

# Corporate Social Responsibility: Can a Corporation Be Responsible If Its Only Responsibility Is to the Shareholders?

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*ABSTRACT: As large-scale problems—such as climate change and wealth inequality—demand collective solutions, Corporate Social Responsibility (“CSR”) is increasingly important. This Note discusses the recent Business Roundtable (“BRT”) “commitment” to responsible business practices and explains how this commitment does not conflict with Delaware Corporate Law—which requires that for-profit corporations work towards shareholder ends. This Note also summarizes the history of CSR and explains why changes in the past have not successfully increased CSR. This Note argues the BRT will not adhere to these commitments on its own and further that sustained change will only come when the legislature is willing to regulate corporations in ways that align the profit incentives with the goals of society at large. Finally, this Note proposes potential regulation that could work to align these goals and thus successfully increase Corporate Social Responsibility.*

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## I. INTRODUCTION

Merrick Dodd Jr. and Adolf Berle are widely credited with starting the conversation on corporate purpose and Corporate Social Responsibility

(“CSR”).<sup>1</sup> Almost 100 years ago, Dodd suggested that corporations and corporate management should focus on more than just shareholders,<sup>2</sup> and “argued for greater social responsibility on the part of corporations and corporate management.”<sup>3</sup> Berle, on the other hand, argued that corporate directors should only concern themselves with “making profits for their stockholders’ until such time as [someone is] prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”<sup>4</sup>

Disagreement about corporate purpose—what corporations *should* do and what their focus *should* be—remains strong.<sup>5</sup> In 2019, The Business Roundtable<sup>6</sup> (“BRT”)—a nonprofit lobbying group composed of CEOs of 181 major U.S. companies—weighed in on this debate with its recent “Statement on the Purpose of a Corporation” (“Statement”).<sup>7</sup> In the Statement, the CEOs announced they “share a fundamental commitment to all of our stakeholders,” and “commit to . . . [d]elivering value to our customers,” “[i]nvesting in our employees,” “[d]ealing fairly and ethically with our suppliers,” “[s]upporting the communities in which we work,” and “[g]enerating long-term value for shareholders.”<sup>8</sup> This stance represented a monumental shift from the BRT mantra of the past 20 years—that “the paramount duty of management and of boards of directors is to the corporation’s stockholders.”<sup>9</sup> Thus, after 100 years, the largest companies in America appear to be siding with Merrick Dodd, Jr.

1. Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 459 (2006) (“Social responsibility theory began in earnest in the 1930s. Columbia Law School Professor Adolf A. Berle, Jr., and Harvard Law School Professor E. Merrick Dodd, Jr., debated the issue in the *Harvard Law Review*.”).

2. Shareholder and stockholder are equivalent terms and will be used interchangeably throughout this Note.

3. Velasco, *supra* note 1, at 459.

4. A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

5. See LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 16–19 (2012); Honorable Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 135 (2012) (explaining that there is a “continuing dismay evidenced in Western, capitalist nations when public corporations that pursue profit . . . take actions that adversely affect the nation’s economic stability, the corporation’s employees, or the environment”); Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 171–74 (2018).

6. See *About Us*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us> [<https://perma.cc/5A67-WY7R>].

7. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Sept. 6, 2019), <https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-February-2021-compressed.pdf> [<https://perma.cc/5TZB-ATUR>].

8. *Id.*

9. BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf> [<https://perma.cc/N7DT-6CHT>].

Yet, three major questions arise in light of the BRT Statement: (1) does Delaware law allow these companies to adhere to their recent commitments; (2) if it does, will the companies follow through; and (3) if they are unlikely to follow through on the commitments, are there other ways to incentivize these companies to be socially responsible?

On the first question, this Note will contend that Delaware law does indeed allow pursuit of these commitments, if implemented correctly. However, this Note will argue that companies will likely fail to follow through on their commitments from the BRT Statement. This Note will further argue that the BRT Statement could, in fact, negatively affect other efforts to improve corporate social responsibility. This argument will include a discussion of the structural context in which corporate decision-makers operate, which will help citizens and policy makers focus on solutions that effectively incentivize CSR.<sup>10</sup>

Finally, in light of the conclusion that the BRT is not going to improve CSR—and may set it back—this Note will consider some changes that could improve CSR. First, this Note will discuss ineffective attempts to increase CSR. This Note will then identify areas in which legislative action could increase CSR by aligning corporate and social incentives.

Part II explores the background of Delaware corporate law, the BRT history, and its recent Statement. Part III analyzes whether the Statement conflicts with Delaware law and whether the BRT CEOs will follow through on the commitments in their Statement. Part III additionally addresses past attempts at increasing CSR. Part IV presents a solution to increase CSR, describes the ideal legislative targets, and describes the type of legislation that could tie CSR goals with corporate incentives.

## II. CORPORATE SOCIAL RESPONSIBILITY, ITS HISTORY, AND THE BUSINESS ROUNDTABLE'S NEW STATEMENT

### A. WHAT THIS NOTE MEANS BY CSR AND WHY IT IS RELEVANT NOW

Corporate Social Responsibility (“CSR”) does not have one clear definition.<sup>11</sup> Some definitions explain that CSR “is thought to begin where the law ends . . . [and that CSR] reflects the belief that corporations have

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10. See Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) (explaining that “lecturing others to do the right thing without acknowledging the actual rules that apply to their behavior, and the actual power dynamics to which they are subject, is not a responsible path to social progress. Rather, it provides an excuse for avoiding the tougher policy challenges that must be overcome if we are to make sure that for-profit corporations become vehicles for responsible, sustainable, long-term wealth creation.”).

11. Berger-Walliser & Scott, *supra* note 5, at 171 (“Researchers have noted that a particular challenge of studying CSR is finding commonality among the variety of definitions and contexts in which CSR is used.”).

[negative] duties . . . refrain[ing] from causing harm to the environment, individuals and communities; as well as positive duties to actively engage in activities to improve society and [the] environment.”<sup>12</sup> Others find that CSR “refers to [companies] addressing environmental and social, as well as financial, concerns—the so-called triple bottom line.”<sup>13</sup> This Note does not propose a new definition of CSR. When CSR is mentioned in this Note, it is in reference to any corporate action or inaction, voluntary or otherwise, that benefits some non-stockholder group (employees, a certain community, society at large, etc.) or the environment.<sup>14</sup> Furthermore, CSR, as used in this Note, does not necessarily imply benefit or harm to stockholders; so long as a corporate action advances societal or environmental interests, then it falls under this Note’s use of CSR.

This Note’s discussion of CSR is relevant not only because of the BRT Statement, but also because the climate crisis has put sustainable business practices into the forefront of our society’s collective self-consciousness.<sup>15</sup> As discussed in Section IV.B.1 *infra*, this Note explains that climate change has created problems so large that they can only be solved with considerable government intervention. As corporate decision-making is increasingly evaluated through a sustainability lens, an analysis of the current state of CSR is helpful in order to chart a practical and effective path forward.<sup>16</sup>

This Note addresses CSR in the context of Delaware’s corporate law, which “remains the bedrock of corporate governance and the home of most incorporated businesses in America today.”<sup>17</sup> Over 67 “[p]ercent of all Fortune 500 companies are incorporated in Delaware.”<sup>18</sup> Most companies

12. Min Yan & Daoning Zhang, *From Corporate Responsibility to Corporate Accountability*, 16 HASTINGS BUS. L.J. 43, 43 (2020).

13. Jeff Civins & Mary Mendoza, *Corporate Sustainability and Social Responsibility: A Legal Perspective*, 71 TEX. BAR J. 368, 369 (2008).

14. I include non-voluntary activity in order to encompass all socially responsible corporate activity. If the government taxed an activity so heavily that the activity could not be profitable, businesses would cease this activity completely. While this may not be “voluntary” in a strict sense, it would fall under my use of CSR if the termination of this activity benefitted the environment or some non-stockholder group.

15. See Swann Bommier & Cécile Renouard, *Corporate Responsibility in the Climate Crisis*, PUB. BOOKS (Jan. 21, 2019), <https://www.publicbooks.org/corporate-responsibility-in-the-climate-crisis> [<https://perma.cc/7UW8-ETB3>]; Robinson Meyer, *This Land Is the Only Land There Is*, ATLANTIC (Aug. 8, 2019), <https://www.theatlantic.com/science/archive/2019/08/how-think-about-dire-new-ipcc-climate-report/595705> [<https://perma.cc/9NBL-P9PN>]; Robinson Meyer, *This Is Your Life on Climate Change*, ATLANTIC (Jan. 15, 2020), <https://www.theatlantic.com/science/archive/2020/01/2019-was-2nd-hottest-year-record-nasa-and-noaa-say/604939> [<https://perma.cc/99CY-AKqJ>].

16. See *infra* Section IV.B.1.

17. Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1010 (2013).

18. DEL. DIV. OF CORPS., ANNUAL REPORT STATISTICS (2018), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2018-Annual-Report.pdf> [<https://perma.cc/XB72-S58L>].

make their home in Delaware because its Court of Chancery<sup>19</sup> establishes “the most advanced and flexible” corporate law by “provid[ing] a high degree of sophistication and understanding, a well-established body of caselaw, and a great sense of predictability on which corporations can rely.”<sup>20</sup> Companies also appreciate the way Delaware law governs “board determinations, classified boards and removal of members of boards, board committees, liability of directors and officers, and appraisal rights.”<sup>21</sup> This corporation-friendly state has developed its reputation over the past few decades, and has no clear plans on changing its business-focused trajectory.

B. *THE DEVELOPMENT OF SHAREHOLDER WEALTH MAXIMIZATION  
IN DELAWARE LAW*

The seminal case holding corporate directors liable when their decisions do not put shareholders first is not from Delaware, but from Michigan.<sup>22</sup> The Michigan Supreme Court ruled in *Dodge v. Ford Motor Co.* that Henry Ford, as a director, could not place the interests of other constituencies—including the local community or Ford employees—above Ford shareholders.<sup>23</sup> The court found that Ford breached his legal fiduciary duties when he placed the interests of other constituencies above the interests of minority shareholders.<sup>24</sup> The court explained that “[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”<sup>25</sup> This holding clarified a corporate board’s obligations and put shareholders on notice that if their profits were openly subordinated to anything else, the shareholders could sue, and win.

