ENVIRONMENTAL DISCLOSURE: TOWARD AN INVESTOR BASED CORPORATE ENVIRONMENTALISM NORM?

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ABSTRACT

Recently, the United States has been profoundly influenced to make socially and environmentally responsible decisions. This influence comes from the idea that people have a responsibility to take care of the world. This moral obligation conflicts with the current corporate decision-making norm to maximize shareholder wealth. Governmental attempts have failed to shift the current maximization norm toward an environmentally responsible norm. This article proposes that for such a shift to occur, it must come within the organization through shareholder or investor demand. However, the shareholder demand for environmentally responsible corporations may only be fostered through the availability of adequate information.

I. INTRODUCTION

People generally invest their money as a method for saving it. Whether saving money for retirement, a home, or something else, investing keeps money out of spending accounts and can also contribute to growth through interest. Investing, however, should be viewed in the same light as any other consumer purchase. Invested dollars finance and support publicly-traded corporations, much like the dollars spent on consumer products finance, and support the producer corporation. Although price is important, many people also consider factors such as quality, brand, and the environmental impact of the product and its producer.[1] Despite the growing consumer focus on environmental responsibility, there remains an assumption that investors are solely concerned with wealth

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1 *2008 Green Gap Survey Fact Sheet*, CONE, 1 (2008), http://www.coneinc.com/stuff/contentmgr/files/0/57bfa0d65ae70c7e1122a05a9d0d67e0/files/2008greengapsurveyfactsheet.pdf. [hereinafter *Green Gap Survey*].

maximization.[2] The present norm for corporate decision-making reflects that narrow assumption.[3] However, it is conceivable that the consumer who considers more than just price in their purchasing decisions could also consider more than just monetary growth, particularly environmental impact and/or responsibility in the purchasing decision of their investments.

The growing concern over environmental responsibility comes from the notion that protecting the environment is intrinsically valuable.[4] Anything with intrinsic value creates "a prima facie direct moral duty on the part of moral agents to protect it or at least refrain from damaging it."[5] Regardless of its origins, environmental sustainability[6] is, at least ostensibly, a widely accepted societal norm and, among many individuals, a personal norm.[7] Research suggests a disconnect between an individual's vocal commitment to environmentalism and behavior supporting sustainability.[8] Bridging the gap between theoretical and actual environmentalism may be accomplished by connecting investments to environmental impact.

As of late, sustainability projects have become major profit-makers for corporations and many corporations are vying for a sustainability reputation.[9] Sustainable companies and developments are defined as those that "fulfill present and future needs while [only] using and not harming renewable resources and unique human-environmental systems of a site."[10] In 2007, *Business Week*

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[2] *See* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, § SM, at 17.

[3] *See* Andrew Keay, Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and All That: Much Ado About Little? 1-2 (Jan. 4, 2010) (unpublished manuscript) (*available at* http://ssrn.com/abstract=1530990) (footnotes omitted).

[4] *See* Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2008), http://plato.stanford.edu/entries/ethics/environment al/.

[5] *Id.*

[6] Though no fixed definition of sustainability exists, sustainability is generally defined as "meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs." Rep. of the World Comm'n on Env't & Dev., *Our Common Future*, 54 U.N. Doc. A/42/427, 42d Sess. (Aug. 4, 1987).

[7] *See* Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U. L. REV. 1101, 1117 (2005) [hereinafter Vandenbergh, *Order Without Social Norms*] ("Studies suggest that an abstract norm favoring protection of human health and the environment is widely held, stable, and influential.") (footnote omitted).

[8] Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 119-24 (2009) [hereinafter Babcock, *Assuming Personal Responsibility*].

[9] *See* Jason C. Jones, *The Oregon Trail: A New Path to Environmentally Responsible Corporate Governance?*, 54 ST. LOUIS L.J. 335, 336 (2010) (footnotes omitted).

[10] *Defining Sustainability*, WASH. ST. UNIV. SCH. OF ARCHITECTURE AND CONSTR. MGMT., http://www.arch.wsu.edu/09%20publications/sustain/defnsust.htm (last visited Feb. 19, 2011) (alteration in original) (citation omitted). Washington State University developed

identified the companies with top-rated sustainability practices in several industries.[11] Some of the most recognizable names in their respective industries were the most environmentally responsible. Toyota, Renault, and Volkswagon were the top three automotive companies for developing hybrid technologies, "fuel efficient cars and factories," and "clean diesel technologies," respectively.[12] Other industry leaders included Phillips Electronics, recognized for developing energy-saving technologies, Motorola, for disclosing environmental impact data, and Dell, for recycling old personal computers.[13] Does this shift in behavior, reflecting environmental concerns by the general public, represent a shift in the decision-making norm for the corporation or are corporations simply responding to a present consumer demand?

Maximization of shareholder profits is the generally-accepted corporate governance decision-making norm.[14] At present, environmental responsibility and profit making can be synonymous, but this might not always be the case.[15] In the face of a shareholder primacy norm, corporations may fear that considering the environment and society will not maximize shareholder profits and thus avoid such focused policies. Some believe that corporate decision-making norms must shift if corporations are to have the freedom to act sustainably and ensure that the new corporate environmentalism is more than just a passing trend.[16]

So the question then becomes, how can the corporate decision-making norm be shifted to promote sustainability? This article examines theories used to promote corporate decision makers' sustainable behavior.[17] Part II discusses norms, their role in corporate governance, and how they can be changed. Part III provides an overview of the current corporate decision-making norm, share-

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this definition by combining several others, including the 1987 U.N. Conference definition. See definition cited *supra* note 6.

[11] *Who's Doing Well by Doing Good*, Bus. Wk., Jan. 29, 2007, http://www.businessweek.com/magazine/content/07_05/b4019004.htm.

[12] *Id.*

[13] *Id.* The list includes corporations that are involved in other sustainable activities, such as assisting with local economies, investing in poor countries, and employment policies that encourage female and minority leadership. *Id.*

[14] *See* Keay, *supra* note 3, at 1-2. This norm has many names, including "shareholder primacy theory, also known as 'shareholder value' or 'shareholder wealth maximisation.'" *Id.* (footnotes omitted).

[15] *See* Jones, *supra* note 9, at 337.

[16] *See* Jones, *supra* note 9, at 336 (citing Kent Greenfield & D. Gordon Smith, *Debate: Saving the World with Corporate Law?*, 57 Emory L.J. 947, 960 (2008)).

[17] The majority of reviewed methodologies categorize environmental issues under the corporate social responsibility (CSR) umbrella, which includes hiring and employee retention policies, as well as corporate behaviors that impact communities and other constituencies. As a result, most literature does not separate environmental and human concerns. For the purpose of this article, however, environmental responsibility is treated as a distinct goal with a distinct solution.

holder wealth maximization, with an emphasis on its susceptibility to change. Part IV examines current statutory attempts to shift the corporate decision-making norm and their successes and failures. Part V proposes that the investor/consumer is the key to shifting the corporate decision-making norm. This includes an inquiry into the ways that the investor/consumer can gather more information to accommodate decision-making that is more in line with their personal norms. This method ultimately allows the consumer/investor, and society in general, to promote corporate environmental sustainability *vis-a-vis* the marketplace and impose the new norm of corporate environmental responsibility through investor demand.

II. Role of Norms in Corporate Governance

A. *Norms*

Norms play an important role in society by creating a context for social behavior and obligations.[18] Norms are used both to identify and describe current behavior, as well as to define optimal behavior.[19] A potential new norm of corporate environmental responsibility, whereby corporations consider environmental impact and sustainability issues when making financial and governance decisions, would be both descriptive and prescriptive.[20] Current statutes and case law suggest that corporations may consider factors other than shareholder wealth maximization, such as community and, occasionally, environmental, impact.[21] However, these policies and programs, such as B-Corporation certification,[22] only mirror society's growing concern with the shareholder wealth maximization norm. And, in this case, these policies are descriptive of the recognition that shareholder wealth as positive law is a watered down version of its normative counterpart. Corporate environmental responsibility advocates need a decision-making norm that is prescriptive to guide the means that will achieve the sustainability end.

The norm-changing solutions discussed herein focus on the government serving as the "norm entrepreneur."[23] Although norms require an outside force to effectuate lasting change,[24] and government can act as such by creating "public programs and social understandings" that will facilitate the new norm's

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[18] *See* Babcock, *Assuming Personal Responsibility*, *supra* note 8, at 134 (footnotes omitted).

[19] *See id.* at 134 (footnotes omitted).

[20] *See id.*

[21] *See infra* pp. 216-217, 221-26 and notes 73-77, 83, 98-122.

[22] *See infra* Part III.A.

[23] Cass Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 909 (1996) (defining this term as "people interested in changing social norms").

[24] *See* Babcock, *Assuming Personal Responsibility*, *supra* note 8, at 155.

expression,[25] public skepticism often prevents the government from serving this function.[26] However, a norm entrepreneur can produce norm bandwagons, resulting in an increase in the number of people adhering to the new norm.[27] If the norm bandwagon grows larger, a norm cascade occurs, transforming the old norm into a new one.[28] Professor Hope Babcock observes that a norm cascade can occur during a "republican moment."[29] Due to the heightened exposure of environmental issues and with the climate change debate and the rise of the "green" movement, the world is presently in the midst of such a republican moment,[30] making this the right time for a shift in the corporate decision-making norm. According to Babcock, these republican moments are fleeting and, if they are to be used successfully, require immediate action.[31]

To assume that the shareholder wealth maximization norm accurately reflects investor expectations is to assume investors generally prioritize monetary assets over sustainability. As the next section will demonstrate, individual investors, seen also as consumers, value the inherent worth of the environment, and expect corporations to hold the same values.[32] This suggests the current norm's depreciation, and that the current state is ripe for a shift to corporate environmental sustainability.

