last updated Dec. 2020) [<https://perma.cc/7K96-ZRNP>] [hereinafter *GRI Database*].

information,”⁹¹ probably all the statistics in this paragraph include corporations reporting to any one of GRI’s more than one-thousand standards.⁹²

SASB was founded in 2011 with the support of Michael Bloomberg and Bloomberg Philanthropies.⁹³ It promulgated its standards in November 2018.⁹⁴ As of January 2021, about six hundred corporations were listed on the SASB website as “reporting with SASB Standards.”⁹⁵ Although fewer companies report to SASB standards than to GRI standards, reporting to SASB standards appears to be increasing rapidly.⁹⁶

GRI and SASB maintain that “[r]ather than being in competition, GRI and SASB are designed to fulfill different purposes for different audiences” — SASB for investors, and GRI for a wide variety of stakeholders.⁹⁷ In a coauthored op-ed, representatives of GRI and SASB wrote:

GRI and SASB are intended to meet the unique needs of different audiences. The GRI standards are designed to provide information to a wide variety of stakeholders and consequently, include a very broad array of topics. SASB’s are designed to provide information to investors and consequently, focus on the subset of sustainability issues that are financially material.⁹⁸

In 2020, SASB, GRI, and others reiterated this understanding of their respective roles in a joint statement.⁹⁹

⁹¹ Tim Mohin & Jean Rogers, *How to Approach Corporate Sustainability Reporting in 2017*, GREENBIZ (Mar. 16, 2017), <https://www.greenbiz.com/article/how-approach-corporate-sustainability-reporting-2017> [<https://perma.cc/SWB4-77TU>].

⁹² I base this conclusion on examination of reports contained in the GRI database, and the total number of reports contained in that database. See *GRI Database*, *supra* note 90. GRI 101, Standard 3.3 specifically contemplates partial reporting. That standard provides in relevant part that “[i]f the reporting organization uses selected GRI Standards, or parts of their content, to report specific information,” it must include a statement “indicat[ing] which specific content from the Standard has been applied.” GLOB. REPORTING INITIATIVE, *supra* note 44, at 25.

⁹³ Editorial Board, *Bloomberg’s Business Nanny*, WALL ST. J. (Mar. 6, 2020, 3:58 PM ET), <https://www.wsj.com/articles/bloombergs-business-nanny-11581975748> [<https://perma.cc/C57Q-UHXR>].

⁹⁴ *Standards Overview*, VALUE REPORTING FOUND., <https://www.sasb.org/standards/> (last visited Sept. 26, 2021) [<https://perma.cc/ACU7-CMLB>].

⁹⁵ See *supra* note 30 and accompanying text.

⁹⁶ See *supra* notes 30–31 and accompanying text.

⁹⁷ Mohin & Rogers, *supra* note 91.

⁹⁸ *Id.*

⁹⁹ See CDP ET AL., STATEMENT OF INTENT, *supra* note 57, at 8.

SASB's materiality focus is disadvantageous in that it (1) ignores externalized social costs,¹⁰⁰ (2) tailors the information for investors' use — making it less useful to other stakeholders,¹⁰¹ and (3) reduces the comparability of the information across corporations.¹⁰² SASB's materiality focus is advantageous in that materiality is the “cornerstone” of the federal securities laws.¹⁰³ ESG standards based on materiality are more likely to appeal to investors and the SEC.

Although GRI and SASB claim to have identified “a few companies that are using both approaches,”¹⁰⁴ reporting the same variable to different standards is awkward and uncommon. A GRI representative described the alignment problem as it existed between SASB and GRI in 2018:

In many cases, our standards are identical. In others, the SASB has defined disclosures that represent issues that are narrowly defined for certain industries. There is alignment work to be done in the third category where the two frameworks have similar disclosures with different characteristics. For this group, we are working together on a technical level with an aim to create better alignment.¹⁰⁵

The Better Alignment Project was a two-year effort announced by GRI, SASB, the Climate Disclosure Standards Board (“CDSB”), and the Integrated Reporting Council (“IIRC”) in November 2018.¹⁰⁶ Its purpose was to drive “better alignment of sustainability reporting

¹⁰⁰ Hans B. Christensen, Luzi Hail & Christian Leuz, *Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review*, 26 REV. ACCT. STUD. 1176, 1232 (2021) (“[F]inancial materiality almost by definition excludes reporting on firm impacts that are externalities.”).

¹⁰¹ See Lipton, *supra* note 49, at 561 (“[S]takeholders have identifiable needs that are best served by a generalized disclosure system designed for their interests.”).

¹⁰² See *supra* note 72 and accompanying text.

¹⁰³ BUS. ROUNDTABLE, THE MATERIALITY STANDARD FOR PUBLIC COMPANY DISCLOSURE: MAINTAIN WHAT WORKS 3 (2015), <https://s3.amazonaws.com/brt.org/archive/reports/BRT.The%20Materiality%20Standard%20for%20Public%20Company%20Disclosure.2015.10.29.pdf> [<https://perma.cc/3QTB-5439>].

¹⁰⁴ Dunstan Allison-Hope, *Can the GRI and SASB Reporting Frameworks Be Collaborative?*, GREENBIZ (Jan. 2, 2018), <https://www.greenbiz.com/article/can-gri-and-sasb-reporting-frameworks-be-collaborative> [<https://perma.cc/9SB7-JVPE>].

¹⁰⁵ *Id.*

¹⁰⁶ *Better Alignment Project*, CORP. REPORTING DIALOGUE, <https://corporatereportingdialogue.com/better-alignment-project/> (last visited Nov. 17, 2021) [<https://perma.cc/P7DS-BR4V>] (comparing CDP, CDSB, GRI, IIRC, and SASB standards to the TCFD recommended disclosures).

frameworks.”¹⁰⁷ The CDSB publishes a “framework” for climate disclosure that has 374 users.¹⁰⁸ The IIRC is an NGO that advocates for integrated reporting of financial and other “value creation” information.¹⁰⁹

Although more than two years have elapsed, the Better Alignment Project has issued no final report. Circumstances have changed. In September 2020, the International Financial Reporting Standards Foundation (“IFRS”) issued a “Consultation Paper” suggesting that IFRS “[c]reate a Sustainability Standards Board and become a standard-setter working with existing initiatives and building upon their work.”¹¹⁰ IFRS’s power grab is apparently backed by the International Organization of Securities Commissions (“IOSCO”).¹¹¹ But reporting to SASB standards appears to be booming,¹¹² and SASB has merged with IIRC to become the Value Reporting Foundation.¹¹³ Instead of reporting their progress on alignment, the Better Alignment Project’s members issued a Statement of Intent to Work Together Towards Comprehensive Corporate Reporting.¹¹⁴ A SASB-GRI alignment no longer appears imminent.

¹⁰⁷ *Id.*

¹⁰⁸ *Infographic: CDSB Framework Users*, CLIMATE DISCLOSURE STANDARDS BD. (Dec. 1, 2017), <https://www.cdsb.net/cdsb-framework/750/infographic-cdsb-framework-users> [<https://perma.cc/GNR2-2BDT>].

¹⁰⁹ *International Integrated Reporting Council Privacy Notice*, VALUE REPORTING FOUND., <https://integratedreporting.org/international-integrated-reporting-council-privacy-policy/> (last visited Sept. 26, 2021) [<https://perma.cc/TC9B-S45U>] (“The International Integrated Reporting Council (IIRC) is a global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs. The coalition is promoting communication about value creation as the next step in the evolution of corporate reporting.”).

¹¹⁰ SUSTAINABILITY REPORTING, *supra* note 57, at 8.

¹¹¹ *See* Erik Thedéen, Dir. Gen., Finansinspektionen & Chair, Int’l Org. Sec. Comm’n’s Task Force on Sustainable Fin., Speech at the Driving Global Standards on Sustainable Finance Conference (Sept. 30, 2020), <https://www.fi.se/en/published/presentations/2020/erik-thedeens-speech-at-driving-global-standards-on-sustainable-finance/> [<https://perma.cc/V6BQ-9QDQ>] (“I believe IOSCO has a unique position to help and facilitate that process. In fact, IOSCO played a similar role in the development of the financial reporting, the IFRS, almost 20 years ago.”).

¹¹² *See supra* note 30.

¹¹³ Sustainability Acct. Standards Bd., IIRC and SASB Announce Intent to Merge, *supra* note 57.

¹¹⁴ CDP ET AL., STATEMENT OF INTENT, *supra* note 57, at 2 (“In this paper, five framework- and standard-setting institutions of international significance have come together to help resolve this confusion and to show a commitment to working towards a comprehensive corporate reporting system.”).

2. Reporting Levels

The levels of reporting to GRI or SASB standards are difficult to assess. First, both organizations report statistics for the number of corporations reporting to any of their standards, not the number of corporations reporting to their entire set of standards.¹¹⁵ Second, corporations frequently claim to report to a standard when in fact they merely produce data similar to that required by the standard.¹¹⁶ When that occurs, it is usually not in the interests of the standard-promulgator to correct them. The promulgators are competing to portray their standards as widely adopted.¹¹⁷ Once a set of standards dominates, promulgator overclaiming probably will subside.

Two developments are likely to boost reporting levels dramatically. First, institutional investors have been ratcheting up the pressure on corporations to report to dominant standards. In his January 2020 letter to CEOs, Larry Fink, CEO of BlackRock, the world's largest investor, made this request:

This year, we are asking the companies that we invest in on behalf of our clients to: (1) publish a disclosure in line with industry-specific SASB guidelines by year-end . . . or disclose a similar set of data in a way that is relevant to your particular business; and (2) disclose climate-related risks in line with the [the Task Force on Climate-related Financial Disclosure's] recommendations¹¹⁸

Fink added this thinly veiled threat:

Last year BlackRock voted against or withheld votes from 4,800 directors at 2,700 different companies. Where we feel companies and boards are not producing effective sustainability disclosures or implementing frameworks for managing these issues, we will hold board members accountable.¹¹⁹

¹¹⁵ See *supra* note 92 and accompanying text.

¹¹⁶ Liesen et al., *supra* note 73, at 1051 (“[O]ur finding that the majority of corporate GHG emissions disclosures are incomplete suggests that it is unlikely the information can allow for meaningful benchmarking and comparison across firms. As such, the potential for the disclosure to induce improved corporate climate change performance is at best, questionable.”).

¹¹⁷ Martinez, *supra* note 58, at 6 (“[D]espite SASB’s claims that the companies included in this study are reporting to its standards, 75% of these companies are not.”).

¹¹⁸ *Larry Fink’s 2020 Letter to CEOs*, *supra* note 29.

¹¹⁹ *Id.*

Voting against or withholding votes from directors embarrasses the directors and may even result in their removal from office.¹²⁰

Two weeks later, the world's fourth largest investor, State Street Global Advisers, issued a similar threat.¹²¹ Since the publication of those threats, reporting to SASB standards has accelerated sharply.¹²²

The second development that may boost reporting is the possibility that the SEC will require all public companies to report to a commonly accepted disclosure framework or explain why they chose not to do so.¹²³ The SEC's current language would require that each public corporation "identify a commonly accepted disclosure framework and fully disclose all material information in accordance with such framework."¹²⁴ That seems to require that if the corporations report to GRI or SASB standards that they report to all that are material.¹²⁵ Most currently report to only a few of the standards in those sets.

3. Stakeholder Software Development

Figure 1 shows the role of software in the ESG information system. The software that provides ESG information for investors is readily available. The same is not true of software for other stakeholders. To take ESG information into account, the other stakeholders must retrieve the information themselves and integrate it into their decision making processes. That may be practical in large transactions, such as the purchase of a house or the acceptance of a job offer. It is unlikely, however, in the large bulk of small transactions, such as consumer product purchases. The ESG information system will be fully effective only when stakeholder software that links the ESG information on corporations to their products and services is available at the point of sale.

¹²⁰ See Reena Aggarwal, Sandeep Dahiya & Nagpurnanand R. Prabhala, *The Power of Shareholder Votes: Evidence from Uncontested Director Elections*, 133 J. FIN. ECON. 134, 151 (2019) ("We find that directors receiving more dissent experience negative future outcomes. Dissent is associated with increased director turnover.").

¹²¹ See Letter from Cyrus Taraporevala to Board Members, *supra* note 29.

¹²² See *supra* note 30 and accompanying text.

¹²³ U.S. SEC. & EXCH. COMM'N, *supra* note 35, at 7.

¹²⁴ *Id.*

¹²⁵ See, e.g., Glob. Reporting Initiative, *supra* note 44, at 22 ("To claim that a sustainability report has been prepared in accordance with the GRI Standards, the reporting organization shall meet all criteria for the respective option (Core or Comprehensive); *id.* at 21 ("Core. This option indicates that a report contains the minimum information needed to understand the nature of the organization, its material topics and related impacts, and how these are managed.).