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19. See *Court of Chancery*, DEL. CTS., <https://courts.delaware.gov/Chancery> [<https://perma.cc/TNF9-B67S>] (“The Delaware Court of Chancery is widely recognized as the nation’s preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world’s commercial affairs is conducted. Its unique competence in and exposure to issues of business law are unmatched.”).

20. Westaway & Sampsel, *supra* note 17, at 1008.

21. *Id.*

22. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 670–75 (Mich. 1919).

23. *Id.* at 671 (“[Ford may not] deprive the stockholders of the company of the fair and reasonable returns upon their investment by way of dividends to be declared upon their stockholding interest in said company.”).

24. *Id.* at 684 (“[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.”).

25. *Id.*

Sixty-five years later, the Delaware Supreme Court faced a similar question of law in *Unocal Corp. v. Mesa Petroleum Co.*<sup>26</sup> *Unocal* involved the Unocal board's response to a takeover offer from Mesa Petroleum.<sup>27</sup> The issue was whether "Unocal['s] board ha[d] the power and duty to oppose a takeover threat it reasonably perceived to be harmful to the corporate enterprise, and if so, [was] its action here entitled to the protection of the business judgment rule?"<sup>28</sup> The court explained that a corporate board has a "fundamental duty and obligation to protect the corporate enterprise" and "a fiduciary duty to act in the best interests of the corporation's stockholders."<sup>29</sup> However, the court noted it was acceptable for a board to evaluate "the impact" a takeover bid may have "on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)" while fulfilling these duties.<sup>30</sup> This last note raised questions among lawyers and businesses, as some viewed this ambiguity as a grant of broader discretion to corporate boards, allowing them to place the interests of other constituencies on the *same footing* as their shareholders.<sup>31</sup>

One year later, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,<sup>32</sup> the Delaware Supreme Court seemed to clear up this ambiguity—at least within the context of a takeover. A hostile bidder alleged Revlon's board breached its fiduciary duty by selecting one bid over another "that was potentially more valuable to the equity holders."<sup>33</sup> The Delaware court found that Revlon's directors had breached their legal duty to the company's shareholders, explaining that "while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders."<sup>34</sup> This ruling demonstrated the court's understanding that, under Delaware law, directors evaluating takeover bids could only consider

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26. *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 953–57 (Del. 1985); see also Strine, *supra* note 10, at 768 ("The Delaware Supreme Court first grappled explicitly with the question of the ends of corporate law in the case of *Unocal Corp. v. Mesa Petroleum Co.*").

27. *Unocal*, 493 A.2d at 949.

28. *Id.* at 953.

29. *Id.* at 954–55.

30. *Id.* at 955.

31. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 308 (1999) (arguing that "*Unocal* squarely rejects shareholder primacy in favor of the view that the interests of the 'corporation' include the interests of nonshareholder constituencies").

32. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 175 (Del. 1986).

33. Strine, *supra* note 10, at 769; see *Revlon*, 506 A.2d at 176–79.

34. *Revlon*, 506 A.2d at 176.

the interests of other constituencies if it would also benefit shareholders; the interests of non-shareholders could never be pursued as an end in itself.<sup>35</sup>

Because *Revlon* and *Unocal* were confined to the sale-of-company context, whether Delaware law required shareholder wealth maximization in all instances remained an open question.<sup>36</sup> Additional litigation in the non-sale-of-company context is sparse because directors have wide latitude when deciding what is best for a corporation and its stockholders (as well as the attendant timeline of these goals).<sup>37</sup> This wide latitude largely stems from the Business Judgment Rule (“BJR”)—a legal doctrine calling for shareholder-challenged board decisions to be evaluated under “the [rebuttable] ‘presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’”<sup>38</sup>

Although it is far-reaching, the BJR has limits. These limits were delineated in a unique case, *eBay Domestic Holdings, Inc. v. Newmark*, that pitted the founders of Craigslist against eBay. Notably, the case did not involve a company sale.<sup>39</sup> In *Newmark*, the Delaware Court of Chancery described the broad discretion afforded by the rule, explaining that

[w]hen director decisions are reviewed under the business judgment rule [BJR], this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote[s] stockholder value.<sup>40</sup>

35. See Strine, *supra* note 10, at 771 (explaining that “[n]on-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefiting the stockholders”).

36. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 733 (2005) (arguing that “the law gives corporate managers considerable implicit and explicit discretion to sacrifice profits in the public interest”); *id.* at 766 (arguing that *Unocal* “emphasize[s] that this profit-maximization duty applies only to such sales of corporate control and thus make clear it does not apply otherwise”); see also STOUT, *supra* note 5, at 30–31 (arguing that *Revlon* “is the exception that proves the rule”). But see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (arguing that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value”).

37. J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 12 (2012) (explaining that the “lack of enforcement of the shareholder . . . maximization norm does not mean the norm does not exist”).

38. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010) (quoting *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995)) (adding that “the Court ‘will not substitute its judgment for that of the board if the [board’s] decision can be “attributed to any rational business purpose”’ (alteration in original) (quoting *Unitrin*, 651 A.2d at 1373)).

39. *Newmark*, 16 A.3d at 8–20.

40. *Id.* at 33.



After explaining the BJR's breadth, the court marked its limit, finding the Craigslist founders breached their fiduciary duty to eBay—a minority shareholder in Craigslist at the time—because the founders “openly eschew[ed] stockholder wealth maximization” and “did not make any serious attempt to prove that the Craigslist culture, which rejects any attempt to further monetize its services, translates into increased profitability for stockholders.”<sup>41</sup> Thus, the Craigslist founders were not protected by the BJR.<sup>42</sup>

Taken together, *Revlon*, *Unocal*, and *Newmark* resolve a number of questions surrounding the legal duties of corporate directors. First, in the context of a sale, a board's legal duty is to take the highest bid possible.<sup>43</sup> Second, if a director openly admits to prioritizing anything over her stockholders, that director will be in breach of her fiduciary duties.<sup>44</sup> Third, any directorial action that is rationally related to an increase in shareholder value at some future time will be protected by the BJR.<sup>45</sup> Thus, regardless of true motivation, the day-to-day activities of a corporate board will enjoy BJR protection provided that nothing is clearly prioritized above increasing shareholder wealth—in the present or future.<sup>46</sup> While this opens the door for

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41. *Id.* at 33, 35.

42. *Id.* at 34 (explaining that “[h]aving chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. . . . Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders. . . .”).

43. *See* *TW Servs., Inc. v. SWT Acquisition Corp.*, Nos. 10427, 10298, 1989 WL 20290, at \*7 (Del. Ch. Mar. 2, 1989) (explaining that “[i]n the setting of a sale of a company for cash, the board's duty to shareholders is inconsistent with acts not designed to maximize present share value, acts which in other circumstances might be accounted for or justified by reference to the long run interest of shareholders”).

44. *See* *Newmark*, 16 A.3d at 35 (finding breach when the Craigslist founders “openly eschew[ed] stockholder wealth maximization”). *See generally* *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (noting that a director is bound to prioritize shareholders over other non-corporate interests).

45. *See* *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. 12108-VCL, 2017 WL 1437308, at \*17 (Del. Ch. Apr. 14, 2017) (explaining that directors “must . . . treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare”); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (Del. 1989) (holding that when directors take actions, “there must be a rational basis for the action such that the interests of the stockholders are manifestly the board's paramount objective”); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986) (explaining that there must “be some rationally related benefit accruing to the stockholders” when considering other constituencies).

46. *Strine*, *supra* note 10, at 776 (concluding, “[o]f course, it is true that the business judgment rule provides directors with wide discretion, and thus enables directors to justify—by reference to long-run stockholder interests—a number of decisions that may in fact be motivated more by a concern for a charity the CEO cares about, the community in which the corporate headquarters is located, or once in a while, even the company's ordinary workers, rather than long-run stockholder wealth”).

a director to undermine the duty of shareholder wealth maximization in practice, it “does not alter the reality of what the law is.”<sup>47</sup>

To date, Delaware courts continue to hold that the ultimate legal obligation of a director is to the stockholders of her company.<sup>48</sup> For example, in 2013 the Delaware Chancery Court explained that “the duty of loyalty<sup>49</sup> therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital.”<sup>50</sup> And in 2017, the Chancery Court held that “under Delaware law . . . directors . . . must seek ‘to promote the value of the corporation for the benefit of its stockholders.’”<sup>51</sup> Thus, “[d]espite all of the academic debate, the *persistent common perception* seems to be that directorial duties require placing shareholder wealth at the forefront.”<sup>52</sup>

### C. THE BUSINESS ROUNDTABLE’S NEW COMMITMENT TO CORPORATE SOCIAL RESPONSIBILITY

In recent years, the business community at large has shown increased interest in sustainable business practices.<sup>53</sup> With its new Statement, the BRT appears to be joining the ranks of those advocating for sustainable business practices and increased corporate social responsibility.<sup>54</sup>

47. *Id.*

48. *See, e.g., In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 36–43 (Del. Ch. 2013); *In re Rural Metro Corp.*, 88 A.3d 54, 80–85 (Del. Ch. 2014); *Frederick Hsu*, 2017 WL 1437308, at \*16–22.

49. *See The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, DELAWARE.GOV, <https://corplaw.delaware.gov/delaware-way-business-judgment> [<https://perma.cc/88HA-SS3Z>] (asserting that the duty of loyalty is one of the fiduciary duties owed by corporate directors and “[b]roadly stated, . . . requires directors to act in good faith to advance the best interests of the corporation and, similarly, to refrain from conduct that injures the corporation”).

50. *In re Trados Inc.*, 73 A.3d at 37.

51. *Frederick Hsu*, 2017 WL 1437308, at \*17 (quoting *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010)).

52. Murray, *supra* note 37, at 17; *see also* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654–55 (2006) (citing research that “found that the norm of shareholder wealth maximization was implicit in most business school courses, and so powerful that it did not need to be defended”); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1288 (1992) (explaining that “[d]irectors seem to believe that their legal duty is to the stockholders”); Hansmann & Kraakman, *supra* note 36, at 439 (stating that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value”).

53. *See* Elizabeth Schmidt, *New Legal Structures for Social Enterprises: Designed for One Role but Playing Another*, 43 VT. L. REV. 675, 725–27 (2019) (explaining that “significant social and economic changes are taking place”).

54. *Statement on the Purpose of a Corporation*, *supra* note 7.