B. *Consumer & Investor Expectations*

Norms are "inexpensive and efficient ways to encourage positive individual behavior through 'social surveillance and sanctioning[.]' "[33] However, to actually influence behavior, those induced to conform to the norm must associate such change with some benefit.[34] In this context, the analysis focuses on the benefit conferred on individuals when they conform to a norm of corporate environmental responsibility. Thus, as individuals find benefits in environmental protection and make sustainability a priority, the new norm will effect greater change. For the corporation norm to shift, individuals must first accept a new, yet rapidly emerging, pro-environmental norm that requires individual participation.

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25 Richard H. Pildes, *The New Public Law: The Unintended consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 940 (1991).

26 Sunstein, *supra* note 23, at 919.

27 *Id.* at 909.

28 *Id.* at 912.

29 Hope M. Babcock, *Global Climate Change: A Civic Republican Moment for Achieving Broader Changes in Environmental Behavior,* 26 PACE. ENVTL. L. REV. 1, 2 (2009) [hereinafter Babcock, *Global Climate Change*] (footnote omitted).

30 *Id.* at 3.

31 *Id.* at 18, 14-15.

32 *But see* Babcock, *Assuming Personal Responsibility, supra* note 8, at 137.

33 *Id.* at 137 (quoting Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications,* 78 TUL. L. REV. 605, 642 (2004)).

34 *Id.* at 131 (footnote omitted).

Individuals first act as consumers to support environmental protection.[35] In a 2007 survey report, consumers were found to react positively to "Cause Branding,"[36] which is "a business strategy that helps an organization stand for a social issue(s) to gain significant bottom line and social impacts while making an emotional and relevant connection to stakeholders." Consumers react to Cause Branding by buying products from companies known for social and environmental contributions.[37] While Cause Branding suggests consumer support for businesses that positively contribute to the community, the study revealed that consumers are critical of short-term or superficial corporate commitments to causes.[38] Consumers may even proactively boycott products or become activists when companies engage in irresponsible environmental and social practices.[39]

A more recent study found that American consumers most frequently consider the direct benefit conferred upon them when buying a green product.[40] Additionally, consumers are also frequently influenced by products with a clear connection to an environmental issue and an easily quantifiable positive impact on that issue, as well as by, companies that maintain a strong, long-term environmental commitment.[41]

Similar to consumers, investors purchase products and expect a commitment to corporate environmental responsibility.[42] In fact, socially responsible investing ("SRI") assets grew four percent faster than all other U.S. managed assets combined between 1995 and 2005.[43] Experts estimate that out of the $25.2 trillion total in the investment marketplace, 12.2% is managed under SRI strategies.[44] In fact, some venture capitalists now target only SRIs, which signals a clear commitment to the cause.[45] Additionally, individual investors seem to be

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[35] *See* Vandenbergh, *Order Without Social Norms*, *supra* note 7, at 1121-22 (footnotes omitted).

[36] *Cone Cause Evolution & Environmental Survey*, CONE, 2 (2007), http://www.coneinc.Com/stuff/contentmgr/files/0/a8880735bb2e2e894a949830055ad559/files/2007_cause_evolution_survey.pdf [hereinafter *Cone Cause Evolution*].

[37] *Id.* at 8.

[38] *Id.* at 6.

[39] *See id.*

[40] CONE, *supra* note 1, at 2.

[41] *Id.*

[42] *Id.*

[43] CONE, *supra* note 36, at 10.

[44] *Socially Responsible Investing Facts*, SOC. INVEST. FORUM, http://www.socialinvest.org/resources/sriguide/srifacts.cfm (last visited May 24, 2011).

[45] These venture capitalist, or venture philanthropist, groups include Echoing Green, Venture Philanthropy Partners, and Khosla Ventures, and have the potential for significant impact despite their size; they seek high-risk projects for potential high returns and significant environmental or societal impact. *See* Janet E. Kerr, *Sustainability Meets Profitability* 37-43 (Nov. 1, 2007) (unpublished manuscript), (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296270) (footnotes omitted).

more recently concerned with environmental and social issues when deciding where to invest their own funds. Investors are certainly interested in profit; however, their investments tend to decrease when profit is maximized at societal or environmental expense.[46]

In addition, the United Nations has put together an initiative for institutional investors called the *Principles for Responsible Investment*.[47] When an institutional investor signs on to these principles, they not only adopt the six principles, but are given possible action items for how to accomplish them.[48] Principles that incorporate "environmental, social, and corporate governance (ESG) issues" into investing decisions include, seeking disclosure, being active owners in corporations, and setting up various reporting procedures.[49] These principles demonstrate a developing norm among both individual and institutional investors for environmentally responsible corporations.

However, individuals, as both consumers and investors, do not consistently act in environmentally responsible ways. Their behavior demonstrates a disconnect between stated support for protecting the environment and individual decisions that may actually further that goal.[50] This disconnect may be the result of cognitive dissonance, whereby individuals purposely avoid information that may contradict their own self image.[51] Cognitive dissonance can obstruct environmental responsibility because "it is difficult for a person who supports environmental protection to recognize that her actions may actually be degrading the environment."[52] In fact, when presented with environmentally responsible options, individuals may choose the alternative which supports current behaviors that are not environmentally responsible, like driving SUVs and not recycling.[53]

Lack of information about environmental harm might also contribute to instances in which environmentally supportive individuals act in ways that injure the environment.[54] If consumers and investors are better informed on which practices are environmentally responsible, they can adjust their behavior and shake their status quo bias. A normative shift with a policy that increases envi-

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[46] *See* CONE, *supra* note 36, at 10 (finding that in 2007 investors considered corporate social and environmental practices 66% of the time when deciding on investments, reflecting a 26% increase since 2001).

[47] *The Principles for Responsible Investment*, PRINCIPLES FOR RESPONSIBLE INV., http://www.unpri.org/principles (last visited May 24, 2011).

[48] *Id.*

[49] *Id.*

[50] *See* Micheal P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 593 (2004).

[51] Babcock, *Assuming Personal Responsibility*, *supra* note 8, at 126.

[52] *Id.* at 127 (citing Michael P. Vandenbergh, *The Social Meaning of Environmental Command and Control*, 20 VA. ENVTL. L.J. 191, 208 (2001)).

[53] *Id.*

[54] *Id.*

ronmentally responsible knowledge will address this disconnect, encouraging specific action that gives investors concrete solutions.

C. *Turning Abstract Normative Principles into Concretes*

In the abstract, a social norm is a behavioral rule that sanctions certain behavior through ostracizing and shaming those that go against the norm.[55]

> Norm change happens in such circumstances in one of two ways: either through the provision of information on consensus beliefs or on objective reality to group members. Information on consensus beliefs may change an individual's understanding of what activities will incur social sanction . . . . Information may also change one's belief about the actual outcome of a particular behavior and, thus, change the behavior one would prefer to undertake in that situation.[56]

Protecting the environment is abstract and difficult to enforce when individuals cannot conceptualize their specific role.[57] For the new norm to promote conforming behaviors, there must be a concrete prescriptive norm.[58] An abstract norm of "protecting the environment" provides individuals or corporations with little direction, because "protecting the environment" may mean many things. A corporate environmental responsibility norm is more specific, especially if accompanied by a concrete action request. If investors support corporations that consider environmental and sustainable practices, even in the face of short-term profit losses, then corporations will be forced to choose between complying with the new norm, or losing investors.

However, consider the previously mentioned problem of cognitive dissonance. Some corporations engage in environmentally friendly practices, while other corporations, whose behaviors are relatively unknown to the public, exploit the environment.[59] Environmental protection, as an abstract norm, does,

> [I]nfluence our behavior when we are aware of the consequences our actions will have for others, and when we accept personal responsibility for those actions . . . . [W]hen those two factors are present, a concrete norm that relates to, or implements, an abstract norm and tells us how to act will be activated. Our compliance with a norm also increases if we are confident about the information telling us our behavior is bad and in situations where we believe the norm will be enforced by others, like our family, community, or even the government.[60]

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[55] *See* Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 608 (2004) (discussing the effects of a social norm).

[56] *Id.* at 618.

[57] Babcock, *Assuming Personal Responsibility*, *supra* note 8, at 140.

[58] *Id.* at 134.

[59] *See* Jones, *supra* note 9, at 337.

[60] Babcock, *Global Climate Change*, *supra* note 29, at 11.

Therefore, in order for people to behave in accordance with their personal norms, they must have as much information as is necessary to do so.[61] Without the necessary information, individuals may over or underestimate their knowledge about environmental problems, and make decisions based on misinformation.[62] When information about corporate environmental behaviors is both centralized and meaningful, the information itself will bridge the gap between the abstract norm of environmental preservation and the concrete norm of corporate environmental responsibility.[63] Investors will be able to use this information to invest in corporations that behave consistently with their concrete norms. With widespread information, it is possible to have the norm cascade discussed above. An increased demand for corporations that behave in environmentally responsible ways is the most tangible way to shift the corporate decision-making norm. Investors who demand wealth maximization yield corporations with decision makers behaving accordingly. If, however, investors demand environmental responsibility, the corporate decision makers will shift to supply such a demand.