Some ESG information systems do provide information about products at the point of sale. For example, LEED (Leadership in Energy and Environmental Design) is a “green building rating system.”¹²⁶ The U.S. Green Building Council certifies the resource efficiency of particular buildings. Sellers who have obtained certification of their buildings make potential buyers aware of it. The U.S. Green Building Council claims that “LEED-certified buildings command the highest rents, while lease-up rates typically range from average to 20% above average; vacancy rates for green buildings are an estimated 4% lower than non-green properties.”¹²⁷

Similarly, Consumers Union, UL, and Good Housekeeping have certified a wide variety of products for an average of more than a century. Although UL certifies products for “low chemical emissions”¹²⁸ and Good Housekeeping makes “sustainability” awards,¹²⁹ none of those three organizations report whether the corporations that produce the products are socially responsible. Their systems facilitate customer control of products through product markets, but not control of the corporations that manufacture or sell the products.

The buyers of goods and services can use ESG information about their sellers effectively only if the information is available at the point of sale. Some scholars assume that the information will be there without considering how the system would accomplish that.¹³⁰ But the system can make corporate ESG information available only if the system can

¹²⁶ *What is LEED?*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/help/what-leed> (last visited Sept. 26, 2021) [<https://perma.cc/54WE-GN4V>]; see also Mary Jane Angelo & Joanna Reilly-Brown, *Whole-System Agricultural Certification: Using Lessons Learned from LEED to Build a Resilient Agricultural System to Adapt to Climate Change*, 85 U. COLO. L. REV. 689, 736-47 (2014) (explaining how LEED operates).

¹²⁷ *Why LEED?*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/leed/why-leed> (last visited Sept. 26, 2021) [<https://perma.cc/9N43-A4YT>].

¹²⁸ *GREENGUARD Certification*, UL, <https://www.ul.com/services/greenguard-certification> (last visited Sept. 26, 2021) [<https://perma.cc/A2DH-UR5X>] (“GREENGUARD Certified products are recognized, referenced or preferred by more than 450 federal purchasers, retailers, green building rating tools and building codes around the world.”).

¹²⁹ *Frequently Asked Questions About Good Housekeeping’s Sustainability Awards*, GOOD HOUSEKEEPING (Apr. 13, 2021), <https://www.goodhousekeeping.com/institute/about-the-institute/a24483277/good-housekeeping-sustainability-awards-faqs/> [<https://perma.cc/K9UR-U5UB>].

¹³⁰ E.g., Min Yan & Daoning Zhang, *From Corporate Responsibility to Corporate Accountability*, 16 HASTINGS BUS. L.J. 43, 46 (2020) (“The assumption is that the product, capital, and labour markets will influence corporate behavior by penalizing poor performers (i.e., social irresponsibility) and rewarding good ones (i.e., social responsibility).”).

link products and services to the corporations that produce and distribute them.

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

a. The Supply Chain Problem

The supply chain problem is that several corporations, each with its own ESG ratings and rankings, may participate in making a single product or service available. Buyers may have difficulty determining which of the corporations they should hold responsible. For example, Amazon may sell chocolate manufactured by Godiva from the cocoa beans of numerous growers in Ghana and Cote d'Ivoire, some of whom use child labor and deforest.¹³¹ For Godiva or Amazon to provide the chocolate buyer with information about all of the corporations in the supply chain is impractical. Some growers may use child labor while others do not. But a box of Godiva chocolate purchased on Amazon cannot be identified as containing chocolate from a particular grower.

GRI standards address this problem by requiring corporations to report the risk that child labor is present in their supply chains.¹³² In effect, that holds corporations responsible for their worst suppliers' actions and incentivizes them to remove their worst suppliers from their supply chain. That may solve the problem for a product available through a single source.

Supply chains are not, however, so simple. To illustrate, Godiva recently received the lowest possible rating from Green America on child labor in supply chains.¹³³ Godiva sells chocolate through Amazon, but also through other channels. Should customers who seek to avoid facilitating child labor avoid purchasing chocolate — or all products — from Amazon?

¹³¹ See generally Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), <https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/> [<https://perma.cc/MLX4-EBPN>] (describing the situation in which this hypothetical is set).

¹³² GLOB. REPORTING INITIATIVE, GRI 408: CHILD LABOR 6 (2016) (requiring the reporting of operations or suppliers with significant risk for relying on either child labor or hazardous working conditions for young workers).

¹³³ *Chocolate Company Scorecard*, GREEN AM., <https://www.greenamerica.org/chocolate-scorecard> (last visited Sept. 27, 2021) [<https://perma.cc/9J7Y-WQR2>].

To answer that question, the customer would need to compare the customer's alternatives.¹³⁴ Those alternatives might include buying some other brand of chocolate through Amazon, buying Godiva chocolate through one of Amazon's competitors, buying some other brand of chocolate through one of Amazon's competitors, or not buying chocolate at all. Which would best implement the customers' values might depend not just on the CSR of the corporations involved, but also on then-current consumer strategies for combating child labor. For example, successively boycotting alternative supply chains might be the strategy most likely to induce competition to eliminate child labor.

GRI standard 408-1 would require Amazon to report "suppliers considered to have significant risk for incidents of . . . child labor" and "measures taken by [Amazon] intended to contribute to the effective abolition of child labor."¹³⁵ SASB's supply chain standard would not apply to Amazon. Amazon would be in SASB's "Multiline and Specialty Retailers & Distributors" industry, for whom SASB deems "Supply Chain Management" immaterial.¹³⁶ The closest SASB accounting metric applicable to Amazon is CG-MR-410a.1. That metric does not address child labor directly.¹³⁷ Instead, it requires that the entity "disclose its revenue from products that are third party certified to an environmental or social sustainability standard."¹³⁸

SASB's decision not to require Amazon or other multiline retailers to report child labor in their supply chains apparently reflects SASB's judgment that market actors would not hold Amazon responsible for that child labor.¹³⁹ At the same time, however, SASB's decision would make it impossible for market actors to hold Amazon responsible in the hypothetical world in which SASB standards were dominant. The market would not have the necessary information.

¹³⁴ See Lisa A. Neilson, *Boycott or Buycott? Understanding Political Consumerism*, 9 J. CONSUMER BEHAV. 214, 217 (2010) (noting that gender and philosophy affect choices about boycotting).

¹³⁵ GLOB. REPORTING INITIATIVE, *supra* note 132.

¹³⁶ See SASB *Materiality Map*, SUSTAINABILITY ACCT. STANDARDS BD., <https://www.sasb.org/standards/materiality-map/> (last visited Nov. 18, 2021) [<https://perma.cc/2FQ3-QTDV>].

¹³⁷ SUSTAINABILITY ACCT. STANDARDS BD., *MULTILINE AND SPECIALTY RETAILERS & DISTRIBUTORS 21* (2018), https://www.sasb.org/wp-content/uploads/2018/11/Multiline_and_Specialty_Retailers_Distributors_Standard_2018.pdf [<https://perma.cc/4X6C-S2RW>].

¹³⁸ *Id.*

¹³⁹ If market actors would hold Amazon responsible, the risk that market actors will discover the child labor and actually hold Amazon responsible would be material and so disclosable.

Amazon reports to neither the GRI nor the SASB standard. Instead, Amazon reports to its own “exacting standards” which are “derived from the United Nations Guiding Principles on Business and Human Rights, and the Core Conventions of the International Labour Organization (“ILO”).”¹⁴⁰ Amazon requires its direct suppliers “to engage workers who are (i) 15 years old, (ii) the age of completion of compulsory education, or (iii) the minimum age to work in the country where work is performed, whichever is greater.”¹⁴¹ Amazon does not make this standard applicable to Amazon’s indirect suppliers. Instead, “[i]n order to ensure these standards are cascaded throughout our supply chain, [Amazon] expect[s] suppliers to consistently monitor and enforce these standards in their own operations and supply chain.”¹⁴²

As applied to the Godiva example, Amazon requires and expects that Godiva not use child labor, and requires that Godiva require and expect Godiva’s growers not to use child labor. That leaves it to Godiva to address the child labor problem in Ghana and Cote d’Ivoire. Amazon states that it is “committed to working with [its] suppliers to improve protections for their workers,” but Amazon’s supply chain standards impose no public reporting requirements.¹⁴³ In the absence of public reporting, no sound basis for supply chain comparisons among multiline retailers exists.

Thus, neither Amazon’s nor SASB’s standards require Amazon and other multiline retailers to report on child labor in their supply chains. GRI standards do. Ultimately, the solution to the supply chain problem would be to require all of the corporations in the supply chain to report, but that level of reporting is probably decades away.

b. The Trademark Problem

Some corporations sell goods or services in their own names. Examples include Apple, Inc. and Microsoft Corporation.¹⁴⁴ But the large majority of all brand names are not the names of corporations.

¹⁴⁰ AMAZON, AMAZON SUPPLY CHAIN STANDARDS 1, https://sustainability.aboutamazon.com/amazon_supply_chain_standards_english.pdf (last visited Sept. 26, 2021) [<https://perma.cc/74WG-6Z2N>].

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 1.

¹⁴³ *Id.*

¹⁴⁴ That is, Apple, Inc., the company, sells its products through “Apple” stores and the Apple logo appears on those products.

They are trademarks.¹⁴⁵ Consumers see the trademarks when they shop, but usually do not know the names of the corporations operating under them.¹⁴⁶ The corporations selling under the trademarks may or may not be the manufacturers of the products sold or even the owners of the marks.¹⁴⁷ For many of the products sold on Amazon, the product description does not include the name of the trademark owner or the manufacturer.¹⁴⁸

To furnish ESG information about sellers at the point of sale would require that the information system link brands or product descriptions to those sellers and thus to their ESG ratings and rankings. Although the owners of most trademarks publicly acknowledge their ownership, some do not. For each trademark, an owner's name is shown on the United States Patent and Trademark Office online records. But that record owner may be a corporate employee who holds the trademark in trust for an unnamed beneficiary, a subsidiary not identified as such, or a trademark licensor.¹⁴⁹ Under current law, it may be impossible to link trademarks to corporations comprehensively without the corporations' cooperation. The solution may be to link the products for which

¹⁴⁵ For example, Doctors' Associates, Inc. franchises the Subway sandwich stores. *Doctor's Associates Inc.*, FOREST 500, <https://forest500.org/rankings/companies/doctors-associates-inc> (last visited Nov. 6, 2021) [<https://perma.cc/P98D-KH5F>].

¹⁴⁶ See Robert W. Emerson, *Franchisors' Liability when Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 653 (1992) (discussing a survey finding that "only 9.9% of the respondents correctly answered that most Chevron gas stations are locally owned and operated, while 57.0% erroneously believed that they were mostly nationally owned and operated, and 28.0% incorrectly concluded that most were dually owned and operated both nationally and locally").

¹⁴⁷ Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1100-01 (2002).

¹⁴⁸ E.g., *1080P Webcam Computer Camera*, AMAZON, https://www.amazon.com/Microphone-Computer-Webcams-Broadcast-Confer-ence/dp/B088LMZZV4/ref=sr_1_1_sspa?dchild=1&keywords=webcams&qid=1590378682&sr=8-1-spons&psc=1&spLa=ZW5jcjcnldGVkUXVhbGlmaWVyPUEySlZMUNYWVBOU11VjMvUyJ5cHRlZElkPUeWNTM5MDYzMlVCREE3T0hXQVBIWSZlbnNyeXB0ZWRBZElkPUeWJj2N Tk3MUgzUU pTVlQ0UIROJndpZGdlldE5hbWU9c3BfYXRmJmFjdGlvbj1jbGlja1JlZGl yZWNoJmRvTm90TG9nQ2xpY2s9dHJlZQ== (last visited Nov. 6, 2021) [<https://perma.cc/VQ5E-MNDZ>] (merely stating that the "brand" is "FFGY Petsply" and providing no additional information about the trademark owner or manufacturer). The mark does not appear in the United States Patent and Trademark Office's Trademark Database. *Trademark Electronic Search System (TESS)*, U.S. PATENT & TRADEMARK OFF., <https://tmsearch.uspto.gov/bin/gate.exe?f=searchss&state=4810:kriornr.1.1> (last visited Nov. 6, 2021) [<https://perma.cc/87KD-RN5J>] (search for "FFGY Petsply").

¹⁴⁹ See LOPUCKI & VERSTEIN, *supra* note 47, at 57-68 (explaining the lack of congruency between the public's view and the lawyer's view of legal actors).

information is available and see whether market pressure is sufficient to compel the others to disclose.

C. ESG Information System Costs

Repurposing may affect the corporation's costs. Those costs may in turn affect the prices of the corporation's products and services. In addition, the ESG information system will affect the cost at which Potential Stakeholders can obtain and use CSR information in their decision making. I consider each effect separately. I conclude that repurposing will increase the corporations' costs in the short run, but reduce them in the long run.¹⁵⁰ If that conclusion is correct, repurposed corporations will not need to raise the prices of their products or services. They should instead treat the increased costs they will incur in the short run as an investment that will pay out in the long run.