### 1. The Business Roundtable's Past

As mentioned previously, the BRT is a nonprofit lobbying group composed of CEOs from major U.S. companies.<sup>55</sup> The BRT's August 2019 Statement is not only surprising because it diverges from past BRT statements, but because it also runs counter to the group's past actions. In the 1970s, the BRT helped defeat the antitrust bill of 1975, "played a leading role in blocking the creation of a consumer-protection agency," and worked to block a labor law reform bill in 1977.<sup>56</sup> Additionally, the BRT successfully lobbied for corporate tax cuts under President Reagan, urged President Bush Sr. to initiate trade with Mexico, and strongly opposed the SEC's proposed "shareholders' access to proxy" rule.<sup>57</sup> In light of the BRT's history, one may argue "the Business Roundtable . . . exists to prevent the U.S. government from statutorily mandating corporate America's fulfillment of" an "obligation[] to the workers and communities that sustain them."<sup>58</sup> Thus, there is good reason to be skeptical of this new BRT Statement, and it should be evaluated with the BRT's entire history in mind.

### 2. Reaction to the Business Roundtable's Statement

There was considerable reaction from the business and legal communities after the BRT released its Statement.<sup>59</sup> One notable reaction in the business community came from the Council of Institutional Investors ("CII"), a nonprofit association of pension funds and other employee benefit funds, foundations, and endowments.<sup>60</sup> CII responded with a reaffirmation of

55. See *About Us*, *supra* note 6.

56. Eric Levitz, *When CEOs Promise a Kinder Capitalism, Watch Your Wallet*, INTELLIGENCER (Aug. 20, 2019), <http://nymag.com/intelligencer/2019/08/americas-top-ceos-disavowed-shareholder-value-dont-clap.html> [<https://perma.cc/65BZ-6ZFL>]; Eileen Shanahan, *Antitrust Bill Stopped by a Business Lobby*, N.Y. TIMES (Nov. 16, 1975), <https://www.nytimes.com/1975/11/16/archives/antitrust-bill-stopped-by-a-business-lobby-top-executives-united-in.html> [<https://perma.cc/QSQ6-QVKQ>].

57. Edward Cowan, *Tax Cuts: First, Business Wants Fast Depreciation; Washington*, N.Y. TIMES (Feb. 1, 1981), <https://www.nytimes.com/1981/02/01/business/tax-cuts-first-business-wants-fast-depreciation-washington.html> [<https://perma.cc/SF66-VFPC>]; Larry Rohter, *U.S. and Mexicans Cautiously Back Free-Trade Idea*, N.Y. TIMES (June 12, 1990), <https://www.nytimes.com/1990/06/12/business/us-and-mexicans-cautiously-back-free-trade-idea.html> [<https://perma.cc/YFP2-28XB>]; Floyd Norris, *Market Place; A Debate Grows over Proxy Rules*, N.Y. TIMES (Dec. 18, 1990), <https://www.nytimes.com/1990/12/18/business/market-place-a-debate-grows-over-proxy-rules.html> [<https://perma.cc/LEB5-VRQT>].

58. Levitz, *supra* note 56.

59. Within three days of the BRT Statement release, the Council of Institutional Investors formally responded and three major law firms—Sullivan & Cromwell, Davis Polk & Wardwell, and Wachtell, Lipton, Rosen & Katz—all put out memos responding to the Statement. Press Release, Council of Institutional Invs., Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose 1 (Aug. 19, 2019), [https://www.cii.org/files/about\\_us/press\\_releases/2019/08\\_19%20BRT%20response\\_finalx.pdf](https://www.cii.org/files/about_us/press_releases/2019/08_19%20BRT%20response_finalx.pdf) [<https://perma.cc/P5SF-ANFQ>].

60. See *About CII*, COUNCIL OF INSTITUTIONAL INVS., <https://www.cii.org/about> [<https://perma.cc/R5DW-KM6N>].

its members' commitment to shareholder wealth maximization, disagreeing with the BRT Statement and explaining that it "believes boards and managers need to sustain a focus on long-term shareholder value."<sup>61</sup>

Additionally, three major U.S. law firms released memos within days of the Statement's publication.<sup>62</sup> Wachtell, Lipton, Rosen & Katz's ("Wachtell") response stated that "Delaware law does not enshrine a principle of shareholder primacy or preclude a board of directors from considering the interests of other stakeholders."<sup>63</sup> It further stated that "[t]he fiduciary duty of the board is to promote the value of the corporation."<sup>64</sup> The memo decries short-term thinking and finally explains that Wachtell "ha[s] proposed *The New Paradigm*, which conceives of corporate governance as a partnership among corporations, shareholders and other stakeholders to resist short-termism and embrace ESG [environmental, social, and governance] principles in order to create sustainable, long-term value."<sup>65</sup>

Davis Polk & Wardwell's ("Davis Polk") memo explained that "[t]he Statement of Purpose is for the moment mainly symbolic since legislatures and courts, not trade associations, define the scope of a director's fiduciary duties."<sup>66</sup> Further, it stated that the BRT Statement "does not change the business judgment rule" and that "[i]t remains to be seen whether . . . the concepts in the Statement of Purpose will lead . . . to a new separate duty, that would encompass a requirement to balance duties to the corporation and its shareholders, as well as the interests of other stakeholders."<sup>67</sup> The memo concludes that the Statement "is likely to fuel expectations of various shareholder and activist groups for increased ESG disclosures."<sup>68</sup>

Sullivan & Cromwell's ("Sullivan") memo began with a cautionary note, explaining "it is essential . . . that the Purpose Statement not be misinterpreted as inconsistent with fundamental principles of corporate law,

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61. Press Release, Council of Institutional Invs., *supra* note 59, at 1.

62. See generally Memorandum, Wachtell, Lipton, Rosen & Katz, Stakeholder Governance and the Fiduciary Duties of Directors (Aug. 22, 2019) [hereinafter Wachtell, Lipton, Rosen & Katz], <https://static.reuters.com/resources/media/editorial/20190822/wachtellmemo8.22.19.pdf> [<https://perma.cc/QHU4-ZU4B>] (explaining the need to consider interests other than shareholders' interests for long-term value); Memorandum, Sullivan & Cromwell LLP, Corporation Purpose: Business Roundtable "Statement on the Purpose of a Corporation" Proposes New Paradigm (Aug. 20, 2019) [hereinafter Sullivan & Cromwell], <https://mailings.sullivanandcromwell.com/28/1855/uploads/gpm7865.pdf> [<https://perma.cc/CG7D-ZG65>] (same); Memorandum, Davis Polk & Wardwell LLP, The Business Roundtable Statement on Corporate Purpose (Aug. 21, 2019) [hereinafter Davis Polk], [https://www.davispolk.com/sites/default/files/2019-08-21\\_the\\_business\\_roundtable\\_statement\\_on\\_corporate\\_purpose.pdf](https://www.davispolk.com/sites/default/files/2019-08-21_the_business_roundtable_statement_on_corporate_purpose.pdf) [<https://perma.cc/K8FG-TJTK>] (explaining the Statement's political and legal impact).

63. Wachtell, Lipton, Rosen & Katz, *supra* note 62, at 1.

64. *Id.* at 2.

65. *Id.* at 3.

66. Davis Polk, *supra* note 62, at 1.

67. *Id.*

68. *Id.*

and, in particular, the fiduciary duties of directors.”<sup>69</sup> Sullivan’s memo also addressed Delaware law, noting that “[u]nder Delaware law, directors of these corporations owe their fiduciary duties to the corporation and its stockholders.”<sup>70</sup> It added that “a board’s fiduciary duty . . . does not preclude . . . [it] from considering the interests of other constituencies as part of the determination of what creates long-term value for the corporation and its stockholders.”<sup>71</sup> The memo additionally cautioned “that a decision by a board that is not grounded in the best interests of the corporation and its stockholders likely would not be protected by the business judgment rule under the current state of the law.”<sup>72</sup>

### III. WHY THE BUSINESS ROUNDTABLE’S STATEMENT IS LEGAL AND WHY THAT DEMONSTRATES ITS UNPRODUCTIVENESS

This Part first addresses whether the BRT Statement conflicts with current Delaware law. After concluding it does not, this Part will evaluate whether the BRT CEOs will follow through on their commitments and concludes this is unlikely in light of the structural constraints that today’s CEOs face. It will then explain why statements like the BRT’s, without true enforcement mechanisms, actually impede CSR. Finally, it will discuss why past efforts to increase CSR have been largely ineffective.

#### A. THE BUSINESS ROUNDTABLE’S STATEMENT DOES NOT CONFLICT WITH DELAWARE LAW AND SHAREHOLDER WEALTH MAXIMIZATION<sup>73</sup>

If the BRT Statement is read as an explicit rejection of shareholder wealth maximization, then the BRT CEOs would be in breach of legal duties owed to their corporations.<sup>74</sup> Although cases finding fiduciary breaches “are rare[—]because the business judgment rule is so powerful, and defendants are not generally so open about eschewing shareholder interests”—both *Ford* and *Newmark* provide excellent examples of this type of breach, in which directors openly confessed to contradicting the law.<sup>75</sup> In light of these cases,

69. Sullivan & Cromwell, *supra* note 62, at 1.

70. *Id.*

71. *Id.*

72. *Id.* at 2.

73. It should be noted that this analysis requires an acceptance of the position advanced previously in Part II—that Delaware law requires shareholder wealth maximization (at some time) and that for-profit corporations in Delaware “must seek ‘to promote the value of the corporation for the benefit of its stockholders.’” *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. 12108-VCL, 2017 WL 1437308, at \*17 (Del. Ch. Apr. 14, 2017) (quoting *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010)); see also Strine, *supra* note 10, at 776 (explaining how the business judgment rule gives directors wide decision-making latitude).

74. See *Frederick Hsu*, 2017 WL 1437308, at \*17.

75. *Murray*, *supra* note 37, at 12; see also *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683–84 (Mich. 1919) (finding a breach of fiduciary duty in part because Mr. Ford said, “[m]y ambition . . . is to employ still more men, to spread the benefits of this industrial system to the greatest

the BRT Statement should not be read as an explicit rejection of shareholder wealth maximization.