III. Current Norm: Shareholder Primacy

Before discussing the attempts to shift the current norm, it is important to look at the current decision-making norm and its origins. Many believe that a shift in the corporate decision-making norm is the only true way to effectuate a change in corporate environmental behavior.[64] At present, the general norm in corporate decision-making is one of shareholder primacy.[65] The shareholder primacy model, as a theory of the firm, is generally comprised of three parts: (1) the shareholder wealth maximization norm; (2) the notion that ultimate control of the firm lies with the shareholders; and, (3) the idea that shareholders are the single constituency with monitoring and enforcement rights over the organization.[66] This article's focus, however, will be on part one as a decision-making norm.

It is generally understood that "the business of business is to make profit"[67] and that this "shareholder wealth maximization norm . . . has been fully inter-

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[61] *Id.*

[62] Babcock, *Assuming Personal Responsibility*, *supra* note 8, at 127.

[63] *Id.*

[64] *See generally* Jones, *supra* note 9.

[65] *See generally* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. Corp. L. 277 (1998).

[66] Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. Corp. L. 59, 72 (2010); *see also* Henry Hansmaan & Reiner Kraakman, *The End of History for Corporate Law*, 89 Geo. L. J. 439, 440-41 (2001).

[67] Friedman, *supra* note 2, at 17.

nalized by American managers."[68] This standard of corporate governance is traced back to the (in)famous *Dodge v. Ford Motor Co.*,[69] a decision read by just about all students of corporate law.[70] The decision, which held that a business corporation and its directors are to utilize their power primarily to further investor profit,[71] set the stage for a near century of controversy.[72] This change to the directors' discretion does not extend to the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.[73] Corporate decision-making "ends" and "means" (*i.e.*, the decision-making rule for corporate decision makers) are ultimately supposed to further the shareholders' best economic interest.[74]

Dodge set off the precursor to our modern-day debate on the role and purposes of the corporation, the famous clash between Professors Adolf Berle and Merrick Dodd.[75] In that debate, Professor Berle argued that "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."[76] Shareholders, although they may have individual interests, presumably share only an interest in the aggregate: wealth maximization.[77]

The utilitarian argument in favor of wealth maximization is that all stakeholders, employees, constituents, and communities benefit from a corporation that increases profits.[78] "In the long run . . . employees and other stakeholders are overall better off with fluid and efficient capital markets . . . both wealth and, in the end, fairness are maximized by shareholders being the corporation's

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[68] Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 717 (1996).

[69] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

[70] This trend is perhaps "under fire." *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 164 (2008).

[71] *Id.* at 165.

[72] *Id.* at 164.

[73] *Id.* at 165.

[74] *See, e.g.*, Hansmaan & Kraakman, *supra* note 66, at 441-42.

[75] *See generally* Adolf Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Powers in Trust*]; Adolf Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *For Whom Corporate Managers Are Trustees*]; Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) [hereinafter Dodd, *For Whom Are Corporate Managers Trustees?*]; Merrick Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935) [hereinafter Dodd, *Effective Enforcement*].

[76] Berle, *Powers in Trust*, *supra* note 75, at 1049.

[77] Keay, *supra* note 3, at 1.

[78] *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001).

residual beneficiary, with the other claimants getting what they want via contract with the corporation."[79] Stated differently, the best way to serve the various stakeholders, and the public, generally, is to focus entirely on shareholder interests (read: maximization of wealth).[80] Moreover, to the extent those stakeholder interests are not served by the maximization of shareholder wealth, they will be regulated in areas other than corporate law.[81]

A. *Norm as Law?*

In several states, directors are required by law to consider the "best interests of the corporation" when discharging executive duties.[82] The best interest of the corporation has generally been interpreted to mean profit maximization.[83] Yet, even within the wealth maximization norm, few court decisions actually propose that wealth maximization be the sole factor in decision-making.[84] The Delaware courts have reinforced this notion holding that only the corporate directors and officers act in the "best interests of the company."[85] As a general illustration, the American Law Institute's ("ALI") Principles of Corporate Governance provides a source of doctrinal authority. The ALI publication states that the corporation "should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[86] ALI's use of the word "enhance" is critical when compared to "maximize," as used by the court in Dodge.

Moreover, ALI provides that the corporation "may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes," even if corporate profit is not enhanced.[87] ALI's provision illustrates that a corporation does not have a sole duty to maximize profits and

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[79] *Id.*; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) ("there is one and only one social responsibility of business—to . . . increase its profits . . . .").

[80] *See* Roe, *supra* note 78, at 2065; *see also* Hansmann & Kraakman, *supra* note 66, at 441.

[81] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 93, 94 (Harvard Univ. Press 1991).

[82] *See* Model Business Corporations Act § 8.30(a) (2005) ("Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.").

[83] *See* EASTERBROOK & FISCHEL, *supra* note 81, at 94; *see also* Bainbridge, *supra* note 67, at 717.

[84] *See, e.g.*, A.P. Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953) (allowing a corporation to donate to an educational institution based on the idea that corporations have a social responsibility to act accordingly within their communities).

[85] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[86] *The Objective Conduct of the Corporation,* 69 ALI PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994).

[87] *Id.* at § 2.01(b)(3). The provisions of ALI's Principles of Corporate Governance recognize that a "corporation is a social as well as an economic institution" and there must be

can engage in socially responsible conduct. As a result, "even though the shareholder primacy norm is closely associated with debates about the social responsibility of publicly-traded corporations, its impact on the ordinary business decisions of such corporations is limited."[88]

A Delaware court concluded in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. that a corporation's duty to maximize shareholder wealth is limited in scope to situations involving buyout negotiations.[89] Additionally, the Delaware court in Paramount Communications, Inc. v. Time Inc.[90] stated, "absent a limited set of circumstances as defined under Revlon, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short-term, even in the context of a takeover." Decided within the same year as Revlon, the court in Unocal Corp. v. Mesa Petroleum Co. held that corporate decision makers must determine its effects on the corporate enterprise, before making a decision on a takeover bid.[91] Such an analysis includes balancing various concerns, which may include "the impact on 'constituencies' other than shareholders (that is, creditors, customers, employees, and perhaps even the community generally)."[92]

Therefore, although widely considered to be the decision-making norm for corporate managers and directors, "the notion that corporate law as a positive matter 'requires' companies to maximize shareholder wealth turns out to be spurious. The offhand remarks on corporate purpose offered by the Michigan Supreme Court in Dodge v. Ford lack any foundation in actual corporate law."[93] Moreover, the courts have given corporate decision makers broad discretion through the business judgment rule to make decisions that they deem to be "in the best interests of the corporation," even if they are not independently justifiable as serving the shareholder's short-term profit maximizing interests.[94]

Moreover, the ALI *Principles of Corporate Governance* allow for a corporation to "devote a reasonable amount of resources to public welfare, humanitari-

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balance between a corporation's economic objective and social needs. *See id.* at § 2.01 comment e.

[88] Smith, *supra* note 65, at 280.

[89] 506 A.2d 173, 184-85 (Del. 1986).

[90] 571 A.2d 1140, 1150 (Del. 1989).

[91] 493 A.2d 946, 955 (Del. 1985).

[92] *Id.*

[93] Stout, *supra* note 70, at 172. .

[94] *See* Jones, *supra* note 9, at 343; *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of the Corporation*, 85 VA. L. REV. 247, 306 (1999); Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1005 (2009) ("[E]ven if one subscribes to the view that corporate law requires fiduciaries to maximize shareholder wealth in the abstract, the business-judgment rule affords corporate decision-makers so much latitude as to render such a duty unenforceable and meaningless.").

an, educational, and philanthropic purposes."[95] Comment *f* expounds on the permissive nature of the business judgment rule that allows CEOs' deference in decision-making.[96] Section 2.01(b)(3) attends to the widely accepted practice that corporations at least consider the social and environmental impacts of their behaviors. Comment i further explains that social considerations may be subject to a reasonableness test: the more related the social or philanthropic action is to the mission, the more resources may be used.[97] If a corporation expends significant resources on a community interest, there should be a strong relationship to the company's general purpose.[98] However, the relationship test is not strict and courts have found that utilizing company resources for a public good is a legitimate end, which does not require a justification tied to profit making.[99]

B. *Why the Need to Change?*

In 1999, Ben and Jerry's Homemade Inc. stocks were trading at a low around $16.50; the company was forced by shareholders to sell to the highest bidder, Unilever, which bought stock for $43.60 per share.[100] Ben Cohen, of Ben and Jerry's, attempted to gather buyers, including the Meadowbrook Lane Capital (an investor group including the socially conscious founder of the Body Shop), in an effort to retain local control and to maintain the company's commitment to social responsibility.[101] Shareholders successfully sued Ben and Jerry's because the deal did not produce capital gains as a cash deal would produce, but rather, resulted in a "stock swap at the same share price."[102] This suit illustrates the type of problems a wealth maximization norm poses for corporations wishing to maintain the integrity of policies involving environmental responsibility.