1. Cost Effects on the Prices of Goods and Services

Participation in the ESG information system will impose three new costs on each participating corporation. The first is the cost of measuring and auditing the corporation's CSR performance. The second is the cost of deciding whether the corporation should improve its CSR performance. The third is the cost of improving the corporation's CSR performance if the corporation decides to do that. Those costs may be substantial. They will tend to increase the prices of the participating corporations' products and services.¹⁵¹

At the same time, participation will also tend to reduce some of the participating corporations' costs and thus reduce the prices of their products and services.¹⁵² For example, reporting comprehensively under a single set of standards may be less expensive than reporting under the current system. Under the current system, more than a hundred ESG "data providers" compete to obtain information from

¹⁵⁰ See Saura Masconale & Simone M. Sepe, *Activist Capitalism and Democracy* 17, 33-35 (Eur. Corp. Governance Inst., Working Paper No. 568/2021, 2021) (noting that CSR initiatives "[are] a means toward long-term returns (even though [they have] short-term costs)").

¹⁵¹ See, e.g., Desiree Hanford, *Do Green Buildings Cost More?*, FACILITIESNET (June 1, 2008), <https://www.facilitiesnet.com/green/article/Do-Green-Buildings-Cost-More--8954> [<https://perma.cc/WJ62-RAGY>] (discussing different costs of green buildings).

¹⁵² See Lipton, *supra* note 49, at 527 ("Corporations may generate goodwill from customers, employees, and surrounding communities if they are perceived as good citizens, which may translate into higher sales, better employee retention, and productive relationships with regulators.").

corporations and provide it to investors, raters, and rankers.¹⁵³ “Many provide lengthy questionnaires to companies (some with many hundreds of questions). Responding to these forms takes a great deal of time and effort”¹⁵⁴

Corporations’ cost of evaluating and improving CSR performance may be partly or entirely offset by ESG Benefit. High CSR-performing corporations may have lower marketing costs because their CSR ratings and rankings sell their products and services for them. Another way to put the same point is that the published high ranking is free marketing of the corporation’s products and services. High CSR-performing corporations may achieve higher sales volumes and benefit from economies of scale. High CSR-performing corporations’ greater appeal to Potential Stakeholders may reduce their costs of hiring and retaining employees,¹⁵⁵ reduce their costs of finding and contracting with strategic partners, increase their access to capital while reducing its cost,¹⁵⁶ and improve their relationships with the communities in which they operate.

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

CSR’s potential to reduce corporations’ costs is even more easily visible from the perspective of society as a whole. “CSR” and “sustainability” are often used interchangeably. Sustainability is the

¹⁵³ See RAKHI KUMAR & ALI WEINER, STATE ST. GLOB. ADVISERS, THE ESG DATA CHALLENGE 2 (2019), <https://www.ssga.com/investment-topics/environmental-social-governance/2019/03/esg-data-challenge.pdf> [<https://perma.cc/263P-6TSU>].

¹⁵⁴ Bennington, *supra* note 63.

¹⁵⁵ See Philipp Krueger, Daniel Metzger & Jiaxin Wu, *The Sustainability Wage Gap* 34-35 (Eur. Corp. Governance Inst., Working Paper No. 718/2020, 2021) (“[There is] evidence that firms with better sustainability characteristics tend to pay lower wages (about 10%) and attract and retain workers that are more skilled.”); see also George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 663 (2021) (“In a resource-constrained environment, being able to attract and retain human capital is an important part of a firm’s competitive strategy.”).

¹⁵⁶ See Dan S. Dhaliwal, Oliver Zhen Li, Albert Tsang & Yong George Yang, *Voluntary Nonfinancial Disclosure and the Cost of Equity Capital: The Initiation of Corporate Social Responsibility Reporting*, 86 ACCT. REV. 59, 79-80 (2011) (finding that the voluntary issuance of a sustainability report leads to a reduction in the firm’s cost of capital and that firms with superior CSR performance attracts institutional investors and analyst coverage); Bennington, *supra* note 63 (“Requiring disclosure of [ESG information] directly by the Issuer will facilitate the flow of capital to US Issuers of all sizes with or without ESG-related investment mandates.”).

ability to exist continually.¹⁵⁷ Corporations can achieve sustainability only by internalizing their social costs.¹⁵⁸ If all actors in the economy do the same, the result is economic efficiency. If the human race exists over the long run, economic efficiency — sustainability — is the cheapest method of accomplishing that, not a source of additional costs.¹⁵⁹ If total social costs are lower and allocated appropriately, each corporation's costs will be lower.

CSR costs that corporations internalize will tend to be more than offset by reduction of society's costs of dealing with externalizations. When corporations externalize their social costs, government often responds by paying remediation costs and trying to recover them from the wrongdoer, the wrongdoer's industry, or the public.¹⁶⁰ The transaction costs of that process are high. Preventing externalization eliminates the need for remediation and recovery. For example, if the ESG information system prevents corporations from releasing the greenhouse gases that cause rising sea levels, that may eliminate the need for flood control measures in coastal cities or the relocation of those cities to higher ground. If public expenses decreased, governments could reduce taxes.

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

¹⁵⁷ *Sustainability — What Is It? Definition, Principles and Examples*, YOU MATTER (June 18, 2021), <https://youmatter.world/en/definition/definitions-sustainability-definition-examples-principles/> [<https://perma.cc/Y6HB-YR56>].

¹⁵⁸ See Geoffrey Heal, *Corporate Social Responsibility: An Economic and Financial Framework*, 30 GENEVA PAPERS ON RISK & INS. 387, 393 (2005) (“The issues raised provide us with an implicit definition of CSR, which we now formalize. CSR involves taking actions which reduce the extent of externalized costs or avoid distributional conflicts.”); Alessio M. Paces, *Sustainable Corporate Governance: The Role of the Law* 13 (Eur. Corp. Governance Inst., Working Paper No. 550/2020, 2020) (“From an economic standpoint, sustainability implies inter alia reducing the negative externalities of production on the environment.”).

¹⁵⁹ See *Economic Efficiency*, INVESTOPEDIA, https://www.investopedia.com/terms/e/economic_efficiency.asp (last visited Nov. 16, 2020) [<https://perma.cc/29BX-JNCW>] (“Economic efficiency is when all goods and factors of production in an economy are distributed or allocated to their most valuable uses and waste is eliminated or minimized.”).

¹⁶⁰ E.g., *Environmental Surcharge Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/environmental-surcharge> (last visited Nov. 16, 2021) [<https://perma.cc/33MP-627H>].

Once the ESG information system is effective, CSR's benefits will probably accrue disproportionately to the first corporations to report and spend on CSR improvements. Stakeholders and the public will be more likely to notice and react enthusiastically to their efforts. Those corporations will tend to win high CSR rankings and then benefit from the stickiness of ESG Benefit¹⁶¹ and the feedback loop in CSR rankings.¹⁶² Even if the first-movers' initial costs are higher, the government may impose equally high costs on their competitors by mandating the same CSR reporting and improvements. The laggards will incur the costs without receiving the accolades.

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

2. Cost Effects on Potential Stakeholder Power

Potential Stakeholders and the organizations that design and control the ESG information system will share the power that system generates. The organizations' power will be derived from their ability to determine what gets measured and by what standards. The Potential Stakeholders' power will be derived from their freedom — to the extent of their financial ability — to confer ESG benefit on whatever corporations they chose on whatever bases they choose.¹⁶³ Through their choices of what corporations to deal or associate with, Potential Stakeholders can reward corporations that express the Potential Stakeholders' values. Those dealings and associations — ESG Benefit — are the corporations' incentives to repurpose themselves to the Potential Stakeholders' values.

¹⁶¹ See *infra* Part II.A.2.

¹⁶² See Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 13-14 (2007) (characterizing rankings as “self-fulfilling prophecies”); Luis L. Martins, *A Model of the Effects of Reputational Rankings on Organizational Change* 16 ORG. SCI. 701, 712 (2005) (“[B]usiness schools were more likely to undertake organizational change the more their top managers perceived an identity-reputation discrepancy relative to the rankings.”).

¹⁶³ See Kishanthe Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727, 749-50 (2019) (“These stakeholders rely on reputation when deciding whether to provide a corporation with something it needs in order to succeed: investors provide capital, employees provide talent, consumers provide revenue, suppliers provide product sourcing and support, and communities provide the social license to operate.” (footnotes omitted)).

To exercise their power effectively, Potential Stakeholders must make the effort necessary to inform themselves. With the right software, that effort may be trivial. A consumer may choose between otherwise virtually identical products on the basis of ESG information that appears on the same computer screen, turn into the higher-ranked gas station rather than the lower-ranked one, or click to see the relevant rankings before buying a corporation's shares at the market price. Eighty-five percent of Americans and ninety-one percent of millennials say that they would switch brands to one associated with a cause.¹⁶⁴

A substantial literature reports that Potential Stakeholders are willing to incur substantially higher costs to transact with high-CSR performers. Consumers not only state a willingness to pay more for socially responsible products,¹⁶⁵ they *actually* buy more socially responsible products¹⁶⁶ and pay more for them.¹⁶⁷ Corporations devote

¹⁶⁴ CONE COMM'NS, NEW CONE COMMUNICATIONS RESEARCH CONFIRMS MILLENNIALS AS AMERICA'S MOST ARDENT CSR SUPPORTERS, BUT MARKED DIFFERENCES REVEALED AMONG THIS DIVERSE GENERATION 4 (2015), <https://www.conecomm.com/2015-cone-communications-millennial-csr-study-pdf> [<https://perma.cc/U83F-JB5J>].

¹⁶⁵ GLOBALWEBINDEX, CORPORATE SOCIAL RESPONSIBILITY: EXAMINING THE ROLE OF CSR IN TODAY'S CONSCIOUS CONSUMERIST LANDSCAPE 4 (2019), <https://www.globalwebindex.com/reports/corporate-social-responsibility> [<https://perma.cc/M4JW-GGCM>] ("The number of consumers who would pay more for sustainable and eco-friendly products has risen dramatically between 2011 and 2019, reaching almost 60%."); see also CONE COMM'NS, 2017 CONE COMMUNICATIONS CSR STUDY 9, 12 (2017), <https://www.conecomm.com/2017-cone-communications-csr-study-pdf> [<https://perma.cc/4PCG-PRHA>] (finding that eighty-seven percent of consumers would buy and seventy-six percent would boycott based on values); Kendall Park, *Understanding Ethical Consumers: Willingness-to-Pay by Moral Cause*, 35 J. CONSUMER MKTG. 157, 163 (2018) ("With each additional year of education, respondents are willing to pay 10 cents more [for products advertised as sustainably made]. Holding all other variables constant, a college graduate would pay 39 cents more for the same pair of sustainable socks than a high school graduate, and a medical doctor would pay 78 cents more.").

¹⁶⁶ Ryan W. Buell & Basak Kalkanci, *How Transparency into Internal and External Responsibility Initiatives Influences Consumer Choice*, 67 MGMT. SCI. 932, 943 (2020) (finding grocery store customers eighty-five percent more likely to purchase coffee when exposed to information about the company's internal sustainability practices, and finding university bookstore customers nineteen percent more likely to purchase certain products when informed about the company's commitment to paying a living wage); Jens Hainmueller, Michael J. Hiscox & Sandra Sequeira, *Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment*, 97 REV. ECON. & STAT. 242, 253 (2015) (finding that grocery store sales of the two most popular bulk coffees rose by ten percent in a field experiment when the coffees carried a Fair-Trade label).

¹⁶⁷ See Hainmueller et al., *supra* note 166, at 251 (finding that customers who regularly purchased more expensive coffee were "willing to pay a sizeable premium" when the coffee was labeled as "Fair Trade").

substantial resources to vetting the corporations with whom they deal¹⁶⁸ and deselecting corporations from their supply chains based on CSR performance.¹⁶⁹ Fifty-five percent of surveyed Americans and seventy-five percent of millennials say they would take a pay cut to work for a responsible company.¹⁷⁰ Forty-four percent of Americans “worry a great deal” about climate change.¹⁷¹ Twenty-six percent of total US-domiciled assets under management — \$12 trillion — are invested using socially responsible investment strategies,¹⁷² despite the lack of persuasive evidence that such strategies produce higher returns.¹⁷³ The most sophisticated institutional investors are examining ESG risks for *all* the corporations in which they invest.¹⁷⁴ Although the available data may

¹⁶⁸ Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 496-502 (2020) (describing corporations’ writing and enforcement of rules for other corporations with whom they deal).

¹⁶⁹ CDP, *CASCADING COMMITMENTS: DRIVING AMBITIOUS ACTION THROUGH SUPPLY CHAIN ENGAGEMENT 6* (2019), <https://www.cdp.net/en/research/global-reports/global-supply-chain-report-2019> [<https://perma.cc/KJ3K-QVNS>] (noting that, in a survey of 115 major purchasing organizations belonging to the CDP Supply Chain Program (a global sustainability disclosure organization), forty-three percent deselect suppliers based on their environmental performance and an additional thirty percent are considering doing so); *see also* Min Zhang, Lijun Ma, Jun Su & Wen Zhang, *Do Suppliers Applaud Corporate Social Performance?*, 121 J. BUS. ETHICS 543, 553 (2014) (“[E]nterprises which exhibit better CSR, enjoy a closer relationship with the [supplier] stakeholder groups and more trade credit from the groups.”).