The BRT Statement is distinguishable from past cases of explicit breach because the Statement is vague and is not an outright renunciation of shareholder wealth maximization.<sup>76</sup> The BRT CEOs “commit” to many things (“[i]nvesting in our employees[,] . . . [d]ealing fairly and ethically with our suppliers[,] . . . [s]upporting the communities in which we work[,] . . . [and] commit[ting] to deliver value to all of [our stakeholders]”),<sup>77</sup> but do not appear willing to suborn stockholder interests to reach such goals.

In *Newmark*, Jim and Craig (the founders of Craigslist) were unable to tie the Craigslist culture (“which reject[ed] any attempt to further monetize its services”) to any value creation for their shareholders—now or at some point in the future.<sup>78</sup> The court explained that it would not “accept . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.”<sup>79</sup>

The BRT Statement is distinct from *Newmark* because it is plausible these commitments will eventually redound benefits to the shareholders. These practices may be the best way to create a sustainable business with potential for long-term value creation. Regardless of how it is framed, as long as it could be rationally related to maximizing shareholder value—a very low bar—any action taken pursuant to the BRT Statement will be protected by the BJR.<sup>80</sup>

Moreover, Wachtell’s, Davis Polk’s, and Sullivan’s memos align with the interpretation that the BRT Statement is compatible with shareholder wealth maximization. Sullivan’s memo explained that a board’s fiduciary duty is to “long-term value creation” and that commitments to other constituencies can aid companies in their pursuit of value creation.<sup>81</sup> The Sullivan memo further noted that a CEO could take actions that “initially affect the corporation’s

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possible number, to help them build up their lives and their homes”); *Newmark*, 16 A.3d at 33–35 (finding a breach of fiduciary duty because “Jim and Craig did not make any serious attempt to prove that the craigslist culture, which rejects any attempt to further monetize its services, translates into increased profitability for stockholders”).

76. Compare *Statement on the Purpose of a Corporation*, *supra* note 7 (offering only vague commitments to stakeholders and reserving that “individual companies” still serve their “own corporate purpose”), with *Newmark*, 16 A.3d at 34–36 (rejecting a policy “that specifically, clearly, and admittedly seeks *not* to maximize” shareholder wealth).

77. *Statement on the Purpose of a Corporation*, *supra* note 7.

78. *Newmark*, 16 A.3d at 33.

79. *Id.* at 34.

80. *Id.* at 33, 36 (“[T]he Court ‘will not substitute its judgment for that of the board if the [board’s] decision can be “attributed to any rational business purpose.”” (second alteration in original) (quoting *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 954 (Del. 1985)).

81. Sullivan & Cromwell, *supra* note 62, at 1–2.

short-term profitability” as long as the reason is to increase profitability in the long run.<sup>82</sup>

Davis Polk’s memo also found no violation of current law, concluding that “[t]he Statement of Purpose is . . . mainly symbolic.”<sup>83</sup> The Davis Polk memo further stated that, at this time, directors are only legally beholden to shareholders, explaining that “[i]t remains to be seen whether, in time . . . the concepts in the Statement of Purpose will lead to *an evolution* of [legal duties] . . . that would encompass a requirement to balance duties to the corporation and its shareholders, as well as the interests of other stakeholders.”<sup>84</sup>

The Wachtell memo is more ambiguous, but also found the BRT statement compatible with Delaware law.<sup>85</sup> It confusingly stated that Delaware law does not mandate shareholder primacy, yet said “[t]he fiduciary duty of the board is to promote the value of the corporation.”<sup>86</sup> The memo also explained that a corporate board has great latitude to consider non-shareholder constituencies *as long as* it is “pursu[ing] a strategy to create sustainable long-term value.”<sup>87</sup> While Wachtell may not want to label this pursuit shareholder wealth maximization, the firm still strongly implies that a director’s goal must be to create value for the corporation—i.e., make more money for the shareholders.<sup>88</sup>

In sum, all three memos provide a path for CEOs who want to work towards the BRT commitments without violating Delaware law. At first blush, this appears to be a win-win. However, as will be discussed below, it is unlikely the BRT CEOs will attempt to follow through on these commitments.<sup>89</sup>

*B. THE BUSINESS ROUNDTABLE CEOs ARE UNLIKELY TO FOLLOW THROUGH ON THEIR COMMITMENTS AND THEIR STATEMENT MAY HINDER OTHER EFFORTS TO INCREASE CORPORATE SOCIAL RESPONSIBILITY*

A robust discussion about CSR is necessary because “CSR is growing in importance, both in terms of public awareness and in corporate acknowledgement.”<sup>90</sup> In fact, “[i]n 2017, 85% of the S&P 500 Index companies published sustainability reports . . . up from slightly less than 20% in 2011.”<sup>91</sup> The BRT Statement provides an interesting opportunity to analyze

82. *Id.*

83. Davis Polk, *supra* note 62, at 1.

84. *Id.* (emphasis added).

85. Wachtell, Lipton, Rosen & Katz, *supra* note 62, at 1–2.

86. *Id.* at 2.

87. *Id.* at 3.

88. *See id.*

89. *See* Strine, *supra* note 10, at 786 (explaining that “[s]tockholders remain the sole constituency with voting rights and the right to sue to enforce the DGCL and fiduciary duties”).

90. Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV’T L. REP. NEWS & ANALYSIS 10155, 10155–56 (2019) (footnote omitted).

91. *See* Schmidt, *supra* note 53, at 726.

the current state of CSR, because the Statement exposes one way CSR can be used in a functionally ineffective manner: by making empty promises that hinder regulation and other changes that would promote CSR.

1. The Business Roundtable CEOs Are Unlikely to Follow Through on Their Commitments

The BRT CEOs are unlikely to implement their commitments because non-shareholder constituencies—employees, communities, and other stakeholders—have no access to enforcement mechanisms to ensure follow-through.<sup>92</sup> This lack of access is caused when only one group—shareholders—is given the ability to hold directors accountable under Delaware Law.<sup>93</sup> Delaware General Corporation Law (“DGCL”) grants “only stockholders . . . the right to vote for directors; approve certificate amendments; amend the bylaws; approve certain other transactions[;] . . . and enforce the DGCL’s terms and hold directors accountable for honoring their fiduciary duties.”<sup>94</sup> It is only logical for directors to cater to those who can hire or fire them and simply pay lip service to anyone else.

On the other hand, a CEO truly committed to the BRT Statement could implement change as long as that director related such change to the company’s long-term value—thus bringing the decision under the BJR’s protection. However, given the rise of activist investors willing to oust well-meaning CEOs at any sign of weakness, very few will consider working towards the BRT “commitments” to be a prudent choice.<sup>95</sup>

For some stark examples, look no further than Whole Foods and Etsy—two companies that marketed “themselves to be long-term, sustainable, and responsible.”<sup>96</sup> After Whole Foods “posted declining sales for the seven quarters ending in April 2017,” an activist investor “accumulate[d] an 8% position in the company, which it leveraged to replace the chairman and add five independent directors to the board.”<sup>97</sup> To CEO and co-founder John Mackey’s chagrin, “[p]rioritizing community well-being and partnership with local farmers, a respectable but more costly business model, was buried in favor of profit maximization.”<sup>98</sup>

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92. Strine, *supra* note 10, at 766, 786.

93. *Id.* at 766.

94. *Id.* (footnotes omitted).

95. Rissman & Kearney, *supra* note 90, at 10164 (“No recent development has influenced firms’ strategic and financial decision-making as profoundly as the surge in shareholder activism following the global financial crisis.” (quoting J.P. MORGAN, *THE ACTIVIST REVOLUTION: UNDERSTANDING AND NAVIGATING A NEW WORLD OF HEIGHTENED INVESTOR SCRUTINY 1* (2015), [https://www.jpmorgan.com/content/dam/jpm/corporate/investment-bank/cfa/pub/Understanding\\_and\\_Navigating\\_a\\_New\\_World\\_of\\_Heightened\\_Investor\\_Scrutiny.pdf](https://www.jpmorgan.com/content/dam/jpm/corporate/investment-bank/cfa/pub/Understanding_and_Navigating_a_New_World_of_Heightened_Investor_Scrutiny.pdf) [<https://perma.cc/L273-WNPN>])).

96. *Id.* at 10165.

97. *Id.*

98. *Id.*



In Etsy's case, in response to a "lower-than-peer growth rate," an activist investor managed to expel "the chairman and CEO Chad Dickerson and a layoff of 8% of [Etsy's] work force."<sup>99</sup> Since this change Etsy has also lost its status as a B Corp.<sup>100</sup> This change in status was a notable loss because, at the time, "Etsy was one of only two B Corporations traded on a major public exchange."<sup>101</sup> Thus, even if a CEO believes sustainable business practices will pay dividends in the long run, she risks becoming a target of activist investors if short-term returns appear low. These examples also demonstrate the pressure directors feel to focus on prioritizing short-term over long-term value.<sup>102</sup>

Furthermore, there is a diminished incentive to act pursuant to the BRT Statement because companies may reap a financial benefit with words alone.<sup>103</sup> One recent study looked at the effect CSR had on a business's hiring potential and worker output.<sup>104</sup> This study "f[ound] strong evidence that" businesses stand to see pecuniary gains if they merely advertise themselves as socially responsible.<sup>105</sup>

Appearing to be socially responsible can attract more talent because "advertising the firm as a CSR firm increases application rates by 24%."<sup>106</sup> To attract an equivalent increase in applications, the study found "it would have taken [the business] increasing the amount of pay they offered by about a third—from \$11 to almost \$15 an hour—to get an equivalent increase in the number of applicants."<sup>107</sup> Additionally, this study found that appearing

99. *Id.*

100. *Id.* B-corp status is awarded by B Lab, a nonprofit that certifies corporations that "meet the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose." *About B Corps*, CERTIFIED B CORP., <https://bcorporation.net/about-b-corps> [<https://perma.cc/B34W-VW27>].

101. Rissman & Kearney, *supra* note 90, at 10165.

102. See Martin Lipton, *Corporate Purpose: Stakeholders and Long-Term Growth*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 29, 2019), <https://corpgov.law.harvard.edu/2019/05/29/corporate-purpose-stakeholders-and-long-term-growth> [<https://perma.cc/S9Q5-LGM7>]; see also BUS. & SOC'Y PROGRAM, ASPEN INST., OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT & BUSINESS MANAGEMENT 2 (2009), [https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/overcome\\_short\\_state0909\\_0.pdf](https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/overcome_short_state0909_0.pdf) [<https://perma.cc/NF2V-5G5P>] (explaining that often, "money managers, mutual funds and hedge funds . . . focus on short-term stock price performance").