The idea that corporations have a social responsibility to communities and the local environment originated with E. Merrick Dodd Jr. who argued that a

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[95] American Law Institute, Principles of Corporate Governance: The Objective and Conduct of the Corporation § 2.01(b)(3)(1992) (Proposed Final Draft 1992).

[96] *Id.* at § 2.01(a) cmt. f. The economic objective under section 2.01(a) to "enhance corporate profit and shareholder gain" does not imply "that the corporation must extract the last penny of profit out of every transaction in which it is involved." Furthermore, the comment goes on to explain that if "corporate officials who authorize a decision satisfy the test of the business judgment rule (§ 4.01(c)); the decision itself would satisfy § 2.01." *Id.*

[97] *Id.* at § 2.01(b)(3) cmt. i.

[98] *Id.*

[99] *See, e.g.*, Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del.Ch. 1969); Sorensen v. Chicago, B. & Q. Ry., 199 N.W. 534 (Neb. 1924); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953); Union Pacific R.R. v. Trustees, Inc., 329 P.2d 398 (Utah 1958).

[100] Timothy McQuiston, *Unilever Buys Ben & Jerry's*, VERMONT BUS. MAG. (May 1, 2000), http://findarticles.com/p/articles/mi_qa3675/is_200005/ai_n8892928.

[101] *Id.*

[102] *Id.*

corporation should serve society.[103] If corporate decision-makers are granted freedom to make decisions freely and are not constrained by the wealth maximization norm, then there is no need to change. The business judgment rule protects decisions that consider the impact on communities, employees, and customers.[104] Therefore corporate decision makers are not presently required to maximize profits and have full authority to make decisions not in accordance with such a norm (*i.e.*, environmental responsibility).[105] For example, the protection could logically be extended to cover a corporation's decision to reduce pollutants, or to substitute green technology for burning through non-renewable resources, despite the fact that they may reduce profits in the short-term. Decisions like these are in the vein of promoting long-term corporate stability. Corporations would benefit from anticipating future environmental regulations; additionally, protecting the environment could mean sustainability and a longer corporate life. Therefore, "as a practical matter, courts will not interfere with corporate social responsibility because there is almost always a plausible argument that actions beneficial to a corporation's employees, customers, or creditors, or the environment, are in the long-term interests of the corporation's stockholders."[106]

One corporate scholar, however, argues that while it has been said that the business judgment rule "gives the managers some leeway in how they define profit" further supporting that CEOs may consider factors other than immediate profit maximization, this relief in some situations may be "marginal at best."[107] When the law interprets the wealth maximization norm in its truest form, or when the decision to promote social and environmental objectives cannot be pursued without sacrificing profit, there is little or no legal recourse for protecting an environmentally responsible decision.

The wealth maximization norm as interpreted into law reflects consideration of environmental responsibility and sustainability, which suggests that a shift

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[103] Dodd, *For Whom Are Corporate Managers Trustees?*, *supra* note 75, at 1154-55.

[104] *See* Unocal Corp. v. Mesa Petroleum Corp., 493 A.2d 946, 955 (Del. 1985). The Court held that directors are able to consider various factors when making decisions, including the impact on non-shareholder constituents, employees, suppliers, customers and the community.

[105] Smith, *supra* note 65, at 280, 285. ("The duty of care as usually formulated requires a director to act in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interests of the corporation . . . and 'the best interests of the corporation are generally understood to coincide with the best long-term interests of the shareholders . . . . [a]s a result, even though the shareholder primacy norm is closely associated with debates about the social responsibility of publicly traded corporations, its impact on the ordinary business decisions of such corporations is limited.").

[106] Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J. L. BUS. & FIN. 31, 35 (2005).

[107] Kent Greenfield, *Saving the World with Corporate Law?* 130, 12 (April 3, 2007) (unpublished student research paper, Boston College Law School) (on file with author).

toward a norm of corporate environmental responsibility is not far-fetched. However, without the shifting of the norm, even though a corporation has the ability to act in environmentally responsible ways, what ensures that it will? Without a shift in the decision-making norm, many corporations may rely on the wealth maximization norm to continue to defend harmful environmental practices. Regardless of the ubiquitous status of the wealth maximization norm and its questionable enforceability, if a decision-making change is to be made, then the norm must change.

IV. Pro-Environmental Strategies within Current Norm

The question then becomes, in the face of a need to change the decision-making norm, how can such a change occur? First, it is important to take a look at the current strategies to promote environmentally responsible corporate behavior within the current wealth maximization norm. There is little doubt that, at present, there is a widespread trend towards corporate environmentalism. "[C]orporations are coming to understand that '[a] company that is really good at managing its environmental footprint . . . is going to be better positioned almost for almost any new environmental legislation that comes down the pike."[108] In addition to being preemptive of future regulations, various other factors have contributed to the sense of urgency pressing corporate environmentalism forward toward an environmentally responsible trend. Factors include international indices, a movement to prompt corporate players to measure and disclose environmental impact, the media attention on environmental issues, and rising oil prices.[109] As a consequence, corporations are now anticipating new environmental regulations, marketing toward green consumers, and trying to create environmentally sound products.[110]

A corporate decision maker's understanding that not all ventures will result in short-term profits for investors is pivotal to this trend. In a letter to their shareholders, Google founders declared a commitment to social betterment, though it may mean forsaking short-term gains:[111] "Don't be evil. We believe strongly that in the long term, we will be better served—as shareholders and in all other ways—by a company that does good things for the world even if we

[108] Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 Wm. & Mary Envtl. L. Rev. 291, 308 (2006).

[109] *Id.* at 301 (arguing that an entire range of factors suggest that the corporate environmental movement is not a collection of pseudo-events, but in fact, a paradigm shift); *see also* Robert C. Illig, *Al Gore, Oprah, and Silicon Valley: Bringing Main Street and Corporate America into the Environmental Movement*, 23 J. Envtl. L. & Litig. 223 (2008) (discussing the impact of branding and the environmental movement on corporate responsibility).

[110] Barnard, *supra* note 108, at 291-92.

[111] *2004 Founders IPO Letter*, Google (2004), http://investor.google.com/corporate/2004/ipo-founders-letter.html.

forego short term gains."[112] As more mainstream corporations, like Google and Wal-Mart,[113] set their sights on the dual benefits of social and environmental initiatives, the potential for a great movement toward environmental responsibility grows.

However, these changes in corporate decision-making are not the product of any statutory or otherwise driven mandate; they are the product of consumer demand. And, since we are still operating within the wealth maximization norm, the statutory attempts to change it have not been successful.[114] This section will review the current approaches, including voluntary certifications and statutory schemes.

A. *B-Corporations and the Fourth Sector*

One way a corporation may demonstrate commitment to environmental responsibility is through voluntary certification. Such a certification sends a public message that this corporation supports social and environmental goals in its decision-making.[115] These new, hybrid corporations, which combine social and environmental goals with profit-making, have recently emerged as viable options to promote environmentally responsible behavior in the context of the general "corporate social responsibility" ("CSR") umbrella.[116] Generally, CSR focuses on the public benefits from the products and services of the traditional three sectors: business, non-profit, and government.[117] In an attempt to institutionalize the various hybrid corporations made popular by socially responsible consumers and shareholder-demand, the "fourth sector" emerges from these traditional three sectors.[118]

The "fourth sector" provides a "new organizational sector that integrates social purposes with business methods"[119] with the for-benefit corporation, branding and legitimatizing a new form of business.[120] Simply put, a for-benefit corporation is "driven by a social purpose [that is] . . . economically self-sus-

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[112] *Id.*

[113] *See 2009 Global Sustainability Report,* WAL-MART (Jan. 31, 2009), http:// walmartstores.com/sites/sustainabilityreport/2009/en_threeKeyGoals.html. Wal-Mart has enumerated three goals as of January 31, 2009 to "(1) be supplied 100 percent by renewable energy, (2) to create zero waste, (3) to sell products that sustain our resources and the environment." *Id.*

[114] *See* Keay, *supra* note 3, at 11-12.

[115] *See The Emerging Fourth Sector: The Three Traditional Sectors*, FOURTH SECTOR, http://www.fourthsector.net/learn/fourth-sector (last visited Feb. 10, 2011).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 278, 280-81 (2009).

taining, and . . . socially, ethically, and environmentally responsible."[121] The interests of all stakeholders are embedded into the business mission. This mission-based approach resembles the strategies employed by the creators of the B-Corporation.

"B-Corporations" meet environmental and social standards established within a legal framework and expand the duties of the corporation to stakeholders and the environment within the existing corporate laws.[122] In 2006, the Aspen Institute gathered academicians, philanthropists, government agents, and business professionals to discuss emerging issues in social enterprise.[123] The purpose of the roundtable—to identify legal strategies that strengthen social entrepreneurialism—garnered several ideas, including extending tax benefits to for-profit charities, certification and standards of review for socially responsible corporations, and state statutory initiatives.[124] Today, over 190 corporations are certified B-Corporations.[125]

To achieve a B-Corporation certification, a corporation must earn a score of 80 out of 200 possible points on a survey measuring standards of social and environmental performance.[126] Some of the factors measured to determine a corporation's certification include: (1) the percentage of net profits donated to charity; (2) an "evaluation of managers' performance; (3) the percentage of managers who are women or minorities; and, (4) the percentage of revenue derived from "products that are organic, locally sourced, fair trade, or [otherwise] green."[127] Corporations that earn 80 points must then revise their governing doctrines to include stakeholder and environmental interests.[128] Restructuring governing doctrines is a key component to the certification process and exemplifies a legal commitment to the interests of all constituencies, not just shareholders.[129] A change in a corporation's governing documents may protect corporate fiduciaries that choose to operate this way, and conversely, gives shareholders a right to enforce the codified commitment of the company to be socially responsible. By amending the articles of incorporation, a B-Corporation communicates to potential investors a commitment to social and environ-

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[121] *Id.* (quoting FOURTH SECTOR, *supra* note 115).