¹⁷⁰ CONE COMM’NS, *MILLENNIAL EMPLOYEE ENGAGEMENT STUDY 1* (2016), <https://www.conecomm.com/2016-cone-communications-millennial-employee-engagement-study-pdf> [<https://perma.cc/EAG6-HWE3>]; *accord* David B. Montgomery & Catherine A. Ramus, *Calibrating MBA Job Preferences for the 21st Century*, 10 ACAD. MGMT. LEARNING & EDUC. 9, 17 (2011) (finding, in a study of MBA job hunters, “Ethical Reputation rates as over 95% as important as Financial Package”).

¹⁷¹ Lydia Saad, *Americans as Concerned as Ever About Global Warming*, GALLUP (Mar. 25, 2019), <https://news.gallup.com/poll/248027/americans-concerned-ever-global-warming.aspx> [<https://perma.cc/L3D5-SCQA>].

¹⁷² U.S. SIF FOUND., *REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 1* (2018), [https://www.ussif.org/files/2018%20_Trends_OnePager_Overview\(2\).pdf](https://www.ussif.org/files/2018%20_Trends_OnePager_Overview(2).pdf) [<https://perma.cc/84TR-XNZD>].

¹⁷³ *See* BOFFO & PATALANO, *supra* note 78, at 41 (“[H]igh scoring ESG portfolios, even when using a best-in class approach that limits the concentration from reducing exposure to lower ESG scores, do not seem to outperform traditional indices.”).

¹⁷⁴ *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 63, at 9 (“Institutional investors with whom we spoke generally agreed that ESG issues can have a substantial effect on a company’s long-term financial performance.”). For example, BlackRock now requires that each of its portfolio managers take ESG information into account. *See BlackRock’s 2020 Letter to Clients: Sustainability as BlackRock’s New Standard for Investing*, BLACKROCK, <https://www.blackrock.com/us/individual/blackrock-client-letter> [<https://perma.cc/9HKT-8SKM>] (“By the end of 2020, all active portfolios and advisory strategies will be fully ESG integrated — meaning that, at the portfolio level, our portfolio managers will be

not be adequate to estimate the ESG Benefit that Potential Stakeholders can confer, it appears to be substantial.

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

II. RESPONSES TO STANDARDIZATION

The standardization of CSR reporting will make repurposing possible. The newly effective ESG information system will provide information to corporations, Potential Stakeholders, and the public. The system's effect will depend on the recipients' collective response to that information. This part analyzes that response strategically.¹⁷⁵ The analysis is divided into two parts: (1) the corporations' and Potential Stakeholders' strategic responses and their effects, and (2) the magnification of those effects by ESG rankings and CSR prestige.

A. *Strategic Response*

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

1. Corporations

When a set of standards becomes dominant, corporations will face two categories of choices. The first is the manner in which, and the extent to which, they report. At present, corporations can report to

accountable for appropriately managing exposure to ESG risks and documenting how those considerations have affected investment decisions.”).

¹⁷⁵ See generally Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 507-09 (1997) (explaining the relationship between strategic analysis and the systems approach).

some GRI or SASB standards without reporting to others.¹⁷⁶ They can also choose whether to respond to proprietary surveys and questionnaires. But to be rated and ranked for CSR on data reported to a dominant standard set will require that a corporation report to all or substantially all of the raters' or rankers' criteria.¹⁷⁷

Corporations' incentives will be to report to all standards if that will result in beneficial rating or ranking, to report to only particular standards if that will result in beneficial ratings or ranking on those particular criteria, or to report to no standards if the corporations would not be beneficially rated or ranked on any.¹⁷⁸ To enhance their own ability to get information, raters and rankers encourage Potential Stakeholders to assume the worst about non-reporters.¹⁷⁹ A likely result would be that only corporations that ranked above the average by criteria would report to those criteria. Overall, a large majority of corporations may choose to report to all or some standards, making a system based on voluntary reporting viable.

The securities law requirement that public corporations "state a *material* fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" limits corporations' ability to report selectively.¹⁸⁰ A corporation will either have to remain ignorant of facts that may be crucial to the management of its business or collect those facts and risk having to disclose them. Corporations will err on the side of over-collection and reporting because remaining ignorant would itself endanger the corporations.¹⁸¹

The second category of corporate choice is the direction and magnitude of the corporation's effort to improve its CSR performance.

¹⁷⁶ See *supra* note 92 and accompanying text.

¹⁷⁷ See GLOB. REPORTING INITIATIVE, *supra* note 44, at 23 (providing criteria that must be met to claim that a report was prepared "in accordance with the GRI standards").

¹⁷⁸ See Florencio Lopez-de-Silanes, Joseph A. McCahery & Paul C. Pudschedl, *ESG Performance and Disclosure: A Cross-Country Analysis* 5 (Eur. Corp. Governance Inst., Working Paper No. 481/2019, 2019) ("[The study found] a strong relationship between the extent of ESG disclosure and the quality of a firm's disclosure.").

¹⁷⁹ See, e.g., *Chocolate Company Scorecard*, *supra* note 133 ("Non-participation [in the survey] was viewed as a lack of transparency . . ."); *Companies Scores*, CDP (2020), <https://www.cdp.net/en/companies/companies-scores> [<https://perma.cc/ZK7D-THCV>] (assigning letter grades to companies, with F signifying a "[f]ailure to provide enough information to be evaluated").

¹⁸⁰ See 17 C.F.R. § 240.10b-5 (2021) (emphasis added).

¹⁸¹ See Remmer Sassen, Anne-Kathrin Hinze & Inga Hardeck, *Impact of ESG Factors on Firm Risk in Europe*, 86 J. BUS. ECON. 867, 869 (2016) (providing evidence that "social performance lowers firm risk").

“The literature suggests that firms generally respond to mandatory CSR reporting by expanding and adjusting their CSR activities to improve CSR performance, which is typically costly to firms.”¹⁸² Corporations concerned only with profit maximization will seek to capture available ESG Benefit because ESG Benefit is profit. That is, once corporations have collected their ESG information, corporations will assess investment in various aspects of CSR improvement on the same criteria by which they assess competing deployments of their capital.

Corporations may improve their CSR performances by divesting irresponsible operations. If the operations remain in the corporate group, the divestment will be ineffective, because reporting is by group. If the corporations spin the operations off or sell them, but continue to receive products or services from the operations, the corporations may be required to report on them as part of the corporations’ supply chains.¹⁸³

Even complete divestment may not result in a net improvement in the environment if the buyer continues the operations. For example, BP lowered its greenhouse gas emissions by sixteen percent by selling its Alaskan operations to Hilcorp Energy Co. and others¹⁸⁴ Because the buyers continued the operations, a Bloomberg investigation later found that “overall emissions from former BP facilities will likely be unchanged or even rise under new owners.”¹⁸⁵

If the ESG information system had been complete, it would have moderated the effect of BP’s divestment in at least two ways. First, under SASB standards, BP would have been encouraged to report the method of its divestment. BP did so, and that may be how Bloomberg discovered the problem.¹⁸⁶ Second, potential customers would be reluctant to

¹⁸² Christensen et al., *supra* note 100, at 1231; accord Sorabh Tomar, *Greenhouse Gas Disclosure and Emissions Benchmarking* (SMU Cox Sch. of Bus., Research Paper No. 19-17, 2021), <https://ssrn.com/abstract=3448904> [<https://perma.cc/UC5P-N68M>] (“In 2010, the United States mandated the reporting of greenhouse gas (GHG) emissions for thousands of manufacturing facilities. . . . I find a 7.9% emissions reduction following disclosure.”).

¹⁸³ See *supra* Part I.B.3.a.

¹⁸⁴ Rachel Adams-Heard, *What Happens When an Oil Giant Walks Away*, BLOOMBERG GREEN (Apr. 14, 2021), <https://www.bloomberg.com/graphics/2021-tracking-carbon-emissions-BP-hilcorp/> [<https://perma.cc/LQA4-GBH3>].

¹⁸⁵ *Id.*

¹⁸⁶ See BP, SASB INDEX 2020, at 3 (2021), <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/sustainability/sasb-index-2020.pdf> [<https://perma.cc/6QSL-GGFT>]; see also SUSTAINABILITY ACCT. STANDARDS BD., OIL & GAS — EXPLORATION & PRODUCTION 12-14 (2018), https://www.sasb.org/wp-content/uploads/2018/11/Oil_Gas_Exploration_Production_Standard_2018.pdf [<https://perma.cc/KQB9-9KKB>] (listing the discussion and analysis of “long-term and short-term strategy or plan to

purchase from Hilcorp, because purchasing would add a non-reporting company to their supply chain.¹⁸⁷ Once the other major oil companies were similarly divested, their incentives would be to support a regulatory crackdown on their non-reporting competitors.

2. Potential Stakeholders

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

Some Potential Stakeholders will be more interested in the corporation's performance on specific issues than in its overall CSR performance. Potential employees may be most concerned with the corporation's treatment of employees, communities with its treatment of other communities, customers with its treatment of customers, or any of them with the corporation's record on human rights, carbon emissions, or the race and gender of directors, officers, or employees.¹⁸⁸ The effect will be to make ESG Benefit available to corporations that perform well on a few CSR criteria even if they don't perform well overall. Thus, a large majority of public corporations may benefit from reporting to the dominant standards on at least some issues. Their selective reporting will contribute to the standards' credibility.

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

manage Scope 1 emissions" as an accounting metric for greenhouse gas emission disclosures).

¹⁸⁷ See Adams-Heard, *supra* note 184 ("[N]one of the three buyers on the other side of BP's recent divestment deals discloses overall carbon data or has meaningful climate plans.").

¹⁸⁸ See Paul Sullivan, *How Investors Are Addressing Racial Injustice*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/your-money/investors-racial-injustice.html> [<https://perma.cc/FD6K-BR59>] (describing socially responsible investing intended to promote gender and racial diversity).

Consumer expenditures constitute approximately sixty-eight percent of gross domestic product,¹⁸⁹ making consumers potentially the most important distributors of ESG Benefit. Repurposing may depend on consumers' levels of enthusiasm for and participation in the process of directing ESG Benefit. Those levels will depend largely on the availability of software to support consumer decision making and the promotion of repurposing by the media.

3. Interaction

A corporation that takes CSR action to gain ESG Benefit will likely face two consecutive delays. The first is the delay between the action and its reflection in ratings and rankings. The second is the delay between its reflection in ratings and rankings and the corporation's receipt of ESG Benefit. For a given company, each delay may be years.

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

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

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

¹⁸⁹ U.S. Bureau of Econ. Analysis, *Shares of Gross Domestic Product: Personal Consumption Expenditures*, FED. RSRV. ECON. DATA (July 29, 2021), <https://fred.stlouisfed.org/series/DPCERE1Q156NBEA> [<https://perma.cc/9VU8-N6RU>] (showing graphically that personal consumption expenditures were approximately sixty-eight percent of gross domestic product in the third quarter of 2020).

continued externalization of social costs will not only appear, but will actually be, irresponsible.

Even price-and-quality corporations who persevere ultimately have no future. If the number and sizes of the nonreporting corporations remain large enough to affect the markets for products and services, the reporting corporations and their stakeholders will demand that government level the playing field by mandating reporting and improvement.¹⁹⁰

4. Cheating

Some corporations will try to obtain ESG Benefit by exploiting ambiguities in the standards or reporting false data.¹⁹¹ This problem is not materially different from the analogous problem with the financial reporting system. The solutions are, in part, the same as the solutions to cheating in the financial reporting system: third party auditing, whistleblower protections, government regulations, government enforcement, and securities and consumer class actions. The use of these techniques in combination may be more effective than the use of each alone.¹⁹²

A financial audit is an examination and evaluation of the financial statements of a corporation to determine whether it “present[s] fairly in conformity with generally accepted accounting principles” the corporation’s financial performance or position.¹⁹³ The financial

¹⁹⁰ Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 399, 432 (2021) (“[T]he debate is not narrowly focused on just public companies, but demanding more accountability from all societally influential private companies whose actions have contributed to these problems.”).

¹⁹¹ See U.S. SEC. & EXCH. COMM’N, OFF. OF THE INVESTOR ADVOC., REPORT ON ACTIVITIES 9 (2020), <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2020.pdf> [<https://perma.cc/V864-GXB6>] (“Greenwashing is likely to grow increasingly problematic as companies and funds viewed as ESG-friendly continue to attract assets at an accelerating pace.”).

¹⁹² Cf. Fernán Restrepo, *Hedge Fund Regulation, Performance, and Risk-Taking: Re-Examining the Effect of the Dodd-Frank Act 39* (Mar. 16, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541916 [<https://perma.cc/L29W-JBHA>] (concluding empirical results “suggest that mandatory disclosure, enforcement intensity, and auditors perform a complementary role” in the setting of financial reporting).