103. See Daniel Hedblom, Brent R. Hickman & John A. List, *Toward an Understanding of Corporate Social Responsibility: Theory and Field Experimental Evidence* 41–42 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26222, 2019); Greg Rosalsky, *Does It Pay for Companies to Do Good?*, NPR (Sept. 17, 2019, 6:31 AM), <https://www.npr.org/sections/money/2019/09/17/761312221/does-it-pay-for-companies-to-do-good> [<https://perma.cc/7PP9-RUVB>].

104. See Hedblom et al., *supra* note 103, at 1–14.

105. *Id.* at 1.

106. *Id.* at 3.

107. Rosalsky, *supra* note 103; see also Hedblom et al., *supra* note 103, at 3–4, 32 (explaining the "worker selection" benefits that flow to companies holding themselves out as CSR focused).

socially responsible can increase worker productivity.<sup>108</sup> The study concluded “that a CSR advertisement campaign . . . induces workers to increase their output per unit of time, and also to voluntarily reduce the amount of non-productive down-time while they are on shift.”<sup>109</sup> Viewed through an optimistic lens, this study demonstrates how CSR *could* be a win-win—with more social responsibility leading to higher profits. But the darker side is that companies are unlikely to make real change if they can reap the same benefit (more applicants and increased productivity) with advertising alone.

Further, the myriad other avenues businesses could take to *ensure* social responsibility lends credence to the argument that this Statement “is more an exercise in feeling good than in doing good.”<sup>110</sup> First, nothing prohibits a company from changing its articles of incorporation, legally binding itself to these types of social commitments. Indeed, “maximizing shareholder gain is only a default rule[,] [s]hareholders could opt out of this goal if they so desired.”<sup>111</sup> A company could also reincorporate as a benefit corporation, memorializing a commitment to at least one thing other than shareholder profits.<sup>112</sup> While these changes would require shareholder approval,<sup>113</sup> there is nothing stopping the BRT CEOs from advocating for legally binding change—except the fear of unemployment.

## 2. The Business Roundtable’s Statement, Without Commensurate Action, Is Empty Words and May Hinder Other Efforts to Increase Corporate Social Responsibility

In addition to benefiting from the appearance of responsibility without action, the BRT Statement may hinder other efforts to increase CSR. Commentators have argued that the BRT Statement is essentially a type of “[e]veryman’ propaganda” and “that the business community is expecting blowback from their policies, and they’re trying to get ahead of it.”<sup>114</sup> Such commentators view the BRT Statement skeptically, looking for action instead of words.<sup>115</sup> Additionally, considering the BRT Statement’s publication date

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108. See Hedblom et al., *supra* note 103, at 5.

109. *Id.* at 4.

110. Strine, *supra* note 10, at 768.

111. David G. Yosifon, *Opting out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 469 (2017) (quoting Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008)).

112. DEL. CODE ANN. tit. 8, § 362 (2019).

113. *Id.* § 242.

114. David Lazarus, *Column: CEOs Say They Care About Customers and Workers. Propaganda Experts Are Unimpressed*, L.A. TIMES (Aug. 21, 2019, 5:00 AM) (first quoting Margaret Peacock; and then quoting Nicholas J. Cull), <https://www.latimes.com/business/story/2019-08-20/business-roundtable-propaganda-david-lazarus>.

115. See, e.g., David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> [<https://perma.cc/94NY-G99Q>] (quoting Anand

(ahead of the 2020 presidential election), these companies could have been attempting to position themselves against proposed regulation like Senator Elizabeth Warren's Accountable Capitalism Act,<sup>116</sup> which "would require that corporations with more than \$1 billion in revenue be federally chartered as benefit corporations."<sup>117</sup> It remains to be seen whether the BRT, with its history of lobbying against regulation, will support legislative proposals that work to accomplish the objectives that are set out in the BRT Statement.<sup>118</sup> Making a statement is easy, while taking action requires real work, and until the BRT starts "fight[ing] for policies that enable a thriving world" the Statement is "just empty rhetoric."<sup>119</sup>

C. *CONSTITUENCY STATUTES, BENEFIT CORPORATIONS, AND L3CS HAVE NOT LED TO A LARGE INCREASE IN CORPORATE SOCIAL RESPONSIBILITY*

This Section analyzes why past attempts at increasing CSR have been ineffective. It first evaluates Constituency Statutes, which came to prominence in the 1980s, and then analyzes L3Cs and Benefit Corporations, two corporate structures created with the objective of increasing CSR.<sup>120</sup>

1. Constituency Statutes: A First Attempt at Change

In many states, a change in the law regarding corporate board considerations occurred in the 1980s in the form of constituency statutes.<sup>121</sup> "[C]onstituency statutes [explicitly] allow corporations to consider non-

Giridharadas, who said, "[i]f the Business Roundtable is serious, it should tomorrow throw its weight behind legislative proposals that would put the teeth of the law into these boardroom platitudes").

116. Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

117. Julie Wittes Schlack, *The Business Roundtable Has a Change of Heart? I Think Not*, WBUR (Aug. 28, 2019), <https://www.wbur.org/cognoscenti/2019/08/28/the-business-roundtable-corporate-social-responsibility-julie-wittes-schlack> [<https://perma.cc/JG78-5GUX>]; Gelles & Yaffe-Bellany, *supra* note 115 (discussing Bernie Sanders' and Elizabeth Warren's disapproval of current corporate regulations and quoting Nancy Koehn, a historian at Harvard Business School as saying the BRT is "responding to something in the zeitgeist").

118. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822> [<https://perma.cc/YD9F-Y43V>] (explaining that the BRT lobbyists "killed a major labor law reform, rolled back regulation, lowered their taxes, and helped to move public opinion in favor of less government intervention in the economy").

119. Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARV. BUS. REV. (Aug. 30, 2019), <https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric> [<https://perma.cc/5446-2KNC>]; Jay Coen Gilbert, Andrew Kassoy & Bart Houlahan, *Don't Believe the Business Roundtable Has Changed Until Its CEOs' Actions Match Their Words*, FAST CO. (Aug. 22, 2019), <https://www.fastcompany.com/90393303/dont-believe-the-business-roundtable-has-changed-until-its-ceos-actions-match-their-words> [<https://perma.cc/4DMC-8UGR>].

120. See Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (discussing constituency statutes); Schmidt, *supra* note 53, at 676-77 (discussing L3Cs and Benefit Corporations).

121. See Springer, *supra* note 120, at 85.

shareholder interests in a dynamic manner, weighing the interests involved in a given situation and structuring a creative outcome that may even advance constituency interests.”<sup>122</sup> While many point to such statutes as a codification of stakeholder rights, these statutes have not improved CSR or stakeholder interests.<sup>123</sup> Interestingly, although a majority of states have some kind of constituency statute today, Delaware has never adopted one.<sup>124</sup>

One reason constituency statutes did not advance their purported goals is because they were not proposed by stakeholders and CSR advocates. Rather, the hostile takeover wave of the 1980s provoked a call for constituency statutes.<sup>125</sup> Directors and CEOs felt vulnerable during this time, and among other anti-takeover measures that developed, constituency statutes arose because they gave directors more latitude when responding to threats of hostile takeover.<sup>126</sup> In fact, “[t]here is no indication that any of these constituency statutes were initiated by groups other than corporate management.”<sup>127</sup> Moreover, these statutes are generally permissive, allowing the consideration of stakeholder rights but not mandating it.<sup>128</sup> Furthermore, “[n]one of the[se] statutes explicitly create enforceable rights on the part of nonshareholders, and some explicitly deny such rights.”<sup>129</sup> As a result, constituency statutes insulated the potentially self-serving decisions of directors without bolstering the substantive rights of non-shareholder stakeholders.<sup>130</sup> Thus, constituency statutes have been ineffective at driving social change, failing to improve how directors treat any non-shareholder constituency.<sup>131</sup>

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122. *Id.* at 91.

123. Strine, *supra* note 10, at 767 (explaining that these statutes “have done little, if anything, to make corporations more socially responsible or more respectful of their workers’ or communities’ interests”).

124. Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 702 (2004).

125. Springer, *supra* note 120, at 92 (explaining that “[e]ven if constituency statutes can claim intellectual ancestry in debates about corporate purpose, their immediate heritage is far less high-minded: the management anti-takeover movement of the 1980s”).

126. *See id.* at 94–96.

127. *Id.* at 96.

128. Velasco, *supra* note 1, at 463 (explaining that these statutes “generally provide only that directors may consider the interests of nonshareholders” (emphasis omitted)).

129. *Id.* at 464.

130. *See* Strine, *supra* note 10, at 768 (explaining that a constituency statute “largely shifts power to the directors to couch their own actions in whatever guise they find convenient, without making them more accountable to any interest”); Springer, *supra* note 120, at 122 (determining that “[d]irectors appear to invoke constituency statutes more as a rationalization for deferring to their discretion than as a principled justification for consideration of constituent interests”).

131. *See* Springer, *supra* note 120, at 120–24 (explaining that “it is hard to see how constituency statutes bear any promise of leading to more constituent-friendly corporate practices”).

## 2. L3Cs and Benefit Corporations: A More Recent Attempt to Increase Corporate Social Responsibility

Two other business associations meant to help increase CSR—low-profit, limited liability companies (“L3Cs”) and benefit corporations—have also failed to garner “widespread adoption” among businesses and increase CSR on a large scale.<sup>132</sup> While states have bought in legislatively—“thirty-seven states and the District of Columbia had passed some form of dual-purpose (i.e., social and profit-making) business legislation [by 2018]”—companies have by and large failed to adopt these business forms.<sup>133</sup> In fact, by 2018 “approximately 7,000 businesses were organized as either L3Cs or benefit corporations,” which is only 0.023 percent of “the thirty million businesses currently operating in the U.S.”<sup>134</sup>

### *i. L3Cs*

L3Cs were created to help “[s]ocial enterprises . . . in obtaining funding . . . by creating a new business entity that could convince private foundations to invest in charitably minded for-profit businesses.”<sup>135</sup> The goal was to help L3Cs raise capital more efficiently<sup>136</sup> by allowing foundations to make “program related investment[s] (PRI),” which are “made to further a foundation’s exempt [(i.e., charitable)] purpose.”<sup>137</sup>

The L3C form has not been widely adopted because the “statutes do not include enforcement language”<sup>138</sup> and the financing options are not “unique to the L3C,”<sup>139</sup> which fails to “make life easier for foundations.”<sup>140</sup> Moreover, a substantial amount of due diligence is required to ensure a foundation’s “investments actually qualify as PRIs, given the excise taxes and possible loss of [tax exempt status] they face if they make an incorrect determination.”<sup>141</sup> Furthermore, the financing “*solution[s]*”<sup>142</sup> available to L3Cs have not attracted investment because “from the perspective of state entity law, there is nothing an L3C can do that cannot already be done through an ordinary

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132. See Schmidt, *supra* note 53, at 677.