[122] *See About Certified B Corps,* B-CORP, http://www.bcorporation.net/about (last visited Feb. 10, 2011).

[123] *See generally* Thomas J. Billetteri, *Mixing Mission and Business: Does Social Enterprise Need a New Legal Approach: Highlights from the Aspen Institute Roundtable* (2007), http://www.community-wealth.org/_pdfs/news/recent-articles/04-07/report-billiterri.pdf.

[124] *Id.*

[125] *See B-Corp Directory,* B-CORP, http://www.bcorporation.net/community/search (last visited Feb. 10, 2011).

[126] *See Become a B-Corporation,* B-CORP, http://www.bcorporation.net/become (last visited Feb. 10, 2011).

[127] Hannah Clark, *A New Kind of Company*, INC., MAGAZINE, July 2007, at 23-24.

[128] *See* B-CORP, *supra* note 126.

[129] *Id.*

mental concerns.[130] And, B-Corporation branding gives potential investors standards to measure the impact of their investment on social and environmental good, assuming investors are interested in high-impact businesses.[131]

B. *Statutory Approaches to Environmental Responsibility Implementation*

In 2007, Oregon became the first state to pass legislation that curbs environmentally irresponsible corporate behavior.[132] The new legislation allows a corporation to amend its articles of incorporation to include a purpose clause that mandates socially and environmentally responsible behavior.[133]

The Oregon statute may be interpreted as an extension of non-shareholder constituency statutes that allow a corporation leeway in considering a range of factors when making decisions. Non-shareholder constituency statutes are state laws that permissively allow corporate directors to consider constituencies other than shareholders in decision-making tasks:

> [C]onstituency statutes recognize and respond to the moral call for corporations to consider the external effects of their internal decisions by mandating observance of ethical behavior by directors. They do so without strictly mandating morality, but by urging recognition of the external elements bringing corporations into existence within a society.[134]

Non-shareholder constituents are primarily employees, consumers, and contractors. To date, there are thirty-three states that have constituency statutes: twelve states constrain this provision to take-over situations,[135] and the remaining twenty-one are not limited by any particular condition.[136] Because the stat-

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[130] *Id.*

[131] Anne Moore Odell, *B Corporations: Verified Sustainability*, SOCIAL FUNDS (Mar. 13, 2008), http://www.socialfunds.com/news/article.cgi/2482.html (*quoting* Andrew Kassoy, co-founder of B Lab).

[132] OR. REV. STAT. § 60.047(2)(e) (West 2008).

[133] *Id.* The statute reads: "The articles of incorporation may set forth . . . a provision authorizing or directing the corporation to conduct business of the corporation in a manner that is environmentally and socially responsible." *Id.*

[134] Edward Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L. J. 1085, 1109 (2000).

[135] *See* Judd Snierson, *Race to the Left: A Legislator's Guide to Greening a Corporate Code*, 88 OR. L. REV. 491, 499 (2009) (citing ARIZ. REV. STAT. ANN. § 10-2702 (2009); CONN. GEN. STAT. ANN. § 33-756(d) (West 2009); IDAHO CODE ANN. § 30-1602 (2009); IOWA CODE ANN. § 490.1108A (West 2008); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2006); LA. REV. STAT. ANN. § 12:92(G) (2008); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (West 2009); MO. ANN. STAT. § 351.347(1) (West 2009); OR. REV. STAT. § 60.357 (2009); R.I. GEN. LAWS § 7-5.2-8 (2008); S.D. CODIFIED LAWS § 47-33-4 (2009); TENN. CODE ANN. § 48-103-204 (West 2009)).

[136] *See id.* (citing Fla. Stat. Ann. § 607.0830(3) (West 2009); Ga. Code Ann. § 14-2-202(b)(5) (West 2009); Haw. Rev. Stat. §414-221(b) (2009); 805 Ill. Comp. Stat. 5/8.85 (2009); Ind. Code Ann. § 23-1-35-1(d) (West 2009); Me. Rev. Stat. Ann. tit. 13-C, § 832(6)

utes are similar in wording, Illinois's statute provides a representative example:

> "In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors."[137]

The statutes are permissive, using language like "may" instead of "shall." Connecticut requires directors to consider the interests of stakeholders other than shareholders; however, it is limited to take-over situations.[138] This is surprising when considering that the only case in which the shareholder maximization norm was enforced was in a take-over situation.[139]

There is no precedent for extending the non-shareholder constituent statutes to protect environmental interests.[140] However, many of the constituent statutes include community interests as a permissive consideration.[141] Assuming the corporation impacts the community physically in some undesirable way, or in the alternative wants to impact the physical environment in a positive way, perhaps these statutes can be extended to cover those issues.

Much like the B-Corporation and the Oregon law, there has been an effort by some states to introduce bills that create a new corporate form—the socially responsible corporation ("SRC")—a corporation committed to both maximizing profits and benefitting the public.[142] Minnesota introduced a bill in 2006, and then again in 2009, granting an SRC distinction to corporations that include, in their articles of incorporation, a commitment to stakeholders and/or

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(2009); Mass. Gen. Laws Ann. ch. 156B, § 65 (West 2009); Minn. Stat. § 302A.251(5) (2008); Miss. Code Ann. § 79-4-8.30 (West 2009); Neb. Rev. Stat. § 21-2432(2) (2008); Nev. Rev. Stat. Ann. § 78-138(4) (West 2009); N.J. Stat. Ann. § 14A:6-1(2) (West 2009); N.M. Stat. Ann. § 53-11-35(D) (West 2009); N.Y. Bus. Corp. Law § 717(b) (McKinney 2009); N.D. Cent. Code § 10-19.1-50(6) (2009); Ohio Rev. Code Ann. §§ 1701.13(F)(7), 1701.59(A), (D), (E) (West 2009); 15 Pa. Cons. Stat. Ann. § 515 (West 2009); Vt. Stat. Ann. tit. 11A, § 8.30 (2009); Va. Code Ann. § 13.1-727.1 (West 2009); Wis. Stat. Ann. § 180.0827 (West 2009); Wyo. Stat. Ann. § 17-16-830(e) (2009)).

137 805 Ill. Comp. Stat. 5/8.85 (2009).

138 *See* CONN. GEN. STAT. § 33-756(d)(2010).

139 *See generally* Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173 (Del. 1986).

140 Sneirson, *supra* note 135, at 491.

141 *Id.*

142 Michal Gottesman, Comment, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 351-52 (2007).

the public interest.[143] In analyzing forms of this proposition, a corporation would have to file a "public interest report" alongside annual financial reports using stakeholder input.[144]

In 2006, the Hawaii legislature introduced a similar bill to create a task force to identify the best methods of establishing SRCs.[145] The Hawaiian Governor vetoed this initiative and heavily criticized the provision for exempting corporations from the priority of maximizing shareholder wealth.[146] While neither the Minnesota, nor the Hawaii bill passed in the state legislatures, they represent a current movement to institutionalize SRCs through the creation of new corporate forms backed by law.[147] To further motivate directors to create SRCs, Hawaii's bill, unlike Minnesota's, contemplated a tax benefit for socially responsible corporations.[148] This idea of tax benefits extends beyond state legislatures, and there may be a movement toward restructuring the federal tax code to accommodate for-profit charities or companies that are similar in nature to SRCs,[149] although to date, there has yet to be any legislation introduced on this matter.[150]

C. *The Effectiveness of Current Strategies*

The goal of a successful, environmentally responsible policy should be one that balances the onerous and potentially ambiguous nature of a statutory mandate with the toothless, redundant nature of permissive statutes and voluntary approaches. As mentioned in the previous section, the B-Corporation method and certain state laws, such as the Oregon statute, provide corporations with the ability to amend their governing documents to ensure environmentally responsible behaviors.[151] There are two reasons why corporations should be skeptical

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[143] Public interest is defined as an interest in public health, natural environment, public safety, and human rights, among others. *See* S. 3786-304A, 84th Sess., at § 2(2) (Minn.2006), *available at* http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S3786.0.html&session=ls84. The bill died in the judiciary committee.

[144] *See* Billitteri, *supra* note 123, at 14.

[145] *See* H.R. 3118, 23d Leg. (Haw. 2006), *available at* http://www.capitol.hawaii.gov/session2006/Bills/HB3118_CD1_.htm.

[146] *See, e.g.*, Jerry Coffee, *It's the Worst Business Law Ever*, MIDWEEK, Apr. 12, 2006, http://www.midweek.com/content/columns/coffeebreak_article/its_the_worst_business_law_ever.

[147] *See* S. 3786- 304A, 84th Sess., at § 2(2) (Minn. 2006), *available at* http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S3786.0.html&session=ls84; H.R. 3118, 23d Leg. (Haw. 2006), *available at* http://www.capitol.hawaii.gov/session2006/Bills/HB3118_CD1_.htm

[148] *Id.*

[149] *See, e.g.*, Anup Malani and Eric Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007).