¹⁹³ N.E. Kirk, ‘True and Fair View’ Versus ‘Present Fairly in Conformity with Generally Accepted Accounting Principles’ 1 (Aug. 6, 2001) (unpublished manuscript), <https://www.massey.ac.nz/massey/fms/Colleges/College%20of%20Business/School%20of%20Accountancy/Documents/Discussion%20Papers/208.pdf> [<https://perma.cc/C2YQ-FJCM>].

statements of public corporations must be audited annually by Certified Public Accountants (“CPAs”). CPAs are licensed professionals paid by the audited corporations. The purpose of an audit is to provide “an independent opinion about whether the financial statements are presented fairly in all material respects.”¹⁹⁴ Audits are conducted in accord with standards that “require that the auditor plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether due to error or fraud.”¹⁹⁵

Although the word “audit” is used principally with respect to financial audit in the United States, CPA and other types of firms also audit nonfinancial — including ESG — information and provide “reasonable” or “limited” assurance for the benefit of third parties. At the higher, “reasonable,” level of assurance, the auditor would use “a combination of inspection, observation, confirmation, re-calculation, re-performance, analytical procedures and inquiry . . . including, where applicable, obtaining corroborating information, and depending on the nature of the subject matter, tests of the operating effectiveness of controls.”¹⁹⁶ That is, they inspect and test the corporation’s ESG information collection system to make sure it is reporting accurate data and then put their own reputations on the line by providing assurances to third parties.

Studies differ sharply on the current extent of third-party assurance of reported ESG data.¹⁹⁷ By compiling a random sample of CSR reports

¹⁹⁴ PUB. CO. ACCT. OVERSIGHT BD., *THE AUDITOR’S REPORT ON AN AUDIT OF FINANCIAL STATEMENTS WHEN THE AUDITOR EXPRESSES AN UNQUALIFIED OPINION* 2 n.2 (2017), <https://pcaobus.org/Rulemaking/Docket034/2017-001-auditors-report-final-rule.pdf> [<https://perma.cc/V8X5-FV82>].

¹⁹⁵ *Id.* at app. 1, A1-5.

¹⁹⁶ INT’L AUDITING & ASSURANCE BD., *INTERNATIONAL FRAMEWORK FOR ASSURANCE ENGAGEMENTS* 21-22 (2008), https://www.ifac.org/system/files/downloads/International_Framework_for_Assurance_Engagements.pdf [<https://perma.cc/N8RX-8UXN>].

¹⁹⁷ *Compare, e.g.*, JOSÉ LUIS BLASCO & ADRIAN KING, KPMG, *THE ROAD AHEAD: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING* 26 (2017), <https://home.kpmg/xx/en/home/insights/2017/10/the-kpmg-survey-of-corporate-responsibility-reporting-2017.html> [<https://perma.cc/KA3V-PCKY>] (“Assurance of CR data is now accepted standard practice among G250 companies with more than two thirds (67 percent) of these companies seeking assurance.”), *with, e.g.*, SOL KWON, *INVESTOR RESP. RSCH. CTR. INST., STATE OF SUSTAINABILITY AND INTEGRATED REPORTING 2018*, at 29 (2018), <https://www.weinberg.udel.edu/IIRCiResearchDocuments/2018/11/2018-SP-500-Integrated-Reporting-FINAL-November-2018-1.pdf> [<https://perma.cc/9PGH-YTC5>] (“A minority (about 38 percent) of reports obtain external assurance, and 90 percent of these pertain only to some data, in most cases GHG emissions. . . . Only 3 percent of reporters assert their reports or ES performance data are completely externally verified.”).

by one hundred S&P 500 companies, I found that ninety-three published CSR reports for 2020.¹⁹⁸ Forty-six of the ninety-three (47%) obtained assurances. Thirty-three of the ninety-three (35%) reported limited assurances, six (6%) reported reasonable assurances, five (5%) reported moderate assurances, two (2%) reported high assurances, and the remaining forty-seven (51%) did not report assurances.¹⁹⁹ What is most important at this stage of the ESG information system's development is that CPA firms and others stand ready to provide reasonable assurance regarding ESG information. They do.²⁰⁰

As discussed in Part I.A.1, public corporations' liability for the publication of false ESG information is limited by the puffing, total-mix-of-information, and materiality doctrines. But public corporations that publish materially false ESG information that does affect the total mix can be held liable in securities class actions.²⁰¹ False ESG information may also create liability under federal and state consumer protection and anti-fraud statutes and regulations.²⁰² As ESG information is standardized and becomes more credible these actions will become easier to win because materiality and reliance will be more common.²⁰³

Lastly, the structure of the ESG information system will itself deter cheating. The evaluators are independent market actors who are free to impose any penalties they consider appropriate for cheating. For example, U.S. News has punitively lowered the rankings of law schools that have given them incorrect information.²⁰⁴ The ESG information

¹⁹⁸ Lynn M. LoPucki, *Assurances Study 2* (2021) (unpublished data) (on file with the author).

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., *ALLSTATE*, *supra* note 23, at 26 (“Our information security practices are subject to both internal and external audits . . .”). SMETA Audit is a widely used ethical audit format for the areas of labor, health and safety, environment, and business ethics. *SMETA Audit*, SEDEX, <https://www.sedex.com/smeta-audit/> (last visited Nov. 16, 2021) [<https://perma.cc/Q5BU-2CBA>].

²⁰¹ E.g., *In re BP P.L.C. Sec. Litig.*, No. 12-cv-1256, 2013 WL 6383968, at *27 (S.D. Tex. Dec. 5, 2013) (holding statements in BP’s “Sustainability Reviews” actionable); *In re Massey Energy Co. Sec. Litig.*, 833 F. Supp. 2d 597, 626 (S.D. W. Va. 2012) (holding that the investors “sufficiently alleged particular facts supporting an allegation that its losses were caused by [Defendant]’s misleading and false statements about the safety of its mines”).

²⁰² E.g., Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750-84 (2021).

²⁰³ Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1849-50 (2021) (“[E]vent-driven securities litigation [has] increased in prevalence in recent years, and SEC-mandated ESG disclosure would only accelerate this trend.”).

²⁰⁴ E.g., Scott Jaschik, *Oklahoma Gave False Data for Years to ‘U.S. News,’ Loses Ranking*, INSIDE HIGHER ED (May 28, 2019), <https://www.insidehighered.com/>

system's purpose is to assess and communicate CSR. Cheating on ESG information is not only the antithesis of CSR, it is a threat to the power of Potential Stakeholders to repurpose the corporation. Potential Stakeholders will likely support evaluators who discover cheating and impose draconian penalties.²⁰⁵

B. Response Magnification

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

1. Ranking's Effects

Hundreds of organizations already rank corporations for CSR or some aspect of it. Those rankings have limited effect because they lack credibility.²⁰⁶ Completion of the ESG information system will, however, enable the ranking systems that survive to become credible.

Credible ranking systems can induce competition among ranked organizations²⁰⁷ and cause their behavior to conform to the ranking criteria.²⁰⁸ The process of ranking organizations involves three parties: the organizations ranked, the organizations ranking them, and the audience that uses the ranking. When rankings are credible, the rankers and the audience gain power over the ranked organizations.²⁰⁹ In the context of university rankings, it has been shown that reactions to

admissions/article/2019/05/28/university-oklahoma-stripped-us-news-ranking-supplying-false [https://perma.cc/A5AE-BMX6].

²⁰⁵ See *supra* note 179 and accompanying text.

²⁰⁶ See *supra* Part I.A.2.

²⁰⁷ Jelena Brankovic, Leopold Ringel & Tobias Werron, *How Rankings Produce Competition: The Case of Global University Rankings*, 47 ZEITSCHRIFT FÜR SOZIOLOGIE 270, 270 (2018) (Ger.) (“[R]ankings are almost routinely recognized as an important driver of [increasing competition].”).

²⁰⁸ Martins, *supra* note 162, at 702 (“[T]here appears to be a consensus in the literature that rankings are sources of normative pressure on organizations that push them to conform to the criteria used by the rankings.”).

²⁰⁹ Alice M.M. Miller & Simon R. Bush, *Authority Without Credibility? Competition and Conflict Between Ecolabels in Tuna Fisheries*, 107 J. CLEANER PROD. 137, 137 (2015) (“[O]nce a label is deemed credible by those-to-be-governed, the standards and institutions used to verify compliance to them can exercise power through exclusion.”).

rankings redistribute resources, redefine organizational purpose, and induce responsive strategies.²¹⁰

The power that *U.S. News and World Report* gained over law schools by ranking them demonstrates the ability of rankings to transform the nature of ranked institutions. Sociologists studying law school rankings have found that they “changed the fundamental activities of schools, transforming, for instance, how actors make decisions, do their jobs, and think about their schools.”²¹¹ Sauder and Espeland found that “rankings have become naturalized and internalized as a standard of comparison and success. In changing how law schools think about themselves and pressuring schools toward self-discipline, rankings are now deeply embedded within schools, directing attention, resources, and interventions.”²¹²

Continual ranking magnifies small differences among the ranked organizations in two ways. First, ranking emphasizes the order of the ranked subjects and deemphasizes the amounts of the differences among them. Aside from rankers’ limited use of “ties,” only one ranked organization can be first — even if many are excellent. The amounts of the differences are usually reported ineffectively or not at all. As Brankovic, et al., put it, “by producing, visualizing and publicizing often minimal differences in performance, rankings ‘scarcify’ reputation.”²¹³ Espeland and Sauder also note this capacity to magnify small differences.²¹⁴

Second, ranking procedures usually contain a feedback loop. That is, this year’s rankings are in part based on the ranked organization’s perceived reputation among the audience. That perceived reputation is in part determined by the prior year’s rankings.²¹⁵ The feedback loop not only magnifies differences over time, but also makes initially low rankings difficult for organizations to escape. Anticipation of these effects forces organizations to respond earlier and more decisively to the invitation to compete for rankings.²¹⁶

²¹⁰ Espeland & Sauder, *supra* note 162, at 3.

²¹¹ Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 *AM. SOCIO. REV.* 63, 64 (2009).

²¹² *Id.* at 79.

²¹³ Brankovic et al., *supra* note 207, at 282.

²¹⁴ Espeland & Sauder, *supra* note 162, at 12 (“Although the raw scores used to construct *USN* rankings are tightly bunched, listing schools by rank magnifies these statistically insignificant differences in ways that produce real consequences for schools, since their position affects the perceptions and actions of outside audiences.”).

²¹⁵ *Id.* at 13-14 (characterizing rankings as “self-fulfilling prophecies”).

²¹⁶ See Martins, *supra* note 162.

CSR ranking is likely to have an even greater impact on corporations than *U.S. News* ranking has had on law schools, because corporation managers have less reason to resist CSR rankings than law school deans had to resist law school rankings. First, while *U.S. News* largely dictated its standards, GRI and SASB sought consensus among investors and corporate leaders. Second, corporate leaders have good reason to prefer CSR to shareholder wealth maximization as their primary objective: service to CSR will place them in higher social esteem. The point was captured perfectly in a *New Yorker* cartoon in which a director tells the other board members “I too hate being a greedy bastard, but we have a responsibility to our shareholders.”²¹⁷ By contrast, law school deans do not regard *U.S. News* rankings as benefitting either themselves or their schools.²¹⁸

2. The Prestige Hierarchy’s Effects

CSR is prestigious.²¹⁹ Like rankings, CSR’s prestige will amplify the effects of ESG information. CSR is prestigious because it reflects widely

²¹⁷ LOPUCKI AND VERSTEIN, *supra* note 47, at 585 (reproducing the cartoon by Mick Stevens in the *New Yorker* magazine’s March 5, 2001, issue).

²¹⁸ E.g., Louis H. Pollak, *Why Trying to Rank Law Schools Numerically Is a Non-Productive Undertaking: An Article on the U.S. News & World Report 2009 List of “The Top 100 Schools”*, 1 DREXEL L. REV. 52, 52 (2009) (“I am convinced that [the *U.S. News & World Report*] is an incubus, bad for the health of legal education.”); Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES (July 31, 2005), <https://www.nytimes.com/2005/07/31/us/education/the-878-million-maneuver.html> [<https://perma.cc/3B8D-6B9J>] (quoting then-Stanford Law School Dean Larry Kramer, “These rankings are corrosive to the actual education mean because this poll takes the following 12 criteria and now you have to fetishize them”); *Interview with Kevin Johnson, Dean of the University of California Davis, School of Law*, TOP L. SCHS. (Sept. 2009), <https://www.top-law-schools.com/kevin-johnson-interview.html> [<https://perma.cc/S23U-N63T>] (“Virtually every law school dean loves to hate the *U.S. News & World Report* law school rankings. I can assure you that law school deans across the country dread the rankings released every April.”).