133. *Id.* at 676–77.

134. *Id.*

135. *Id.* at 701–02.

136. *Id.* at 702–04.

137. *Id.* at 702.

138. *Id.* at 708.

139. *Id.* at 710.

140. *Id.* at 707–08.

141. *Id.* at 705.

142. *Id.* at 710.

LLC.”<sup>143</sup> Finally, this corporate form is unattractive to businesses because L3Cs cannot incorporate in Delaware.<sup>144</sup>

*ii. Benefit Corporations*

The benefit corporation is “a form of business corporation that offers entrepreneurs and investors the option to build, and invest in, a business that operates with a corporate purpose broader than maximizing shareholder value and that consciously undertakes a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders.”<sup>145</sup> These corporations include a positive impact—to society, the community, the environment, etc.—in addition to profit as part of their legally defined goals.<sup>146</sup>

Benefit corporations are the product of advocacy by the founders of B Lab—a nonprofit that certifies corporations “that meet the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose.”<sup>147</sup> Benefit corporations have legal status, unlike a B-corp certification, and “create a new fiduciary duty for officers and directors, requiring them to consider the interests of all stakeholders when they make a decision—not simply the interests of the shareholders.”<sup>148</sup>

In 2010, the first state—Maryland—passed benefit corporation legislation, and to date, 36 states and Washington D.C. have passed legislation allowing for the creation of benefit corporations.<sup>149</sup> Three years after Maryland, Delaware’s public benefit corporation legislation became effective on August 1, 2013.<sup>150</sup> Delaware’s statute explains:

a public benefit corporation shall be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of

143. Daniel S. Kleinberger, *A Myth Deconstructed: The “Emperor’s New Clothes” on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 897 (2010).

144. See Madeleine Monson-Rosen, *Companies with Purpose: The L3C Option in the US*, MISSIONBOX (June 6, 2019), <https://www.missionbox.com/article/401/companies-with-purpose-the-l3c-option-in-the-us> [<https://perma.cc/3UTV-27C9>] (identifying that “[a]lthough L3Cs can operate in all 50 states,” they can only incorporate in 11 states—which does not include Delaware).

145. MODEL BENEFIT CORP. LEGIS. § 101 cmt. (BLAB, Draft Apr. 17, 2017), [https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf) [<https://perma.cc/K64B-UNWE>].

146. See *id.* § 201 (explaining that public benefit is necessarily a goal of a benefit corporation).

147. *About B Corps*, *supra* note 100.

148. See Schmidt, *supra* note 53, at 712.

149. Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL’Y 170, 184 (2012); *State by State Status of Legislation*, BENEFIT CORP., <https://benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/Q8GP-LUWF>].

150. *State by State Status of Legislation*, *supra* note 149.

those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.<sup>151</sup>

As of today, there are 43 companies incorporated as public benefit corporations in Delaware, but none are publicly traded.<sup>152</sup> In fact, "as of January 2019, there was only one publicly-traded benefit corporation based in the U.S."<sup>153</sup> Thus, while benefit corporations have "becom[e] the most popular dual-purpose entity available to social entrepreneurs,"<sup>154</sup> they have not enjoyed widespread adoption, especially among publicly traded companies.<sup>155</sup>

Even if incorporation rates increased, the benefit corporation, as it currently exists, is unlikely to produce a large increase in CSR.<sup>156</sup> While benefit corporations explicitly pursue some mission other than profit,<sup>157</sup> "there is no one standard for measuring public benefit, and the benefit corporation is responsible for applying the standard to its own actions."<sup>158</sup> Furthermore, shareholders are the only ones able to hold the business accountable for pursuing its mission,<sup>159</sup> and can "bring a 'benefit enforcement proceeding' against the corporation if they believe the business has failed to pursue or achieve its social mission."<sup>160</sup> This creates an environment where the social mission may end up neglected if shareholders find it too costly to pursue these types of actions.<sup>161</sup> This problem is more acute considering nearly all benefit corporations are privately owned, which usually means a "substantial overlap among the officers, directors, and shareholders."<sup>162</sup> With

151. DEL. CODE ANN. tit. 8, § 362(a) (2019). This section also explains that benefit corporations incorporated in Delaware "shall: (1) Identify within its statement of business or purpose pursuant to §102(a)(3) of this title one or more specific public benefits to be promoted by the corporation; and (2) State within its heading that it is a public benefit corporation." *Id.*

152. See Schmidt, *supra* note 53, at 713; *Find a Benefit Corp*, BENEFIT CORP., <https://benefitcorp.net/businesses/find-a-benefit-corp> [<https://perma.cc/FL47-4RQ4>] (providing a searchable database of benefit corporations in each state).

153. Schmidt, *supra* note 53, at 713.

154. Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1842 (2018); see also *Status Tool: Benefit Corps*, SOC. ENTER. L. TRACKER, <http://socentlawtracker.org/#/bcorps> [<https://perma.cc/UL9M-GYW9>] (providing an interactive map regarding benefit corporation legislation across the States).

155. See generally Schmidt, *supra* note 53 (explaining that relatively low numbers of businesses have incorporated as benefit corporations compared to the number of for-profit companies in the United States).

156. See, e.g., *id.* at 711, 725-27; Winston, *supra* note 154, at 1842-43.

157. DEL. CODE ANN. tit. 8, § 362 (2019).

158. Winston, *supra* note 154, at 1830.

159. See *id.* at 1828-29.

160. *Id.* at 1829 (citing Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 715-16 (2013)).

161. See *id.* at 1822.

162. *Id.* at 1829.

such overlap, true oversight is improbable considering shareholders “are the same people as the management they are supposed to be monitoring.”<sup>163</sup>

Additionally, benefit statutes create issues that “are somewhat paradoxical,” because “there is not enough guidance to protect directors,” but also “so much protection of the directors that the mission is not protected.”<sup>164</sup> This lack of directorial guidance is a product of the broad and undefined standards found in the model benefit corporation legislation.<sup>165</sup> For example, benefit corporations are required to have a “material positive impact on society,”<sup>166</sup> but directors and CEO’s are neither told “what a ‘material positive impact’ is [n]or how to measure it.”<sup>167</sup> Furthermore, the model legislation mandates that benefit corporations “consider the effects of any action or inaction” on stakeholder groups, but there is no guidance about what consideration entails.<sup>168</sup> If “consideration” can be satisfied by superficial adherence, like “a statement in the minutes,”<sup>169</sup> stakeholders will be left with no more consideration than what they already receive from standard, for-profit corporations.

In addition to ambiguity, the board of a benefit corporation is given “so much procedural protection . . . that no practical enforcement mechanism exists.”<sup>170</sup> Even if a suit is brought against the board, “the plaintiff cannot win any monetary awards because the [model] statute explicitly protects the board from financial liability.”<sup>171</sup> While these companies are supposed to provide annual benefit reports that can provide shareholders with critical information, one study found “[o]f . . . [123] active benefit corporations, only eight percent had a benefit report.”<sup>172</sup> This is unsurprising considering that the model benefit corporation legislation, and other hybrid statutes, do not

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163. *Id.*

164. Schmidt, *supra* note 53, at 713.

165. *See id.* at 714–15.

166. MODEL BENEFIT CORP. LEGIS. § 102 (BLAB, Draft Apr. 17, 2017), [https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf) [<https://perma.cc/K64B-UNWE>] (defining “[g]eneral public benefit” as “[a] material positive impact on society and the environment”); *id.* § 201(a) (“A benefit corporation shall have a purpose of creating general public benefit.”).

167. Schmidt, *supra* note 53, at 714; *see* MODEL BENEFIT CORP. LEGIS. § 102.

168. MODEL BENEFIT CORP. LEGIS. § 301(a)(1) (requiring the board to “consider the effects of any action or inaction upon” seven enumerated stakeholders); *see* Schmidt, *supra* note 53, at 713–14.

169. Schmidt, *supra* note 53, at 714.

170. *Id.* at 716.

171. *Id.* It should be noted that Delaware does provide a potential avenue to hold directors liable because Delaware’s Public Benefit Corporation statute provides that directors will not be liable if a “decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.” DEL. CODE ANN. tit. 8, § 365(b) (2019).

172. J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 34 (2015); Schmidt, *supra* note 53, at 716.



“require that reports be filed with the government, or any type of oversight enterprise, nor is there a central repository for those reports.”<sup>173</sup>

Even assuming, *arguendo*, that benefit corporations operate as intended, they would not currently have a material impact in the CSR arena due to the modest number of benefit corporations in existence today.<sup>174</sup> However, this is not to say these corporate forms should not be encouraged or improved. There are many benefit corporations that continue to profit while working towards socially responsible goals.<sup>175</sup> One great example is Patagonia,<sup>176</sup> and private companies seeking to be socially responsible can look to Patagonia and other profitable benefit corporations as a guide.<sup>177</sup> While benefit corporations will continue to work towards societal betterment, the solutions this Note proposes below focus on for-profit corporations, as change in this area would be most impactful.

#### IV. PROPOSALS TO INCREASE CORPORATE SOCIAL RESPONSIBILITY

This Note proposes multiple solutions that, taken together, would compel for-profit corporations in the United States to engage in more socially responsible practices. Some specific government regulations are recommended *infra*, but the list of recommendations is not exhaustive.

First, the shareholder wealth maximization norm does not need to be abandoned, but reframing this norm would improve CSR.<sup>178</sup> Instead of viewing shareholder wealth maximization in the short-term, companies should seek to maximize shareholders’ long-term value.<sup>179</sup> Second, CSR would

173. John Tyler, Evan Absher, Kathleen Garman & Anthony Luppino, *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 235, 265 (2015).