[150] As of the date of this draft (September 1, 2010).

[151] Although the statutes are much more broad than environmental responsibility, this

of implementing such a method. First, if corporations take such measures to implement ERS practices into their governing documents there may be a real concern of opening corporations to shareholder lawsuits.[152] A publicly-traded company "could find itself harried by 'green' shareholders demanding adoption of sustainability provisions, even as more conservative shareholders dismiss such policies as damaging to financial performance."[153] Second, such measures may actually be unnecessary.[154] As voluntary certifications and permissive statutes pass, they fail to impose an obligation on corporate actors, and extend no protection to corporations acting with the environment in mind beyond what is already allowed under the business judgment rule.

Amending corporate articles to include environmental policies has potential to harm the business of a corporation through shareholder lawsuits. For instance, what if the White Dog Café, a Philadelphia-based restaurant and certified B-Corporation, used oil rather than the wind generated energy that provides them 100 percent of their energy? Would this potential violation of their commitment to the environment, codified in their governing documents, give a White Dog employee or consumer standing to sue the corporation? Or, rather, is the privilege of enforcement limited to the shareholders? Whether these amendments are legally binding is yet to be determined.[155]

The effects of the Oregon-like statute may cause concern when a corporation chooses to amend its articles of incorporation to include "environmentally and socially responsible conduct."[156] The vague nature of the Oregon statute, and the requirement that shareholders must first agree to the adoption of any environmental provisions, may give shareholders incentive to sue a corporation that chooses between the environment and profit.[157] The bill's primary sponsor, Representative Greg MacPherson, stated that the intended effect of the bill was to prevent additional lawsuits,[158] presumably those raised by shareholders against CSR businesses who neglect maximization of profit for environmental

article is limited in its scope to only matters involving environmental responsibility and/or sustainability.

152 Clark, *supra* note 127, at 24.

153 Andy Griegerich, *Some Business Lawyers Worry Over Sustainability Effort*, PORTLAND BUS. J., Apr. 21, 2008, http://www.bizjournals.com/Portland/stories/2008/04/21/focus7.html.

154 *Id.*

155 *See Social Action*, WHITE DOG CAFÉ, http://www.whitedog.com/ (last visited May 24, 2011); *see also* Jones, *supra* note 9, at 336 (discussing the likelihood of liability if corporations amend their articles of incorporation and fail to further their stated purpose of environmental responsibility).

156 Griegerich *supra* note 153.

157 *See* Andy Griegerich, *supra* note 153; *see also* Perkins Coie, *Recent Oregon Legislation Addresses Corporate Social Responsibility*, PERKINS COIE BLOG, (Feb. 17, 2011, 9:20 PM), http://www.perkinscoie.com/news/pubs_detail.aspx?publication=1553&op=updates.

158 *Id.*

and social concerns.[159] Advocates of the bill cite the poorly defined parameters and small volume of Oregon case law on the business judgment rule to indicate the necessity of the statute to protect corporate boards that make responsible decisions.[160]

Constituency statutes have garnered a range of responses.[161] Some critics argue that they contradict the shareholder norms[162] or that they violate the Contracts Clause of the Constitution,[163] while others contend that they are insignificant and unnecessary.[164] The primary question seems to be whether constituency statutes may be seen as compatible with or contradictory to the shareholder primacy norms.[165] Except in the few situations where the statute specifically allows a director to prioritize considerations above those of the shareholder,[166] there is no indication that the provisions are anything more than guidance as to additional factors to consider while maximizing shareholder wealth. They generally do not give non-shareholders enforceable rights and some statutes are explicit about the denial of those rights.[167] None of the constituency statutes "indicate how much weight should be given to the various interests. In fact, only a few statutes state that shareholder interests need not be the dominant consideration."[168] Although there is case law that supports the consideration of non-shareholder constituents,[169] the law is still ambiguous as to whether constituency statutes give standing to non-shareholders.[170]

Furthermore, the B-Corporation ranking process provides an example of the vague nature of corporate social responsibility.[171] Specifically, as it relates to the environment, the survey used to evaluate corporate environmental impacts

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159 Jones, *supra* note 9, at 336 (discussing the likelihood that if corporations were to amend their articles of incorporation and fail to further their purpose they would be liable to shareholders).

160 *Id.*

161 *See* Stephen M. Bainbridge, Symposium, *Interpreting NonShareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992).

162 *See id.*

163 *See, e.g.*, Adams & Matheson, *supra* note 134, at 1096.

164 Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 464 (2006-2007).

165 *Id.*

166 *See* Ind. Code § 23-1-35-1(f) (West 2010); Iowa Code § 491.101B(2) (West 2010); 15 Pa. Cons. Stat. §§ 515(b), 1715(b) (West 2010).

167 *See* GA. CODE ANN. § 14-2-202(b)(5) (West 2010); NEV. REV. STAT. § 78.138(6) (2010); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2010); 15 PA. CONS. STAT. §§ 517, 1717 (West 2010).

168 Velasco, *supra* note 164, at 464.

169 *See, e.g.*, Baron v. Strawbridge & Clother, 646 F. Supp. 690, 698 (E.D. Pa. 1986).

170 *The B Impact Rating System*, B CORPORATION, http://survey.bcorporation.net/survey_viewweights.php (last visited Feb. 10, 2011).

171 *Id.*

can lead to some ambiguous results.[172] A point value is assigned to five environmental impact measurements: accountability, facilities, energy inputs, design and development, and transportation/distribution/suppliers.[173] While an investor or consumer will be able to see in percentage how a company is meeting these factors, it is still unclear what the numeric value means in relation to environmental impact and long-term corporate sustainability. Thus, a corporation that devotes the time and resources needed to score well on the environmental factors may not be viable in other ways. For disclosure to be meaningful, investors and consumers are going to want to know more about how this behavior affects a double bottom line. The effect that B-Corporations, or methods like the Oregon law, have had on environmentally responsible corporate governance is largely unanswered. Furthermore, given the above-mentioned chances of increased lawsuits, these methods to change governing documents will certainly not be a catalyst for promoting more corporations to be environmentally responsible absent a general shift in the decision-making norm.

V. Investor Demand, Information, and The Shifting Norm

As discussed above, it is unlikely that the government can function as a norm entrepreneur in the attempt to shift the corporate decision-making norm from one of wealth maximization to one of corporate environmental responsibility.[174] Therefore, the shift must come through investor demand. As discussed in Part III, the increase in investor demand for socially and environmentally responsible companies is increasing.[175] However, there is still the problem of how to get more people to invest in accordance with their personal norms. Professor Babcock suggests that information might be the answer.[176] Do investors have enough information to make investment decisions? Can mandatory disclosure be a form of increasing investor compliance with personal norms?

A. *The Role of Disclosure in Building Investor Demand*

Increased information can be the key to increasing investor demand for environmentally responsible corporations.[177] Imposing limits to corporate actions is not contested; however, the question that remains is what form those limits should take?[178] "The question is whether the limits should be entirely external to the corporation—imposed upon the corporation by markets or by regulation—or whether there should also be internal limits—accommodated within

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[172] *Id.*

[173] *Id.*

[174] *See, e.g.*, Sunstein, *supra* note 23.

[175] *See, e.g.*, Dodd, *For Whom Are Corporate Managers Trustees?*, *supra* note 75; Dodd, *Effective Enforcement*, *supra* note 75.

[176] *See generally* Babcock, *Assuming Personal Responsibility*, *supra* note 8.

[177] Lee, *supra* note 106, at 35.

[178] *Id.*

corporate law."[179] Specifically, information may be increased by mandatory disclosure of corporate environmental impacts.[180] Although increased disclosure regulation may be criticized for reasons that will be examined below, it remains the least intrusive way to effectuate change.[181] Basic support for the disclosure of non-financial data may be found when considering investors as consumers. Investors purchase stocks or investment products. Product quality is an important consideration for consumers of financial products, as any other product. Consumers respond to disclosure. It follows that investors will respond to disclosure in similar ways as consumers, when investments are viewed as products. For example, a study examining the positive effects of nutritional data disclosure demonstrates the potential impact of corporate disclosure on investor behavior.[182] The disclosure of more environmental impact information could affect investor purchasing behavior.

B. *Mandatory Disclosure and Market-Failure*

The premise of market-failure analysis is that voluntary disclosure, while ideal, is ineffective in producing optimum disclosure.[183] This idea is based on the assumption that unless forced to disclose, a corporation may choose to keep some relevant information hidden from the public.[184] These various market failures, information asymmetry, public good, and externalities, have been criticized when used to justify mandatory disclosure of corporate governance, but may provide support for disclosing environmental impacts.[185]

There is asymmetrical information when the parties of an economic relationship, such as investors and corporations, have different types or amounts of information, such as that relating to corporate governance.[186] This lack of shared information separates the investor from environmentally responsible norm compliance.[187] Specifically, the information asymmetry market-failure analysis demonstrates that the market fails to operate as it should when the

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[179] *Id.*

[180] *Id.* at 60.

[181] *See generally* Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, And Reform*, 92 HARV. L. REV. 549 (1979).