²¹⁹ Tara S. Behrend, Becca A. Baker & Lori Foster Thompson, *Effects of Pro-Environmental Recruiting Messages: The Role of Organizational Reputation*, 24 J. BUS. PSYCH. 341, 347 (2009) (“The analysis demonstrates that an environmental message on a company’s web site has the effect of improving the perceived reputation of the company, and in turn the enhanced reputation of a company makes it more attractive to prospective employees. . . . [I]ndividuals may believe that if an organization can spend money on the environment then it is . . . prestigious”); David A. Jones, Chelsea R. Willness & Kristin W. Heller, *Illuminating the Signals Job Seekers Receive from an Employer’s Community Involvement and Environmental Sustainability Practices: Insights into Why Most Job Seekers Are Attracted, Others Are Indifferent, and a Few Are Repelled*, 7 FRONTIER PSYCH. 1, 3 (2016) (“When an employer is known for its CSR practices . . . it signals to job seekers that the organization is prestigious and well-regarded by others.”)

shared, pro-social values: preservation of the planet and environment; fair treatment of customers, employees, and suppliers; contribution to the community; charity; and respect for human rights. Even corporate CEOs²²⁰ and scholars who advocate shareholder wealth maximization²²¹ rush to associate themselves with CSR values. Most people prefer being the “good guys” to being the “bad guys.”

The result is a prestige hierarchy of corporations, with the most socially responsible corporations at the top and the least socially responsible at the bottom. This prestige hierarchy coincides with the prestige hierarchies based on corporate financial success and size. That is, even without a credible ESG information system, high-CSR ranking already correlates with high-reputational ranking.²²²

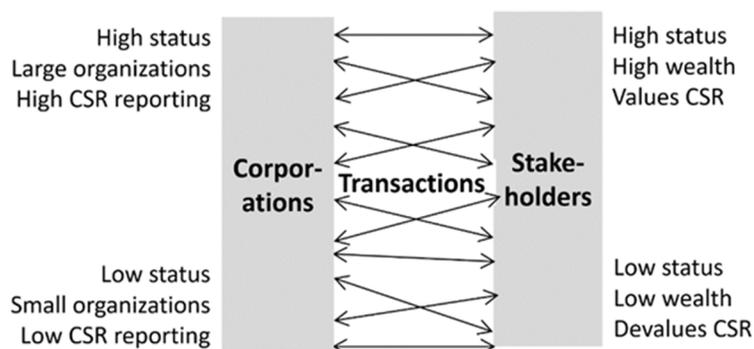
(citation omitted)); Christopher J. Waples & Benjamin J. Brachle, *Recruiting Millennials: Exploring the Impact of CSR Involvement and Pay Signaling on Organizational Attractiveness*, 27 CORP. SOC. RESP. & ENV'T MGMT. 870, 876 (2020) (“[O]rganizational attractiveness encompasses three . . . facets: general attraction, intent to pursue employment, and perceived prestige. All three were found to increase when CSR information was emphasized.”).

²²⁰ E.g., BUS. ROUNDTABLE, PURPOSE STATEMENT, *supra* note 9 (corporate CEOs endorsing CSR).

²²¹ See, e.g., Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV 91, 168 (2020) (“[Corporations] profit-seeking operations contribute to a wide array of society’s problems and impose serious negative externalities on employees, communities, consumers, and the environment.”); Rock, *supra* note 40, at 394-95 (“Finally, we should never forget that many of our problems require regulatory solutions and that we should not fool ourselves into thinking that tinkering with corporate objective can begin to substitute for regulation to control climate change, assure decent wages and working hours, and decent health care, as well as social insurance against the various downsides from competitive global markets.”); see also, e.g., Parella, *supra* note 163, at 735 (noting that in the human rights context “[a] disgraced corporation . . . associates itself with one or more reputable organizations” to restore its legitimacy by adopting the reputable organization’s rules).

²²² Chi-Shiun Lai, Chih-Jen Chiu, Chin-Fang Yang & Da-Chang Pai, *The Effects of Corporate Social Responsibility on Brand Performance: The Mediating Effect of Industrial Brand Equity and Corporate Reputation*, 95 J. BUS. ETHICS 456, 465 (2010) (“CSR and corporate reputation have positive effects on industrial brand equity and brand performance.”); Clara Pe rez-Cornejo, Ester de Quevedo-Puente & Juan Bautista Delgado-García, *Reporting as a Booster of the Corporate Social Performance Effect on Corporate Reputation*, 27 CORP. SOC. RESP. & ENV'T MGMT. 1252, 1258 (2020) (finding, “based on an international sample of firms for six years,” that corporate social performance “positively affect[s] corporate reputation”); Zia ur Rehman, Asad Khan & Asim Rahman, *Corporate Social Responsibility’s Influence on Firm Risk and Firm Performance: The Mediating Role of Firm Reputation*, 27 CORP. SOC. RESP. & ENV'T. MGMT. 2991, 2997 (2020) (finding that better CSR performance may lead to a firm’s induction into Fortune’s reputation list).

Figure 2. The CSR Prestige Hierarchy



A similar prestige hierarchy exists among Potential Stakeholders. The most highly qualified job candidates tend to be wealthier, better educated, and value CSR more highly.²²³ As the candidates seek to identify the largest, wealthiest, and most socially responsible corporations, size, wealth, and social responsibility reinforce one another.²²⁴

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

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

²²³ See Park, *supra* note 165, at 161-64 (demonstrating education's association with CSR); Daniel Hedblom, Brent R. Hickman & John A. List, *Toward an Understanding of Corporate Social Responsibility: Theory and Field Experimental Evidence* 41 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26222, 2019) ("[Recruiting workers by advertising CSR] works to improve productivity, quality-adjusted supply of output to the firm, and per-unit production costs."); Krueger et al., *supra* note 155, at 2 ("[M]ost individuals do care about the sustainability characteristics of their jobs and these preferences are generally more pronounced for highly educated workers and for more recent cohorts.").

²²⁴ See Behrend et al., *supra* note 219, at 347 ("One possible explanation for this relationship [between reputation and the effect of a pro-environmental response] is that job-seekers associate pro-environmental activities with successful and lucrative companies.").

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

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

III. CORPORATE AND INFORMATION SYSTEM CONTROL

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

A. Corporate Control

One of the few mandatory rules of corporate law is that shareholders must have the right to elect the directors.²²⁵ When a single shareholder or group owns a majority of the voting power, that shareholder or group is said to “control” the corporation. It can, as a practical matter, cause the corporation to pursue any objective it chooses.²²⁶ That objective may or may not be the maximization of shareholder wealth.

By the majority-of-the-voting-power test, however, only about seven percent of U.S. public corporations are “controlled” by shareholders.²²⁷

²²⁵ E.g., DEL. CODE ANN. tit. 8, § 151(b) (2021) (“[I]mmediately following any such redemption the corporation shall outstanding 1 or more shares . . . which . . . shall have full voting powers.”); see also MODEL BUS. CORP. ACT § 6.03(c) (AM. BAR ASS’N 2016) (“[O]ne or more shares that together have unlimited voting rights . . . must be outstanding.”).

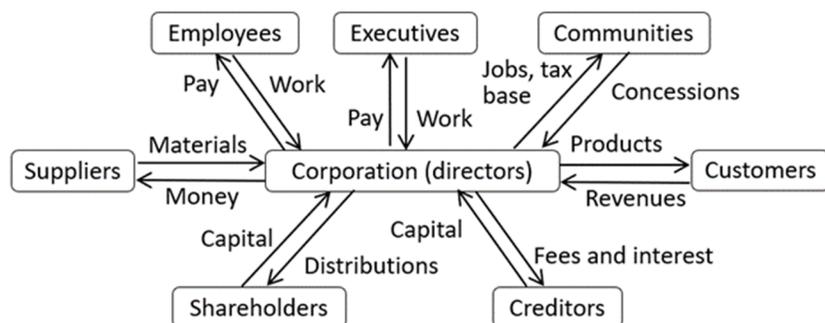
²²⁶ Rock, *supra* note , at 394 (“So long as shareholders retain the sole voting rights, corporations will largely be managed for the benefit of the shareholders, whatever the interpretation of the weaker bonds of fiduciary obligation.”).

²²⁷ EDWARD KAMONJOH, INVESTOR RESP. RSCH. CTR. INST., CONTROLLED COMPANIES IN THE STANDARD & POOR’S 1500: A FOLLOW-UP REVIEW OF PERFORMANCE & RISK 15 (2016), <https://www.weinberg.udel.edu/IIRCiResearchDocuments/2016/03/Controlled-Companies->

When the voting power is dispersed, directors and executives gain varying measures of control and influence.²²⁸ Repurposing will not change that voting control structure or the dynamics of that control.

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

Figure 3. The Corporation as a System



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

Although the ESG information system will benefit the reporting corporations, their stakeholders and Potential Stakeholders will be the primary beneficiaries. They will have more market power because their choices can better express their preferences. The corporation will learn more about itself by collecting ESG information about itself. Some stakeholders, including suppliers, customers, shareholders, and creditors, will themselves be CSR reporters and so will reveal new information about themselves, to the benefit of the corporation. But ESG information about the relatively small proportion of Potential

IRRRCI-2015-FINAL-3-16-16.pdf [https://perma.cc/7WD9-WGAE]; accord Barbara Novick, "The Goldilocks Dilemma": A Response to Lucian Bebchuk and Scott Hirst, 120 COLUM. L. REV. F. 80, 82 (2020) (noting that, for the majority of public companies, "the largest shareholder holds only a single digit percentage of shares outstanding").

²²⁸ LOPUCKI & VERSTEIN, *supra* note 47, at 315 (explaining the shifting control among shareholders, directors, and officers).

Stakeholders who are business corporations will not be nearly as useful to the corporation as ESG information about the corporation will be to numerous Potential Stakeholders.

Like the unrepurposed corporation, the repurposed corporation may or may not seek to maximize shareholder wealth. Whether it does will depend on the preferences of the persons in control of the corporation as control is conventionally defined. They may be officers, directors, or shareholders.²²⁹

The incentives to benefit stakeholders and the public through CSR performance will be the same for shareholder-wealth-maximizing and non-shareholder-wealth-maximizing corporations. Both have the same opportunity to win ESG Benefit by appearing at the top of the CSR rankings. As is true today, potential stakeholders will not know whether a corporation is shareholder-wealth-maximizing.

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

Stakeholder markets will constantly pressure the corporation to benefit stakeholders and the public in ways that Potential Stakeholders approve. Those markets will remain far from perfect. The ESG information system cannot report every policy-relevant variable, and shoppers on Amazon are not capable of evaluating a seller's greenhouse gas emissions. But an effective ESG information system can report more variables than can actually achieve salience in Potential Stakeholder decision making,²³⁰ and shoppers can be shown a credible third party's rating or ranking of the seller's climate change performance. So long as the stakeholder markets press corporations in the right directions, the corporations will move in the right directions.

Environmental and social activists will continue to use boycotts, protests, labor organizing, engagement, and information campaigns to redirect corporate efforts. The ESG information system will facilitate the

²²⁹ *Id.*

²³⁰ See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (“[N]on-drafting parties (usually buyers) are boundedly rational decisionmakers who will normally price only a limited number of product attributes as part of their purchase decision.”).

tasks of discovering the need for redirection and persuading the activists' followers of that need.

B. ESG Information System Control

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

Promulgating reporting standards. The organizations that promulgated the dominant standards initially will have the ability to modify them.²³¹ For example, if SASB's standards dominate, SASB's board of directors will be able to modify them. But the federal government would be the ultimate standards controller, because it has the power to substitute any standards it chooses.²³² As a Congressional Research Service report put it:

One option is to let the markets determine what should be disclosed within the existing regulatory structure. If in the long run there is sufficient interest by investors, and SASB standards become widely accepted, then Congress could direct the SEC to require corporate disclosures in compliance with standards promulgated by SASB and standardize the reporting structure.

. . . Another option is to require the SEC to undertake a cost-benefit study and assess investor interest in sustainability disclosures in order to formalize and standardize sustainability disclosure as part of SEC filings.²³³

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

A requirement that corporations report ESG information is the most likely government intervention. Cynthia Williams and Jill Fisch

²³¹ See Fisch, *supra* note 61, at 951 (“[S]ustainability is a moving target, meaning that the issues that arguably warrant disclosure and their importance continue to evolve.”).

²³² See Michal S. Gal & Daniel L. Rubinfeld, *Data Standardization*, 94 N.Y.U. L. REV. 737, 767 (2019) (listing the government's options, including “supervised delegation to an industry-based [standards setting organization], comprised of professional data scientists”).

²³³ GNANARAJAH, *supra* note , at 31-32.

petitioned the SEC for that intervention,²³⁴ and the SEC Asset Management Advisory Committee has tentatively recommended it.²³⁵

Collecting and auditing data. The corporations themselves will control the systems that collect data at the corporate level. The reasons are that data collection is expensive, requires the involvement of corporate employees, and must occur at locations controlled by the corporations.²³⁶ The government will likely regulate only the auditing function and do so in a manner similar to its regulation of financial information auditing.

Rating and ranking. Government ratings or rankings of CSR are highly unlikely. The ESG information system's purpose, construed most narrowly, is to provide investors — nearly half of all Americans — with the information they need to allocate ESG Benefit. Consequently, ESG information must be public. Once it is public, the First Amendment would prevent the government from banning its use in ratings and rankings. Thus, government ratings or rankings would have to compete with private sector rankings. The government would be reluctant to enter a credibility competition it might lose, and there is no foreseeable harm from the possibility the government might enter and win.