174. Schmidt, *supra* note 53, at 677 (“And yet, 7,000 businesses formed as L3Cs and benefit corporations is a drop in the bucket compared to the thirty million businesses currently operating in the U.S.”).

175. See, e.g., *What is a Benefit Corporation?*, BENEFIT CORP., <https://www.benefitcorp.net> [<https://perma.cc/PD6M-P9VW>] (explaining what benefit corporations are and keeping track of all benefit corporations incorporated in the United States).

176. See *Core Values*, PATAGONIA, <https://www.patagonia.com/company-info.html> [<https://perma.cc/J3AD-5R6L>] (indicating that the company strives to “[c]ause no unnecessary harm” and “[u]se business to protect nature”).

177. See generally *Find a Benefit Corp.*, *supra* note 152 (providing a database of all benefit corporations that private companies can use as a resource to find other companies like Patagonia).

178. Arguing the shareholder wealth maximization norm does not need to change presupposes that the norm exists, which I argued in the background of this Note, *supra* Part II. Additionally, I am not unaware of an argument in response to this Note that the social responsibility I am advocating for could be addressed more efficiently if the law changed more fundamentally regarding what it means to be a for-profit business incorporated in Delaware. However, in this Note, I attempt to provide pragmatic recommendations for change within the corporate law landscape that exists today.

179. See Martin Lipton, *It’s Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt->

improve if government regulations stimulated change by aligning profit incentives with societal goals. Finally, because institutional investors drive so much corporate decision-making, adjusting their incentives to align with societal goals will further promote CSR.

A. *REFRAMING SHAREHOLDER WEALTH MAXIMIZATION TO MEAN  
LONG-TERM VALUE*

CSR will increase under the norm of shareholder wealth maximization as long as this norm is understood as a fiduciary duty to maximize a corporation's *long-term* value. Apart from certain takeover situations—where Delaware law mandates directors accept the highest bid<sup>180</sup>—a focus on long-term value aligns with Delaware jurisprudence.<sup>181</sup> Moreover, an explicit goal of long-term value maximization benefits directors by allowing them to clearly know their role and providing one objective.<sup>182</sup> A specific goal is important because it is challenging for anyone to “serve two masters”<sup>183</sup> and because “[c]orporations typically thrive when the rules under which they operate are transparent and predictable.”<sup>184</sup>

Maximizing long-term value will also return benefits to non-shareholders and increase CSR—at least more than focusing myopically on the short-term.<sup>185</sup> As Martin Lipton of Wachtell argues, “shareholders and other stakeholders have more shared objectives than differences—namely, they have the same basic interest in facilitating sustainable, long-term value creation.”<sup>186</sup> Moreover, when directors focus on long-term growth they are more likely to take into account externalities that may negatively affect the

the-new-paradigm [<https://perma.cc/MM8W-XAU4>] (arguing that “[e]xecutive and director compensation should be designed to align with the long-term strategy of the company and incentivize the generation of long-term value, while dis-incentivizing the pursuit of short-term results at the expense of long-term results”).

180. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 175–78 (Del. 1986).

181. See *Frederick Hsu Living Tr. v. ODN Holding Corp.*, No. 12108-VCL, 2017 WL 1437308, at \*19 (Del. Ch. Apr. 14, 2017) (explaining that “[d]irectors need not seek to maximize current market value for the benefit of the subset of stockholders”); *In re Rural Metro Corp.*, 88 A.3d 54, 80 (Del. Ch. 2014) (holding that “the fiduciary relationship between the Board and Rural’s stockholders required that the directors act prudently, loyally, and in good faith *to maximize Rural’s value over the long-term for the benefit of its stockholders*” (emphasis added)).

182. See Murray, *supra* note 37, at 28 (explaining that “[s]ince Biblical times, it has been well recognized that people cannot properly serve two masters, much less seven or more”).

183. *Id.* at 28–30.

184. Rissman & Kearney, *supra* note 90, at 10157.

185. See Lipton, *supra* note 102; see also BUS. & SOC’Y PROGRAM, *supra* note 102, at 2 (“Encouraging investors . . . to adopt a long-term perspective will ultimately encourage and empower boards of directors to adopt long-term strategies for growth and sustainable earnings, and to rely on long-term, forward-looking metrics in the consideration of compensation and performance incentives.”).

186. Lipton, *supra* note 179.

corporation, or society, in the future.<sup>187</sup> This understanding of a corporation's purpose—maximizing long-term value—gives directors a clear objective and allows them all to play the same game.

Explicitly reframing the shareholder wealth maximization norm is critical to increasing CSR. One barrier to this reframing is that directors and managers are likely to capitulate to activist investors pushing for short-term returns.<sup>188</sup> In the face of pressure from activist investors, even socially responsible directors may not act in accordance with long-term value creation. Furthermore, in light of the discussion *supra* regarding other directorial incentives, directors are not likely to promote sustainable practices on their own. Therefore, the legislature should set socially responsible parameters for directors and institutional investors.

#### B. GOVERNMENT REGULATION TO INCREASE CORPORATE SOCIAL RESPONSIBILITY

Because corporate boards will not look out for stakeholders' best interest without external pressure, it is the legislature's job to encourage businesses to act in a socially responsible manner.<sup>189</sup> Principally, this is because "the legislature has the power, at least in theory, to modify the profit consequences of any given corporate action, so as to nudge corporate behavior in the direction society prefers."<sup>190</sup> Although the BRT would say otherwise, "[i]t is counterproductive to pretend that corporate directors—hardly the most representative slice of society—are effective and unbiased champions for workers, communities, the environment, and society generally, given that they are elected solely by stockholders."<sup>191</sup> Furthermore, "[w]hile government is . . . legitimated (and given fact-gathering and opinion-gathering capability) to make distributional decisions, . . . corporate managements, at least as now structured, are altogether ill-suited to the job of distributing society's riches."<sup>192</sup>

##### 1. Targeted Government Regulation

In a perfect world, the government would regulate just enough in order to nudge corporations without more coercion than necessary. With this is

187. See Berger-Walliser & Scott, *supra* note 5, at 217 ("Corporate externalities are, by definition, impacts of corporate activities that are not included in the cost of goods; these side effects of corporate activities, including various forms of environmental degradation, are either not regulated or regulated in such a manner that the corporation is not responsible for them." (footnote omitted)); BUS. & SOC'Y PROGRAM, *supra* note 102, at 2.

188. See Rissman & Kearney, *supra* note 90, at 10164 ("No recent development has influenced firms' strategic and financial decision-making as profoundly as the surge in shareholder activism following the global financial crisis." (quoting J.P. MORGAN, *supra* note 95, at 1)).

189. David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV 1, 30–34 (1979).

190. *Id.* at 34.

191. Strine, *supra* note 10, at 786.

192. Engel, *supra* note 189, at 30 (footnote omitted).

mind, policymakers need to regulate in proportion to the problem. While some problems necessitate only moderate intervention, others demand drastic action. Climate change provides an example on the latter end of this spectrum.

Because climate change is such a pervasive and pressing problem, what is needed is not so much a nudge, but a strong kick in the form of rapid and large-scale intervention. The climate problem is continually increasing and needs to be addressed within the next decade.<sup>193</sup> Maria Banda explains that “[t]he next decade is particularly critical. Without a rapid increase in the collective ambition to tackle climate change, we will likely forfeit the chance of staying below the 1.5°C target. Crossing that threshold could result in devastating consequences for the most vulnerable countries and ecosystems.”<sup>194</sup> In such a situation, it would be beneficial for the government to implement a battery of changes—such as a carbon tax, subsidies for renewables, a ban on fracking, etc.—that would make a business’s most profitable route align with society’s climate goals.<sup>195</sup> With issues like climate change, the stakes are too high to bet our collective future on companies’ goodwill, and strong government regulation can force their hand in the right direction.

## 2. Government Regulation of Institutional Investors

While this type of regulation would target specific and severe problems like climate change, it would also be beneficial to implement regulations that incentivize corporations to voluntarily prioritize CSR values. One of the most effective ways to do this is to direct focus not on businesses, but on investors.<sup>196</sup>

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193. See Maria L. Banda, *The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement*, 42 HARV. ENV'T L. REV. 325, 328–29 (2018).

194. *Id.* at 328 (footnote omitted); see U.N. ENV'T PROGRAMME, THE EMISSIONS GAP REPORT 2016: A UNEP SYNTHESIS REPORT 3–9 (Daniel Puig, Lars Christiansen & Cecilie Larsen eds., 2016). See generally WORLD BANK GRP., TURN DOWN THE HEAT: CONFRONTING THE NEW CLIMATE NORMAL (2014) (evaluating the risks of global warming beyond 1.5°C); SCOTT F. HERON, C. MARK EAKIN & FANNY DOUVERE, UNESCO, IMPACTS OF CLIMATE CHANGE ON WORLD HERITAGE CORAL REEFS: A FIRST GLOBAL SCIENTIFIC ASSESSMENT 6–9 (2017) (finding that meeting the 1.5°C target “provides a chance” of saving coral reefs); Carl-Friedrich Schleussner et al., *Differential Climate Impacts for Policy-Relevant Limits to Global Warming: The Case of 1.5°C and 2°C*, 7 EARTH SYS. DYNAMICS 327 (2016) (outlining the consequences of global warming in terms of weather, access to water, crop yields, ocean levels, and effects on coral reefs).

195. See Bill McKibben, *Why We Need a Carbon Tax, and Why It Won't Be Enough*, YALE ENVIRONMENT 360 (Sept. 12, 2016), [https://e360.yale.edu/features/why\\_we\\_need\\_a\\_carbon\\_tax\\_and\\_why\\_it\\_won\\_be\\_enough](https://e360.yale.edu/features/why_we_need_a_carbon_tax_and_why_it_won_be_enough) [<https://perma.cc/QMD3-BEEK>].