[182] Alan D. Mathios, *The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market*, 43 J. L. & ECON. 651, 674 (2000) (finding that "[t]he effect of nondisclosure on purchase behavior is an important issue beyond the arena of nutrition labeling. Disclosure remedies have a fundamental role in advertising regulation, financial product regulation, tort liability, duty-to-warn standards, and a host of other areas.").

[183] Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1030 (2000).

[184] *Id.*

[185] *Id.*

[186] John Sloman, *Asymmetric Information and Market Failure*, TEACHING BUS. & ECON., Autumn 2006, at 11.

[187] *Id.*

information an investor has is different or less than the information known by the corporation.[188] Whether by voluntary or mandated disclosure, the release of accurate, relevant information is good for efficient security pricing.[189] However, if some information is good, it does not necessarily mean that more information is better.[190]

Consider the role of information within a consumer seller relationship. It is analogous to the investor-corporation relationship if we view an investor as a consumer of securities.[191] Generally, information remedies can be categorized in three ways: (1) removing restraints to the free flow of information; (2) correcting misleading information; and, (3) promoting additional information.[192] Disclosure as one type of information remedy is preferable because it "simply adjust[s] the information available to consumers . . . leav[ing] consumers free to make their own choices, thus reducing rigidity into the market."[193] This is contingent upon the information provided about a product or an investment being relevant to consumer concerns.[194] For instance, if a consumer is not interested in quality or safety when deciding which product to buy, information about quality and safety is meaningless to promote competition in the market.[195] Similarly, if investors were unconcerned with sustainability, disclosure of corporate environmental impacts would have no effect on an investor choosing to purchase one stock over another. Because investors are concerned with environmental responsibility, and the research suggests that they even attach environmental responsibility to the value of an investment[196] (much like safety features speak to the quality or a product), then information about environmental effects is relevant to determining value. Therefore, the increase in relevant environmental impact information will balance the information asymmetry and allow for investors to make more informed investments, which will be more inline with personal norms.

C. *Current Regime in Corporate Law*

1. SEC Disclosure Requirements

It is important to understand the current state of disclosure to garner whether additional disclosure of corporate environmental impacts is supported. Federal acts not only mandate the disclosure of financial data, but non-financial data as

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188 Bainbridge, *supra* note 161, at 1031.

189 *Id.*

190 *Id.* at 1032.

191 Howard Beales, Richard Craswell & Steven Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. & ECON. 491, 514 (1981).

192 *Id.*

193 *Id.* at 513.

194 *Id.*

195 *Id.*

196 *See infra* Part III.

well. Feasibly, corporate disclosure may be extended to include environmental effects.

The Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") laid the foundation for mandatory corporate disclosure.[197] The historical assumptions under these acts were twofold. First, the false and incomplete disclosure of securities information directly affects the national economy, as information exchanges between corporations and investors are relevant beyond the private sphere.[198] Second, the optimal way to protect investors is through disclosure of accurate and complete information.[199] This section will assume that accurate and complete securities information is both a matter of public concern and necessary for the protection of investor assets.

The current state of information disclosure provides relevant guidance in identifying the materiality of information and the duty of corporations to disclose. Materiality refers to whether the information is likely to be important to the reasonable investor. The Supreme Court defined materiality in *TSC Industries, Inc. v. Northway, Inc.*, as "[a fact] is material if there is a substantial likelihood that the reasonable shareholder would consider it important in deciding how to vote."[200] In contrast to the factual nature of materiality, duty is a legal question of whether corporations are obliged to disclose certain types of information.[201] "In the end, the central question [on whether a duty exists] remains whether disclosure of the information would have had a significant effect on the decisions of the reasonable shareholder."[202]

In February 2010, the SEC promulgated an "interpretive release to provide guidance to public companies regarding the Commission's existing disclosure requirements as they apply to climate change matters."[203] The release instructs corporations as to when climate change matters may rise to the level of materiality.[204] The SEC gives four areas where climate change information may be required to be disclosed: "Impact of Legislation and Regulation," "Impact on International Accords," "Indirect Consequences of Regulation or Business Trends," and "Physical Impacts of Climate Change."[205] All of these areas,

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[197] The Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (2006); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78nn (2006).

[198] FRANKLIN A. GEVURTZ, CORPORATION LAW 540 (2000).

[199] *See id.*

[200] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[201] Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1644 (2004) (citing JAMES COX ET AL., SECURITIES REGULATION ch. 11 (4th ed. 2004)).

[202] *Id.* at 1644, n.14 (quoting Baron v. Smith, 285 F. Supp. 2d 96, 103 (D. Mass. 2003) (internal quotations omitted)).

[203] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).

[204] *Id.*

[205] *Id.* at 6295-96.

however, deal with the external effects of climate change on the business and not necessarily with the corporation's effect on the environment. The question then becomes this: are the corporation's effects on the environment material and thus required to be disclosed?

Two factors indicating that environmental impact is material are: that investors seek environmentally responsible corporations, for example, the institutional investors that have signed on to the *Principles for Responsible Investment*, and that, studies show that venture capitalists identify and invest in environmentally concerned corporations. For investors to evaluate environmental behaviors, they require accurate and widely available information concerning corporate environmental policies.[206] A duty to disclose environmental impacts may be inferred from a finding that environmental information is material to consumers and investors.[207]

Assuming that the research so far comports with the materiality of corporate environmental impacts and a duty of corporations to disclose, proponents of mandatory disclosure may find precedent in existing disclosure duties relating to extending materiality and duty to non-financial reporting. Under Regulation S-K, corporate executives are required to disclose personal information, such as employment history, nature of any familial relationship between executives, corporate securities owned, and other professional biographical information.[208] Additionally, gap-filling rules under the 1933 Act and 1934 Act require disclosure of material information necessary to ensure that required statements are not misleading.[209] The presumption attached to both gap-filling rules and Regulation S-K is that materiality may extend beyond fiscal indicators when investors can use information to assess the value of shares.[210] If that corporate environmental behavior may affect the profitability of the company long-term, or at least indicate quality of management (if they are good at managing environmental risks), such information may be considered material.[211] "This informa-

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[206] *See id.*

[207] *See* Langevoort & Gulati, *supra* note 201, at 1644 (stating that "the underlying rationale for the construction of the disclosure duties (by Congress, the SEC, or the courts) is that this type of information is likely to be important to investors").

[208] *See generally* Regulation S-K, 17 C.F.R. § 229.401 (2010); *see also* Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 755 (2007) (discussing the extension of disclosure to include personal facts about CEOs).

[209] MacLeod, *supra* note 208, at 756.

[210] David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 188-89 (2003).

[211] *Id.* ("Theoretically . . . under the current meaning of materiality in securities disclosures, one might argue that [courts hold] that unfavorable or negative non-financial . . . performance information, in the company's conscious possession, would constitute a material omission . . . if there have been company statements, reports or commitments to indicate

tion about the quality of management is economically significant because it can relate to present and future stock market values, and it is thus information that an economically minded investor could find material."[212]

2. Environmental Impacts Disclosure—Environmental Protection Agency

Environmental data is difficult to obtain, and even harder to discern.[213] This begs two questions of the current reporting requirements: (1) whether the information is accessible, and (2) whether it is interpretable enough for the average investor to assign meaning to it.

Although not required in financial disclosures, currently the government requires corporations to report on the use and storage of hazardous materials and CO_2 emissions.[214] However, this reporting is limited to very specific emission information, and does not extend to other types of environmental impacts.[215] The Consolidated Appropriations Act of 2008 established an eighteen month deadline for the EPA to design a rule "require[ing] mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States."[216]

While that very recent deadline (June 29, 2009) makes access to information very limited, the EPA published and implemented a voluntary plan for partner corporations committed to reducing greenhouse emissions.[217] However, even with this program, the published information is limited and potentially meaningless to any investor. In fact, requests for data release, inconsistent data retrieved from various sources, and a "site-specific" format stunts the access and assessment of the environmental impacts company-wide.[218]

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otherwise, and said unfavorable information is not fully disclosed as part of the total mix of information available to the shareholder.").

212 Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1285 (1999).

213 *See id.* at 1290.

214 *See* Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (2006); Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007).

215 Giji John, *EPA Required to Develop Greenhouse Gas Emission Reporting Rules*, HOLLAND & HART CLIMATE CHANGE LAW BLOG (Feb. 14, 2008), http://www.hhclimatechange.com/climate_change/2008/02/epa-required-to.html.

216 *Id.*; *see* § 2, 121 Stat. at 2124-28.

217 *See Climate Leaders Partners*, EPA, http://www.epa.gov/stateply/partners/index.html (last visited Feb. 9, 2011). Climate Leaders collects data from corporate partners on the corporation's greenhouse emissions for all six greenhouse gases (GHG). They also provide technical assistance and publish the progress of each partner's goal. For example, Anheuser-Busch Companies, Inc. "pledges to reduce total U.S. GHG emissions by 15% from 2008 to 2013." *Id.*

218 Williams, *supra* note 212, at 1291. For an example of site-based reporting, see *Toxic Chemical Pollution Rankings by Facility*, SCORECARD, http://www.scorecard.org/ranking/

Additionally, some information may be accessible, but meaningless. For example, EPA's Climate Leader Program publishes the goals, both achieved and not, of corporations that voluntarily commit to reducing greenhouse emissions. However, the publications do not mention each company's total emissions.[219] Thus, comparisons of Exelon Corporation's reduction of greenhouse gases by 8% to 3M's reduction by 60%, or Wells Fargo's pledge to reduce emissions by 20% to Turner Construction Company's pledge to do the same by 5%, are meaningless in terms of understanding long- or short-term environmental impact.[220] Additionally, they are also meaningless in terms of shareholder value. Even if investors can access this data, they have no mechanism for assigning value to it.