Delivering ratings and rankings. Delivering ratings and rankings to product and service purchasers at the point of decision making may present greater challenges. At the point of decision making, about thirty-five percent of ecommerce purchasers are looking at a screen controlled by Amazon.²³⁷ In response to competitive pressures and consumer demand, that screen might show third-party ESG ratings and rankings. Alternatively, (1) Amazon might try to leverage its market power to impose a rating and ranking system that Amazon controls,²³⁸

²³⁴ Letter from Cynthia A. Williams, Bus. L. Chair, Osgood Hall L. Sch. & Jill E. Fisch, Professor of Bus. L., Univ. Pa. L. Sch., to Brent J. Fields, Sec'y, Sec. & Exch. Comm'n, Request for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure (Oct. 1, 2018), <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf> [<https://perma.cc/88PC-FEM5>]; see also Fisch, *supra* note 61, at 956-59 (proposing that each public corporation include a "sustainability discussion and analysis" in its annual report).

²³⁵ U.S. SEC. & EXCH. COMM'N, *supra* note 35, at 7.

²³⁶ For example, measuring greenhouse gas emissions from a waste dump will require access to the waste dump. GHG PROTOCOL, *supra* note 73, at 21 ("[I]t can be difficult and time consuming to collect GHG emissions data from joint operations not under the control of the reporting company.").

²³⁷ *What's Amazon's Market Share?*, BENEDICT EVANS (Dec. 19, 2019), <https://www.benedictevans.com/benedictevans/2019/12/amazons-market-share19> [<https://perma.cc/QG2L-94TF>] ("Amazon has a large (35-40%) share of ecommerce . . .").

²³⁸ Amazon already sells an Alexa skill called "fair shopping." *Fair Shopping*, AMAZON, <https://www.amazon.com/dp/B07JL9LM7T?tag=skill-enabled-20> (last visited

or (2) Amazon's customers might obtain product-matched ESG information through another application or device while shopping on Amazon.

C. *Market Verses Democratic Control*

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

Because the Potential Stakeholders would be acting through markets, their preferences would be weighted by the dollar amounts of their transactions — what Masconale and Sepe have colorfully dubbed “a (moral) tyranny of the (capitalist) majority.”²³⁹ The wealthy would count more than the poor. That is not, however, a change in policy. The stakeholder markets are already operating, and preferences are already measured in dollars. The reform would merely provide Potential Stakeholders with the information they need to express their preferences effectively.

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

SASB's standards are designed to provide the information *investors* need.²⁴⁰ If SASB's standards prevail, other stakeholders will receive the same ESG information. That information will not, however, be designed to meet the other stakeholders' needs or be in forms convenient for their use. Among other deficiencies, the information will not link products and services to the CSR of their manufacturers and sellers.²⁴¹

Nov. 18, 2021) [<https://perma.cc/8FG9-VAZY>]. “Fair shopping aggregates thousands of products in categories such as fashion, home decor, body care, and jewelry. Products are considered ‘fair’ because they are produced with organic, fair trade materials, labor is ethical, and or the products are sustainably sourced.” *Id.*

²³⁹ Masconale & Sepe, *supra* note 150, at 7.

²⁴⁰ SUSTAINABILITY ACCT. STANDARDS BD., PROPOSED CHANGES TO THE SASB CONCEPTUAL FRAMEWORK AND RULES OF PROCEDURE 25 (2020), <https://www.sasb.org/wp-content/uploads/2020/08/Invitation-to-Comment-SASB-CF-RoP.pdf> [<https://perma.cc/6G6R-ZGL2>] (“The SASB Standards are designed primarily to facilitate disclosure that is useful to investors, lenders, and other creditors for the purpose of making investment decisions on the basis of these users' assessments of short-, medium-, and long-term financial performance and enterprise value . . .”).

²⁴¹ *See supra* Part I.B.3.b.

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

Whether voluntary or government-mandated, an effective ESG information system would provide government with the information government would need to regulate. But if politics renders government incapable of requiring CSR, market repurposing is the second-best solution. The current system gives the public almost no control over CSR.

IV. PARALLEL PROCESSES

CSR is an idea whose time has come. "Society is demanding that companies, both public and private, serve a social purpose."²⁴² Building an ESG information system based on voluntary participation is just one of several possible ways to repurpose the corporation. Others include mandatory CSR reporting, mandatory CSR improvement, changing the law governing corporate purpose, giving employees the right to elect directors, mutual fund pass-through voting, lawsuits to compel SASB reporting, and the adoption of norms and stewardship codes.

CSR advocates are pursuing all these reforms. Each reform complements the others by making their adoption more likely.²⁴³ The plethora of CSR proposals described in this Part have attracted a wide array of supporters. Because all seek the same result, the supporters of all are pushing in the same direction. Those efforts are changing corporations' expectations and strategies. CSR now appears inevitable.

A. Regulation

The most likely regulation of CSR would be the imposition of additional mandatory reporting. For example, Professor Cynthia Estlund has argued for the mandatory disclosure of a variety of the

²⁴² *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> (last visited Sept. 28, 2021) [<https://perma.cc/HQ3H-AN7E>].

²⁴³ See Yan & Zhang, *supra* note 130, at 64 ("[S]ome legal mechanisms such as disclosure requirements under corporate law may in turn strengthen the market force in disciplining corporate behaviour by increasing transparency.").

“terms and conditions” of employment.²⁴⁴ Professors Florian Möslein and Karsten Engsig Sørensen would require that companies “formulate and disclose more specific targets [for their sustainability efforts], outlining how they will achieve them, and finally they should report on what has been achieved.”²⁴⁵

The promulgation and acceptance of GRI and SASB standards has made it easier for the SEC to impose mandatory CSR reporting. Before GRI and SASB, the SEC would have faced a several-year project to develop reporting standards. The issue of whether to mandate reporting would have been debated in the abstract. Today, the SEC could mandate CSR reporting simply by adopting GRI’s, SASB’s, or TCFD’s standards.²⁴⁶ The debate could address the standard set chosen instead of all forms CSR reporting might take. If the SEC adopts GRI’s or SASB’s standards, the SEC presumably will assume the authority to amend them.

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

B. *Changing the Corporation’s Purpose*

The law of Delaware and perhaps that of a few other states facially requires that corporations maximize shareholder wealth.²⁴⁷ Numerous commentators propose to eliminate that requirement and substitute a requirement that corporations also serve the interests of stakeholders

²⁴⁴ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 *passim* (2011) (arguing for mandatory disclosure of work-related information about corporations).

²⁴⁵ Florian Möslein & Karsten Engsig Sørensen, *Sustainable Corporate Governance: A Way Forward* 7 (Eur. Corp. Governance Inst., Working Paper No. 583/2021, 2021), https://ecgi.global/sites/default/files/working_papers/documents/mosleinsorrensfinal.pdf [<https://perma.cc/YB4L-VL9Z>].

²⁴⁶ U.S. SEC. & EXCH. COMM’N, RECOMMENDATION OF THE SEC INVESTOR ADVISORY COMMITTEE RELATING TO ESG DISCLOSURE 10 (May 21, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf> [<https://perma.cc/TEP6-8D5N>] (mentioning those three as “useful standards” that “may help shape [the SEC’s] thinking”). The reference is puzzling because the Task Force on Climate-related Financial Disclosure (“TCFD”) has not published standards. See TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, <https://www.fsb-tcfid.org/> (last visited Sept. 28, 2021) [<https://perma.cc/264T-XCLH>].

²⁴⁷ E.g., *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. 12108, 2017 WL 1437308, at *18 (Del. Ch. Apr. 24, 2017) (“[T]he fiduciary relationship requires that the directors . . . maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital . . .”).

and perhaps the public.²⁴⁸ That change would not significantly increase directors' ability to serve the other stakeholders' interests. Directors already have virtually unlimited discretion to provide benefits to stakeholders in the amounts the directors believe to be in the corporation's long-run interest.²⁴⁹ The long-run interest condition is toothless because the business judgment rule presumes it is satisfied.²⁵⁰ Directors can do whatever they choose, provided only that they refrain from announcing that they are providing stakeholder benefits that they don't believe to be in the corporation's best interests.

Legal recognition of stakeholder and public interests in corporations would, however, have symbolic importance. Reforms that required CSR reporting and improvement could be argued to, and adopted by, boards on their merits. The reforms would not have to be phrased to satisfy the convoluted fiction that they were in the interests of "the corporation and its shareholders."²⁵¹

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

²⁴⁸ E.g., Accountable Capitalism Act, S. 3348, 115th Cong. §5(c)(1)(A) (2018) ("[D]irectors . . . shall manage or direct the business and affairs of the . . . corporation in a manner that — (i) seeks to create a general public benefit; and (ii) balances the pecuniary interests of the shareholders . . . with the best interests of persons that are materially affected by the conduct of the . . . corporation."); Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1061 (2008) ("[W]e should extend [legal] protections to stakeholders."); Amir N. Licht, *Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporations* 23-24 (Eur. Corp. Governance Inst., Working Paper No. 476/2019, 2019) ("[D]irectors . . . will be obliged to treat the company's stakeholders impartially when they make business judgments in the best interest of the company as a whole — an obligation that will be discharged by considering the interests of the company's various stakeholders."); Jaap Winter, *Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board 11* (Apr. 13, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574681 [<https://perma.cc/7LXN-426A>] ("Corporate law could formulate a duty of the board and the directors to ensure that the corporation acts responsibly with a view to the interests of society and the way it uses investor, human, social and natural capital.").

²⁴⁹ Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770-71 (2005) ("[U]nder the business judgment rule, courts are extraordinarily willing to sustain decisions that apparently sacrifice profits (at least in the short run) on the ground that they may conceivably maximize profits (at least in the long run).").

²⁵⁰ LOPUCKI & VERSTEIN, *supra* note , at 335 ("The [business judgment] rule creates a rebuttable presumption that in making decisions, the managers have not breached their duties of care or loyalty.").

²⁵¹ See *N. Am. Catholic Educ. Programming Found. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007).

Delaware courts should recognize that, by failing to build up their companies' ESG function, directors and officers are exposing their shareholders to increased risks. If that failure is due to bad faith, it should be treated as a violation of the duty of loyalty. To clear the bad faith hurdle, boards should ensure that the company has a well-established ESG function. This would consist of an internal governance mechanism with adequate staff and resources, a well-defined substantive scope, and, most importantly, a robust effort for outreach to stakeholders.²⁵²

Similarly, Professor Kishanthi Parella would place on the corporation a duty, when contracting, to “take into account the interests of stakeholders when performance of the contract creates a risk of physical harm to them.”²⁵³

C. *Changing Who Elects Directors*

Some reformers propose that employees share voting control with shareholders. Senator Elizabeth Warren's Accountable Capitalism Act would allow employees to elect forty percent of the directors of any corporation with over one billion dollars in revenues.²⁵⁴ Professors Grant Hayden and Matthew Bodie have proposed several alternatives under which employees would participate in the election of directors.²⁵⁵ Professor Michael Simkovic proposes to allocate additional votes to shareholders who are natural persons.²⁵⁶

D. *Pass-through Voting*

Mutual funds are a form of investment in which numerous investors purchase shares of a fund and the fund purchases the shares of

²⁵² Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1414 (2020) (citation omitted).

²⁵³ Kishanthi Parella, *Contractual Stakeholderism*, B.U. L. REV. (forthcoming 2022) (manuscript at 25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821887 [<https://perma.cc/K294-ZN6D>].

²⁵⁴ Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018) (“Not less than 2/5 of the directors of a United States corporation shall be elected by the employees of the United States corporation . . .”).

²⁵⁵ Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2473-77 (2020).

²⁵⁶ Michael Simkovic, *Natural Person Shareholder Voting* 39 (Mar. 2021) (unpublished manuscript) (on file with author).

numerous public corporations.²⁵⁷ The result is a high level of investment diversification. Each investor in a mutual fund is the beneficial owner of infinitesimal slices of the shares of hundreds or thousands of corporations. Mutual fund investors include about forty-six percent of American households.²⁵⁸

The funds are fiduciaries, each obligated to vote the shares it holds in a manner consistent with the best interests of the fund and the fund's shareholders.²⁵⁹ Some mutual funds believe those interest are to maximize the *shares'* values.²⁶⁰ The effect is that those funds vote the fund investors' money for corporations to maximize shareholder wealth.

Under current law and practice, mutual funds vote the shares the fund holds.²⁶¹ "Pass-through voting" literally means that the holders of the fund's shares would vote the shares the fund holds. Pass through voting in that sense is not practical because each investor might have to vote in hundreds of elections each year. The proposed reform is that mutual funds should instead vote the shares they hold in accord with the *actual*

²⁵⁷ Wallace Wen Yeu Wang, *Corporate Versus Contractual Mutual Funds: An Evaluation of Structure and Governance*, 69 WASH. L. REV. 927, 930 (1994) ("Mutual funds, a type of collective investment vehicle, pool money from public investors and invest in a variety of securities. In simplified terms, they 'split ownership into capital supplying and investment, and professionalize[] the investment function.'" (footnotes omitted) (quoting Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561, 564 (1981))).