196. See Strine, *supra* note 10, at 786–88 (“[S]trong and effective externality regulation is important, because the profit-pressure put on corporations by institutional investors is strong. . . . [I]t is necessary to figure out how to make sure that those who act as direct stockholders—institutional investors—invest and vote with these interests [(what ordinary Americans hold)] in mind.” (footnote omitted)); Rissman & Kearney, *supra* note 90, at 10172 (“The combination of the growth of institutional investing with the increasing concentration of the asset management industry means that the leading asset management firms are enormous. . . . This

Impacting investors requires a focus on “asset managers and institutional investors—who today wield about 80% of the voting power of most public corporations.”<sup>197</sup> In fact, “it has been estimated that the three largest asset managers (BlackRock, Vanguard, and State Street Global Advisors (SSGA)) control on average almost 18% of the stock of nearly 1,700 corporations [in the United States].”<sup>198</sup> With these large investors’ great influence over most public companies, change in corporate behavior is unlikely until these actors “embrace stewardship principles that commit them to support boards of directors pursuing long-term sustainable investment and ESG principles, [otherwise] short-term pressures will continue to erode the foundation of long-term investments that is essential for our collective economic prosperity.”<sup>199</sup>

The legislature should promulgate regulations that would make long-term investments more profitable—and therefore more desirable—to institutional investors. This could be accomplished by implementing “a financial transaction tax [to] discourage[] high frequency trading,”<sup>200</sup> “[i]ncreasing the amount of time that investors must hold an asset [for] it [to] be taxed as a long-term holding,”<sup>201</sup> discouraging companies from “benchmark[ing] portfolios by reference to quarterly earnings per share,”<sup>202</sup> or encouraging businesses to structure executive compensation in a way that rewards long-term company growth.<sup>203</sup> These measures would all increase investment in “patient capital” and decrease the temptation to focus myopically on short-term returns.<sup>204</sup>

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outsized ownership positions large asset managers to exert inordinate influence over the corporations they own.”); *see also* BUS. & SOC’Y PROGRAM, *supra* note 102, at 5 (“Institutional investors now wield substantial power—power that affects American citizens as well as global capital markets.”).

197. Lipton, *supra* note 102.

198. Rissman & Kearney, *supra* note 90, at 10172.

199. Lipton, *supra* note 102.

200. TR. LEADERSHIP FOR. FOR RET. SEC., A NOTE ON SHORT-TERMISM 5 (2016), <http://iri.hks.harvard.edu/files/iri/files/tlf-note-on-long-term-investing.pdf> [<https://perma.cc/R4S8-8TMN>].

201. Alana Semuels, *How to Stop Short-Term Thinking at America’s Companies*, ATLANTIC (Dec. 30, 2016), <https://www.theatlantic.com/business/archive/2016/12/short-term-thinking/511874> [<https://perma.cc/K79E-K89C>]; *see* BUS. & SOC’Y PROGRAM, *supra* note 102, at 3 (explaining that “[c]apital gains tax rates might be set on a descending scale based on the number of years a security is held”).

202. William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 702 (2010).

203. *See* Lipton, *supra* note 102.

204. BUS. & SOC’Y PROGRAM, *supra* note 102, at 5. “The first key leverage point, market incentives to encourage patient capital, is likely to be the most effective mechanism to encourage long-term focus by investors.” *Id.* at 3.

### 3. Government Regulated Transparency

The legislature can also encourage CSR from investors by regulating transparency, “mak[ing] it easier for institutional investors to acquire ESG data and assess its financial impact.”<sup>205</sup> Such regulation is likely to encourage investments more closely aligned with sustainable business practices, because “ESG factors appear to have at best a positive relationship with corporate financial performance and at worst a neutral relationship.”<sup>206</sup> For guidance, legislators could look to the European Commission’s 2018 decision to adopt the action plan on sustainable finance.<sup>207</sup> In addition, the executive branch could increase transparency in the form of SEC mandatory disclosures.<sup>208</sup> If the SEC “compile[d] mandatory ESG disclosure standards” relating to ESG practices, then companies would all be viewed using one benchmark, and investors would have more accurate and reliable information with which to make investment decisions.<sup>209</sup> If the appetite for investment in companies engaging in sustainable practices is growing—and it seems to be<sup>210</sup>—then transparency in business practices will increase investment in corporations with truly sustainable practices. In addition, it would become more difficult for companies to greenwash and make hollow commitments.<sup>211</sup> This shift in investing may be happening naturally as more investors see ESG practices as “material,”<sup>212</sup> but the most efficient and impactful path forward would be for the SEC to codify this into law.

205. OECD, INVESTMENT GOVERNANCE AND THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE FACTORS 44 (2017), <https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf> [<https://perma.cc/HEN4JWKA>].

206. *Id.* at 35.

207. *See Action Plan: Financing Sustainable Growth*, at 1, COM (2018) 97 final (Mar. 8, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN> [<https://perma.cc/XC7C-SQMX>].

208. *See* Rissman & Kearney, *supra* note 90, at 10183.

209. *See id.* at 10163.

210. *See, e.g.*, NIELSEN CO., THE SUSTAINABILITY IMPERATIVE: NEW INSIGHTS ON CONSUMER EXPECTATIONS 2 (2015), [https://www.supplychain247.com/images/pdfs/nielsen\\_global-sustainability-report-oct-2015.pdf](https://www.supplychain247.com/images/pdfs/nielsen_global-sustainability-report-oct-2015.pdf) [<https://perma.cc/FXT8-MUGR>] (explaining that “[s]ixty-six percent of consumers say they are willing to pay more for sustainable brands—up from 55% in 2014 and 50% in 2013”); Rissman & Kearney, *supra* note 90, at 10173 (showing “that millennials and women—two groups that will inherit much of this wealth—place higher value on social responsibility in their investment considerations than their boomer male counterparts who currently control the lion’s share of U.S. assets”); Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK (2020), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/RTD3-GW9G>].

211. *See Greenwashing*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/greenwashing> [<https://perma.cc/M6MM-2Q9J>] (“[E]xpressions of environmentalist concerns especially as a cover for products, policies, or activities.”).

212. *See, e.g.*, Rissman & Kearney, *supra* note 90, at 10183 (“When taken together with the new incentives these managers will have to push for transparency in their holdings’ human rights and environmental performances, this increased power bodes well for improved social outcomes.”). It also appears the world’s largest asset manager—BlackRock—agrees that ESG

Additionally, innovative and new regulatory ideas will need to be pursued in order to encourage CSR on a large scale. One innovative way the government could incentivize and monitor transparency is with blockchain technology. Blockchain is a new technology, which “is, in the simplest of terms, a time-stamped series of immutable records of data that is managed by a cluster of computers not owned by any single entity.”<sup>213</sup> Blockchain is transparent and secure because “every transaction is recorded on a block and across multiple copies of the ledger that are distributed over many nodes (computers) . . . . It’s also highly secure since every block links to the one before it and after it.”<sup>214</sup> Thus, if blockchain is used to track a series of transactions, the records are essentially guaranteed to be true and accurate.<sup>215</sup>

Because of blockchain’s transparency and security, it would be an effective way for the government to monitor companies’ supply chains. The government could set sustainability benchmarks, attach tax incentives or subsidies to those benchmarks, and use blockchain technology to monitor whether companies are reaching those benchmarks. And because of blockchain’s security, the government could be confident it was relying on accurate data, as companies would be unable to report anything but the truth. Moreover, there is already business interest in the supply chain efficiencies that blockchain could provide.<sup>216</sup> A threefold benefit results: decreased costs because of tax incentives, internal efficiency gains, and a more socially responsible corporation—all of which increase the chances such a program would be accepted and implemented.

## V. CONCLUSION

Delaware law is clear that the duty of corporate directors and managers runs to the stockholders only. This is the only constituency given any power by the DGCL and therefore the only group that meaningfully controls director behavior. The BRT Statement seems to challenge this upon cursory examination, but a closer look reveals that it can be read to align with

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factors are material. See Fink, *supra* note 210. In his 2020 annual letter, CEO Larry Fink said he “believe[s] we are on the edge of a fundamental reshaping of finance” because of climate change. *Id.*

213. Ameer Rosic, *What Is Blockchain Technology? A Step-by-Step Guide for Beginners*, BLOCKGEEKS, <https://blockgeeks.com/guides/what-is-blockchain-technology> [<https://perma.cc/65XF-PCMU>].

214. Bernard Marr, *How Blockchain Will Transform the Supply Chain and Logistics Industry*, FORBES (Mar. 23, 2018, 12:28 AM), <https://www.forbes.com/sites/bernardmarr/2018/03/23/how-blockchain-will-transform-the-supply-chain-and-logistics-industry/#73778ccd5fec> [<https://perma.cc/qJQN-BVVQ>].

215. *Blockchain Technology Is Set to Transform the Supply Chain*, LOGISTICS BUREAU (Jan. 9, 2019), <https://www.logisticsbureau.com/how-blockchain-can-transform-the-supply-chain> [<https://perma.cc/3RN9-Y7G3>].

216. See Paul Dughi, *A Simple Explanation of How Blockchain Works*, MISSION.ORG (Feb. 3, 2018), <https://medium.com/the-mission/a-simple-explanation-on-how-blockchain-works-e52f75da6ega> [<https://perma.cc/H6T8-6FRZ>] (“Financial and tech firms invested an estimate[d] \$1.4 billion dollars in blockchain in 2016 . . . [and] \$2.1 billion dollars in 2018.”).

Delaware law. Thus, this Statement seems to be nothing more than an attempt to garner public goodwill and stave off meaningful regulation. In truth, for-profit businesses are committed to one thing—profit. Such a commitment is not necessarily a bad thing, but it is important to understand business incentives and take them as they are if meaningful change is to come in the realm of CSR.

The good news is that this topic is receiving unprecedented interest from businesses and society at large. The attention is making it profitable for some businesses to adopt these practices and leading other companies to incorporate as alternate hybrid businesses, such as benefit corporations and L3Cs.

While this is progress in the right direction, meaningful change on a large scale and a short timeline will only come in the form of government regulation. This Note has proposed changes that would lead to increased CSR—like regulating and monitoring supply chains using blockchain technology—but these are not the only ways. If CSR is something society wants to encourage, the legislature should attempt to change the profit incentives for institutional investors and businesses so that corporate interests align with society's communal goals. Said another way, in the immortal words of DJ Quik: "If it don't make dollars, it don't make sense."<sup>217</sup> And corporations would agree—unless there is a strong profit incentive to do so, a meaningful change in the CSR sphere simply does not make sense.

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217. DJ Quik, *Dollaz + Sense*, YOUTUBE (Apr. 8, 2017), <https://www.youtube.com/watch?v=x8Y3qoIPMZA> [<https://perma.cc/TMM9-2BVZ>].