The argument for mandatory disclosure of environmental information is again an issue of materiality. Investors do not need to know every detail of an issuer's portfolio, but as already established, investors do need to know information that will impact their decisions.[221] Accordingly, the socially conscious investor will seek environmentally conscious corporations to invest in. Assuming that disclosure is supported by situations in which information is incomplete,[222] the audience for corporate environmental disclosure may extend beyond current investors to the public at large. As a device for effectuating a public policy goal, such as protecting the environment, "the intended audience for these disclosures would not be shareholders alone . . . but rather the legislator or regulatory agency with responsibility for the particular subject-matter."[223] This may in fact support an education campaign, where states regulate the general disclosure of corporate environmental impacts, without necessarily distinguishing which corporations are responsible for individual impacts. Such a campaign would then call on current and future investors to inquire about the environmental effects of individual corporations. In conjunction with the mandatory disclosure of environmental impacts of corporations to shareholders, a public education campaign extends the message to insure future investors consider the environment in their initial decision to invest.

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rankfacilties.tcl?fips_state_code=Entire%20United%20States&type=mass&category=Total_env&modifier=na&sic_2=All%20reporting%20sectors&how_many=100 (last visited Feb. 9, 2011).

219 EPA, *supra* note 217.

220 *Id.*

221 *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

222 *See* Beales, Craswell, & Salop, *supra* note 191, at 527. "The need for requiring disclosure, in general, depends on the completeness of the total information environment and sellers' incentives to disclose voluntarily. If information is readily available from another source . . . required disclosure is unnecessary . . . [D]isclosure is most likely to be appropriate when information affects an entire product class without differentiating the brands within that class. In such cases, no one firm may have sufficient incentive to disclose the information on its own, whether the information is positive or negative.").

223 Lee, *supra* note 106, at 71, n.257.

D. *Centralizing the Information*

It is absolutely necessary within the disclosure regime to centralize meaningful data. Current data describes the environment in terms too obtuse to be interpreted by an average investor. "Investors . . . are said to make decisions based on recently learned or easily remembered information rather than on complete data sets."[224] While one strategy may be to single-out specific effects, another may be to interpret those effects and report that interpretation in terms of a social return on investment. Of the potential meaningful data sets that could be disclosed to consumers, it has been suggested that environmental management costs, remediation costs, and energy and wasted materials costs represent some of the types of information useful to investors.[225] A focus on these impacts "allows investors to make informed decisions regarding the value of the enterprise, its management skill, and its performance with regard to environmental stewardship and responsibility."[226]

Researchers propose the standardization of corporate environmental reporting in the form of a social return on investment ("SROI") analysis. This type of system may achieve the centralization and meaning that raw data fails to produce by assigning value to environmental impacts in a way that investors may find useful and accurate. SROI quantifies the returns on investments in social initiatives.[227] Though financial returns are considered, the predominant goal of the SROI analysis is to demonstrate the positive returns associated with Environmental and Social Responsibility ("ESR").[228] The SROI approach involves identifying values and their sources, finding indicators of the value, monetizing indicators, and demonstrating future costs and benefits.[229] An environmentally concerned manufacturer of biodegradable plastics may use an SROI analysis to give value to his environmental impact and to inform investors about the company's ESR practices. He would evaluate the impact of any harmful substances used in the manufacturing of plastic, compare his plastic against non-biodegradable plastics, and finally monetize emissions through emission credits.[230] A centralized implementation of this type of analysis will help investors see through raw numbers to the actual environmental impact of a corporation. This specific type of standardized reporting illustrates the overarching need for a commonly accepted and translatable index that can report environmental data

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224 Bainbridge, *supra* note 161, at 1035 n.57.

225 Monsma & Buckley, *supra* note 210, at 165.

226 *Id.*

227 *The SROI Primer*, LONDON BUSINESS SCHOOL, http://sroi.london.edu (last visited Feb. 9, 2011).

228 NICHOLLS ET AL., SOCIAL RETURN ON INVESTMENT: A GUIDE TO SROI ANALYSIS 4 (2006).

229 *Id.* at 6.

230 For case studies, see *id.* at 9-11.

in such a way that it can then be compared across corporations.[231]

The trend toward environmentally conscious investors and consumers, coupled with a growing cry for more transparency in the government, present policy-makers with an opportunity to increase regulations on corporate reporting. There are several research and development groups devoted to the creation of indices that gauge the environmental and social performance of companies worldwide.[232] Centralization will cease to be problematic if one standardized approach is adopted. Such indices act as an intermediary for the investor, interpreting environmental data into a meaningful form.

Some, however, criticize mandatory disclosure as unnecessary where voluntary disclosure reaches an equilibrium between the costs of disclosure and the benefits.[233] If the costs of disclosure are too high, then corporations may be discouraged from disclosing voluntarily.[234] This in fact supports the need for regulated disclosure. "Absent some market failure, neoclassical economics predicts that the firm will voluntarily provide additional disclosures until an equilibrium is reached in which the marginal benefit of providing an additional unit of disclosure equals the marginal cost of producing that additional unit."[235] However, the combined failure of the information market with evidence that consumers (therefore investors) respond to disclosure, give corporations reason to disclose outside costs.[236]

Due to investor support for environmentally responsible practices, information is incomplete in the current voluntary disclosure regime. Moreover, voluntary disclosure is ineffective in creating optimal levels of disclosure, if firms hesitate to disclose certain information that will simultaneously benefit competitors while acting only to disadvantage the firm that chose to disclose.[237] To

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[231] Monsma & Buckley, *supra* note 210, at 172 n.74 (citing Colloquium, *Should Environmental Laws Be Integrated?*, 15 PACE ENVTL. L. REV. 57, 64-65 (1997)).

[232] *See Global Reporting Initiative*, Coalition for Environmentally Responsible Economies (CERES), http://www.ceres.org/gri (last visited Feb. 9, 2011); *Carbon Counts USA: The Carbon Footprints of US Mutual Funds*, TRUCOST (April 8, 2009), http://www.trucost.com/publications (click hyperlink associated with article) (report on the carbon performance of 91 U.S. mutual funds).

[233] Bainbridge, *supra* note 161, at 1029.

[234] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 454 (7th ed. 2007) (stating that "a sustained commitment to any goal other than profitability will result in the firm's shrinking, quite possibly to nothing"); Bainbridge, *supra* note 161, at 1028 ("Start with the perfectly plausible assumptions that investors value disclosure and that corporations desire to minimize their cost of capital. Or, more precisely, assume that the marginal benefit of an additional unit of disclosure . . . declines as more is produced, while the marginal cost of producing additional units rises as more are produced.").

[235] Bainbridge, *supra* note 161, at 1029-30.

[236] *See* Mathios, *supra* note 182, at 658-68.

[237] *See* EASTERBROOK & FISCHEL, *supra* note 81, at 291 (Firms would be more willing to disclose if others were required to do the same. "Then the costs and any business risks would

ensure that all corporations behave in similar environmentally responsible ways, mandatory disclosure is necessary. In fact, where only one firm is disclosing, the cost may be higher to customers and investors because the corporation will anticipate lower future earnings, which in turn lowers the current share value.[238] This truly acts as a disincentive for corporations willing to disclose environmental impacts under a voluntary disclosure regime.

If it follows that the more information consumers have, the more they will purchase in accordance with their personal norms, then it follows that increased disclosure requirements can be the best solution and have the least intrusive impact on the corporation. If policy-makers institutionalize a measurement of environmental and social impacts of corporations, then the results could be publicized. Regulations that increase reporting would lead to more informed investors. Since investors are already crying out for socially responsible companies, it follows that companies who better support social and environmental sustainability will benefit from increased investment with such publicity. "If the rudder on the private enterprise market is deliberately moved as little as two or three degrees in a corrected more sustainable direction, the course will vary dramatically, heading away from business as usual toward an economy that is more equitable and sustainable if not also one that if ecologically restorative."[239]

VI. Conclusion

Investor demand is the best way to shift the corporate decision-making norm. Corporate decision-makers react to the demands of their shareholders. While shareholder activism or statutory mandates may be viable ways at establishing parameters for corporate decision-makers, they will still look to maximize wealth within those parameters. The best way for shareholders to control corporate decision-makers is the old "Wall Street Walk" (divest from a corporation and invest in another). By investing in environmentally responsible corporations, investors will shift the corporate decision-making norm as corporate decision-makers will be looking to gain the investment dollars. In order for investors to activate their personal norms, however, they need information.

As discussed above, there are currently some ways for investors to gather environmental information, but a more focused mandatory disclosure regime may be required to make the impact desired. Critics will point to the fact that, so far, socially responsible investing has grown to 10% of investments and has done so without mandatory disclosure. Is 10% enough to shift the decision-making norm or does that just reflect the current profitability in being green?

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be distributed more evenly. In the absence of some requirement or strong inducement to disclose, each firm will want to be a holdout.").

238 *Id.*

239 Monsma & Buckley, *supra* note 210, at 171.

The shareholder wealth maximization norm is still very much the guiding light in corporate decision-making, and the only way to change that is investor demand.