²⁵⁸ *Share of Households Owning Mutual Funds in the United States from 1980 to 2020*, STATISTA, <https://www.statista.com/statistics/246224/mutual-funds-owned-by-american-households/> (last visited Nov. 18, 2021) [<https://perma.cc/D8BN-8N4H>].

²⁵⁹ Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 239, 249, 270, 274) ("An investment adviser voting proxies on behalf of a fund, therefore, must do so in a manner consistent with the best interests of the fund and its shareholders." (citations omitted)).

²⁶⁰ See, e.g., *Larry Fink's 2017 Letter to CEOs*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter> (last visited Sept. 28, 2021) [<https://perma.cc/MTY4-NFPS>] ("As a fiduciary, I write on [our investors'] behalf to advocate governance practices that BlackRock believes will maximize long-term value creation for their investments.").

²⁶¹ The practice is changing, but only with respect to the largest investors, most of whom are funds that hold the shares for the benefit of others. Dawn Lim, *BlackRock to Give Up Some Voting Power: Big Clients for Some \$1.5 Trillion in Assets Will Be Able to Vote on Shareholder Proposals*, WALL ST. J., Oct. 8, 2021, at B10 ("Starting in 2022, BlackRock says its large investors can vote themselves on everything from who sits on boards to executive pay to what companies should disclose on greenhouse-gas emissions.").

preferences of the funds' investors.²⁶² The funds could inexpensively determine the preferences of their investors by survey, using sampling.²⁶³ The shares voted in accord with a single set of fund shareholder preferences might be those of hundreds or thousands of corporations. Given the overwhelming popularity of CSR, for nearly every fund the preferences voted would include CSR reporting and improvement.²⁶⁴

In the aggregate, mutual funds own sufficiently large minorities of the shares of most public corporations effectively to control them.²⁶⁵ Thus, mutual funds' adoption of pass-through voting might alone repurpose public corporations.

Even after mutual funds adopted pass-through voting, corporate voting procedures might remain a significant problem. Corporate law does not allow shareholders to make corporate policy. Instead, it gives

²⁶² See Caleb Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 MD. L. REV. 954, 990, 1005 (2020) (proposing general, annually updated voting instructions from investors); Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 IOWA J. CORP. L. 843, 893 (2009) (“[T]he real owners of publicly traded institutions should have the right to forgo profit in the short or long term in the interest of other principles. Giving the true investors a voice on shareholder resolutions, governance, or otherwise is a step in that direction.”). Lynn Stout and Sergio Gramitto propose creation of a Universal Fund Portfolio with shares owned by the public and voted on the shareholders' behalf by proxy advisors chosen by shareholder vote. Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 564-65 (2018).

²⁶³ Scott Hirst, *Social Responsibility Resolutions*, 43 IOWA J. CORP. L. 217, 238 (2018) (suggesting that funds use survey sampling to determine their investors' preferences).

²⁶⁴ See Taub, *supra* note , at 893 (“[W]hen we look to these underlying investors, they say overwhelmingly (in their capacities as citizens, neighbors, people of faith, and so on) that they do not want to support genocide, or environmental damage, or poor labor standards.”); see also *Corporate Social Responsibility: Reputation and Consumers — Part 2*, REASON DIGIT. (Jan. 13, 2017), <https://reasondigital.com/blog/corporate-social-responsibility-and-the-consumer/> [<https://perma.cc/YWY9-X6VR>] (“96% of [500] survey participants agreed that it is important for companies to have good social and environmental policies.”); Toby A. Cox, *How Corporate Social Responsibility Influences Buying Decisions*, CLUTCH (Jan. 7, 2019), <https://clutch.co/pr-firms/resources/how-corporate-social-responsibility-influences-buying-decisions> [<https://perma.cc/Z48E-3SLK>] (survey of 420 consumers finding that “[f]ewer people (44%) say price is among the most important attributes of a company compared to environmentally-friendly business practices (71%), social responsibility (68%), and giving back to the local community (68%)”).

²⁶⁵ For example, three fund managers, BlackRock, Vanguard, and State Street, together own more than twenty percent of the shares of S&P 500 companies. Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019).

the authority to manage corporations to the boards of directors.²⁶⁶ Shareholders have the right to elect the directors, but not to require the directors to pursue a pro-CSR agenda.²⁶⁷

The work-around for that problem is for the mutual fund to announce what it wants the directors to do and then vote against the reelection of any director who does not do it. The largest funds already use this work-around.²⁶⁸ Votes against reelection do not directly remove directors from office, but as a practical matter, corporations find it easier to do the shareholders' bidding than to go to war with them.²⁶⁹ War could result in a proxy fight that *would* remove the directors from office. In essence, pass-through voting would simultaneously threaten directors in virtually all large, public corporations with removal from office if they failed to implement mutual fund investors' CSR preferences.

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

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

Some scholars argue that a mutual fund's imposition of the same CSR obligations on all corporations in which the mutual fund invests would constitute an antitrust violation.²⁷⁰ Mutual funds are an example of "horizontal shareholding" — ownership of the shares of corporations that are supposed to compete with one another. Horizontal

²⁶⁶ E.g., DEL. CODE ANN. tit. 8, § 141(a) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . ."); see also MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2016) ("[T]he business and affairs of the corporation [shall be] managed by or under the direction of[] its board of directors . . .").

²⁶⁷ See, e.g., *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("[I]t is well established that stockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation . . .").

²⁶⁸ See *supra* Part I.B.2.

²⁶⁹ See LOPUCKI & VERSTEIN, *supra* note 47, at 244-45 (explaining the use of shareholder resolutions as a work around).

²⁷⁰ E.g., Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268, 1316-17 (2016) ("[T]he problem of horizontal shareholding is pervasive across our economy because institutional investors like BlackRock, Vanguard, Fidelity, and State Street now own around 80% of all stock in S&P 500 corporations.").

shareholding has antitrust implications because some research purports to show that it leads to less competition and higher prices in product markets.²⁷¹ But the empirical showing is disputed,²⁷² the legal arguments speculative, and the function of mutual funds so important²⁷³ that the antitrust argument is not a serious threat to mutual funds or to pass-through voting.²⁷⁴ The antitrust theme does, however, provide a rhetorical counter to the pass-through voting proposal.

E. Stewardship Codes

Stewardship codes are laws or voluntary sets of principles that guide and legitimize activist shareholder participation in corporate governance. They “reflect the view that engagement by institutional investors is an integral part of any corporate governance system.”²⁷⁵ The codes are relevant here because some of them expressly endorse CSR reporting.²⁷⁶ All the codes provide additional paths and justifications for mutual fund advocacy of CSR reporting.

²⁷¹ Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 *YALE L.J.* 2026, 2032 (2018) (“A growing empirical body of evidence suggests that horizontal shareholding has led to higher prices in product markets.”).

²⁷² E.g., Thomas A. Lambert & Michael E. Sykuta, *The Case for Doing Nothing About Institutional Investors’ Common Ownership of Small Stakes in Competing Firms*, 13 *VA. L. & BUS. REV.* 213, 237-48 (2019) (challenging the findings of the underlying research).

²⁷³ Mutual funds hold twenty-two percent of U.S. corporate equity. *Share of Market Securities Held by Mutual Funds in the United States in 2020, by Security Type*, STATISTA, <https://www.statista.com/statistics/255547/percentage-of-total-market-securities-held-by-investment-companies/> (last visited Nov. 18, 2021) [<https://perma.cc/HPF2-GYM4>].

²⁷⁴ See Keith Klovers & Douglas H. Ginsburg, *Common Ownership: Solutions in Search of a Problem*, in 2 *STANDING UP FOR CONVERGENCE AND RELEVANCE IN ANTITRUST LIBER AMICORUM* 261, 275-77 (Nicolas Charbit & Thomas Moretto eds., 2019) (noting that U.S. antitrust enforcers remain unconvinced and that “the current empirical evidence that common ownership causes anticompetitive harm is limited and hotly disputed”).

²⁷⁵ Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 *SEATTLE U. L. REV.* 497, 506 (2018).

²⁷⁶ *Compare Stewardship Principles*, INV. STEWARDSHIP GRP., <https://isgframework.org/stewardship-principles/> (last visited Sept. 28, 2021) [<https://perma.cc/JA5V-4KNW>] (stewardship principles that make no mention of ESG), with INT’L CORP. GOVERNANCE NETWORK, *GLOBAL STEWARDSHIP PRINCIPLES 11* (2016), <https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf> [<https://perma.cc/Q3X9-QC9N>] (“Principle 6: Investors should promote the long-term performance and sustainable success of companies and should integrate material environmental, social and governance (ESG) factors in stewardship activities.”).

F. *Suing to Compel SASB Reporting*

Paul Rissman and Diana Kearney argue persuasively that promulgation of the SASB standards legally obligates the largest institutional investors to require the corporations whose stock they hold to report to those standards.²⁷⁷ Their argument is that the fund managers, “including six of the 10 largest asset managers globally,” participated in drafting the SASB standards.²⁷⁸ By doing so, the fund managers accepted SASB’s premise that SASB was identifying the information legally material to investors.²⁷⁹ Thus, the fund managers have a fiduciary duty of care to their investors — the holders of the funds’ shares — to vote the shares owned by the fund, and otherwise engage with the corporations, to require the corporations to provide that material information through SASB reporting.²⁸⁰ BlackRock, State Street, and others seem to be doing exactly that.²⁸¹ Consistent with this Article’s argument, Rissman and Kearney predict that, if their argument prevails in court, “corporations [may] become actual champions of liberty and ecological health.”²⁸²

G. *Social Norm Building*

Numerous scholars and organizations have stressed the importance of norm building to repurposing corporations.²⁸³ For example, the British Academy sought to change the purpose of the corporation by publishing eight “principles for purposeful business.”²⁸⁴ In essence, the

²⁷⁷ Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV’T L. REP. 10155 *passim* (2019).

²⁷⁸ *Id.* at 10156.

²⁷⁹ *See id.* (describing SASB as “an organization conceived explicitly to formulate standards that comply with the U.S. Supreme Court’s definition of materiality”).

²⁸⁰ *See id.* (“We argue, however, that by endorsing the materiality of the standards, these specific investors will have created for themselves an extension of their fiduciary duty of care to their customers: an implied duty to ask for, and evaluate, reporting that satisfies the standards.”).

²⁸¹ *See* Aggarwal et al., *supra* note 120, at 151; Letter from Cyrus Taraporevala to Board Members, *supra* note 29; *Larry Fink’s 2020 Letter to CEOs*, *supra* note 29.

²⁸² Rissman & Kearney, *supra* note 277, at 10187.

²⁸³ E.g., Beate Sjøfjell & Mark B. Taylor, *Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose*, 13 INT’L & COMPAR. CORP. L.J. 40, 45 (2020) (“Law is most effective when it is designed to leverage the regulatory power of other modes of regulation: markets, social norms and architecture.”).

²⁸⁴ THE BRIT. ACAD., PRINCIPLES FOR PURPOSEFUL BUSINESS 18-29 (2019), <https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business> [<https://perma.cc/CC3H-TX7S>].

principles recommend a change in the law to require corporations to state their purposes and to impose “high duties of engagement, loyalty and care . . . to public interests where [the corporations] perform important public functions.”²⁸⁵ The remaining six principles are exhortations for the corporations to adopt practices voluntarily.

CONCLUSIONS

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

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

Potential Stakeholders’ use of ESG information in their decision making will confer ESG Benefit on high-CSR performing corporations. If that ESG Benefit is large enough, more corporations will report to more standards, and corporations will begin repurposing themselves to attract more ESG Benefit. If the prospect of ESG Benefit is not large enough to cause widespread reporting, the government will almost certainly mandate ESG reporting.

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

²⁸⁵ *Id.* at 8.

allegorically negotiate based on their financial interests, instead of as individuals who make market decisions based on their values.²⁸⁶

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

The ESG information system will measure the externalization of a variety of social costs.²⁸⁷ Once those externalizations are measured, Potential Stakeholders could shun the externalizers, or government could reimpose the externalized costs on the externalizers.²⁸⁸ Either course could reduce or eliminate future externalizations.

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

²⁸⁶ See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999) (“[S]hareholders, managers, employees, and other groups that make firm-specific investments yield control over both those investments and the resulting output to the corporation’s internal governing hierarchy.”).

²⁸⁷ See generally William Hubbard, Note, *Communicating Entitlements: Property and the Internet*, 22 YALE L. & POL’Y REV. 401, 417 (2004) (“For a legal regime to impose a price, however, the regime must be able to adequately measure the externalized costs.”).

²⁸⁸ Christensen et al., *supra* note 100 (“[B]road CSR disclosures make firms internalize the (social) costs of their impacts on the environment and society and eventually lead to changes in how they operate.”). See generally *What Is the Difference Between Private and Social Costs, and How Do They Relate to Pollution and Production?*, FED. RESRV. BANK S.F. (Nov. 2002), <https://www.frbsf.org/education/publications/doctor-econ/2002/november/private-social-costs-pollution-production/> [https://perma.cc/3KBS-R2EB] (“Society is better off when production and consumption decisions are based on social costs that include external costs, because external costs really do matter in the real world.”).